Toffoloni v. LFP Publishing Group, LLC Doc. 15

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,)
) CASE NO. 1:08-cv-00421-TWT
Plaintiff,)
)
vs.)
)
LFP PUBLISHING GROUP, LLC,)
d/b/a *Hustler* Magazine, et al,)
)
Defendant.)

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a *Hustler* Magazine, et al. ("LFP") and respectfully submits this Brief in Opposition to Plaintiff's Renewed Motion for Partial Summary Judgment as to Liability.

I. Introduction

Plaintiff's renewed motion for summary judgment on the issue of liability rests entirely on her mistaken assertion that the Eleventh Circuit's Rule 12(b)(6) ruling "on the pleadings" that the "newsworthiness exception" to the Georgia common law right of publicity does not preclude Plaintiff from pursuing her right of publicity claim conclusively established LFP's liability in tort based upon the

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bare, unproven allegations of her Complaint. As it was when Plaintiff initially moved for summary judgment before discovery in this case even began, the assertion is incorrect for several reasons.

First, because the Eleventh Circuit's early decision in this case was pursuant to Fed. R. Civ. P. 12(b)(6), its holding could not have addressed the merits of the case. Moreover, under the well-settled "law-of-the-case" doctrine, because pre-trial discovery produced substantial evidence both not available to and contrary to the facts assumed by the Eleventh Circuit, purported findings of fact made in the early appeal could not bind this Court at the summary judgment phase.

Second, summary judgment for Plaintiff remains inappropriate because, should LFP's motion for summary judgment on its "newsworthiness" defense be denied, there remain several material, unresolved questions of fact necessary to any finding of liability which are in dispute and would require resolution by the jury, *inter alia*, whether LFP's publication of the Benoit images was a "commercial use," as that essential element of the right of publicity has been defined by the Georgia courts; whether the images published by LFP are "newsworthy"; and whether LFP was unjustly enriched by its publication of the images. Plaintiff's motion presents no evidence on any of these essential elements of her claim for right of publicity.

Plaintiff has failed to and cannot carry her burden of proof on summary judgment. Accordingly, LFP respectfully submits that, drawing all inferences in its favor as the Court must, Plaintiff's motion for partial summary judgment as to liability should be denied.

II. Statement of Facts

LFP's LR 56.1B(1) Statement of Undisputed Material Facts, Docket Index ("D.I.") 124-2 [Under Seal] ("Facts") are incorporated herein. Set forth below are the facts relevant to the instant motion.

Early in Nancy 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*. (Facts ¶¶ 16.) With Ms. Benoit's knowledge and permission, the photo shoot was videotaped by Defendant Mark Samansky. (*Id*. ¶¶ 17, 19-20.) Contrary to Plaintiff's allegations in her Complaint (allegations which were assumed by the Eleventh Circuit to be true for purposes of LFP's Rule 12(b)(6) motion), and made again in support of her motion for partial summary judgment, Plaintiff's Brief ("Pl. Br."), D.I. 120-1 at 7, 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. (Facts ¶¶ 21-25.)

In July 2007, Mr. Samansky contacted LFP with a proposal to sell 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.) LFP acquired the images from Mr. Samansky for $1,000. (*Id*. at ¶ 41.)

Despite the poor quality of Mr. Samansky's images of Ms. Benoit, 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 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.)

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, through her proffered expert testimony, concedes that the "unique" and "scarce" nature of the Benoit images makes them "newsworthy" and heightens the public's interest in the images. (*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.)

III. Legal Standards

A. Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment may be granted <u>only</u> "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."

The party seeking summary judgment bears the burden of proving the absence of a genuine dispute as to any material fact. *Herzog v. Castle Rock Entm't*, 193 F. 3d 1241, 1246 (11th Cir. 1999). Once the moving party puts forth such proof, the burden then shifts to the non-moving party, which 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) (Thrash, J.). A fact is "material" if a dispute over that fact will affect the outcome of the suit under the law; 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) (denying motion for partial summary judgment due to existence of issues of material fact) (Story, J.).

In the context of a summary judgment motion, the Court must view all evidence "in a light most favorable to the party opposing the motion and must resolve all reasonable doubts in the non-movant's favor." *Willis v. Ralph Hardie's Restaurant No. 2, Inc.*, 2009 WL 3273929, at *1-2 (N.D. Ga. 2009) (citing *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990)) (Duffy, J.). Indeed, a party is entitled to summary judgment only where "the facts and inferences point overwhelmingly in favor of the moving party, such

that reasonable people could not arrive at a contrary verdict." *Chambers v. Zesto Enterprises, Inc.*, 2009 WL 3200682, at *2 (N.D. Ga. 2009) (citation omitted) (Duffy, J.).

B. 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; and (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").

1. The "Commercial Use" Element of The Right of Publicity

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). *See also Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988) (image of anti-pornography activist not used "for financial gain" when published to accompany newsworthy article, even where "*Hustler's* objectives may well have commercial undertones."); *Namath v. Sports Illustrated,* 371 N.Y.S.2d 10, 11-12 (N.Y. App. Div. 1975) (applying New York law) (use of Joe Namath's photograph in advertisements promoting subscriptions held to be "incidental," non-commercial use where photograph used to illustrate content of periodical); *Dempsey v. National Enquirer, Inc.*, 687 F. Supp. 692, 695 (D. Me. 1988) (image not commercial use "in the absence of any allegation that the defendant attempted to use the plaintiff's likeness and words for commercial endorsement of a product.").

2. 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 <u>current events or activities</u>. <u>It extends also to the use of</u> names, <u>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</u>.

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 . . . .").

IV. Argument And Citation To Authority

A. The Eleventh Circuit's Rule 12(b)(6) Ruling Could Not Decide The Merits Of, Or Establish The "Law-Of-The-Case" On, LFP's "Newsworthiness" Defense

Despite more than 4 months of discovery, including LFP paying for Plaintiff's counsel to travel to Los Angeles to depose its corporate representatives, Plaintiff conducted no discovery on, and made no effort to prove, key essential elements of her claim. Instead, rather than offer evidence in support of her motion for partial summary judgment, Plaintiff's theory of liability is based solely on her mistaken belief that the Eleventh Circuit's preliminary 12(b)(6) ruling on the pleadings, alone, finally and conclusively determined those issues of fact. (*See* Pl. Br. at 10: "[T]here is no reason to require the Plaintiff to prove Hustler's liability, because the evidence and the law of the case have conclusively established it.") Plaintiff's misplaced reliance on the legal effect of that decision is fatal to her motion for partial summary judgment.

1. The Eleventh Circuit's Rule 12(b)(6) Decision May Not Properly Be Construed To Have Adjudicated Liability

LFP incorporates herein, by reference and in full, its previous briefing on the legal effect of the Eleventh Circuit's Rule 12(b)(6) opinion in *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (2009). (*See* D.I. 56 at 10-13 and D.I. 124-1 at 13-17.) In short, because "the purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint adequately states a claim for relief …, [and] it is not a procedure for resolving factual questions or for addressing the merits of the case," the *Toffoloni* decision may not be construed to have resolved the merits of Plaintiff's claim *against* LFP on assumed, but still unproven, facts, and without affording LFP an opportunity to prove its affirmative defenses. *See, e.g., F.T.C. v. Citigroup Inc.*, 2001 WL 1763439, at *2 (N.D. Ga. 2001) (Carnes, J.); *see also U.S. v. Holt*, 76 F. Supp.2d 1374, 1376 (M.D. Ga. 1999) ("A motion to dismiss challenges the legal sufficiency of the complaint, and does not invite the Court to assess the veracity or weight of the evidence which may be offered in its support.") (emphasis added) (Sands, J.).

This rule of procedure is neither novel nor subject to dispute. *E.g., Carrs v. Outboard Marine Corp.*, 252 F.2d 690, 691 (5th Cir. 1958) ("Under Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. The cases are generally to be tried on the proofs rather

than the pleadings.") (Cits. omitted); *see also Young Apartments, Inc. v. Town of Jupiter, FL*, 529 F.3d 1027, 1037 (11th Cir. 2008) ("A motion to dismiss does not test the merits of a case . . .") (citing *Mills v. Foremost Ins. Co*., 511 F.3d 1300, 1303 (11th Cir. 2008)).[1] In the context of this case, the effect of the rule is two-fold: First, it means that, as a matter of law, the Eleventh Circuit's *Toffoloni* decision did not establish liability against LFP; and second, it means that Plaintiff must prove her case by offer of proof, not by resting on the pleadings. For these reasons, alone, Plaintiff's motion for partial summary judgment should be denied.

2. <u>The Eleventh Circuit's Rule 12(b)(6) Decision Did Not Establish The "Law-Of-The-Case"</u>

Although her brief contains no reference to the boundaries of the "law-of-the-case" doctrine, Plaintiff nevertheless invokes it, albeit in passing, to support her assertion that the Eleventh Circuit's *Toffoloni* opinion established LFP's

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[1] *See also Arthur H. Richland Co. v. Harper*, 302 F.2d 324, 326 (5th Cir. 1962) (explaining rationale for the rule: "But we repeat again and again and again: this is not the test. Whether [the allegations in the complaint are] all steam, or whether there is some substance depends on <u>the proof</u> offered either on a trial or on a motion for summary judgment demonstrating there is no genuine controversy . . . .") (emphasis added); *Mann v. Adams Realty Co., Inc*., 556 F.2d 288, 293 (5th Cir. 1977) ("A 12(b)(6) motion tests only the sufficiency of the claim set out in the plaintiff's pleadings. <u>Denial of such a motion, therefore, does not indicate that the plaintiff will ultimately prevail on a claim which withstands a 12(b)(6) challenge</u>.") (emphasis added).

liability as a matter of law. (Pl. Br. at 10.) Accordingly, we briefly explain why the doctrine is inapplicable here.

The law-of-the-case doctrine generally holds that "subsequent courts will be 'bound by the findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.'" *Culpepper v. Irwin Mortgage Corp*., 491 F.3d 1260, 1271 (11th Cir. 2007) (upholding district court determination that law-of-the-case doctrine inapplicable) (quoting *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Circ. 1984) (per curiam)). However, the rule "is not an inexorable command, nor does it 'require rigid adherence to rulings made at an earlier step of a case in all circumstances.'" *Culpepper*, 491 F.3d at 1271 (quoting *Murphy v. FDIC*, 208 F.3d 959, 966 (11th Cir. 2000)).[2] Thus, exceptions to the doctrine apply "when substantially different evidence is produced . . . or when the prior decision was clearly erroneous and would result in manifest injustice." *Jackson v. State of Alabama State Tenure Comm'n*, 405 F.3d 1276, 1283 (11th Cir. 2005) (citing

[2] Further, the Eleventh Circuit has made clear that the law-of-the-case doctrine merely "directs a court's discretion" rather than "limits the tribunal's power," *Murphy*, 208 F.3d at 966; accordingly, the Court is "not bound under the doctrine to 'adhere to a ruling with which [it has] emphatically and repeatedly disagreed.'" *Culpepper*, 491 F.3d at 1271 (quoting *Murphy*).

Oladeinde v. City of Birmingham, 230 F.3d 1275, 1288 (11th Cir. 2000)). Both of these exceptions to the doctrine apply here.

First, the fully developed summary judgment record now before the Court is completely different from the bare pleadings which were before the Eleventh Circuit in *Toffoloni*: here, the Court has the benefit of evidence and proof, and is not required to defer to an early ruling made without evidentiary bases. In *Jackson*, the Eleventh Circuit held that it was not bound by a previous summary judgment ruling because, revisiting the issue on a more fully developed record, "[t]wo different sets of facts framed two different issues and permitted two different rulings," explaining:

> [w]hen the record changes, which is to say when the evidence and inferences that may be drawn from it change, the issue presented changes as well. The first exception to the doctrine recognizes that the law of the case is the law made on a given set of facts, not law yet to be made on different facts. *See Davis v. Town of Lake Park*, 245 F.3d 1232, 1237 n. 1 (11th Cir. 2001) ("Law of the case does not apply in this situation because [the later district court judge] based his post-trial order on a different record than did [the earlier district court judge] when addressing summary judgment.") (Cits. omitted).

405 F.3d at 1283-84.

Further, in *Oladeinde*, the Eleventh Circuit held that its affirmation of the trial court's Rule 12(b)(6) decision denying defendants' qualified immunity defense did not preclude it or the trial court from revisiting the issue later in the

proceedings after "the facts developed." 230 F.3d at 1289. Specifically, the Eleventh Circuit noted that "because the complaint did not contain all of the relevant facts that were introduced both at summary judgment and at trial, this court's first opinion affirming the denial of qualified immunity did not establish the law of the case." *Id*. This case is no different than *Oladeinde*: here, Plaintiff's Complaint lacked any facts relevant to LFP's defenses, but now the record contains such evidence introduced at summary judgment. Likewise, here, the Eleventh Circuit's Rule 12(b)(6) rejection of LFP's "newsworthy" defense as a bar to Plaintiff's claims could not establish the law of the case as to that issue.

Finally, given the substantial undisputed record demonstrating that LFP published the Benoit images as part of an editorial feature that is consistent with the type of entertainment news content pervasive in our media culture, to give the Eleventh Circuit's *Toffoloni* opinion preclusive effect would be clearly erroneous and result in a manifest injustice to LFP. As we have argued elsewhere, *see* D.I. 124-1 at 14, to do so 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 evidence in support of its defense against Plaintiff's claims. There could hardly be a more manifest injustice than such a deprivation.

B. Plaintiff Is Not Entitled To Summary Judgment As To Liability Because She Has Not Proven Essential Elements Of Her Claim

As noted above, because Plaintiff misapprehends the significance of the Eleventh Circuit's *Toffoloni* decision, she failed to develop essential proof in support of her claim -- namely, whether LFP's publication of the Benoit images to illustrate an exclusive and constitutionally-privileged news article about Ms. Benoit's life and career is a "commercial use" for purposes of a right of publicity claim, and whether LFP was unjustly enriched by the publication.[3] Because she

[3] Plaintiff's suggestion, Pl. Br. at 2-3, that LFP previously represented to the Court that discovery was needed "regarding the specific and only remaining issues of standing and the possible existence of a release by Ms. Benoit" is false. The Court will recall that LFP was clear in its opposition to Plaintiff's early motion for partial summary judgment that, to establish liability on her claim, Plaintiff had <u>also</u> to (and still must) prove that:

> (4) LFP's publication of the images of Ms. Benoit was for "commercial purposes," as that term is defined for purposes of the Georgia common law claim for right of publicity;
>
> (5) LFP was unjustly enriched by its publication of the images of Ms. Benoit; <u>and</u>
>
> (6) LFP's publication of the images is not protected by the First Amendment to the U.S. Constitution.

(D.I. 56 at 13-14, emphasis added.) *See also* LFP's Response to Plaintiff's Statement of Material Facts, D.I. 55, at 4-5, Nos. 3-4. Plaintiff endeavored to prove <u>none</u> of these prerequisites to LFP's liability on her claim.

has not proven necessary facts on these primary elements of her claim for right of publicity, Plaintiff is not entitled to summary judgment as to liability.

1. Plaintiff Cannot Show A "Commercial Use"

Other than her reference to the Eleventh Circuit's now-disproved speculation about LFP's motives for publishing the Benoit images, Plaintiff provides no support for her assertion that LFP published Benoit's image "for financial gain" as that element of the right of publicity is defined. *Almeida*, 456 F.3d at 1325-26. In fact, the undisputed record evidence shows that LFP did not use Ms. Benoit's image to endorse any product; that LFP would not have published the Benoit images alone, without the context of the exclusive information about Ms. Benoit's early career provided by the attendant news article; and that LFP internally planned for, published, and promoted the Benoit article and images as an editorial "feature" news article, rather than as a nude model pictorial. (Facts ¶¶ 58-63.)[4] The absence of any evidence that LFP published the Benoit news article as a pretext to publish

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[4] Not even the cover mention of the Benoit feature is a "commercial use" because it does not mention Ms. Benoit's name: "Wrestler Chris Benoit's Murdered Wife Nude". (*See* Appendix of Evidence in Support of Defendant's Motion for Summary Judgment, D.I. 124-2, at TAB C-3 [Under Seal].) But even had the cover referenced Ms. Benoit by name, it accurately describes the interior article and photo spread, and therefore it is a classic case of "incidental use" and is no way tortious. *E.g.*, *Namath*, 371 N.Y.S.2d at 11-12.

the Benoit images means that Plaintiff has not carried her burden to prove the "commercial use" element of her right of publicity claim; therefore, her motion for summary judgment as to liability must fail.

2. Plaintiff Cannot Show Unjust Enrichment Of LFP

Likewise, Plaintiff makes no evidentiary showing that LFP was unjustly enriched by the publication of the Benoit images, the only measure of damages on a right of publicity claim. *See Pierson v. News Group Publications, Inc.*, 549 F.Supp. 635, 642 (S.D. Ga. 1982) (summary judgment to defendant on right of publicity claim because "[u]nder this theory, recovery is gauged solely by the unjust enrichment of the defendant . . . [and] there is no evidence demonstrating the advantage gained by the defendant through the use of plaintiff's . . . likeness"). It is undisputed that LFP paid $1,000 to Defendant Samansky for the exclusive information about Ms. Benoit's career and his related images of her. (Facts ¶¶ 41.) It is also undisputed that, from 2007-2008, LFP generally paid its amateur and professional models less than $1,000 for more substantial content of better image quality. (*See* LFP's Second Supplemental Responses to Plaintiff's First Interrogatories, D.I. 151 [Under Seal].) Thus, other than the inherently unreliable and contested opinion testimony of Plaintiff's proffered expert, Dr. Nair-Reichert, the record lacks any proof whatsoever that LFP actually benefitted financially from

publishing the Benoit images. Even if Dr. Nair-Reichert's testimony were admissible, and credited by the Court on summary judgment, it is disputed evidence insufficient to meet Plaintiff's burden of proof on her motion for summary judgment. The motion should therefore be denied.

C. At A Minimum, LFP's "Newsworthiness" Defense Is A Genuinely Disputed Issue Requiring Jury Resolution

As the Court knows, LFP contends that the fully developed, undisputed record supports entry of summary judgment in LFP's favor on its "newsworthiness" defense. (*See* LFP Motion for Summary Judgment, D.I. 124 & 124-1.) If LFP's motion for summary judgment is not granted, however, at a minimum there must then exist a clear and genuine dispute as to applicability of the "newsworthy" defense requiring resolution by the jury. This is because, as the Eleventh Circuit and other federal courts acknowledge, when it is questionable whether a publication is within the sphere of legitimate public interest, *i.e.*, "newsworthy", the issue is one of community standards and values that should be resolved by representative members of the community; that is, the jury, not the courts.[5] LFP respectfully submits that, on this record, Plaintiff cannot show she is

[5] *E.g.*, *Toffoloni*, 572 F.3d at 1208 (the inquiry is ultimately rooted in "that which resonates with our community morals"); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 & n.13 (9th Cir. 1975) ("newsworthiness" a jury question because "we believe that

(footnote continued on next page)

entitled to summary judgment on LFP's asserted defense of "newsworthiness."

V. Conclusion

For the reasons asserted above, LFP respectfully asks the Court to deny Plaintiff's Renewed Motion for Partial Summary Judgment.

Respectfully submitted this 31st day of August 2010.

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(footnote continued from previous page)

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"); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233-34 (7th Cir. 1993) ("Ordinarily the evaluation and comparison of … newsworthiness would be, like other questions of the application of a legal standard to the facts of a particular case, matters for a jury, not for a judge on a motion for summary judgment."); *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 309 (10th Cir. 1981) ("application of the newsworthiness standard to undisputed facts may well present a jury question . . .").

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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/ Darrell J. Solomon
Darrell J. Solomon
Georgia Bar No. 305922

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing **Brief in Opposition to Renewed Motion for Partial Summary Judgment** via the CM/ECF system which will automatically send notification to Plaintiff's attorney of record, who is a participant in the CM/ECF system.

This 31st day of August 2010.

/s/ Darrell J. Solomon
Darrell J. Solomon

Attorneys for Defendant-Appellee
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ATLANTA:5248078.1