

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

J.S., S.L., and L.C.,

Respondents,

v.

VILLAGE VOICE MEDIA HOLDINGS,
LLC, d/b/a Backpage.com;
BACKPAGE.COM, LLC, NEW TIMES
MEDIA, LLC, d/b/a Backpage.com,

Petitioners,

BARUTI HOPSON,

Defendant Below.

No. 44920-0-II

RULING GRANTING
DISCRETIONARY REVIEW

FILED
COURT OF APPEALS
DIVISION II
2013 JUL 26 PM 12:01
STATE OF WASHINGTON
BY _____
DEPUTY

Various companies (collectively, Backpage.com) move for discretionary review of the trial court's order denying its motion to dismiss. The trial court certified the issue for discretionary review and the parties agree that review is appropriate. This court grants review. RAP 2.3(b)(4).

BACKGROUND

Plaintiffs-Respondents J.S., S.L., and L.C. are three minors who allege they were abused by adult pimps who prostituted them by posting advertisements about the minors on the backpage.com website. Backpage.com moved to dismiss the suit, arguing it is immune under section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, as merely a "neutral conduit" for third party speech. Mot. for Disc. Rev., App. E at 6 (Report of Proceedings (RP) Apr. 26, 2013). Plaintiffs responded that

Backpage.com is not immune because the company develops illegal content by creating a section on its site for “escort” advertisements,¹ provides information to the public in this category, and imposes posting rules and restrictions that essentially provide pimps with guidelines to have their minor escort ads accepted for posting.

The superior court denied the motion to dismiss, stating, “the plaintiffs just crossed the line in terms of trying to establish that Backpage was a content developer.” Mot. for Disc. Rev., App. E at 51 (RP Apr. 26, 2013); see *a/so* Mot. for Disc. Rev., App. E at 50 (RP Apr. 26, 2013) (“These are where I’m most concerned . . . it’s the posting guidelines.”). The superior court certified the order for discretionary review, RAP 2.3(b)(4), and both parties agree that review is warranted, albeit for slightly different reasons. The trial court stayed proceedings.

ANALYSIS

The motion presents three related issues for discretionary review: (1) Whether Backpage.com is entitled to immunity under the CDA as a “provider . . . of an interactive computer service,” Mot. for Disc. Rev. at 9; 47 U.S.C. § 230(c)(1) (stating that Internet service providers shall not be “treated as the publisher or speaker of any information”); (2) Whether Backpage.com is instead an “information content provider” not granted immunity by the CDA, 47 U.S.C. § 230(f)(3) (defining a content provider as an entity that is responsible “for the creation or development of information provided through the Internet”); and, (3) Whether our state’s “liberal” CrR 12(b)(6) gives “Washington procedural rules precedence over federal substantive rights.” Mot. for Disc. Rev. at 15.

¹ They argue that “every” advertisement in this section is for prostitution. Resp. to Mot. for Disc. Rev. at 3 (emphasis theirs).

RAP 2.3(b)(4)

RAP 2.3(b)(4) permits this court to grant discretionary review when “[t]he superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” The trial court has so certified, the parties have so stipulated, and this court agrees.²

Controlling Question of Law

Both parties recognize that the CDA provides immunity from liability if Backpage.com is a “provider . . . of an interactive computer service.”³ 47 U.S.C. § 230(c)(1). See generally *Schneider v. Amazon.com*, 108 Wn. App. 454, 31 P.3d 37 (2001) (dismissing claims against Amazon.com because it was immune from suit under the CDA). In general, the issue of immunity from suit warrants review pursuant to RAP 2.3(b). See *Robb v. City of Seattle*, 159 Wn. App. 133, 139, 245 P.3d 242 (2010) (noting discretionary review granted under RAP 2.3(b)(4) on issue whether public duty doctrine barred the action), *reversed on the merits*, 176 Wn.2d 427 (2013); see generally *Chadwick Farms Owners Ass’n v. FHC LLC*, 166 Wn.2d 178, 184-86, 207

² Because this court determines to grant review pursuant to RAP 2.3(b)(4), it need not reach Backpage.com’s arguments that review is also appropriate pursuant to RAP 2.3(b)(1) and (2).

³ An “interactive computer service” is defined as:
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.

47 U.S.C. § 230(f)(2).

P.3d 1251 (2009) (immunity issues raised on discretionary review); *Byrd v. System Transp., Inc.*, 124 Wn. App. 196, 198, 99 P.3d 394 (2004) (issue of immunity under Industrial Insurance Act), *review denied*, 153 Wn.2d 2004 (2005). This court agrees with the trial court and the parties that because the case “cannot proceed if the Court agrees that the Backpage.com defendants are immune from liability,” Backpage.com’s motion for discretionary review involves a controlling question of law.⁴ Resp. to Mot. for Disc. Rev. at 5; RAP 2.3(b)(4).

Substantial Ground for a Difference of Opinion

The primary “difference of opinion,” here, is whether Backpage.com is an immune Internet service provider or a potentially liable “information content provider.” 47 U.S.C. § 230(c)(1) & (f)(3). Backpage.com contends that an Internet service provider’s mere knowledge that a third party is posting illegal content does not preclude CDA immunity. Moreover, an Internet service provider retains immunity even if it “encourage[s]” third parties to publish unlawful content. Mot. for Disc. Rev. at 10 (quoting *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 560 (N.C. App. 2012), *review denied*, 736 S.E.2d 757 (N.C. 2013)). Accordingly, it takes the position that Backpage.com’s mere creation of posting guidelines is insufficient to transform it into an information content provider.⁵ See generally *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC.*, 809 F. Supp. 2d 1041, 1044 (E.D. Mo. 2011) (holding that Backpage.com is not a

⁴ Additionally, because this issue involves immunity, discretionary review of the trial court’s order may materially advance the ultimate termination of the litigation. RAP 2.3(b)(4).

⁵ Amici the Electronic Frontier Foundation and the Center for Democracy & Technology support Backpage.com’s position that it is immune.

service provider despite allegation in complaint that “[Backpage has] posting rules and limitations which aid in the sight veiling of illegal sex services ads to create the veil of legality”).

Respondents answer that the CDA’s grant of immunity is not absolute and if an Internet service provider is responsible even in part for the creation or development of content, it is no longer immune. Resp. to Mot. for Disc. Rev. at 6; *Fair Housing of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1162-63 (9th Cir. 2008). Specifically,

[E]ven if the data are supplied by third parties, a website operator may still contribute to the content’s illegality and thus be liable as a developer. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for “develop[ing]” unlawful content “in whole or in part.” 47 U.S.C. § 230(f)(3).

Roommates.com, 521 F.3d at 1171 (footnote omitted). Consequently, respondents argue that the trial court correctly concluded that Backpage.com encouraged and developed unlawful content, although they also acknowledge, “the conduct of the Backpage.com defendants is sufficiently unique . . . so that there is substantial ground for a difference of opinion.” Resp. to Mot. for Disc. Rev. at 8.

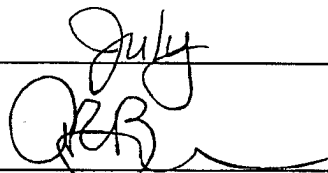
A secondary area for a difference of opinion is Backpage.com’s argument that our state’s CR 12(b)(6) standard improperly trumps substantive federal law. Backpage.com briefed this issue to the trial court. Mot. for Disc. Rev., App. D. at 18-20. At the hearing on the motion to dismiss, the trial court generally addressed the CR 12(b)(6) standard, Mot. for Disc. Rev., App. E at 39, 49, 52 (RP Apr. 26, 2013), but it is unclear from the record whether this issue was included in the trial court’s certification for discretionary review. Mot. for Disc. Rev., App. E at 50-52 (RP Apr. 26, 2013). At

oral argument before this court, plaintiffs did not appear to consent to review of this issue.

This court agrees that the trial court's order involves a controlling question of law as to which there is a substantial ground for a difference of opinion. In addition, because this issue comes before this court on a request for discretionary review of the trial court's denial of a motion to dismiss, it is appropriate to include within the grant of discretionary review the significance of our state's pleading standards in reviewing claims of immunity under federal law. RAP 2.3(e); see generally *Schneider*, 108 Wn. App. at 459 ("If a plaintiff can prove any set of facts consistent with the complaint that would entitle him or her to relief, including hypothetical facts not in the formal record, then the claim should not be dismissed." (quoting *Rodriguez v. Perez*, 99 Wn. App. 439, 442, 994 P.2d 874, review denied, 141 Wn.2d 1020 (2000))). Accordingly, it is hereby

ORDERED that Backpage.com's motion for discretionary review is granted. The Clerk of Court will issue a perfection letter.

DATED this 26th day of July, 2013.



Aurora R. Bearse
Court Commissioner

cc: James C. Grant
Ambika K. Doran
Erik L. Bauer
Michael T. Pfau
Darrel Cochran
Venkat Balasubramani
Hon. Susan Serko