-086349

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT - DIVISION FOUR

KATHLEEN R., et al.,

Plaintiff and Appellant,

v.

CITY OF LIVERMORE,

Defendant and Respondent.

____

)
) Appellate Case No. A-086349
)
) Alameda County Superior Court
)
) Case No. V-015266-4
)
) (Hon. George C. Hernandez, Jr.)
)
)

RESPONDENT'S BRIEF

Thomas R. Curry, City Attorney, #50348
Daniel G. Sodergren, Assistant City Attorney, #144182
Gabrielle P. Whelan, Deputy City Attorney, #173608
1052 South Livermore Avenue
Livermore, California 94550
Telephone: 925/373-5120

Attorneys for Defendant and Respondent
City of Livermore

TABLE OF CONTENTS

TABLE OF AUTHORITIES
I. INTRODUCTION AND SUMMARY OF ARGUMENT
II. BACKGROUND.
A. State law Relating to Municipal Libraries
B. The Livermore Public Library
III. PROCEEDINGS BELOW
A. The Trial Court Found Appellant's State Law Claims to be Barred by Section 230 of the Federal Communications Decency Act
B. The Trial Court Rejected Appellant's Claim That the City Violated Her Son's Fourteenth Amendment Right to Substantive Due Process
IV. ISSUES PRESENTED
V. STANDARD OF REVIEW
VI. LEGAL DISCUSSION
A. Section 230 of the Federal Communications Decency Act Provides the City Immunity From Liability Based on Material That is Transmitted Over the Internet by Others on Library Computers
1. Section 230 is Unambiguous and Directly Applicable
a. Section 230 Applies Equally to All State Law Causes of Action Regardless of the Relief Requested
b. The Library is a Provider of an Interactive Computer Service
c. The Causes of Action Contained in the Complaint Treat the Library as a Publisher or Speaker of Offensive Material.
2. Mainstream Loudoun v. Board of Trustees of the Loudoun County Library
3. Civil v. Criminal Liability
B. Appellant's Requests for Declaratory Relief are Barred by the California Tort Claims Act (Gov. Code § 810 et seq.)
C. Providing Unrestricted Internet Access to the Internet on Library Computers is Not Actionable Under Code of Civil Procedure Section 526a as a Waste of Public Funds
D. Appellant is Precluded From Bringing a Public Nuisance Action
1. Civil Code Section 3493
2. Civil Code Section 3482
E. Providing Unrestricted Access to the Internet on Library Computers Cannot be Considered a Dangerous Condition of Public Property as That Term is Used in the Tort Claims Act
F. Providing Unrestricted Access to the Internet is Not Violative of Appellant's Fourteenth Amendment Rights to Substantive Due Process

1. The City Does Not Have a Constitutional Duty to Protect Appellant's Son From Offensive Materials That are Transmitted Over the Internet
a. The City Does Not Have a Duty Based on a "Special Relationship"
b. The City Does Not Have a Duty Based on the Creation of a Danger
2. The City Did Not Arbitrarily Exercise Power in Violation of Substantive Due Process
a. The Library's Internet Policy Does Not Violate Substantive Due Process
b. The Executive Actions Alleged by Appellant Do Not Violate Substantive Due Process
VII. CONCLUSION

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Amendment 1
Amendment 5
Amendment 14

FEDERAL CASES

Balistreri v. Pacifica Police Department (9th Cir. 1988) 901 F.2d 696
Blumenthal v. Drudge (D.D.C. 1998) 992 F.Supp. 44
Brown v. Hot, Sexy and Safer Products, Inc. (1st Cir. 1995) 68 F.3d 525
Carlson v. Cleburne County (8th Cir. 1996) 93 F.3d 505
Collins v. Harker Heights (1992) 503 U.S. 115 [117 L.Ed.2d 261, 112 S.Ct. 1061]
Consumer Projects Safety Commission v. GTE Sylvania (1980) 447 U.S. 102 [64 L.Ed.2d 766, 100 S.Ct. 2051]
County of Sacramento v. Lewis (1998) 523 U.S. 833 [140 L.Ed.2d 1043, 118 S.Ct. 1708]
DeShaney v. Winnebago County Department of Social Services (1989) 489 U.S. 189 [103 L.Ed.2d 249, 109 S.Ct. 998]
Dorris v. County of Washoe (Nev. 1995) 885 F.Supp. 1383
Eisenstadt v. Baird (1972) 405 U.S. 438 [31 L.Ed.2d 349, 92 S.Ct. 1029]
Graham v. Independent School District No. I-89 (10th Cir. 1994) 22 F.3d 991
Griswold v. Connecticut (1965) 381 U.S. 479 [14 L.Ed.2d 519, 85 S.Ct. 1678]
Ingraham v. Wright (1977) 430 U.S. 651 [51 L.Ed.2d 711, 97 S.Ct. 1401]
J.O. v. Alton Community Unit School District 11 (7th Cir. 1990) 909 F.2d 267
Kaiser Aluminum & Chemical Corp. v. Bonjorno (1990) 494 U.S. 827 [108 L.Ed.2d 842, 110 S.Ct. 1570]
Loving v. Virginia (1967) 388 U.S. 1 [18 L.Ed.2d 1010, 87 S.Ct. 1817]
L.W. v. Grubbs (9th Cir. 1992) 974 F.2d 119
Mainstream Loudoun v. Board of Trustees of the Loudoun County Library (E.D.Va. 1998) 2 F.Supp.2d 783 (E.D.Va. 1998) 24 F.Supp.2d 552
Martinez v. California (1980) 444 U.S. 277 [62 L.Ed.2d 481, 100 S.Ct. 553]
Meyer v. Nebraska (1923) 262 U.S. 390 [67 L.Ed. 1042, 43 S.Ct. 625]

Monell v. New York City Department of Social Services (1978) 436 U.S. 658, [56 L.Ed.2d 611, 98 S.Ct. 2018]
Nebbia v. New York (1934) 291 U.S. 502 [78 L.Ed. 940, 54 S.Ct. 505]
Onossian v. Block (9th Cir. 1999) 175 F.3d 1169
Pierce v. Society of Sisters (1925) 268 U.S. 510 [69 L.Ed. 1070, 45 S.Ct. 571]
Reno v. American Civil Liberties Union (1997) 521 U.S. 844 [138 L.Ed.2d 847, 117, S.Ct. 2329]
Rochin v. California (1952) 342 U.S. 165 [96 L.Ed. 183, 72 S.Ct. 205]
Skinner v. Oklahoma ex rel. Williamson (1942) 316 U.S. 535 [86 L.Ed. 1655, 62 S.Ct. 1110]
Washington v. Glucksberg (1997) 521 U.S. 702 [138 L.Ed.2d 772, 117 S.Ct. 2258]
Wood v. Ostrander (9th Cir. 1989) 879 F.2d 583
Zeran v. America Online, Inc. (4th Cir. 1997) 129 F.3d 327

FEDERAL STATUTES

42 U.S.C. section 1983
47 U.S.C. section 223
47 U.S.C. section 230

STATE CASES

Aaitui v. Grande Properties (1994) 29 Cal.App.4th 1369
Baiza v. Southgate Recreation and Park District (1976) 59 Cal.App.3d 669
Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal.3d 862
Baldwin v. Zoradi (1981) 123 Cal.App.3d 275
Beck Devlopment Company v. Southern Pacific Transportation Company (1996) 44 Cal.App.4th 1160
Brown v. Petrolane, Inc. (1980) 102 Cal.App.3d 720
Buchanan v. Los Angeles County Flood Control Distict (1976) 56 Cal.App.3d 757
Chase v. State (1977) 67 Cal.App.3d 808
Cornelius v. Los Angeles County Metropolitan Transportation Authority (1996) 49 Cal.App.4th 1761
County of Los Angeles v. Superior Court (1967) 253 Cal.App.2d 670
Doe v. America Online, Inc. (1998) 718 So.2d 385
Dujardin v. Ventura County General Hospital (1977) 69 Cal.App.3d 350
Fleming v. State of California (1995) 34 Cal.App.4th 1378
Fort Emory Cove Boatowners Association v. Cowett (1990) 221 Cal.App.3d 508
Friends of H Street v. City of Sacramento (1993) 20 Cal.App.4th 152
Goodman v. Kennedy (1976) 18 Cal.3d 335
Hayes v. State of California (1974) 11 Cal.3d 469
Institoris v. City of Los Angeles (1989) 210 Cal.App.3d 10
Kilgore v. Younger (1982) 30 Cal.3d 770
Koll-Irvine Center Property Owners Association v. County of Orange (1994) 24 Cal.App.4th 1036
Lompoc Unified School District v. Superior Court (1993) 20 Cal.App.4th 1688

Michaelian v. State Compensation Insurance Fund (1996) 50 Cal.App.4th 1093
Minsky v. City of Los Angeles (1974) 11 Cal.3d 113
National Organization for Reform of Marijuana Laws v. Gain (1979) 100 Cal.App.3d 586
People ex rel. Busch v. Projection Room Theatre (1976) 17 Cal.3d 42
Robbins v. Foothill Nissan (1994) 22 Cal.App.4th 1769
Shell Oil Co. v. Richter (1942) 52 Cal.App.2d 164
State v. Superior Court (Young) (1995) 32 Cal.App.4th 325
Venuto v. Owens-Corning Fiberglas Corporation (1971) 22 Cal.App. 116
Wheeler v. Gregg (1949) 90 Cal.App.2d 348

STATE STATUTES

Code of Civil Procedure

section 472c
section 526a
section 526(a)(6)
section 731

Civil Code

section 3479
section 3480
section 3481
section 3482
section 3493

Education Code

section 18030.5
sections 18900
section 18919

Government Code

section 810
section 835
section 835.2
section 905
section 905.2
section 945.4
section 1060
section 54950

Penal Code

section 313.1

MISCELLANEOUS

Prosser on Torts (3d ed.)
5 Witkin California Procedure (4th ed. 1997)

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to the City of Livermore's ("City") policy of providing unrestricted Internet access in the Livermore Public Library ("Library"). The policy was adopted by the Livermore Library Board of Trustees ("Library Board") at a noticed public meeting in 1997. After appellant's son allegedly downloaded offensive material from the Library's computers, she brought this lawsuit.

Appellant's original complaint requested injunctive relief against the City preventing it from spending any public funds to provide unrestricted Internet access. The complaint also requested declaratory relief stating that the City is liable for future damage to appellant's children caused by their use of City computers. These requests for relief were based on causes of action alleging that the City is wasting public funds, creating a public nuisance and fostering potential damages claims by allowing minors to have unrestricted access to the Internet.

The trial court dismissed appellant's original complaint, finding all causes of action contained in it to be preempted by section 230 of the federal Communications Decency Act (the "Act"). Section 230 of the Act explicitly preempts any state law cause of action that would make an Internet service provider liable for information originating with a third party.

In an attempt to avoid the broad preemptive scope of section 230, appellant then amended her complaint to allege a cause of action under 42 U.S.C. section 1983 for a violation of her son's Fourteenth Amendment right to substantive due process. This cause of action was based on claims that the provision of unrestricted Internet access "shocks the conscience" and interferes with a fundamental right of personal security and freedom from infliction of pain. Appellant's amended complaint was dismissed by the trial court without leave to amend.

The plain language of section 230 clearly supports the trial court's finding that appellant's state law causes of action are preempted. Appellant's arguments against the application of section 230 are largely based on a federal district court case from the Eastern District of Virginia (Mainstream Loudoun v. Board of

Trustees of the Loudoun County Library (E.D.Va 1998) 2 F.Supp.2d 783 and 24 F.Supp.2d 552). Mainstream Loudoun involves the constitutionality of a county library policy that required site-blocking software to be installed on the library's computers. Not only does this case involve a completely different issue, it involves a completely different immunity provision within section 230.

Appellant also argues that section 230 was never intended to provide immunity against criminal liability. While this may be true, it is of no help in this case, which involves civil causes of action and civil liability.

In addition to being preempted by section 230, appellant's claims simply ignore the basic requirements of applicable state statutory and case law. These fatal flaws serve as an independent basis supporting the trial court's dismissal of the appellant's complaint without leave to amend.

Finally, appellant's attempt to avoid the application of section 230 and relevant state law by advancing a constitutional challenge to the City's policy fares no better. The Constitution only protects against arbitrary state inaction; it does not protect against the type of inaction alleged here.

This lawsuit, while provocative, is not sufficient to state a legal cause of action. The decision of the trial court should be affirmed.

II.

BACKGROUND

A. State Law Relating to Municipal Libraries

The organization and operation of municipal libraries are governed by Education Code section 18900 et seq. These sections provide that the legislative body of a city may, by ordinance, establish a public library. (Id. at § 18900.) Public libraries must be managed by a five member library board, which ". . . may make and enforce all rules, regulations, and bylaws necessary for the administration, government, and protection of the libraries under its management, and all the property belonging thereto." (Id. at §§ 18910 and 18919.)[1] Any person who violates any library rule, regulation or bylaw may be fined or excluded from the library. (Id. at § 18960.) Library boards may also purchase all necessary books, journals, publication and other materials. (Id. at § 18922.)

B. The Livermore Public Library

Although a free library has existed in the City since 1896, the Livermore Public Library was established, pursuant to the above described state legislative grant of authority, in 1901 (Joint Appendix in Lieu of Transcript ("JA") at pp. 55-59.). The Library Board has adopted bylaws and conducts regular meetings which are

noticed and open to the public pursuant to the Ralph M. Brown Act (Gov. Code, § 54950 et seq.). (JA: 60-61.)

At a noticed public meeting on February 27, 1997 (JA at pp. 62-64.), the Library Board unanimously adopted a policy governing the use of Internet access at the Library entitled the "Access to Electronic Information, Services and Networks Policy" (the "Library's Internet Policy"). (JA at pp. 65-66.) The Library's Internet Policy ". . . recognizes that freedom of speech and expression are central to the successful maintenance of a free society . . ." and provides that "Internet access is available for all users of the Livermore Public Library" including minors. At the same time, the Library's Internet Policy states the following:

The Library's Internet access is intended as an information resource. The Internet allows users to connect to networks of resources outside the library. The Internet is a global entity with a highly diverse user population. The Internet has no federal, state or local control of its users or content. The Internet and its available resources may contain materials of a controversial nature. The Livermore Public Library does not monitor and has no control over the information accessed through the Internet and cannot be held responsible for its content. Users are cautioned that accuracy, completeness and currency of information found on the Internet varies widely. Library patrons use the Internet at their own risk. Preventing users from accessing all systems, networks and services which may or do contain materials messages or graphics that might be considered offensive to a user or inappropriate to minors is not technically feasible. . . .

Individuals must accept responsibility for determining what is appropriate. The Library recognizes and supports Federal laws dealing with the access to information. It upholds and affirms the right of each individual to have access to constitutionally protected materials and also affirms the right and responsibility of parents to determine and monitor their children's use of library materials and resources. Parents and guardians are encouraged to work closely with their children. Parents are expected to monitor and supervise children's use of the Internet in selecting material that is consistent with personal and family values. The Livermore Public Library does not provide this monitoring or supervision.

The Library's Internet Policy also contains a list of unacceptable uses, which include "[u]sing resources for other than educational, informational and recreational purposes" and "[u]sing resources for unauthorized, illegal or unethical purposes." (Id.)

III.

PROCEEDINGS BELOW

A. The Trial Court Found Appellant's State Law Claims to be Barred by Section 230 of the Federal Communications Decency Act.

On May 28, 1998, appellant filed a complaint requesting injunctive relief against the City ". . . preventing its or its agents, servants, and employees from spending any public funds on the acquisition, use, and /or maintenance of any computer system connected to the Internet or World Wide Web for which it allows any person to access, display, and/or print obscene material or for which it allows minors to access, display, and/or print sexual material harmful to minors." ("complaint") (JA at pp. 5-6.) The complaint also requested declaratory relief ". . . stating that the City of Livermore is legally liable for all future damage to plaintiff's children caused by the children accessing, acquiring, displaying, and/or printing sexual and other material harmful to minors on any library computer connected to the Internet or World Wide Web." (JA at p. 6.) These requests for relief were based on causes of action alleging that the City is wasting public funds, creating a public nuisance and fostering potential damages claims by allowing minors to have unrestricted access to the Internet.

On July 10, 1998, the City filed a demurrer to the complaint. (JA at pp. 27-28.) In the demurrer, the City argued, among other things, that section 230 of the federal Communications Decency Act (47 U.S.C. § 230) preempted all causes of action contained in the complaint because all such causes of action treated the provider of an interactive computer service (the Library) as a publisher or speaker of obscene or harmful information. (See JA at pp. 38-41.)

On October 21, 1998, the trial court sustained the City's demurrer and gave appellant fourteen days leave to amend the complaint. (JA at pp. 109-110.) In doing so, the trial court held that the causes of action contained in the complaint were defective because ". . . the federal Communications Decency Act prohibits the imposition of liability on the City library for providing access to material that is transmitted over the Internet by others. (See 47 U.S.C. § 230, subsection (c)(1).)" (Id.)

B. The Trial Court Rejected Appellant's Claim that the City Violated Her Son's Fourteenth Amendment Right to Substantive Due Process.

On November 4, 1998, appellant filed a first amended complaint for injunctive relief ("first amended complaint"). (JA at pp. 111-114.) The first amended complaint alleged a cause of action under 42 U.S.C. section 1983 for a violation of her son's Fourteenth Amendment rights to substantive due process. (Id.)

On December 23, 1998, the City filed a demurrer to the first amended complaint. (JA at p. 116.) On January 14, 1998, the trial court sustained the City's demurrer to the first amended complaint and dismissed it without leave to amend. (JA at pp. 190-191.) A judgment of dismissal was filed on February 2, 1999. (JA at p. 192.) Appellant filed a notice of appeal on March 12, 1999. (JA at p. 193-195.)

IV.

ISSUES PRESENTED

Whether section 230 of the federal Communications Decency Act provides the City immunity from liability based on material that is transmitted over the Internet by others on Library computers.

Whether appellant's requests for declaratory relief, stating that the City is liable for all future damage to appellant's children caused by the City providing unrestricted access to the Internet, are barred by the California Tort Claims Act (Gov. Code, § 810 et seq.).

Whether providing unrestricted access to the Internet on Library computers is actionable under Code of Civil Procedure section 526a as a waste of public funds.

Whether appellant may bring a public nuisance action based on the City providing unrestricted access to the Internet on Library computers.

Whether providing unrestricted access to the Internet on Library computers is a considered a dangerous condition of public property, as that term is used in the Tort Claims Act. (See Gov. Code, § 835.)

Whether the City has violated appellant's Fourteenth Amendment rights to substantive due process by providing unrestricted access to the Internet on Library computers.

V.

STANDARD OF REVIEW

When a demurrer is sustained without leave to amend, it is the duty of the appellate court to decide whether there is a reasonable possibility that the defect can be cured by amendment. If it can, the trial court has abused its discretion and the appellate court must reverse. If it cannot be reasonably cured, there has been no abuse of discretion. (Michaelian v. State Compensation Insurance Fund (1996) 50 Cal.App.4th 1093, 1105, citing to Kilgore v. Younger (1982) 30 Cal.3d 770, 781.) The appellant bears the burden of showing the appellate court how the complaint can be amended to state a cause of action. (Id., citing to Code of Civ. Proc., § 472c; Goodman v. Kennedy (1976) 18 Cal.3d 335, 349.)

VI.

LEGAL DISCUSSION

A. Section 230 of the Federal Communications Decency Act Provides the City Immunity from Liability Based on Material that is Transmitted Over the Internet by Others on Library Computers.

The Communications Decency Act of 1996 (the "Act"), part of the Telecommunications Act of 1996, became effective of February 8, 1996.[2] The Act represents an initial effort to define the appropriate scope of federal regulation of the Internet. At issue here is section 230 of the Act, which expressly preempts any state law cause of action that would make an Internet service provider liable for information originating with a third party. (47 U.S.C. § 230; see Zeran v. America Online, Inc. (4th Cir. 1997) 129 F.3d 327, and Blumenthal v. Drudge (D.D.C. 1998) 992 F.Supp. 44.)

1. Section 230 is Unambiguous and Directly Applicable.

In applying a federal statute, the appellate court must follow the rules of statutory construction enunciated by the United States Supreme Court. (Robbins v. Foothill Nissan (1994) 22 Cal.App.4th 1769, 1774.) Therefore, the court must first rely on the language of the statute itself: "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" (Kaiser Aluminum & Chemical Corp. v. Bonjorno (1990) 494 U.S. 827, 835 [108 L.Ed.2d 842, 110 S.Ct. 1570], quoting from Consumer Products Safety Commission v. GTE Sylvania (1980) 447 U.S. 102, 108 [64 L.Ed.2d 766, 100 S.Ct. 2051].)

Subdivision (d) (3) of section 230 provides, in relevant part, that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Subdivision (c) (1) of section 230 provides that "[n]o 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."

The elements of section 230 preemption, derived from the plain language of these two subdivisions, are: (1) state law causes of action; (2) which are directed toward a provider of an interactive computer service; and (3) which treat the provider as a publisher or speaker of offensive material. Each of these elements is present here.[3]

a. Section 230 Applies Equally to All State Law Causes of Action Regardless of the Relief Requested.

Subdivision (d) (3) of Section 230 extends the scope of preemption to both "liability" and "causes of action" that may be stated under state law. Therefore, it makes no difference in this case that appellant is requesting equitable relief in the form of an injunction in addition to her request for prospective damages. These requests for injunctive relief are nevertheless based on causes of action. The distinction between causes of action and injunctive relief is an important one: while a cause of action consists of the tort or other wrongful act pleaded in the

complaint, an injunction is an equitable remedy available to a person aggrieved by the torts or other wrongful acts. (See 5 Witkin Cal. Proc. (4th ed. 1997) Pleading, § 781, p. 238; § 778, p. 235.) "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted [citation]. (Emphasis added.)" (Shell Oil Co. v. Richter (1942) 52 Cal.App.2d 164, 168.)

b. The Library is a Provider of an Interactive Computer Service.

The allegations in this case relate to a public library. Under section 230, a public library can be a provider of an "interactive computer service." Subdivision (e) (2) of section 230 defines the term "interactive computer service " to mean ". . . 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. (Emphasis added.)" Here, the Library clearly falls within this definition.

c. The Causes of Action Contained in the Complaint Treat the Library as a Publisher or Speaker of Offensive Material

Because appellant's state law causes of action allege that the City is committing a tortious or wrongful act by distributing, or maintaining computers and services which distribute offensive material, they treat the Library as a ". . . publisher or speaker of . . . information provided by another information content provider." (47 U.S.C.A. § 230, subd. (c) (1).) The causes of action therefore are preempted by section 230.

In Zeran v. America Online, Inc., supra, 129 F.3d 327, the court squarely addressed the preemptive scope of subdivision (c) (1) of section 230. In that case, the plaintiff filed suit against a commercial interactive computer service provider alleging that the provider unreasonably and negligently delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. Holding that the plaintiff's claims were barred by subdivision (c) (1) of section 230, the Zeran court concluded that "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." (Id. at p. 330.)

The Zeran court went on to point out the Congressional purpose in establishing this statutory immunity:

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply

another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized Internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.' Id. § 230 (a) (3). It also found that the Internet and interactive computer services 'have flourished, to the benefit of all Americans, with a minimum of government regulation.' Id. § 230 (a) (4) (emphasis added). Congress further stated that it is 'the policy of the United States . . . to reserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.' Id. § 230 (b) (2) (emphasis added).

(Id.)

The plaintiff in Zeran attempted to avoid the preemptive scope of section 230 by arguing that the section did not apply to "distributors" of offensive material, but only to "publishers" of such material. (Id. at pp. 331-334.) The court unequivocally disagreed, finding that legally "distributor"and "publisher" liability were indistinguishable, and that to hold otherwise would be contrary to the clear intent of Congress in enacting section 230. (Id.)[4]

All of appellant's state law causes of action attempt to make the City liable for material that originates with a third party. Immunity from this type of liability is exactly what Congress had in mind when it enacted section 230.

2. Mainstream Loudoun v. Board of Trustees of the Loudoun County Library

Appellant relies heavily on the court's opinion in Mainstream Loudoun v. Board of Trustees of the Loudoun County Library (E.D.Va 1998) 2 F.Supp.2d 783 and 24 F.Supp.2d 552, to support her argument that section 230 is inapplicable here. (See Opening Brief at pp. 5-6.) Mainstream Loudoun involves the constitutionality of a county library policy that required site-blocking software be installed on the library's computers. In that case, the court summarily concluded, among other things, that section 230 did not provide the Loudoun County Library immunity from an action for declaratory and injunctive relief based on a violation of the First Amendment. (Id., 2 F.Supp.2d at 790, 24 F.Supp.2d at 561.)

Appellant's blind reliance on Mainstream Loudoun to support her argument against the application of section 230 here reflects a confused reading of the court's opinions. Mainstream Loudoun involves the immunity contained in subdivision (c) (2) of section 230, it does not involve the immunity contained in subdivision (c) (1) of section 230, which is at issue in this case.

As explained in Zeran v. America Online, Inc., supra, 129 F.3d 327, the Congressional purpose in enacting section 230 was twofold. First, section 230 was enacted to ". . . maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." (Id. at p. 330; 47 U.S.C. § 230, subds. (b) (1) and (2).) Second, section 230 was enacted to ". . . encourage service providers to self-regulate the dissemination of offensive material over their services." (Zeran v. America Online, Inc., supra, 129 F.3d at p. 331; 47 U.S.C. § 230, subds. (b) (3) and (4).)

The twofold purpose in enacting section 230 is embodied in two distinct forms of immunity. First, subdivision (c) (1) of section 230 establishes "content provider" immunity:

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.

Second, subdivision (c)(2) of section 230 establishes "filtering provider" immunity:

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

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

The "content provider" immunity derived from subsection (c) (1) of section 230 was the type of immunity that was at issue in Zeran v. America Online, Inc., supra, 129 F.3d 327, Blumenthal v. Drudge, supra, 992 F.Supp. 44 and Doe v. America Online, Inc., supra, 718 So.2d 385. These cases involve the transmission of allegedly offensive and defamatory material over the Internet via the service provider America Online.

Mainstream Loudoun, on the other hand, involves the "filtering provider" immunity derived from subdivision (c) (2) of section 230. The court in Mainstream Loudoun was well aware of the distinction between subdivisions (c) (1) and (c) (2). (See Mainstream Loudoun, 2 F.Supp.2d at p. 789 [quoting subdivision (c) (2)], 24 F.Supp.2d at p. 561 [citing subdivision (c) (2)] and 24 F.Supp.2d at p. 565, ftnt. 15 ["However, to the extent defendant's concern is with its own criminal liability, the Fourth Circuit has clearly stated that service

providers are not liable 'for information originating with a third-party user of the service.' See Zeran v. American Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)."].) This explains why the court in Mainstream Loudoun made the following statement:

Thus, as its name applies, § 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. 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 in § 230 would bar the instant action, which is for declaratory and injunctive relief. [Citations.]

(Id., 2 F.Supp.2d at p. 790.)

The Mainstream Loudoun court undoubtedly realized that, while Congress does have the power to preempt state law causes of action, it does not have the power to preempt causes of action based on violations of the United States Constitution, including the First Amendment. Furthermore, the Mainstream Loudoun court apparently recognized that the immunity conferred by subdivision (c) (2) may be narrower than the immunity conferred by subdivision (c) (1). Subdivision (c) (2) provides in relevant part only that "[n]o provider or user of an interactive computer service shall be held liable . . ." (Emphasis added.). Alternatively, the broader language of subdivision (d) (3), at issue here, applies to both liability and causes of action. (See discussion ante at pp. 12-13.)

3. Civil v. Criminal Liability

Throughout the trial court proceedings and in her Opening Brief, appellant has attempted to frame this case as criminal in nature. This is a fundamental mischaracterazation. This case involves civil causes of action and civil liability. It has nothing to do with criminal law.

First, appellant contends that section 230 does not apply here because subdivision (d) (1) of the section provides that it should not be construed to impair the enforcement of criminal laws. (Opening Brief at p. 6-7.) The enforcement of criminal laws is not an issue in this lawsuit. To the extent appellant is contending that library employees are violating federal or state criminal laws the appropriate course of action would be for her to file a complaint with the appropriate law enforcement officials.

Second, appellant offers two hypothetical fact situations to support her argument that Congress never intended section 230 to provide what she calls "public exhibitor" immunity. (Opening Brief at pp. 7-8 [". . . CDA § 230 was never designed to provide this sort of 'public exhibitor' immunity."].) Both hypotheticals involve men engaging in criminal activity with children and again

have nothing to do with the civil liability at issue here. Section 230 does not prevent the application of state or federal criminal statutes,[5] and would not prevent the criminal prosecution of appellant's hypothetical men.

B. Appellant's Requests for Declaratory Relief are Barred by the California Tort Claims Act (Gov. Code § 810 et seq.).

The second and third causes of action contained in the complaint request declaratory relief ". . . stating that the City of Livermore is legally liable for all future damage to plaintiff's children caused by her children accessing, acquiring, displaying, and/or printing sexual and other material harmful to minors on any library computer connected to the Internet or World Wide Web." (Complaint, JA at pp. 4-5.)

These requests for prospective damages are precluded by the California Tort Claims Act (the "Tort Claims Act") (Gov. Code, § 810 et seq.). The Tort Claims Act makes government tort liability dependant on statute. (Id. at § 815(a).).[6] Recovery under the Tort Claims Act is limited to actual injury suffered before the commencement of the suit and only after a written claim has been presented to the City and rejected.[7] Prospective damages cannot be recovered. (See Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal.3d 862, 869.) Therefore, appellant's requests for declaratory relief for prospective damages are subject to demurrer without leave to amend.

C. Providing Unrestricted Internet Access to the Internet on Library Computers is Not Actionable Under Code of Civil Procedure Section 526a as a Waste of Public Funds.

The first cause of action contained in the complaint alleges that "[u]sing public funds to access, display, and/or prints [sic] matter harmful to minors at the request of or for the use of a minor is a waste of public funds." (Complaint, JA at p. 3-4.)

This cause of action is based on Code of Civil Procedure section 526a, which provides in relevant part that:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or within one year before the commencement of the action, has paid, a tax therein. (Emphasis added.)

In order to allege a cause of action under section 526a, not only must a plaintiff allege the payment of property taxes within the jurisdiction (Cornelius v. Los Angeles County Metropolitan Transportation Authority (1996) 49 Cal.App.4th 1761, 1774.), he or she must also plead facts sufficient to show that the

expenditure of public funds is in fact illegal. (County of Los Angeles v. Superior Court (1967) 253 Cal.App.2d 670, 678; National Organization for Reform of Marijuana Laws v. Gain (1979) 100 Cal.App.3d 586, 598; Fort Emory Cove Boatowners Association v. Cowett (1990) 221 Cal.App.3d 508, 515.)

Appellant only alleges that she is a "taxpayer." (JA at p. 2.) This is not sufficient to state a cause of action under section 526a. (Cornelius v. Los Angeles County Metropolitan Transportation Authority, supra, 49 Cal.App.4th at 1774.)

Moreover, allowing appellant to amend this allegation to properly establish standing, as she requests in her Opening Brief, would do no good. (See Opening Brief at p. 9.) The appellant could never plead facts sufficient to show that the expenditure of public funds on providing unrestricted Internet access is illegal, and could therefore never state a cause of action under section 526a.

D. Appellant is Precluded From Bringing a Public Nuisance Action.

The second cause of action contained in the complaint alleges that "[a]llowing minors to use the computers to access, acquire, display, and/or print sexual and other material harmful to minors is a public nuisance." (Complaint, JA at p. 4.)

Appellant is precluded from bring a public nuisance action in this case because: (1) she lacks standing under Civil Code section 3493; and (2) Civil Code section 3482 bars nuisance actions against public entities where the alleged wrongful acts are expressly authorized by statute such as in this case.

1. Civil Code Section 3493

Under the facts alleged, appellant has no standing to sue for a public nuisance.[8] Civil Code section 3493 specifically provides that "[a] private person may maintain an action for public nuisance, if it is specially injurious to himself, but not otherwise." In order to bring an action under section 3493, the public nuisance must be a private nuisance to the plaintiff, or the plaintiff must have suffered damages different in kind from the general public. This requirement stems from the fundamental principle that:

. . . a private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependant upon a disturbance of rights in land but upon an interference with the rights of the community at large. (Prosser on Torts (3d ed.) at p. 594.) Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind form that suffered by the general public. [Citations.] Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public. [Citations.] Where, on the other hand, the nuisance is a private as well as a public one, there is no

requirement that the plaintiff suffer damage different in kind from that suffered by the general public and he 'does not lose his rights as a land-owner merely because others suffer damage of the same kind, or even of the same degree, . . . ' [Citations.]

(Venuto v. Owens-Corning Fiberglas Corporation (1971) 22 Cal.App.3d 116,124.)

First, appellant has not properly alleged a private nuisance because she has not alleged any interference with the use and enjoyment of property. Absent such an allegation, appellant cannot claim that providing unrestricted Internet access to minors is a private nuisance to her. (See id. at pp. 124-125; Koll-Irvine Center Property Owners Association v. County of Orange (1994) 24 Cal.App.4th 1036, 1041; Friends of H Street v. City of Sacramento (1993) 20 Cal.App.4th 152, 160.)

Second, the Appellant has not alleged a "special injury" different in kind from the general public.[9] Appellant claims that she has satisfied the "special injury" requirement of Civil Code section 3493 because she has alleged that her son ". . . suffered actual psychological injury by being repeatedly exposed to material deemed obscene material and material 'harmful to minors'." (Opening Brief at p. 10.) This is not sufficient to state a legal cause of action.

Simply alleging an injury does not meet the requirements of Civil Code section 3493. The special injury must be of a character different in kind and not merely in degree from that suffered by the general public.[10] (Koll-Irvine Center Property Owners Association v. County of Orange (1994) 24 Cal.App.4th 1036, 1040-1041 ["Koll-Irvine argues its allegations of mental anguish, risk of higher insurance premiums, diminished property values and reduced usefulness of its premises constitute unique damages due to its proximity to the Fuel Farm. But these damages apply to all the homes and businesses in the area of the airport."]; Institoris v. City of Los Angeles (1989) 210 Cal.App.3d 10, 21 ["In general, the annoyance and inconvenience suffered by Plaintiff (interruption of television and radio communication, interruption of sleep and general annoyance), which is the basis for the emotional distress claim, is the same kind as that suffered by other residents in the general vicinity of Plaintiff's property; the only difference is the degree to which a particular resident experiences the aircraft annoyance."]; Brown v. Petrolane, Inc. (1980) 102 Cal.App.3d 720, 726 [Fear of a liquefied petroleum gas storage facility near plaintiffs' homes, which were located in an area of recurring seismic activity, was a fear that differed between individuals within the community, if at all, in degree rather than kind.]; Venuto v. Owens-Corning Fiberglass Corporation, supra, 22 Cal.App.3d 116, 124 -125 ["In essence the complaint alleges nothing more than that the health of the general public and that of plaintiffs, as members of the public, is being injured because of defendant's activity [manufacturing fiberglass], but that the health of each plaintiff is being injured to a greater degree [because of their allergies and respiratory disorders]. Plaintiffs' alleged damage is, therefore, not different in kind but only in degree from that shared by the general public."].)

Appellant's complaint makes clear that the alleged injuries suffered by her son are not different in kind from those allegedly suffered by the general public. (Complaint, JA at p. 4, ¶ 25 ["Moreover, any person who is in the vicinity of the computer and glances at it when obscene images are being displayed will be exposed to obscene material even if they did not intend to view it."].) The Library is open to the public and Internet access is available to all patrons. The alleged injuries suffered by appellant's son may be different in degree by those allegedly suffered by other library patron, but they are not different in kind.

2. Civil Code section 3482

Appellant's nuisance cause of action is also precluded by Civil Code section 3482, which bars an action for nuisance against a public entity where the alleged wrongful acts are expressly authorized by statute. The Library's Internet Policy, having been adopted by the Library Board within the scope of authority conferred upon it by the Legislature (Ed. Code, § 18919), has the same force within the City as a statute passed by the Legislature has throughout the state. (Wheeler v. Gregg (1949) 90 Cal.App.2d 348, 370.)

The application of Civil Code section 3482 was discussed in some detail in Friends of H Street v. City of Sacramento, supra, 20 Cal.App.4th 152. In that case, the plaintiffs sought injunctive relief against the city to reduce traffic speed on their street on the ground that the condition of the street constituted a public nuisance. (Id. at pp. 156-159.) The court held that the trial court properly sustained the City's demurrer without leave to amend on the basis that the complaint was barred by Civil Code section 3482. This holding was based on the court's finding that:

The Vehicle Code and Streets and Highways Code authorize the City to regulate traffic within its jurisdictions, and, in its discretion, expend funds to generally manage and control its streets. [Citations.] Although the relevant statutes do not expressly authorize the City to operate its streets in a manner which generates traffic, noise, fumes, litter, and headlight glare . . . such loss of peace and quiet is a fact of urban life which must be endured by all who live in the vicinity of freeways, highways, and city streets.

(Id. at p. 163.)

The City does not dispute that, under Civil Code section 3482 , the statute must contemplate the doing of the very act which occasions the injury. The alleged wrongful act here (unrestricted Internet access), however, is specifically contemplated in the Library's Internet Policy. Not only does the Policy expressly contemplate unrestricted Internet access, it also contemplates that minors will be using the Library's computers:

Parents and guardians are encouraged to work closely with their children. Parents are expected to monitor and supervise children's use of the Internet in selecting material that is consistent with personal and family values. The Livermore Public Library does not provide this monitoring or supervision.

(JA at p. 65.)

E. Providing Unrestricted Access to the Internet on Library Computers Cannot be Considered a Dangerous Condition of Public Property as That Term is Used in the Tort Claims Act.

The third cause of action contained in the complaint alleges that the Library premises are unsafe for children and requests injunctive relief to prevent a multiplicity of damage suits. (Complaint, JA at p. 5.)

What appellant terms "premises liability", when applied to a public entity, is referred to in the Tort Claims Act as liability for a dangerous condition of public property, the limitations of which are set forth in Government Code section 835:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

The term "dangerous condition" is defined in subdivision (a) of section 830 of the Government Code as ". . . a condition of property that creates a substantial (as distinguished form a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

To the extent appellant is arguing that providing unrestricted Internet access to minors is a dangerous condition of public property because it increases the possibility that minors will be exposed to obscene and harmful material posted on the Internet by third parties, her argument is precluded by the Tort Claims Act. It is settled law that a public entity cannot be held liable for a dangerous condition of public property based on third-party conduct alone, whether that conduct is criminal or merely negligent. (See Hayes v. State of California (1974) 11 Cal.3d 469, 472.) Instead, in order for liability to be imposed, the third-party conduct

must be coupled with a physical defect of the public property. (Id., see also State v. Superior Court (Young) (1995) 32 Cal.App.4th 325, 327-328 [Holding that demurrer should have been sustained without leave to amend because a public entity was not liable for injuries to a plaintiff who was thrown from her horse when a bicyclist came speeding down the same state park trail.]; Lompoc Unified School District v. Superior Court (1993) 20 Cal.App.4th 1688, 1696-1697 [Existence of football field, unscreened from passing motorists, does not constitute a dangerous condition merely because a motorist's attention may be drawn to the activity on the premises.]; Baldwin v. Zoradi (1981) 123 Cal.App.3d 275, 291-294 [Lack of supervision of school dormitory where alcoholic beverages were consumed is not dangerous condition of public property.]

Appellant has not, and cannot, allege that the Library's computers are physically defective. Because the Tort Claims Act precludes any suit for damages, injunctive relief is not necessary, or available, to prevent a multiplicity of lawsuits. (See Code of Civ. Proc., § 526, subd. (a) (6).)

F. Providing Unrestricted Access to the Internet is not Violative of Appellant's Fourteenth Amendment Rights to Substantive Due Process.

The fourth cause of action contained in the first amended complaint, is based on 42 U.S.C. section 1983 and alleges that the City has violated appellant's son's Fourteenth Amendment right to substantive due process. (First amended complaint, JA at pp. 111-113.)

Section 1983 provides in relevant part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

(42 U.S.C. § 1983.)

To state a cause of action under section 1983, the conduct complained of must have: (1) been committed by a person acting under color of state law;[11] and (2) deprived appellant of a constitutional right. (Balistreri v. Pacifica Police Department (9th Cir. (1988) 901 F.2d 696, 699.) Appellant fails to show that the City deprived her or her son of a constitutional right. The City has no constitutional duty to protect appellant's son and has not taken any action that can be characterized as arbitrary in the constitutional sense.

1. The City Does Not Have a Constitutional Duty to Protect Appellant's Son From Offensive Materials That are Transmitted Over the Internet.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., amdt. 14, § 1.)

In DeShaney v. Winnebago County Department of Social Services (1989) 489 U.S. 189 [103 L.Ed.2d 249, 109 S.Ct. 998], the United States Supreme Court squarely addressed the purpose and limitations of the Due Process Clause. In DeShaney, the county received numerous complaints that a father routinely beat his son. Although the county took some protective measures, it never tried to remove the child from the father's custody. Eventually, the father administered a beating that left the child permanently brain damaged and profoundly retarded. In upholding judgment in favor of the county, the Supreme Court stated that:

. . . [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' [citations]. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.

(Id., 489 U.S. at pp. 195-196.)

Although the Supreme Court in DeShaney rejected liability in constitutional tort when the governmental defendant has no connection to the plaintiff other than its ability to render aid, it did recognize "certain limited circumstances" where the Constitution ". . . imposes upon the State affirmative duties of care and protection with respect to particular individuals." (Id. at p. 198.)

First, the Court recognized that ". . . when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. [Citation and fn.]" (Id. at pp. 199-200.) The affirmative duty to protect in the custodial setting ". . . arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citation and fn.]" (Id.)

Second, DeShaney suggests that if the state contributes in some way to a person's peril, or if its undertakings worsen the plaintiff's position, a constitutional duty to act may arise:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

(Id. at p. 201.) These two duties have respectively come to be known as the "special relationship" duty and the "danger created duty." Appellant has failed to allege facts sufficient to trigger either of these duties.

a. The City Does Not Have a Duty Based on a "Special Relationship."

A duty based on a "special relationship" arises where the plaintiff is truly rendered helpless by his or her relation with the state, as in the case of custody or involuntary hospitalization. (L.W. v. Grubbs (9th Cir. 1992) 974 F.2d 119.) Where the state does not render the plaintiff helpless, no "special relationship" exists. For example, courts have refused to find that the state enters into a "special relationship" with students because it requires them to attend school. (See J.O. v. Alton Community Unit School District 11 (7th Cir. 1990) 909 F.2d 267, 272; and Graham v. Independent School District No. I-89 (10th Cir. 1994) 22 F.3d 991.) Similarly, a "special relationship" does not arise where a person is required to appear in court to participate in various legal proceedings. (See Dorris v. County of Washoe (Nev. 1995) 885 F.Supp. 1383, 1385 ["The state may have required Dorris to appear in court, but it did not thereby assume responsibility for her 'basic human needs' or 'entire personal' life; she retained 'substantial freedom to act.' [Citation.]".)

Appellant does not, and cannot, allege that by entering the library her son was rendered helpless or that he was in effect placed in custody by City librarians or the mesmerizing effect of the City's Internet terminals. The City does not have a duty based on a "special relationship."

b. The City Does Not Have a Duty Based on the Creation of a Danger.

The Ninth Circuit has addressed the elements of a "danger created duty" in Wood v. Ostrander (9th Cir. 1989) 879 F.2d 583 and L.W. v.Grubbs, supra, 974 F.2d 119. In both cases, the court made clear that, in order to base a claim on a "danger created duty," there must be direct affirmative conduct on the part of the state in placing the plaintiff in danger. Here, appellant has not claimed, nor could she ever claim, that the City took any affirmative direct action to place her son in

danger.[12] If any direct action was taken, it was taken solely by appellant's son when he took the steps necessary to access offensive material on the Internet.[13]

In Wood v. Ostrander, supra, 879 F.2d 583, a state trooper stopped the car in which the plaintiff was riding, arrested and removed the driver, impounded the car, and left the plaintiff stranded in a high-crime area at 2:30 a.m. The plaintiff was subsequently raped. The court held that the direct affirmative conduct of the trooper in arresting the driver, impounding his car, and apparently stranding the plaintiff in a high-crime area, distinguished the plaintiff from the general public and triggered a duty of the police to afford her some measure of peace and safety. (Id. at p. 590.)

In L.W. v. Grubbs, supra, 974 F.2d 119, the State of Oregon hired the plaintiff, a registered nurse, to work in the medical clinic of a medium security prison. Although the state led her to believe that she would not be required to work alone with violent sex offenders, the State selected a known violent sex offender to work alone with the plaintiff in the clinic. In fact, according to his files, the inmate was considered very likely to commit a violent crime if placed alone with a female. The inmate assaulted, battered, kidnaped and raped the plaintiff. The court held that the actions of the state in knowingly assigning the inmate to work with the plaintiff, despite its knowledge of his violent proclivities, and enhancing her vulnerability to attack by misrepresenting to her the risks of attending her work supported section 1983 liability. (Id. at pp. 121-122.)

In contrast to Wood v. Ostrander and L.W. v.Grubbs, here there is no direct state action. In fact, it is the inaction of the City which is the basis of appellant's claims.

Appellant cannot argue that, by merely inviting children to the Library, the City has taken sufficient action so as to state a cause of action for a violation of substantive due process. (See first amended complaint, JA at p. 112, ¶ 40 ["Upon information and belief, plaintiff alleges that the library advertises itself as a place where children are welcome and that the library puts on special programs to entertain and educate children. Upon information and belief, plaintiff further alleges that the library invites, encourages, and entices children to come to the library and use the resources at the library, including the computers."].) This type of argument was flatly rejected in Carlton v. Cleburne County (8th Cir. 1996) 93 F.3d 505.

The plaintiffs in Carlton were sightseers who were injured after a county bridge collapsed. The plaintiffs argued that, by offering the bridge as a tourist location, the county affirmatively placed them in danger, and thereby created a constitutional duty. The court rejected this argument, holding that any action taken on the part of the county was directed towards the general public and did not create a duty under DeShaney. (Id. at pp. 508-509.)

As in Carlton, if any action was taken by the City in inviting children to the Library, it was directed towards the general public. This type of general indirect contact has never been recognized as "state action" for the purposes of the Fourteenth Amendment. (See Martinez v. California (1980) 444 U.S. 277, 286 [62 L.Ed.2d 481, 100 S.Ct. 553] [Girl's death was too remote a consequence of parole officers' action in releasing murderer because ". . . the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger."]; Aaitui v. Grande Properties (1994) 29 Cal.App.4th 1369, 1383 [City's failure to abate unsafe pool was not directly related to child's drowning and was ". . . not the stuff of which the Supreme Court has declared constitutional protections . . . ."]; Fleming v. State of California (1995) 34 Cal.App.4th 1378 [Parole officer's release of murder and failure to arrest him after he left the state was insufficient to constitute a deprivation of substantive due process.].)

DeShaney governs this case. The City does not have a constitutional duty to protect appellant's son from his own actions or actions of third parties who may transmit offensive material over the Internet.

2. The City Did Not Arbitrarily Exercise Power in Violation of Substantive Due Process.

Not only do appellant's claims fail to trigger a constitutional duty, the also fail to show that the City arbitrarily and oppressively exercised its power in violation of substantive due process.

Due process protection in the substantive sense limits what the government may do in both its legislative and executive capacities. (County of Sacramento v. Lewis (1998) 523 U.S. 833 [140 L.Ed.2d 1043, 118 S.Ct. 1708].) The criteria used to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. (Id.)

Appellant's allegations involve both legislative and executive action. To the extent that the allegations involve the adoption and implementation of the Library's Internet Policy, they relate to legislative action. (See discussion ante at p. 29.) To the extent that the appellant is alleging that the Library ". . . invites, encourages, and entices children to come to the library and use the resources at the library, including the computers" and ". . . has never publicly stated that it has the policy of allowing minors to view obscenity and pornography on its computers . . .", the allegations relate to executive action. (First amended complaint, JA at p. 112, ¶¶ 40, 41.) Regardless of the type of action alleged, appellant fails to state a cause of action for a violation of substantive due process.

a. The Library's Internet Policy Does Not Violate Substantive Due Process

Appellant suggests that judicial review of the Library's Internet Policy should be governed by the "strict scrutiny" test because ". . . this case involves the

fundamental right and liberty interest of personal security and freedom from infliction of pain . . . ." (Opening Brief at p. 15.) [14]

Ordinarily, judicial review of legislative action is governed by the "rational relationship" test: "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." (Nebbia v. New York (1934) 291 U.S. 502, 537 [78 L.Ed. 940, 54 S.Ct. 505].)

However, where the legislative action limits a fundamental constitutional right, the Due Process Clause provides for heightened judicial scrutiny. In such cases, judicial review is governed by the "strict scrutiny" test: "'. . . the State may prevail only upon showing a subordinating interest which is compelling,' [citation]. The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' [Citations.]" (Griswold v. Connecticut (1965) 381 U.S. 479, 497 [14 L.Ed.2d 519, 85 S.Ct. 1678] (conc. opn. of Goldberg, J.).)

In addition to those rights specifically enumerated in the Constitution, the United States Supreme Court has found other rights to be so essential to individual liberty in our society that they are deemed fundamental and worthy of strict judicial scrutiny. The list of rights protected under the Due Process Clause and deemed fundamental by the Supreme Court was outlined in Washington v. Glucksberg (1997) 521 U.S. 702 [138 L.Ed.2d 772, 117 S.Ct. 2258]:

In a long line of cases, we have held that , in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, ibid; Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, Casey, supra. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. Cruzan, 497 U.S., at 278-279, 110 S.Ct., at 2851-2852.

(Id., 521 U.S. at p. 720.) In Glucksberg, the Supreme Court refused to expand this list to include the right to assistance in committing suicide. (Id. at p. 727.)

The Library's Internet Policy does not even remotely implicate or interfere with any fundamental rights or liberties protected by the Due Process Clause. There is no fundamental right to be free from offensive material that is transmitted over the

Internet. (See Brown v. Hot, Sexy and Safer Products, Inc. (1st Cir. 1995) 68 F.3d 525 [Students' compelled attendance at a sexually explicit AIDS awareness assembly did not amount to a violation of substantive due process. The court found no fundamental right to be free from "exposure to vulgar and offensive language and obnoxiously debasing portrayals of human sexuality." (Id.at p. 534.)]].) Therefore, judicial review of the Policy is governed by the "rational relationship" test. This test is easily satisfied here.

The Library's Internet Policy is reasonably related to the City's legitimate goal of allowing ". . . each individual to have access to constitutionally protected materials . . ." (JA at p. 65), and is presumed to be constitutionally valid.

b. The Executive Actions Alleged By Appellant Do Not Violate Substantive Due Process.

The United States Supreme Court has repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense." (County of Sacramento v. Lewis, supra, 523 U.S. at p. 846, citing to Collins v. Harker Heights (1992) 503 U.S. 115, 129 [117 L.Ed.2d 261, 112 S.Ct. 1061].) Therefore, the cognizable level of executive abuse of power is that which "shocks the conscience". (Id.) The type of conduct which "shocks the conscience" was discussed in detail by the United States Supreme Court in County of Sacramento v. Lewis, supra, 523 U.S. 833, which involved substantive due process claims arising from the unintentional killing of an individual by law enforcement officers:

It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have make it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. . . . We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. [Citations.] It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. [Citation.]

(Id. at p. 848.)

The court in Lewis then went on to explain that the level of culpability that shocks the conscience in one environment may not be ". . . so patently egregious in another . . .", and that ". . . substantive due process demands an exact analysis of

circumstances before any abuse of power is condemned as conscience-shocking." (Id. at p. 850.)

The plaintiffs in Lewis contended only that the officers had acted in "conscious disregard" of the individual's life. Based on this, the court held that the plaintiff's claims did not rise to the level of culpability necessary to implicate a substantive due process theory of relief. (Id. at p. 855.) The court held that ". . . in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." (Id. at p. 836, see also Onossian v. Block (9th Cir. 1999) 175 F.3d 1169 [Holding that officers' conduct in pursuing a reckless driver, who ultimately struck and severely injured the plaintiff, did not "shock the conscience" within the meaning of Lewis.].)

In this case, the conduct alleged to be shocking appears to be the City's failure to prevent access to offensive material or to adequately warn parents and children of the potential dangers associated with having a policy of unrestricted Internet access. This does not rise to the level of conscience-shocking as described in Lewis.

In Collins v. City of Harker Heights, supra, 503 U.S. 115, the United States Supreme Court held that a failure to warn of potential dangers in the employment setting could not be characterized as arbitrary, or conscience-shocking, in a constitutional sense. The plaintiff in Collins was the widow of a city sanitation department employee who died of asphyxia after entering a manhole to unstop a sewer line. In rejecting the plaintiff's claim that the city's "deliberate indifference" to her husband's safety was conscience-shocking governmental action, the court stated the following:

We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' [citation], we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law, [citations]. The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. [Citations.]

(Id., 503 U.S. at p. 128, see also Brown v. Hot, Sexy and Safer Productions, Inc., supra, 68 F.3d at p. 531 [Students' compelled attendance at a sexually explicit AIDS awareness assembly did not "shock the conscience."].)

As in Collins, appellant's allegations cannot be properly characterized as arbitrary, or conscience-shocking, in the constitutional sense. Appellant's attempt to simply repackage her defective state statutory causes of action as constitutional violations must fail. Something more than this is needed to support a substantive due process claim.

VII.

CONCLUSION

There is no possibility that the numerous defects contained in the appellant's complaints can be cured by amendment. The trial court correctly followed and applied the plain language of section 230 and correctly rejected the appellant's tenuous constitutional argument. The trial court's decision is further supported by appellant's failure to follow and meet established state law requirements. The trial court's decision should be affirmed.

Copyright Tech Law Journal.

Date:________________ Respectfully submitted,
____

Daniel G. Sodergren
Assistant City Attorney
Attorney for Respondent
City of Livermore
October 18, 1999

A:\KATHLEEN October 18, 1999

FOOTNOTES

[1] Additionally, during the 1997-98 legislative session, the Legislature added section 18030.5 to the Education Code which provides as follows:

(a) Every public library that receives state funds pursuant to this chapter and that provides public access to the Internet shall, by a majority vote of the governing

board, adopt a policy regarding access by minors to the Internet by January 1, 2000.

(b) Every public library that is required to adopt a policy pursuant to subdivision (a) shall make the policy available to members of the public at every library branch.

[2] In 1997, the United States Supreme Court invalidated two parts of the Act as being unconstitutional (47 U.S.C. § 223, subd. (d) and a portion of 47 U.S.C. § 223, subd. (a)). (Reno v American Civil Liberties Union (1997) 521 U.S. 844 [138 L.Ed.2d 874, 117 S.Ct. 2329].) Section 230 was not at issue in Reno, and remains valid.

[3] As used in this brief, the term “state law causes of action” refers to those causes action contained in appellant’s original complaint, as distinguished from the Fourteenth Amendment substantive due process claim contained in appellant’s first amended complaint, discussed below. (Infra at pp. 33-50.)

[4] An identical “distributor” argument was recently considered and rejected by the Fourth District Court of Appeal of Florida. (Doe v. America Online, Inc. (1998) 718 So.2d 385 (appeal pending before the Florida Supreme Court (No. 94-355), argued September 1, 1999 (see www.wfsu.org/gavel2gavel)). In that case, the plaintiff brought an action against the interactive computer service provider America Online, Inc. alleging that it was liable for allowing a third party to advertise and arrange for the sale and distribution of pornographic videotapes and photographs of her minor son over the company’s service. The appellate court dismissed this argument based on the immunity contained in subdivision (c) (1) of section 230, and certified several questions involving the applicability of section 230 to the Florida Supreme Court.

[5] Section 230 provides in relevant part that “[n]othing in this section shall be construed to impair the enforcement of . . . any . . . Federal criminal statute.” (47 U.S.C. § 230, subd. (d) (1).) Even though this subdivision only speaks to federal criminal statutes, enforcement of state criminal statutes (including Penal Code section 313.1, as cited by the appellant in her hypothetical (Opening Brief at p. 8)) is no way prevented by section 230. (See 47 U.S.C. § 230, subd. (d) (3) [”Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”].)

[6] Ordinarily, requests for declaratory relief are not affected by the Tort Claims Act and the Act’s claims-filing requirements because such requests are usually brought to obtain specific nonmonetary relief. (See Minsky v. City of Los Angeles (1974) 11 Cal.3d 113, 121.) However, in this case, appellant’s requests for declaratory relief do not simply ask for a declaration of “rights and duties” as provided for in Government Code section 1060; instead, they ask the court to

impose prospective monetary damages. (See Baiza v. Southgate Recreation and Park District (1976) 59 Cal.App.3d 669, 673.)

[7] Under the Tort Claims Act, an action for “money damages” may not be maintained against the City unless a written claim has first been timely presented to the City and rejected in whole or in part. (Gov. Code, §§ 905, 905.2, 945.4.) Compliance with this procedure must be alleged by a plaintiff to state a cause of action; failure to do so is subject to demurrer. (See Dujardin v. Ventura County General Hospital (1977) 69 Cal.App.3d 350, 355; Chase v. State (1977) 67 Cal.App.3d 808, 812.) Here, the complaint fails to properly allege compliance with the claims-filing procedures of the Tort Claims Act.

[8] Civil Code section 3479 defines a nuisance as “[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.” Civil Code sections 3480 and 3481 divide the class of nuisances into public and private. A public nuisance “affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” (Civ. Code, § 3480.) A private nuisance is defined as every nuisance not included in the definition of public nuisance. (Civ. Code, § 3481)

[9] Appellant cites People ex rel. Busch v. Projection Room Theatre (1976) 17 Cal.3d 42 to support her standing argument. (Opening Brief at p. 10.) The public nuisance action in the Busch case was “. . . brought by public officials acting on behalf of the public generally and proceeding under provisions (see Code Civ. Proc., § 731) which expressly confer standing upon them.” (17 Cal.3d at p. 51.) This case is inapplicable here, where the issue is whether a private person has standing to bring a public nuisance action.

[10] Appellant cites Buchanan v. Los Angeles County Flood Control District (1976) 56 Cal.App.3d 757 and Beck Development Company v. Southern Pacific Transportation Company (1996) 44 Cal.App.4th 1160 to support her claim of special injury. (Opening Brief, pp. 10-11.) Both of these cases involved physical interference with the enjoyment of the plaintiffs’ land. In Buchanan it was erosion of the plaintiff’s land through improper activity of a flood control district. (56 Cal.App.3d at 768.) In Beck it was contamination under the plaintiffs property. (44 Cal.App.4th at 1214.) Therefore, both of these cases also involved private nuisances. Where the nuisance is a private as well as public, as in these cases, there is no requirement that the plaintiff suffer damage different in kind from that of the general public. (Venuto v. Owens-Corning Fiberglass, supra, 22 Cal.App.3d 116, 124.) These cases are inapplicable here, where there is no interference with appellant’s property and therefore no private nuisance. Here, appellant must still suffer damages different in kind from that of the general public.

[11] In Monell v. New York City Department of Social Services (1978) 436 U.S. 658 [56 L.Ed.2d 611, 98 S.Ct. 2018], the United States Supreme Court held that Congress intended municipalities to be included among those persons to whom section 1983 applies. (Id., 436 U.S. at pp. 688-689.) However, the Court made it clear that municipalities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." (Id. at pp. 690-691.) The City does not dispute that the facts alleged in the first amended complaint establish the existence of a municipal policy. Therefore, this discussion focuses only on whether the City deprived the appellant of a constitutional right.

[12] Although appellant's Opening Brief claims that the City took affirmative direct action (". . . 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"), no such allegations are contained in appellant's complaint or first amended complaint. (See Opening Brief, p. 7.)

[13] As was pointed out by the United States Supreme Court in Reno v. American Civil Liberties Union, supra, 521 U.S. 844:

Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.'

(Fn. omitted.) (Id. at p. 854.)

[14] Appellant cites to Wood v. Ostrander, supra, 879 F.2d 583, 589, to support her claim that a child has a "liberty interest in personal security and freedom from restraint and infliction of pain." (Opening Brief at p. 14.) This language, quoted from Wood, was being used in that case to describe the holding in Ingraham v. Wright (1977) 430 U.S. 651 [51 L.Ed.2d 711, 97 S.Ct. 1401]. In Ingraham, the Supreme Court upheld the use of corporal punishment for children by state school teachers so long as the state had some procedure to later determine the propriety of such actions and impose liability for any excessive use of force. The majority opinion in Ingraham fully accepted the position that physical restraint constitutes a deprivation of liberty for which some process is due unless it would be of an extremely brief and de minimis nature. Ingraham is inapplicable in this case. This case does not involve physical restraint or procedural due process.