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.	)	

PLAINTIFF'S REPLY TO
DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION TO STRIKE TESTIMONY OF GEORGE LISBY

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit ("Plaintiff"), through counsel, and files this her Reply to LFP Publishing Group, LLC's ("Defendant") Memorandum in Opposition to Plaintiff's 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. INTRODUCTION

Plaintiff filed her Motion to Strike Testimony of Gregory C. Lisby, Ph.D., J.D., or in the Alternative, to Disqualify Expert ("Plaintiff's Motion") on July 27, 2010. Dr. Lisby's report erroneously and baselessly concludes that the images of Nancy Benoit that were published in *Hustler Magazine* are somehow "newsworthy," even though the Eleventh Circuit Court of Appeals has conclusively ruled that these pictures are not newsworthy as a matter of law. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009). Dr. Lisby's report cannot be used to assist a trier of fact pursuant to Federal Rule of Evidence 702, because the issue of the newsworthiness is a question of law and not fact, and has already been decided in this case.

Defendant filed its Memorandum in Opposition to Plaintiff's Motion ("Defendant's Memorandum") on August 13, 2010, arguing that the Eleventh Circuit's ruling is not binding on the facts of this case, and that Plaintiff has mischaracterized the conclusions contained in Dr. Lisby's report. Plaintiff provides this Reply to Defendant's Memorandum.

II. ARGUMENT AND CITATION TO AUTHORITY

Despite the arguments presented in Defendant's Memorandum, the facts remain unchanged that Dr. Lisby's report:

(1) cannot assist a trier of fact in deciding a legal issue that has already been conclusively determined by the Eleventh Circuit;

(2) is not based on any established methodology; and

(3) cites no legal authority or standard whatsoever in Dr. Lisby's attempted determination of whether the images of Nancy Benoit were "newsworthy." Nevertheless, Plaintiff will address below the arguments presented in Defendant's Memorandum

A. Images Similar to Those Published by Defendant Are Not "Pervasive" or "Commonplace."

Dr. Lisby's report, as well as Defendant's Memorandum, claims that photographs of the nature of those published of Nancy Benoit in *Hustler Magazine* are "pervasive in entertainment and celebrity news media outlets," and "commonplace." *See* Defendant's Memorandum pp. 2, 6, 12; *see also* Dr. Lisby's Report, p. 20. Despite Defendant's assertions, nude images of celebrities are not as ubiquitous as Defendant would have this Court believe. Many of the entertainment and celebrity magazines cited by Dr. Lisby in his report, such as *OK! Weekly*, *US Weekly*, *In Touch*

Weekly, *Life & Style Weekly*, and *People*, (Dr. Lisby's Report p. 6) suggest that the images published by Defendant are mainstream and newsworthy, do not typically publish nude images in their magazines, whether of celebrities or otherwise. In fact, none of the photographs included in Dr. Lisby's report, purportedly demonstrating how commonplace nude images of celebrities are, came from the magazines listed above. Dr. Lisby also does not mention in his report, much less address, whether celebrities are paid for the use of their images in such magazines, or how such images are obtained.

Having been unable to find main stream magazines that publish nude images of celebrities similar to those published by Defendant, Dr. Lisby and his assistants were forced to consult sordid websites such as Gawker.com, defamer.com, Celebitchy.com, What Would Tyler Durdin Do? (www.wwtdd.com), Egotastic (www.egoctastic.com), and The Superficial (www.thesuperficial.com) in order to find nude images of celebrities similar to those published by Defendant. Dr. Lisby's Report pp. 14, 16. These websites hardly qualify as the "reputable and well-known entertainment/celebrity news outlets" described in Defendant's Memorandum. *See* Memorandum p. 15. These websites are not print magazines and are free to the public, as distinguished from *Hustler Magazine*'s profit motives associated with the

publication of salacious photographs. In addition, Dr. Lisby's report does not address whether any of the nude images found during his "research" were published with permission or compensation of those persons who own those images, or whether any of those images qualified as "newsworthy" under the law of the right of publicity. Obviously, Dr. Lisby cannot provide such an analysis, which renders his entire opinion without any probative value. Also, Dr. Lisby's opinion does not provide one scintilla of the legal theory of newsworthiness that could indicate that any of the images of Nancy Benoit were newsworthy, by comparison to other factual situations or otherwise.

In fact, Dr. Lisby and his researchers even used the phrase "NSFW" (Not Safe For Work) to find pictures similar to those published by Defendant. By Dr. Lisby's own definition, images that are NSFW classify as "material offensive to others or easily tracked by corporate technology overseers." Dr. Lisby's Report p. 14. This itself is a clear indication that those images do not possess the "legitimate public concern" necessary to qualify them as newsworthy. *See* *Toffoloni* at 1208.

Simply because relatively obscure, quasi-pornographic websites such as Celebitchy and Egotastic publish images of celebrity nudity does not render all nudity to be newsworthy, which is the ultimate conclusion of Dr. Lisby's report. It also does

not mean that those persons whose images have been published do not have a cause of action for the illegal publications of their images.

B. The Eleventh Circuit's Opinion Conclusively Decided the Newsworthiness Issue in this Case.

Defendant argues that because this case came to the Eleventh Circuit Court of Appeals on a 12(b)(6) motion to dismiss, that the Eleventh Circuit cannot make any determinations of fact as to this case, and that its opinion ruling that the images of Nancy Benoit were not newsworthy does not control.

The Eleventh Circuit's findings were based upon a review of the article and the images published by Defendant, and their relation to Ms. Benoit's murder. These facts have not changed over the course of discovery, and remain the same now as when the Eleventh Circuit considered them in its opinion. The Court's newsworthiness investigation required "an intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern -- Benoit's murder." *Id.* at 1208. The Eleventh Circuit performed this review on the objective facts relating to the article and images themselves, and their relation to Ms. Benoit's murder. These conditions, which are the sole factual basis upon which the Eleventh Circuit based its opinion, have not changed, and Defendant has presented

nothing over the course of discovery to contradict these facts. As such, the Eleventh Circuit's conclusive ruling that the images of Ms. Benoit are not newsworthy is fully binding upon Defendant in this case. Dr. Lisby's report, which does not even address the conclusive, unrefuted facts relied upon by the Eleventh Circuit to prove that the images of Nancy Benoit were not newsworthy, adds nothing that could assist a trier of fact in deciding an issue that has already been conclusively decided.

Assuming, arguendo, that the Eleventh Circuit's opinion in this case does not exclusively resolve the issue of whether the actual images published by Defendant were newsworthy, Dr. Lisby's report wilfully ignores the binding theories of law contained in the Eleventh Circuit's opinion, and other case law, regarding general principals of newsworthiness. Dr. Lisby cited to no legal authority, and did not consider any specific legal principals in the preparation of his report. It is impossible for Dr. Lisby to make a determination of newsworthiness without considering the legal standards employed for such a determination.

The definition of "newsworthiness" is certainly more legally defined than Defendant's definition of any "matter of public interest." Defendant's Memorandum p. 16, fn. 9. The Eleventh Circuit's opinion made clear that, simply because there may be a public appetite or interest for an image, the determination of newsworthiness

involves the requirement for the Court to "engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals." *Toffoloni* at 1208.

Citing *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989), the Eleventh Circuit found that "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incidental to its commercial purpose." *Toffoloni* at 1209. Therefore, even if there is a public interest aspect of the nude images of Nancy Benoit, which Plaintiff denies, such public interest is merely incidental to Defendant's commercial purpose of publishing such images for profit.

Also citing the *Restatement (Second) of Torts* § 652D cmt. h., the Eleventh Circuit held that "the line is to be drawn when the publicity ceases to be the giving of information to which the public is *entitled*, and becomes a morbid and sensational prying into private lives for its own sake, *with which a reasonable member of the public, with decent standards, would say that he had no concern*." *Toffoloni* at 1211 (Emphasis supplied). This established theory of law, that the "morbid and sensational prying into private lives for its own sake" is not cause for newsworthiness, was wholly ignored by Dr. Lisby in his report.

Despite Defendant's claims that Plaintiff has mischaracterized Dr. Lisby's conclusions in his report, Defendant fails to explain how, if celebrity nudity is itself newsworthy, *Hustler* can simply publish any nude images of any celebrity without compensation to that celebrity. Dr. Lisby's report erroneously concludes that, due to "the preoccupation with photos of celebrities, preferably candid photographs with partial nudity," such images classify as legally newsworthy. Dr. Lisby's Report, p. 12. This incorrect and disingenuous conclusion is emphasized in a heading in Dr. Lisby's report: "Celebrity Nudity Is Itself Often A Newsworthy Subject." Dr. Lisby's Report p. 11.

Dr. Lisby provides no limiting factors in his opinion. If Dr. Lisby's skewed logic were accurate, any nude image of any celebrity is by definition newsworthy in today's society. This conclusion is in direct contradiction to the Eleventh Circuit's opinion and all applicable case law. "On these facts, were we to hold otherwise, LFP would be free to publish 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.

Defendant's expert does not apply or even attempt to consider the requirements of the legal definition of newsworthiness in his opinion. Because Dr. Lisby's report blatantly fails to provide any probative factual support for his conclusions, and because he ignores the established law regarding "newsworthiness" applicable to this case, that report is inadmissable and should be excluded from the record.

C. Techniques and Resources Used by Plaintiff's Expert Are Irrelevant to the Validity of Dr. Lisby's Expert Report.

Defendant has also claimed in its Memorandum that Dr. Lisby utilized a more established technique and relied on a greater quantity of data than Plaintiff's expert, Dr. Usha Nair-Reichert. *See* Defendant's Memorandum pp. 3, 14. Any comparisons between Dr. Lisby's methodology and Dr. Nair-Reichert's methodology are irrelevant to the issue in question.

The Defendant's expert and Plaintiff's expert prepared reports and rendered opinions on two completely separate and distinct issues. Dr. Lisby's report attempts to address the newsworthiness of the images of Nancy Benoit that were published by Defendant Dr. Nair-Reichert's report addresses the value of the unauthorized used of Nancy Benoit's image by Defendant. Both experts utilized

separate data sets and methodologies, although Dr. Lisby's report was void of any legal support, in deriving their respective conclusions regarding different subject matter areas. Dr. Lisby's report and analysis does not address whatsoever, much less refute, the conclusions in Dr. Nair-Reichert's report.

Dr. Lisby's report is not admissible under Fed. R. Evid. 702, because it does not utilize the legal definition as the standard when considering the newsworthiness exception to the right of publicity, which in itself is a question of law. Dr. Lisby's report does not even mention that standard and, therefore, cannot be used to assist a trier of fact to determine the newsworthiness exception. In addition, and more importantly, the newsworthiness of the photographs of Nancy Benoit has already been determined by the Eleventh Circuit based upon established and unchallenged facts.

D. This Court May Properly Consider Plaintiff's Motion to Strike, or in the Alternative, to Disqualify Defendant's Expert.

Finally, Defendant argues that a Motion to Strike is not the proper mechanism to address the admissibility of expert testimony. Motions to Strike have been used to strike affidavits of experts and other witnesses, and it is within the Court's discretion to treat Plaintiff's Motion to Strike as a Motion to Exclude.

"Although affidavits technically do not constitute pleadings, courts have permitted affidavits to be challenged by motions to strike," *Moret v. Geren*, 494 F. Supp.2d 329, 336 (D. Md. 2007). *See also Natural Res. Def. Council v. Kempthorne*, 539 F. Supp.2d 1155, 1162 (E.D. Cal. 2008), "a 'motion to strike' materials that are not part of the pleadings may be regarded as an 'invitation' by the movant 'to consider whether [proffered material] may properly be relied upon.'" (Citing *U.S. v. Crisp,* 190 F.R.D. 546, 551 (E.D. Cal.1999)); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am.*, 474 F. Supp.2d 75 (D. D.C. 2007).

This Court has the complete discretion to rule on Plaintiff's Motion to Strike, or, in the alternative, to consider independently whether the material proffered by Defendant "may properly be relied upon." *Kempthorne* 539 F. Supp.2d at 1162.

Regardless of Defendant's contentions, Plaintiff clearly included in her Motion an alternative remedy by requesting that this Court disqualify Dr. Lisby as an expert based upon the limitations imposed upon experts in Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). The arguments presented by Plaintiff in her Motion with regard to Dr. Lisby's qualifications to provide expert testimony in this case stand unrefuted. Dr. Lisby's report is not based upon any recognized methodology, does not address required legal standards, does not

introduce any relevant factual issues, and cannot assist this Court or a trier of fact in deciding that which has already been decided as a matter of law.

III. CONCLUSION

For the reasons stated above, and for those outlined in Plaintiff's Motion, Defendant's expert's report should be excluded from evidence, and Dr. Lisby should be disqualified from any further testimony as an expert in this case.

Respectfully submitted August 27, 2010.

/s/ Richard P. Decker
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CERTIFICATE OF SERVICE

This is to certify that on August 27, 2010, I have electronically filed the foregoing Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike Testimony of George Lisby 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.

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