UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO STRIKE TESTIMONY OF GREGORY C. LISBY OR, IN THE ALTERNATIVE, TO DISQUALIFY EXPERT

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit ("Plaintiff"), through counsel, and files this her Brief in Support of Motion to Strike Testimony of Gregory C. Lisby, Ph.D., J.D., or in the Alternative, to Disqualify Expert with this Court as follows:

I. BACKGROUND AND STATEMENT OF FACTS

This case arises from Defendant LFP Publishing Group, LLC's ("Defendant") unauthorized publication of nude and partially nude images of Nancy Benoit in the March 2008 issue of *Hustler Magazine*. A cause of action for violation of the right of publicity was brought by Plaintiff, Nancy Benoit's mother, as Representative of the Estate of Nancy Elizabeth Benoit. This Court granted Defendant's Motion to Dismiss on October 6, 2008. Plaintiff appealed, and on June 25, 2009, the Eleventh Circuit Court of Appeals reversed the judgment of the District Court, and issued an opinion holding that Plaintiff had properly stated and proven a claim for violation of the right of publicity. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009). Specifically, the Eleventh Circuit found that the "photographs were not incident to a newsworthy article," and that "these photographs do not qualify for the newsworthiness exception to the right of publicity." *See Toffoloni* at 1213. The case was remanded for further proceedings.

On May 28, 2010, LFP submitted the Affidavit and Expert Report of Dr. Gregory Lisby, a professor in the Department of Communications at Georgia State University. The conclusion reached by Dr. Lisby in his Affidavit and Report is that the photographs of Nancy Benoit were newsworthy "[b]y the standards of the

entertainment/celebrity news media at the time." *See* Report, p. 22. This issue has already been determined in the negative by the Eleventh Circuit.

II. ARGUMENTS AND CITATIONS TO AUTHORITY

This Court should exclude Dr. Lisby as an expert in this case, and dismiss all evidence or testimony therefrom, as Dr. Lisby and his Report do not meet the standards for expert testimony as codified by Rule 702 of the Federal Rules of Evidence and as set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). In the alternative, this Court should strike Dr. Lisby's Affidavit and Report pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, as the materials contained therein are redundant, immaterial, and impertinent.

A. Dr. Lisby Must Be Disqualified Pursuant to Rule 702 of the Federal Rules of Evidence and the Standard Set Forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

First and foremost, the newsworthiness of an image is a question of law and not fact. "It is in the determination of newsworthiness - in deciding whether published or broadcast material is of legitimate public concern - that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom." *See Toffoloni* at 1208. The Eleventh Circuit has ruled as a matter

of law that the images of Nancy Benoit published by Defendant in this case are not newsworthy.

> The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny. The photographs bear no relevance-let alone "substantial relevance"-to the "matter of legitimate public interest." [cite] On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as "newsworthy." Surely that debases the very concept of a right to privacy.

Toffoloni at 1212.

Expert testimony is presented to assist the *trier of fact*. *See* Fed. R. Evid. 702. No amount of expert testimony is relevant to a determination of law. Notwithstanding this legal maxim, the Defendant presented an "expert" witness to contradict the unambiguous ruling of the Eleventh Circuit in this case. There is nothing in Dr. Lisby's Report that could assist a trier of fact to establish the newsworthiness of the images of Nancy Benoit at issue in this case, because newsworthiness is a matter of law that has already been conclusively determined by the Eleventh Circuit Court of Appeals in this case.

The standards applicable to the qualifications and testimony of an expert witness are set forth by Rule 702 of the Federal Rules of Evidence, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Dr. Lisby's Report was apparently commissioned by Defendant to attempt to conclude and argue once again that the photographs of Nancy Benoit at issue were in fact newsworthy. Dr. Lisby does not cite to any specialized knowledge that would be required to reach his conclusions. Dr. Lisby cites to no scientific method he used to reach his conclusion. There is no indication of why or how Dr. Lisby's background as a communications professor and lawyer somehow enable him to ignore and contradict the clear and legally conclusive findings of the Eleventh Circuit in this case.

It appears that Dr. Lisby simply asked his research assistants to surf the internet for lewd images, and based upon the popularity of certain internet sites

containing nudity, he attempts to conclude as a so called "expert" that every nude image on the internet is newsworthy.

In *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993), the Supreme Court of the United States further clarified the requirements for expert testimony as set in Rule 702. *Daubert* sets forth a non-exclusive checklist for use in evaluating the reliability of scientific expert testimony. These factors include:

> (1) whether the expert's technique or theory can be or has been tested-that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
>
> (2) whether the technique or theory has been subject to peer review and publication;
>
> (3) the known or potential rate of error of the technique or theory when applied;
>
> (4) the existence and maintenance of standards and controls; and
>
> (5) whether the technique or theory has been generally accepted in the scientific community.

Daubert, 509 U.S. at 593-595.

The same criteria that are used to assess the reliability of a scientific opinion have been applied to evaluate the reliability of non-scientific, experience-

based testimony. *See* *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167 (1999) where "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Under any scenario, Dr. Lisby's Report is subject to *Daubert* standards to determine reliability.

In this case, Dr. Lisby's Report is simply a subjective, conclusory opinion that cannot be assessed for reliability. There is no cited technique or theory in Dr. Lisby's Report that is subject to peer review. There is no known standard against which Dr. Lisby's opinion can be compared, and there is no established rate of error for Dr. Lisby's applied theory. There are no standards or controls mentioned anywhere in the Report. There is no evidence that Dr. Lisby's techniques for determining "newsworthiness" have been accepted within the scientific or legal community.

The basis provided by Dr. Lisby in his Report to support his conclusions consists entirely of non-verifiable sources, including quotes from unrelated roundtable discussions, television interviews, news shows, articles and other public forums. *See* Report pp. 4-11. This unconfirmed and unverifiable hearsay is inadmissable at trial and cannot form a reasonable basis for an expert report or opinion. When compiling

evidence for an expert report, there must not be too "great an analytical gap between the data and the opinion proffered." *See* *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512 (1997). In this case, there is no rational connection between the irrelevant "data" (lewd pictures) collected by Dr. Lisby's research assistants and the opinion he proffered in his Report.

In *Cochran v. Brinkmann Corp.* 2009 WL 4823858 (N.D. Ga. 2009), the court concluded that an expert's conclusions were not based upon scientific data, but were based upon estimations and assumptions; therefore, the expert's report did not meet the *Daubert* standards and was not admissible. *See also*, *McGee v. Evenflo Co.*, 2003 WL 23350439 *9 (M.D. Ga. 2003) (excluding as unreliable expert testimony on alternative design of car seat); *Michigan Millers Mut. Ins. Corp. v. Benfield,* 140 F.3d 915, 921 (11th Cir. 1998) (upholding district court's exclusion of expert testimony as unreliable where expert "performed no tests"); and *Wright v. Case Corp.*, 2006 WL 278384 (N.D. Ga. 2006) (expert testimony is excluded where there is insufficient scientific data for expert's conclusions).

Here, Dr. Lisby's opinion is simply an "assumption" and is not based upon any objective facts, data, or analysis. There is no rational support for the conclusion that, because some celebrity has posed nude on the cover of *Time*

Magazine, that it was proper for Defendant to publish unauthorized nude photographs of Nancy Benoit after she was murdered. The photographs proffered by Dr. Lisby as "data" were either published with permission or were taken from porn sites of unknown origin. The excuse of "everyone else is doing it" is not an acceptable foundation, under any theory, for an expert report.

It has been conclusively established in this case that: (1) the photographs of Nancy Benoit were taken over 20 years ago; (2) she did not give her consent for those images to ever be produced; (3) she believed that these images were destroyed; and (4) these images do not fit within the newsworthiness exception of the First Amendment as held by the Eleventh Circuit as a matter of law.

Dr. Lisby's Affidavit and Report should be excluded as evidence in the case under Federal Rule of Evidence 702 because:

(1) Dr. Lisby's "technique" cannot be tested and cannot be challenged in any objective sense;

(2) Dr. Lisby's "technique" is instead simply a subjective, conclusory approach, without any relevant basis in fact or law, that cannot reasonably be assessed for reliability;

(3) Dr. Lisby's "technique" has never been subject to peer review and publication;

(4) Dr. Lisby's "technique" has no known or potential rate of error;

(5) Dr. Lisby has not cited and cannot provide the existence and maintenance of any standards and/or controls for his "technique"; and

(6) Dr. Lisby's "technique" is not generally accepted in the scientific community.

B. Dr. Lisby's Affidavit and Report are Redundant, Immaterial, and Impertinent, and Should be Stricken Pursuant to Fed. R. Civ. P. Rule 12(f).

Rule 12(f) of the Federal Rules of Civil Procedure states: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Id.* Though Rule 12(f) speaks to pleadings, the rule has been applied to strike affidavits and expert reports, if such reports are redundant, immaterial, impertinent or scandalous. *See*, *Moret v. Geren*, 494 F.Supp.2d 329 at 336 (D. Md. 2007) "Although affidavits technically do not constitute pleadings, courts have permitted affidavits to be challenged by motions to strike because the Federal Rules provide no other means to contest their sufficiency." (citing *McLaughlin v. Copeland,* 435 F. Supp. 513, 519 (D. Md.1977).); *See also*, *U.S. ex*

rel. Pogue v. Diabetes Treatment Centers of America, 474 F.Supp.2d 75 (D. D.C. 2007); *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 224 F.R.D. 261 (D. D.C. 2004); *Natural Resources Defense Counsel v. Kempthorne*, 539 F.Supp.2d 1155 (E.D. Ca. 2008).

In *Cochran v. Brinkmann Corp.* 2009 WL 4823858 (N.D. Ga. 2009), a motion to strike affidavits was presented to the court under Rule 12(f), though the motion was technically outside the scope of Rule 12(f). "While the motions technically are improper, the Court opts to consider the motions as Defendant's objections to the admissibility of evidence contained in the affidavits." *Id*. at 14.

In its analysis of the application of the Rule, the courts have retained the ordinary meanings of the words "redundant" and "immaterial," however, courts have determined that the word "impertinent" is a term of art relating to the responsiveness and relevance of the materials in question to the particular issue to be decided by the Court.

> Impertinence has been said to consist of any allegation not responsive nor relevant to the issues involved in the action, and which could not be put in issue or be given in evidence between the parties. 'To determine whether a matter is impertinent one must first determine the scope of the issues in controversy, and then, under 12(f) determine whether the matter injected in the pleadings is relevant or material thereto.'

Northwestern Mut. Life Ins. Co. v. McGivern, 132 Ga. App. 297, 208 S.E.2d 258 (1974) citing 2A Moore's Federal Practice, pp. 2422, 2423.

It is clear from a review of Dr. Lisby's Affidavit and Report that the materials contained therein are redundant, immaterial, and impertinent. The only conclusion reached in Dr. Lisby's Report is that the photographs of Nancy Benoit at issue were, in his unsupported opinion, newsworthy "[b]y the standards of the entertainment/celebrity news media at the time." *See* Report, p. 22. This conclusion is in direct contradiction of the findings of the Eleventh Circuit in this Case. Dr. Lisby's "standards" seem to be that anything goes in the entertainment industry. In this very case, the Eleventh Circuit ruled, as a matter of law, that the very same photographs of Nancy Benoit are conclusively and unequivocally *not* newsworthy, and therefore these same photographs do not qualify for the newsworthiness exception of the right of publicity. Dr. Lisby cannot overrule the Eleventh Circuit with his unsupported, subjective opinion that, because there are other nude photographs in the world, therefore, all such photographs are newsworthy.

Much of Dr. Lisby's Report is focused on the recent trends that magazine and internet media outlets are concentrating more on celebrity and entertainment news. *See* Report pp. 3-11. Dr. Lisby's tortured analysis is irrelevant to the sole issue

to be decided by this Court: the damages incurred by Plaintiff due to Defendant's violation of Nancy Benoit's right of publicity.

In this case, the Eleventh Circuit Court unequivocally ruled that "[t]he fact of Benoit's nudity is not in and of itself newsworthy." *Toffoloni* at 1209. This conclusion of law is specifically and directly contrary to Dr. Lisby's baseless Report, which maintains that somehow the public appetite for nude celebrities justifies a violation of the right of publicity, and that "celebrity nudity is itself often a newsworthy subject." *See* Report p. 11.

Dr. Lisby's Report, which is not based upon any scientific methodology or factually analogous situations, cannot contradict the final rule of law issued in this case. The Eleventh Circuit found that the photographs were not newsworthy, as they "'impart[] no information to the reading public'" *Id*. at 1209 (citing *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525, 530 (E.D. Pa. 1982).

Simply because there is a demand for "candid photographs with partial nudity," such demand does not transform all nude photographs into legal, newsworthy images. *See* Report p. 12. Demand for nude celebrity photos certainly does not enable anyone to publish private images without the subject's consent and approval.

To the contrary, the prolific demand for nude photographs strengthens the need for legal protection of the rights of those images.

Millions of issues of the March 2008 edition of *Hustler Magazine* containing nude photos of Nancy Benoit were sold worldwide. Contrary to Dr. Lisby's opinion, the existence of demand for nude photographs has no bearing on the question of newsworthiness of the prohibited nude photographs of Nancy Benoit. As cannot be overstated, the Eleventh Circuit has already ruled that the very images of Nancy Benoit that were published by Defendant did not satisfy the newsworthiness exception.

Contrary to Dr. Lisby's Report, the newsworthiness of a celebrity image cannot be determined by providing a book report of various entertainment/celebrity media outlets; newsworthiness is a question of law, to be determined by the courts on a case by case basis. *See Toffoloni*. Simply because images of Nancy Benoit published by Defendant were able to "'draw' to get audiences to the outlet's web page or magazine print addition …," (Report p. 13) does not lead to the legal conclusion that these photographs are newsworthy and that the publication of these photographs did not violate Nancy Benoit's right of publicity. In this case, the question of

newsworthiness of the photographs of Nancy Benoit has already been decided by the Eleventh Circuit.

In Tab B of his Report, Dr. Lisby attaches numerous nude, partially nude, and suggestive photographs of celebrities, and posits that because these photographs have been published, and because "these types of images were pervasive and commonplace," therefore the images of Nancy Benoit "qualify as newsworthy." *See* Report p. 12. Dr. Lisby does not cite to any recognized methodology of equating the images of Nancy Benoit with the images included in Tab B of the Report, nor does he attempt to determine whether the photographs in question were published with permission.

The materials in Tab B of the Dr. Lisby's Report are a collection of wide-ranging images that were either: (1) taken in the public arena; (2) taken in professional photo shoots; or (3) the subject was compensated for the use of the image. There is no evidence in Dr. Lisby's report that any of the subjects of these images refused to give his or her consent for the publication of those images. In stark contrast, the images of Ms. Benoit at issue were not taken in public, and it is undisputed that neither she nor her Estate were compensated for the use of these photographs. The undisputed evidence of record is that Ms. Benoit adamantly refused to give her

permission for the use of such images, and ordered the images to be destroyed. *See*, e.g., Plaintiff's Verified Complaint; Plaintiff' Brief in Support of Renewed Motion for Partial Summary Judgment filed contemporaneously herewith; *see also*, Deposition of James Daus dated April 2, 2010, pp. 52-53 attached as Exhibit C to Plaintiff's Brief in Support of Renewed Motion for Partial Summary Judgment.

Dr. Lisby's position, that the popularity of celebrity equates to value, supports Plaintiff's position that the value of the photographs used by Defendant is significant and that the Estate of Nancy Benoit should be compensated as such. According to Dr. Lisby, the Nancy Benoit images were apparently in great demand, therefore the value of such images is substantial.

Dr. Lisby also implies in his Report that Nancy Benoit had previously posed for, and released, photographs of herself in suggestive poses or clothing. *See* Report p. 21. This fact has no relevance on the newsworthiness of fully nude images of Nancy Benoit taken over 20 years ago and illegally published by Defendant. Nancy Benoit was at one time an aspiring model and made a conscious decision to pose for various photographs at different stages in her career. She controlled who published any of her photographs and she determined the compensation that she received for the use of such photographs.

Dr. Lisby's Report focuses only upon the popularity of nude celebrity images, and completely discounts the accompanying story that was supposedly the basis for publishing the nude images of Nancy Benoit in the first place. Dr. Lisby's conclusion is that, based upon "the standards of the entertainment/celebrity news media at the time," because Nancy Benoit is nude in the photographs, the very fact that she was nude makes the images "newsworthy." *See* Report p. 22. Dr. Lisby's expert opinion is that any nude, suggestive, or compromising picture of any celebrity, no matter how it was obtained, is newsworthy and therefore may be published by any media outlet with impunity.

As the Eleventh Circuit held in this case, newsworthiness in the legal sense can only be determined by the Court. Dr. Lisby's Affidavit and Report do not address the issue of value in this case, which is the only issue left for determination by this Court. Instead, he engages in an unsupported analysis of his opinion of the definition of "newsworthiness." Dr. Lisby's Affidavit and Report are redundant, immaterial, and impertinent, and should be stricken.

III. CONCLUSION

Dr. Lisby must be disqualified as an expert in this case, and his Affidavit and Report excluded from evidence because they do not meet the standards

set forth in Rule 702 of the Federal Rules of Evidence and *Daubert*. In addition, because the materials in Dr. Lisby's Report, and the conclusions reached in that Report, are redundant, immaterial, and impertinent, his Affidavit and Report must be stricken by this Court pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

Respectfully submitted July 27, 2010.

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Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that on July 27, 2010, I have electronically filed the foregoing Motion to Strike Testimony of Gregory C. Lisby, or in the Alternative, to Disqualify Expert and Brief in Support thereof with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
S. Derek Bauer, Esq.

Barry J. Armstrong, Esq.
Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

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