CAUSE NO. DC-14-08689

BRIANNA WILLIAMS,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff	§	
v.	§	**DALLAS COUNTY, TEXAS**
	§	
	§	
SHERRY FAWLEY &	§	
CARE.COM, INC.,	§	
	§	
	§	**298TH JUDICIAL DISTRICT**
Defendants		

CARE.COM, INC.'S MOTION TO DISMISS UNDER RULE 91a OF THE TEXAS RULES OF CIVIL PROCEDURE

Subject to and without waiving its motion to dismiss on forum-selection grounds, Defendant Care.com, Inc. ("Care.com") moves to dismiss Plaintiff Brianna Williams's negligence claim pursuant to Texas Rule of Civil Procedure 91a.

SUMMARY OF THE ARGUMENT

Plaintiff Brianna Williams started working as a nanny for the Fawley family in November 2012. Pet. ¶ 4.03. Williams found the position through a job posting by Sherry Fawley ("Fawley") on Care.com's website. Pet. ¶¶ 4.02, 4.03. Four months later, Brian Lee Fawley, Defendant Fawley's husband, allegedly exposed himself to Williams while they were alone in the Fawley home with Defendant Fawley's infant. *Id.* ¶ 4.04. Williams brought this lawsuit, but not against Mr. Fawley. Rather, she has sued his wife, who was not home at the time of the alleged incident, and Care.com. *Id.* ¶ 4.02-04. Williams alleges a single count of negligence against each defendant. She contends that Mrs. Fawley should have disclosed her husband's uncontrollable urges and the fact that he was required to register as a sex offender. *Id.* ¶ 6.01-.03. And she contends that Care.com had a duty of care to investigate and disclose to Williams whether anyone in the Fawley household had any criminal history or, in the alternative,

to disclose that Care.com did not conduct a criminal background check on Fawley or the members of her household. *Id.* ¶ 5.01-02.

As discussed further below, Williams's claim against Care.com is barred by well-established federal law. Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, protects websites like Care.com from claims arising from the online content and resulting offline conduct of third parties. Akin is the matter *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). There, the United States Court of Appeals for the Fifth Circuit held that Section 230 barred a young woman who had been sexually assaulted by a man she met through MySpace from pursuing negligence claims against the social network based on its alleged failure to implement adequate safety measures. *Id.* at 422. Numerous other cases have similarly relied on Section 230 in rejecting attempts by plaintiffs to hold website services liable for the online content and resulting offline conduct of third parties. *See, e.g.*, *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 724, 727-28 (N.D. Ohio 2007), *aff'd*, 551 F.3d 412 (6th Cir. 2008) (plaintiff who was arrested after having sex with minor who had lied about her age on website could not sue website for failure to warn of potential inaccuracies in ads posted on site); *Beckman v. Match.com*, No. 2:13-CV-97, 2013 WL 2355512, *5-6 (D. Nev. May 29, 2013) (plaintiff who was attacked by man she met through online dating service barred by Section 230 from suing service for its failure to warn of potential dangers from other site users); *Gibson v. Craigslist*, No. 08 Civ. 7735(RMB), 2009 WL 1704355, *3-4 (S.D.N.Y. June 15, 2009) (Section 230 barred claim against Craigslist for hosting listing for handgun that was later bought and used to shoot plaintiff). Based on Care.com's immunity under Section 230, Williams's claim against it should be dismissed under Rule 91a. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex.

App.—Beaumont 2014, pet. filed) (dismissing claim under Rule 91a based on Section 230 immunity).

Even if federal law permitted Williams's claim, Texas law does not support it. Williams's negligence claim is premised on the erroneous assumption that Care.com owed her a legal duty to screen the members of the Fawley household for potential criminal history or to warn her that it did not perform such screening. But Williams cannot point to any statutory or common law authority for such a duty. Moreover, no special relationship exists that would justify the creation of such a duty under these circumstances. In fact, as courts have recognized, the obligation to investigate and disclose the criminal background history of a website's millions of users (not to mention their households, too) would effectively drive social networking, ecommerce, and other online services out of business. *See, e.g., Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851 (W.D. Tex. 2007) *aff'd* 528 F.3d 413 (5th Cir. 2008) (declining to impose a duty on MySpace to take measures to protect minors from sexual predators); *Beckman v. Match.com*, 2013 WL 2355512 at *8 (no duty to warn of security dangers posed by individuals using the site).

Accordingly, because Williams's allegations do not entitle her to relief against Care.com, her claim should be dismissed under Texas Rule of Civil Procedure 91, and Care.com should be awarded its reasonable attorney's fees.

FACTUAL BACKGROUND

Care.com's website provides a virtual platform for care providers to connect with care seekers. Among other things, the platform allows care providers to respond to job opportunities posted by seekers of care. Plaintiff Brianna Williams, who provides babysitting and nanny-care services, chose to become a member of Care.com in 2010, while she was attending nursing

school.[1] Pet. ¶ 4.03. In November 2012, Williams answered an ad posted by defendant Sherry Fawley for babysitting services for her children. Pet. ¶ 4.02-03. Mrs. Fawley hired Williams, who worked for the Fawleys for approximately four months. *Id.* ¶ 4.03. On March 18, 2013, Mrs. Fawley's husband allegedly exposed himself to Williams while they were alone in the house with the Fawley's infant child. *Id.* ¶ 4.04. Williams claims that, as a result of this incident, she has suffered severe emotional distress and mental anguish, lost future earning capacity, and was forced to delay her schooling. *Id.* ¶ 7.02. She has sued Care.com for negligence, based essentially on the fact that Care.com did not inform her of Mr. Fawley's criminal background or warn her that Care.com did not perform a background check on members of Defendant Fawley's household.

ARGUMENTS AND AUTHORITIES

Rule 91a of the Texas Rules of Civil Procedure "allows a party to move the court to dismiss a groundless cause of action." *GoDaddy*, 429 S.W.3d at 754. The Rule is "analogous to [Federal] Rule [of Civil Procedure] 12(b)(6)," and Texas courts "find case law interpreting 12(b)(6) instructive." *Id.*; *Wooley v. Schaffer*, -- S.W.3d ----, 2014 WL 3955111, at *2 (Tex. App.—Houston [14th Dist.] Aug. 14, 2014, no pet. h.) ("[W]e find case law interpreting Rule 12(b)(6) instructive."). Even under the most generous reading of Williams's Petition, she fails to state a viable claim against Care.com.

[1] Williams alleges that she enrolled in November 2012. *Id.* In fact, Care.com records show that she enrolled as a member in August 2010. *See* Declaration of David Krupinski ¶ 7. Because the relevant Terms of Use are identical regardless of which date she enrolled, the Court need not resolve this discrepancy. *Id.*

A. Plaintiff's Claim against Care.com Is Barred by Section 230 of the CDA.

Williams's attempt to hold Care.com liable for Mr. Fawley's alleged criminal conduct is barred by the immunity protecting Care.com under Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230.

In 1996, Congress enacted the CDA to promote "the continued development of the Internet" and 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." 47 U.S.C. § 230(b)(1),(2). Section 230(c)(1) achieves those purposes by providing broad immunity to every "*interactive computer service*," like Care.com, from claims flowing from their publication of user-generated content. The statute provides this immunity by mandating that "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." 47 U.S.C. § 230(c)(1). The statute defines "interactive computer service" as:

> [A]ny 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.

Id. § 230(f)(2). It defines "information content provider" as:

> [A]ny 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.

Id. § 230(f)(3). In other words, the CDA draws a clear distinction between third-party content creators (who are amenable to suit) and the online services that host or enable the publication of the content (who are not).

Care.com clearly qualifies as an "interactive computer service." As courts have explained, "[t]oday, the most common interactive computer services are websites." *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1048 (E.D. Mo. 2011) (quoting *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008)). This is because a website "'enables computer access by multiple users to a computer server,' namely the server that hosts the web site." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (quoting § 230(f)(2)). Courts have also consistently held that the "operator of a website that allows people to join and view other users' profiles" is an interactive computer service under the CDA. *Beckman*, 2013 WL 2355512, *3; *Doe v. MySpace,* 528 F.3d at 415; *Doe v. SexSearch.com,* 502 F. Supp.2d at 722.

Further, "interactive computer services" do not lose their CDA immunity easily. For example, they do not lose immunity by allowing third-party users to post content on their websites. *See Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) ("Defendant does not provide the content of the 'Sponsored Link' advertisements. It provides a space and a service and thereafter charges for its service."). They do not lose immunity by having notice of false, incomplete, objectionable, or illegal content on their websites. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (reasoning that notice liability would incentivize websites to remove content every time they received an objection, which would have a chilling effect on freedom of Internet speech, contrary to Congress's intent in enacting the CDA). And they do not lose it by making a profit from third-party posts and online transactions. *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 560 (N.C. Ct. App. 2012) ("[T]he fact that a website operates a commercial business or makes a profit has no relevance to the immunity determination."). In fact, the only way an "interactive computer service" like Care.com may lose its CDA immunity is by actually

creating or developing the specific content at issue. Here, Williams does not allege, nor could she, that Care.com played any substantive role in the creation or development of Fawley's online posting soliciting babysitting services. Pet. ¶ 4.02-03.

Moreover, it is well established that the immunity afforded "interactive computer services" covers the types of claims Williams asserts in this case. In its landmark decision in *Doe v. MySpace*, the Fifth Circuit held that a sexual-assault victim's negligence claim was barred under virtually identical facts. *See* 528 F.3d at 419. As with Care.com, MySpace provided an online platform for users to connect with each other. *Id.* at 416. To make these connections, users would create profiles for themselves, choosing which personal information to include. *Id.* Through the site, the plaintiff connected with an older man. *Id.* They began meeting offline, and during one of those meetings, he assaulted her. *Id.* The plaintiff attempted to recover against MySpace on a negligence claim, alleging that the website had failed to implement basic online safety measures that would have protected her from the sexual assault offline. *Id.* The Fifth Circuit held, however, that this negligence theory was "merely another way of claiming that MySpace was liable for publishing the communications," and it affirmed the district court's dismissal of the plaintiff's complaint. *Id.*

There is no legitimate basis on which to distinguish *Doe* from this case. Like the plaintiff in *Doe*, Williams attempts to artfully plead around Section 230 by styling her negligence claim as being based on a failure to implement certain safety measures. *Cf. id.* at 419. The underlying claim is essentially that Williams never would have met or been employed by Defendant Fawley and subsequently been harmed if Care.com had warned her of Mr. Fawley's criminal history or that Care.com did not conduct a criminal background check on Fawley or members of her

household. Pet. ¶ 4.02. That is precisely the type of claim that the Fifth Circuit rejected in *Doe v. MySpace*. *See* 528 F.3d at 419-420.

Similarly, in *Beckman v. Match.com*, plaintiff met and began dating a man, Ridley, she met on Match.com's website. *Beckman*, 2013 WL 2355512, at *1. Shortly thereafter, she ended the relationship, and was subsequently brutally attacked by Ridley. *Id.* Plaintiff sued Match.com, alleging, among other things, that it had failed to warn her of the potential harm and had misrepresented the safety of the website. *Id.* at *5. In granting Match.com's motion to dismiss based on Section 230, the court stated:

> Plaintiff argues that her claims for misrepresentation and negligence (failure to warn) are not directed at the publication of third-party profiles, but rather at Match.com's failure to implement basic safety measures to prevent criminals and other dangerous people from communicating with users of Match.com that are genuinely attempting to start a relationship. Plaintiff is basically asserting she never would have met or been attacked by Ridley had Match.com warned her or did not negligently misrepresent a profile or the safety of its website. The court finds that these claims are actually directed at Match.com's publishing, editorial and/or screening functions – all of which are clearly entitled to immunity under the CDA.

Id. at *6.

In short, Williams's claim against Care.com attempts to do exactly what Section 230 prohibits: shift the liability for the offline tort against her from Mr. Fawley to Care.com and shift the liability for the online content she challenges from Mrs. Fawley to Care.com. *See Doe v. MySpace*, 528 F.3d at 419 ("Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online."). While Plaintiff's claim against Care.com is couched in terms of a failure to investigate and disclose, time and again the courts have held that such claims, at their core, are

directed at the website operator's publishing, editorial, or screening functions, which are covered by the CDA's immunity, and are therefore barred. As a result, Williams's claim against Care.com must be dismissed. *GoDaddy.com v. Toups*, 429 S.W.3d at 754 (dismissing claim under Rule 91a based on Section 230 immunity).

B. Care.com Did Not Owe Plaintiff a Legal Duty to Screen Listings or Users on Its Site or to Notify Her That It Did Not Conduct Such Screenings.

Even if Williams could overcome Care.com's Section 230 immunity, her claim fails as a matter of law because Care.com had no duty to screen website users, to disclose users' criminal history, or to notify users that they did not take such measures. To state a claim for negligence, a plaintiff must allege the existence of a duty, a breach of that duty, and damages proximately caused by the breach. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Whether a duty exists is a legal question for the court.[2]

In essence, Williams's contends that Care.com is obligated to perform criminal and other background checks on not only all of its users, but all of the members of their households, as well. Specifically, she alleges that Care.com has a duty to

> screen[] it[s] customers for caregiving services, which includes, but is not limited to, to determining whether Defendant Fawley or any member of her household had ever been the subject of a complaint, restraining order, or other legal action, involving, arrested for, charged with, or convicted of any felony, any criminal offense involving violence, abuse, neglect, fraud or larceny, or any offense that involves endangering the safety of others, dishonesty, negligence, or drugs, or being registered or currently required to register as a sex offender with any government agency.

[2] Texas and Massachusetts law regarding imposition of a duty to protect from a third party is substantively the same. *See, e.g.*, *Kavanagh v. Trs. Boston Univ.*, 795 N.E.2d 1170, 1176 (Mass. 2003) ("[A]s a general rule, there is no duty to protect another from the criminal conduct of a third party.").

Pet. ¶ 5.01. In the alternative, she contends that Care.com had a duty to "disclose to [her] that no criminal screening or background check had been or would be performed on the members of Defendant Fawley's household." *Id.* ¶ 5.02(e).

But Williams cannot point to any statute or common law authority for establishing such a duty. No such authority exists. In the absence of an existing statutory or common-law duty, courts apply a "risk-utility" test and determine whether there is a special relationship between the parties in deciding whether to impose a new duty. Texas courts "consider several interrelated factors, including the risk, foreseeability, and likelihood of injury," which are then weighed against the "social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

Imposing a duty on Care.com to conduct background checks on all of its members as well as every member of their household would be an enormous burden, and effectively would "stop . . . business in its tracks." *See Doe v. Myspace*, 474 F. Supp. 2d at 851 (declining to impose a duty on MySpace to take measures to protect minors from sexual predators). As the district court pointed out in *Doe*, landlords, phone companies, delivery services, and web hosts "all could learn, at some cost, what [the user] was doing with the services and who was potentially injured as a result; but state law does not require these providers to learn, or to act as Good Samaritans if they do." *Id.* at 851-52 (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003)).[3]

[3] Moreover, Williams has not alleged that Care.com had any knowledge of Mr. Fawley's record as a registered sex offender such that it should have been aware of an increased risk of his potentially criminal behavior. And there is no allegation that Care.com had unique access to the information about Mr. Fawley's criminal behavior, which was a matter of public record. Indeed, Williams was in a better position than Care.com to learn about Mr. Fawley's previous inappropriate conduct because she was in

If the risk of injury does not outweigh the burden of placing a duty on defendant, a court will consider whether a special relationship justifies the recognition of a duty to the plaintiff. *Greater Houston Transp. Co.*, 801 S.W.2d at 525. Special relationships include the relationship between employer and employee, parent and child, and independent contractor and principal. *Id.* Here, Williams has not pled the existence of any special relationship between Care.com and any of the individuals involved, including Mrs. Fawley, Mr. Fawley, or Williams. *See Doe v. MySpace*, 474 F. Supp. 2d at 850 ("Plaintiffs have alleged no such special relationship between MySpace and either Pete Solis or Julie Doe."); *cf. Robinson v. Match.com, LLC*, 3:10–CV–2651–L, 2012 WL 3263992, at *18 (N.D. Tex. Aug. 10, 2012) (relationship between website and its subscribers not sufficiently "special" to create duty of good faith and fair dealing).

In short, Care.com was under no legal duty to take the actions Williams cites as the basis of her negligence claim. Accordingly, that claim must be dismissed under Rule 91a.

CONCLUSION AND PRAYER

Subject to and without waiving its motion to dismiss on forum-selection grounds, Defendant Care.com, Inc. prays that the Court grant this Motion to Dismiss, dismiss with prejudice Plaintiff's claim against it, enter judgment that Plaintiff take nothing, and award Defendants fees, costs, and expenses, along with such other and further relief to which they are justly entitled.

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communication with Mrs. Fawley during the *four months* between when she responded to Fawley's posting and when the incident occurred. *See Beckman*, 2013 WL 2355512, at *9 (no duty where assault occurred months after plaintiff and third-party attacker met online).

Dated: October 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was served electronically on the following counsel of record on this 24th day of October, 2014:

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