No. 14-19-00845-CV

Fourteenth Court of Appeals
in Houston, Texas

In re Facebook, Inc. and Facebook, Inc. d/b/a Instagram

Original Proceeding from No. 2018-69816, 334th District Court of Harris County, Texas, Hon. Steven Kirkland, presiding

Response to Motion for Stay

Annie McAdams
annie@mcadamspc.com
Texas Bar No. 24051014
Annie McAdams, PC
1150 Bissonnet
Houston, Texas 77005
(713) 785-6262
(866) 713-6141 (fax)

David E. Harris
dharris@shhlaw.com
Texas Bar No. 24049273
Sico Hoelscher Harris LLP
802 N. Carancahua
Suite 900
Corpus Christi, TX 78401
(361) 653-3300
(361) 653-3333 (fax)

Michael T. Gallagher
mike@gld-law.com
Texas Bar No. 07586000
The Gallagher Law Firm
2905 Sackett Street
Houston, Texas 77098
(713) 222-8080
(713) 222-0066 (fax)

Timothy F. Lee
timlee@warejackson.com
Texas Bar No. 12139500
Margaret E. Bryant
margaretbryant@warejackson.com
Texas Bar No. 24073972
Michelle R. Meriam
michellemeriam@warejackson.com
Texas Bar No. 24063871
Ware, Jackson, Lee, O'Neill,
Smith & Barrow, LLP
2929 Allen Parkway, 39th Floor
Houston, Texas 77019
(713) 659-6400
(713) 659-6262 (fax)

Counsel for Jane Doe Real Party in Interest

Introduction

Facebook completely failed to warn Jane Doe about the human traffickers it knew were using its website to groom and recruit their victims. These human trafficking victims were then compelled to participate in commercial sex acts, like Jane Doe was after her trafficking from Facebook's platform. All the while, Facebook was knowingly benefited from the traffickers' use of its platform. Facebook has already lost the argument that the Communications Decency Act (CDA), 47 U.S.C. Section 230, prevents it from being held liable in this case, but lodges an extraordinary request to stay the trial court's proceedings during this mandamus.

Facebook's request for stay is not based on some imminent harm Facebook faces if this Court decides the trial court ruled incorrectly—there is no trial setting or disclosure of privileged documents just over the horizon. Facebook's wants to stay trial court proceedings solely because it believes its already rejected arguments will prevail on mandamus, and in the meantime it does not want to spend resources defending against Jane Doe's claims.

But the trial court already rejected the same arguments, as did the 151st District Court in a virtually identical context,[1] so there is no reason to believe Facebook will prevail during this third bite at the apple. If anything, the presumption should favor Jane Doe—she remains the prevailing party.

While Facebook goes to great lengths to emphasize the number of courts that have dismissed claims against internet service providers under the CDA, it neglects to mention that all of those decisions predate the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. No. 115-164, 132 Stat. 1253 (2018). FOSTA amended Section 230 to clarify that human trafficking claims such as those brought by Jane Doe are not covered by the CDA.

Facebook's request to stay is just the latest of many delay tactics. Facebook has been relentlessly resisting discovery in this litigation—even jurisdictional discovery oriented to Facebook's special appearance. There is little reason to give it a pass on complying with its discovery obligations for the duration of this mandamus proceeding. Finally, Facebook's recent announcement of its off Facebook activity

[1] Exhibit A.

project creates a very real danger that as the Court considers its mandamus, Facebook will be destroying evidence that is relevant to Jane Doe's claims.

We will begin with a discussion of FOSTA because the amendments to the CDA are the clearest indication that Congress never intended the statute to be a defense to sex trafficking claims. The argument then turns to the more general subject of why Texas statutory and common-law claims would not be preempted by the CDA in any event. Following that will be a discussion of Facebook's thus-far successful attempts to avoid any meaningful discovery in this case and the fact that it may be systematically destroying evidence relevant to this case in the pursuit of its Off Facebook privacy initiative.

I. In 2018, the FOSTA Amendments Made It Clear That Congress Never Intended for the CDA to Preclude Sex Trafficking Claims

Facebook's argument for a stay of trial court proceedings is based upon its rather obviously self-interested description of the CDA's operation. Motion for Stay, pp. 1-4. If Facebook is wrong in its interpretation of the CDA, there is nothing left of its argument for a stay. The 2018 amendments to the CDA make it clear that Facebook is wrong.

As the largely federal case law that Facebook relies upon developed, defendants engaged in sex trafficking of minors increasingly used Section 230 as a shield. *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016) (claims that website facilitates illegal conduct by posting ads for human trafficking are foreclosed by Section 230). Congress addressed this problem in 2018 when it passed FOSTA, which, among other things, amended Section 230 to clarify that it was never intended to apply to human trafficking claims.

Congress passed FOSTA in April 2018 and clearly stated its intent in the enacting clause:

> To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and *State* criminal and *civil law* relating to sexual exploitation of children or sex trafficking, and for other purposes.

Pub. L. No. 115-164, 132 Stat. 1253 (2018) (emphasis added). This statement of purpose includes civil law claims such as Jane Doe's.

The "sense of Congress," according to FOSTA, was that Section 230 "was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." *Id.* at sec. 2(1). Thus, the point of the amendment

was "to ensure that such section does not provide such protection to such websites." *Id*. at sec. 2(3).

The judicial opinions interpreting Section 230 as providing broad immunity to internet service providers, upon which Facebook relies, were the motivation for the amendment. As Senator Portman explained, the Act "was never intended to protect those who knowingly facilitate the sex trafficking of vulnerable women and girls." 163 Cong. Rec. S3965, S3977 (daily ed. July 13, 2017).

None of the cases cited by Facebook are sex trafficking claims that were decided after FOSTA took effect. We are unaware of any appellate decisions in the entire nation that post-date FOSTA. There is no reason to think the courts—even the federal courts—will not follow the direct expression of Congressional intent found in FOSTA.

II. Basic Preemption Doctrine Demonstrates that the CDA, No Matter How Interpreted, Does Not Preempt State Law Claims

The CDA states:

> 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.

47 U.S.C. § 230(e)(3). Facebook ignores the savings clause; as long as state-law claims are consistent with Section 230, they are not preempted. Jane Doe is asserting state statutory and common-law claims that are consistent with Section 230 as amended.

There is always a presumption against preemption, especially when the state causes of action involves matters of public health and safety—matters over which states have historically exercised primary authority. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). Accordingly, courts must assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*

Texas's human trafficking statute addresses matters of public health and safety by providing redress to minors who have been victimized by human traffickers and those who facilitate trafficking. Tex. Civ. Prac. & Rem. Code § 98.002. The Texas Supreme Court has held that common-law actions based upon negligence involve the state's power to regulate health and safety matters and are therefore protected by the heightened presumption against federal preemption. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

The conclusion to be drawn from the presumption against preemption is that even if the federal cases Facebook relies upon were correctly decided—and Jane Doe will have much to say on this subject in response to the petition—those decisions are not controlling on a state court deciding state law issues. So Facebook's arguments that a stay is "necessary" to comply with the CDA, Motion at 3-4, is only relevant to a federal court facing causes of action that do not relate to human trafficking.

III. Particularly in Light of Facebook's Discovery Recalcitrance, a Stay Prejudices Jane Doe

Facebook notes that discovery "is still in its early stages here." *Id.* at 5. But that is because Facebook has vigorously resisted Jane Doe's every attempt to obtain discovery in this litigation.

Immediately following the filing of Jane Doe's lawsuit, she attempted to obtain discovery from Facebook. Jane Doe has served jurisdictional discovery, proposed stipulations on jurisdictional facts, merits-based discovery, requests for disclosures, request for a protective order, a request for privilege log and a request for depositions without any meaningful response. Her discovery requests have been met with consistent resistance.

Jane Doe has had to file Motions to Compel on both sets of discovery sent to Facebook. But for Facebook's continued efforts to resist discovery, the case would be much further along. To the extent that Facebook complains the discovery is overbroad, the trial court is in the best position to consider that argument. A stay will prevent that from occurring. Any continued delay in the discovery process will prejudice Jane Doe.

IV. The Off-Facebook Project Appears to Pose a Threat to Jane Doe's Ability to Obtain Evidence

In late August, Facebook announced the launch of a new tool called "off-Facebook activity" that would enable users themselves to remove entirely the third-party website information that Facebook has been storing for years. Contained within that universe of data is likely information that Jane Doe has been seeking in discovery in this case.

Facebook itself described this initiative:

> If you clear your off-Facebook activity, we'll remove your identifying information from the data that apps and websites choose to send us. We won't know which websites you visited or what you did there, and we won't use any of the data you disconnect to target ads to you on Facebook, Instagram or Messenger.

Facebook, *Now You Can See and Control the Data That Apps and Websites Share With Facebook*, https://newsroom.fb.com/news/2019/08/off-facebook-activity/(Aug. 20, 2019).

Jane Doe assumes that Facebook is in the process of following through with its representations and allowing users—potentially including the predators that trafficked her—to delete information contained on their itemized browsing history. If that occurs before Jane Doe is afforded an opportunity to obtain discovery from Facebook, it will obviously impair Jane Doe's preparation of her case.

A stay of proceedings in the trial court increases this already present risk, and thus prejudices Jane Doe.

V. Conclusion

Jane Doe asks that the request for stay be denied.

Respectfully submitted,

/s/ Annie McAdams

THE GALLAGHER LAW FIRM
Michael T. Gallagher
mike@gld-law.com
Texas Bar No. 07586000
Pamela McLemore
pamm@gld-law.com
Texas Bar No. 24099711
Boyd Smith
Texas Bar No. 18638400
2905 Sackett Street
Houston, Texas 77098
(713) 222-8080
(713) 222-0066 (fax)

SICO HOELSCHER HARRIS LLP
David E. Harris
dharris@shhlaw.com
Texas Bar No. 24049273
Louie J. Cook
lcook@shhlaw.com
Texas Bar No. 24101191
802 N. Carancahua, Suite 900
Corpus Christi, Texas 78401
(361) 653-3300
(361) 653-3333 (fax)

ANNIE MCADAMS, P.C.
annie@mcadamspc.com
Texas Bar No. 24051014
Matthew S. Parmet
matt@mcadamspc.com
Texas Bar No. 24069719
1150 Bissonnet
Houston, Texas 77005
(713) 785-6262
(866) 713-6141 (fax)

WARE, JACKSON, LEE, O'NEILL,
SMITH & BARROW, LLP
Timothy F. Lee
timlee@warejackson.com
Texas Bar No. 12139500
Margaret E. Bryant
margaretbryant@warejackson.com
Texas Bar No. 24073972
Michelle R. Meriam
michellemeriam@warejackson.com
Texas Bar No. 24063871
2929 Allen Parkway, 39th Floor
Houston, Texas 77019
(713) 659-6400
(713) 659-6262 (fax)

Attorneys for Plaintiff Jane Doe

Certificate of Service

On November 4, 2019, true and correct copies of this document were served via ProDoc eFiling service on the following counsel of record:

HUNTON ANDREWS KURTH LLP
Kelly Sandill
ksandill@huntonak.com
Katy Boatman
Kboatman@huntonak.com
Ashley Kahn
akahn@huntonak.com
600 Travis, Suite 4200
Houston, Texas 77002

Scott A. Brister
sbrister@huntonak.com
500 W. 5th Street, Suite 1350
Austin, Texas 78701

GIBSON, DUNN & CRUTCHER, LLP
Russell H. Falconer
rfalconer@gibsondunn.com
2100 McKinney Ave., Suite 1100
Dallas, Texas 75201

Kristin A. Linsley
klinsley@gibsondunn.com
555 Mission Street
San Francisco, California 94105

YETTER COLEMAN LLP
Reagan Simpson
rsimpson@yettercoleman.com
April L. Farris
afarris@yettercoleman.com
Collin J. Cox
ccox@yettercoleman.com
Tracy N. LeRoy
tleroy@yettercoleman.com
Jeffrey A. Andrews
jandrews@yettercoleman.com
811 Main Street, Suite 4100
Houston, Texas 77002

Attorneys for Facebook, Inc.

/s/ Timothy F. Lee

NO. 2018-69816

Jane Doe	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
Facebook, Inc; et al	§	**334th JUDICIAL DISTRICT**

NO. 2018-82214

Jane Doe,	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
Facebook, Inc., dba Instagram, Inc. et al	§	**334th JUDICIAL DISTRICT**

Order

Defendant Facebook seeks dismissal of these two cases pursuant to 91a of the Texas Rules of Civil Procedure. This motion is one of several procedural preliminary hurdles that the parties advise will be filed and argued in these cases prior to full litigation of the underlying claims. While a ruling in Facebook's favor may end the case for Facebook, a ruling for the Plaintiffs only allows the case to proceed to the next level.

Rule 91a requires dismissal of a claim if the action "has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle a claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1. The Court may not consider evidence, but only the allegations in the petition and arguments of counsel in their motions and responses. At this stage, Facebook is not arguing the facts, but rather claims it is not liable to the Plaintiffs because of the immunity granted internet service providers under Section 230 of the Federal Communications Decency Act, 47 U.S.C. § 230 (the "Act").

47 USC § 230(c)(1) provides: "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." In 2018, Congress added exclusions to this broad grant of immunity to ensure that sex trafficking laws were not impacted. The parties debate the extent of the exclusions.

The parties do not dispute that Facebook is an interactive computer service as defined in the statute at 47 § USC 230(f)(2). The question presented to the Court is

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whether the claims raised by Plaintiffs treat Facebook as the publisher or speaker of information provided by another.

Plaintiffs have brought causes of action sounding in negligence, gross negligence and statutory damages under the Texas Civil Practice and Remedies Code Chapter 98, which allows for damages from persons who engage in trafficking or knowingly or intentionally benefit from such traffic. Plaintiffs contend that Facebook facilitates and/or was used by predators to find, groom, target, recruit and kidnap children into the sex trade. Plaintiffs allege that Facebook profits from the collection of data and the use of the data to target and promote interactions between Facebook users. These interactions include minors and sexual predators. Each of the Plaintiffs are victims of human trafficking to whom Plaintiffs contend Facebook owes a variety of duties which have been breached leading to the Plaintiffs being victimized in human trafficking. Plaintiffs contend they are not seeking to impose liability for the publication of the third party communications, but rather they seek to impose liability for Facebook's independent actions or failure to act, specifically failure to warn, negligence in undertaking to protect potential victims of sex trafficking, and for knowingly facilitating and benefiting from the sex trade.

Facebook contends that all of Plaintiffs' claims turn entirely on the communications Plaintiffs had with malicious third parties. Because Plaintiffs' injuries are dependent on those communications, Facebook contends they are all barred by the immunity granted internet service providers under the Act.

The language of the statute is broad and both parties have cited cases that support their positions. Facebook points to the broad grants of immunity articulated in *Zeran v. America Online Inc.* 129 F.3d 327 (4th Cir. 1997) (republishing defamation) and *Doe v. MySpace, Inc.* 528 F.3d 413 (5th Cir. 2008) (negligence—failure to implement safety measures), among others. Plaintiffs points to the more narrow immunity recognized in *Doe v. Internet Brands, Inc.,* 824 F.3d 846 (9th Cir. 2016) (ISP not immune to failure to warn claim) and *Huon v. Denton*, 841F.3d 733 (7th Cir. 2016) (ISP not immune to defamation in content it generated).

While the injuries presented in the 9th and 5th Circuit cases are similar to those presented in this case, the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case. None of the cases deal with the statutory cause of action pled in this case, and all of the cases pre-dated the amendments adopted in 2018.

The few Texas cases that have addressed the issue come out of the Beaumont Court of Appeals and none of these deal with the same causes of action or facts as are presented in this case. See *Milo v. Martin*, 311 S.W.3d 210 (Tex. App.—Beaumont 2010, no pet.) (defamation); *GoDaddy.com LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied) (intentional infliction of emotional distress); and, *Davis v. Motiva Enterprises LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App.—Beaumont April 2, 2015, pet. denied) (failure to supervise employees' internet use).

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In reviewing the statute and the cases cited by the parties, the Court concludes that Plaintiffs have plead causes of action that would not be barred by the immunity granted under the Act. Accordingly, Defendants' Rule 91A Motions to Dismiss are denied.

[redacted]

Signed:
5/23/2019

STEVEN KIRKLAND
Judge Presiding

FILED
Marilyn Burgess
District Clerk
MAY 22 2019
Time: Harris County, Texas
By Deputy

EXHIBIT A