Rel: August 12, 2022

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

1200871

Ex parte The HuffingtonPost.com, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: K.G.S., individually and as guardian and next friend of Baby Doe, a minor child

v.

The HuffingtonPost.com, Inc., d/b/a The Huffington Post, et al.)

(Jefferson Circuit Court, CV-17-249)

BOLIN, Justice.

The HuffingtonPost.com, Inc. ("HuffPost"), petitions this Court for a writ of mandamus directing the Jefferson Circuit Court to vacate its order denying HuffPost's motion for a summary judgment based on the immunity provided in the Communications Decency Act of 1996, 47 U.S.C. § 230, and to enter a summary judgment in its favor pursuant to the immunity provided in 47 U.S.C. § 230. Parties to this case have previously been before this Court. See Facebook, Inc. v. K.G.S., 294 So. 3d 122 (Ala. 2019).

Facts and Procedural History

In K.G.S., this Court set forth the following relevant facts:

> "In June 2015, K.G.S. filed a petition in the Mobile Probate Court to adopt Baby Doe, and, shortly thereafter, the birth mother filed a contest to K.G.S.'s petition for adoption. The birth mother subsequently came in contact with Mirah Riben, 'a well-known critic of the United States' adoption system' and a contributor to the Huffington Post[, a Web site operated by HuffPost]. The birth mother shared with Riben her version of the events that led her to contest K.G.S.'s petition to adopt Baby Doe. On July 7, 2015, the Huffington Post, which K.G.S. describes as 'a prominent media outlet,' published two online articles about Baby Doe's adoption that included the full name of the birth mother; identified K.G.S. by her full name as the prospective adoptive mother of Baby Doe; identified Baby Doe by the name the birth mother had given Baby Doe; and included photographs of Baby Doe. The articles detailed how, after signing a pre-birth consent to allow K.G.S. to adopt Baby Doe, the birth mother notified K.G.S. and K.G.S.'s attorney, before Baby Doe was born, that she had changed her mind about allowing Baby Doe to be adopted; the birth mother, however, never legally withdrew the pre-birth consent to adoption, and K.G.S. obtained

> custody of and filed a petition to adopt Baby Doe approximately three weeks after Baby Doe was born.
>
> "The day after the articles were published, Claudia D'Arcy, a resident of New York state, created a page on Facebook's social-media Web site dedicated to reuniting the birth mother and Baby Doe ('the Facebook page'), which 'attached' the articles published by the Huffington Post. The Facebook page also included K.G.S.'s full name and a 'number' of photographs of Baby Doe, who was then in the custody of K.G.S. … After the creation of the Facebook page, K.G.S. was 'inundated with appallingly malicious and persistent cyber-bullying.' In a letter dated July 28, 2015, K.G.S.'s attorney notified Facebook that the Facebook page needed to be removed because it was in violation of the Alabama Adoption Code, § 26-10A-1 et seq., Ala. Code 1975 ('the Adoption Code'), which, the attorney said, prohibits the disclosure of 'any matters concerning an adoption, including parties' actual names.' Facebook removed the 'cover photo, but refused to delete the [Facebook] page or otherwise prevent it from disseminating its harmful and false message.' "

294 So. 3d at 127-28 (footnote omitted).

On July 7, 2017, K.G.S., individually and as the guardian and next friend of Baby Doe, sued HuffPost, Mirah Riben, and a number of other defendants alleging that the defendants had made statements relating to the adoption that subjected them to civil liability and had unlawfully disclosed confidential information about the adoption "to create a sensationalized, salacious, and scandal-driven trial in the court of public opinion to pressure K.G.S. into relinquishing her custody of Baby Doe." Specifically, as the complaint relates to HuffPost, K.G.S. alleged that Riben was "not an independent third-party

content provider" for HuffPost; that Riben held "herself out to be an agent/employee of" HuffPost; and that HuffPost likewise represented that Riben was its "agent/employee," as evidenced by, among other things, "its presentation of her biography on its Web site, the number of pieces attributed to her that it has published, the description of her it includes in many of those pieces, and its willingness to promote and associate itself with her work." K.G.S. further alleged that HuffPost had "assisted [Riben] in creating, developing, and writing" the articles relating to the adoption that were posted on the Huffington Post Web site operated by HuffPost. K.G.S. asserted against HuffPost claims of invasion of privacy (false light, misappropriation, and making private information public); negligence per se by violating confidentiality provisions of Alabama's Adoption Code, § 26-10A-1 et seq., Ala. Code 1975; the tort of outrage; negligence; wantonness; negligent hiring and supervision; unjust enrichment; and conspiracy.

On October 20, 2017, HuffPost moved the circuit court to dismiss the claims asserted against it based upon the Communications Decency Act of 1996, 47 U.S.C. § 230, which provides online publishers immunity from state-law claims arising from content created and developed by other parties. On

November 8, 2019, the circuit court entered an order denying the motion to dismiss.

On October 29, 2020, HuffPost moved the circuit court for a summary judgment, again arguing, among other things, that it was entitled to immunity pursuant to § 230 because, it asserted, as the provider of an "interactive computer service," it could not be held liable as the "publisher or speaker" of information provided by Riben, who was an "information content provider." HuffPost further argued that it could not be considered an "information content provider" with respect to the articles written by Riben, based on K.G.S.'s allegations that an agency relationship existed between it and Riben, because, it asserted, there was no evidence indicating that Riben was its agent or employee. HuffPost argued that the evidence showed that it had assumed no control over Riben, as demonstrated by the "blogger terms and conditions" that Riben had agreed to before posting content to the Huffington Post Web site; that Riben had characterized her relationship with HuffPost as being an "unpaid blogger"; and that no evidence existed indicating that HuffPost had held out Riben as having authority to act on HuffPost's behalf.

On December 22, 2020, K.G.S. filed a response in opposition to the motion for a summary judgment, arguing that a summary judgment was generally

inappropriate on the issue of agency and that substantial evidence existed that created genuine issues of material fact as to whether Riben was acting as HuffPost's agent when she wrote the articles regarding K.G.S.'s adoption of Baby Doe that were posted on the Huffington Post Web site. K.G.S. argued that, because, in her opinion, an agency relationship existed between HuffPost and Riben, HuffPost, as the principal, "step[ped] into the shoes of Riben" and, thus, must be considered an "information content provider" that is not entitled to immunity under § 230.

On August 13, 2021, the circuit court entered an order granting the motion for a summary judgment as to the invasion-of-privacy (misappropriation) claim but denying the motion as to the remaining claims. The circuit court found that K.G.S. had presented substantial evidence creating genuine issues of material fact as to whether an agency relationship existed between Riben and HuffPost at the time the articles were written. The circuit court also found that HuffPost was not entitled to § 230 immunity because, it said, HuffPost had failed to present sufficient evidence to support any distinction between the "Voices" section of the Huffington Post Web site -- which published "blogs" and contributor-created content -- and the "News" section of the Huffington Post Web site -- which published original HuffPost-

created content. The circuit court determined that the failure of the evidence to demonstrate such a distinction was important because both the "Voices" section and the "News" section were published on the Huffington Post Web site, and HuffPost had admitted that it would be liable for content published in the "News" section.

Standard of Review

> "'"While the general rule is that the denial of a motion for summary judgment is not reviewable, the exception is that the denial of a motion for summary judgment grounded on a claim of immunity is reviewable by petition for writ of mandamus." Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000). A writ of mandamus is an extraordinary remedy available only when there is: "(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court." Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001).'

"Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003). Also,

> "'whether review of the denial of a summary-judgment motion is by a petition for a writ of mandamus or by permissive appeal, the appellate court's standard of review remains the same. If there is a genuine issue as to any material fact on the question whether the movant is entitled to immunity, then the moving party is not entitled to a summary judgment. Rule 56, Ala. R. Civ. P. In determining whether there is a [genuine issue of] material fact on the question whether the movant is entitled to immunity, courts, both trial and appellate,

> must view the record in the light most favorable to the nonmoving party, accord the nonmoving party all reasonable favorable inferences from the evidence, and resolve all reasonable doubts against the moving party, considering only the evidence before the trial court at the time it denied the motion for a summary judgment. Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000).'
>
> "Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002)."

Ex parte City of Montgomery, 272 So. 3d 155, 159 (Ala. 2018).

> "'"Once the [summary-judgment] movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."'
>
> "Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

Discussion

HuffPost argues that it had a clear legal right to immunity under 47 U.S.C. § 230 and that the circuit court had an imperative duty to enter a summary judgment for it on all the claims asserted against it by K.G.S.

Section 230 provides, in pertinent part:

> "(a) Findings
>
> "The Congress finds the following:
>
> "(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> "(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> "(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> "(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> "(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
>
> "(b) Policy
>
> "It is the policy of the United States --
>
> "(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

"(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

"(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) Protection for 'Good Samaritan' blocking and screening of offensive material

"(1) Treatment of publisher or speaker

"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.

"(2) Civil liability

"No provider or user of an interactive computer service shall be held liable on account of --

> "(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> "(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"....

"(e) Effect on other laws

"....

"(3) State law

> "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.

Section 230 defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server ...." 47 U.S.C. § 230(f)(2). In contrast, an "information content provider" is defined as "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). In light of Congress's findings and policy concerns, reviewing courts have treated § 230 immunity as "quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'" Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003)(footnotes omitted). An interactive-computer-service provider qualifies for immunity only with respect to information provided by an information content provider other than itself. Id. However, it is understood that an entity can be both an interactive-computer-service provider and an information content provider. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008). "[A]n 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content

provider' for the portion of the statement or publication at issue." Carafano, 339 F.3d at 1123.

> "If [an interactive-computer-service provider] passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the [interactive-computer-service provider] is also a content provider. Thus, [an interactive-computer-service provider] may be immune from liability for some of the content it displays to the public but be subject to liability for other content."

Roommates.com, 521 F.3d at 1162-63. An interactive-computer-service provider is "responsible, in whole or in part," for the creation or development of content if the service provider materially contributed to the creation or development of the content. Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398 (6th Cir. 2014). "A material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed content allegedly unlawful." Id. at 410. Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role." Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). Thus, claims that seek to hold an interactive-computer-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.

The United States Court of Appeals for the Second Circuit has explained:

> "In the seminal Fourth Circuit decision interpreting the immunity of Section 230 shortly after its enactment, Zeran v. America Online, Inc., [129 F.3d 327 (4th Cir. 1997),] that court described Congress's concerns underlying Section 230:
>
> > "'The amount of information communicated via interactive computer services is ... staggering. The specter of ... liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress ... chose to immunize service providers to avoid any such restrictive effect.'
>
> "129 F.3d at 331.
>
> "The addition of Section 230 to the proposed [Communications Decency Act] also 'assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions,' Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) and Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94 … (N.Y. Sup. Ct. May 24, 1995), both of which 'appl[ied] traditional defamation law to internet providers,' [Federal Trade Commission v.] LeadClick [Media, LLC], 838 F.3d [158] at 173 [(2d Cir. 2016)]. As we noted in LeadClick, '[t]he first [decision] held that an interactive computer service provider could not be liable for a third party's defamatory statement ... but the second imposed liability where a service provider filtered its content in an effort to block obscene material.'

Id. (citations omitted) (citing 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995 (statement of Rep. Cox))).

"To 'overrule Stratton,' id., and to accomplish its other objectives, Section 230(c)(1) provides that '[n]o provider ... 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). Subject to certain delineated exceptions, id. § 230(e), Section 230(c)(1) thus shields a defendant from civil liability when: (1) it is a 'provider or user of an interactive computer service,' as defined by § 230(f)(2); (2) the plaintiff's claims 'treat[]' the defendant as the 'publisher or speaker' of information, id. § 230(c)(1); and (3) that information is 'provided by' an 'information content provider,' id. § 230(f)(3), other than the defendant interactive computer service.

"In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity. See LeadClick, 838 F.3d at 173 (collecting cases); Marshall's Locksmith Serv. Inc. v. Google, LLC, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ('Congress inten[ded] to confer broad immunity for the re-publication of third-party content.'); Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016) ('There has been near-universal agreement that section 230 should not be construed grudgingly.'); Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 408 (6th Cir. 2014) ('[C]lose cases ... must be resolved in favor of immunity.') (quoting Fair Hous. Council v. Roommates.Com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc)); Doe v. Myspace, Inc., 528 F.3d 413, 418 (5th Cir. 2008) ('Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.'); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) ('The majority of federal circuits have interpreted [Section 230] to establish broad ... immunity.'); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) ('§ 230(c) provides broad immunity for publishing content provided primarily by third parties.') (citation omitted); Zeran, 129 F.3d at 330 …

> ('Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.')."

Force v. Facebook, Inc., 934 F.3d 53, 63-64 (4th Cir. 2019).

As mentioned above, a defendant is entitled to § 230 immunity when: "(1) it is a 'provider or user of an interactive computer service,' as defined by § 230(f)(2); (2) the plaintiff's claims 'treat[]' the defendant as the 'publisher or speaker' of information, id. § 230(c)(1); and (3) that information is 'provided by' an 'information content provider,' id. § 230(f)(3), other than the defendant interactive computer service." Force, 934 F.3d at 64. The first two elements of § 230 immunity are clearly satisfied here. As to the first element, when the articles at issue were published on the Huffington Post Web site in July 2015, HuffPost was a prominent media outlet that maintained that Web site, which provided two platforms: a platform for displaying news stories (the "News" section) and a "contributor platform" on which "contributors" could author "blogs" on various topics and post those "blogs" (the "Voices" section). Thus, as a Web-site operator, HuffPost was a provider of an "interactive computer service," as defined by § 230(f)(2). As to the second element, K.G.S. has asserted claims against HuffPost arising from the publication of the two articles authored by Riben on the Huffington Post Web site and has alleged that HuffPost, acting through its agent Riben, assisted in "creating,

developing, and writing" the articles. Thus, K.G.S.'s claims treat HuffPost as the "publisher or speaker" of the information pursuant to § 230(c)(1).

The determinative issue is whether HuffPost satisfied the third element by establishing that the information contained in Riben's articles posted to the Huffington Post Web site was not information "provided by" HuffPost as an "information content provider." For the purposes of § 230, Riben is undisputedly an "information content provider" of the articles. The determinative issue presented specifically turns on whether HuffPost, which undisputedly provides an "interactive computer service," can also be considered an "information content provider" of the articles posted to its Web site. See Roommates.com, 521 F.3d at 1162 (holding that an entity can be both an interactive-computer-service provider and an information content provider).

I. Agency Relationship Between HuffPost and Riben

K.G.S. argued in the circuit court that HuffPost was the "information content provider" of the articles authored by Riben because, she asserted, Riben was acting as HuffPost's agent when she posted the articles to the Huffington Post Web site. Therefore, K.G.S. contended, HuffPost could not claim § 230 immunity as to the claims asserted against it. The circuit court

agreed, finding that genuine issues of material fact were presented regarding whether an agency relationship existed between Riben and HuffPost at the time the articles were posted to the Web site.

As discussed above, HuffPost was a prominent media outlet that maintained the Huffington Post Web site, which provided a platform for displaying news stories (the "News" section) and the "contributor platform" for posting "blogs" authored by nonemployees (the "Voices" section). Both the "News" section and the "Voices" section were published on the same Web site. New content is no longer being posted to the "Voices" section, but at its peak approximately 100,000 people posted content to that section.

To become a "content contributor" to the "Voices" section, an individual simply had to request to register as such with HuffPost. Riben registered as a content contributor in October 2014. Riben was neither employed nor compensated by HuffPost. In the four years that Riben contributed content to the Huffington Post Web site, she posted over 100 articles to the "Voices" section. HuffPost continues to maintain an author's biography page for Riben on the Web site. Riben has indicated on her page on the "LinkedIn" Web site that she was an "author, activist, writer" for HuffPost and that she was a

"blogger" for HuffPost. Riben has also indicated on her page on the "Facebook" Web site that she "works at" HuffPost.

To submit content to the Huffington Post Web site, a content contributor had to upload the content to the backstage portal to the Web site. Further, to submit the content to the Web site, the content contributor had to check a "pop up" box indicating that he or she had read and agreed to certain blogger terms and conditions. Those blogger terms and conditions provided, among other things:

> 1. that content contributors were independent contractors and not employees of HuffPost;
>
> 2. that content contributors could not hold themselves out as agents or representatives of HuffPost;
>
> 3. that content contributors would not be compensated by HuffPost for their submissions;
>
> 4. that content contributors agreed that, as independent contractors, they were not under the direction and control of HuffPost and that the content contributors had complete control over the manner and means by which they submitted a "blog" post;
>
> 5. that content contributors could write about anything they chose to write about so long as it was not "objectionable," "inaccurate," "inflammatory," "defamatory," or "threatening";
>
> 6. that HuffPost did not select or approve a content contributor's topic;

> 7. that contract contributors were required to correct factual errors in their submissions within 24 hours of being given notice of such errors; and
>
> 8. that content contributors agreed that, by submitting content to HuffPost, they granted to HuffPost an irrevocable perpetual license to exercise all rights under copyright law with respect to the content.

Riben stated that she had no memory of reviewing or signing the blogger terms and conditions. Once a content contributor had checked the box indicating that he or she had agreed to the blogger terms and conditions and the content had been uploaded to the Web site via the backstage portal, the submitted content would then be placed in a HuffPost editor's queue for review. The HuffPost editors followed a "Blog Team Handbook" when editing submitted content. The Blog Team Handbook described the editor's two biggest responsibilities as:

> "(1) Our primary role is to capitalize upon our best content. Quality blog-editing leads to better readership of blog content on [the Huffington Post Web site] and elsewhere.
>
> "(2) Our secondary responsibility is to recognize and prevent the publication of problematic material.
>
> "You are in charge of judgment calls, slander, clarity, cleanliness and virality."

The editor would perform a cursory review of the submitted content to make sure it did not raise any obvious "red flags" as to certain subjects, such as racism, pornography, questionable medical advice, hate speech, and

accusations of illegal activity. If submitted content raised a "red flag" with an editor, that content would not be published on the Web site. If the submitted content was accepted by the editor, it would be published, usually within 48 hours. Riben testified that she assumed that the editors at HuffPost had reviewed her submissions to determine whether they presented issues of legality or otherwise violated law. Once the content was published on the Web site, the content contributor was "locked out" of the content and could not edit or make changes to the content. To make changes to published content, a content contributor had to be let "back in" to the content by an editor. Once the changes were made, the content contributor would have to resubmit the content with the changes for editorial review.

Riben's articles were reviewed by Stuart Whatley, a HuffPost editor. On July 7, 2015, after reviewing the articles, Whatley published them on the Huffington Post Web site. After the articles were published on the Web site, Whatley made formatting and technical changes to the articles, including, at Riben's request, adding hyperlinks to the published articles. Whatley and HuffPost did not make any substantive changes to the articles after they were published. Riben later informed an attorney for the birth mother that "I am sure I am responsible for my content, NOT HuffPost."

On July 30, 2015, an attorney representing the adoption agency that had assisted K.G.S. demanded that HuffPost retract the articles. On August 5, 2015, Whatley informed Riben of the demand for the retraction of the articles. Riben responded by stating that she would "defer" to HuffPost's counsel as to how "to precede or simply … take the post down, as you/they see fit." Whatley responded by informing Riben that, as an "independent blogger," she was in "control [of] and legally responsible for your post, and so we are looking to you to tell us how you want to address this complaint." Whatley told Riben that HuffPost and its counsel could not advise her on this matter. Riben suggested adding a disclaimer stating that the articles were based on what the birth mother had told Riben regarding the adoption. On August 6, 2015, HuffPost's counsel informed the attorney for the adoption agency that Riben had suggested adding explanatory disclaimers to the articles and advised the adoption agency to contact Riben with any further concerns. In July 2017, Riben requested that HuffPost remove the articles from its Web site; however, the articles continue to be displayed on the Huffington Post Web site.

The circuit court found that genuine issues of material fact existed regarding the existence of an agency relationship between HuffPost and Riben on theories of both actual authority and apparent authority. "[U]nder the

doctrine of respondeat superior a principal is vicariously liable for the torts of its agent if the tortious acts are committed within the line and scope of the agent's employment." Martin v. Goodies Distrib., 695 So. 2d 1175, 1177 (Ala. 1997). On the other hand, "a party is ordinarily not liable for the tortious act of his independent contractor." Id. "The test for determining whether a person is an agent or employee of another, rather than an independent contractor with that other person, is whether that other person has reserved the right of control over the means and method by which the person's work will be performed ...." Id. "The test for determining whether an agency existed by 'estoppel' or by 'apparent authority' is based upon the potential principal's holding the potential agent out to third parties as having the authority to act." Malmberg v. American Honda Motor Co., 644 So. 2d 888, 891 (Ala. 1994). "Agency is generally a question of fact to be determined by the trier of fact," and "[w]hen a defendant's liability is to be based on agency, agency may not be presumed ...." Id. at 890. Alabama law on the doctrine of agency by estoppel, or apparent authority, was summarized in Malmberg as follows:

> "'While some suggestion has been made that a distinction exists between apparent authority and authority grounded on estoppel, ... our cases and authority generally base the two upon the same elements.

> "'"'As between the principal and third persons, mutual rights and liabilities are governed by the apparent scope of the agent's authority which the principal has held out the agent as possessing, or which he has permitted the agent to represent that he possesses and which the principal is estopped to deny.'
>
> "'"Such apparent authority is the real authority so far as affects the rights of a third party without knowledge or notice ...." …
>
> "'"When one has reasonably and in good faith been led to believe, from the appearance of authority which a principal permitted his agent to exercise, that a certain agency exists, and in good faith acts on such belief to his prejudice, the principal is estopped from denying such agency ...." ...
>
> "'"The apparent authority of the agent is the same, and is based upon the same elements as the authority created by the estoppel of the principal to deny the agent's authority; that is to say, the two are correlative, inasmuch as the principal is estopped to deny the authority of the agent because he has permitted the appearance of authority in the agent, thereby justifying the third party in relying upon the same as though it were the authority actually conferred upon the agent."'

"Pearson v. Agricultural Insurance Co., 247 Ala. 485, 488, 25 So. 2d 164, 167 (1946) (citations omitted); see Wood v. Shell Oil Co., ... 495 So. 2d [1034,] 1038 [(Ala. 1986)]. The doctrine of apparent authority is based upon the actions of the principal, not those of the agent; it

> is based upon the principal's holding the agent out to a third party as having the authority upon which he acts, not upon what one thinks an agent's authority might be or what the agent holds out his authority to be. See Automotive Acceptance Corp. v. Powell, 45 Ala. App. 596, 234 So. 2d 593 (Ala. Civ. App. 1970), quoted with approval in Massey-Ferguson, Inc. v. Laird, 432 So. 2d 1259 (Ala. 1983)."

644 So. 2d at 891. A third party's belief that an individual is an agent or employee of the principal must be "objectively reasonable"; what the third party "subjectively perceived" is immaterial to the analysis. Brown v. St. Vincent's Hosp., 899 So. 2d 227, 239 (Ala. 2004). This Court has held that "'there must be a reliance on the part of the injured person before liability can be engrafted through the doctrine of respondeat superior, by estoppel, on the master.'" Brown, 899 So. 2d at 237 (quoting Union Oil Co. of California v. Crane, 288 Ala. 173, 179, 258 So. 2d 882, 887 (1972)).

> "'"'Estoppel,' by holding out another as the agent of the asserted principal, 'is always a matter personal to the individual asserting it and he must therefore show that he was misled by the appearances relied upon. It is not enough that he might have been, ... so misled. It must also appear that he had reasonable cause to believe that the authority existed; mere belief without cause, or belief in the face of facts that should have put him on his guard is not enough.'"'
>
> "[Union Oil Co. of California v. Crane,] 288 Ala. [173] at 180, 258 So. 2d [882] at 887 [(1972)].

> "'[B]efore there can be apparent authority that implies an agency relationship, the "authority" must be "apparent" to the complaining party and that party must have relied on the appearance of authority; he cannot rely on an appearance of authority that he was ignorant of.'
>
> "Watson v. Auto-Owners Ins. Co., 599 So. 2d 1133, 1136 (Ala. 1992)."

Brown, 899 So. 2d at 237.

A. Actual Authority

K.G.S. points this Court to certain evidence relied upon by the circuit court to support its determination that genuine issues of material fact existed as to whether HuffPost exercised control over Riben and, thus, as to whether an agency relationship existed between HuffPost and Riben. K.G.S. notes that the circuit court relied upon evidence indicating

> 1. that HuffPost selected Riben as one of its content contributors;
>
> 2. that HuffPost reviewed and approved the articles for publication on its Web site;
>
> 3. that HuffPost holds a perpetual license to control the articles written by Riben;
>
> 4. that HuffPost maintained exclusive control and access to the articles;
>
> 5. that only HuffPost can remove the articles from the Web site; and

> 6. that HuffPost refused to comply with Riben's request to remove the articles from the Web site.

It is undisputed that Riben was not HuffPost's employee and was not paid by HuffPost for the content that she submitted to HuffPost. Although Riben contends that she had no memory of reviewing or signing the blogger terms and conditions, Whatley testified that a content contributor could not upload content to the Web site without first checking a "pop up" box indicating that the content contributor had read and agreed to the blogger terms and conditions. Those blogger terms and conditions were agreed to by the parties and expressly stated that content contributors were independent contractors and could not hold themselves out as an agent or representative of HuffPost. The content contributors agreed that, as independent contractors of HuffPost, they were not under the direction and control of HuffPost and that HuffPost did not select or approve a content contributor's topic. A content contributor was free to select any topic he or she chose to write about so long as it was not "objectionable," "inaccurate," "inflammatory," "defamatory," or "threatening." Those terms indicate that Riben and HuffPost expressly agreed that HuffPost did not possess any right or authority to control the manner in which Riben created the content that she submitted to HuffPost. See Batzel v. Smith, 333 F.3d 1018, 1036 (9th Cir. 2003) (holding that the sponsor of a Web site could

not be held vicariously liable for Web site operator's actions in posting allegedly defamatory e-mail authored by a third party because the sponsorship agreement disclaimed sponsor's control rather than evincing its assent to control). However, we note that "a contract which, on its face, directly disclaims any agency relationship or which does not by its terms create such a relationship, will not preclude the finding of agency if there is independent evidence of a retained right of control." Wood v. Shell Oil Co., 495 So. 2d 1034, 1037 (Ala. 1986). We find no independent evidence indicating that HuffPost retained a right of control over Riben and the manner in which she created content for the Huffington Post Web site.

The evidence that K.G.S. has pointed this Court to that was relied upon by the circuit court focused primarily on HuffPost's role as editor of the submitted content, i.e., reviewing and approving content, controlling access to content, and withdrawing the content. The circuit court found that HuffPost reviewed and approved the content submitted by Riben and maintained exclusive control and access to the articles. Indeed, the evidence presented indicates that HuffPost editors reviewed the content submitted by content contributors for objectionable material and that, if none was found, the editors would accept the content and publish it to the Web site. Riben herself testified

that she had assumed that the editors at HuffPost reviewed her submissions only for objectionable material and had also stated that she was "responsible for [her] content, NOT HuffPost." Once submitted content was published on the Web site, the content contributor was "locked out" of the content and could not edit or make changes to the content without an editor allowing the content contributor access to the published content. As noted earlier, HuffPost refused Riben's request to take the articles down.

Those reserved editorial rights of HuffPost to review and approve Riben's submitted content do not establish that it had control over K.G.S.'s creation of the content. The retained right to supervise or approve the work of an alleged agent to determine whether the alleged agent's work is in conformity with an agreement with the alleged principal does not, in and of itself, establish control. Wood, 495 So. 2d at 1037; see also John Deere Constr. Equip. Co. v. England, 883 So. 2d 173, 178 (Ala. 2003)(quoting Malmberg, 644 So. 2d at 890) (stating that "'proof of control requires more than proof of a mere right to determine if the person claimed to be an agent is conforming to the requirements of a contract'"). Further, we note that the federal courts have determined that an interactive-computer-service provider does not lose § 230 immunity merely for "taking action that is necessary to the display of allegedly

illegal content," Jones, 775 F.3d at 410, or for exercising "a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content." Zeran, 129 F.3d at 330. See also Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1103 (9th Cir. 2009) (holding that publication involves reviewing, editing, and deciding whether to publish or withdraw from publication third-party content and is protected by § 230 immunity).

In addition, in determining that genuine issues of material fact existed as to whether HuffPost exercised control over Riben in the creation of her content, the circuit court also relied on evidence indicating that HuffPost controlled access to the published content, including the right to remove the published content from its Web site; that HuffPost refused Riben's request to remove the articles from the Web site; and that HuffPost retained an exclusive perpetual license to control the publication of the content submitted by Riben. The circuit court's reliance upon such evidence to support its determination that genuine issues of material fact exist as to the existence of an agency relationship between HuffPost and Riben is misplaced, because that evidence simply indicates that HuffPost was exercising traditional editorial and publishing functions that do not remove it from the umbrella of protection afforded to it by § 230. Zeran, supra; Barnes, supra.

The circuit court also gave consideration to the fact that HuffPost selected Riben as one of its content contributors. Although HuffPost selected Riben as a content contributor, nothing in that selection indicates that HuffPost reserved the right to exercise control over Riben in the creation of her content for the Huffington Post Web site. The blogger terms and conditions expressly provided that Riben was an independent contractor and that Riben had complete control over choosing the topics that she chose to write about and submit to the Web site so long as the content was not objectionable. The control that HuffPost did have was limited to its editorial role as the publisher of Riben's content, which does not by itself establish control for purposes of agency or remove it from the umbrella of protection afforded to it by § 230. Wood, supra; Zeran, supra. There is simply no evidence that would support the finding that HuffPost reserved or exercised any control over Riben in the creation of her content for the Web site.

Based on the foregoing, we conclude that the circuit court erred in finding that genuine issues of material fact existed regarding whether an agency relationship existed between HuffPost and Riben based on a theory of actual authority.

B. Apparent Authority

The circuit court also found that genuine issues of material fact existed regarding whether an agency relationship existed between HuffPost and Riben based on a theory of apparent authority. Much of the evidence that K.G.S. points us to, and that the circuit court relied upon, as to this issue relates to HuffPost's reservation of the right to review and approve the submitted content, HuffPost's publication of the content, and HuffPost's control of access to the content after it had been published. That evidence has been discussed above and will not be restated. The circuit court also relied on evidence indicating

> 1. that HuffPost published and displayed an author page for Riben on its Web site without identifying Riben as merely an unpaid content contributor;
>
> 2. that Riben held herself out as an agent of HuffPost on her social-media Web-site pages;
>
> 3. that Riben believed that Whatley was her personal editor and that HuffPost was responsible for the content of the articles;
>
> 4. that Riben was a prolific contributor to HuffPost;
>
> 5. that Riben believed that HuffPost was responsible for the alleged illegal content in the articles because HuffPost did not warn her of any possible legal ramifications;
>
> 6. that Riben relied upon HuffPost for advice as to whether to take the articles down or issue a retraction;

> 7. that the relationship with HuffPost and Riben was so intertwined that Riben believed HuffPost would represent her in legal proceedings; and
>
> 8. that Riben was referred to HuffPost by a friend and engaged in a vetting process before contributing content to HuffPost.

The circuit court's reliance upon evidence indicating that Riben held herself out as an agent of HuffPost on her social-media Web-site pages; that Riben believed that HuffPost was responsible for the content in the articles; that Riben relied upon HuffPost to take the articles down or issue a retraction; and that Riben believed that HuffPost would represent her in legal proceedings is misplaced, because that evidence would not support a finding of apparent authority. Initially, we note that this evidence is in direct conflict with the blogger terms and conditions, which specifically provided that Riben could not hold herself out as an agent or representative of HuffPost, that content contributors agreed that as independent contractors they were not under the direction and control of HuffPost, that content contributors had complete control over what they chose to write about so long as it was not objectionable, and that HuffPost did not select or approve a content contributor's topic. Further, it matters not what the purported agent holds himself or herself out to be or believes himself or herself to be. The doctrine of apparent authority is based upon the actions of the purported principal and not those of the

purported agent or what the purported agent holds his or her authority out to be. Malmberg, 644 So. 2d at 891. What the purported agent believes his or her status to be is also irrelevant, because apparent authority is based upon a third party's objectively reasonable belief that an individual is an agent of the principal. Brown, 899 So. 2d at 239. Thus, Riben's holding herself out as an agent of HuffPost, or her belief that she may have been an agent of HuffPost, will not support a finding of apparent authority.

The circuit court relied upon evidence indicating that Riben became a prolific contributor to HuffPost after being referred to HuffPost by a friend and going through a vetting process. This evidence also does not support a finding of apparent authority because it, too, is rooted in the actions of Riben as the purported agent and not the actions of HuffPost as the purported principal. Malmberg, supra. Further, to the extent that HuffPost took any action in this regard, it simply provided Riben a platform to post her content, which Congress has chose to protect through § 230 immunity. See Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998).

The circuit court's reliance upon HuffPost's displaying Riben's author page on its Web site without noting that she was an unpaid content contributor will also not support a finding of apparent authority. Although HuffPost did

not expressly state on Riben's author page that Riben was not an employee or agent of HuffPost, nothing in Riben's author page can be viewed as HuffPost's holding Riben out as having the authority to act on behalf of HuffPost. Malmberg, supra. The existence of an agency relationship will not be presumed. Bain v. Colbert Cnty. Nw. Alabama Health Care Auth., 233 So. 3d 945 (Ala. 2017). Additionally, to the extent that the displaying of Riben's author page on the Huffington Post Web site can be considered an act taken by HuffPost, the mere display of the author's page, by itself and without more, will not create an inference of an agency relationship based on apparent authority. See Malmberg, 644 So. 2d at 891 (holding that the displaying of logos on signs and literature alone will not create an inference of an agency relationship).

Based on the foregoing, we conclude that the circuit court erred in determining that genuine issues of material fact existed regarding whether an agency relationship existed between HuffPost and Riben based on a theory of apparent authority.

II. "Voices" Section v. "News" Section

The circuit court also denied HuffPost's motion for a summary judgment on the basis that HuffPost failed to present sufficient evidence to support any

distinction between the "Voices" section and the "News" section of the Huffington Post Web site. The circuit court found this distinction important because both the "Voices" section and the "News" section are published on the same Web site and HuffPost has admitted that it would be liable for content published in the "News" section. The circuit court determined that HuffPost had failed to provide any evidence supporting that the "Voices" section contained content written exclusively by content contributors.

HuffPost argues that how the content is displayed on the Web site is irrelevant to a determination of whether it is entitled to § 230 immunity. We agree. The critical determination to be made is whether HuffPost, which is undisputedly a provider of an "interactive computer service," can also be considered an "information content provider" of the articles authored by Riben that were posted to its Web site. See Roommates.com, supra. In other words, the critical determination is whether HuffPost is "responsible, in whole or in part, for the creation or development" of the content contained in Riben's articles posted to the "Voices" section of the Huffington Post Web site. 47 U.S.C. § 230(f)(3); Carafano, 339 F.3d at 1125. Whether a reader of the articles understands the author to be an unpaid independent contractor of HuffPost or an employee of HuffPost is not a consideration relevant to the determination

of whether HuffPost is entitled to § 230 immunity, and a determination on that basis cannot deprive HuffPost, as an interactive-computer-service provider under § 230, of immunity to which Congress has determined that it is entitled.

Conclusion

Based on the forgoing, we conclude that HuffPost has demonstrated a clear legal right to the relief sought, and we grant the petition for a writ of mandamus.

PETITION GRANTED; WRIT ISSUED.

Bolin, J., concurs specially, with opinion, which Wise, Sellers, and Mendheim, JJ., join.

Shaw and Bryan, JJ., concur in the result.

Parker, C.J., and Stewart, J., dissent.

Mitchell, J., recuses himself.

BOLIN, Justice, concurring specially.

As the author of the main opinion, I feel compelled to note the seemingly harsh outcome that results from this Court's opinion as it relates to K.G.S.'s claims against The HuffingtonPost.com, Inc. ("HuffPost"), which, importantly, involve the privacy interests of an adoptee. HuffPost published the articles that K.G.S. has alleged wrongfully thrust, on a massive scale, the very private details of her adoption of a child into the public eye, while simultaneously attacking the adoption as "wrongful." Once the alleged wrongful nature of the articles was brought to the attention of HuffPost, HuffPost failed to remove the articles from its Web site.

However, Congress has clearly expressed its intent to immunize interactive-computer-service providers -- such as HuffPost -- from any action attempting to hold them accountable, and/or liable, for disseminating information that originates with third-party information content providers who submit private or confidential information to the interactive-computer-service providers. See 47 U.S.C. § 230(c)(1); Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997). Congress has expressly preempted any state law to the contrary. 47 U.S.C. § 230(e)(3).

I acknowledge the findings and policy concerns expressed by Congress

when it enacted 47 U.S.C. § 230 and provided immunity to entities identified as providers of "interactive computer services." Although I agree with those findings and recognize those policy concerns, I am concerned with the relatively robust application of § 230 and the expansive definition of "interactive computer service," see 47 U.S.C. § 230 (f)(2), in light of the powerful role that the Internet plays in the dissemination of information, and disinformation, in today's world. "Simply put, the Internet has made us all susceptible to public scrutiny and shame. Whether or not we participate in online life, technology makes us all public figures in a way that had never been anticipated by privacy law, the First Amendment, or the [Communications Decency Act of 1996, 47 U.S.C. § 230]." Repu-Taint Sites and the Limits of § 230 Immunity, 12 No. 7 J. Internet L. 3 (Jan. 2009).

The evidence in this case demonstrates that HuffPost undertook certain duties to perform a cursory review to make sure that content submitted to its Web site did not raise any "red flags," such as containing racism, pornography, questionable medical advice, hate speech, or accusations of illegal activity. Apparently, those reserved duties did not obligate HuffPost to review submitted content for its veracity or potential for libel.

Section 230 has carved out exceptions to the immunity afforded under

that statute for actions that violate certain federal criminal laws, see § 230(e)(1), intellectual-property laws, see § 230(e)(2), and sex-trafficking laws, see § 230(e)(5). I am of the firm opinion that deeply personal matters touching on the privacy and sanctity of the family, such as the adoption at issue in this case, should be given the same -- or, arguably, stronger -- protection by Congress.

In following the rule of law, this Court is bound to follow the immunity provision found in § 230 and the caselaw interpreting that provision, but it does not make it right, especially when the privacy interests of a minor are involved.

Wise, Sellers, and Mendheim, JJ., concur.