



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)
FIFTH JUDICIAL CIRCUIT)

Kenneth B. Loveless,

C/A No.: 2022-CP-40-01364

RECEIVED

Jan 27 2023

Plaintiff,

SC Court of Appeals

v.

**ORDER GRANTING
DEFENDANT’S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Lesley Ann Stiles a/k/a
Leslie Lou Stiles,

Defendant.

This matter is before the Court on Defendant Leslie Stiles’¹ motion for judgment on the pleadings as to Plaintiff Kenneth B. Loveless’s claim for libel. On December 2, 2022, the Court held a hearing on the motion at the Richland County Courthouse. Plaintiff was represented by Desa Ballard of Ballard & Watson, Attorneys at Law. Defendant was represented by Christopher P. Kenney of Richard A. Harpootlian, P.A. For the reasons explained below, Defendant’s motion is **GRANTED**, and Plaintiff’s libel claim is **DISMISSED WITH PREJUDICE**.

Factual and Procedural Background

This libel action was filed on March 16, 2022. At all times relevant to this action, Plaintiff was an elected member of the board of trustees for Lexington-Richland School District 5 (District 5). Defendant is the administrator of page called “Deep Dive Into D5” located on the social media website Facebook. Plaintiff’s claim arises from statements made on the Facebook page that Plaintiff contends are “libel *per se*” and were “voluntarily published on the internet by [Defendant] and by others with her [Defendant’s] consent, ratification, and endorsement” which Plaintiff

¹ Stiles’ answer and motion indicate she is misidentified in the caption as Lesley Ann Stiles a/k/a Leslie Lou Stiles.

alleges were intended by Defendant to be seen by the public “with specific knowledge they were false and/or with a reckless disregard for whether they were false or not.” Compl. ¶ 5.

On April 13, 2022, Defendant filed an answer and counterclaim for abuse of legal process. On April 26, 2022, Plaintiff filed a reply. On May 10, 2022, Defendant filed this motion arguing the Court should grant judgment on the pleadings because (1) she is immune from suit under § 230 of the Communications Decency Act of 1934 (CDA), as amended, (2) the statements are not actionable, and (3) the statements are privileged by the First Amendment to the U.S. Constitution. On November 23, 2022, Defendant filed a memorandum of law in support of this motion, which the Court has considered, along with the relevant case law. On December 2, 2022, the Court held a hearing on the motion and heard argument from the parties.

Legal Standard

Judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff’s favor. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009) (citing *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). All well-pleaded factual allegations are deemed admitted for purpose of the motion. *Russell*, 305 S.C. at 89, 406 S.E.2d at 339. The motion will be denied only if there is a controverted material fact which, if decided in favor of the non-moving party, would entitle him to judgment in his favor. *Id.*

Judgment on the motion should also be granted when a pleading is so defective that no cause of action is stated, and the plaintiff is not entitled to any relief whatsoever. *See Pope v. Wilson*, 427 S.C. 377, 384, 831 S.E.2d 442, 445 (Ct. App. 2019); *Diminich v. 2001 Enters., Inc.*, 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987).

Findings of Fact and Conclusions of Law

The tort of defamation allows a plaintiff to recover for injury to his reputation resulting from the defendant's communications a false message about the plaintiff to others. *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464–65, 629 S.E.2d 653, 664 (2006). Libel is a written defamation or one accomplished by actions or conduct. *Id.* The elements of defamation are (1) a false and defamatory statement, (2) unprivileged publication to a third party, (3) fault, and (4) actionability irrespective of special harm or special harm caused by publication. *Id.* As discussed below, the First Amendment to the U.S. Constitution modifies the common law of defamation when, in relevant part, the plaintiff is a public official.

Having reviewed the pleadings and applicable law, and having considered the arguments of the parties, the Court concludes the Complaint is irreparably flawed as a matter of law and should be dismissed. Plaintiff's claim is barred by the CDA, and he has not and cannot plead a cognizable claim considering his status as a public official and the actual malice standard required by the Constitution.

I. Section 230 of the CDA bars state law claims to impose liability on a social media user for third party statements.

Defendant argues Plaintiff's claim is foreclosed by Section 230 of the CDA because it bars state law actions that seek to hold one social media user responsible for the statements of another. The Court agrees.

Section 230 of the CDA requires that “[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). An “information content provider” is “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.” *Id.* §

230(f)(2). An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server....” *Id.* § 230(f)(2). The CDA also provides an immunity for users from state law claims: “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.” *Id.* § 230(e)(3).

Defendant argues Facebook is an interactive computer service, and she is an information content provider, as are the unnamed individuals who allegedly made statements Plaintiff contends are libelous. Defendant reads Subsection 230(c)(1) to say that she cannot be treated as the publisher or speaker of information provided by another Facebook user and Subsection 230(e)(3) prohibits this state law action as an effort to hold her responsible for those other users’ statements in contravention of Subsection 230(c)(1). The Court agrees. This is the natural and plain reading of the statute, and it comports with the way Section 230 has been applied by federal courts for the last 25 years. *See, e.g., Monsarrat v. Newman*, 28 F.4th 314 (1st Cir. 2022) (moderator of online neighborhood forum immune from suit where he copied and reposted defamatory comments about plaintiff by anonymous users accusing plaintiff of being a “child predator”); *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018) (Google immune from defamation claim predicated on failure to remove third-party post), *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (consumer affairs website immune from suit over statements made in consumer reviews), *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (negligence action against AOL for unreasonable delay in removing defamatory post barred).

Plaintiff sought to avoid this conclusion by arguing his claim is different than those barred by Section 230. The Complaint alleges Defendant “voluntarily published” the purportedly libelous statements as administrator of the Facebook page. *See* Compl. ¶ 5. During the hearing on this

motion, Plaintiff's counsel argued Plaintiff was presenting a "novel" theory not foreclosed by Section 230 and that it was based on Defendant's purported undertaking as page administrator. Specifically, counsel pointed to Defendant's statement on the Facebook page that "All information posted is a result of much research and analysis. . ." See Compl. ¶ 8. In Plaintiff's view, this statement constitutes an undertaking by Defendant to ensure the accuracy of the content posted by others on the page and allows Plaintiff to hold her liable for purportedly defamatory statements, even if made by third parties. The Court rejects this argument for three reasons.

First, the Court finds as a matter of law that no reasonable person could read Defendant's statement concerning "research and analysis" and conclude she undertook to ensure every posting made on the Facebook page, including the postings of others, were factual, verified, and endorsed by Defendant. See *White v. Wilkerson*, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997) (trial court makes initial determination whether statements are capable of defamatory meaning).

Second, even if that statement could be read as an "undertaking" of sorts, that is not a legally meaningful distinction under Section 230 and caselaw applying it. For instance, in *Zeran* the plaintiff brought a claim for negligence for failing to timely remove an offending third party post and argued AOL was not a "publisher," but a "distributor" that was exempt from the CDA. See 129 F.3d at 331–32. The Fourth Circuit found this distinction meaningless and "foreclosed by § 230." *Id.* at 332. In *Nemet*, the plaintiff argued Section 230 did not apply because it alleged that the consumer affairs website where an offending statement was posted "contacted the consumer to ask questions about the complaint and to help her draft or revise her complaint." 591 F.3d at 258 (quotations omitted). The court rejected this argument noting the allegation made "upon information and belief" that the web site "participated in the preparation" of the statement was a

bare allegation that, even if true, would not render the website the content provider within the meaning of the CDA. *Id.*

Plaintiff's claim here is similarly defective. Even crediting his bald assertion that the statements were published with Defendant's consent, ratification, and endorsement, his allegations are indistinguishable from the theories rejected in *Zeran* and *Nemet*. Plaintiff's undertaking theory is just negligence by another name—he contends Defendant undertook a duty vet the content of the Facebook page and failed to perform that duty. That is a negligence claim, but *Zeran* is clear that styling a claim as one that sounds in negligence does not circumvent Section 230 when the factual allegations that purportedly give rise to liability attempt to hold one content provider responsible for statements of another. Likewise, statements on a website suggesting review or control over third party content do not render one content provider liable for the statements of another. *Cf. Nemet*, 591 F.3d at 258 (“Moreover, in view of our decision in *Zeran*, [the car dealer] was required to plead facts to show any alleged drafting or revision by [the website] was something more than a website operator performs as part of its traditional editorial function.”); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 63, 146 P.3d 510, 529 (2006) (Section 230 “does not permit Internet service providers or users to be sued as ‘distributors,’ nor does it expose ‘active users’ to liability.”). While no reasonable person would assume Defendant's statement about research and analysis constituted an undertaking to validate the accuracy of every other user's statement, that argument fails regardless as a matter of settled law.

Finally, based on the Court's review of the Complaint, there are no statements specifically attributed to the Defendant herself. *See* Compl. ¶ 15 (alleging Defendant published, ratified, and/or endorsed seven enumerated statements) & ¶ 16 (26 statements of others). The Complaint is clear that Plaintiff seeks to hold Defendant liable for third-party statements based on the notion

Defendant was responsible for censoring statements that Plaintiff finds offensive. *E.g.*, Compl. ¶ 16 (alleging Defendant “acted with actual malice in undertaking the responsibility for monitoring the Page, which imposed on her the obligation to delete defamatory posts on the Page.”). Plaintiff’s counsel repeatedly confirmed this during the hearing when arguing Plaintiff’s claim is predicated on an undertaking theory. However, because there are no statements directly attributable to the Defendant, Section 230 is dispositive of the entirety of Plaintiff’s libel claim.

* * *

For these reasons, the Court concludes Section 230 of the CDA controls here and requires dismissal of this case. The purpose of the CDA is to “act[] as a bulwark against ‘intrusive government regulation of speech.’” *Bennett*, 882 F.3d at 1165 (quoting *Zeran*, 129 F.3d at 330). In passing the CDA, Congress sought to protect and preserve vibrant Internet discourse unfettered by federal or state regulation. 47 U.S.C. § 230(b)(2). “The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.” *Zeran*, 129 F.3d at 331. This case is no exception to that rule. Accordingly, the Court holds Section 230 requires judgment on the pleadings in Defendant’s favor.

II. The First Amendment protects Defendant from suit by a public official claiming she had a duty to censor third party statements on a social media site.

Alternatively, the Court concludes Defendant is entitled to judgment on the pleadings as to Plaintiff’s libel claim because the actual malice standard articulated in *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), and progeny protects Defendant from suit by a public official alleging she was responsible for the veracity of statements by others on Facebook.

As an initial matter, the Court finds Plaintiff is a public official. In cases involving defamation of a public official, the plaintiff must prove the defendant acted with constitutional actual malice, i.e., with knowledge the statement was false or with reckless disregard of its falsity.

Sanders v. Prince, 304 S.C. 236, 239, 403 S.E.2d 640, 643 (1991) (citing *Sullivan*, 376 U.S. 254 at 279–80). Thus, “an important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure.” *Erickson*, 368 S.C. at 468, 629 S.E.2d at 666. This determination is a matter of law that must be decided by the court. *Id.* Here, Plaintiff is a public official. As a member of the school board elected by voters, he had the sort of power and responsibility over governmental affairs that invites public scrutiny and discussion separate and apart from the controversy giving rise to this action. *See id.* (quoting *Holtzscheiter v. Thomson Newspapers, Inc. (Holtzscheiter II)*, 332 S.C. 502, 520 n.4, 506 S.E.2d 497, 507 n.4 (1998) (Toal, J., concurring in result)). Accordingly, Plaintiff must plead and prove by clear and convincing evidence that Defendant’s publication was made with “actual malice,” or it is constitutionally privileged. *Garrard v. Charleston Cty. Sch. Dist.*, 429 S.C. 170, 209, 838 S.E.2d 698, 718 (Ct. App. 2019).

Defendant argued Plaintiff’s claim fails because Defendant did not publish the statements and the statements are not actionable under several theories. *See* Def.’s Omnibus Mem., 14–26. The Court finds it unnecessary to reach many of these arguments. As explained, Plaintiff’s theory is that, as administrator of the Facebook page, Defendant undertook an obligation to remove defamatory statements and, by failing to do so, she was ratifying or endorsing them. This theory is incompatible with the constitutional protections afforded to Defendant by the First Amendment for two reasons.

First, Plaintiff’s undertaking theory can never, as a matter of law, constitute actual malice. Under South Carolina tort law, an undertaking is one way an individual can come to have a legal duty, the breach of which might cause damages that might be recoverable. *See, e.g., Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 213, 826 S.E.2d 285, 290–91 (2019) (quoting Restatement

(Second) of Torts (1965) to explain voluntary undertaking for consideration can be liable for failure to exercise reasonable care). However, a libel claim never sounds in negligence because “[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common and constitutional law.” *Erickson*, 368 S.C. at 482–83, 629 S.E.2d at 673–74 (affirming dismissal of negligence claim).

Here, Plaintiff must allege not only that the statements are false, but that Defendant, in fact, *knew* they were false or that she “entertained serious doubt” as to the truth but disregarded the concern of that falsity. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (“reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”). This extremely high standard is not met by an undertaking theory. At most, Plaintiff has alleged negligent performance of a duty, but mere errors fall well short of what Plaintiff must plead and prove. *See Erickson*, 368 S.C. at 467, 629 S.E.2d at 665 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). Thus, even assuming an undertaking allegation could suffice as the predicate for a libel claim (it does not under *Erickson*), it never satisfies the actual malice standard.

Second, this conclusion is underscored by the prophylactic purpose the actual malice standard serves in a case like this one. Speech concerning public officials “must be protected with special vigilance” because electing members of the government and debating their qualifications touches on “the essence of a free and responsible government.” *George v. Fabri*, 345 S.C. 440, 455, 548 S.E.2d 868, 875 (2001) (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (quoting James Madison, 4 J. Elliot, Debates on the Federal Constitution 575 (1861))). Those who choose public life must reasonably expect that this “profound national commitment” to public debate on public issues will be “uninhibited, robust, and wide-open” and

will at times “include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Sullivan*, 376 U.S. at 270. “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993). These constitutional concerns are most present in this case.

The essence of the statements in the Complaint are opinions and criticism of Plaintiff’s performance of his duties as a member of the school board. Some of these statements are pointed and question whether Plaintiff has performed his duties ethically, particularly in connection with decisions concerning a school district contract and his obligation to recuse himself from official action related to the contract. *See* Compl. ¶ 15. Other statements are sharper, claiming Plaintiff is an “unethical hypocrite,” a “liar,” and a “loser,” for example. *See id.* ¶ 16. However, unpleasant or offensive this criticism may be to Plaintiff, it is protected discourse by the First Amendment. Defendant was under no obligation to censor the speech of others to protect Plaintiff from criticism. The Constitution protects her from such a claim and requires dismissal here.

Conclusion

For the reasons explained above, Plaintiff’s libel claim fails under Section 230 of the CDA and the First Amendment to the U.S. Constitution. Defendant’s motion for judgment on the pleadings is **GRANTED**. Having liberally construed the Complaint and considered the arguments of the parties and relevant law, the Court concludes Plaintiff’s libel claim fails as a matter of law and is hereby **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.

[JUDGE’S E-SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Kenneth B Loveless vs Lesley Ann Stiles , defendant, et al

Case Number: 2022CP4001364

Type: Order/Civil Judgment

So Ordered

Jean H. Toal