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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MAUREEN TOFFOLONI, as)
Administrator and Personal)
Representative of the Estate)
of Nancy E. Benoit,)
)
Plaintiff,)
)
-vs-)
)
LFP PUBLISHING GROUP, LLC,)
Doing business as Hustler)
Magazine,)
)
Defendant.)
)

Docket No. 1:08-CV-421-TWT
October 2, 2009
Atlanta, Georgia
10:00 a.m.

TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL:

On behalf of the Plaintiff: Richard P. Decker
Decker, Hallman, Barber & Briggs
On behalf of the Defendant: S. Derek Bauer
McKenna, Long & Aldridge

*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*

SUSAN C. BAKER, RMR, CRR
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1 (Proceedings held in Atlanta, Georgia, October 2,
2 2009, 10:00 a.m., in chambers.)

3 THE COURT: All right. This is the case of Toffoloni
4 versus LFP Publishing Group, Case Number 08-CV-421.

5 First let me ask counsel for the parties to identify
6 yourselves for the record and the parties you represent
7 beginning with the Plaintiff.

8 MR. DECKER: Richard Decker for Maureen Toffoloni.

9 MR. BAUER: And Derek Bauer for LFP Publishing.

10 THE COURT: All right. This is a hearing on the
11 Defendant's motion to stay proceedings in this case pending a
12 petition to the Supreme Court for a writ of certiorari.

13 Mr. Bauer, it's your motion. I'll hear from you
14 first.

15 MR. BAUER: Well, thank you, Judge. I think our
16 motion's pretty straightforward. We tried to keep it pretty
17 simple. We were obviously surprised by the 11th Circuit's
18 panel decision reversing your 12(b)(6) order dismissing the
19 case. With, you know, all due respect to Mr. Decker, I think
20 the 11th Circuit went its own way and didn't really follow the
21 arguments the Plaintiff made but just decided that it didn't
22 like this particular case; and I don't blame them on the facts.
23 This is a tough one. But I think they disregarded some pretty
24 clear Georgia precedent on the scope of the Georgia common law
25 right of publicity and certainly disregarded a lot of federal

1 jurisprudence on the application of the First Amendment to this
2 type of expression of the free press.

3 And we did ask for petition for rehearing as the
4 Court, I think, is aware. And the 11th Circuit didn't touch
5 it. But we do think that the way that the 11th Circuit ruled
6 presents a very compelling case for U.S. Supreme Court review.
7 This is an area of the law that the Supreme Court does have a
8 propensity to wade into when there is some disagreement or a
9 potential chilling effect from circuit court decisions on
10 matters of First Amendment jurisprudence.

11 Specifically, in this case what's really troubling to
12 our client but I think to the media bar in general is that the
13 11th Circuit decided that it was perfectly constitutional and
14 subject to the newsworthy exception to the right of publicity
15 under the First Amendment for LFP Publishing to write an
16 article about the nude photos of Ms. Benoit but -- and the
17 public was certainly entitled as a matter of constitutional
18 right to learn about the existence of the photos through an
19 editorial, but the public then couldn't view them. We do
20 believe that that is an untenable position of law under the
21 Constitution and that the U.S. Supreme Court is very likely to
22 address this question on a petition for cert.

23 That said, there are a whole lot of factual issues
24 that the Plaintiff's going to have to prove, all of her
25 allegations in her complaint. We do expect if the case

1 proceeds through trial court proceedings there's going to be a
2 lot of discovery required. It will be costly to both parties.
3 We expect there will be summary judgment motions that the
4 Defendant brings. There will be lots of expert testimony, I
5 believe, on the issue of damages if this case continues to
6 proceed through a civil discovery to a dispositive motions
7 phase. And we think it makes logical sense given the
8 importance of the issues that are raised by the 11th Circuit's
9 decision in the way they decided the case for all parties to
10 give the U.S. Supreme Court an opportunity to review the case
11 before incurring those substantial expenses which again would
12 be incurred by both parties.

13 I can assure you that Defendant's goal here is not to
14 unnecessarily delay proceedings. They have nothing to gain by
15 dragging it out. This truly is a case in which there's an
16 important constitutional principle of law at issue, and it
17 ought to be decided before all parties incur substantial
18 expense litigating the merits of a case that after Supreme
19 Court review may not be required.

20 THE COURT: Mr. Decker?

21 MR. DECKER: Judge, no way, no how. The 11th Circuit
22 opinion couldn't have been clearer that they have violated her
23 right of publicity. Liability has been established by the 11th
24 Circuit, and the only question now is damages. I need to do
25 some discovery on the damage issue, how much money they made

1 publishing these 20-year-old nude photographs worldwide. I
2 need to do some discovery on Hustler's net worth for the
3 purpose of punitive damages, and then I'm ready.

4 The petitioner for cert has to show three things:
5 First, that there is a substantial likelihood that the Supreme
6 Court will take the case; secondly, that there is a substantial
7 likelihood that the Supreme Court will reverse; and, thirdly,
8 that if there is no stay then irreparable harm will occur.

9 They haven't even gotten close to any of them. First
10 of all, the Supreme Court takes less than one percent of cases
11 on cert; so it's highly unlikely and nowhere near probable that
12 the Supreme Court just on a statistical basis would take this
13 case which has the full weight of the 11th Circuit behind it.
14 Rehearing en banc was denied.

15 There is no probability that the Supreme Court will
16 reverse the 11th Circuit because they've already decided the
17 newsworthiness issue in the Zacchini case. It's almost exactly
18 the same case. It wasn't nude photographs. It was a guy being
19 shot out of a cannon. The local TV station portrayed --
20 publicized his act on TV. People didn't have to pay for it,
21 therefore, under the guise of newsworthiness. And the Supreme
22 Court, you know, ten years ago said that's not newsworthy. The
23 fact of his act may be newsworthy, but publishing his entire
24 act is violating his right of publicity. That's what he does
25 for a living. So there's no likelihood that the Supreme Court

1 will reverse.

2 And then, finally, even if the first two elements
3 were complied with which they're not, nowhere near, the third
4 one, they're not even close on the third irreparable harm.
5 Incurring some litigation costs with their two teams of lawyers
6 in doing discovery in this case is not the kind of irreparable
7 harm that the Supreme Court talks about when staying a case in
8 the lower court.

9 We have two elderly people here, her mother and
10 father. Her mother is the administrator. She is elderly.
11 Nobody knows how long they're going to be around. They're
12 entitled to their day in court. You know, a year's delay in
13 seeing whether the Supreme Court will even take this case is
14 just not fair. And they're entitled to go forward. They're
15 entitled to do their discovery.

16 You know, it's my decision if I want to roll the dice
17 and try the case and get a judgment and collect it and then
18 have to give it back to Hustler if they got the thing reversed
19 which I don't think they would. It's my decision whether to do
20 discovery, wait 'til the petition is denied and then try the
21 case according to the Court's calendar. But this is just pure
22 delay. It's trying to run out the clock. I've seen it a
23 thousand times. They're just trying to drag their feet on and
24 on with litigation costs.

25 And the reason I filed the motion for attorneys' fees

1 in response to this motion after telling Derek that I was going
2 to do that is because I see this as a harbinger of the future.
3 I think everything that we do in this case is going to be
4 pulling teeth. I think everything that I ask for, every move
5 that I make is going to be met by two teams of lawyers who are
6 going to just try to run out the clock. And I think this is
7 the first step in that direction, and I had to fire a shot to
8 let them know that I wasn't going to sit there and let them be
9 a punching bag when the 11th Circuit has already told them that
10 they violated this lady's rights. They violated her rights,
11 and the issue is now damages. That's the only issue in this
12 court is damages.

13 And we need to do a little discovery on how much
14 money they made, what their net worth is, and then we are
15 ready. And I just think a stay while they go or don't go to
16 the Supreme Court would just be devastating to these elderly
17 people.

18 Thank you.

19 THE COURT: Mr. Bauer, it's your motion. I'll give
20 you the last word.

21 MR. BAUER: I appreciate that, Judge.

22 Well, first of all, the case law is clear this is not
23 Mr. Decker's decision. This is yours. This Court has the
24 discretion to enter a stay if the equities demand it. And
25 there is guidance when parties are seeking a stay during a

1 petition for cert pending of what factors that you should look
2 at, and Mr. Decker did accurately represent what those are.

3 I disagree with him about whether those factors are
4 met here, and I think the cases that we cited in support of our
5 motion show that this is the type of compelling constitutional
6 issue that the courts do find are likely to be granted cert.
7 The statistics that he cites are absolutely consistent with my
8 understanding of how hard it is to get the Supreme Court to
9 grant cert. But, you know, we cited some statistics in our
10 motion that show that in this type of case the Supreme Court's
11 much more likely to do so.

12 I take significant issue with Mr. Decker's assessment
13 of the 11th Circuit's decision. This was the 11th Circuit's
14 review of our 12(b)(6) motion as you know. The 11th Circuit
15 assumed as it had to much like this Court did in response to
16 our motion to dismiss that the facts that Mr. Decker's client
17 alleged in her complaint were true for purposes of deciding
18 that motion.

19 The 11th Circuit's decision is based on fact
20 allegations that have not been proven -- and, frankly, my
21 client is not convinced that they can be proven -- not the
22 least of which is the assertion that the 11th Circuit was very,
23 very concerned about that Ms. Benoit had insisted that the
24 photos be destroyed and never see the light of day. That was
25 instrumental to the 11th Circuit's decision. That's an

1 unproven fact, and it's going to be key to liability. And, you
2 know, I don't have the authority to broadcast our entire
3 defense strategy should the case go to trial; but there's no
4 possibility that an 11th Circuit decision on a Rule 12(b)(6)
5 motion can be construed as a decision on liability leaving only
6 damages left.

7 Now, Mr. Decker still has the obligation to prove the
8 factual elements of his claim; and we are going to require that
9 he do that. As to his assertion that our motion to stay is
10 some harbinger of things to come, you know, I've never had the
11 pleasure of litigating with Mr. Decker before. He has got a
12 lot more gray hair than I do. I hope to have a long career in
13 this court in front of you and others here in the Northern
14 District; and, you know, I'm going to be accountable for the
15 type of lawyer that I am. And I don't think there's any basis
16 for Mr. Decker's allegations in the motion for attorney's fees
17 or in this hearing to suggest that, you know, counsel for the
18 Defendants is going to engage in any kind of misconduct.

19 We're accountable to you and intend to be and
20 understand that and intend to act accordingly throughout this
21 case, and that is not a basis in my opinion for this Court to
22 deny a motion to stay that's otherwise sound.

23 Mr. Decker's allegations about no probability of
24 success, he has a fundamental misunderstanding of how this case
25 and the U.S. Supreme Court's precedent in right of publicity

1 cases, specifically the Zacchini case that he references,
2 operates. This case is not Zacchini. Zacchini is informative
3 to the legal issue in this case only insofar as it contains the
4 U.S. Supreme Court's pronouncements about the newsworthiness
5 boundaries of the right of publicity. But on the facts
6 Zacchini is an entire act case. That case applies only where
7 the Defendant is -- has appropriated the complete act from
8 start to finish of a performer, and that's not the case we have
9 here. And, frankly, it's not informative of what the U.S.
10 Supreme Court's going to do with this case.

11 And, finally, irreparable harm. There is a dearth of
12 cases that address -- where courts have addressed this type of
13 motion to stay. They just don't come up all that often. And
14 in each of the cases that we've cited it's pretty clear that
15 the cost of litigation is the type of irreparable harm that the
16 U.S. Supreme Court considers that the parties will incur when
17 deciding whether there's a harm that justifies the entry of a
18 stay.

19 And I respect the Plaintiff's desire to move this
20 case through to trial. And, you know, we're hopeful that the
21 U.S. Supreme Court prohibits them from doing that by reversing
22 the 11th Circuit's decision. But our client shouldn't be
23 forced to incur what will be substantial litigation expense if
24 that can be avoided simply by giving the U.S. Supreme Court a
25 brief window of opportunity to determine whether it wants to

1 review the case.

2 Our petition for certs are due November 25th. We
3 filed a notice of our intent to file that petition so that
4 there wouldn't be any question about the motives of the
5 Defendant to actually do so. It's not a stalling tactic.
6 They're going to seek cert. Mr. Decker's opportunity -- and
7 there will be amicus support is my understanding for that
8 petition as well.

9 Mr. Decker will have an opportunity to respond and
10 tell the Supreme Court why they shouldn't take it. That will
11 happen relatively quickly within 30 or 45 days, I believe, of
12 November 25th; and we will have a decision by spring. And
13 discovery in this case right now on the track it's on would be
14 closed by mid-February, I believe. And we won't have a
15 decision by the U.S. Supreme Court by then. And it's simply
16 our suggestion that efficiency, fairness to the parties, logic
17 and sensibility dictates that we ought to give that brief
18 window of time to the U.S. Supreme Court to decide what it
19 wants to do. And if they say no, we're right back here come
20 March. And Mr. Decker and I can spend some quality time
21 together seeing if he can prove the facts of his case next
22 summer.

23 THE COURT: All right. I'm going to deny the motion
24 for a stay for these reasons. The Defendant has the burden of
25 showing that there's a reasonable probability that certiorari

1 will be granted, second, a significant possibility that the
2 judgment below will be reversed and a likelihood of irreparable
3 harm if the judgment is not stayed.

4 I really don't know what the chances are that cert
5 will be granted in this case. I think the chances are probably
6 greater than the run-of-the-mill case because there are First
7 Amendment implications. If they take the case, I think there's
8 a reasonable likelihood that they would reverse the 11th
9 Circuit. Otherwise, I wouldn't have granted the motion to
10 dismiss in the first place since it was my opinion that
11 publication of the photographs in connection with the story
12 about her life fell within the newsworthiness exception to the
13 right of publicity.

14 But I don't have to decide either of the first two
15 questions because I think the third question is dispositive,
16 and that is whether there's a likelihood of irreparable injury.
17 And my reading of the cases is that generally speaking costs of
18 litigation are not considered to be the type of irreparable
19 injury that would justify a stay while a party is seeking a
20 certiorari to the Supreme Court.

21 I'll be available to manage the discovery. If the
22 Supreme Court takes certiorari, I can reconsider the decision I
23 made today. But for now I'm going to deny the motion to stay.
24 The case can take its normal course. And if the situation
25 changes, we can revisit the issue.

1 Mr. Decker, if you want to prepare a written order,
2 get Mr. Bauer's approval as to form denying the motion, I'll be
3 glad to sign it.

4 MR. DECKER: Attorneys' fees, Judge?

5 THE COURT: I didn't even know you had filed a
6 motion.

7 MR. DECKER: Yes, I did. Okay.

8 MR. BAUER: And, Judge, we did file a response to his
9 motion yesterday. And with respect if the Court decides
10 there's any issue in Mr. Decker's motion that warrants
11 consideration by the Court, we would ask to be heard on that
12 before the Court rules.

13 THE COURT: I'll take a look at it, and if I think I
14 need to hear further from either side I'll let you know.

15 MR. BAUER: Thank you.

16 THE COURT: All right. Have you filed an answer?

17 MR. BAUER: We have.

18 THE COURT: You have.

19 MR. BAUER: We filed an answer and our certificate of
20 interested persons and corporate disclosure statement. There's
21 a couple of deadlines coming up. We've got to get together and
22 have a planning conference and present you a scheduling order,
23 I think; and some initial disclosures will be coming up soon.

24 THE COURT: Okay. Everything then --

25 MR. BAUER: We're on track.

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THE COURT: -- is on track.
All right. Thank you very much, gentlemen.
(Proceedings adjourned at 10:19 a.m.)

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UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 14, are a true and correct copy of the proceedings in the case aforesaid.

This the 14th day of December, 2009.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court