IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT OF FLORIDA

Case No. 4D-13-3469

MEDYTOX SOLUTIONS, INC.,
SEAMUS LAGAN and WILLIAM G. FORHAN,

Plaintiffs/Appellants,

v.

INVESTORSHUB.COM, INC.,

Defendant/Appellee.

On Appeal from the Seventeenth Judicial Circuit Court in and for Broward County, Florida.

REPLY BRIEF

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I. INTRODUCTION

In its Answer Brief, Appellee Investorshub.com, Inc. ("Investorshub") confirms that the purpose of the Communications Decency Act was to protect internet service providers from "tort liability" for statements posted by third parties. Investorshub further recognizes that Appellants Medytox Solutions, Inc., Seamus Lagan, and William G. Forhan (the "Medytox Parties") are not seeking to hold Investorshub liable for the statements posted on its internet site. The Medytox Parties seek, as their sole remedy, a permanent injunction ordering the removal of the specific postings that have been found to be defamatory and libelous in other proceedings.

Notwithstanding, Investorshub claims that the action for a permanent injunction is barred under the decision of the Third District Court of Appeal in *Giordano v. Romeo*, 76 So. 3d 1100 (Fla. 3d DCA 2011), and also as an impermissible prior restraint on speech for which there is an adequate remedy at law.

Both of these arguments fail. The *Giordano* decision did not address the issue of preemption as preemption relates to a claim for injunctive relief and whether such claims "treat" internet service providers as "publishers," which is the only basis to find preemption under the Communications Decency Act. Instead, in

Giordano, the claim for injunctive relief was analyzed as part of a claim for significant monetary damages.

Investorshub's First Amendment defense also fails. A permanent injunction limited to statements that have been previously found to be defamatory is not an impermissible prior restraint on speech. Importantly, this action was dismissed as preempted - not as prohibited by the First Amendment.

Therefore, the order of dismissal should be reversed to allow the Medytox Parties their day in court.

ARGUMENT

I. An action for a permanent injunction ordering the removal of statements that have been found to be defamatory is not preempted by the Communications Decency Act.

In its Answer Brief, Investorshub argues that the Medytox Parties' claim for a permanent injunction is preempted by Section 230(e)(3), which provides that "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." *See* Answer Brief at 8. However, Investorshub has failed to establish that an action for injunctive relief seeking the removal of statements that have been found to be defamatory - and libelous - is inconsistent with the Communications Decency Act.

First, Investorshub fails to acknowledge that the scope of the preemption clause of the Communications Decency Act is limited. Section 230(e)(3) expressly

provides that "nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." This clause precedes the preemption clause quoted by Investorshub and is – for obvious reasons – absent in Investorshub's Answer Brief. The full text of Section 230(e)(3) reads:

> 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.

When read in its entirety, it is clear that, far from creating a blanket federal immunity for "any action," Section 230 simply preempts those actions that are inconsistent with the Communications Decency Act. Therefore, the seminal question in this case is whether a claim for injunctive relief seeking the removal of statements found to be defamatory is inconsistent with the Communications Decency Act. The answer to this questions is clearly, "no."

The congressional mandate that is at the core of this appeal is in Section 230(c) of the Communications Decency Act. Nothing in Section 230(c) prohibits an action for injunctive relief seeking the removal of statements that have been found to be defamatory or libelous.[1]

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[1] The title of Section 230(c) is "Protection for "Good Samaritan" blocking and screening of offensive material." As several courts have noted, this title is inconsistent with the argument that Section 230(c) was created to grant internet

Because the Medytox Parties are not seeking any civil liability in this action, Investorshub cannot rely on Section 230(c)(2) – which expressly prohibits civil liability claims against internet service providers for good faith efforts to restrict the access to or the availability of materials deemed by the internet service provider to be "lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." This Section, which is intended to encourage internet service providers to clean up the internet is not at issue in this case because the Medytox Parties are not pursuing any civil liability claim against Investorshub. Because Section 230(c)(2) does not apply in this case, Investorshub is left to rely on the statutory language of Section 230(c)(1).

Investorshub suggests that an action for injunctive relief is inconsistent with the language of Section 230(c)(1). But, a close analysis of Section 230(c)(1) demonstrates that this argument is a fallacy.

Unlike Section 230(c)(2), Section 230(c)(1) does not expressly bar any civil action. Indeed, the title of Section 230(c)(1) is "Treatment of publisher or speaker," and provides that:

> 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.

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service providers blanket immunity to post offensive material. *See Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

Compare to 47 U.S.C.§ 230(c)(2) (which is titled "civil liability" and provides that "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).")

The Florida Supreme Court held in *Doe v. America Online*, 783 So. 2d 1010 (Fla. 2001), that Section 230(c)(1) preempts tort-based causes of action against internet service providers for the distribution of offensive material posted by third parties. These tort actions seek to hold internet service providers liable for exercising a traditional function of a publisher – the removal of a publication. As such, these actions treat internet service providers as the publisher of the statements and are inconsistent with Section 230(c)(1).

However, there is a dearth of case law analyzing whether a cause of action that does not require proof that the interactive service provider exercises the traditional functions of a publisher as an element of the claim is barred by Section

230(c)(1). This issue has never been addressed by the Florida Supreme Court, and indeed, has not been specifically addressed by any District Court in Florida.[2]

This issue was addressed by the Ninth Circuit Court of Appeals in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). In *Barnes*, the plaintiff sued Yahoo – an internet service provider – for failing to remove offensive postings uploaded by her ex-boyfriend. *Id.* at 1098. The complaint pled a claim for promissory estoppel, which alleged that Yahoo had promised to the plaintiff that it would remove the offensive postings and had failed to do so, and a claim for negligence. *Id.* The trial court dismissed both claims as preempted under Section 230(c)(1). *Id.* The trial court reasoned that both claims treated Yahoo as the publisher of the offensive postings. *Id.*

The Ninth Circuit affirmed the dismissal of the negligence claim but held that the equitable claim for promissory estoppel was not preempted. *Id.* at 1105-06. The Ninth Circuit reasoned that Section 230(c)(1) is not a blanket preemptive clause. *Barnes*, 570 F.3d at 1108. Instead, this section "only ensures that in certain cases an internet service provider will not be 'treated' as the 'publisher or speaker' of third-party content for the purposes of another cause of action."

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[2] The Complaint in *Giordano*, 76 So. 3d at 1100, involved a claim for a permanent injunction. But, the Third District did not address the issue of whether a claim for injunctive relief treats the internet service provider as a publisher. Instead, the claim for injunctive relief was erroneously analyzed together with the claim for monetary damages. *Id.*

Barnes, 570 F.3d at 1101. Whether a claim is preempted by Section 230(c)(1), the court reasoned, depends on "*whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker.*" *Id.* at 1102.

The Ninth Circuit then turned to the elements of the two causes of action alleged by the plaintiff. The court agreed that the negligence claim clearly treated Yahoo as the publisher of the statement:

> In other words, the duty that [Plaintiff] claims Yahoo violated derives from Yahoo's conduct as a publisher – the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because such conduct is publishing conduct that we have insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.

Id. at 1103.

The court of appeals then contrasted the elements of the negligence claim to the elements of the claim for promissory estoppel. *Id.* at 1106. The court noted that the claim for promissory estoppel was not based on a duty arising out of Yahoo's role as the publisher or disseminator of the offensive statements. *Id.* at 1107. Instead, the claim for promissory estoppel was based on an obligation arising out of Yahoo's role as the maker of the promise to remove the offensive

material. *Id.* The court acknowledged that the promise was related to the removal of the material but, reiterating that Section 230(c)(1) does not provide blanket immunity, the court concluded that the claim that Yahoo did not keep its promise did not derive from the conduct of Yahoo as a publisher:

> How does this analysis differ from our discussion of liability for the tort of negligent undertaking? . . . After all, even if Yahoo did make a promise, it promised to take down third-party content from its website, which is quintessential publisher conduct, just as what Yahoo allegedly undertook to do consisted in publishing activity. The difference is that the various torts we referred to above each derive liability from behavior that is identical to publishing or speaking: publishing defamatory material, publishing material that inflicts emotional distress, or indeed, attempting to de-publish hurtful material but doing it badly . . . Promising is different because it is not synonymous with the performance of the action promised . . . [the act of promising] generates a legal duty distinct from the conduct at hand . . .

Id.

The Seventh Circuit Court of Appeals reached the same conclusion as the Ninth Circuit in *Barnes* and held that Section 230(c)(1) only preempts claims that seek to hold an internet service provider liable for its role as the publisher of third-party content. *See City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). Rather than creating an absolute immunity for internet service providers, Section 230(c)(1) "limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement." *Id*. But, Section 230(c) (1) does not have

any effect on actions that do not seek to hold the internet service provider liable for third-party content.

The claims asserted by the Medytox Parties in this action do not treat Investorshub as a publisher. The Medytox Parties are not seeking to hold Investorshub liable for a duty that arises out of its role as the publisher of the statements posted by Mr. Hawley. Indeed, the Medytox Parties have not sued Investorshub for monetary damages. Instead, the Medytox Parties seek, as their only remedy, a permanent injunction ordering the removal of statements that have been found to be defamatory. This claim is not based on any duty owed by Investorshub, let alone a duty as publisher.

An analysis of the elements of the claims asserted by the Medytox Parties confirms this conclusion. Under Florida law, a claim for a permanent injunction requires proof of: (1) a clear legal right, (2) an inadequate remedy at law, and (3) that irreparable harm will arise absent injunctive relief. *See Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So.3d 183, 186 (Fla. 2009); *K.W. Brown and Co. v. McCutchen*, 819 So.2d 977, 979 (Fla. 4th DCA 2002). None of these elements require the court to "treat" Investorshub as a "publisher." The Medytox Parties will have to prove that Mr. Hawley's postings are defamatory or libelous. This issue is well established in the record as Mr. Hawley himself has offered his assistance in the removal of the postings, and a jury found these postings to be

defamatory. *See* Initial Brief at ¶ 18. But, any decision on this issue at this stage is premature, and the Court should assume that the statements published by Mr. Hawley are in fact false and harmful to the reputation of the Medytox Parties as alleged in the Amended Complaint. *Id.* at ¶ 21.

The Medytox Parties will also have to prove that they do not have any adequate remedy at law, and that they will suffer irreparable harm in the absence of an injunction. But, again, none of these issues involves any conduct or duty of Investorshub, let alone a duty arising out of its role as a publisher.

This action was filed because Investorshub published Mr. Hawley's statements. But, as the Ninth Circuit and Seventh Circuit have established, Section 230(c)(1) does not provide blanket immunity from suit, it bars claims that treat internet service providers as publishers, which a claim for injunctive relief does not do. *Barnes*, 570 F.3d at 1108.

Consistent with this reasoning, several courts have held that claims for injunctive and declaratory relief are not preempted by the Communications Decency Act. *See Doe v. Franco Productions*, No. 99 C 7885, 2000 WL 816779 (N.D.Ill. June 22, 2000); *Mainstream Loudon v. Board of Trustees of the Loudon Country Library*, 2 F.Supp.2d 783, 790 (E.D.Va. 1998). ("[D]efendants cite no authority to suggest that the tort-based immunity to 'civil liability' described by § 230 would bar the instant action, which is for declaratory and injunctive relief.")

Unfortunately, most of the Section 230(c)(1) cases have involved claims for monetary damages artfully pled to circumvent the preemption clause together with claims for injunctive relief, and courts have failed to make the distinction between a claim for monetary relief and a claim for injunctive relief. *See e.g., Giordano v. Romeo*, 76 So. 3d 1100 (Fla. 3d DCA 2011). But, this District should not compound this error.

An action that seeks an injunction ordering the removal of libelous statements is not based on any duty owed by the internet service provider as a publisher; and, therefore, is consistent with the Communications Decency Act.

II. An injunction seeking the removal of statements that have been previously found to be defamatory is not a prior restraint on speech.

Investorshub argues that a permanent injunction ordering the removal of statements that have been found to be libelous is an impermissible prior restraint on speech. This argument disingenuously ignores the fact that the Medytox Parties are seeking a limited permanent injunction for the removal of specific statements: (1) that have been posted on the internet; (2) that have already been found to be defamatory by a jury - or will be found to be defamatory by the court if the trial court takes judicial notice of the jury verdict in the case against Mr. Hawley; and (3) which Mr. Hawley himself has requested to be taken down.

An injunction ordering the removal of statements found to be defamatory is not a prior restraint on speech. *See Saadi v. Maroun*, No. 8:07-cv-01976-T-24-

MAP, 2009 WL 3617788 (M.D.Fla. 2009) (holding that a permanent injunction was appropriate for the removal of specific publications that had been found by the jury to be defamatory); *see also Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007) (concluding that an injunction prohibiting speech already found defamatory by the trial court was not an invalid prior restraint).

In determining whether an injunction restraining defamation may be issued under the First Amendment, there is a significant distinction between requests for preventive injunctive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory. *Id*. The constitutional problems of a prior restraint disappear once there has been a determination that the publication at issue is defamatory. *Id*.; *see also* 1 Hanson, Libel and Related Torts (1969) § 170, pp. 139–140.

Not surprisingly, the cases that Investorshub cites for the proposition that the First Amendment preempts the claim for injunctive relief in this case involve claims for *temporary or preliminarily* injunctions, which the Medytox Parties have never requested in this case. *See* Answer Brief at 28-31.

On July 2, 2013, in the action filed against Mr. Hawley, a jury found that the statements posted by Mr. Hawley on Investorshub's site were false and had caused

Mr. Lagan $750,000 in pain and suffering damages.[3] The trial court will have to determine the preclusive effect of this verdict, but the key issue in this constitutional analysis is that before a permanent injunction is entered, there will be a final determination that such statements are defamatory.

III. The Medytox Parties do not have an adequate remedy at law for the irreparable harm continued to be caused by the defamatory postings.

Investorshub further claims that the jury verdict is an adequate remedy at law. This argument, which was not the basis for the dismissal of the Amended Complaint, does not salvage the dismissal order.

First, this argument is premature given the procedural stage of this case. The Medytox Parties allege that they do not have an adequate remedy at law to redress the irreparable harm caused by the defamatory postings. Amended Complaint ¶ 52 [App. 146-230]. These allegations must be assumed to be true at this procedural juncture. *See Anson v. Paxson Communications Corp.*, 736 So.2d 1209, 1210 (Fla. 4th DCA 1999); *Barnes*, 570 F.3d at 1098 n.1. The Medytox Parties have not yet had an opportunity to present evidence of irreparable harm and will do so during the course of the proceedings.

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[3] *See* Verdict Form (July 2, 2013 – Case No. 12-001873 (07) in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida).

In any event, a monetary judgment is not an adequate remedy at law to cure the irreparable harm caused by the continuous publication of statements that have been found to be defamatory. *Saadi*, 2009 WL 3617788, at *3 (M.D.Fla. 2009) ("Accordingly, this Court finds that the jury verdict and judgment have not given [the defamed plaintiff] complete relief, since the defamatory statements … remain. Therefore, the Court finds that [defendant] should be enjoined from continued or repeated publishing of the statements contained in Trial Exhibits 19 and 20 that were found by the jury to be defamatory. However, the scope of the injunction must be limited to those statements.")

As such, the order of dismissal must be reversed.

CONCLUSION

Neither the Communications Decency Act nor the First Amendment bars the issuance of a permanent injunction ordering the removal of statements that have been found to be defamatory.

For these reasons, Appellants request that this Court reverse the Circuit Court's Order dismissing the complaint and allow the underlying action for injunctive relief to proceed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is printed in Times New Roman 14-point font in compliance with the requirements of the Florida Rules of Appellate Procedure.

/s Francisco A. Rodriguez
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this **10th** day of March, 2014 to : **Deanna K. Shullman, Esq.**, Thomas & LoCicero PL, 401 SE 12th Street, Suite 300, Ft. Lauderdale, FL 33316.

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