

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA**

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC,
d/b/a *Hustler* Magazine, et al.,

Defendant.

CASE NO. 1:08-cv-00421-TWT

**BRIEF IN OPPOSITION TO PLAINTIFF'S EMERGENCY
MOTION FOR PROTECTIVE ORDER**

NOW COMES Defendant LFP Publishing Group LLC, d/b/a Hustler Magazine ("LFP") and respectfully submits this memorandum of law in opposition to Plaintiff's Emergency Motion for Protective Order for the Depositions of Tyler Downy, Mark Samansky and Christopher Helton (Docket Index ("D.I.") 180) (the "Motion").

I. Introduction

LFP has noticed the deposition of three out-of-state witnesses for use at trial: Tyler Downey, Mark Samansky and Christopher Lee Helton.¹

Plaintiff's Motion argues the depositions of these three witnesses are improper because (1) their depositions will produce no testimony relevant to the issues remaining in this case and (2) Plaintiff will be unfairly prejudiced because of the "considerable time and expense" she will incur if the depositions occur. (Motion at p. 14.)

To the contrary, each of Messrs. Downey, Samansky and Helton will provide testimony that is directly relevant to the remaining issues to be tried in this case. Specifically, each will provide testimony relevant to the value of the images published by LFP; and Mr. Downey will provide testimony that LFP's editors and publisher believed at all times that they had the right to publish the images without seeking the permission of Ms. Benoit's estate, which testimony is directly relevant to Plaintiff's claim for punitive damages. Moreover, the depositions have been scheduled at the Plaintiff's convenience and, as a cost-saving mechanism, they will be taken remotely via videoconference.

¹ LFP provided proper notice to Plaintiff of the three depositions pursuant to Fed. R. Civ. P. 30. *See* D.I. 177 - 179.

For the foregoing reasons, and those set forth in further detail below, LFP respectfully submits that Plaintiff's Motion should be denied.

II. Argument

The standard for post-discovery depositions is a liberal one under the Pretrial Order issued by the Court on January 3, 2011. The Order states: "Provided there is no resulting delay in readiness for trial, the parties **shall...be permitted to take the depositions of any persons for the preservation of evidence and for use at trial.** (Pretrial Order, D.I. 176, at ¶ 2) (Emphasis added). There will be no delay in the parties' preparation for trial; and, in any event, each of the three deponents will provide testimony relevant to the issues of compensatory damages and, in the case of Mr. Downey, punitive damages.

A. Each Deponent Will Offer Relevant Testimony

1. *Tyler Downey, Mark Samansky And Christopher Lee Helton Will Provide Testimony Relevant To The Value Of The Images Published By LFP*

The testimony of each of Mr. Downey, Mr. Samansky and Mr. Helton will be relevant to the issue of compensatory damages -- that is, the value of the images published by LFP.

Mr. Downey was editorial assistant at *Hustler* Magazine from February 2006 through February 2008 (and at all times relevant to this case), and Mr. Downey

negotiated the purchase of the Benoit images on behalf of LFP. He has direct knowledge of what amount LFP was willing to pay for the images. Mr. Samansky shot the videotape from which the Benoit images were extracted and negotiated the sale of the images to LFP with Mr. Downey. Thus, Mr. Downey and Mr. Samansky can and will testify about both sides of the transaction in which LFP purchased the images, including what amount the seller was willing to accept for the images and what LFP was willing to pay for them.

Mr. Helton has been a professional photographer since the 1980s. He took photographs of Ms. Benoit in his capacity as a professional photographer as Ms. Benoit posed nude at the same modeling session and photo shoot videotaped by Mr. Samansky. Mr. Helton remains a professional photographer specializing in celebrity and popular music subjects. He will testify about the market for the Benoit images at the time LFP purchased them.

2. *Each Deponent Will Provide Testimony That Directly Contradicts The Testimony Of One Of Plaintiff's Listed Witnesses*

The testimony of each of Mr. Downey, Mr. Samansky and Mr. Helton will also directly contradict previous testimony of Mr. Jim Daus, one of Plaintiff's listed witnesses. (Pretrial Order at Attachment F-1.)

Mr. Daus was Ms. Benoit's first husband and was married to her at the time Ms. Benoit posed nude. Both in his affidavit (attached to Plaintiff's Verified

Complaint, D.I. 1) and in his April 2, 2010 deposition, Mr. Daus testified that he and Ms. Benoit demanded that all videotape and photographs taken of Ms. Benoit during the photo shoot be destroyed. LFP intends to contradict this evidence at trial.

Mr. Samansky will testify that neither Mr. Daus, Ms. Benoit, nor anyone else ever asked him to destroy the videotape he shot during the photo shoot. Likewise, Mr. Helton will testify that neither Mr. Daus, Ms. Benoit, nor anyone else ever asked him to destroy the photographs he shot during the photo shoot.

Further, Mr. Downey's testimony will contradict Mr. Daus' previous testimony that during a telephone conversation that took place between Mr. Downey and Mr. Daus, Mr. Daus demanded that LFP refrain from publishing the images of Ms. Benoit. Mr. Downey will testify that Mr. Daus never made such a demand and that Mr. Daus's real motive for contacting LFP was to learn whether he was entitled to any money as a result of LFP's publication of the images.

Each deponent thus may be used to impeach or rebut one of Plaintiff's key witnesses.

3. *Mr. Downey Will Provide Testimony Relevant To Plaintiff's Claim For Punitive Damages*

Mr. Downey's testimony should also be permitted because it goes directly to the issue of punitive damages.

In a Georgia right of publicity case, a plaintiff may be awarded punitive damages only “where a wrongful motive or state of mind appears, but not in cases where the defendant has acted innocently....” *Cabaniss v. Hipsley*, 114 Ga. App. 367, 383 (1966) (quoting William L. Prosser, *Privacy*, 48 Calif. L. Rev. at 409). As described above, Mr. Downey had direct knowledge of LFP’s decision to publish the Benoit images: he is the author of the news article about Ms. Benoit and he participated in the decision to publish the images illustrating the article. He will testify concerning LFP’s “state of mind” when it determined that it had the lawful right to publish the images; therefore, his testimony goes to the very heart of the punitive damages issue.

B. The Depositions Will Not Cause Delay, Undue Burden, or Undue Expense

Plaintiff claims that the depositions to which she objects will cause her unfair prejudice because of the burden, expense and delay she will experience if they are allowed to proceed. These claims are misplaced.

First, all three depositions are scheduled to take place over a period of nine days, with the final deposition scheduled for February 19, 2011. All three would thus be complete a full week prior to the parties’ scheduled February 23 pretrial conference.

Second, in an attempt to reduce the burden and expense to both parties, LFP offered for the depositions to be taken remotely via videoconference. All three depositions will be take remotely and the farthest Plaintiff's counsel will have to travel for the depositions is to the law offices of McKenna Long & Aldridge LLP, in downtown Atlanta. Moreover, each of the three depositions was scheduled at the convenience of and coordinated with Plaintiff's counsel's schedule.

C. The Court Cannot Yet Assess The Relevancy Of The Deposition Testimony

Plaintiff's relevancy objections should be reserved for trial. The relevancy of the expected testimony of Mr. Downey, Mr. Samansky and Mr. Helton cannot be pre-judged. Moreover, each deponent will likely rebut or impeach anticipated testimony of a Plaintiff's witness. For these reasons, determination of the relevancy of such deposition testimony prior to the trail is premature.

III. Conclusion

For all of the foregoing reasons, LFP respectfully requests that the Court deny Plaintiff's Motion.

Respectfully submitted this 31st day of January 2011.

/s/ Darrell J. Solomon

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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing BRIEF IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR PROTECTIVE ORDER via the CM/ECF system which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 31st day of January 2011.

/s/ Darrell J. Solomon _____

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