STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
THE HONORABLE JEAN HOEFER TOAL

Appellate Case No. 2023-000145

Kenneth B. Loveless, ... Appellant,

v.

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

FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I. ISSUES ONE AND FOUR

As to Issues One and Four, Appellant Kenneth Loveless (hereinafter "Loveless") stands on the arguments set forth and fully briefed in the Initial Brief of Appellant, neither of which have been discredited in any way by Respondent.

II. ISSUE TWO

In order to claim protection under § 230 of the CDA, a defendant must establish that she is "(1) a 'provider or user of an interactive computer service'; (2) the plaintiff's claim holds the defendant responsible as the publisher or speaker of any information; and (3) the relevant information was provided by another information content provider. *Henderson v. The Source for Pub. Data*, 53 F.4th 110 (4th Cir. 2022) (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

Loveless does not dispute that Respondent has satisfied the first requirement to claim protection under § 230 of the CDA. Respondent is clearly a user of an interactive computer service as defined by § 230(f)(2), that interactive computer service being Facebook. 47 U.S.C § 230(f)(2). However, Respondent fails to meet the second and third requirements of immunity under Section 230.

A. Loveless' undertaking theory of liability is not barred by the CDA.

The second requirement for immunity under § 230 requires a defendant to establish that the "plaintiff's claim holds the defendant responsible as the publisher or speaker of any information." Public Data. Loveless's theory of liability is not one that is simply reduced down to Respondent's role as a publisher. Instead, Loveless seeks to hold Respondent liable under an

undertaking theory in which the Respondent voluntarily undertook the common law duty to provide factual and accurate information on the Deep Dive Facebook page, of which Respondent was the administrator and where she warranted the accuracy and thorough research of each post that would appear. Despite Respondent's warranty to the public that "all information posted [was] the result of much research and analysis," Respondent failed to monitor the page and delete false and defamatory posts, thus ratifying and endorsing the false and defamatory statements of others by allowing them to remain on the Facebook page. (R. pp. 39-41 ¶ 16). Respondent didn't have to make that warranty; she elected to do it, and is obligated to do so with due care, which she clearly did not do.

B. Respondent authored defamatory posts about Loveless and cannot establish that the defamatory statements at issue were provided solely by another information content provider.

Even if the Court finds that Respondent has satisfied the second requirement, Respondent is still not entitled to immunity under the CDA because she has failed to establish that the defamatory statements and posts on the Facebook page were provided solely by other information content providers or third parties. In *Henderson*, the Fourth Circuit held that an interactive computer service cannot be held responsible for development the unlawful information "unless they have gone beyond the exercise of tradition editorial functions and materially contributed to what made the content unlawful." 53 F.4th 110 (4th Cir. 2022). "Whether a defendant development information such that they are an information content provider turns on whether the defendant has materially contributed to the pieces(s) of information relevant to liability." *Id*.

The court in Henderson further explained that "[A defendant] can be both 'a provider or user of an interactive computer service' and also the 'information content provider.' And when a

defendant is both, § 230(c)(1) provides no protection." *Henderson* at 126, Fn 22. In *Monsarrat v. Newman*, the Court notes that "a 'key limitation' to section 230 immunity is that it 'only applies when the information that forms the basis for the state law claim has been provided by 'another information content provider.'"28 F.4th 314(1st Cir. 2022) (quoting *Universal Commc'n Sys., Inc. v. Lycos, Inc*., 478 F.3d 413, 418 (1st Cir. 2007)). Therefore "a user or provider of an interactive computer service remains liable for its own speech." *Id*. Further, the third requirement does not "turn on whether the defendant materially contributed to some part of the total information disseminated…but on whether the defendant materially contributed to the defamatory aspect of the information." *Henderson* at 128.

As set forth above, Respondent's liability in this matter is based upon Respondent's voluntary undertaking to provide factual and accurate information of the Deep Dive Facebook page for which she served as administrator. Respondent failed to uphold the duty she undertook by failing to remove and censor false and defamatory statements about Loveless that were posted to the Facebook page by other Facebook users.

However, the Complaint does not limit Respondent's liability to statements of third parties. The Complaint alleges that during her administration of the Deep Dive page, "[Respondent] has frequently authored defamatory posts about [Loveless] herself." (R. p. 37, ¶ 9). In addition to identifying the defamatory statements posted to the Facebook group by third parties, the Complaint lists the specific false and defamatory statements that were alleged to be authored by Respondent:

a. "If you are against government conspiracy, if you are against the appearance of corruption, if you are against the appearance of rewarding friends, if you are against back room deals and public business conducted in private – then you should be interested in the way your current school Board or [*sic*] Trustees is doing business."

b. "Mr. Loveless had an EC opinion requiring his recusal from certain matters and he refused for a length of time."

c. "My apologies to Mr. Ken Loveless – I didn't know he was a reader but am happy to make a correction to a comment I made in error stating there was an AG opinion regarding him and I meant an Ethics Commission…opinion that he should recuse himself from certain discussion and voting."

d. "Loveless says he will no longer recuse himself from topics related to construction. Likely bc (*sic*) his financial relationship with Contract Construction has ended, although he makes it appear that he has just decided to end it be he wants to."

e. "Mr. Loveless uses his position to influence decisions."

f. Mr. Loveless participates in deliberation and attempts to use his position to influence decisions."

g. "This SEC Ethics Opinion…further states that Mr. Loveless may not in any way attempt to use his position to influence decisions. Has Trustee Loveless complied with these requirements? Sadly, he has not."

(R. pp. 38-39 ¶ 15).

Respondent claims that Loveless is now attempting to "re-plead" his claim and change his position on appeal which is simply not true. (RIB, Pg. 13). From the outset of this litigation, Loveless has sought to hold Respondent liable for failing to uphold the duty she voluntarily undertook by republishing, ratifying, and/or endorsing defamatory statements about Loveless posted by third parties *and* those posts authored by Respondent herself.[1] It can hardly be said that Loveless's claim does not include Respondent's own defamatory statements when Loveless identified in the Complaint statements that are specifically attributed to Respondent. (R. pp. 38-39, ¶ 15).

[1] Respondent's counsel erroneously argued to the trial judge that Respondent herself was simply a "republisher" of comments of other people and completely ignored Respondent's own false and defamatory statements.

Respondent further claims that in the course of discovery, Loveless has failed to identify a single statement that is attributable to Respondent as the speaker. (RIB, Pg. 16). However, this claim is demonstrably false. In response to Respondent's discovery request, Loveless identified fourteen (14) statements that Respondent posted or authored personally. (R. pp. 906-919). Respondent incorrectly asserts that none of the statements identified in discovery as attributable to her were set forth in the complaint. In fact, there were at least three of Respondent's statements identified in discovery that were specifically set forth in the complaint. (*See* R. pp. 38-39, ¶ 15 (c), (b), (g)).

It is clear that Respondent cannot satisfy the third requirement to claim immunity under Section 230 of the CDA because the defamatory statements which form the basis for Loveless's defamation claim include Respondent's own statements and not solely statements of third parties. Accordingly the trial court erred in finding that Respondent is immune from suit under Section 230 of the CDA.

III. ISSUE THREE

Under South Carolina common law, "libel is actionable *per se* if it involves written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptable, or ridiculous." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464-65, 629 S.E.2d 653, 664 (2006).

When a claim for defamation involves a public official, that public official may recover damages for a defamatory falsehood if he proves that the statement was made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct 710, 11 L.Ed.2d 686 (1964). To prove actual malice, "a plaintiff must show by clear and convincing evidence that the defendant made

the statement with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*.

Loveless maintains that the trial court erred in determining that he was, at all times relevant, a public official as a matter of law. As previously set forth, Loveless's service on the board of trustees was part-time, for which he received no compensation since he served as a volunteer. Loveless's full-time job is a commercial contractor. (AIB, Pg. 15). Under the common law standard, Loveless has established a viable claim against Respondent for defamation. (R. pp. 36-44). Despite the trial court's determination that he is a public official, Loveless has also pled and set forth sufficient facts to support that Respondent acted with actual malice in republishing, ratifying and/or endorsing the false and defamatory statements posted to the Deep Dive Facebook page.

Respondent asserts that Loveless's undertaking theory cannot satisfy the actual malice standard, however, a review of the defamatory statements that Respondent personally posted, as well as those she republished and ratified as being accurate or true based on Respondent's warranty, clearly indicate that Respondent either knew the statements were false or entertained serious doubt as to the truth but disregarded the concern of their falsity. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). These statements include but are not limited to:

a. "Crooked Ken is an unethical hypocrite and a liar."
b. "…Don't let it be lost that as per usual, Crooked Ken goes after a woman. He continues to demonstrate contempt and disrespect for women."
c. Wow, he is a loser."
d. "Buth then again, with Ken on the board, you HAVE to always be concerned about ethics."

e. “Ken and Jan are proven liars, ethics violators, and remarkably untrustworthy.”

f. “Crooked Ken strikes again!!!”

(R. pp. 39-41, ¶ 16).

Such statements are not merely opinions and cannot be couched as opinions when the Facebook page to which they were posted specifically warrants, by and through the Respondent, that “all posts are the result of much research and analysis.” Even if those statements can be categorized as opinions, they are still actionable because they assert provable falsehoods. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993).

Finally, in its order granting judgment on the pleadings, the trial court held that Loveless was required to plead and prove by clear and convincing evidence that the Respondent’s publication was made with actual malice, however this was improper. (R. pp. 12-22). At this stage in the proceedings, Loveless was not required to prove anything, and was only required to plead sufficient facts to constitute an action for defamation, which he did. (*See* R. pp. 36-42).

CONCLUSION

For the reasons set forth above, Appellant Kenneth Loveless respectfully requests an order from this Honorable Court reversing the order of the trial court issued on December 21, 2023 and December 22, 2023, and remanding this case to the Circuit Court to proceed on the merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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