

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
) February 17, 2010
) Atlanta, Georgia
) 10:01 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

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1 (Proceedings held in Atlanta, Georgia, February 17,
2 2010, 10:01 a.m., in chambers.)

3 THE COURT: All right. This is the case of Maureen
4 Toffoloni 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 MR. DECKER: Good morning, Your Honor. Rick Decker
8 for Maureen Toffoloni, the Plaintiff.

9 MR. BAUER: And Derek Bauer for Defendant LFP
10 Publishing, LLC.

11 THE COURT: All right. This is a hearing on the
12 Defendant's motion for protective order which is our Docket
13 Number 73 and the Plaintiff's motion to compel which is our
14 Docket Number 75.

15 Mr. Decker, I'll hear from you first.

16 MR. DECKER: Thank you, Judge.

17 Judge, unfortunately, we are back, I'm back
18 requesting assistance from the Court concerning a discovery
19 dispute. In essence, I am on behalf of the Plaintiff seeking
20 financial information from Hustler and its parent companies
21 concerning their economic activity for four years, including
22 the year in which they published the images that we are upset
23 about for the purpose not only of establishing a baseline for
24 punitive damages which is, I think, a legitimate claim to the
25 case but also for our compensatory damages. And I'd like to

1 take just a couple of minutes to explain where I'm coming from
2 on that.

3 First of all, Judge, with respect to the information
4 that we are seeking not only from LFP Publishing doing business
5 as Hustler which is the primary entity involved but according
6 to the Defendant's certificate of interested persons Hustler is
7 owned by something called LE Advisors, LLC. And LE Advisors,
8 LLC, is in turn owned by LFP, Inc. So there's LFP Publishing
9 doing business as Hustler, then there's LE Advisors that owns
10 that company, and then LFP owns both companies.

11 So my point being that any dime, any dime that's made
12 by Hustler on these images or anything else ultimately redounds
13 to the benefit of the ultimate parent LFP, Inc.. And that is
14 the reason for which I requested financial information because
15 of the parent relationship.

16 So when we got down to damages discovery, I requested
17 monthly operating statements for 2006, '7, '8 and '9 from
18 Hustler Advisors and LFP, Inc., for the purpose of showing not
19 only their worldly circumstances for purposes ultimately of
20 punitive damages, Judge, but even if this were not a punitive
21 damages case, all of the cases, the Georgia cases, the 11th
22 Circuit in the Toffoloni case and the Douglas case which the
23 11th Circuit quoted from extensively all say that the measure
24 of damage, of compensatory damage in this case is the benefit
25 to the appropriator of the images, the name, whatever it is

1 that was misappropriated to that entity. So the measure, the
2 primary measure of damage in this case will be how Hustler
3 benefitted financially from using these images without
4 compensation and without permission.

5 As I said, any dime that Hustler made from the use of
6 these images without permission, without compensation redounded
7 to the benefit of Hustler but then its parent and then its
8 parent's parent. So that is the reason why I requested
9 financial information in the form of monthly operating
10 statements and net worth statements from each of those entities
11 for the four years which I felt would establish a trend. And
12 my experts when I get this information and when I hire them
13 will be trying as they said in the Douglas case, the 7th
14 Circuit said in the Douglas case to separate out how from that
15 information how Hustler -- and that was also a Hustler case --
16 benefitted from its unlawful use of these images.

17 And if you look for a bump, you look for a blip, you
18 try to say, well, this is what they made the month before, this
19 is what they made the month of the publication of the unlawful
20 images, you can establish a trend. You can see how they -- how
21 these images benefitted the company financially.

22 And so quite apart from the issue of punitive damages
23 there's the issue of compensatory damages that the only -- and
24 the benefit to Hustler of its use of these images. And the
25 only way that I could possibly ever get anywhere close to

1 discerning that information is if I had their financial
2 information for the months and years surrounding this
3 publication. And as I think the Court knows and I know and I'm
4 sure Derek Bauer knows, all of this stuff is maintained on a
5 computer and it would take about 30 seconds to print out four
6 years' worth of financial information. The stack of paper
7 probably wouldn't be any higher than an inch. So it's not a
8 giant burden we are talking about or a huge amount of paper
9 that we're talking about. It's just monthly operating
10 statements for these entities for essentially four years.

11 We also, Judge, have a confidentiality order in this
12 case. So that there's no way that the information is going to
13 get outside this case to injure -- somehow injure Hustler with
14 its competitors in any way. So that's not a legitimate
15 concern. As I understand Hustler's position in this case, it
16 is that because I couched my request in terms -- I prefaced my
17 request by saying, you know, to support the Plaintiff's claim
18 for punitive damages please give us the following information
19 when I didn't have to do that. I did it -- I don't really know
20 why I did it.

21 But even if this Court were to say somewhere down the
22 road that this is not a punitive damages case which I don't
23 think you will, I think that's a jury question, it's a
24 compensatory damages case at the very least. And I need the
25 information. I think I am entitled to it. I won't do anything

1 with it except try to develop a damage claim in this case, and
2 it's something I think that I'm entitled to without having to
3 come to court to get it.

4 Clearly, if and when a jury is asked to pass on the
5 question of punitive damages, then the worldly circumstances of
6 Hustler will be appropriate. But in this case, this particular
7 case, since the measure of damage is the benefit to the
8 Defendant you really can't separate it out. You can't say to
9 the jury, you know, just look at this for purposes of
10 compensatory damages 'cause they're going to look at it.
11 They're going to see what Hustler is worth, what Hustler has
12 made over the four years in question. And that's just an
13 unfortunate fact. But I don't think still in all when it's all
14 said and done that the Court is going to take a punitive
15 damages case away from the jury.

16 If I may read just briefly, Judge, from a couple of
17 cases, the Georgia case says -- this is cited in our brief, the
18 Alonso case -- the measure of damage in an unsanctioned
19 appropriation case such as this is the value of the benefit
20 derived by the person appropriating the other's name or
21 likeness. Very simple. It's the value of the benefit to them.
22 That was in turn cited by the Toffoloni case by the 11th
23 Circuit who said: We are guided by the 7th Circuit's opinion
24 in Douglas versus Hustler to conclude that LFP may be held
25 liable in damages for violation of a right of publicity when it

1 publishes images of Benoit that had economic value without her
2 permission, let alone without compensating her estate.

3 Quoting the 7th Circuit and Judge Posner in the 7th
4 Circuit case, the Douglas versus Hustler said: Before a court
5 can gauge the award of punitive damages -- he was talking in
6 this instance about punitive damages -- it must first gauge the
7 financial position of the wrongdoer. Hustler is immensely
8 profitable. An award of punitive damages reduced to \$100,000
9 would have little effect on its propensity well documented in
10 several of the cases we have cited to invade people's legal
11 rights.

12 And so, Judge, I mean, it seems clear to me that for
13 both purposes, actual and punitive damages, this financial
14 information is appropriate. And I ask the Court to pass an
15 order requiring Hustler to provide it.

16 Thank you.

17 THE COURT: Mr. Bauer?

18 MR. BAUER: Thank you, Judge.

19 Well, if I may, let's start with the easy one; and
20 that is Plaintiff's effort to serve discovery that 's targeted
21 towards non-parties, distinct corporations that aren't parties
22 to this case by serving discovery on the Defendant LFP
23 Publishing Group, LLC. Notwithstanding the issue of whether
24 the actual discovery requests that Plaintiff has -- is
25 attempting to obtain, the discovery Plaintiff is attempting to

1 obtain from these non-parties is actually relevant to any issue
2 or valid claim in the case, it's not appropriate for him, for
3 Plaintiff, rather, to obtain this discovery through a discovery
4 request directed to the Defendant when these corporations are
5 separate and distinct entities and aren't parties and are
6 subject to appropriate process.

7 Simply put, if Plaintiff wants to seek discovery from
8 non-parties, he's got to issue subpoenas to do it; and we're
9 going to insist that he follow the right protocol and process.
10 And those entities will ostensibly get representation and
11 protect their rights accordingly under that process. And this
12 is important to the Defendant because obviously once you start
13 pretending that legal distinctions and separations of
14 corporations aren't formal distinctions then you have the
15 possibility of losing them and waiving them.

16 So the Defendant absolutely is going to insist on
17 corporate formalities, and it's appropriate that they do so. I
18 really am kind of baffled by the fact that Plaintiff hasn't
19 addressed that particular issue at all in any of her papers and
20 hasn't attempted to serve these entities appropriately, but we
21 think that one is pretty plain and would ask the Court to
22 preclude Defendant from the obligation of having to provide
23 discovery of non-parties.

24 The issue with respect to the financial information
25 -- and if the Court wants me to address the relevancy of the

1 punitive damages discovery to the non-parties, I'm happy to.
2 But I intend to just deal with it for the Defendant who is my
3 only client here if that pleases the Court. But the issue for
4 the Defendant with respect to the financial information that
5 Plaintiff seeks isn't one of burden or confidentiality.

6 Mr. Decker's quite correct that, you know, I don't believe that
7 producing the stuff that he has requested would be inordinately
8 burdensome to the Defendant; and we have absolute confidence in
9 the protective order that the Court has entered in this case.

10 The issue is one of relevancy. And if it -- for what
11 it's worth, I think Plaintiff made quite clear what she
12 perceives the relevancy of this information to be when she
13 couched it in terms of this is my punitive damages discovery
14 when it was issued. And that's also consistent with the
15 position Plaintiff took when she filed her motion for summary
16 judgment right after remand saying the only issue left for this
17 Court is damages and I just need to do my discovery on punitive
18 damages.

19 With respect to her suggestion that the information
20 is relevant to the calculation of compensatory damages, let me
21 just say this. The language that Mr. Decker read to you about
22 the value of actual damages in a case such as this is
23 absolutely correct. And the benefit to the appropriator is the
24 same as an unjust enrichment calculation, and that's what the
25 courts in Georgia have said about how actual damages in a ripe

1 publicity case are calculated.

2 The unjust enrichment to the Defendant in this case
3 if there was one would be what value LFP Publishing or Hustler
4 would have paid for these images but didn't by virtue of its
5 alleged appropriation. We have provided to Mr. Decker and to
6 Plaintiff the discovery that's necessary for that calculation.
7 We gave him several years' worth of sales figures for Hustler
8 Magazine which includes the revenues. That's several years
9 before and through the current date of his request which was
10 last fall, I believe. So he's got all the information that he
11 could possibly need to analyze trends in the sales of Hustler
12 Magazine that could arguably be associated with the publication
13 of these specific images.

14 And let me just say that, you know, I've looked at
15 those figures. And there will be no trend that is discernible;
16 and, if anything, sales figures have consistently gone down for
17 Hustler Magazine. I think it's going to be supremely difficult
18 for any expert that Mr. Decker might hire to look at those
19 sales figures and say that somehow the publication of these
20 particular images provided a sales boost to Hustler. But
21 that's far down the road.

22 We've also given Plaintiff the amounts that Hustler
23 has paid to models, both amateurs and professionals, and
24 celebrities for the last several years, the years that he
25 requested, so that he can also use if he chooses to the amount

1 that Hustler has actually paid for the right and privilege to
2 publish models' photos to calculate compensatory damages.

3 What LFP's revenues are based on anything other than
4 the sales of the magazine or what revenues its parents have
5 generated from other products other than the magazine are,
6 simply put, entirely irrelevant under the standard that
7 Plaintiff has argued to you for the calculation of compensatory
8 damages. And so it's our position, Your Honor, that the only
9 relevancy that the discovery that's at issue in our protective
10 order motion and Mr. Decker's motion to compel is punitive
11 damages.

12 And if I might, as the Court knows, it's our position
13 that Plaintiff's complaint fails to state a valid claim for
14 punitive damages. Now, we recognize that the procedural
15 posture of this issue coming before the Court is somewhat
16 unusual. And I submit that that is because of the unusual
17 circumstance of the 11th Circuit reversal in this case which as
18 you know we believe to be manifest constitutional error. And
19 so while ordinarily this issue might have been dealt with on a
20 12(b)(6) motion to dismiss or on summary judgment, it's
21 unfortunate that we're here now in the framework of a discovery
22 dispute to deal with what we admit and acknowledge is
23 effectively a dispositive issue with respect to Plaintiff's
24 punitive damages claim.

25 The problems with the claim, though, are pretty

1 straightforward. First -- and Plaintiff hasn't addressed any
2 of these issues in her briefing, and Mr. Decker didn't mention
3 it in his argument; I'm sure he will when he gets to speak
4 again in a minute -- but there's a pleading problem. Rule 8
5 governs the standard of pleading and requires that you actually
6 plead facts, specific facts in support of every claim. And
7 they haven't done that. They haven't done that not because it
8 was an oversight or omission but because in these circumstances
9 the fact is that they don't have the facts, they don't exist in
10 this case, that could support any allegations that are
11 sufficient to state a claim for punitive damages.

12 And for that reason, Plaintiff can't even in good
13 faith amend her complaint to cure a pleading deficiency because
14 in the circumstances we find ourselves in we submit that it's
15 not only inappropriate on the facts but I think it would be
16 unconstitutional because we have a media Defendant here to ask
17 a jury to decide whether the requisite intent and aggravating
18 circumstances that are required to support a punitive damages
19 claim are present where I think it's manifest that the belief
20 that this publication was privileged was at least at a minimum
21 a reasonable belief.

22 And punitive damages as the Court knows requires
23 something far more, and I don't know that we unless the Court
24 would like need to go through the facts again. But if I might
25 just briefly touch on them.

1 By the time the Plaintiff brought her complaint to
2 the attention of Hustler, the images had already been
3 published. By the time suit was filed the images were already
4 off the shelves. Notwithstanding that fact, once Hustler
5 received Plaintiff's complaint it immediately pulled the images
6 out of potential internet circulation from all foreign
7 licensees so there was absolutely no chance of future
8 publication. And, of course, as Hustler represented to
9 Mr. Decker immediately upon receipt of his initial complaint
10 and as we've briefed thoroughly to the Court, Hustler always
11 believed that what it was doing was lawful and it had a
12 constitutional privilege to publish the images. Those facts we
13 submit preclude an award of punitive damages.

14 There are three elements required under Georgia law
15 to sustain a claim for punitive damages for a right of
16 publicity violation. They've got to prove that it was
17 premeditated -- and these aren't alternative elements. These
18 are all required elements. The violation's got to be
19 premeditated, it has to have been a conscious appropriation,
20 and it has to be continued after the violation is brought to
21 the attention of the appropriator.

22 Now, I don't think the Court needs to go beyond the
23 third element, continuation to dispose of any illusion about
24 the validity of the punitive damages claim. There are only two
25 Georgia cases that we've found that shed any light on how the

1 continuation element of a punitive damages claim for a
2 violation of right of publicity must be -- how it can be met
3 and satisfied from an evidentiary standard.

4 The first is the Cabaniss case which we've cited, the
5 Court's very familiar with I'm sure. This is the gay Atlanta
6 publication where the Plaintiff's image was used in an
7 advertisement that was published within the publication, and it
8 was as Mr. Decker has argued many times a case of mistaken
9 identity. However, in explaining what continuation requires in
10 order to sustain a claim for punitive damages the Cabaniss
11 court said that aggravating circumstances are required and mere
12 negligence is not enough. This means that the appropriator not
13 just should have known that what it was doing was a violation
14 of the right of publicity but they have to have known for
15 certainty that the publication was unlawful.

16 In that particular case, with respect to the
17 continuation element of a punitive damages claim, the Cabaniss
18 court said that the jury would have to find that the Playboy
19 Club kept using the ad with Plaintiff's likeness after
20 realizing that there was a mistake of identity and that it had
21 no right to publish them and the violation would, therefore,
22 continue. So the Cabaniss court tells us that to satisfy the
23 element of continuation Plaintiff has to show that after the
24 awareness of the violation occurred in the Defendant's mind the
25 Defendant continued the publication anyway unlawfully.

1 Obviously, that's not present here; and the fact that Hustler
2 has pulled those images isn't in dispute.

3 The second case that addresses what might satisfy the
4 element of continuation to support a claim for punitive damages
5 is the case that is preferred authority of Mr. Decker and
6 Plaintiff; and that's the Alonso versus Parfet case, a Supreme
7 Court case in Georgia from 1985. In that case the Court held
8 that there was a question of fact as to whether a continuation
9 sufficient to support punitive damages occurred where the
10 Defendants "admit that they used Plaintiff's name on various
11 documents unrelated to his employment even after he complained
12 of that use." And the issue in that case was whether a
13 physician who was formerly employed by a physician practice
14 could sustain a claim for punitive damages against the
15 physician practice for continuing to use his name in marketing
16 materials and directories and information provided to patients
17 long after his employment had been terminated and in this case
18 after he had complained that they were continuing to use his
19 name.

20 So here Plaintiff has not alleged, nor could she, the
21 type of continuation that the Georgia courts have said is
22 required to sustain a punitive damages claim. And, of course,
23 in this case we submit there could not possibly be any
24 aggravating circumstances present where there really can't be a
25 legitimate question about Hustler's intent to violate the law

1 where a belief that the First Amendment protected the
2 publication was manifestly reasonable.

3 And really that's the more interesting issue, I
4 think, in our motion for protective order; and that is would
5 the Constitution permit and does the Georgia right of publicity
6 punitive damages standard permit a jury to find that there was
7 malicious intent by Hustler to violate this woman's right of
8 publicity where it was clear to Hustler's lawyers and to the
9 Court with respect that the prevailing constitutional
10 principles and law in effect protected that information from
11 any tort liability for publication.

12 And we don't believe that particularly where, you
13 know, a media Defendant is the one doing the publishing that
14 the First Amendment can permit a jury to make a decision after
15 the fact that where there's a close call and legitimate
16 disagreement among learned legal professionals about whether
17 the First Amendment protected the publication --

18 THE COURT: I don't think the 11th Circuit thought I
19 was particularly learned in my decision in this case,
20 Mr. Bauer.

21 MR. BAUER: Well, Judge, you're right. I know that.
22 And you know how we feel about the 11th Circuit's decision, and
23 we'll see what the U.S. Supreme Court has to say about it.
24 We're actually quite hopeful that they'll take that up soon.
25 And if not, I'm convinced the Defendants will wait and try

1 again later in this case.

2 But let me say this with respect to that. I have not
3 found a single case that permits punitive damages where the
4 District Court first found that the First Amendment privilege
5 applied to the publication at issue. And following that, I'm
6 unaware of any case where a Circuit Court of Appeals has ever
7 reversed such a finding. And, you know, I'm convinced that
8 that ruling's not ultimately going to stand.

9 But it still, I think, illustrates the point that,
10 yes, the 11th Circuit disagreed with you and with me; but
11 clearly there's room for disagreement. And under such
12 circumstances where a media Defendant is charged with the
13 responsibility before publication to determine whether it's got
14 a lawful privilege for the publication if there's truly a
15 legitimate disagreement among judges, among courts, among
16 lawyers as to whether something's privileged or not, there
17 couldn't possibly be the requisite intent in those
18 circumstances necessary to justify an award of punitive
19 damages.

20 Now, this is not a defamation case. It's not a
21 false-light case. It's not a publication-of-private-facts case
22 notwithstanding the 11th Circuit's efforts to make it one. And
23 so actual malice isn't a standard that's required here. If any
24 one of those claims were at issue, the law is quite crystal
25 clear that Plaintiff couldn't even obtain compensatory damages

1 unless she proved that the violation was conscious,
2 premeditated and intentional.

3 We don't have that standard here, and we concede that
4 Plaintiff under the 11th Circuit's rule can sustain apparently
5 until the Supreme Court says otherwise a claim for compensatory
6 damages based on the 11th Circuit's pretext argument. But we
7 do submit that in these circumstances where actual malice isn't
8 required to sustain a claim for compensatory damages something
9 more absolutely must be present, and this is consistent with
10 the Georgia law requiring aggravating circumstances. But
11 something more must be present before you can subject a media
12 Defendant to punitive damages for a publication.

13 The chilling effect, I think, if a jury was allowed
14 to make a punitive damages decision in this case, the chilling
15 effect on the media, I think, is plain and would be profound.
16 No media outlet could publish in a good-faith belief that its
17 actions were constitutionally protected or rely on the advice
18 of their counsel to that effect without fear that they would be
19 exposed not just to compensatory damages for the value of the
20 images that they didn't pay for but for punitive damages that
21 could potentially be fatal to their business.

22 I mean, we all know that Hustler's revenues,
23 notwithstanding the media at large, is suffering in this
24 economy more than even most industries. And allowing this
25 punitive damages claim to go to a jury doesn't just have an

1 impact on Hustler, it's got an impact on all media who have to
2 be able to rely on the constitutional privilege to conduct
3 their business. And that's why we think that as a matter of
4 First Amendment jurisprudence and even beyond the requirements
5 of the clear Georgia elements required to sustain a punitive
6 damages claim that it's unreasonable in this case and would be
7 unconstitutional to allow a jury to even make that
8 determination.

9 So, in short, our argument is if there's any
10 legitimate question as to whether the publication is privileged
11 as we submit clearly exists and existed here we do submit that
12 no reasonable jury could find that the publication was made
13 with the requisite premeditation and conscious appropriation
14 required to sustain a claim for punitive damages.

15 And with that I would just like to make one last
16 point before I cede the floor to Mr. Decker again. He makes
17 much of the 7th Circuit's Douglas case. That was a case
18 against Hustler. He has quoted it again here today. The 11th
19 Circuit quoted it. That case is very different from this one.
20 That was an actual malice case. There was no news correlation
21 to the publication of the model's images in that case. In
22 other words, Hustler just came into possession of a Playboy
23 model's pictures and decided to publish them in the absence of
24 any connection whatsoever to any newsworthy event, whether it
25 was her getting a new job or dying or being involved in some

1 matter of public interest. That's a major distinction
2 obviously between this case and the Douglas case.

3 But, more importantly, the facts in that case showed
4 that Hustler knew that Playboy had a license to publish the
5 images and that it did not, published them anyway. And, even
6 more importantly, there was evidence that there were forged
7 documents presented by Hustler in support of its right to
8 publish the photos.

9 Those are clearly facts that sustain an actual malice
10 in a punitive damages threshold. None of those types of facts
11 are present here. It's a very different case. And we submit
12 that the Douglas case really doesn't provide any guidance on
13 this issue to the Court.

14 Thank you.

15 THE COURT: Mr. Decker, you're the one seeking the
16 discovery. I'll give you the last word.

17 MR. DECKER: Thank you, Judge.

18 First of all, there's no pleading requirement that we
19 have violated. When this case was filed in state court, we
20 made a claim for punitive damages. We understand that we have
21 to provide evidence to support the claim for it to go to the
22 jury, but we intend to do that. And there's no doubt that
23 there will be evidence.

24 For one thing, I told Hustler not to do this on
25 January the 16th. And the question will be what could they

1 have done on January the 17th to see that these images did not
2 run. And if they decided to roll the dice as they did in the
3 Robin Douglas case and make the contention after the fact that
4 it was newsworthy just as in the Douglas case, in this case
5 they said these nude images are newsworthy. In the Robin
6 Douglas case, when she refused to allow them to run pictures
7 for which she had posed nude for Playboy -- she was no
8 shrinking violet, but she didn't want her pictures appearing in
9 Hustler -- they published them anyway and said they were part
10 of her career, part of about a news article on her career, the
11 same newsworthiness nonsense that they have raised in the
12 Toffoloni case.

13 The 11th Circuit has said that they're not entitled
14 to that defense. And until the -- unless and until the Supreme
15 Court says otherwise, that's the law of this case. So there
16 will be evidence, Judge, to support the claim for punitive
17 damages. And we need -- Mr. Bauer is getting the cart before
18 the horse. He is asking for summary judgment on a claim and
19 without having filed summary judgment, without discovery being
20 finished, without there being any briefing on the subject or
21 affidavits or otherwise. But there will be evidence in this
22 case that Hustler intentionally went forward publishing these
23 images when they knew the family objected and tried to defend
24 their doing so after the fact.

25 Now, they're going to say that their lawyer told them

1 it was okay. Well, he was wrong. Their lawyer was wrong. And
2 if he is going to come into court and testify that I told them
3 it was okay, then he will be subject to cross-examination. But
4 unless and until all of that happens, what we're talking about
5 now is discovery. We are entitled to discovery of this
6 financial information.

7 I want to dispute what Mr. Bauer said about the sales
8 numbers. They gave us sales numbers for this particular run of
9 the magazine for the March 2008 edition. They gave us no
10 revenue figures. They certainly didn't give us any comparative
11 revenue figures for years and months prior to this edition.
12 But what we need are actual dollars. We need to know what
13 Hustler made off of this publication and what they made off
14 publications before and after this publication to see if they
15 had to the extent to which they did benefit.

16 That is exactly what the 7th Circuit said which the
17 11th Circuit adopted in saying if you can discern what the bump
18 was and as a result of their use of these images without
19 permission then that's what your damages are, the benefit to
20 the Defendant. Should it prove infeasible to disentangle the
21 various factors that contributed to the profitability of the
22 January issue of the magazine and to determine the effect that
23 it may have had on the profitability of subsequent issues, the
24 profit of the entire issue might be a reasonable starting point
25 for assessing damages in this case.

1 So all we're asking for is what the Court has already
2 said is the way you try to establish your actual damages. And
3 there will be plenty of evidence, Judge, at the appropriate
4 time to support the claim for punitive damages; but right now
5 all we're asking for is the right to complete our discovery.

6 Thank you.

7 THE COURT: All right. I'm going to grant in part
8 and deny in part the Plaintiff's motion to compel discovery.
9 I'm going to grant the motion to compel with respect to
10 Interrogatory Number 7 and Request for Production of Documents
11 Number 2. I'm going to deny the motion to compel with respect
12 to Interrogatory Number 8, Interrogatory Number 9 and Request
13 for Production of Documents 3, 4, 6 and 7. I'll also grant the
14 motion to compel with respect to Request for Production of
15 Documents Number 5.

16 There is a claim for punitive damages in the case,
17 and I am extremely reluctant to rule on a very fact-specific
18 question such as whether such a claim should be submitted to
19 the jury or whether summary judgment should be granted as to
20 that claim in the context of a discovery dispute. The claim is
21 there now. No motion to dismiss has been filed with respect to
22 the claim. There's no motion for summary judgment with respect
23 to the claim. And I think the Plaintiff is entitled to the
24 discovery that it seeks with respect to the Defendant's worldly
25 circumstances which might be relevant to a claim for punitive

1 damages if such a claim survives a motion for summary judgment,
2 motion for judgment as a matter of law, whatever future
3 procedural posture might affect that claim.

4 I don't think that the Plaintiff is entitled to
5 discovery as to non-parties. I don't think that the Plaintiff
6 can seek that discovery simply by filing interrogatories or
7 requests for production in this case as to non-parties. But
8 putting that aside, it has not -- I'm not persuaded that that
9 discovery would be relevant even if those parties had been
10 properly served with the subpoenas. The fact that parent
11 companies may benefit in some fashion from the profit and loss
12 of Hustler I don't believe makes their worldly circumstances
13 relevant to any claim for punitive damages.

14 With respect to the Defendant's motion for protective
15 order, I couldn't find a response to that, Mr. Decker. I'm
16 going to treat your motion to compel as a response with respect
17 to the interrogatories and requests for production for which I
18 have granted your motion to compel. Otherwise, I'm going to
19 grant the motion for a protective order with respect to the
20 interrogatories and requests for production where I denied your
21 motion to compel and your Rule 30(b)(6) deposition notice with
22 respect to those topics -- wait a minute. What did I say? Did
23 I say granting or denying?

24 Let me start over.

25 With respect to the Rule 30(b)(6) notice, I'm

1 granting the motion for protective order with respect to the
2 topics for which I denied the motion to compel.

3 MR. DECKER: I understand.

4 MR. BAUER: The non-party discovery.

5 THE COURT: The non-party discovery. And I'm denying
6 the motion for protective order with respect to those topics
7 for which I granted the motion to compel.

8 MR. DECKER: I understand.

9 THE COURT: And, Mr. Bauer, if you'll prepare a
10 written order incorporating those rulings, get Mr. Decker's
11 approval as to form and present it to me, I'll be glad to sign
12 it.

13 MR. BAUER: Thank you, Judge.

14 MR. DECKER: Thank you, Judge.

15 THE COURT: All right.

16 (Proceedings adjourned at 10:43 a.m.)

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UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 25, are a true and correct copy of the proceedings in the case aforesaid.

This the 11th day of March, 2010.

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