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

BEVERLY McCLENDON, And BEVERLY McCLENDON As Next Of Friend of the minor child, JEWEL CIERA WASHINGTON, Plaintiffs,	:	
Vs.	:	Civil Action File No.: 1:10-cv-03254-CAP
WARNER BROS. ENTERTAINMENT, INC., TYRA BANKS, BENNY MEDINA, KERRIE MORIARTY, And JOHN REDMANN, Defendants.	:	

PLAINTIFFS'OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs and respectfully submit this Brief in Opposition to Defendants' Motion For Summary Judgment.

Summary Judgment in not appropriate in this case because there are several material questions of fact in dispute. Pursuant to Fed. R. Civ. P. 56(c), summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

The party seeking summary judgment bears the burden of proving the absence of a genuine dispute to any material fact. Herzog v. Castle Rock Entm't, 193 F. 3d 1241, 1246 (11th Cir. 1999). Thereafter, the burden shifts to the non-moving party. The non-moving party must go beyond the pleadings and present evidence showing that a genuine issue of material fact does in fact exist. Burchfield v. CSX Transp., Inc., 2009 WL 1405144, at *2 (N.D.Ga. 2009) (Trash, J.). A material fact is one that would affect the outcome of the case under the law and an issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Peterson v. Sprock, 2009 WL 383582, at *2 (N.D.Ga. 2009)(Story, J.) When considering a motion for summary judgment, the Court must view all facts and inferences in favor of the non-movant.. Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). When the parties' evidence conflicts, the Court credits the evidence of the non-movant. Evans v. Stephens, 407 F. 3d 1272, 1277 (11th Cir. 2005).

ALLEGATIONS OF THE PLAINTIFFS

This case involves a 15 year old child's appearance on the Tyra Banks Show without parental consent. Plaintiff Jewel Washington was an avid fan of the Tyra Banks Show (hereinafter the "show") and watched in every day. She responded to

an internet solicitation to appear on the show in 2009. The show's topic was labeled "sexorexia" by the producers. (Exh. 1, Def. response to requests for docs.) Staff of the show contacted Plaintiff Jewel Washington and spoke directly with the child before attempting to speak with her parent. Sometime after the initial contact the show's producer, Vanessa Adamo asked to speak with the child's mother, Plaintiff Beverly McClendon. Plaintiff Jewel Washington simply changed her voice and pretended she was her mother. Neither defendant nor their staff has ever spoken with Plaintiff Beverly McClendon. (McClendon Affidavit) The Defendants never obtained the written consent from Plaintiff McClendon for her daughter to travel and appear on the Tyra Banks Show. (McClendon Affidavit.) The defendants claim they sought the signature of Beverly McClendon but were duped by the 15 year old plaintiff when she forged her mother's signature. The Defendant never bothered to request a copy of the license of Plaintiff Beverly McClendon to at least compare her signature. The defendants have no written policy or protocol in regards to obtaining parental consent for minors to appear on the show. (Exh 2, Def. response to requests for docs. # 7) The Defendants requested the driver's license of Tafoya Sutton only after he and Plaintiff Jewel Washington had flown to New York. Tafoya Sutton is not related to the Plaintiff's by blood or marriage and Plaintiff Beverly McClendon does not know him and has

never met him. (McClendon Affidavit) Tafoya Sutton is simply a friend of Miss Washington.

The Defendants had no desire for the truth, only for sensationalism. Either the Defendants were on notice from the very beginning of their contact with Plaintiff Jewel Washington that she was prone to fabrication or the Defendants themselves were prepared and willing to make-up salacious facts for ratings.

In response to Plaintiffs' requests for production of documents, Defendants provided a document called a "guest plug". In the Defendants comments portion of this document it states "I am a very outgoing, attractive teenager that is addicted to sex. I had my first child when I was 12 years old and my second at 16. I cannot keep my legs closed at all. I really do think that I need help. I have been pregnate over 20 times and want to make something with my life but sex is holding me back". (Exhibit 1) These comments were entered into the Defendants' Guest Plug Info Page on October 22, 2009. Plaintiff Jewel Washington has never had any children and could not possibly have had a second child at 16, when she was 15 when she appeared on the show. (Affidavits of Plaintiffs) Dr. Drew Pinsky is an addiction medicine specialist not a doctor of medicine or doctor of psychology. (Defendants' statement of material facts) and the Defendants made no attempt to confirm any information Plaintiff Jewel Washington provided them in relation to a sexual addiction. Jewel Washington is has never been diagnosed as a sexual

addict, has never been treated, counseled or seen by any doctor, clinician or other professional for sex addiction. (Affidavits of Plaintiffs)

Argument and Citation of Authority

I. Summary Judgment as to Jewel Washington

The Defendant's contend summary judgment is proper for three reasons (1) Plaintiff Jewel Washington is responsible for her own actions, consented to the commission of the tort and is therefore precluded from recovery (2) Plaintiff Jewel Washington assumed the risk and (3) the defendants' actions are not the proximate cause of Plaintiff Jewel Washington's injury.

Consent By The Minor

The Defendant assert that Georgia has established 14 years as the age of responsibility for purposes of negligence, therefore Miss Washington is responsible for her own actions and her conduct precludes recovery as a matter of law. Defendants have cited several cases in support of this proposition. Most of the cases cited establish that at 14, a plaintiff is presumed capable of realizing

danger and of exercising the necessary forethought and caution to avoid an accident. McKinnon v. Streetman, 192 Ga. App. 647, 649 (1989). The majority of the cases cited as illustrative by the Defendants involved automobile accidents or accidents involving physical injury wherein the peril was obvious to a child of 14 years of age. If appearing on a nationally televised show purporting to be a sex addict was an obvious peril, consent would not be necessary. Georgia statute O.C.G.A. § 51-11-2 precludes consent by a minor incapable of giving such consent.

O.C.G.A. § 51-11-2 provides that as a general rule no tort can be committed against a person consenting thereto if that consent is free, is not obtained by fraud, and is the action of a sound mind. This code section precludes consent by a minor incapable of giving consent, but does not preclude consent by a minor capable of consenting. McNamee v. AJW, 238 Ga. App. 534, (1999), 519 S.E. 2d 298. A minor acquires capacity to consent to different kinds of invasions and conduct at different stages in his development. McNamee at 302. Contrary to Defendants assertions, 14 is not the age that Georgia law has determined is the age when all minors acquire the capacity to consent to a tort. Yes, case law and statute has determined that a child over the age of 14 is deemed to have the mental capacity of an adult and chargeable with the same standard of diligence for his own safety when it comes to driving a car with defective equipment or making a will, but

statute requires a person to be 16 before they can consent to marriage, unless pregnant or the parents of a child born out of wedlock and that they reach the age of majority before they can contract. McNamee recognized, as with other jurisdictions, that there is no hard and fast rule as to the age at which a person attains the capacity to consent to bodily invasions. In McNamee the Court held that is was an issue for determination by the jury and summary judgment was properly denied the 16 year-old defendant minor in the 15 year old minor's claims of sexual battery, rape and negligence, based on the argument that the 15 year-old minor consented to the sexual acts. Just as there is no hard and fast rule in Georgia nor in other jurisdictions at to age at which a person attains the capacity to consent to bodily invasions, there has been no determination in Georgia nor any other jurisdiction as to when a minor acquires capacity to consent to relieving a talk show host and a production company of their duty to obtain parental consent before exploiting her likeness on national television.

Assumption Of The Risk

Defendants argue Plaintiff Jewel Washington assumed the risk of any injury by her own actions. Assumption of the risk bars Plaintiff Jewel Washington from recovery only if it is established that Miss Washington, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not. Atlanta Affordable Housing Fund Limited Partnership et al. v. Brown et al., 253 Ga. App. 286, 558 S.E.2d 827, (2002). Plaintiffs contend there was coercion of circumstances in this matter. Plaintiff testified in deposition that she was a huge fan of the show listing it on her Facebook as a TV show she was interested in. (Washington deposition pg.95:16)

The lure of stardom or the desire to simply to appear on television has created what some would describe as trash television. One need only turn on the TV. to be bombarded with a plethora of pure ignorance. People being torn out of their clothes and broadcasting their paternity tests results in a completely deplorable setting. Nevertheless there are the Kim Kardashians of the world who was catapulted to stardom with a sex tape that went public. A reasonable person could easily agree the attraction and lure of TV. stardom arguable serves as a coercion of circumstances in the world we live in.

In addition, the affirmative defense of assumption of the risk requires both actual and subjective knowledge of the risk. Atlanta Affordable Housing Fund Limited Partnership et al. v. Brown et al., 253 Ga. App. 286, 558 S.E.2d 827, (2002). Defendants have made no attempt to establish that Miss Washington had actual or subjective knowledge of the risks and harm of appearing on a nationally televised show which labeled her as a sex addict. The Defendants have failed to establish that Miss Washington even contemplated damage to her reputation and the research potential employers, colleges and the military undertake when investigating and making decisions regarding employment and admission and the inexhaustible numbers of pedophiles and sexual predators who saw her likeness, all of which are obvious risks involved in such an undertaking. There is difference between knowledge of a peril and a full appreciation of the risk. To establish an assumption of the risk defense, the Defendants must establish that the Plaintiff Jewel Washington (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed herself to those risks. Atlanta Affordable Housing Fund Limited Partnership et al. v. Brown et al., 253 Ga. App. 286, 558 S.E.2d 827, (2002). Defendants have totally failed to present any evidence in this regard. Knowledge is the watchword of assumption of the risk and means both actual and subjective knowledge. It is not simply

Plaintiff's comprehension of a general non-specific risk associated with such conditions or activities but Plaintiff's knowledge that she has, in advance, consented to relieving the Defendants of their obligation to get parental consent for her to appear on the show and is willing to take her chances from the known risk of failing to have her mother decided whether she should appear on the show and allow Plaintiffs to exploit her for their monetary gain. Atlanta Affordable Housing Fund Limited Partnership et al. v. Brown et al., 253 Ga. App. 286, 558 S.E.2d 827, (2002).

Proximate Cause

The Defendants further contend that their actions in not obtaining the requisite intent are not the proximate cause of Miss Washington's injury. It cannot be said, as is required, that the actions of the Plaintiff Washington, "preponderate in producing the injurious effect" therefore the actions of the Defendants are too "remote and contingent" to be the proximate cause of the injury. Meadows v. Diverse Power, Inc., 296 Ga. App. 671, 673 (2009). While Miss Washington pretended to be her mother on the phone, the Defendants had never spoken to her mother; Beverly McClendon in life therefore had no reasonable basis to know she was who she represented herself to be. While Miss Washington forged her mother's signature, a cursory look at Beverly McClendon's signature on her

license would have clearly indicated the consent form was not signed by the same person. Furthermore, for the Defendants to assert to have actually obtained verbal consent from Beverly McClendon for Miss Washington to appear on the show with Tafoya Sutton while she was in the hospital, just out of intensive care is more than mere negligence but reckless and incredulous. Ms. McClendon was never in the hospital during the relevant time. (Affidavit of Beverly McClendon)

Proximate cause is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. Atlanta Affordable Housing Fund Limited Partnership et al. v. Brown et al., 253 Ga. App. 286, 558 S.E.2d 827, (2002). The determination of proximate cause is undeniably a jury question, only to be decided by the court if reasonable persons could not differ as to both the relevant facts and the evaluative application of legal standards. Atlanta Affordable Housing Fund Limited Partnership et al. v. Brown et al., It is entirely conceivable that reasonable persons might believe that the Defendants lack of policy to obtain parental consent and incredulous measures purported to have been taken in this case evidences a level of negligence and recklessness which negates the actions of the minor child.

II. Summary Judgment as to Beverly McClendon

Violation of Right to Privacy

Defendants argue summary judgment is appropriate as against Plaintiff Beverly McClendon for two reasons (1) The violation of the right to privacy is a personal right, and Georgia does not recognize a 'relational' right to privacy and (2) The negligence claim fail because the Defendants owe no duty to Plaintiff McClendon.

Defendants contend that under Georgia law there is no 'relational' right of privacy on behalf of the parents. This is not entirely true. Georgia recognized a relational right to privacy in Bazemore et al., v. Savannah Hospital et al., 171 Ga. 257, 155 S.E. 194 (1930). In Bazemore, the parents of a deceased child set out a cause of action for the unauthorized publication of the picture of said child. The parents alleged the Defendants disregarded their right to privacy and commercialized the pictures for pecuniary gain and the exposure of the pictures being to the chagrin, mortification, humiliation, insult and injury of the petitioner parents. The court in Bazemore found the suit was not based on injury to the deceased child; the wrong was committed after the death of the child. The right of action is an action on the part of the plaintiff parents. Bazemore, at 197. In

addition, the concurrence of Justices Russell, C.J and Hine, J., opined that the petition would set out a cause of action if the child had not died. More importantly, Defendants can cite no case law that expressly rejects a 'relational' right to privacy in Georgia. In Waters v. Fleetwood, 212 Ga. 161, 91 S.E. 2d 344 (1956), the court pronounced that Georgia law has never passed on the question of whether or not there might be a 'relational' right of privacy because the Court in Bazemore was not a unanimous decision.

Negligence Claim

The Defendants contend Plaintiff Beverly McClendon's negligence claim fails to establish that she is owed a legal duty and in the absence of such a duty her claim is not actionable. Contrary to this assertion, the Defendants had a legal duty to obtain Plaintiff McClendon's consent prior to having her child, Miss Washington appear on the show. Ms. McClendon had a legal right, above all others, to make the decision whether or not Plaintiff Washington was to appear on the show. Pursuant to O.C.G.A. § 19-7-1 (a), until a child reaches the age of 18 or becomes emancipated, the child shall remain under the control of his or her parents, who are entitled to the child's services and the proceeds of the child's labor. It is well settled in Georgia that a child does not have the legal capacity to enter into a contract. A contract purported to be entered into by a child of fifteen years of age is voidable and unenforceable. Vinson v.State, 124 Ga. 19, 52 S.E.

79, (1905). The requirement of consent in Georgia is the right that belongs to the parent and in this case Plaintiff McClendon.

O.C.G.A. § 51-1-10 provides, "If a tort shall be committed upon the person or reputation of the wife, the husband or wife may recover therefore; if the wife shall be living separate from the husband, she may bring an action for such torts and also torts to her children and recover the same to her use," and as the Defendants have argued,

> "As a general rule no tort can be committed against any person consenting thereto if that consent is free, not obtained by fraud, and is the action of a sound mind, the consent of a person incapable of consenting, such as a minor, may not affect the rights of any *other* person having a right of action". O.C.G.A. § 51-11-2 (Emphasis supplied)

Plaintiff Beverly McClendon is the "other" person contemplated by the statute as having a right of action. She is within the class of persons who are sought to be protected. The requirement of procuring a parent's consent in matters relating to their child protects not just the child but the parent's right to make the decision on what is in the best interests of the child.

Miss Washington's consent and willingness to appear on the show are of no consequence to Ms. McClendon's negligence claim. Actionable negligence consists of a violation of some duty owed to another person. In order for a

violation of the statutory duty of obtaining parental consent to contract a minor, the person claiming it must be within the class for whose benefit the statute was passed. In determining whether the violation of the statutory requirement is negligence per se as to the person upon which a cause of action will rest, the court is to look to the particular statute in respect to its purposes, that is the evils it was intended to guard against and the persons it was intended to protect. Jones v. Dixie Drive-It-Yourself System, 97 Ga. App. 669, 670, 104 S.E. 2d 497 (1958). The defendants did not have a valid contract, waiver and release, authorizing Plaintiff Washington to appear on the show. The requirement of obtaining parental consent to contract with a fifteen year old is designed to protect a parent's right to control their child. Plaintiff Beverly McClendon is within that class of persons whose rights the statute is designed to protect.

WHEREFORE, the Plaintiffs pray Defendants' Motion For Summary Judgment is DENIED.

Respectfully submitted this 3nd day of January, 2012.

s/WANDA S. JACKSON, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, January 3, 2012, I have electronically filed Plaintiffs' Opposition To Defendants' Motion For Summary Judgment with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys record:

1. Thomas M. Clyde
2. Marcia Bull Stadeker

s/WANDA S. JACKSON, ESQ.
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