

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY, MARYLAND

ZEBULON J. BRODIE

vs.

INDEPENDENT NEWSPAPERS, INC., et al

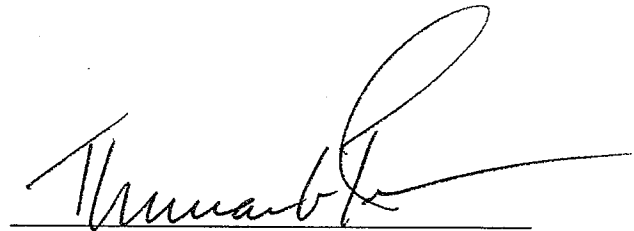
17-C-06-11665

ORDER

For the reasons set out in the foregoing memorandum, it is this 21 day of November, 2006, by the Circuit Court for Queen Anne's County

**ORDERED**, that Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment be, and it is hereby, **GRANTED**; and it is further

**ORDERED**, that defendant's Motion for Protective Order be, and it is hereby, **DENIED**.



Thomas G. Ross

TRUE COPY, TEST, *Judge*  
SCOTT MACGLASHAN, CLERK

BY:  DEPUTY CLERK

November 21, 2006

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THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY, MARYLAND

ZEBULON J. BRODIE  
vs.  
INDEPENDENT NEWSPAPERS, INC., et al

17-C-06-11665

MEMORANDUM

The case *sub judice* was before this Court on September 26, 2006 for a hearing on Independent Newspapers, Inc.'s (hereinafter "INI" or "defendant") Motion to Dismiss, or, alternatively, Summary Judgment, and their Motion for Protective Order, at which time counsel for both parties argued their respective positions, following which the case was taken *sub curia* for the purpose of entering a written decision.

**Introduction**

Mr. Zebulon Brodie (hereinafter "Plaintiff") filed the instant action on May 22, 2006 against INI and three unknown individuals for defamation and civil conspiracy to commit defamation. INI moved to dismiss the complaint on July 31, 2006,<sup>1</sup> on the basis that the federal Communication Decency Act precluded it, the alleged statements were not "of and concerning" the plaintiff, and/or the statements were non-actionable opinion. Subsequently, plaintiff subpoenaed INI on August 1, 2006 to identify several individuals<sup>2</sup> who made anonymous statements on INI's internet message board. In response, INI filed a Motion for Protective Order on August 31, 2006, stating as grounds therefore that the request failed to overcome the First Amendment right to speak anonymously.

The facts and procedural history of the action will be set forth below and then analysis will be engaged to render a resolution to the issues presented.

**Factual History**

Plaintiff is a resident of Queen Anne's County, real estate developer, and equity owner in two local restaurants. INI is a Delaware corporation that publishes a web-based forum known as Newszap.com (hereinafter "Newszap.com"),<sup>3</sup> which assembles text from its registered members and publishes the text to the general public over the internet.<sup>4</sup> Newszap.com also features individual

<sup>1</sup> An Order granting a Consent Motion for an Extension of Time to Respond to Plaintiff's Complaint was entered on June 27, 2006, allowing defendant to respond by July 31, 2006.

<sup>2</sup> Specifically, the subpoena duces tecum sought "any and all documents and tangible things identifying and/or relating to the following registered users of Newszap.com: CorsicaRiver, Chatodosoleil, Born & Raised Here" from INI's Custodian of Records.

<sup>3</sup> INI also operates thirty-one (31) community newspapers in Arizona, Delaware, Florida, and Maryland, including the Daily Banner and Cristfield Times on Maryland's Eastern Shore.

<sup>4</sup> "The internet is an international network of interconnected computers. One of the many means by which individuals access the internet is through an interactive computer service. These services offer not only a connection to the internet

'community web pages' for communities in the four states that its newspapers serve. The web page at issue has links to twenty (20) counties, cities, and towns on the Eastern Shore. Each of these feature, among other things, a link to a "Public Issues Forum," on which registered users can post messages and engage in dialogue on public issues related to the community. The forums on Newszap.com have existed for more than five years and boast more than four thousand (4,000) registered users, generating nearly 2.9 million page views since January 1, 2006. In its "Policies and Disclaimers" statement on Newszap.com, INI sets forth, with regard to its oversight of posted content, the following guidelines:

Because posted items are not edited in advance, we ask that participants keep their comments and postings within the bounds of civility and fair play. We reserve the right to delete any comments posted to the Public Issues Forums or any other forum on the newszap.com server. Comments that contain profanity, obscenities, personal attacks, or commercial promotion or solicitation (at non-commercial sites) or that violate any laws will be deleted promptly when brought to our attention. We reserve the right to remove the posting privileges of individuals who violate these standards. Any complaints about postings should be emailed to [webmaster@newszap.com](mailto:webmaster@newszap.com).

Other than removing posts that violate the aforementioned guidelines, INI does not edit the content posted on its web site by its users. INI maintains identifying information for registered members who are also the subject of the suit; namely "CorsicaRiver", "chatdosoleil", and "Born & Raised Here" (hereinafter collectively "Defendants Doe").

The complaint alleges that the Defendants Doe, on March 14, 2006, in the Public Issues Forum for Centreville, Maryland, in a thread entitled "Centreville Eyesores," transmitted text to INI's website, directed to those in the Queen Anne's County area with the intent it be published over the internet. The text, according to the complaint, accused the Plaintiff: (1) of maintaining dirty and unsanitary looking food-service places and allowing trash from those establishments to waft into the nearby waterway; and (2) with regard to a historical home known as the "Charles Cahall Farm," [of] getting "away with torching it," and having no "sense of decency" and other niceties. INI, via newszap, published the text to the general public.

The fact-sensitive nature of any suit alleging defamation and the resulting inquiry thereof compels the complained of dialogue herein to be set forth below in order to fully appreciate the issues at hand:

**CorsicaRiver:** I think there must be a special circle in Hell reserved for a greedy, selfish developer who deliberately burns down a beautiful pre-war Civil War [sic] house, after cutting down all the 100-year-old cypress trees around it. . . . What I'm referring to is not in Centreville, but nearby in Church Hill . . . . The white Greek Revival house facing 213 that Zeb Brodie sold 3 months ago for \$1.85 mil to developers, who deliberately torched it this past weekend. . . . Shame on you, Mr. Brodie!

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as a whole, but also allow their subscribers to access information communicated and stored only on each computers service's individual proprietary network." Zeran v. AOL, 129 F.3d 327, 328 (1997).

**Born & Raised Here:** Oh my God, they burned the place down? I can't believe it!!! I heard Bill Sharp bought it from Brodie, don't know if that's true or not. Has anyone else heard the same thing?

**CorsicaRiver:** Yes, they burned it down . . . and shame on Bill Sharp as well as on Mr. Brodie! I just found out some more information about the house. It was known as the Charles Cahall Farm and apparently dated back to the 1850s. In his 1980 historic sites survey, Orlando Ridout of the Maryland Historic Trust called it "one of the most carefully preserved farmhouses in the country," "remarkable," and "virtually untouched." There were also a well-preserved meath house, windmill, and granary . . .

**SecretAgentMan:** Bastards!

**Chatdusoleil:** . . . Has there been a news story on the fire this weekend? Or an investigation?

### **Procedural History**

On May 26, 2006, plaintiff sued INI and Defendants Doe for defamation and civil conspiracy to commit defamation. Specifically, plaintiff alleges that the statements made by the Defendants Doe are defamatory *per se* because they injured the Plaintiff in his profession and employment. He further claims that they knowingly and/or in the alternative, negligently, made and published the false statements to Queen Anne's County residents, whom understood the publications to be false and defamatory.

On March 28, 2006, counsel for plaintiff sent an email to Newszap.com claiming that the statements on the website were libelous because neither plaintiff or his development company were the owner of the historic home, and did not participate in its razing.

On July 31, 2006 INI moved to dismiss the complaint, or in the alternative, for summary judgment. As grounds therefore, INI argues: (1) the federal Communications Decency Act provides immunity to INI because they are an interactive computer service; (2) the statements are not "of and concerning" the Plaintiff; (3) the statements were non-actionable opinion; and (4) the claim for civil conspiracy must be dismissed for the same foregoing reasons. The parties' oral arguments were heard before this Court on September 26, 2006

#### **The Questions Presented are:**

1. Is INI an interactive computer service, as that term is defined in 47 U.S.C. section 230(f)(2), and thus immune from a lawsuit seeking to them liable for information originating from third party users of their service?
2. If the instant action is not barred by the aforementioned statute, were the statements "of and concerning" the plaintiff?
3. If the aforementioned statute does not bar the instant action, were the statements non-actionable opinion?

4. Despite whether or not INI is an interactive computer service, as that term is defined in 47 U.S.C. §230(f)(2), should INI be protected from complying with Plaintiff's subpoena duces tecum to provide identifying information for three unknown registered users of their site?

### Analysis

Pursuant to Rule 2-322(c),<sup>5</sup> the resolution of the issues before this Court will be treated as one for summary judgment and disposed of as provided in Rule 2-501.<sup>6</sup>

The primary issue in this case is whether 47 U.S.C. §230 of the federal Communications Decency Act (hereinafter "CDA") bars this claim. This is an issue of first impression in Maryland. Furthermore, Section 230 is a federal statute and "it is well established law that the meaning of a federal statute is ultimately for the federal courts to decide." United States v. Eisinger Mill and Lumber Co. Inc., 202 Md. 613 (1953). Therefore, federal cases analyzing the statute will be more persuasive than in the usual state case.

The CDA precludes actions against owners and operators of internet-based forums with respect to the publication of messages authored by third parties. The relevant portion of 47 USC § 230<sup>7</sup> of the CDA states: "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." §230(c)(1). Because of a preemption clause in §230(e)(3), §230(c)(1) overrides the traditional treatment of publishers under statutory and common law. Dimeo v. Tucker Max, 433 F. Supp.2d 523, 529 (E.D. Pa. 2006). Section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Zeran v. AOL, 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997). Specifically, §230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Id. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred. Id. Through §230, Congress has granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. As a result internet publishers are treated differently from corresponding publishers in print, television and radio." Parker v. Google, 422 F.Supp. 2d 492, 501 (E.D. Pa. 2006)(citations omitted). None of this means, of course, that the original culpable parties who posted the defamatory statements escape accountability, if their statements, were indeed defamatory. Zeran, supra.

Congress enacted §230 to advance two goals: (1) the free exchange and promotion of ideas on the Internet; and (2) to encourage service providers to self-regulate the dissemination of offensive material over their services. Dimeo, supra. See Zeran, supra (Congress' purpose in

<sup>5</sup> "If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501." Md. R. 2-322(c).

<sup>6</sup> "The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. R. 2-501.

<sup>7</sup> All further references are to 47 U.S.C. unless otherwise noted.

providing section 230's immunity was to preclude the chilling effect tort liability would have in area of such prolific speech since it would be impossible for service providers to screen each of their millions of postings for possible problems.); Batzel v. Smith, 333 F.3d 1018 (9<sup>th</sup> Cir. 2003) (Purpose of §230 to encourage service providers to self-regulate the dissemination of offensive material over their services.); Parker, supra. (E.D. Pa. 2006) (Intent of §230(e)(3) is to preclude courts from entertaining claims that would place a computer service provider in a publisher's role.)

Plaintiff and INI dispute the appropriate designation to be ascribed to INI under CDA. To benefit from §230 immunity, INI must demonstrate (1) that they qualify as a "provider or user of an interactive computer service"; (2) the asserted claims treat them as a publisher or speaker of information; and (3) the challenged communication was "information provided by another information content provider." Dimeo, supra at 529. *Cf* Batzel v. Smith, 333 F.3d 1018,1030 (9<sup>th</sup> Cir. 2003).

Initially, Section 230(f)(2) defines "interactive computer service" to mean any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Significantly, however, §230 limits immunity to information "provided by another information content provider." §230(c)(1). Section 230(f)(3) defines "information content provider" to mean 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. INI is an interactive computer service. INI, through Newszap.com, is both a provider and user of an interactive computer service. *See Dimeo, supra* (defendant's website, which features message boards for third-party postings, is a "provider"); Parker, supra at 501 (Google "provide[s]" an interactive computer service with its USENET bulletin boards); Carafano v. Métrosplash.com, Inc., 207 F.Supp. 2d 1055, 1065-66 (C.D. Cal: 2002) (same for online matchmaking website), *aff'd* 339 F.3d 1119 (9<sup>th</sup> Cir. 2003); Gentry v. eBay, Inc., 99 Cal. App. 4<sup>th</sup> 816, 831 (2002) (same for eBay.com); Schneider v. Amazon.com, Inc., 31 P.3d 37, 39-41 (Wash. App. Ct. 2001) (same for Amazon.com).

Clearly, INI did not create the Defendants Doe's messages. The Defendants Doe composed the messages entirely on their own. INI did not edit, or in any way alter the statements posted. All INI did was take down the messages. Therefore, there is no way that INI's involvement rises to the level of "development." *See Batzel*, 333 F.3d at 1031 (defendant listserv<sup>8</sup> whom selected material for publication and made minor alterations to email before inclusion in said listserv found not to be content provider for purposes of §230). In this case, there is no doubt that Newszap.com qualifies as an "interactive computer service" and not an information content provider." Thus it is eligible for immunity under section 230. *See Parker, supra* (In each instance raised by plaintiff, defendant, Google, either archived, cached, or simply provided access to content that was created by a third party. The defamatory statements in postings and on website were created by users). It is clear that

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<sup>8</sup> "A listserv is an automatic mailing list service that amounts to an e-mail discussion group . . . Subscribers receive and send messages that are distributed to all others on the listserv . . . Messages may be automatically posted to the listserv or filtered through the list owner (who may elect not to post messages that are off topic or inappropriate). A listserv, unlike a newsgroup, involves one-to-many messaging rather than the use of distributed message databases." Batzel v. Smith, 333 F.3d 1018, 1022 (9<sup>th</sup> Cir. 2003)(citation omitted).

section 230 was intended to provide immunity for service providers like Newszap.com on exactly the claims Plaintiff raises here. See Id.

Second, Plaintiff's defamation claim treats INI as the publisher of the messages on their website. Plaintiff does not allege that INI wrote any of the posts. Instead, he only claims that INI, through the website, published the defamatory statements aimed at Plaintiff. See Dimeo, supra.

Lastly, the posts constituted "information provided by another information content provider." Id., citing §230(c)(1). Section 230(f)(3) defines "information content provider" to mean "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." INI did not create the anonymous posts. The registered users, the Defendants Doe, authored them entirely on their own. See Id.

As INI is immune from liability for actions taken by a third party this Court does not pass on INI's remaining two theories, namely: (1) whether or not the statements were not "of and concerning" the Plaintiff; or (2) whether or not the statements were non-actionable opinion. However, as stated, none of this means, of course, that the original culpable parties who posted the defamatory statements escape accountability, if their statements, were indeed defamatory. Zeran, supra. Therefore, it is incumbent upon INI to provide identifying information for the three registered users also named in the present suit.

### **Conclusion**

INI is an interactive computer service, as that term is defined in 47 U.S.C. §230(f)(2), and is thus immune from the instant action against it seeking to hold them liable for information originating from third party users of their service. As such, Plaintiff's complaint, as it pertains to INI, shall be summarily dismissed in favor of INI.

Because the identifying information of the alleged tortfeasors is in the exclusive control of INI, they will be ordered to comply with Plaintiff's subpoena duces tecum, and their Motion for Protective Order shall be denied.