

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
 as Administratrix and Personal)
 Representative of the)
 ESTATE OF NANCY E. BENOIT,)
)
 Plaintiff,)
)
 v.)
)
 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.)

CIVIL ACTION
FILE NO. 1:08-CV-0421-TWT

PLAINTIFF’S MOTION IN LIMINE

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit (“Plaintiff”), through counsel, and moves the Court for an Order as follows:

(1)

Plaintiff anticipates that Defendant and/or Defendant’s counsel may attempt to inject into this case argument or evidence that the Defendant relied upon

the advice of legal counsel when deciding whether to publish the nude images of Nancy Benoit that are at issue in this case. Defendant has already clearly stated in its Response to Interrogatory Number 1 of Plaintiff's Third Continuing Interrogatories that it does not intend to use reliance on the advice of legal counsel as a defense to Plaintiff's claim for punitive damages. To later allow Defendant to use reliance on the advice of counsel as a defense, when Plaintiff has been unable to conduct any discovery in the matter, is fundamentally unfair, improper, and would be prejudicial to Plaintiff. For these reasons, Defendant should not be allowed to introduce evidence about reliance on legal advice.

(2)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to another videotape of Nancy Benoit and her then husband Jim Daus. More specifically, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to introduce evidence that Ms. Benoit, immediately prior to or during the photo shoot where the nude images of Ms. Benoit at issue in this case were taken, allowed a videotape to be made which allegedly depicted her husband Jim Daus and her engaged in sexual activity. See Affidavit of Mark Samansky, ¶ 6. As conclusively established

by the Samansky Affidavit, the alleged videotape was destroyed by Mr. Samansky at the direction of Mr. Daus. This videotape, if it ever existed, no longer exists, and has absolutely no bearing on the current issues in this case. Not one of the anticipated witnesses or parties in this case have ever even seen this alleged videotape, or can truthfully describe it. Obviously it does not now exist, if it ever did. Therefore, any reference to the alleged sexual activity videotape is irrelevant, has no probative value, is prejudicial to Plaintiff and should not be allowed by this Court.

(3)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to this Court's October 3, 2008 Order granting Defendant's Motion to Dismiss based upon the newsworthiness exception of the right of publicity. Defendant may attempt to introduce this Court's October 3, 2008 Order for some reason, possibly as some evidence that Defendant could have reasonably believed the nude images of Ms. Benoit to be newsworthy at the time of publication as a defense against punitive damages. By virtue of the judgment in this case by the Eleventh Circuit Court of Appeals, and this Court's own order dated November 23, 2010 granting partial summary judgment to the Plaintiff on the issue of the Defendant's liability, the

Court's earlier Order of October 3, 2008 is a legal nullity. It is of no force or effect. To offer the October 3, 2008 Order into trial evidence is improper, has no probative value, and would be prejudicial to Plaintiff. As such, any reference to this Court's October 3, 2008 Order should not be allowed by this Court.

(4)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce the deposition testimony of Mr. Tyler Downey, a former employee of Defendant. Mr. Downey's entire testimony is irrelevant to the remaining issues in this case, namely, the value of the images published by Defendant, whether punitive damages should be assessed against Defendant, and if so, the amount of those punitive damages. As such, Mr. Downey's deposition testimony should be excluded by this Court.

(5)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce the deposition testimony of Mr. Christopher Helton, a photographer who was apparently present during the photo shoot where the nude images of Nancy Benoit at issue in this case were taken. Mr. Helton's entire testimony is irrelevant to the remaining issues in this case, namely,

the value to Defendant of the images published by Defendant, whether punitive damages should be assessed against Defendant, and if so, the amount of those punitive damages. As such, Mr. Helton's deposition testimony should be excluded by this Court.

(6)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce the deposition testimony of Mr. William Otten, another photographer who was apparently present during the photo shoot where the nude images of Nancy Benoit at issue in this case were taken. Mr. Otten's testimony, largely about Nancy Benoit's fledgling modeling and wrestling career, is irrelevant to the remaining issues in this case, namely, the value to Defendant of the images published by Defendant, and whether punitive damages should be assessed against Defendant, and if so, the amount of those punitive damages. As such, Mr. Otten's deposition testimony should be excluded by this Court.

(7)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce the deposition testimony of Mr.

Kevin Sullivan, a former wrestler and ex-husband of Nancy Benoit. Mr. Sullivan's entire testimony is irrelevant to the remaining issues in this case, namely, the value to Defendant of the images published by Defendant, whether punitive damages should be assessed against Defendant, and if so, the amount of those punitive damages. As such, Mr. Sullivan's deposition testimony should be excluded by this Court.

(8)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce the deposition testimony of Mr. James Daus, the husband of Nancy Benoit at the time that the nude images of Ms. Benoit were taken. Mr. Daus' testimony is irrelevant to the remaining issues in this case, namely, the value to Defendant of the images published by Defendant, whether punitive damages should be assessed against Defendant, and if so, the amount of those punitive damages. As such, Mr. Daus' deposition testimony should be excluded by this Court.

(9)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce documents numbered 1, 2, 3, and 4 of Attachment G-2 of the March 28, 2011 Pretrial Order. These documents are not

full and complete copies of the referenced magazines, and thus should be excluded from evidence by this Court.

(10)

Furthermore, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce documents numbered 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18. Attachment G-2 of the March 28, 2011 Pretrial Order. These documents are improper, irrelevant to the issues remaining in this case, constitute hearsay, and, in the case of document number 9, was not produced by Defendant in discovery despite relevant requests by Plaintiff. These documents must therefore be excluded from evidence by this Court.

(11)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to Defendant's reliance on the advice of legal counsel as a defense to Plaintiff's claim for punitive damages.

(12)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel

or any witness which in any way relates to the video taken by Mark Samansky allegedly depicting Ms. Benoit and Mr. Daus engaging in sexual activity.

(13)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to this Court's October 3, 2008 Order granting Defendant's Motion to Dismiss based upon the newsworthiness exception of the right of publicity.

(14)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to Tyler Downey's deposition testimony.

(15)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to Christopher Helton's deposition testimony.

(16)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to William Otten's deposition testimony.

(17)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to Kevin Sullivan's deposition testimony.

(18)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to James Daus' deposition testimony.

(19)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to documents numbered 1, 2, 3, and 4 of Attachment G-2 of the March 28, 2011 Pretrial Order.

(20)

Plaintiff moves *in limine* for an Order excluding any evidence, documents, pleadings, questions, statements, arguments, or testimony from counsel or any witness which in any way relates to documents numbers 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of Attachment G-2 of the March 28, 2011 Pretrial Order.

WHEREFORE, Plaintiff prays that, for the reasons outlined above and further detailed in her Brief in Support filed contemporaneously herewith that Plaintiff's Motion In Limine to exclude the listed issues and materials is GRANTED.

Respectfully submitted May 23, 2011.

/s/ Richard P. Decker

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