

Case No. S235968

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DAWN HASSELL, *et al.*
Plaintiffs and Respondents,

vs.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

SUPREME COURT
FILED

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After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Superior Court of the County of San Francisco
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

YELP INC.'S OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. This Court has recognized a narrow exception to the requirement that a non-party to litigation receive notice and an opportunity to be heard before an order is entered that may be applied to that non-party, limiting that exception to cases where the non-party is acting in concert with a party, or the party can only act through others (such as a union that can only act through its members).

Can that narrow exception be extended to a non-party without any factual findings to support that extension, thus allowing courts to deprive online publishers of notice and the right to be heard before infringing their First Amendment rights by ordering them to remove online content?

2. 47 U.S.C. § 230(c)(1) and (e)(3) prohibit courts from treating any “provider ... of an interactive computer service ... as the publisher or speaker of any information provided by another content provider,” and, separately, from permitting a “cause of action [to] be brought” or “liability [to] be imposed” if it is “inconsistent with this section.”

Despite Section 230’s statutory immunity, may a court enjoin a website publisher and require it to remove third-party created content from its website—and impose contempt citations and related liabilities that might flow from a failure to abide by such an injunction—merely because the plaintiff chose not to name the website publisher as a party in the litigation?

II. SUMMARY OF ARGUMENT

Yelp Inc.¹ learned for the first time that a prior restraint had been entered against it when a copy was delivered to its registered agent for service of process. A00537-547. The default Judgment that included that prior restraint required Yelp—a non-party to the underlying lawsuit—to remove reviews critical of Plaintiffs from its website and to not publish *future* postings from two Yelp accounts. A00213. Although Yelp had been given no advance notice that Plaintiffs were seeking a prior restraint against it, the trial court denied Yelp’s motion to vacate the Judgment. A00808-810.

The court of appeal affirmed, invoking a narrow exception to basic due process rights that was created to prevent parties from evading an injunction through gamesmanship. Op. 18-19. On review, the appellate court did not find, or even consider whether, Yelp had engaged in such misconduct, and did not analyze Yelp’s connections with the actual defendant. The appellate Opinion contemplates contempt and sanctions

¹ Along with Yelp’s related websites and mobile applications, Non-Party Appellant Yelp Inc. is referred to simply as “**Yelp**” in this Brief.

Plaintiffs Dawn L. Hassell and the Hassell Law Group are referred to collectively as “**Hassell**” or “**Plaintiffs.**”

Citations to the three-volume Appendix filed in the court of appeal are denominated “**A00XXX.**”

Citations to the appellate court’s Memorandum Opinion are to “**Op.**”

Citations to the concurrently-filed Request for Judicial Notice are to the “**RJN.**”

proceedings against Yelp if it refuses to comply, although Yelp has no more connection with the enjoined party than it has with the tens of millions of other third-party authors whose reviews it hosts on Yelp, and engaged in no wrongful conduct.

The court of appeal's due process analysis was flawed at virtually every step. Initially, the court misread U.S. Supreme Court authority that unequivocally requires notice and an opportunity to be heard in connection with orders restraining the distribution of speech. The appellate court held that no *prior* hearing was required. Op. 23. And while it may be true that in a narrow category of cases, courts may enjoin speech without a *prior* hearing, the law also is clear that a *prompt* hearing is constitutionally required to give the enjoined party an opportunity to oppose entry of an injunction against it. That did not happen here. Section ~~IV.A~~, *infra*.

To support its decision, the appellate court grossly expanded a narrow exception to due process, which gives courts leeway to apply injunctions to non-parties who—after the injunction is entered—are proven to have acted in collusion with the enjoined party, such as agents and abettors of that party. Without analyzing whether these cases should be extended to this very different factual scenario involving Internet speech, the court turned this exception into a general rule, which now allows courts to expressly name non-parties in injunctions without any factual findings of

misconduct. In doing so, the court rendered meaningless the careful guidelines California courts have adopted to limit the scope of this narrow exception, giving defamation litigants worldwide an incentive to forum shop in California and a roadmap to circumvent due process rights here. Section IV.B, *infra*.

The court reached its conclusion only by pretending that Yelp is nothing more than the “administrator” of its website, ignoring Yelp’s role as a publisher of third-party authored speech and its First Amendment right to control its own website. It also invoked this Court’s decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 (“*Balboa Island*”) to support the prior restraint it entered against Yelp, while ignoring the fact that in *Balboa Island* this Court narrowly approved an injunction entered against a *party* following a *contested trial*, and nowhere suggested that courts may permit injunctions against *non-parties* following *default proceedings*. None of the cases cited by the court of appeal support its rejection of Yelp’s First Amendment rights here. Section IV.C, *infra*.

The court of appeal combined its unwarranted rejection of Yelp’s due process and First Amendment rights, with an unprecedented *narrowing* of the previously robust protection provided by the Communications Decency Act, 47 U.S.C. § 230 (“Section 230”), to deny Yelp the federal immunity it would have received if Hassell had sued it. The court exalted the form of the action—namely, the fact that Yelp was tactically not named

as a party—over the plain language of Section 230 and Congress’ clear intent in enacting it to protect websites from actions that treat them as publishers or distributors of third-party content.

Section 230 immunity plays a vital role in the legal landscape that has allowed the Internet to flourish. As this Court noted a decade ago in its sole decision evaluating Section 230, “[t]he provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are [] a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.” *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 56 (“*Barrett*”). In *Barrett*, this Court made clear that Section 230 immunizes website operators from actions by disgruntled businesses hoping to punish them for allowing third-party content—even defamatory content—to remain on their websites. *Id.* at 39-40. Section V.A, *infra*.

The court of appeal followed *Barrett* in name alone. Op. 27. Yelp established its right to Section 230 immunity by demonstrating that (1) Yelp is a “provider or user of an interactive computer service”; (2) Hassell seeks to treat Yelp as a “publisher or speaker” of the content at issue; and (3) the action is based on “information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Courts across the country consistently have held that Section 230 protection precludes injunctive relief. *E.g., Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 697-98 (“*Kathleen R.*”). The broad protection the United

States Congress intended when it enacted Section 230 protects Yelp here. Section V.B, *infra*.

The appellate court rejected Yelp’s Section 230 defense only by treating Yelp “as the publisher or speaker” of the information provided by Bird, contrary to the plain language of Section 230(c)(1). Specifically, the court affirmed an injunction imposed on Yelp by stretching due process law to conclude that Yelp was acting “*with or for*” Bird (Op. 30-31)—treating Yelp as standing in Bird’s shoes solely based on Yelp’s role as an online publisher of her alleged content. The court’s misinterpretation of Section 230 is utterly inconsistent with its due process holding—a contradiction that injects confusion into each of these legal principles. Its decision was flawed at every step, and must be reversed. Section V.C, *infra*.

Viewed only through the prism of review websites such as Yelp, Section 230’s broad protection of websites that publish third-party content plainly serves the public interest. *E.g., Edwards v. District of Columbia* (D.C. Cir. 2014) 755 F.3d 996, 1006 (“[f]urther incentivizing a quality consumer experience are the numerous consumer review websites, like Yelp ..., which provide consumers a forum to rate the quality of their experiences”). If Yelp and entities like it are denied their right to exercise editorial control in publishing consumer reviews, this will provide businesses an effective tool to remove critical commentary and consumers will suffer.

But the appellate decision reaches far beyond this single area, vast though it may be. Internet publishers routinely display third-party content, including political organizations, media entities, and repositories of creative content such as YouTube, to name only a few. Some of this content entertains or educates, while some simultaneously offends, and much of it walks a line between protected and unprotected speech. The value of such content lies in the diversity and disparate views and opinions offered online.

This does not leave plaintiffs like Hassell without a remedy—although if it did it would not matter because Congress’ intent controls. For twenty years, Congress has insisted that plaintiffs look to the content creator alone for a remedy, through tools such as judgment liens and contempt proceedings—post-judgment options that Hassell never pursued here. During those twenty years, no court has approved Hassell’s stratagem of denying a website publisher its due process rights in order to tactically avoid the immunity Congress established through Section 230. The appellate court’s blessing of the injunction entered against Yelp, following an *uncontested* hearing to prove up the default judgment against Bird alone (A00213), is a new loophole that this Court should close, lest future plaintiffs exploit it to escape Section 230’s broad immunity.

If this Court were to affirm the appellate court’s opinion, Yelp and other websites would suffer and the public that relies on the wealth of

online third-party commentary—to aid decision-making on myriad issues like consumer purchases, politics, and employment— would be harmed as subjects of criticism follow Hassell’s example: intentionally sue the commenter alone, perhaps in a manner that maximizes the chance that he or she will be unable or unwilling to defend the lawsuit regardless of its underlying merit, and then after a default judgment present the injunction to the website publisher as an unassailable *fait accompli*. As the Amicus letters supporting review explained, people across the world are invoking the appellate decision to demand that website publishers remove content they do not like, or reconfigure their websites to hide that content. *E.g.*, *Amicus* Letter of Google, Inc., dated August 10, 2016, at 3; *Amicus* Letter of Glassdoor, Inc., dated August 15, 2016, at 2. This case is only one of many different attempts to misuse the court system in the hope of stifling speech on the Internet. *E.g.*, RJN Exs. A-C. The court of appeal’s decision threatens to undermine the validity and efficacy of the information available to consumers, and online speech generally. Yelp respectfully requests that this Court reverse that decision.

III. STATEMENT OF FACTS AND PROCEDURE

A. Yelp Publishes Tens of Millions of Third-Party Authored Reviews.

Yelp allows any member of the public to read and write online reviews about local businesses, government services, and other entities.

A00240. Yelp is available to the public at no charge and without any registration requirement. *Id.* Those who register by creating an account may write reviews about businesses and service providers, and thus contribute to a growing body of tens of millions of publicly-available consumer reviews. *Id.* Tens of millions of other users read the reviews on Yelp when making a wide range of consumer and other decisions. *Id.* The businesses listed on Yelp also can create free accounts, which allow them to publicly respond to any review, with such a response appearing next to the original review. *Id.* Individuals posting reviews on Yelp can remove them at any time. A00841. As Yelp’s website explains, it applies automated software to all reviews posted in an attempt to provide the most helpful reviews to consumers. A00519.

B. Hassell Obtains An Injunction Against Yelp Without Giving It Any Notice.

1. Third-Party Users Write Critical Reviews About Hassell Law Group On Yelp.

Hassell, a San Francisco attorney, owns The Hassell Law Group, P.C. A00006. According to Hassell’s Complaint, Bird suffered a personal injury on June 16, 2012, and retained The Hassell Law Group. A00002-3. After a few months, Hassell ended the attorney-client relationship. *Id.* On January 28, 2013 a user with the screen name “Birdzeye B.” posted a one-star review of The Hassell Law Group on Yelp, complaining that “dawn hassell made a bad situation much worse for me” and accusing Hassell of

failing to communicate with her and abandoning her as a client, among other things. A00018. Believing that “Birdzeye B.” was Bird, Hassell sent Bird an email that day, requesting she remove the “factual inaccuracies and defamatory remarks” from Yelp. A00005. Bird replied the next day, complaining about Hassell’s representation. A00348.

2. Hassell Sues Bird And Obtains A Default Judgment, Which Includes An Injunction Against Yelp.

On April 10, 2013, Dawn Hassell individually, and the Hassell Law Group P.C., filed a complaint against Bird, but not Yelp, in San Francisco Superior Court. A00002. The suit asserted claims based on two allegedly defamatory reviews—one by Birdzeye B. and another by a reviewer identified as J.D. (A00004-5)²—and sought compensatory and punitive damages. It also sought injunctive relief against Bird only. A00013. Although the Birdzeye B. public account profile stated that its creator lived in Los Angeles (A00091), Bird was served through substitute service on the owner of the Oakland home in which Bird was injured, who told the process server that he had not seen Bird in months. A00026. On July 11, 2013, the court entered a default against Bird. A00023.

² The “J.D.” review accused Hassell of improperly deducting costs from a settlement. A00020. Hassell claimed that “J.D.” was Bird based on the review’s use of capitalization, despite the content being at odds with the original challenged statement. A00034, A00099.

On November 1, 2013, Hassell filed a Summary of the Case in Support of Default Judgment and Request for Injunctive Relief. A00033-36. Hassell significantly expanded the relief being sought as described in the Complaint, adding another allegedly defamatory statement to her claim (A00036, A00102)³ and demanding for the first time that the court “make an order compelling Defendant and Yelp to *remove* the defamatory statements, including all entire posts, immediately. If for any reason Defendant does not remove them all by the Court-ordered deadline (which is likely given Defendant’s refusal to answer the complaint), *the Court should order Yelp.com to remove all 3 of them.*” A00051 (emphasis in original).

Plaintiffs’ Request for Judgment went further, seeking “an Order ordering Yelp.com to remove the reviews *and subsequent comments of the reviewer* within 7 business days of the date of the court’s Order.” A00051 (emphasis added). Hassell *intentionally* did not serve her application for default judgment on Yelp or otherwise notify Yelp about it. A00243; *see also* A00837. The court granted the requested injunction, including the part ordering non-party Yelp to remove the existing comments *and any “subsequent” comments* posted by “Birdzeye B.” or “J.D.” A00213. The court made no factual findings as to Yelp. *Id.*

³ She added another post from Birdzeye B. that accused Hassell of trying to “threaten, bully, intimidate, harrass [sic]” her into removing the reviews. A00036, A00102.

C. The Trial Court Denies Yelp's Motion To Vacate The Injunction.

On January 28, 2014, Yelp's registered agent for service of process received a letter enclosing a Notice of Entry of Judgment and threatening Yelp with contempt proceedings if it did not comply with the Judgment. A00537-547. On February 3, 2014, Yelp responded to Hassell by letter stating that as a non-party that did not receive notice or an opportunity to be heard, Yelp was not bound by the terms of the Judgment. A00548-550. Yelp further explained that Section 230 precludes enforcement of the prior restraint, or liability as to Yelp. A00549. Hassell did not respond until April 30, 2014. She claimed that her office was "currently setting a motion to enforce the court's order against Yelp," but did not respond substantively to Yelp's position. A00551.

On May 23, 2014, Yelp moved to vacate the Judgment. A00225-470. Hassell opposed Yelp's Motion to Vacate. A00471-572. On September 29, 2014, the trial court denied Yelp's Motion. A00808. It quoted from *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906 ("*Ross*"), and *Berger v. Superior Court* (1917) 175 Cal. 719, 721 ("*Berger*"), to hold that injunctions may run to non-parties who are aiding and abetting an enjoined person to violate an injunction, and concluded that Yelp fit within this exception to general due process requirements. A00808-809. It

implicitly rejected Yelp’s claim to immunity under Section 230, not even referencing it in its order. *Id.*⁴

D. The Court Of Appeal Affirms The Trial Court’s Decision.

In a published decision, the court of appeal affirmed the trial court’s conclusion that Yelp was bound by the prior restraint. Op. 1-2. As relevant here, the court characterized the portion of the Judgment requiring Yelp to remove content from its website as a “removal order” (A00212-213)—not an injunction (Op. 1)—and without any explanation, treated the “removal order” as if it were separate from the Judgment. *E.g.*, Op. 10-11 (concluding that Yelp was not aggrieved by the default judgment, but was aggrieved by the removal order).⁵

⁴ During oral argument on Yelp’s motion, the trial court expressed disbelief that the statute could mean what this Court, and uniform federal courts nationwide, have said it means. The trial court complained to Yelp’s counsel that “[w]hat you’re saying is you can post any kind of defamatory information for the world to see, and you can say, we don’t have anything to do with it. We don’t care if they say Ms. Hassell shot her mother, or something like that. It doesn’t make any difference. I think your position is a very hard one to swallow.” A00834:6-11. While this Court expressed similar reservations about the statute, it followed Congress’ directive and held that as a matter of law, websites like Yelp cannot be held liable for content posted by third parties, even if the content is defamatory. *Barrett*, 40 Cal.4th at 62-63.

⁵ Some of the court’s holdings grew out of this novel characterization of the injunction against Yelp, and its Opinion ultimately turned on its conclusion that Yelp was not subject to an injunction at all. *E.g.*, Op. 29 (“[a]gain though, the party that was enjoined from publishing content in this case was Bird, ...”). Title aside, the “removal order” is a classic injunction and the court of appeal plainly erred by treating it as anything else. *See, e.g., PV Little Italy, LLC v. MetroWork Condominium Ass’n* (2012) 210 Cal.App.4th 132, 143 n.5 (order returning control of

After evaluating Yelp’s standing to appeal (issues not raised here), the appellate court rejected Yelp’s argument that due process barred enforcement of the injunction against it. Op. 18-23. The court noted, first, that “An Injunction Can Run Against a Nonparty.” Op. 18. Citing a handful of cases, the court concluded that “settled principles undermine Yelp’s theory that the trial court was without any authority to include a provision in the Bird judgment which ordered Yelp to effectuate the injunction against Bird by deleting her defamatory reviews.” Op. 19.

The appellate court did not discuss or apply any of the requirements that California courts have enunciated to justify extending an injunction to a non-party. Op. 19-21. Instead, it simply distinguished the cases Yelp cited, concluding that none presented facts similar to those presented here. *Id.* The court made clear that its decision did not turn on the facts of the case, and that the question of whether Yelp was “aiding and abetting” Bird’s violation of the injunction “has no bearing on the question whether the trial court was without power to issue the removal order in the first instance.” Op. 21.

The court next rejected Yelp’s argument that the First Amendment protects its right to distribute Bird’s speech. Op. 21-23. The court

association to non-parties was properly characterized as injunction); *People v. Brewer* (2015) 235 Cal.App.4th 122, 135 (defining injunction “as a writ or order commanding a person either to perform or to refrain from performing a particular act” (citation omitted)).

distinguished a U.S. Supreme Court case holding that book and magazine distributors are entitled to due process in connection with a seizure order. Op. 21-22 (citing *Marcus v. Search Warrants* (1961) 367 U.S. 717 (“*Marcus*”). The court explained that “in this context, it appears to us that the removal order does not treat Yelp as a publisher of Bird’s speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews.” *Id.* The court provided no definition of its newly fashioned term “administrator of the forum.” The court believed that the issue was whether a *prior* hearing was required, and that this case differs from *Marcus* because here “specific speech has already been found to be defamatory in a judicial proceeding.” Op. 23.

The court also rejected Yelp’s argument that the injunction is an unconstitutional prior restraint. Op. 23-26. Expanding this Court’s decision in *Balboa Island* to apply to non-party Yelp, the court held that “the trial court had the power to make the part of this order requiring Yelp to remove the [statements at issue] because the injunction prohibiting Bird from repeating those statements was issued following a determination at trial that those statements are defamatory.” Op. 25. It narrowly reversed only that part of the trial court’s order that barred publication of any comments by “Birdzeye B.” or “J.D.” that might be posted in the future. *Id.*