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IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
MAR 24 1999
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

JANE DOE, mother and legal guardian of JOHN DOE, a minor,

Petitioner,

v.

AMERICA ONLINE, INC., a foreign corporation, and RICHARD LEE RUSSELL, individually

Respondents.
_____/

CASE NO: 94-355
4TH DCA CASE NO: 97-02587

PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

Certified Questions from The District Court of Appeal
Fourth District

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CERTIFICATE OF TYPE SIZE & STYLE

Appellant hereby certifies that the type size and style of the Amended Reply Brief of Appellants is Times New Roman 14 point.

SUMMARY OF ARGUMENT

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ARGUMENT

I. ZERAN v. AOL IS NOT APPLICABLE TO THIS CASE AS THIS IS NOT A DEFAMATION CASE BUT RATHER INVOLVES CRIMINAL CONDUCT

Defendant continues to paint this case as a defamation case in order to apply the decision in Zeran v. America OnLine, 129 F.3d 327 (4th Cir. 1997) to Doe's claims. The fact remains, however, that this case does not involve defamation or any theory of liability based on defamation and Zeran simply does not apply. This case involves the use of AOL's service to sell and distribute child pornography, clearly not the type of conduct contemplated by Congress in enacting Section 230 of the CDA.

As stated by this very court, "the sexual exploitation of children is a particularly pernicious evil". Schmitt v. State, 590 So. 2d 404,410 (Fla. 1991). Justice Pariente, in authoring the opinion in State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997) quoted this language when observing that "the state's primary purpose is to destroy the market for such material [child pornographic materials] and thus eliminate the economic incentive for the exploitation itself. Indeed , the exploitation of children for sexual purposes involves a level of heinousness of the highest magnitude." Cohen, at 440. This very concern is what Congress intended to address with the enactment of Section 230. Members of Congress, in order to further the state's ability to carry out its purpose, specifically provides that Section 230 does not prohibit the

enforcement of State laws that are consistent with Section 230.

It would be totally inconsistent with this important congressional purpose to read Section 230 as giving a computer service provider such as AOL free rein to knowingly distribute the very child pornography and obscenity sought to be restrained, without any obligation to be the "Good Samaritan" the statute seeks to empower. The statute does not seek to allow computer services to be child pornographers and marketers on services over which they have control. Rather, it seeks to enlist their technology and good faith efforts in removing such illegal materials and activities from the stream of commerce. Section 230 was intended to protect "Good Samaritan" acts to "restrict or enable restriction" of such "objectionable" material. Reading it as enabling the services to be knowing distributors in violation of criminal laws or in tortuous disregard to third parties is not the "plain meaning" of the statute, as explained by Congress in its Conference Report and made clear by the chosen bill and statutory section titles. Adopting the Zeran court's absolute immunity interpretation of Section 230 would lead to unprecedented results. It would allow AOL and other computer service providers to turn a blind eye to known criminal and "heinous" activities occurring within its system knowing that there would be no liability for doing so. It is inconceivable that this is what Congress intended when enacting Section 230.

One commentator has suggested that the rule of Zeran v. AOL does not represent a faithful interpretation of congressional intent. Ballen, Ian: *"Zeran v. AOL: Why The Fourth Circuit Is Wrong"*, J.Internet Law (March 1998). The author concludes that Section 230 of the CDA was plainly intended to encourage interactive computer services and users in restricting access to objectionable content. However, "the result of Zeran, therefore, would be to discourage, rather than encourage services to restrict access to objectionable material, which is exactly the opposite result that Congress intended in enacting the statute".

The overall purpose of the CDA was to curb the illegal and harmful trafficking in pornography, not to immunize computer service providers so they could knowingly aid and abet the distribution of that which Congress attempted to eliminate. Adoption of the Zeran rule to the facts of the instant case defeats the purpose of Section 230 and the Communications Decency Act as a whole. The Zeran rule should only apply to cases involving defamatory claims and should not be applied to cases involving criminal conduct, to wit: the sexual exploitation of children.

II. ZERAN V. AOL DOES NOT BIND THIS COURT AND SHOULD NOT BE FOLLOWED BECAUSE IT WRONGLY INTERPRETS SECTION 230 OF THE CDA

AOL urged, and the Court below followed, the isolated opinion of the U.S. Court of Appeals for the Fourth Circuit in Zeran. Zeran, from the SC, NC, VA, MD Circuit, is the only federal appellate decision directly construing Section 230 of the

CDA. Petitioner Doe respectfully submits that Zeran is seriously flawed. It was wrongly decided, and should not be followed.

It is elementary that decisions by even the Eleventh Circuit do not bind this Court. Fourth Circuit authority is no more weighty than the quality and depth of its judicial reasoning. Often this Court has charted an important new path, and been affirmed by this U.S. Supreme Court.

For example, Operation Rescue v. WHC, 626 So.2d 664 (Fla. 1993), sharply disagreed with Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993). The Supreme Court resolved the conflict in favor of this Court, with the stronger emphasis on individual medical-privacy rights. Madsen v. WHC, 512 U.S. 753 (1994). The Eleventh Circuit view was rejected and set aside. This Court prevailed, independently, and persuasively.

The Fourth Circuit panel in Zeran disregarded individual rights and the entire centuries -old body of state tort law remedies altogether. Instead, the Zeran panel adopted a strained, unforeseeable view of Section 230(C)(1) that swept aside all concerns of traditional individual remedies and state civil and criminal law interests, as well as the purposes and findings of Congress in the beginning of Section 230 itself.

The Fourth Circuit has frequently, since Zeran, set aside individual and privacy

rights, to rule for federal authority, or state authority, or municipal authority, instead of an individual citizen who had been grievously wronged.

For example, in Condon v. Reno, 155 F.3d 453 (4th Cir. 1997), the Fourth Circuit disregarded individual privacy and a federal effort to protect same, ruling in effect that State DMV records may remain open for potential copying of personal information by anyone, even stalkers. The Seventh and Tenth Circuits both subsequently rejected the Fourth Circuit approach. Travis v. Reno, No. 98-2881 (7th Cir. Dec. 16, 1998); Oklahoma v. United States, 161 F.3d 1266 (10th Cir. 1998).

Similarly, the Fourth Circuit again denied individual privacy claims, and held the Violence Against Women Act, Pub L No 103-322, §§400001-40703, unconstitutional in Brzonkala v. VPI, No. 96-1814 (4th Cir. Mar. 5, 1999)(en banc), rejecting the civil tort claim of a woman who had been violently raped.

Doe urges this Court not to follow the Fourth Circuit Zeran approach. It unreasonably subordinates individual rights and remedies, and wrongly interprets Section 230(C)(1) of the CDA Far more reasonable interpretations are appropriate which protect individual rights and do not twist Congressional intent or destroy entire bodies of state tort law and remedies. The Zeran panel picked out a very few words in a sentence and paragraph of the CDA statute. Those words had a quite different purpose from that attributed to them, and were used to support an erroneous

conclusion. That is clear when one studies the telecommunications act, headings, and the statutory language from start to finish.

Section 230 is entitled "Protection for private blocking and screening of offensive material." In plain English that implies legal protection for a computer service provider who "blocks out" or "screens out" offensive matter, such as pornography. That is the opposite of what AOL did in this case. AOL here knowingly allowed criminal trafficking in child pornography, without any reasonable efforts at screening or blocking out. If AOL had "screened," it might have had some immunity from suit by the pornographer, but that is not this case. The victim here is a child, deprived of innocence and scarred for life by the recklessness of AOL.

Section 230(C)(1) which follows is subtitled "Protection for 'good Samaritan' blocking and screening of offensive material (1) Treatment of publisher or speaker". Again, the label and context are about "blocking" and "screening," by an ostensible "Good Samaritan." AOL was no Samaritan aiding a child. AOL was the "Anti-Samaritan," doing the opposite, recklessly providing a means, a space, a room for a known child pornographer. This was worse than operating a hotel for known drug dealing or prostitution. AOL can claim no refuge or immunity here as any kind of Samaritan. AOL did the opposite of what would have been required for any degree of protection from liability. AOL gave safe harbor to trafficking in child

pornography. AOL made no reasonable attempt to block or screen. Nor may AOL receive an exemption for doing the very opposite of that required to disclaim liability. There should be no such reward. Section 230(C)(1) also has none of the language Congress traditionally utilizes for the kind of exemption AOL claims. As Petitioner's Brief earlier explained, this subsection was not discussed or debated in Congress. It was inserted without hearings in the kind of private executive sessions where the public has no voice, but the lobbyists operate with impunity.

Section 230(C)(2) on "Civil liability," continues to restrict liability for blocking or screening and other material, which AOL did not do. This subsection shows how limited an exemption Congress allowed, and only for blocking, absolutely *not* for the kind of aiding and abetting of child pornography involved in this case.

AOL next ventured down to Section 230(D)(3) for whatever support it could find there, and the Zeran panel agreed. However, that view was plainly in error. The interpretation offered here by Petitioner Doe is fully "consistent" with the Act of Congress and its principal focus on "blocking" and "screening." AOL fails outside of any exemption because it did the very opposite of what was required.

These facts involve AOL in knowing complicity with trafficking in illegal child pornography. No American Congress, ever, would have intended to exempt a computer service provider, or anyone, from tort liability for the unlawful activity

known to and disregarded by AOL here. These facts involve not simple defamation, as in Zeran. This is a case of reckless involvement by AOL with criminal trafficking in child pornography.

The CDA "Findings" explicitly encourage "vigorous enforcement of Federal criminal laws to deter and punish trafficking ;in obscenity, stalking, and harassment by means of computer." See Section §230(B)(5) of the CDA. Nothing in the "Findings" suggests a wholesale repeal of entire bodies of state tort law, particularly not civil liability for aiding and abetting by AOL of trafficking in child pornography. AOL provided a worldwide market and customers for the exploitation involved in this case. The "Findings" of Congress also do not suggest that aiding and abetting, and civil liability, are somehow to be tolerated in the future in situations such as this. These facts are different. They vividly illustrate the compelling need for vigorous and strong state law tort remedies.

Section 230 can fairly be construed to save a reasonably limited exemption, without wholesale disregard of an entire body of Florida tort law in the child pornography context. That exemption was plainly designed to apply only to "blocking" and "screening" activities by a computer service provider, including when it is a "publisher" or "speaker." Congress intended nothing more. Zeran is a highly strained, wholly unnecessary interpretation of Section 230. It defies a common sense

understanding of the telecommunications statute in its entirety. Zeran is a lobbyist's dream, but it is a child's nightmare, and very bad statutory construction.

The grand and overly mystified purposes of computer services and the Internet will not be harmed one whit by reversal of the judgment below. This is a civil liability/child pornography case. AOL should not be above the law when it aids and abets the defilement of Florida's children. There is nothing political, scholarly, or cultural about aiding and abetting child pornography. If anything, liability in this context will encourage AOL to avoid marketing itself to the more vile users of its service. The "Chat Room" is a product, a space, a room in cyberspace. AOL has no claim to be above the law when it allows pornographic predators to seek out Florida's children in such rooms or when it assists them in marketing the product of their predation, and continues to aid and abet criminal pornography when the facts become well known.

III. THE LOWER COURT ERRED IN FINDING THAT SECTION 230 OF THE CDA APPLIES RETROACTIVELY TO EVENTS GIVING RISE TO CLAIMS BEFORE ITS ENACTMENT

Despite defendant's argument to the contrary, the language in Section 230 that is pointed to in support of retroactive application , is not clear and unambiguous as to its meaning. The U.S. Supreme Court has long held that a statute is not to receive retroactive construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Here, the words used by Congress in Section 230 are subject to a number of different interpretations as discussed in Plaintiff's Brief on the Merits and do not satisfy the clear, strong and imperative test. As such, they cannot receive retroactive construction.

Furthermore, to give this Section retroactive construction would, contrary to Defendant's position, destroy a vested right that had vested with the Plaintiff prior to the enactment of the Act. There is conflict amongst the Federal Courts as to whether a person has a vested right in an unfiled cause of action in tort. The Plaintiff, in her Brief on the Merits, cited several cases that hold that Plaintiff does, in fact, have a vested right in an unfiled tort action. As such, Section 230 should not be applied retroactively so as to unconstitutionally destroy Plaintiff's vested rights.

IV. WHERE THE TRIAL COURT FAILED TO GRANT PLAINTIFF LEAVE TO AMEND HER COMPLAINT, THE COURT COMMITTED REVERSIBLE ERROR

The Defendant contends that the trial court correctly dismissed Plaintiff's original Complaint for failure to state a cause of action without leave to amend because amendment would be futile. Defendant takes this position because they claim that Section 230 of the CDA bars any causes of action based upon information provided by third party users. However, Defendant fails to understand the gravamen of Plaintiff's position herein. The basis of Plaintiff's causes of action, which could easily be clarified by amendment, is not that the Defendant should be held liable for the third party's information, but rather that Defendant should be held liable for failing to prevent or stop the trafficking of child pornography that was taking place within their system. Defendant can and should be held accountable for actions and/or inactions that increased the zone of foreseeable risk to third parties such as the Plaintiff. This can be accomplished without treating the Defendant as either a publisher or speaker, since those terms are more appropriately applied in defamation liability cases. To the extent that Plaintiff's Complaint is construed by its wording to allege publisher or speaker liability, the court should grant leave to amend to clarify Plaintiff's distinct cause of action separate and apart from publisher or speaker liability.

The causes of action in the instant case are more analogous to a premises liability case where the landowner must protect against reasonably foreseeable third party assault or a tortfeasor's liability for negligently allowing an advertisement which causes foreseeable harm to a foreseeable plaintiff. See Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071 (1993). Defendant's repeated attempts to characterize this as a defamation case so as to be precluded by Section 230 should not prohibit Plaintiff's right to amend to allege causes of action other than defamation. As previously stated, there are other causes of action, such as a third party beneficiary breach of contract claim that certainly would not be affected by Section 230 and Plaintiff should be given ample opportunity to amend to allege such a cause of action. More importantly, Plaintiff's claims are not based in defamation type liability and do not seek to treat Defendant as a publisher or speaker but to the extent that they are construed as such, Plaintiff should be permitted to amend her Complaint to clarify her position.

CONCLUSION

Petitioner hereby adopts the conclusion from Petitioner's Initial Brief on the Merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery this 23RD day of March, 1999 to: **L. MARTIN REEDER, JR.**, ESQUIRE, Steel, Hector & Davis, 1900 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 (650-7232), **PATRICK J. CAROME**, ESQUIRE, Wilmer, Cutler & Pickering, 2445 M Street, Washington, D.C., 20037 (202/663-6000), and to **RICHARD LEE RUSSELL**, 2055 Mass. Ave. NE St. Petersburg, FL 33703-3403.

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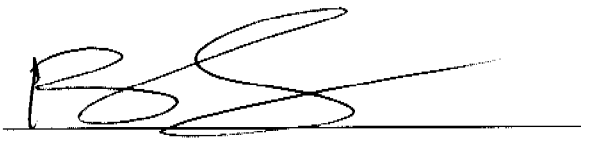

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