Toffoloni v. LFP Publishing Group, LLC Doc. 124 Att.

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

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC,
d/b/a *Hustler* Magazine, et al,,

Defendants.

CASE NO. 1:08-cv-00421-TWT

DEFENDANT'S BRIEF IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant LFP Publishing Group, LLC d/b/a *Hustler* Magazine ("LFP") and hereby respectfully submits this Brief in Support of its Motion for Summary Judgment. In support of its Motion, LFP also relies on its LR 56.1B Statement of Undisputed Material Facts (hereinafter, "Facts") and Appendix of Evidence to be manually filed under seal pursuant to the Court's December 22, 2009 Protective Order, Docket Index 70.

Dockets.Justia.com

I. Introduction

LFP's motion for summary judgment respectfully asks the Court to revisit the Eleventh Circuit's analysis of the "newsworthiness" privilege with the benefit of a factual record fully developed through discovery and, in the alternative, to grant summary judgment to LFP on Plaintiff's request for punitive damages should her underlying right of publicity claim survive this motion.

The undisputed factual record reveals the all-important context in which *Hustler* Magazine published the images of Nancy Benoit in its March 2008 issue; and it proves that, for better or worse, and notwithstanding the Eleventh Circuit's unsupported assumption that no "reasonable person" could find the images of Ms. Benoit "newsworthy," the Benoit images are in fact typical of the nature and subject matter of news and entertainment reporting that has become pervasive in mainstream American media.

Specifically, the now fully-developed record proves that magazines and websites devoted entirely or substantially to covering the activities of entertainers and public figures are the fastest (and arguably the only) growing and profitable segments of the print- and on-line media industry. Often the "news" attracting the public's attention is nothing more than a glimpse of a celebrity (sometimes doing something entirely unremarkable or inane, sometimes posing willingly for

paparazzi, and not infrequently, fully- or partially-nude); the effect of the American public's thirst for this fare is that such "news" is no longer the exclusive province of fringe tabloids, but is now a staple of prime "news hour" television programs, CNN, FOX News and other cable network headlines, and even the central premise of satirist Carl Hiaasen's newest novel.

In short, the factual record confirms that a primary interest of the American public is "news" of the private lives of celebrities (including a celebrity's decision to pose nude), and that the subject Benoit article and images published in *Hustler* were part of an exclusive story about an aspect of Ms. Benoit's career that the public could learn from no other media outlet. Accordingly, notwithstanding the arguably low level of dignity of the information about Ms. Benoit published by *Hustler* Magazine, the record is clear that the information is firmly within the sphere of actual public interest, and therefore it is protected under Georgia law and the First Amendment.

The undisputed record is also clear that, given the context described above, no reasonable jury could conclude that the publisher and editor of *Hustler* did not act in the sincere and reasonable belief that publication of the Benoit images was constitutionally-protected. Because the record provides no basis from which a reasonable jury could conclude that LFP acted with the requisite malice and intent

necessary to support an award of punitive damages under Georgia law, even if *Hustler's* publication of the Benoit images was not constitutionally-privileged, summary judgment to LFP is appropriate on Plaintiff's claim for punitive damages.

II. Statement Of The Case

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, LFP moved to dismiss Plaintiff's Complaint for failure to state a claim, which motion was granted by the Court on October 3, 2008. (Docket Index ("D.I.") 13 at p. 7.) Plaintiff appealed the decision to the United States Court of Appeals for the Eleventh Circuit, which, assuming the relevant facts pleaded in the Complaint to be true, reversed the decision and remanded the case for further proceedings. *See Toffoloni v. LFP Publishing Group, LLC, et al*., 572 F.3d 1201 (11th Cir. 2009) *cert. denied*, 130 S.Ct. 1689 (2010). On remand, Plaintiff moved for partial summary judgment with respect to liability on her right of publicity claim, D.I. 50, which motion was denied by the Court upon a finding that the merits of Plaintiff's claims, including unresolved or unproven factual questions relating thereto, were not and could not be decided by the Eleventh Circuit in its review of a Rule 12(b)(6) motion to dismiss and, accordingly, discovery regarding this action was warranted. (D.I. 76 at 4 & 6.)

Fact and expert discovery was conducted by both Plaintiff and LFP. On a fully developed factual record, both Plaintiff and LFP now move for summary judgment.

III. Statement Of Facts

The Facts filed herewith are incorporated herein. The following is an overview.

Plaintiff Maureen Toffoloni is the mother of Nancy Benoit. Ms. Benoit was "a model, professional woman wrestler and public figure." (Verified Complaint, D.I. 1 ("Complaint") at ¶ 15). Her husband, Christopher Benoit, was also a well-known professional wrestler. Mr. Benoit murdered Ms. Benoit and their son in June 2007 and then committed suicide. (Facts ¶¶ 36-37.)

LFP publishes *Hustler* Magazine, a self-styled "Gentlemen's Magazine," on a monthly basis. *Hustler* includes a variety of content including photographs of nude women, exposés and articles on news, politics, entertainment, and environmental and other controversial issues and humor. (*Id*. ¶ 3.)

Early in Ms. Benoit's career, before she became a professional wrestler and celebrity, she agreed to pose in the nude for photographs for the purpose of developing a nude modeling career by selling the photographs to a gentlemen's magazine such as *Penthouse* or *Playboy*. (*Id*. ¶¶ 16.) With Ms. Benoit's

knowledge and permission, the photo shoot was videotaped by Defendant Mark Samansky.[1] (Facts ¶¶ 17, 19-20.) Contrary to Plaintiff's allegations in her Complaint (allegations assumed by the Eleventh Circuit to be true for purposes of LFP's Rule 12(b)(6) motion), neither Ms. Benoit nor anyone else ever asked Mr. Samansky to destroy the videotape or footage he took during the modeling session and photo shoot. (*Id*. ¶¶ 21-25.)

In July 2007, Mr. Samansky contacted LFP with a proposal to sell it nude images of Ms. Benoit extracted from the videotape footage he shot for publication in *Hustler* Magazine, along with exclusive information about Ms. Benoit's early nude modeling ambitions, to be used in an article accompanying the images. (*Id*. ¶ 38.) The images Mr. Samansky extracted from his video footage depict Ms. Benoit fully-clothed, partially-clothed and posing fully nude. (*Id*. ¶ 39.)

Despite that Mr. Samansky's images of Ms. Benoit were of poor quality, LFP was interested in publishing them because they illustrated and were a part of an exclusive news and entertainment story about an international celebrity that had recently been the subject of substantial and intense public interest. (*Id*. ¶¶ 58-59.) LFP considered and always intended to publish the Benoit article and images as an

[1] Defendant Samansky previously filed for bankruptcy in the District of Colorado; and although he has not been dismissed as a party-defendant, he has not actively participated in the defense of this case, and is not represented by counsel for LFP.

editorial news feature, and not as a model or "girls" pictorial (*Id*. ¶¶ 60-62); and although the Benoit images are "newsworthy" standing alone, LFP would not have published the images unaccompanied by the exclusive information about Ms. Benoit's early career also acquired from Mr. Samansky. (*Id*. ¶ 63.) LFP planned for, published, and promoted the Benoit article and images on the cover of and in the March 2008 issue of *Hustler* Magazine as an editorial "feature" article, rather than as a nude model pictorial. (*Id*. ¶¶ 60-62.)

News and entertainment coverage of celebrity lifestyles and behavior is a substantial component of the content of most established print media, with more than 1/6th of all magazine editorial page content in 2008 devoted to "entertainment/celebrity" reporting. (*Id*. ¶ 66.) With the growing prevalence of "gossip" websites, the public's preoccupation with celebrity news has dramatically increased. (*Id*. ¶ 69.) Celebrity news-oriented magazines have become more popular than general news magazines: while newsstand circulation has jumped 8.9% for celebrity magazines, industry-wide newsstand circulation has fallen 3.4%. (*Id*. ¶¶ 67-68.)

Images of nudity (both celebrity and non-celebrity) are not only prevalent but almost ubiquitous on the Internet. (*Id*. ¶ 71.) Much of the news and entertainment content of recent and current celebrity gossip media outlets consists

of celebrity images (both clothed and nude/partially nude), alone, without accompanying informational content providing additional context to the images. (*Id*. ¶ 72.)

The *Hustler* Magazine article and images of Ms. Benoit are consistent with the nature and content of entertainment/celebrity news that was not only popular but also pervasive in entertainment media outlets at the time they were published in March 2008. (*Id*. ¶¶ 74, 76-77.) The publisher and editors of *Hustler* believed that LFP had the right to publish the images of Ms. Benoit without seeking permission from her estate because the images were lawfully obtained and were entertainment/celebrity news of the kind that permeates entertainment media content. (*Id*. ¶ 82.)

Even Plaintiff concedes that the "unique" and "scarce" nature of the Benoit images heightens the public's interest in the images and is therefore central to their value. (*Id*. ¶ 78.)

The March 2008 issue of *Hustler* had already been printed, distributed and sold to the public on newsstands before LFP received Plaintiff's January 16, 2008 demand letter complaining of the publication. (*Id*. ¶ 84.) Although it was impossible at that time for LFP to recall or limit the distribution of the March 2008 issue of *Hustler* (*Id*. ¶ 85), LFP immediately blocked the Benoit images from

appearing on any *Hustler*-affiliated website, removed back-issues of the March 2008 issue from sale or distribution, and voluntarily agreed that it would not republish the images of Ms. Benoit in any future issue of *Hustler* magazine or authorize their republication by any other licensees. (*Id*. ¶ 86.) LFP has not republished the Benoit images or licensed their republication by any other entity or individual. (*Id*. ¶ 87.)

IV. Legal Standards

A. Right of Publicity

In order for a plaintiff to prevail on a Georgia right of publicity claim, an appropriation must be made (1) of another's name and likeness (2) without that person's consent (3) for the financial gain of the appropriator. *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703, 250 Ga. 135, 143 (1982). *See also Cabaniss v. Hipsley*, 151 S.E. 2d 496, 503, 114 Ga. App. 367, 377 (1966) (right of publicity tort "consists of the appropriation, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness").

If the defendant's publication is not for a "commercial purpose," it is not subject to the right of publicity. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1325-26 (11th Cir. 2006) (applying Florida law) (citing with approval the Restatement (Second) of Torts § 652C, comment (d) (1977): "the mere incidental

use of a person's name or likeness is not actionable under the right of publicity.")

As relevant, § 652C, comment (d) of the Restatement reads:

> No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.

(Emphasis added).

1. The "Newsworthiness" Exception to the Right of Publicity

An individual's right of publicity is necessarily limited by the fundamental rights to freedom of speech and freedom of the press guaranteed by the United States Constitution. U.S. CONST. amend. I. Accordingly, the Georgia Supreme Court has adopted a "newsworthiness" exception to the right of publicity: "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 212 Ga. 161, 167, 91 S.E.2d 344, 348 (1956). In other words, "where the publication is newsworthy, the right of publicity gives way to freedom of the press." *Toffoloni*, 572 F.3d at 1208.

"Newsworthiness" extends beyond the traditional concept of news. The Restatement (Second) Torts states that:

> The scope of a matter of legitimate concern to the public is not limited to "news," in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.

Rest. 2d Torts § 652D, comm. j (emphasis added); *see also Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002) (citations omitted) (same); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578, 97 S. Ct. 2849, 2859 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."). Photos, alone, can be newsworthy; no corresponding news article is required before photos are entitled to First Amendment protection. *Waters*, 212 Ga. at 167, 91 S.E.2d at 348 (photos of child murder victim "newsworthy" even if sold separately from newspaper article about the murder); *see also ETW Corp. v. Jireh Pub., Inc*., 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including . . . photographs . . . .").

2. Punitive Damages in a Right of Publicity Case

A plaintiff may be awarded punitive damages for a violation of Georgia's right of publicity only where "the acts of the defendant have been of a character to import premeditation or knowledge *and* consciousness of the appropriation *and* its continuation." *Cabaniss v. Hipsley*, 114 Ga. App. 367, 386-87, 151 S.E.2d 496, 509 (1966) (emphasis added); *see also Alonso v. Parfet*, 253 Ga. 749, 750, 325 S.E.2d 152, 154 (1985) (quoting *Cabaniss*). Further, punitive damages are permitted only "where a wrongful motive or state of mind appears, but not in cases where the defendant has acted innocently…." *Cabaniss*, 114 Ga. App. at 383 (quoting William L. Prosser, *Privacy*, 48 Calif. L. Rev. at 409).

B. Summary Judgment

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden to demonstrate that no genuine issue of material fact remains in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986). Once it has done so, the burden then shifts to the non-

moving party to set forth specific facts showing that a genuine issue of material facts exists warranting trial. Fed. R. Civ. P. 56(e).

V. Argument

A. Summary Judgment Is Appropriate On The Claim For Right Of Publicity Because The Benoit Images Are Newsworthy

1. The Eleventh Circuit's Rule 12(b)(6) Opinion Did Not And Could Not Address The Merits Of The "Newsworthiness" Exception

We recognize that, in its appellate review of the Court's order granting LFP's Rule 12(b)(6) motion to dismiss, D.I. 13, the Eleventh Circuit held that LFP's publication of the Benoit images "do not qualify for the newsworthiness exception to the right of publicity," *see Toffoloni*, 572 F.3d at 1213. However, as a matter of well-settled law and due process, the *Toffoloni* decision may not be construed to have resolved the merits of Plaintiff's claim for liability *against* LFP on assumed, but unproven, facts. *See, e.g., F.T.C. v. Citigroup Inc*., 2001 WL 1763439, at *2 (N.D.Ga. 2001) ("the purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint adequately states a claim for relief. A motion to dismiss concerns only the complaint's legal sufficiency and is not a procedure for resolving factual questions or for addressing the merits of the case.") (Carnes, J.); *see also* Wright & Miller, Federal Practice and Procedure: Civil 3d at § 1356 (same); *Scheuer v. Rhodes*, 416 U.S. 232, 250, 94 S.Ct. 1683 (1974) ("We

intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved."); *see also* D.I. 76 at 4.[2] Indeed, to hold that the Eleventh Circuit's *Toffoloni* opinion decided the issue of "newsworthiness" conclusively and finally against LFP would be an unconstitutional deprivation of LFP's due process rights, under both the 5th and 14th Amendments to the U.S. Constitution, to present the facts of the case in its defense against Plaintiff's claims.

[2] Indeed, appellate review of a Rule 12(b) motion cannot establish the "law of the case" on any fact-dependent issue, much less liability, where discovery may, but has yet to, reveal whether the allegations in the Complaint or the Defendant's defenses are in fact supported by evidence. *See, e.g., McKenzie v. BellSouth Telecommunications, Inc*., 219 F.3d 508, 513 (6th Cir. 2000) ("[O]ur holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery."). This is true, of course, because the courts are not permitted to make factual findings when reviewing a Rule 12(b)(6) motion, but must instead assume the facts alleged to be true for the limited purpose of evaluating whether Plaintiff has stated a claim. *Murphy v. F.D.I.C*., 208 F.3d 959, 962 (11th Cir. 2000); *see also Roth v. Jennings*, 489 F.3d 499, 508 (2nd Cir. 2007) ("In any event, a ruling on a motion for dismissal pursuant to Rule 12(b)(6) is not an occasion for the court to make findings of fact."); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (fact-finding by court "impermissible" on review of 12(b)(6) motion); *In re Consolidated Industries*, 360 F.3d 712, 717 (7th Cir. 2004) ("Of course, a judge reviewing a motion to dismiss under Rule 12(b)(6) cannot engage in fact-finding."); *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 700 (9th Cir. 2004) ("[T]he court may not make fact findings of a controverted matter when ruling on a Rule 12(b)(6) motion.").

While the courts are authorized to determine, as a matter of law, whether a publication is, in fact, "newsworthy" and therefore entitled to constitutional protection,[3] it is clear the courts may engage in such an exercise only after the record is sufficiently developed to permit the fact-sensitive balancing required to make such a judgment. *See Connick v. Myers*, 461 U.S. 138, 147-148 & n.7, 103 S.Ct. 1684, 1690 & n.7 (1983) (holding that "the inquiry into the protected status

[3] Courts are rightly wary of deciding the converse, however; that is, whether a publication is not of interest to the public and therefore not "newsworthy." *See, e.g., Prince v. Viacom*, 2008 WL 1782288 at *4 (S.D. Tex. 2008) ("The idea that a court decides what is of public interest is the antithesis of free expression; its central idea is that the reader, listener, and watcher is free to decide for himself what interests him."); *see also See Gertz v. Robert Welch, Inc*., 418 U.S. 323, 346, 94 S. Ct. 2997, 3010 (1974) ("…it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not – to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' We doubt the wisdom of committing this task to the conscience of judges.") (citation omitted); *see also Harper & Rowe Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 561, 105 S.Ct. 2218, 2231 (1985) (quoting Judge Meskill of the Second Circuit: "[c]ourts should be chary of deciding what is and what is not news.'") (citation omitted). This is because, as the Eleventh Circuit acknowledged in *Toffoloni*, 572 F.3d at 1208, the inquiry is ultimately rooted in "that which resonates with our community morals," i.e., the public's values, and where there is some question regarding whether a publication is of interest to the public, it should be resolved by the jury, and not by even the most carefully considered judicial pronouncement. *See Virgil v. Time, Inc*., 527 F.2d 1122, 1130 & n.13 (9th Cir. 1975) (dispute about "newsworthiness" a jury question because "a determination founded on community mores must be largely resolved by a jury subject to close judicial scrutiny to ensure that the jury resolutions comport with First Amendment principles").

of speech is one of law, not fact" and "determined by the content, form, and context of a given statement, as revealed by the whole record.") (emphasis added).[4] The significance of this rule of law is demonstrated here, in the instant case, where many of the key facts assumed by the Eleventh Circuit in its decision (based primarily on the unproven allegations of the Complaint) have been disproved in discovery. Specifically, three of the Eleventh Circuit's central factual assumptions are contradicted by the undisputed record, to wit:

(1) Ms. Benoit never requested that the video footage of her nude photo shoot be destroyed, Facts ¶¶ 22-25,; *compare Toffoloni*, 537 F.3d at 1204 ("Toffoloni alleges that, immediately after the shoot, her daughter asked Samansky to destroy the photographs and video and believed that Samansky had destroyed them.");

(2) LFP did not publish the article about Ms. Benoit as a "pretext" to publish the images, Facts ¶¶ 59, 63; *compare Toffoloni*, 537 F.3d at 1213 ("These private, nude photographs were not incident to a newsworthy article; rather, the brief biography was incident to the photographs."); and

(3) The Benoit images are themselves typical of subject matter pervasive in popular media culture and of real interest to the public, Facts ¶¶ 70-74; *compare Toffoloni*, 537 F.3d at 1209, 1211 ("The fact of Benoit's nudity is not in and of itself newsworthy . . . [but a matter] with which

[4] Notably, in *Connick*, the U.S. Supreme Court made clear that because it is the "obligation" of the courts to determine the application of the First Amendment, they cannot "avoid making an independent constitutional judgment on the facts of the case." 461 U.S. at 150, n.10, 103 S.Ct. at 1692, n. 10 (emphasis added). Even the Eleventh Circuit's decision in *Toffoloni* recognizes that the inquiry is a "fact-sensitive balancing," 537 F.3d at 1208, emphasis added, which exercise cannot be performed in the absence of a fully developed factual record.

> a reasonable member of the public, with decent standards, would say that he had no concern.'").

Therefore, where, as here, the important question of constitutional privilege is in issue, it is the Court's solemn responsibility to exercise its "constitutional judgment on the facts of the case"; that is, to examine the issue of "newsworthiness" on the complete, and fully developed, factual record. *Connick*, 461 U.S. at 147-148 & n.7, 103 S.Ct. at 1690 & n.7 (emphasis added). Averments that are assumed to be true for purposes of a motion to dismiss must not, once they are disproved, reduce the rights of free speech and free press of LFP.

2. The Benoit Images Illustrate An Exclusive, Newsworthy Story About Ms. Benoit's Life And Career

With the benefit of a complete record, it is clear the Benoit images are "newsworthy" as the parameters of that exception to the right of publicity are defined by Georgia law and mandated by the First Amendment.

First, the record now provides the "context" in which the images were published (which context, *Connick* instructs, must be considered), and reveals that they are consistent with the type and nature of information sought after by the public and, as a result, prevalent in media celebrity/entertainment news reporting. (*Id*. ¶¶ 70-74.) LFP's expert, Dr. Greg Lisby, surveyed hundreds of print- and on-line media outlets and confirmed that celebrity gossip reporting, including

reporting instances of celebrity nudity, is not only pervasive now, but was equally prevalent in media "entertainment news" reporting when LFP decided to publish the Benoit article and images. (Facts ¶¶ 65-69, 71; Expert Report of Greg Lisby, Ph.D., J.D. ("Dr. Lisby's Report").) Dr. Lisby's Report includes scores of examples where the fact of a celebrity being nude or partially nude is, itself and standing alone, the news item reported and of interest, *id*.; and those undisputed facts prove that the Benoit images published in *Hustler* are clearly within the sphere of matters of real and general public interest. (*Id*. ¶ 74.)

Second, it is undisputed that the content of the Benoit images was a *Hustler* "exclusive"; that is, the public could view, and learn about the historical context of, the Benoit images from no other source.[5] (*Id.* ¶¶ 46-48, 59.) Public access to stories of interest is the paradigm of "newsworthiness." *E.g., Prince*, 2008 WL 1782288 at * 4 ("The harm [posed by judicial blue-penciling] is to the public's access to stories -- factual, fictional or suppositional.").

Third, the "newsworthiness" of the Benoit images is central even to Plaintiff's case. Ms. Toffoloni contends, through her proffered expert, that the Benoit images are "unique," and given Ms. Benoit's celebrity were of such interest

[5] In fact, neither Plaintiff nor Ms. Benoit's second husband even knew Ms. Benoit had briefly pursued a nude modeling career before *Hustler* published the feature. (Facts ¶¶ 47-48.)

to *Hustler's* readers that their publication contributed significantly to LFP's sales of the March 2008 issue and future issues of *Hustler* Magazine. (*Id.* ¶ 78.) The significant public interest in the Benoit images may very well have some relation to their commercial value; but it also confirms, beyond dispute, that LFP enjoys a constitutional right to publish them as a matter of law.[6]

Finally, contrary to the Eleventh Circuit's assumptions, the record proves that the *Hustler* news article about the images, and putting them into context given Ms. Benoit's recent high-profile death, was no "pretext": LFP would not have published the images without the contextual article (*id.* ¶ 63), which even the Eleventh Circuit agrees is "newsworthy." *Toffoloni*, 537 F.3d at 1209 ("The biographical piece, in and of itself, certainly falls within the newsworthiness exception.").[7] That undisputed fact is reinforced by LFP's consistent treatment of the Benoit images as part of an editorial news "feature", and not as a typical nude

[6] Notably, even Ms. Benoit sought to take advantage of the public's interest in viewing risqué photos of her, posing for and selling semi-nude photographs to advance her early wrestling career. (Facts ¶ 29.)

[7] Of course, photos alone are "newsworthy"; no "pretext" was even needed. *E.g., Anderson v. Fisher Broadcasting Cos., Inc*., 300 Or. 452, 464, 712 P.2d 803, 811 (1986) ("Doubtless in many instances a picture not only is worth a thousand words to a publisher but words would be worth nothing at all."). Here, the exclusive news content published with the Benoit images merely conveyed additional, itself newsworthy, information.

model pictorial (*id*. ¶ 43, 60-62); and by LFP's long history of publishing celebrity-oriented features. (*Id*. ¶ 81.) The fact is, the Benoit feature is consistent with *Hustler's* historical non-pornographic, non-sexually explicit editorial content, and the type of such content *Hustler's* readers have come to expect the magazine to publish regularly.

In short, the undisputed record confirms the real public interest in the Benoit images published in *Hustler* and information of similar substance. Thus, on review of the fully developed factual record, LFP respectfully submits that there can be no sincere dispute that publication of the Benoit images in *Hustler* Magazine was "newsworthy" and, accordingly, summary judgment on Plaintiff's right of publicity claim is appropriate.

B. LFP Is Entitled To Summary Judgment On Plaintiff's Claim For Punitive Damages

Plaintiff cannot prove that LFP acted with premeditation, and conscious knowledge of an unlawful appropriation of Ms. Benoit's image, and wrongfully continued the appropriation after Plaintiff's complaint. *Cabaniss*, 114 Ga. App. at 386-87. Accordingly, even if LFP is not entitled to summary judgment on Plaintiff's right of publicity claim under the "newsworthiness" exception, summary judgment for LFP is due on her derivative claim for punitive damages.

First, the undisputed facts show that LFP published the Benoit images in the good faith belief that that publication was constitutionally-protected under the First Amendment to the U.S. Constitution. (*Id*. ¶¶ 79-82.) That belief was reasonable because: (1) the images were obtained lawfully from the undisputed copyright holder and published as part of a legitimate and "newsworthy" editorial article on Ms. Benoit's life and career (*id*. ¶82); (2) similar celebrity and entertainment news content, including nude images, has been a substantial and important component of *Hustler*'s regular editorial content for more than 30 years (*id*. ¶81); (3) the Benoit images are consistent with the type and nature of information sought after by the public and, as a result, prevalent in media celebrity/entertainment news reporting by *Hustler's* competitors in the entertainment news industry (*id*. ¶¶ 70, 74); and (4) reasonable and educated minds -- even learned courts and advocates-- clearly and sincerely disagree about whether the Benoit images are of legitimate public interest and therefore subject to constitutional-protection as "newsworthy." (*Id*. ¶ 88.) On these undisputed facts, no reasonable jury could find that LFP published the Benoit images with a conscious and premeditated intent to violate the publicity rights of the Benoit Estate. For this reason alone, LFP is entitled to summary judgment on Plaintiff's punitive damages claim.

But even if a malicious intent by LFP could be shown (which it cannot), the punitive damages claim must fail because LFP did not "continue" the appropriation after learning of Plaintiff's complaint. The facts show that the March 2008 issue of *Hustler* Magazine was printed, delivered to subscribers, and available for retail purchase by the public on January 8, 2008, before Plaintiff's January 16, 2008 demand letter was sent to LFP, and well before Plaintiff's February 5, 2008 Complaint and Motion for Temporary Restraining Order were filed. (Facts ¶¶ 83-85.)[8] Further, despite having no legal obligation to do so, after learning of Plaintiff's complaint, LFP voluntarily took steps to ensure that the Benoit images would not be republished: in *Hustler* or by its licensees, through sales of back issues, or on the *Hustler* website. (Facts ¶¶ 86-87.) In short, there was no "continuation" of the alleged appropriation -- even though LFP has always believed it had and still has the right to publish the images.

If there was a violation of Plaintiff's right of publicity by LFP, Plaintiff can point to no evidence that it was anything but an innocent infringement. Punitive damages are not permitted in such circumstances. *Cabaniss*, 114 Ga. App. at 383 (punitive damages not permitted "in cases where the defendant has acted

[8] In fact, the April 2008 issue of *Hustler* had already been distributed and made available for sale, and the March 2008 issue taken off the shelves, by the time Plaintiff's lawsuit was filed. (Facts ¶ 44.)

innocently….”). Summary judgment is therefore warranted on Plaintiff’s claim for punitive damages.

VI. Conclusion

The Court has a duty to analyze the constitutional question raised in this case on the fully developed factual record. What the Court has before it now, and what the Eleventh Circuit lacked on its Rule 12(b)(6) review, is uncontroverted proof that, despite its arguably tasteless nature, LFP’s publication of the Benoit images is consistent with the type and subject matter of celebrity “news” that the public desires, demands, and expects, even more than “traditional” news. As Judge Hughes of the Southern District of Texas recently observed, “[o]ur system works because we do not cordon suitable discussion,” *Prince*, 2008 WL 1782288 at *4, even when the public trend is to discourse of a “lower dignity”. Because the record demonstrates that each aspect of the *Hustler* Magazine editorial feature about Ms. Benoit, including her nude images, is within the sphere of real public interest, Plaintiff cannot sustain her right of publicity claim, and summary judgment is appropriate.

[Signatures on following page]

Respectfully submitted this 30th day of July 2010.

/s/ S. Derek Bauer
James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537
Darrell J. Solomon
Georgia Bar No. 305922

McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Pro hac vice:

Paul J. Cambria, Jr.
Jeffrey Reina
William M. Feigenbaum

LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202-3924
(716) 849-1333
(716) 849-1315 (facsimile)

Attorneys for LFP Publishing Group, LLC

CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer
Georgia Bar No. 042539

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT FACTS which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 30th day of July 2010.

/s/ S. Derek Bauer
S. Derek Bauer

MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

ATLANTA:5241415.5