THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2020-0496

Debbie Banaian

Plaintiff, Appellant

v.

Ann Elizabeth Bascom, et al

Defendants, Appellees

---

**MANDATORY APPEAL FROM A FINAL DECISION OF THE HILLSBOROUGH COUNTY, NORTHERN DISTRICT, SUPERIOR COURT**

---

# BRIEF OF DEFENDANT/APPELLEE KATIE MOULTON

---

By: Debra L. Mayotte, NH Bar #: 8207
Desmarais Law Group, PLLC
831 Union Street
Manchester, NH 03104
(603) 623-5524
mayotted@desmaraislawgroup.com

Attorney Debra L. Mayotte will represent the Appellee at Oral Argument

## TABLE OF CONTENTS

## TABLE OF CASES

**CASES** **PAGES**



## TABLE OF STATUTES AND OTHER AUTHORITIES

**STATUTES** **PAGES**



## STATUTES INVOLVED IN THE CASE

47 U.S.C. § 230
§230. Protection for private blocking and screening of offensive material
**(a) Findings.** The Congress finds the following:
**(1)** The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
**(2)** These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
**(3)** The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

**(4)** The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
**(5)** Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
**(b) Policy.** It is the policy of the United States—
**(1)** to promote the continued development of the Internet and other interactive computer services and other interactive media;
**(2)** to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
**(3)** to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
**(4)** to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
**(5)** to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
**(c) Protection for "Good Samaritan" blocking and screening of offensive material.**
**(1)** Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
**(2)** Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
**(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
**(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].
**(d) Obligations of interactive computer service.** A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.
**(e) Effect on other laws.**
**(1)** No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act [47 USCS § 223 or 231], chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code [18 USCS §§ 1460 et seq. or §§ 2251 et seq.], or any other Federal criminal statute.
**(2)** No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

**(3)** State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
**(4)** No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.
**(5)** No effect on sex trafficking law. Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—
**(A)** any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title [18 USCS § 1591];
**(B)** any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or
**(C)** any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.
**(f) Definitions.** As used in this section:
**(1)** Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.
**(2)** Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
**(3)** Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.
**(4)** Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:
**(A)** filter, screen, allow, or disallow content;
**(B)** pick, choose, analyze, or digest content; or
**(C)** transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

## STATEMENT OF THE CASE

The Complaint of the Plaintiff/Appellant Debbie Banaian (hereinafter "Banaian") asserts the Defendant Caidan Winchester (hereinafter "Winchester") was a website usurper who hacked the Merrimack Valley Middle School website to post that Banaian was sexually perverted and desirous of sexual liaisons with students and their parents. Complaint, ¶¶ 2, 5. Further, Banaian's Complaint asserts that the Defendant Cameron Tillman (hereinafter "Tillman") was a website tweeter who photographed the defamatory alterations made by Winchester and tweeted the image over twitter. Id., ¶¶ 3, 6. Further, Banaian's Complaint asserts that John Does #1-10 and Jane Does #1-10 "re-tweeted" Tillman's tweeted image of Winchester's alteration to the website. Id., ¶¶ 4, 6. Further, Banaian's Complaint asserts the Re-Tweeters were responsible for "capturing the original defamatory posting." Id., ¶¶ 4, 6. In her Complaint, Banaian, described the role of the re-tweeters as "...[t]heir role would be similar to the publication of defamatory newspaper content by having the newspaper delivered without charge to numerous members of the defamed person's community." Id., ¶ 6. Thus, Banaian's Complaint concedes the retweeters were uninvolved with the creation or development of the defamatory content and that the retweeters played no role beyond republishing.

The Defendant/Appellee Katie Moulton (hereinafter "Moulton") is alleged by Banaian to be one of the so-called re-tweeters. Banaian's Complaint does not assert that any of the re-tweeters had any involvement with Winchester's alteration of the website or Tillman's tweeting of an image of same. Nor does Banaian's Complaint assert that the re-tweeters added or altered any content but rather asserts that they re-tweeted Tillman's tweeted image of Winchester's website alterations.

## SUMMARY OF ARGUMENT

The retweeting defendants, including Moulton, are "users" within the meaning of the Communications Decency Act ("CDA") and, as such, are immune from any civil liability for any re-tweet on twitter of the content created by others. 47 U.S.C.§230.

## ARGUMENT

Under the CDA, "...[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C.§230(c)(1). Further the CDA provides "... [n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section." 47 U.S.C.§230(e)(3). The plain language of the statute identifies users as subject to immunity from suit.

The defendant Moulton is alleged by plaintiff to be a "re-tweeter". Banian has not alleged that the "re-tweeters" created or developed the information that was re-tweeted. In fact, Banian has alleged the opposite of creation or development. Banian alleges in her Complaint the "...re-tweeters were responsible for capturing the original defamatory posting." Id., ¶ 6. This is significant because a "user" of an interactive computer service, such as twitter, is not treated as the publisher or speaker of any information provided by another information content provider under the CDA. Twitter is interactive computer service under the CDA. *see* Am. Freedom Defense Initiative v. Lynch, 217 F.Supp. 3d 100, 104 (D. D.C. 2016) and Fields v Twitter, Inc., 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016).

The CDA defines an information content provider as a person "...responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The re-tweeters are not information

content providers because they have not created or developed the allegedly defamatory posting. Where the re-tweeters are not information content providers, the re-tweeters are granted immunity through § 230(c).

The re-tweeters, including Moulton, are users of an interactive computer service. The term "user" is not defined in the statute. Although not controlling, the California Supreme Court in Barrett v. Rosenthal, 146 P 3rd 510 (2006) analyzed the term "user" in the CDA and its analysis is persuasive.

"User" plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service. Barrett v. Rosenthal, 40 Cal. 4th 33, 48 (2006).

> Section 230(c)(1) refers directly to the "user of an interactive computer service." Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet..." Section 230(a)(2) notes that such services "offer users a great degree of control over the information that they receive." And section 230(b)(3) expresses Congress's intent "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services." Thus, Congress consistently referred to "users" of interactive computer services, specifically including "individuals" in section 230(b)(3). Barrett, supra at page 48.
>
> There is no basis for concluding that Congress intended to treat service providers and users differently when it declared that "[n]o provider or user of an interactive computer service shall be treated as [a] publisher or speaker..."(§230(c)(1). We cannot construe the statute so as to render the term "user" inoperative. Barrett, supra at page 48.

The Barrett Court concluded that there is no basis for deriving a special meaning for the term "user" in section 230(c)(1), or any operative distinction between "active" and "passive" Internet user. By declaring that no "user" may be treated as a "publisher" of third

party content, Congress has comprehensively immunized republication by individual Internet users. Barrett, supra at pages 56-57. The reviewing court must begin with the language employed by Congress and the assumption that its ordinary meaning expresses the legislative purpose. "User" plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service. Id.

Other courts have reached the same conclusion that republishers are users under the CDA. In Directory Assistants, Inc. v. Supermedia, LLC, 884 F. Supp. 2d 446, 451 (E.D.Va. 2012), the Court found that a user of an interactive computer service who finds and forwards via e-mail that content posted online in an interactive computer service by others is a user and immune from liability. The action of compiling information from a website and e-mailing that information to others clearly constitutes use of that website and its services. Id. Page 452. The Directory Assistants court in reaching its decision highlighted that there were no allegations that the defendants created the posts or altered them. Id. Page 452. Here, there is no claim by Banian that the re-tweeters created or altered the tweet.

See also Mitan v. A. Neumann & Assocs., LLC, No. 08-6154, 2010 WL 4782771, 2010 U.S. Dist. LEXIS 121568 (D. NJ November 17, 2010) (A person who receives via the internet defamatory content and republishes same on the internet without involvement in the creation or development of same is immunized from any civil liability under § 230(c)(1)).

In Charles Novins, Esq. PC v. Cannon, 2010 U.S. Dist. LEXIS 41147 (D. NJ 2010), the Plaintiff sued individuals for allegedly republishing a defamatory web posting or email originally authored by the defendant Cannon. The court held that it does not matter how the defendants republished the alleged defamatory statements – whetehr by email, website post or

some other method; and with the exception of Cannon, all of the defendant acted as re-publishers of another person's information, and as such they are protected by the CDA. Id.

## CONCLUSION

The re-tweeting defendants are users within the meaning of the CDA and as republishers who did not create or develop content are entitled to broad immunity from civil liability under §230(c)(1). The trial court below was therefore correct to grant the re-tweeter defendants motions to dismiss. The trial court's rulings should therefore be affirmed.

WHEREFORE, the Defendant/Appellee, Katie Moulton, respectfully requests that this Honorable Court Affirm the lower court order granting Moulton's Motion to Dismiss.

Respectfully submitted,
KATIE MOULTON

By her attorneys,
DESMARAIS LAW GROUP, PLLC

Dated: June 8, 2021

By: /s/Debra L. Mayotte

Debra L. Mayotte, Esquire, N.H. Bar No. 8207
831 Union Street
Manchester, NH 03104
603-623-5524 (Telephone)
603-623-6383 (Facsimile)
mayotted@desmaraislawgroup.com

## REQUEST FOR ORAL ARGUMENT AND CERTIFICATIONS

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned requests oral argument on behalf of Katie Moulton before the full court and designates Debra L. Mayotte, Esquire, to be heard. The undersigned estimates that oral argument will require (15) minutes.

Pursuant to Supreme Court Rule 26(7), undersigned counsel hereby certifies that this brief contains 2700 words and is in compliance with Rule 16(11).

Undersigned counsel hereby certifies that a copy of this brief has been delivered through the electronic filing system on June 8, 2021 to all registered e-filers.

Dated: June 8, 2021

Respectfully submitted,

/s/Debra L. Mayotte
Debra L. Mayotte, Esquire
N.H. Bar No. 8207

# APPENDIX

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY

HILLSBOROUGH SUPERIOR COURT, NORTH
216-2019-CV-00418

**MS. DEBBIE BANAIAN**
123 South Jewett Street
Manchester, NH 03103

**v.**

**WEB SITE USURPER**
**CAIDEN WINCHESTER**
106 Village Street
Penacook, NH 03303

**AND**

**WEBSITE TWEETER**
**CAMERON TILLMAN**
251 Village Street, Apt 4
Concord, NH 03303-4805

**And**

**DEFAMATORY RE-TWEETERS**
**(a group comprising 20+ minors,**
**named herein as John Doe #1-10,**
**and Jane Doe #1-10)**

**JURY TRIAL REQUESTED**

## COMPLAINT

1. The Plaintiff, Debbie Banaian, is a citizen of New Hampshire and resides at 123 South Jewett Street, Manchester, New Hampshire, 03103. At the times relevant herein, she was a teacher of Science in the Merrimack Valley Middle School, 14 Allen Street, Penacook, NH.

2. The Defendant, Caiden Winchester, Website Usurper, is a citizen of New Hampshire, and was a student at Merrimack Valley High School at the relevant times herein. Usurper is believed to have lived on Whittaker Circle, Concord, or may be residing with his father, Scott Winchester, in Portsmouth NH.

3. The Defendant, Cameron Tillman, Website Tweeter, is a citizen of New Hampshire, and was a student at Merrimack Valley High School at the relevant times herein. Website Tweeter is believed to have lived or is living with his parents at 251Village Street, Apt. 4, Concord, NH 03303-4804.

4. The Defendants Defamatory Re-Tweeters are citizens of New Hampshire and at the time of the incident giving rise to this action are believed to be students at Merrimack Valley High School. Many are believed to be minors residing with their parent(s), or recent graduates. The group of Defamatory Re-Tweeters is believed to be comprised of students of both genders, and for present confidentiality purposes are identified as John Does #1-10 and Jane Does #1-10. The Re-Tweeters are identified by their Twitter accounts as follows:

Emily John@Emilyjohn
Jared Kushner@B_Enwright
tvdd6@todd_hults
aaron bliss@aaronblissss
Christiaian Sabina@cubefish420
Ethan Hollen@Ethan_Hollen
jay@jayleneeeexoxo
Ann Bascom@ann_b10
Ryan Defina@DefinaRyan
Jake MacDuffie@jmacduffie
emma@emmaadavi_s
emily@xx_emilyyyd
Bryan Gagnon@BryanGagnon
Kyle Tucker@Kyle_tucker42
Rock/fatcunt@briianachaput
Katie Moulton@KatieeMoulton
kmoulton@motocross_44
Maggie Deriso@Maggiederiso
Tim Brodaa@timbroda
Shannon@shanananon123

## FACTUAL ALLEGATIONS

5. On May 17, 2016, Website Usurper hacked the Merrimack Valley Middle School website and changed Ms. Bannaian's website, which is designed for student and parent communication and information, so as to post a broadside suggesting that Ms. Banaian was sexually peverted and desirous of seeking sexual liaisons with Merrimack Valley students and their parents. The posting was highly defamatory and placed Ms. Banaian in a false light.

6. Soon after Usurper completed the hacking and changing of the Banian webpage, Website Tweeter took a picture of the altered website and tweeted that image over Twitter. Within a matter of hours after Usurper's defamatory post, and Website Tweeter's tweet, the Re-Tweeters published the defamatory posting regarding Ms. Banaian through Twitter. The Website Tweeter and

Re-Tweeters were responsible for capturing the original defamatory posting and insuring its widespread publication by communicating the posting to a variety of casual internet participants who would happen to encounter the tweet communication. Their role would be similar to the publication of defamatory newspaper content by having the newspaper delivered without charge to numerous members of the defamed person's community.

7. As a proximate result of the combined defamatory actions of Usurper, Website-Tweeter and Defamatory Re-Tweeters, Ms. Banaian was subjected to school-wide ridicule as the posting regarding her sexuality became "viral" and educated virtually the entire Middle School and High School to the defamation published by the Defendants.

8. The Defendants' defamatory conduct was highly damaging to the Plaintiff. The defamatory content spewed by the Defendants was so cruel and outrageous that the Plaintiff was – for an extended period – unable to function as a teacher. She was unable to resume her employment for approximately 6 months. She was made physically ill and required extensive counseling and professional support. Her functioning is still limited, in the sense that she is sporadically overcome by stress at unpredictable times.

9. As a proximate result of the Defendants' publishing of defamatory content regarding the Plaintiff, she has lost wages, endured great distress and anxiety, needed professional support, suffered illness and stress disorder, lost many of the enjoyments of living, suffered diminished standing in her profession and reputational losses, incurred medical bills and other special damages, and sustained other losses that are normal and direct consequence of the defamation..

COUNT I: DEFAMATION

10. Plaintiff repleads the prior allegations insofar as relevant.

11. The Defendants' conduct was defamatory of the Plaintiff, in that it constituted the publication of false content regarding the Plaintiff, diminishing her in the eyes of respectable members of the community and placing her in a false light.

12. There is no privilege available to the Defendants shielding their defamatory conduct.

13. The Defendants' conduct was reckless and without reasonable care, publishing defamatory content to third-party readers of internet content who would understand the defamatory meaning of that content.

14. The Plaintiff is entitled to liberal compensatory damages, given the outrageous falsity and evil nature of the defamation published by the Defendants.

15. The nature of the Plaintiff's injury is single and indivisible, in that the reckless impairment of her reputation does not permit a determination of the portion of reputational loss (and other losses) caused by each Defendant. Since separation is not possible, each Defendant is liable for the entirety of Plaintiff's losses.

COUNT II: RECKLESS INFLICTION OF EMOTIONAL DISTRESS

16. Plaintiff repleads the prior allegations insofar as relevant.

17. The Defendants' conduct, insofar as it constituted a wanton and conscious indifference to the respectability and dignity of the Plaintiff, was reckless.

18. The acts of the Defendants were extreme, outrageous, and clearly a gross departure from the boundaries of civilized conduct.

19. The acts of the Defendants predictably and obviously caused the Plaintiff severe emotional distress, wholly within the bounds of the damage that would be reasonably expected.

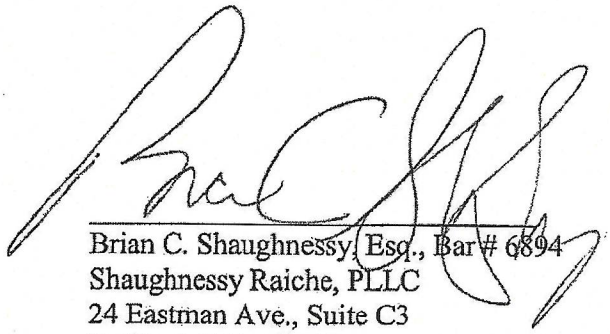
20. The nature of the Plaintiff's injury is single and indivisible, in that the reckless infliction of emotional distress does not permit a determination of the portion of such distress caused by each Defendant. Since separation is not possible, each Defendant is liable for the entirety of Plaintiff's losses.

---

21. Plaintiff requests judgment on her behalf. Plaintiff's damages are within the jurisdictional limits of this Court.

22. Plaintiff requests a jury trial.

5/16/19
Date



Brian C. Shaughnessy, Esq., Bar # 6894
Shaughnessy Raiche, PLLC
24 Eastman Ave., Suite C3
Bedford, NH 03110
(603) 644-4357
Brian@SRLaw-NH.com