Case No. 13-5946

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

SARAH JONES,

Appellee.

v.

DIRTY WORLD ENTERTAINMENT RECORDINGS, LLC, et al.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (BERTELSMAN, W.)

APPELLEE SARAH JONES' RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellee Sarah Jones makes the following disclosures: (1) that she is not a subsidiary or affiliate of a publicly owned corporation and (2) that there is no publicly owned corporation, that is a party to this appeal that has a financial interest in the outcome.

Dated: December 23, 2013

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REQUEST FOR ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 28(b)(1)(B) and 34(a), the Appellee also requests that this matter be set for oral argument. This appeal involves a question of law with the potential to be a matter of first impression in this circuit.

SUPPLEMENTAL STATEMENT OF THE CASE

The most important, undisputed reality, which allows this circuit to make a narrow ruling, is that Richie created this site to collect dirt or gossip about real people, he reviewed all submissions prior to posting and made decisions about which posts would be displayed, and edited the posts and added comments to them. This is not Facebook or other platform that passively acquiesces to the content provided by users. Richie encouraged users of his site to post defamatory material and ratified that content and encouraged additional content through his comments. The sole issue on appeal is whether the trial court appropriately denied immunity under the Communications Decency Act to the Appellants.

As a general matter, Sarah Jones, the Appellee agrees with most of the Appellants, Mr. Karamian's and Dirty World, LLC's ("Richie"), statement of the case. However, Richie tries to gloss over the undisputed fact that after a trial, the jury found Richie liable for defamation by clear and convincing evidence. Further, the trial court instructed the jury based upon the Appellee's status as a public figure, requiring that the jury find that the statements were made with knowledge of the falsity or with reckless disregard to the truth. The trial court specifically included the jury instruction with the heightened standard to avoid appealable issues, despite the fact that the trial court found that Ms. Jones was actually a private figure.

STATEMENT OF FACTS

When Richie started the "thedirty.com," he was looking at reality television and the popularity of celebrity gossip and decided that he wanted to do the same with regular people. (RE 176, Trial Transcript Day 3, pp. 2578-79). He is "in the business of putting insulting or humiliating things about normal people on his site. *Id.* at 2579. He knows that the humiliating and insulting posts are put up to embarrass people, so that others can watch their neighbors fall off their "high horse." *Id.* at 2586.

Prior to October 27, 2009, Sarah Jones ("Ms. Jones") had never even heard of thedirty.com until a comment was posted about both her and a Bengals football player, Shayne Graham. (RE 174, p. 2309). Specifically, that post stated, "She's been spotted around town lately with the infamous Shayne Graham. She also slept with every other Bengal Football player." *Id.* at 2310; RE 64-2, p. 507. Ms. Jones never slept with Mr. Graham or any other Bengal football player. *Id.* On that same day, Richie commented on the post about Shayne Graham being a sex addict. (RE 64-2, p. 507).

On December 7, 2009, the second post claiming that Ms. Jones' husband had contracted sexually transmitted diseases and which implied that she had those diseases as well, was posted to the site. *Id.* at 509. The comment also stated that

she had sex at the school where she taught and Richie made his comment about teachers being freaks in the sack. *Id.* The December 7, 2009 post is as follows:

> "The Dirty Army: Nik, here we have Sarah J, the captain cheerleader of the playoff-bound Cincy Bengals. Most people see Sarah as a gorgeous cheerleader and high school teacher. Yes, she's also a teacher. What most of you don't know is her ex, Nate cheated on her with over 50 girls in four years. **In that time, he's tested positive for chlamydia infection and gonorrhea, so I'm sure Sarah also has those.** What's worse is he brags about doing Sarah in the gym, football field, or classroom at the school. She teaches at Dixie Heights."

RE 64-2, p. 509(emphasis added). This is defamation. Richie admitted at trial that he reviewed the submission before posting, decided to post the submission, and let it remain published. This is no different than a newspaper who is liable for defamation it publishes regardless of the source. Immediately below this text, Richie commented, "[w]hy are high school teachers freaks in the sack? -Nik." *Id.* Just two days after this post, someone posted a photo of Ms. Jones on vacation. *Id.* at 511. The post acknowledged the previous posts, commented in passing about "the infected couple," insults Ms. Jones' beauty, and is also commented upon by Richie. *Id.*

On December 28, 2009 a post stated that a lawsuit had been filed against Richie. *Id.* at 515. The next day, two posts were submitted relating to Ms. Jones. *Id.* at 517, 519. The first post references the lawsuit and Richie comments, "Note

to self: Never try to battle the DIRTY ARMY." *Id.* at 517. The next post from the same day referenced other BenGal cheerleaders and Richie commented, "I love how the DIRTY ARMY has war mentality… why go after one ugly cheerleader when you can go after all the brown baggers." *Id.* at 519.

Immediately upon learning of the October 27, 2013 post, Ms. Jones attempted to contact Richie to have the post removed. (RE 174 at 2311-12). Just two days later, she was able to send an email after trying to contact Richie via MySpace. *Id.* at 2312. Ms. Jones never received a response to the email, and concerned about her students' questions regarding the post, she persisted in her request to have the post removed. *Id.* She sent requests on November 1, 6, 8, 11, 12, 13, 14, 15, 19, of 2009, all without a response. *Id.* at 2312-13.

As a result of the October 27, 2013 post, Ms. Jones had to meet with the superintendent and was told that she would have to sit down with the five class periods she taught to tell them she did not have any sexually transmitted diseases. *Id.* at 2317. She was also tested to verify that she did not have an STD and the school went through its security footage to make sure that she did not have sex with her ex-boyfriend on school property. *Id.* at 2317.

Similar to Richie's original motion for judgment in the trial court, he once again cites numerous times to his affidavit attached to that motion. However, those comments still have to be viewed in conjunction with the other statements he made

under oath at deposition and at trial. Even standing alone, the statements in his affidavit do little to change the factual situation as it was examined by the district court.

At the very beginning of his deposition, Richie claims to be the editor of thedirty.com:

Q. What do you do? What is your role in thedirty.com?

A. I'm the editor.

(RE 67, Richie Depo. p. 696). Later, he says "Umm, I am the editor as far as I do—I do control, like, comments." *Id.* at 698. Then when he wants all blame to fall on third parties he claims to not be an editor:

Q. And you edit it, correct?

A. No. I put my line at the end of it. I don't edit posts.

Id. at 734. Much more recently, Richie again claims to be not just an editor, but "Editor-In-Chief" of www.thedirty.com. (RE 64-2, p. 478, ¶ 1).

Likewise, Richie is extremely generous to himself with any numbers. When bragging about the popularity of his site, he claims, "[W]e get, you know, thousands of submissions a day and we weed it down to the top 150, 200." that at most 10% of the "thousands of submissions a day" ever get posted. (RE 67 Depo.

p. 696). However later on, Richie claims that as much as "30 or 25 percent actually make the website." *Id.* at 710.

When he wants to look responsible, Richie claims to personally weed through the "thousands" of SUBMISSIONS he receives, and then weeds it down to the "top 150, 200" posts which he actually puts up on his site. *Id.* at 696. Elsewhere in the deposition, when he remembers he is being held accountable for his complete control of the website and the harm it causes, he claims that the process isn't run entirely by him, but that it is automatic. *Id.* at 700. Then later, he remembers (one can only assume) that he controls the entire process again:

> [Y]ou just upload your submission. So, you would say the picture and our process automatically, you know, resizes the image, puts the watermark, puts your saying and adds the Dirty Army, so it's coming from a third party, and it -- then it goes to our list of submissions and then we go through them and look at each image and see, you know, read the—read the stuff and see what's good enough . . . .

Id. at 709-10, emphasis added. Richie claims that thedirty.com has a "removal department," and when asked about said "removal committee," he admits grudgingly that that is, "Um, pretty much me." *Id.* at 708.

When he wants to make himself look responsible and conscientious, Richie claims that "I'm there [on the site] to monitor stuff and make sure we're putting up as much truthful information as possible." *Id.* at 714. But when questioning gets more intense, Richie retreats to "It's not my job to fact-check every single post,"

Id. at 755, and ultimately states his true opinion about www.thedirty.com: "It's the Internet, you can say whatever you want on the Internet." *Id.* at 757.

However the evidence presented during discovery at at trial demonstrates that Richie's actions place him and the other Appellants outside the protection of the Communications Decency Act ("CDA"). Despite the relatively lengthy review of the history of the CDA, the question of law in this case is very narrow. Whether, under these specific circumstances, that Richie developed the actionable content, thereby falling outside of the umbrella of immunity provided by the CDA. Mr. Richie crossed the line and became an information content provider. As betrayed by his own comment: you can say whatever you want on the Internet.

Of course, that is not true. Defamation is defamation and is not protected speech. The problem is anonymous defamation on the internet, while actionable, could hardly be collected by judgment in most cases. That is not the issue in this case where the source of the defamation is still unknown despite efforts to find out. However, it equally will not ever be known if Richie was the original source.

SUMMARY OF THE ARGUMENT

Richie holds onto the "fact" that the posts were not defamatory, but were hyperbole or rhetoric. As described in the statement of facts, the posts most certainly were defamatory. However, this factual issue has already been

determined by a jury to be defamatory by clear and convincing evidence. The sole issue is whether the Defendants were correctly denied immunity for these defamatory statements under the CDA. The district court was correct in denying immunity to Richie based upon the specific circumstances of this case.

The CDA was created to give protection to those who offer interactive computer services to third parties, and to encourage self-policing. Richie seeks to use the CDA as a shield, but he does not qualify under the statute. Richie acted as an information content provider by encouraging the development of the offensive content about Ms. Jones. Specifically, Richie fully controlled the dirty.com website: 1) he acted as the editor and selected small percentage of submissions to be posted, 2) he reviewed submissions without verifying accuracy, and 3) decided if postings should be removed, if he received an objection to a post.

In simple terms, he controlled what went up, how it read, and how long it stayed up. He even added his own two cents which encouraged others to post additional defamatory content. Richie posted the submission about Ms. Jones without verifying the accuracy of the content and decided that he would not remove the post despite Ms. Jones requests to have the post removed.

Richie also adopted the actionable content of the post by including his own taglines or comments about the posts. After the second post, Richie asks, "[w]hy

are all high school teachers freaks in the sack," which encouraged others to post additional defamatory material. Finally, the name of the website, thedirty.com, when viewed in the totality of the circumstances, encouraged users to submit defamatory material. He even calls on his "Dirty Army."

The district court held that the Richie was not eligible for immunity under the CDA because he was an information content provider. The district court reasoned that due to the name of the site, the manner in which it was managed, and Richie's personal comments, that Richie encouraged the development of what is offensive about the content of the site.

ARGUMENT

The Communications Decency Act provides immunity to providers and users of interactive computer services for liability arising out of the content provided by a third-party:

> 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

47 U.S.C. § 230(c)(1). To determine whether the operator of a website is immune under the CDA, the Court must ask three questions:

1) Is the Defendant a provider or user of an "interactive computer service?"
2) Do the Plaintiff's claims require treating the Defendant as a "publisher or speaker" of information? And

3) Was the allegedly actionable material provided by another information content provider?

See Courtney v. Vereb, 2012 WL 2405313 (E.D.La. 2012)(setting forth test)(*citing Smith v. Intercosmos Media Group Inc.*, 2012 WL 31844907 (E.D.La. 2002)).

However, CDA immunity applies only if the interactive computer service provider is not also an information content provider. *Fraley v. Facebook Inc.*, 830 F.Supp.2d 785, 802 (N.D. Cal. December 16, 2011) (citing *Roomates.com*, 521 F.3d at 1162).

> The term 'information content provider' means 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.

47 U.S.C. § 230(f)(3)(emphasis added). Richie posted all content on thedirty.com and developed what was offensive about the site. "[T]he party responsible for putting information online may be subject to liability, even if the information originated with a user." *Fraley v. Facebook Inc.*, 830 F.Supp.2d 785, 802 (N.D.Ca. 2011)(citing *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003). Richie admits to creating other content: "I do create content."(RE 175, p. 2453).

The Sixth Circuit has previously rejected an interpretation of the CDA, which would grant broad immunity to almost all internet services. *Doe v. SexSearch.com*, 551 F.3d 412, 415 (6th Cir. 2008):

> We do not adopt the district court's discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services.

Richie's interpretation of the CDA would extend blanket immunity to interactive computer services. The district court also rejected this broad interpretation of the CDA in its holding below.

This case is the perfect example of why such a ruling has been made. Although Richie has cited other state courts' rulings to try to claim protection under the CDA, the Sixth Circuit has refused to follow these courts' rulings and "explicitly reserve[d] the question of its scope for another day" *Id.* at 416. Such a broad interpretation of the CDA would be overreaching and would give unlimited protection to any actor that makes defamatory comments as long as done on the internet.

After examining precedent from the Seventh, Eighth, Ninth, and Tenth Circuits, the district concluded that while the Courts have stated that immunity under the CDA is broad, "the weight of authority teaches that such immunity may be lost." *Jones v. Dirty World Entertainment, LLC*, 2013 WL 4068780 *2-3 (E.D.Ky., Aug 12, 2013). A website operator who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or

adopting the posts becomes a creator or developer of that content and is not entitled to immunity. *Id.* at 3.

In its order denying Richie's motion for judgment as a matter of law, the district court determined that under Kentucky law the posts could be found libelous and that the Defendants were the developers of the objectionable content of the website. *Id.* at 2-5. The district court reasoned that the name of the site, the manner in which it was managed, and the personal comments of Richie encouraged the development of what was offensive[1] about the content of the site. *Id.* at 4-5. In July of 2013, a jury determined, by clear and convincing evidence, that the posts were defamatory, were posted with actual malice, were not hyperbole or rhetoric, and were not opinion. (RE 207, pp. 3130-33).

Richie is correct that the purpose of the CDA is to protect those who undertake to remove offensive material posted on a website. However the protection afforded was not intended to subvert the law of defamation. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157,

[1] In his brief, Richie comments on the fact that the speech that needs constitutional protection the most, is the speech that people find offensive. While the district court used the term "offensive," it should be noted that the court examined a number of different cases in which the various defendants attempted to argue for immunity over different causes of action. In this matter, "offensive" is logically being used to describe content that created liability for different reasons. It is well established that not all speech is constitutionally protected, including common law defamatory speech.

1164 (9th Cir.2008) ("The **Communications Decency Act** was not meant to create a lawless no-man's-land on the Internet."). Here Richie was instrumental in developing the offensive content in question and is therefore not entitled to immunity under the CDA.

RICHIE DEVELOPED THE ACTIONABLE CONTENT BY ENCOURAGING THE POSTING OF DIRT, SELECTING A SMALL PERCENTAGE OF POSTS FOR PUBLICATION, AND MOST SIGNIFICANTLY BY ADDING A TAGLINE AT THE END OF EACH POST

Since a jury already found by clear and convincing evidence that the posts were defamatory, there is only one issue in this appeal: Whether the defamatory content was developed by Richie. The term "develop" is not as limited as Richie attempts to paint it. The examples that Richie uses to define the boundaries of develop are closer to the definition for creation of content.

The district court found that the name of the website, thedirty.com, specifically encourages users to post "dirt" about others. *Jones v. Dirty World Entertainment, LLC*, 2013 WL 4068780 *5; RE 76, p. 854. This goes beyond a site that encourages reviews of services, as encouraging the submission of dirt is designed to lead to the submission of defamatory content, as well as content that violates individuals' right to privacy. Further, Richie sorts through at least one thousand submissions each day and decides to post between fifteen and twenty percent of the posts submitted.(RE 67, p. 696). Finally, after a submission is

posted, he adds a tagline and if a takedown request is received, he decides if they should be taken down. *Id.*

It is not just the name of the site, or just the use of a tagline that makes the CDA inapplicable to Richie. It is all of these items, taken together, which demonstrates that Richie is responsible for developing the tortious content on the website and specifically the content relating to Ms. Jones. Here the district court correctly determined that Richie effectively acted as an information content provider of the actionable content because he encouraged the development of what was defamatory about the content. Because the defamatory material was developed by Richie, those comments cannot be said to have been provided by another information content provider and thus Richie is not immune for those comments under the CDA.

A. The Definition of Develop is not so Exceptionally Narrow as to Require the Operator to Explicitly Create the Libelous Content

Under Richie's narrow definition of "develop," the only way that a website owner can lose immunity is by changing a post to make it defamatory or by independently creating its own defamatory speech. (See Appellant Brief at 43). This definition is contrived from *Roommates*, which requires that a website operator materially contribute to the creation of unlawful content. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th

Cir.2008). Richie spends close to thirteen pages of his brief trying to show how the definition of "develop" is narrowed to these two examples.[2] These examples are, in reality, much closer to examples of creating content than developing content. This is important to Richie's claim, as he indicates that there is no evidence presented by Ms. Jones that Richie himself created the libelous content, but rather she claims that Richie specifically encouraged the development of the libelous content.

On the other hand, the Roommates court noted that an operator that passively acquiesces to users' misconduct would not lose protection under the CDA. *Roommates* at 1169. Richie's interpretation of Ninth Circuit's examples do little more than to give black and white examples that do little to cover the vast ocean in between passive acquiescence to users' posts and modifying a post to make it defamatory. This is important, because this reading of the CDA is not new, it is well accepted.

B. Richie Developed the Defamatory Content Because the Name of the Site Encouraged the Posting of Dirt, Reviewed All Submissions, Posted a Small Percentage of Submissions, Decided if Posts should be

[2] The example given in Roommates is the editing of a word to make a true statement false and which then imputes a criminal conduct on another. This means that the statement was not defamatory until the operator made iy defamatory. Another example given for an operator that did nothing to develop the actionable content was the providing neutral tools to carry out what may be unlawful or illicit searches does not amount to "development" for purposes of the immunity exception.

Removed, and Added Taglines or Opinions that Effectively Ratified the Defamatory Content.

Richie attempts to distinguish the *Accusearch* and *Roomates*' holdings in an attempt to show that he did not, under the current law from the Ninth and Tenth Circuit, develop the content so as to lose immunity. (Appellate Brief, 31-43). However, these holdings only help to strengthen the argument that Richie did develop the culpable content.

Accusearch involved a website that would sell "inherently unlawful" records to the public. *Fed. Trade Comm'n v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir.2009). While here Richie claims that the defamatory material was posted by a third party, *Accusearch* claimed immunity from liability because the illegal records were obtained by third parties. *Id.* The *Accusearch* court held that one is not responsible for "developing" allegedly actionable content only "if one's conduct was neutral with respect to the offensiveness of the content." *Id.* at 1199. The Tenth Circuit reasoned that *Accusearch* solicited requests for confidential information, paid researchers to find it, knew researchers would likely use improper methods, and charged the customers for the service. *Id.* at 1200.

In *Roomates*, a roommate-matching website required users to answer questions about their age, race, sex, and marital status as a condition of using the website. *See Roommates.com, LLC*, 521 F.3d 1157 (9th Cir.2008). The Ninth

Circuit held that the website operator did not enjoy CDA immunity because the condition, requiring answers to the illegal questions, constituted the "creation or development of information" and thus made the site an "information content provider" within the scope of 47 U.S.C. § 2309(c) and (f)(3). *Id.* at 1164–69. The court reasoned that the operator was not being sued for removing some harmful messages while failing to remove others; instead, it is being sued for the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal. *Id.* at 1170.

First, Richie attempts to distinguish his site as a simple online message board that did not involve transactions for sale of illegal records. In doing so, Richie notes that,"[t]hese unlawful transactions could not have been completed without the direct participation of *Accusearch* itself." (Appellate Brief, p. 33). He further compares Ms. Jones' argument, and the district court's holding, that he developed the offensive content to an argument rejected by the Ninth Circuit in *Roomates*.

What Richie fails to recognize is that, like *Accusearch*, the defamatory posts could not have been completed without the direct participation of Richie. Richie is the owner and editor of thedirty.com. (RE 175, p. 2449-50). The site receives at least 1000 submissions per day and he posts the top 150-200 submissions. *Id.* at 2450-51. The submissions that are posted are those that Mr. Richie selects, because

he thinks they are worthy of the site. *Id.* at 2450. Mr. Richie was the sole person that decided what submissions were posted, and what posts would be removed by request. *Id.* at 2452.

Like *Roommates*, the website is designed to encourage users to post defamatory material, which Richie then ratifies by the use of his own tagline on the submissions. "The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune." *Roommates* at 1175. Richie encourages the submission of illegal content and is not entitled to immunity.

Richie further attempts to compare Ms. Jones argument with an argument that *Roommates* specifically rejected. In *Roommates*, the plaintiff separately argued that the defendant impliedly encouraged users to post unlawful content by providing a section for additional comments. *Id.* at 1174. The plaintiff specifically argued that the site developed additional culpable content by including a separate comments area, solely because of the original, mandatory, and discriminatory questions. *Id*. Neither Ms. Jones' argument, nor the district court's opinion, are analogous to this argument rejected by the Ninth Circuit in *Roommates*. The district court's interpretation of the word develop does not include an action as innocuous as the inclusion of a text box for additional comments.

Mr. Richie acted as editor and selected a small percentage of submissions to be posted to the site, and it was common for Mr. Richie to add a tagline that stated his opinion of the post. Richie misunderstands, or otherwise misstates the district court's ruling on these facts. He attempts to view each fact separate from all of the others, as though each single fact lead to the denial of immunity and could have done so separately. However, these facts must be taken together, the totality of the circumstances. *Ascentive, LLC v. Opinion Corp.*, 842 F.Supp.2d 450, 474 (E.D.N.Y., Dec. 13, 2011)(citing Roommates)

1. Thedirty.com was Designed to Encourage the Posting of Defamatory or otherwise Tortious Material

Richie turns first to the argument that he made in the district court, that in a Western District of Missouri case, under "almost identical facts," the court explained that the name of a "website is irrelevant." *S.C. v. Dirty World, LLC*, 2012 WL 3335284 *5 (W.D.Mo., March 12, 2012). However, this claim is just not accurate. The court rejected the argument that the name of the website, standing alone, was enough to remove the defendant from the protection of the CDA. *Id.* The court noted that although a website name may encourage defamatory content, it does not make the operator liable for every post. *Id.* (*citing Global Royalties, Ltd.*, 544 F.Supp.2d at 933).

Far from holding that the name of a website is irrelevant, the court merely held that the name standing alone is not sufficient to deny the operator immunity.

The S.C. court specifically distinguished the district court's holding, from Ms. Jones' case, noting that in this case that Richie ratified the defamatory comments by adding his own comment and refusing to remove the posts despite Ms. Jones' request. *Id.* at 4-5. The S.C. court reasoned that the defendant did not ratify the post by adding his own comment and removed the post at the request of the plaintiff. Id. at 5. The court continued, "[g]iven these significant factual differences, *Jones* is not persuasive." *Id.*

Richie also cites to *Ascentive* for the holding that a website was entitled to CDA immunity even though its name was offensive. Once again, Richie misquotes the court. It is Richie that labels the website "pissedconsumer.com" as offensive, not the court. In fact, the *Ascentive* court did not even take the name of the website into account in reaching its holding. Ascentive, LLC v. Opinion Corp., 842 F.Supp.2d 450, 474-75 (E.D.N.Y., Dec. 13, 2011). Instead the court looked at what the defendant did to encourage the development of culpable content. *Id.* at 476. In *Ascentive*, the defendants' argument that the plaintiff developed the content was based upon the defendants' manipulation of the order in which reviews were displayed. *Id.* While the Ascentive court held that the website was entitled to immunity, Ms. Jones put forward a distinct argument: that Richie developed the content at issue by the use of the website's name, which not-coincidentally called

its fans the Dirty Army, and by the comments by Richie which encouraged the posts.

The name of website encourages posting of "dirt," or otherwise potentially defamatory materials. At one point in his brief, Richie sites to a number of cases involving potentially questionable website names.[3] At another point he names websites that seem to be reputable, but were the repository for some rather shocking content. Anyone with experience surfing the internet is aware that a website name might not adequately describe the content of the site.[4] What Richie misses is that while the name of the website alone will not necessarily encourage development of illegal content, or necessarily even be relevant in the determination, is that it may do either or both depending on the specific factual circumstances of the case.

The name of the website can be relevant, in certain circumstances, to the factual determination of whether an operator developed the offensive content.[5] Following Richie's request to hold, as a matter of law, that his website's name is

[3] The questionable website names include pissedconsumer.com, shittyhabitats.com.
[4] Richie quips that Apple.com is not about pomaceous fruit, and therefore it cannot be believable that thedirty.com is about posting defamatory material.
[5] Richie notes the "subtle point" that websites without offensive content do not need the CDA to survive, because without offensive content there is no reason to sue. However the CDA was only designed to protect those website operators who do not create or develop the actionable content. No reading of the CDA offered by Richie allows the creator or developer of the content to escape liability if the content is defamatory.

irrelevant to the determination of whether he developed the actionable content is contrary to the well-established totality of the circumstances review. It also overlooks the fact that while the name might encourage users to post photographs of dirt or different objects that coated in grime, it is also relevant to a determination that it requests dirt about people. Ms. Jones even entered into evidence that Richie admitted that the website, "thedirty.com" is made for posting people's dirt. (RE 176, p. 2580). Therefore the Court should be able to consider the impact of the name of the website in determining that Richie encouraged development of the content.

2. Richie's Purpose in Creating the Site and His Taglines and Comments Developed and Adopted the Actionable Content.

As stated previously, a jury found by clear and convincing evidence that the postings on the website would be actionable even under the heightened standard for a public figure. It is important to remember that Richie was looking for these types of posts to be submitted. When Richie started the site, he was looking at reality television and the popularity of celebrity gossip and decided that he wanted to do the same with regular people. (RE 176, Trial Transcript Day 3, pp. 2578-79). He is "in the business' of putting insulting or humiliating things about normal people on his site. *Id.* at 2579. He knows that the humiliating and insulting posts are put up to embarrass people, so that others can watch their neighbors fall off their "high horse." *Id.* at 2586.

With the purpose of his website clearly in mind, it seems logical that Richie could have adopted or encouraged actionable content just by posting the submission, thereby validating that submission. However, Richie goes at least one step further. He taunts victims in front of his audience, including the Plaintiff, (*See* RE 67, p. 716), thereby encouraging his readers to post more about that victim, as well as to generate similar submissions about others, in the hopes that Richie will select theirs to expound upon.

Richie claims that it is "impossible to make generalized conclusions about what type of 'principal content' appears on the site" (RE 64-2, p. 479, ¶ 5). Even though he previously stated that "thedirty.com" is made for posting people's dirt. (RE 176, p. 2580). While the standard is not what is on the site in general, but that "of the particular postings relating to [Plaintiff] that are the subject of this lawsuit," Richie would have been denied immunity under any definition. *Whitney Info. Network, Inc. v Xcentric Ventures LLC,* 2008 WL 450095 at *12 (M.D.Fla. Feb. 15, 2008).

The CDA holds that an interactive computer service provider is responsible for the development of offensive comment "if it in some way specifically encourages development of what is offensive about the content." *Federal Trade Commission v. Accusearch Inc.,* 570 F.3d 1187, 1199 (10th Cir. 2009). This is the entire purpose of thedirty.com. "Stuff comes in and it's going to get a reaction."

(RE 176, p 2584). Richie even admits he wants things that will "get a reaction" something shocking. "It's to get a rise out of someone." *Id.*

Richie acts as editor of the site and selects a small percentage of submissions to be posted. He adds a "tagline." (RE 67, p. 698). He reviews the postings but does not verify their accuracy. *Id.* at 715. If someone objects to a posting, he decides if it should be removed. *Id.* at 708. It is undisputed that Richie refused to remove the postings about plaintiff that are alleged to be defamatory or an invasion of privacy.

In his comments, Richie refers to "the fans of the site" as "the Dirty Army." *Id.* at 730-31. He also adds his own opinions as to what he thinks of postings. *Id.* at 734. Richie's goal in establishing the site was to bring reality TV to the Internet. *Id.* at 737-38. He wants everybody to log on to "the dirty.com" and check it out. *Id.* at 743. In his opinion, "you can say whatever you want on the internet." *Id.* at 757.

One of Richie's comments posted concerning the plaintiff was "Why are all high school teachers freaks in the sack," which a jury could certainly interpret as adopting the preceding allegedly defamatory comments concerning her alleged sexual activities. (RE 64-2, p. 509). This tagline, a photo of Ms. Jones, and the original story implying that Ms. Jones must also have a sexually transmitted disease appear on one page as a single story. *Id.* When asked about this comment, he stated: "[i]t was my opinion, you know, watching the news and seeing all these

teachers sleeping with their students and, you know, just my opinion on all teachers just from, like, what I see in the media." (RE 67, p. 741).

Richie also posted his own comment addressed directly to the plaintiff, stating in part: "If you know the truth, then why do you care? With all the media attention this is only going to get worse for you . . . You dug your own grave here, Sarah." *Id.* at 761. On another post, Richie stated: "I think they all need to be kicked off [the Bengals' cheerleading squad] and the Cincinnati Bengals should start over. Note to self. Never try to battle the Dirty Army. Nik." *Id.* at 761 (emphasis added).[6]

Given this evidence, it cannot be said that Richie was neutral with respect to the offensiveness of the content. He made the site to collect potentially defamatory material, named it thedirty.com, named its users the dirty army and encouraged the army to have war mentality against those that objected to the site, and added his own comments to the posts to obtain that objective. Richie encouraged users to post defamatory content and to fight those that opposed them. Even taking into consideration that the original "freaks in the sack" comment may have been added later, does not change the district court's interpretation. Every post included with Richie's affidavit is in some fashion about Ms. Jones, whether it was through getting dirt on just her or on all of the BenGal cheerleaders. Under the precedent of

[6] See RE 64-2, pp. 507-19 for all posts. Richie's comments are followed by "-nik"

Roommates and Accusearch, Richie is not entitled to immunity under the CDA as he is a developer of the actionable content in question.

CONCLUSION

Richie designed this website to collect gossip or dirt about real people. He developed the site to encourage defamatory material by the use of the website name, thedirty.com, by encouraging his Dirty Army (users) to have war mentality, and by adding his own comments which validated the original post by adopting it as his own. A jury has already determined that the comments were defamatory, and Richie is not entitled to immunity under any rational reading of the CDA or the precedent interpreting it. Therefore, Ms. Jones respectfully requests that the Court affirm the district court's denial of immunity.

Respectfully submitted,

/s/ Eric C. Deters

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(c) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Sixth Circuit Rule 32(a)(7)(b). The brief has been prepared in proportional typeface using Times New Roman 14 point.

Exclusive of the portions of the brief exempted by Sixth Circuit Rule 32(a)(7)(B)(iii), the brief contains 5,968 words. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

The undersigned understands a material misrepresentation in completing this certificate or circumvention of the type volume limits in Sixth Circuit Rule 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Eric C. Deters

Eric C. Deters

ADDENDUM – DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Rules of Appellate Procedure, Rule 28(d) and 30(b), hereby designate the following portions of the record below for inclusion in the Joint Appendix:

Description of Entry	Date	Docket #
Richie Affidavit and Exhibits	09/21/2011	64-2
Richie Deposition	10/12/11	67
Trial Transcript Day 1	03/07/2013	174
Trial Transcript Day 2	03/07/2013	175
Trial Transcript Day 3	03/07/2013	176
Jury Instructions	07/11/2013	207

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, a true copy of the foregoing corrected appellate brief has been sent via the Court's CM/ECF system which will serve all counsel of record:

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