

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 4**

KATHLEEN R., in her capacity as an individual, KATHLEEN R., in her capacity as a taxpayer,
and KATHLEEN R., in her capacity as guardian ad litem for BRANDON P., a minor,

Plaintiff and Appellant,

vs.

CITY OF LIVERMORE,

Defendant and Respondent.

NO. A086349

Alameda County Superior Court Case No. V-015266-4

(Hon. George C. Hernandez, Jr., Presiding)

OPENING BRIEF OF APPELLANT KATHLEEN R.

On appeal from an order of the Superior Court of California,
County of Alameda, sustaining a demurrer without leave to amend

The Honorable George C. Hernandez, Jr., Presiding

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STATEMENT OF THE CASE

Plaintiff KATHLEEN R., in her capacity as an individual, KATHLEEN R., in her capacity as a taxpayer, and KATHLEEN R., in her capacity as guardian ad litem for BRANDON P., a minor, appeals from an order of the Alameda County Superior Court, denying writ relief against respondent.

On May 28, 1998, appellant filed her complaint against respondent City of Livermore. (JA 0001.)

The complaint requested that the lower court order the City of Livermore to, inter alia, stop providing obscene pornography to minors by its practice of allowing minors to use City-owned computers in the city library to download obscene pornography. The complaint further alleged that Kathleen R.'s minor son had been injured when he went to the city library and was able to use the computer to download obscene pornography.

On July 10, 1998, the City filed its demurrer to the complaint (JA 0022.) It was joined by an amicus brief from the ACLU and People for the American Way (JA 0067.)

The demurrer was heard on October 21, 1998. The court sustained the demurrer with leave to amend, citing the federal Communications Decency Act (47 U.S.C. §230) as immunizing libraries for filtering/non-filtering decisions. (JA 0109.)

On November 4, 1998, plaintiff filed her First Amended Complaint. On December 23, 1998, the City again demurred (JA 0116) and was again joined by amici ACLU and People for the American Way (JA 0136).

On January 13, 1999, the City's demurrer was heard, and the next day the court sustained the demurrer without leave to amend. (JA 0190.) A Judgment of Dismissal was thereafter entered on February 2, 1999, (JA 0192) and the Notice of Appeal was filed on March 12, 1999 (JA 0193).

STATEMENT OF FACTS

Being a demurrer, the facts for purposes of appeal consist of those allegations found in the complaint and the facts judicially noticed by the court.

For a general background on the Internet and the availability of sexually explicit material, the appellant would incorporate as if fully referenced herein the 86 findings of fact for which she has requested judicial notice.

The complaint itself alleges that the City of Livermore maintains a public library system which includes a branch known as the "Civic Center" branch library ("library"). At the library, there are a number of public access computers (all paid for and maintained with public funds) which individuals, without regard or consideration of their age, are free to use. Certain of these computers ("computers") have a data link connection to what is commonly known as the Internet or the "World Wide Web" ("web"). Using these computers, users can request text, images, and other computerized information from computers in other locations which themselves have been connected to the web.

On or about June 13, 1997, without the permission or consent of his parents, Brandon P. went to the library and brought along with him a computer floppy disk ("disk"). At the library, Brandon P. stationed himself in front of one of the computers with web access. Using the computer, Brandon P. accessed web sites containing color images of semi-nude and nude women positioned in sexually alluring and/or explicit poses designed to appeal to the viewer's prurient interest. Some of the images depicted one or more women engaging in sexual activity. These images were and are harmful to minors, and at least some of them were legally obscene.

Using the computer, Brandon P. transferred an exact duplicate of various of the images from the computer screen to his disk using a process called "downloading." Brandon P. then left the library and, without any adult's knowledge or permission, proceeded to use a computer at a relative's house to print out the images. Brandon P. then allowed one or more minors to view certain of the images.

On or about the next day, Brandon P. again returned to the library and proceeded again to download sexually explicit images to the disk and again later print them out at a relative's house.

Brandon P. did this activity approximately 10 times. At no time were his parents aware of his activities. Copies of some of the printed images described are found in the record at JA 0007-0020. In addition, the image shown in paragraph 1 of the complaint at JA 0001 was also an image so downloaded and printed.

The City of Livermore has been made aware that minors and others use its computers with web access to view and download sexually explicit images and sexually obscene images and that in the process minors such as Brandon P. are being seriously harmed. In spite of this, the City of Livermore continues to allow minors to use these computers and assists them in doing so. A copy of the lawsuit in draft form was forwarded to the City Attorney of Livermore on March 31, 1998. His three page response, found at JA 0022-0024, justified the library policy.

STANDARD OF REVIEW

The standard of review for a sustained demurrer is well known. As our state supreme court noted in Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967,

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58]; Buckaloo v. Johnson (1975) 14 Cal.3d 815, 828 [122 Cal.Rptr. 745, 537 P.2d 865].) The court does not, however, assume the truth of contentions, deductions or conclusions of law. (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146, 793 P.2d 479].) The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" (Longshore v. County of Ventura (1979) 25 Cal.3d 14, 21 [157 Cal.Rptr. 706, 598 P.2d 866].) However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 103 [101 Cal.Rptr. 745, 496 P.2d 817].) And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.)

ARGUMENT

I. The lower court erred by finding that the Communications Decency Act trumped all state causes of action

With regard to Causes of Action 1, 2, and 3, the lower court found them to be defective because the Federal Communications Decency Act prohibits the imposition of liability on the City library for provided access to material that is transmitted over the Internet by others, citing 47 U.S.C. §230(c)(1). (JA 0109.) Respectfully put, this was legal error.

It is true that the Communications Decency Act ("CDA") at 47 U.S.C. §230 provides broad protection for online service providers, particularly in defamation actions such as *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327 (online service not liable for refusing to remove defamatory messages); and *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44 (online service not liable for refusing to remove columnists defamatory column.) The instant case, however, was not affected by the CDA.

A. CDA §230 was not intended to offer immunity to libraries, and the only court to look at the issue has already rejected library immunity

In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* (1998) 2 F.Supp.2d 783 (E.D.Va), the library argued that because it was an "interactive computer service" it was immune from judicial review for its decision concerning its treatment of obscene and pornographic material. (*Id.* at 789.) After fully analyzing *Zeran* and the legislative history of the Communication Decency Act itself, the *Loudoun* court concluded that:

§230 was enacted to minimize state regulation of Internet speech by encouraging private content providers to self-regulate against offensive material; §230 was not enacted to insulate government regulation of Internet speech from judicial review.

(*Id.* at 790.) In other words, the CDA was not enacted to protect government entities from judicial review but rather private entities from judicial review.

The *Loudoun* court further noted that "even if §230 were construed to apply to public libraries, defendants cite no authority to suggest that the 'tort based' immunity to 'civil liability' described by §230 would bar the instant action, which is for declaratory and injunctive relief." (*Id.*) Here, of course, plaintiff is not seeking to impose civil monetary liability on the library; rather, it is seeking injunctive relief.

The ACLU in its brief at JA 0076, fn. 7, suggested that *Loudoun* is distinguishable in its decision to deny §230 immunity to libraries. Specifically, the ACLU suggested that the *Loudoun* decision is to be read as simply denying immunity for constitutional challenges. The problem with this analysis is that it does not do justice to *Loudoun's* analysis of the CDA's legislative history nor to the *Zeran* case. If the *Loudoun* court wanted to express the maxim that "federal immunities must give way to constitutional challenges," then it could have done so in one sentence. Instead, the court made a lengthy analysis of why §230 did not apply to public libraries. (See *Loudoun*, 2 F.Supp.2d at 789-90.)

Accordingly, this court is asked to follow *Loudoun* and find that 47 U.S.C. §230 offers no immunity to the library.

B. Even if CDA §230 offered general immunity to libraries, the obscenity exceptions to CDA §230 specifically override it

Assuming, *arguendo*, that *Loudoun* was decided incorrectly and that public libraries do enjoy CDA immunity, the exceptions found at 47 U.S.C. §230(d) override the immunity.

According to 47 U.S.C. §230(d)(1), nothing within §230 is to be construed as effecting the enforcement of obscenity and child pornography statutes. As the Supreme Court noted in Reno v. American Civil Liberties Union (1997) 521 U.S. 844, 877 fn. 44, 117 S. Ct. 2329, 2347, 138 L.Ed.2d 847, 901, "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."

The gravamen of this suit is that the defendant library is knowingly soliciting, aiding the transmission of, and providing obscene and harmful images, transmitted from both within the state and from without the state, to minors. This cause of action is entirely consistent with the CDA's stated exemptions. Indeed, because 47 U.S.C. §230(d)(4) states that §230 is intended to have no effect on state laws consistent with §230, it is clear that Congress did not intend to abolish federal or state actions and statutes which prohibited obscenity and lewdness. Thus, the state-law causes of actions in the complaint are entirely consistent with Congress' exemptions.

C. Even if CDA §230 offered general immunity to libraries and the obscenity exceptions did not apply, it does not affect this action

Finally, even if §230 applied without exception as the City suggested below, it still would not justify a finding the complaint failed to state a cause of action.

The City will suggest that under §230(c)(1), neither the City (in its role as "provider") nor its patrons (in the role of "users") can be treated as a "publisher or speaker of any information provided by another information content provider." Therefore, the City will conclude, the fact that children are being harmed by seeing obscenity on the City's computers is of no concern because the City did not publish the obscenity.

Two analogies show that this reading cannot be what Congress intended. First, imagine that a man stationed himself at one of the library's computers and, when an 11 or 12 year old child walked by, said, "Here, let me show you some neat pictures." The child stops to look. Imagine that the man then calls up on the screen utterly debased and vile obscene images, such as forceful sexual assault. The child, after seeing the images, becomes visibly upset and relates the incident to an adult who in turn calls the police. The City would suggest that the man could not be prosecuted under a state "criminal exhibition of obscene images harmful to minors" statute such as Cal. Penal Code §313.1(a) or under any other "corruption of youth" statute because the man, under §230(c)(1), was neither the publisher nor the speaker of the obscene images but was merely an exempt "user" of an "interactive computer system." The City's reading would also give the man complete immunity from an "Intentional Infliction of Emotion Distress" suit for the same reason. This is patently absurd and hardly what Congress intended. The man's wrong exists not in creating or distributing the images but in choosing to publicly exhibit them to impressionable youngsters. It is no different with the library which knowingly allows minors to access obscenity in its premises and, when asked, would even facilitate them doing so with one-on-one help.

As another example, assume that the man has a cable television which receives otherwise legal pornographic images but which are obscene as to children. Obviously, the man is neither the

publisher nor the speaker of the images. However, if the man invites children to view the images on his cable television, he would likewise be civilly and criminally liable as an exhibitor.

The point, of course, is that, CDA §230 was never designed to provide this sort of "public exhibitor" immunity. For this reason, the court should not find this lawsuit as being preempted by the CDA.

II. The First Cause of Action (Waste of Taxpayer Funds) stated a cause of action

Plaintiff did not contest below that Code of Civil Proc. §526a actions demand a precise factual allegation concerning taxpayer standing. Plaintiff was quite willing to do so by amending the complaint, but in light of the court's ruling that the CDA trumped all state law claims, was foreclosed from doing so. Plaintiff was quite prepared to add or substitute another plaintiff for this cause of action. (JA 0086.)

With regard to the actual validity of the cause of action itself, the court could not have found that the provision of obscenity, especially children, was an acceptable use of government funds. It is easy for a patron (especially a young one) to call up obscene images through any search engine using trivial words such as girl or woman. Moreover, Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1047 is clear that the amount of public funds in question need not be large:

Thus, taxpayer standing exists where the amount of the challenged expenditure is small or an allegedly illegal procedure actually saves taxes, where a purportedly illegal expenditure does not come from tax revenues, where the action is brought by a nonresident taxpayer, and even where there are other persons directly affected by the challenged government action.

The court is asked to allow plaintiff an opportunity to amend the complaint and also to possibly add or substitute another plaintiff for this particular cause of action.

III. The second Cause of Action (Nuisance) states a cause of action

The complaint satisfactorily alleged the elements of a public nuisance.

A. Plaintiff has standing

First, by alleging that children are and continue to be exposed to obscene pornography, plaintiff has alleged a private harm with the exact specificity needed for a nuisance claim. In People ex rel. Busch v. Projection Room Theatre (1976) 17 Cal.3d 42, the plaintiff attempted to have a theater declared a public nuisance because of the "'past and continuing exhibition' of magazines and films 'all of which are lewd and obscene under the laws of this State. . .'" (Id. at 48.) Our Supreme Court found that "there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application of their public nuisance statutes." (Id. at 55.)

The only question, then, is whether the plaintiffs in this case have alleged the sort of "special injury" necessary for a private citizen complaining of a public nuisance. (See, Id. at 51.) The answer is in the affirmative, owing to the fact that the harm alleged is actual in that the minor suffered actual psychological injury by being repeatedly exposed to material deemed obscene material and material "harmful to minors." This injury is sufficient. In Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal.App.3d 757, 768, the pleadings suggested that a condition maintained by the government was a danger to the neighborhood, thus qualifying as a public nuisance. The court further found that not only was there a private nuisance because land was involved, but because it was plaintiff's child and brother who were killed, plaintiff had standing to sue on both a private and public theory.

Similarly, plaintiff here is not alleging a theoretical harm but an actual harm to a minor child. There should be no question that plaintiff has shown the requisite harm to qualify for relief under Busch. (See, also, Beck Development Co. v. Southern Pacific Transportation Co. 44 Cal.App.4th 1160, 1213 (while speculation itself is insufficient, a private party has standing if he shows that an "apprehension of injury is well founded" or the existence of an "actual and unnecessary hazard"; Restatement Second of Torts, §821C, comment d (physical injury from a localized nuisance is generally considered sufficient to confer standing).)

B. The alleged nuisance was not and is not "authorized by statute"

It is true that anything authorized by statute is not a nuisance as per Civil Code §3482. However, neither the library nor the City ever specifically authorized the exhibition of obscene and harmful matter.

As a general rule, our Supreme Court has "consistently applied a narrow construction to section 3482." (Greater Westchester Homeowners Assn. v. City of Los Angeles (1979) 26 Cal.3d 86, 100.) In order to qualify as a §3482 defense, the authority must be express. Such was the case in Farmers Ins. Exchange v. California (1985) 175 Cal.App.3d 494, where an insurer sought to have the state's practice of spraying malathion declared a public nuisance. The cause of action failed because the release of the destructive spray was specifically authorized by Food & Ag. C. §5321 et seq.

Apart from a very specific grant, however, municipalities generally lose when they rely on Civil Code §3482. The City of Madera argued that state statute specifically authorized it to operate a sewage plant, thus excusing the plant's noxious odors. The court rejected the argument because "[n]one of the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities." (Varjabedian v. Madera (1977) 20 Cal.3d 285, 292.) Los Angeles argued that because federal law controlled the planning, location, construction, and operation of airports and also governed flight procedures, the City was excused from the personal injuries caused by airport noise. The California Supreme Court disagreed, finding that "statutes which broadly authorize or regulate airports and aircraft flights do not create a legislative sanction for their maintenance as a nuisance." (Greater Westchester, 26 Cal.3d at 101.)

Boiled down, the simple test is whether "it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury." (Id.) Here, it would take a "legislative" enactment which stated: "The library approves of minors viewing on library computers obscene pornography transmitted via the Internet, and staff is to allow minors to do so and assist them as necessary."

The problem with such a specific grant, of course, is that it would violate federal and state obscenity law, would directly contradict Busch which states that pictorial lewdness can serve as the basis for a nuisance finding, and would more generally shock the conscience of the court and serve as another basis for a substantive due process challenge. The grant of authority that the library actually does have falls far short of specifically allowing the conduct complained of in this case because the conduct is unlawful as per state and federal law.

Thus, this court should find that the immunity granted by Civil Code §3482 is inapplicable.

IV. The Third Cause of Action (Premises Liability) states a cause of action

The City in this case is liable for creating and maintaining a known dangerous condition of property, namely providing obscene and harmful matter to children. The City's counter was that "a public entity cannot be held liable for a dangerous condition of public property based on third-party conduct alone." (JA 0048.) While true, this argument missed the point.

The library itself is maintaining a device into which an impressionable child need only type the word "girl" and click thrice to view obscene perversions of the darkest order. It is the library which encourages minors to use the device, it is the library who knows that minors have and continue to harm themselves by simply using the device in the way the library intends, and it is the library which could easily put a stop to the harm by simply restricting minor's access.

Much like the hypothetical man, supra, who knowingly exposed youngsters to rank obscenity, so to the library and its staff knowingly assist youngsters in using the library's equipment to harm themselves.

The litany of cases cited by the City (JA 0048-49) and which will likely be cited against by City in its appellate brief, are about harms created by third-parties and are not instructive here. As an example, Baldwin v. Zoradi (1981) 123 Cal.App.3d 275, is unhelpful because in that case, the dangerous instrumentalities (alcohol and an automobile) were provided by others and not by the defendant itself. It might be difficult to fault the library for unknowingly allowing a patron to bring in a computer if the patron used it to exhibit obscene images to children; it is quite different when the library provides the computers itself to children and gives operating instructions on how to call up harmful images.

If the library decided to celebrate the history of the razor blade and set up an open display case where youngsters were encouraged to handle dozens of razor-sharp blades, surely the library would have created a dangerous condition and would be liable for the injuries which resulted. If the City set up a display of hundreds of obscene vile pornographic images and invited children to view the many pictures on display, knowing that the images are harmful to children and cause

them extreme psychological damage, the library would have created a dangerous condition and would be liable for the ensuing psychological harm.

The allegations of the complaint are on par with these situations, and the court is asked to allow the third cause of action.

V. The Fourth Cause of Action (Substantive Due Process) states a claim

A. The library needs to show a compelling state interest to show obscene pornography to minors

The 5th Amendment, applied to the states via the 14th Amendment, prohibits state actors from depriving anyone of life or liberty without due process of law. It is well settled that a child has a liberty interest in personal security and freedom from restraint and infliction of pain. (Wood v. Ostrander (1989) 879 F.2d 583, 589 (court summarizes Supreme Court authority that "child had liberty interest in personal security and freedom from restraint and infliction of pain").)

A child's constitutional right to personal security by necessity includes two kinds of substantive due process limits applicable to the government. As the Supreme Court recently noted in County of Sacramento v. Lewis (1998) 523 U.S. ___, ___, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043, 1057,

While due process protection in the substantive sense limits what the government may do in both its legislative, see, e.g., Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and its executive capacities, [citation], criteria to identify what is fatally arbitrary differ depending on whether it is legislative or a specific act of a governmental officer that is at issue.

The instant case should not be viewed as if it were merely about an alleged abuse of power by the executive branch. Cases in which hapless plaintiffs sue government executive agents such as parole officers, police officers, swimming pool code enforcement officers, social workers, etc., for doing too little are obviously difficult cases for a plaintiff to win. To obtain judgment in such circumstances, as Lewis points out, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" (Lewis, 523 U.S. at ___, 118 S.Ct. at 1716, 140 L.Ed.2d at 1057.) Plaintiffs, in fact, do contend that the library's affirmative conduct in this case shocks the conscience and would thus pass muster under any of the cited cases. (See section (D) below.)

However, this lawsuit is not simply about official conduct which happened in the past. It is also about a legislative enactment and official policy by the City that the library is to provide children with all materials on the Internet, including obscene pornography. As the Court in Griswold v. Connecticut (1965) 381 U.S. 479, 497, 85 S.Ct. 1678, 1688-89, 14 L.Ed.2d 510, 523 (Goldberg, J., concurring) stated,

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.

"Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196. See Schneider v. Irvington, 308 U.S. 147, 161.

Because this case involves the fundamental right and liberty interest of personal security and freedom from infliction of pain (violated by providing children obscene pornography and psychologically harming children them), and because there is no "compelling" reason to give children any access to the Internet at all, the only question remaining is whether is the library's policy is significantly responsible for the harm.

B. The library's policy is materially responsible for the injury inflicted on Brandon and other children in this case

The allegations of the complaint show that the library and its policy are the source of harm in this matter.

i. Merely providing obscene pornography to children causes them harm

In the typical personal security/freedom-from-infliction-of-pain case, the injury is caused by the use of an instrumentality and not its mere viewing. For instance, a state policy allowing children to be stabbed by state actors would be constitutionally infirm, but not a state policy allowing the display of knives. A city policy allowing police to beat children with bats would be constitutionally infirm, but not a policy allowing police to give bats to children to play with.

Plaintiff's complaint contends, however, that allowing children to simply view obscene pornography seriously injures them. In this case, then, the government is to be considered responsible for infringing on a child's liberty interest and fundamental right of personal security and freedom from infliction of pain merely by giving the child visual access to obscene pornography. The injury is complete at the time of distribution.

ii. Library policies specifically provides that minors will be able to view "inappropriate" graphics

Library policy specifically allows children to access obscene pornography as detailed in the complaint. The official library policy states that "preventing users from accessing . . . graphics that that might be . . . inappropriate to minors is not technically feasible." (JA 0023.)

C. The Library policies are responsible for children viewing obscene pornography on library equipment

The library is integrally involved in providing pornography and should be considered the actual source of it. Imagine that, pursuant to policy, the library installs an obscene pornography display terminal in which patrons simply push a large red button and obscene pornography is displayed on the screen. The library could try to argue that children who push the red button are

responsible for the images conjured up. This would be untenable, however, because the likelihood that such images would appear would be high given the way the library set up the terminal. There would be no doubt that the library policy was significantly responsible for providing obscenity to minors, and this would be a clear constitutional violation in light of the harm it causes to minors.

On the other end of the spectrum, assume that library policy allows patrons to use slide projectors. If college pranksters inserted pornographic slides into the slide projectors from time to time, it would be difficult to suggest that library policy allowed the display of pornography on the projector. After all, the library could reasonably argue, such a use was never contemplated by the policy and that the display was accomplished only through the skill and cunning of the prankster.

The issue becomes positioning Livermore's policy on the spectrum of responsibility. Plaintiff would submit that Livermore's policy is almost the same as the "red button" example.

• It is extremely easy for a child to access obscene pornography by **accident** on Livermore's terminals

If given the opportunity, plaintiff proposed to present evidence that children can very easily access obscene pornography on accident. (JA 0177.) On some browsers, one need only type in various common words, hit return, and without further clicking obscene pornography will be displayed on the screen.

Worse, however, is using a search engine. If allowed to go to trial in this case, plaintiff would present evidence from an Internet expert who would testify on the vast numbers of web sites that are conjured up when one types in innocent sounding words into Internet search engines such as Excite, Yahoo, and AltaVista. While using a search engine does take an additional two clicks of the mouse (once on the browser "Search" button to bring up a search engine, and then once on the results obtained from the engine), plaintiff is prepared to present evidence from a child development expert who will suggest that even the most unsophisticated child can perform these operations with virtually the same ease as pushing the red button in the example above.

• It is extremely easy for a child to access obscene pornography **intentionally** on Livermore's terminals

Given the ease with which children can access obscenity on accident, it should come as no surprise that youngsters can bring up countless obscene images by either directly trying sites with sexually-related names or by typing in sexually related words into a search engine.

The upshot of this that the library's policies in practice are responsible for children viewing obscene pornography on library equipment

D. Even viewed as an executive (as opposed to legislative) constitutional violation, the facts would still show the library to be in violation of the constitution

Even if there was no policy in question here, the library executives in this case have violated the constitution.

It is true that to be liable for a substantive due process violation alleging that a library actor placed someone in danger, there needs to be some form of affirmative conduct on the part of the library. This element is made out because the library is the key distributor and its staff and technicians make it simple to access pornography.

Below, amici suggested that Carlton v. Cleburne County (8th Cir. 1996) 93 F.3d 505 was somehow "dispositive." This is hardly the case. The Carlton court found that the dangerous condition of rotting bridge cables was created not by the county but by natural rust and that it would be an "impossible burden" to "impose an affirmative duty to protect the general public from a situation created by the processes of nature." (Id. at 509.) It is not nature which has set up Livermore's computer terminals to display pornography to children.

Similarly, the case of DeShaney v. Winnebago County Department of Social Services (1989) 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249, cited below by both defendant and amici, is similarly unhelpful.

The Supreme Court granted certiorari in DeShaney to settle the conflicts about "when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights." (DeShaney, 489 U.S. at 194, 109 S. Ct. at 1002, 103 L.Ed.2d at 258.) The case involved a social worker who once temporarily rescued a beaten child from an abusive father, allowed the boy to return, and after repeated warnings and suspicions about abuse, did nothing. The child was ultimately beaten into a coma by the father.

In DeShaney, the defendant social worker never contributed to the abuse and was never present during the abuse. The court concluded that "the harm was inflicted not by the State of Wisconsin, but by Joshua's father" and that "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." (DeShaney, 489 U.S. at 203, 109 S. Ct. at 1007, 103 L.Ed.2d at 263.). The allegations of this complaint are nothing similar.

In fact, the elements of a typical substantive due process case based upon malfeasance by an executive officer has elements quite different than those at bar, as suggested by the following chart:

| <i>Typical substantive due process case</i> | <i>This case</i> |
|---|---|
| An <u>adult</u> claims that the government | A <u>child</u> (who cannot discern the psychologically harmful) claims that the government |
| <u>Ignored the potential for harm by</u> | <u>intended for him to view all sorts of matter, including the psychologically harmful by</u> |

| | |
|--|--|
| <u>Failing to take action or by disregarding policy and that the adult was harmed on a</u> | <u>Installing equipment pursuant to policy known to have a high likelihood of harming children and operating that equipment in a child-harming manner on a</u> |
| <u>Single occasion.</u> | <u>continuing basis.</u> |

The differences are striking and suggest that the level of culpability of the library officials is more than sufficient to set forth a claim even under the more stringent tests of executive malfeasance.

Thus the court is asked to find that even if the policy in question was an executive decision and not a legislative one, it still is violative of the constitutional rights of children to be free from pain under the substantive due process clause.

RULE 13 STATEMENT

The lower court's judgment of dismissal is a final judgment appealable under §904.1(a)(1).)

CONCLUSION

Neither Congress nor the state legislature ever intended any existing law to shield libraries who knowingly provide obscene and harmful material to children. The lower court erred by sustaining the demurrer without leave to amend. This court is asked to reverse the decision and order the defendant to file an answer.

Respectfully submitted

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