IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1
District Court Case No: 4D-13-3469

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

Petitioners,

v.

INVESTORSHUB.COM, INC.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

Deanna K. Shullman
Rachel E. Fugate
Allison S. Lovelady
THOMAS & LOCICERO PL
401 S.E. 12th Street, Suite 300
Ft. Lauderdale, FL 33316
Telephone: (561) 340-1433
Facsimile: (561) 340-1432

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

STATE RULES

STATEMENT OF THE CASE AND FACTS

Petitioners, Medytox Solutions, Inc., Seamus Lagan, and William G. Forhan ("Petitioners"), attempt to invoke this Court's discretionary jurisdiction to review a decision by the Fourth District Court of Appeal holding that Section 230 of the Communications Decency Act (47 U.S.C. § 230 (1998)) ("Section 230") immunizes interactive computer services providers ("ISPs") from lawsuits seeking to force them to remove from their websites allegedly defamatory statements made by third parties. (hereinafter "Opinion"). (A. at 5.)[1] At the request of Petitioners' counsel, Investorshub.com, Inc. ("iHub") removed two third-party posts Petitioners claimed were defamatory but declined to remove two others. (A. at 2.) Petitioners then sued iHub, an ISP, for failing to remove the postings, which were made by a third party on iHub's website. (A. at 2.) Petitioners sought a declaratory judgment that the third party posts were defamatory and should be removed from the internet and an injunction requiring iHub to stop publishing the content. (A. at 2.)

The trial court dismissed the complaint and entered judgment in favor of iHub. (A. at 2.) The Opinion affirmed the trial court and followed the Third District Court of Appeal's decision in Giordano v. Romeo, 76 So. 3d 110 (Fla. 3d DCA 2011), reaching the same result as the Giordano Court had reached on the

[1] Petitioners filed an Appendix containing a copy of the Fourth District Court of Appeal decision. Reference to the Appendix will be "A at __."

same issue (whether Section 230 immunity bars claims for injunctive relief). (A. at 5.)

Petitioners herein seek to invoke the discretionary jurisdiction of this Court to review "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of . . . the supreme court on the same question of law." Art. V, § 3(b), Fla. Const.

SUMMARY OF THE ARGUMENT

Petitioners claim the Opinion misapplies this Court's precedent in Doe v. Am. Online, Inc., 783 So. 2d 1010 (Fla. 2001) ("Doe"). No conflict with the Doe decision exists, however. The Opinion actually is in harmony with Doe, which adopted the reasoning of the Virginia federal courts in Zeran v. Am. Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997), aff'd 129 F.3d 327 (4th Cir. 1997), and simply applied the plain language of Section 230 in a case that, like the instant action, sought to hold an ISP responsible for its failure to remove third party content. Petitioners' argument simply does not support invocation of this Court's discretionary jurisdiction.

ARGUMENT

Because there is no irreconcilable holding between the Opinion and any decision from this Court or another district court of appeal,[2] Medytox attempts to invoke "misapplication conflict" by arguing that the Fourth District's Opinion misapplies and, therefore, conflicts with this Court's ruling in Doe. This argument lacks merit and fails to present any legitimate ground for invoking this Court's conflict jurisdiction.

I. The Scope of this Court's Discretionary Jurisdiction is Narrow.

Article V, Section 3(b) of the Florida Constitution vests this Court with the discretion to accept jurisdiction to review "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of . . . the supreme court on the same question of law." Art. V, § 3(b), Fla. Const. A conflict between a Florida Supreme Court decision and a district court decision occurs when the district court accepts a decision of the Florida Supreme Court as controlling precedent but then "attribute[s] to that decision a patently erroneous and unfounded principal of law." Pinkerton-Hays Lumber Co. v. Pope, 127 So. 2d 441, 443 (Fla. 1961). In such cases, the district court is said to have misapplied the law of this Court, and Florida

[2] As the Petition acknowledges, the Opinion is *consistent* with the Third District Court of Appeal's decision in Giordano, 76 So. 3d at 1102, wherein the Third District held that Section 230 bars claims for injunctive relief against ISPs. (Petition at 3.) There is no Florida appellate court decision to the contrary.

Supreme Court review is appropriate. Id. (accepting jurisdiction where district court adopted as precedent a prior decision of Florida Supreme Court but then applied *subjective* definition of "foreseeability" in same legal context in which Florida Supreme Court's prior decision had previously set forth an *objective* standard). The Fourth District did not misapply the law in this case.

II. The Petition Fails to Properly Invoke this Court's Discretionary Jurisdiction.

Section 230 provides 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). Section 230 further reads: "[*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) (emphasis added). In immunizing an ISP from a suit based on its failure to remove objectionable content, this Court in Doe specifically held that Section 230 "expressly bars 'any actions,' and we are compelled to give the language of this preemptive law its plain meaning." Doe, 783 So. 2d at 1018.

In Doe, America Online, Inc. ("AOL"), an ISP, failed to block access to a child pornographer who was using AOL chat rooms to market photographs and videotapes of young boys having sex with each other and with the pornographer. Doe, 783 So. 2d at 1011. Jane Doe, the mother of one of the pornographer's victims, sued AOL on her son's behalf, alleging that AOL failed to take steps to

stop the pornographer from using AOL's chat rooms to market child pornography for sale and distribution, even though AOL knew or should have known about the content of the posted materials. Id. at 1012. AOL neither warned the pornographer nor suspended his service; instead, refusing to take down his chat room solicitations. Id.

In immunizing AOL, this Court expressly adopted the reasoning of the Fourth Circuit and United States District Court for the Eastern District of Virginia in Zeran v. Am. Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997), aff'd 129 F.3d 327 (4th Cir. 1997). Doe, 783 So. 2d at 1013-17. The Zeran court, in reviewing an ISPs failure to take down fake postings purporting to be from the plaintiff and offering for sale offensive t-shirts, had held that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether the publish, *withdraw*, postpone or alter content – are barred" by Section 230. Id. (emphasis added). The Zeran Court reasoned that once an ISP is notified of the potentially defamatory posting, it is thrust into the role of a traditional publisher and must decide whether to publish, edit, or remove the posting. Id. at 332. By seeking to impose liability on an ISP for its failure to remove the offending statement, plaintiff sought to impose liability on the ISP for "assuming the role for which Section 230 specifically proscribes liability – the publisher's role." Id. at 332-33. Such an approach would undermine the purpose

and scope of Section 230, said the Zeran Court, as faced with potential liability every time someone complained about third party content, computer service providers would be forced to severely restrict speech on the web, creating a chilling effect not tolerated by the First Amendment.[3] Id. at 331.

This Court in Doe applied the same logic as the Zeran Court to preclude the claims against AOL for its failure to remove postings that solicited the sale of child pornography. Put simply, this Court already has decided that Section 230, by its plain meaning, applies to any action that challenges an ISPs editorial discretion to publish, edit, or withdraw content. Petitioners below challenged iHub's editorial discretion. The Opinion, consistent with Doe, barred the challenge. (A. at 5.)

Petitioners attempt to invoke this Court's jurisdiction by making a distinction without a difference between the Opinion and Doe; namely, that Doe involved an action for money damages and Petitioners herein seek an injunction. (Petition at 4.) This distinction is not drawn in the statutory language of Section 230, which immunizes ISPs from both causes of action *and* liability or in Doe, which simply gives the statute its plain meaning and applies Section 230 to "any

[3] At the time the Complaint was filed below, iHub hosted 85-million individual postings on 22,000 separate message boards, with new postings added at a rate of 40,000 new posts per trading day. (A. at 1.) It is, in fact, impossible for iHub to screen users' content for potentially injurious speech.

action" challenging an ISPs editorial discretion not to remove content from its website.

Because no true conflict exists, Petitioners instead cite Mainstream Loudoun v. Bd. of Tr. of the Loudoun County Library, 2 F. Supp. 2d 783 (E.D. Va. 1998) and Doe v. Franco Productions, Case No. 99 C 7885, 2000 WL 816779 (M.D. Ill. June 22, 2000) in support of jurisdiction. Neither addresses the jurisdictional question presented by the Petition, and there exists no basis for this Court's jurisdiction to review cases in conflict with federal district courts in other states. Moreover, neither case is in conflict with the Opinion. Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (affirming lower court's dismissal of action and expressly *declining* to interpret Section 230); Mainstream Loudoun, 2 F. Supp. 2d at 790 (public library not entitled to CDA immunity against challenge to restrictions on library patron access to certain websites because such restrictions *by a state actor* violate library patrons' First Amendment rights).

In Doe, as here, the plaintiff brought a cause of action challenging an ISP's refusal to remove objectionable content. Whether that cause of action seeks an award of money or an injunction[4] against the ISP, in each instance, the plaintiff has

[4] Petitioners downplay the extraordinary nature of what they were asking the trial court to do, which was to remove from publication statements already published and to forego future publication of the statements, by informing this Court they "solely" and "simply" seek removal of the postings, "nothing more than that."

(footnote continued on next page)

brought a cause of action that seeks to treat the ISP as the publisher of third party content by challenging the ISPs decision not to withdraw content. To make a determination that an ISP must remove content from its website, a court necessarily must make a legal determination that the objected to speech is defamatory (or otherwise pass judgment on its content[5]), placing the interactive computer service provider in the role of publisher who must defend the content of the speech or face an injunction prohibiting publication. This intrudes on the

---

(Petition at 3-4, 8.) Petitioners, in essence, seek a prior restraint, "the most serious and least tolerable infringement on First Amendment rights." Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). This is akin to asking a court to burn newspapers or books or to recall those items in circulation based on an accusation that something contained therein is libelous. The law of defamation has never supported such an approach. E.g., Moore v. City Dry Cleaners & Laundry, 41 So. 2d 865, 873 (Fla. 1949) (*en banc*) (dissolving injunction against picketing employer's business, even though statements may ultimately prove untruthful); Reyes v. Middleton, 17 So. 937, 939 (Fla. 1859) ("[i]t seems well-settled that a court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property").

[5] Petitioners improperly cite to matters outside the record in their Petition in informing the Court that a jury found the poster liable in a separate action. (Petition at 1.) This is both improper and incorrect. First, the information was not in the record on appeal. Second, there existed no identity of parties or statements at issue in the separate action. Accordingly, for the trial court to determine whether iHub should be enjoined from publishing the statements at issue, it would have to make its own determination of whether *these* statements were defamatory of *these* Petitioners, placing iHub squarely in the position to defend the statements' content and running afoul of Section 230. Moreover, if Petitioners have, in fact, recovered money damages from the poster, then they are not, as their Petition claims "without any viable remedy or redress." (Petition at 2.)

publisher's traditional editorial functions; namely, *whether to publish* or *withdraw* third party content, and is precisely the exercise of editorial discretion Section 230 is designed to immunize. Doe, 718 So. 2d at 389; Zeran, 129 F.3d at 333; 47 U.S.C. § 230. The Fourth District, in extending the same proscription against "any action" that intrudes on the decision to publish or withdraw third party content, acted consistent with and did not misapply Doe.

In fact, the Opinion does not even apply Doe. Rather, as Petitioners acknowledge (Petition at 4.), the Opinion expressly notes that Doe did not confront the issue presented to the District Court below. Accordingly, the Opinion cannot possibly expressly and directly conflict with Doe on the same question of law, which the Florida Constitution requires in invoking this Court's discretionary jurisdiction. See Art. V, Fla. Const.

There is no misapplication of Doe and thus no basis for conflict jurisdiction in this case. This Court should deny the Petition.

CONCLUSION

Petitioners' jurisdictional brief is nothing more than a disagreement with the Fourth District Court of Appeal's Opinion. Petitioners do not proffer any actual conflict or misapplication of law that would give rise to this Court's discretionary jurisdiction. This Court should decline to invoke its discretionary jurisdiction over this matter.

Respectfully submitted,

THOMAS & LOCICERO PL

/s/Deanna K. Shullman
Deanna K. Shullman
Florida Bar No.: 0514462
Rachel E. Fugate
Florida Bar No.: 0144029
Allison S. Lovelady
Florida Bar No.: 70662
401 SE 12th Street, Suite 300
Ft. Lauderdale, FL 33316
dshullman@tlolawfirm.com
alovelady@tlolawfirm.com
secondary email: bbrennan@tlolawfirm.com
Telephone: (561) 340-1433
Facsimile: (561) 340-1432

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail to:

Michael Marsh, Esq.
Francisco A. Rodriguez, Esq.
AKERMAN LLP
michael.marsh@akerman.com
francisco.rodriguez@akerman.com
SunTrust International Center
One S.E. Third Avenue, 25th Floor
Miami, FL 33131-1704

on this 4th day of February, 2015.

/s/ Deanna K. Shullman
Attorney

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14 point and otherwise meets the requirements of the rule.

/s/ Deanna K. Shullman
Attorney