IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWENTY-FIFTH DIVISION

DIONYSIUS HIPP, INDIVIDUALLY on behalf of himself and All Others Similarly Situated — PLAINTIFF

V. NO. 2009-CV-4321

MECHANICAL PUBLISHERS, INC. and BANANABERRY ENTERPRISES, INC. — DEFENDANTS

BRIEF IN SUPPORT OF
MOTION TO DISMISS FOR FAILURE
TO STATE A CAUSE OF ACTION
PURSUANT TO RULE 12(b)(6) OF THE
ARKANSAS RULES OF CIVIL PROCEDURE

I.

INTRODUCTION

Defendant, Mechanical Publishers, Inc. moves to dismiss the Plaintiff's Complaint pursuant to Rule 12 (b)(6) of the Arkansas Rules of Civil Procedure.

Defendant seeks the shortest route to dismissal of this frivolous and absurd complaint. The easiest way to get rid of this waste of the Court's time is to point out that there is simply nothing to litigate. Plaintiff's Complaint is defective in many respects, and by making this Motion Defendant does not intend to waive any of the other defects in Plaintiff's Complaint. However, Plaintiff's Complaint is

fundamentally defective in that even when construed most liberally in the light most favorable to the allegations contained therein, it fails to state a cause of action.

II.

PROCEDURAL HISTORY

Plaintiff filed this Complaint on December 30, 2000. He served both Defendants by serving O. Julius Bananaberry on the seventeenth hole at Chenal Country Club on Wednesday, April 28, 2010. This breach of etiquette so disrupted Bananaberry's game that he lost a close golf game to his good friend and golfing partner Cecil Gottrocks III. Both Defendants filed timely answers to the Complaint. This Defendant filed on Friday, May 14, 2010, and Bananaberry Enterprises filed on Tuesday, May 18, 2010. Bananaberry Enterprises challenged the service under the doctrine of *stercorem tauri*, asserting that as it is now a Luxembourg Corporation it is entitled to the protections of the Geneva Convention, this Court denied its motion and by order of June 8, 2010 held that the service upon its registered agent was good service. The Court further noted that Bananaberry Enterprises had raised most of the defenses that must be raised in the initial pleading in its initial pleading, and that Mechanical Publishers, Inc. had raised all defenses that must be raised in the initial pleading in its initial pleading, and further noted that the answer of Mechanical Publishers would most likely inure

to the benefit of Bananaberry Enterprises under so any issues regarding whether any defenses were raised in a timely manner were moot.

III.

RULE 12(b)(6)

On a Motion to Dismiss for Failure to State a Claim, the Court must take all acts alleged in the complaint as true and must view them in a light most favorable to the party who filed the complaint. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id*. However, a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id*. The court will look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Id*.

IV.

FACTS

This set of facts is admitted for purposes of the motion only.[1] Mechanical Publishing is in the business of publishing books, *inter alia* a series of books which it designates "Lurid Tales of Depravity." "Lurid Tales of Depravity" is promoted

[1] We know the Court understands this, but having dealt with Dionysius Hipp before, we are certain that if we do not emphasize this, we are bound to hear that we "admitted" all this later in the event the Court does not see fit to grant this motion. Of course, in this case, this is all a fairly unnecessary precaution, as the likelihood of the Court denying the motion and wasting any more time than is necessary on this frivolous nonsense is small indeed.

as high quality pornography, promoted as appealing to prurient interests, and all reasonable efforts are made to keep the marketing materials out of the hands of minors. "Lurid Tales of Depravity" are, in fact, merely reprints of works on which copyright--if indeed it ever applied, has long since expired. The works have been retitled by the publisher, and the names of the authors disguised. For example, *Romeo and Juliet* by William Shakespeare is published as *Teen Lust* by Billy S. The reprints contain frequent illustrations, as frequently as every page or two, consisting of a reproduction of a painting, drawing, or photograph of sculpture. These items are generally of a vintage to be far beyond any protection of the copyright laws. The verso, or left side of the page[2], of each such page is blank, save the annotation, "This page intentionally left blank."

The Court may take judicial notice of the fact that the use of the phrase "This page intentionally left blank" is common in the printing industry. Without a doubt, it appears in some of the books in the Court's chambers.

V.

LAW

The elements of fraud are (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in

[2] The undersigned had to look it up.

reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004).

An expression of opinion, i.e., a statement concerning a matter not susceptible of accurate knowledge, cannot furnish the basis for a cause of action for deceit or fraud. *Vickers v. Gifford-Hill & Co., Inc.*, 534 F.2d 1311 (8th Cir.1976); *St. Paul Fire and Marine Insurance Co. v. Hundley*, 354 F.Supp. 655 (E.D.Ark.1973); *Ryan v. Batchelor*, 95 Ark. 375, 129 S.W. 787 (1910). An expression of opinion, or promotion of a product in the nature of "puffing" is not actionable. *Grendel v. Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987); Prosser and Keeton on Torts (5th Ed.), Chap. 18, § 109.

Pornography is in the eye of the beholder. To quote Justice Stewart, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), "I know it when I see it." *Id.* at 197. Here, any statements made in promoting the product were pure statements of opinion and little else.

As to the assertions regarding "This page intentionally left blank," the undersigned has written and discarded at least fifteen drafts of arguments on this point. The undersigned has discarded the arguments on the basis that they were intemperate and relied far too heavily on insults on the intelligence of the Plaintiff and any other person who would not understand the meaning of "This page

intentionally left blank" in its context. Fearing that he would be unable to avoid the fate of the counsel in cases such as *McLemore v. Elliot*, 272 Ark. 306, 614 S.W.2d 226 (1981) and *Ligon v. McCullough*, 368 Ark. 598, 247 S.W.3d 868 (2007) if he were to address the unreasonableness of Mr. Hipp's allegation that the statement on the blank pages is a false statement of material fact, the undersigned will restrict himself to the fourth element. Taking the easy way out, Mr. Hipp has failed to allege any conceivable justifiable reliance on the representation. It is undisputed that the phrase appears in the books, but it is likewise undisputed that Mechanical Publishers sells "Lurid Tales of Depravity" by mail. The purchaser never sees the books, or the representation, until after the purchase. There is no way that Mr. Hipp could have relied on the alleged misrepresentation to his detriment.

Finally, it is true that Mechanical Publishers does not sell "Lurid Tales of Depravity" to persons under the age of seventeen (or eighteen or even occasionally twenty-one—our marketing materials vary). It is admitted for purposes of this argument that there is no legal obligation to restrict the sales in this manner. However, there is no legal obligation to sell our product to anyone. If this practice happens to mislead the gullible, so be it.

Plaintiff has failed to illustrate any way in which the practice of selling exclusively to adults violates the rights of Plaintiff who, though his behavior seems to the contrary, is an adult.

VI

CONCLUSION

There is no there there. There is no justiciable issue stated. The Complaint should be dismissed.

WHEREFORE, Plaintiff's Complaint should be dismissed, and Defendant should be awarded costs, fees, and all other just and proper relief.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, O. Will Laquelle, hereby certify that I have served a copy of the above and foregoing document on the individual identified below, this _____ day of _____, 2009:

Dionysius Hipp
8317 Ascension Rd.
Little Rock, AR 72204

_____
O. Will Laquelle