

**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.,

Defendant.

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

**DEFENDANT LFP PUBLISHING GROUP, LLC'S RESPONSE TO
PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE TO BE TRIED**

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al. ("LFP") and respectfully submits this response to Plaintiff's factual allegations made in her Renewed Motion for Partial Summary Judgment As to Liability, Docket Index ("D.I.") 120.

General Response

As a threshold matter, LFP shows that Plaintiff, in support of her motion, has not filed a separate Statement of Material Facts as to Which There Is No

Genuine Issue to be Tried (“Statement of Facts”) as required by Local Rule (“L.R.”) 56.1B.(1), which provides:

a movant for summary judgment shall include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately and supported by a citation to evidence proving such fact. The court will not consider any fact: (a) not supported by a citation to evidence (including page or paragraph number); (b) supported by a citation to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant’s statement of undisputed facts.

L.R. 56.1B.(1) (Emphasis added.)

Although her motion and brief in support, D.I. 120 & 120-1, are silent on the matter, to the extent Plaintiff relies on her Statement of Facts filed with her October 2009 motion for partial summary judgment, *see* D.I. 50-3, LFP hereby incorporates, in full, its responses to same, *see* D.I. 55.

To the extent Plaintiff may contend that the enumerated allegations in her motion, D.I. 120, are intended to serve as her LR 56.1B.(1) Statement of Facts, and therefore require specific enumerated responses from LFP, such responses are provided below. LFP shows, however, that the enumerated allegations in Plaintiff’s motion do not comply with the rule and should not be considered by the Court not only because they are not in a separate paper, but also because they are

supported almost exclusively with citations to pleadings rather than to evidence in violation of LR 56.1B.(1)(a) & (b).

Finally, LFP shows that Plaintiff's brief in support of her motion, D.I. 120-1, contains several factual assertions that are not included in the enumerated allegations in her motion, D.I. 120, nor supported by citations to evidence. (D.I. 120-1 at 6-7.) Pursuant to LR 56.1B(1)(d), the Court should not consider such facts.

Specific Responses

LFP hereby responds to the enumerated allegations set forth in Plaintiff's motion, D.I. 120, as follows:

1. Plaintiff is the duly appointed and serving personal representative of the Estate of Nancy E. Benoit, deceased, of Fayette County, Georgia.

RESPONSE: UNDISPUTED, but unsupported by citation to evidence as required by LR 56.1B.

2. Defendant is the publisher of "*Hustler* Magazine."

RESPONSE: UNDISPUTED, but unsupported by citation to evidence as required by LR 56.1B.

3. Hustler published nude and partial nude images (the "images") of Nancy E. Benoit in its so-called "March 2008" edition. See Exhibits A, B, C, and

D, respectively to Plaintiff's Verified Complaint; see also Answer of Defendant LFP Publishing Group, LLC (the "Answer"), ¶¶ 8, 21, and 33.

RESPONSE: UNDISPUTED, but unsupported by citation to evidence, rather than pleadings, as required by LR 56.1B.

4. Hustler did not seek or obtain the permission of Nancy E. Benoit, or anyone authorized to act on behalf of Nancy E. Benoit, or the Estate of Nancy E. Benoit, to use, publish, or make any other commercial use of the images. See Exhibits C and D to Plaintiff's Complaint.

RESPONSE: UNDISPUTED, but unsupported by citation to evidence, rather than pleadings, as required by LR 56.1B, and immaterial. LFP did not make a "commercial use" of Ms. Benoit's image as that term is defined for purposes of a right of publicity claim, and LFP lawfully published the images as part of an exclusive news and entertainment story about Ms. Benoit and thus did not require the permission of Ms. Benoit's Estate or anyone acting on its behalf. (LFP's Statement of Undisputed Material Facts, Docket Index 124-3, ("Facts") at ¶¶ 40-41, 63, 74-77 & 82.)

5. Hustler did not compensate Nancy E. Benoit, or the Estate of Nancy E. Benoit, for its use of the images for commercial purposes. See Exhibits C and D to Plaintiff's Complaint.

RESPONSE: DISPUTED and unsupported by citation to evidence, rather than pleadings, as required by LR 56.1B, and immaterial. There was no “commercial use” of the images as that term is defined for purposes of a right of publicity claim. (See LFP’s Brief in Opposition to Plaintiff’s Renewed Motion for Partial Summary Judgment as to Liability at 17-18.) Further, because the images were published as part of an exclusive news and entertainment story about Ms. Benoit, no compensation to Ms. Benoit’s Estate was required by law. In any event, LFP compensated the lawful copyright-owner for use of images. (Facts at ¶¶ 40-41.)

6. In the case of *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009), the United States Court of Appeals for the Eleventh Circuit has held that Hustler’s use and publication, for commercial purposes, of the images of Nancy E. Benoit in its “March 2008” edition “[does] not qualify for the news worthiness exception to the right of publicity” held by Nancy E. Benoit during her life and by her Estate after her death. *See Toffoloni*, supra at 1213.

RESPONSE: DISPUTED, and unsupported by citation to evidence as required by LR 56.1B, and immaterial because the *Toffoloni* decision could not be construed to have decided the merits of either Plaintiff’s right of publicity claim or

LFP's "newsworthiness" defense thereto, *see* LFP's Motion for Summary Judgment and Brief in Support, D.I. 124 & 124-1, incorporated fully herein.

7. Thus, there is no genuine issue with respect to the fact that Hustler used and published the images of Nancy E. Benoit for commercial purposes in its "March 2008" edition of Hustler Magazine. Defendant has admitted same.

RESPONSE: DISPUTED, and unsupported by citation to evidence as required by LR 56.1B. LFP has not admitted and denies that it made any "commercial use" of the Benoit images, as that term is defined for purposes of a right of publicity claim. LFP fully incorporates herein its response to enumerated allegation number 4, above.

8. There is no genuine issue with respect to the fact that Defendant's use and publication of the images of Nancy E. Benoit for commercial purposes were without the permission of Nancy E. Benoit, or someone authorized to act on her behalf, and without the permission of Plaintiff, as the personal representative of the Estate of Nancy E. Benoit.

RESPONSE: DISPUTED, and unsupported by citation to evidence as required by LR 56.1B. LFP denies that it made any "commercial use" of the Benoit images, as that term is defined for purposes of a right of publicity claim. LFP admits that it published the images without the permission of Ms. Benoit, her

Estate, or anyone acting on its behalf, but shows that no such permission was necessary because the images were published as part of an exclusive news and entertainment story about Ms. Benoit. LFP fully incorporates herein its response to enumerated allegation numbers 4 and 7, above.

9. There is no genuine issue with respect to the fact that Defendant did not compensate Nancy E. Benoit or the Estate of Nancy E. Benoit for its use and publication, for commercial purposes, of the said images of Nancy E. Benoit. Defendant has admitted same.

RESPONSE: DISPUTED, and unsupported by citation to evidence as required by LR 56.1B. LFP denies that it made any “commercial use” of the Benoit images, as that term is defined for purposes of a right of publicity claim. LFP admits that it published the images without compensating Ms. Benoit or her Estate, but shows that no compensation was necessary because the images were published as part of an exclusive news and entertainment story about Ms. Benoit. LFP fully incorporates herein its response to enumerated allegation numbers 4, 5, 7 and 8, above.

10. Based upon the Verified Complaint, facts admitted by the Defendant, and the opinion and judgment of the Eleventh Circuit Court of Appeals in *Toffoloni v. LFP Publishing Group, LLC, supra*, Plaintiff moves for an Order declaring that

Defendant LFP Publishing Group, LLC is liable to Plaintiff for Defendant's violation of Plaintiff's right of publicity, with Plaintiff's damages to be decided by a jury.

RESPONSE: To the extent a response to Plaintiff's prayer for relief is required, it is hereby denied.

Respectfully submitted this 31st day of August 2010.

/s/ Darrell J. Solomon

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

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing DEFENDANT LFP PUBLISHING GROUP, LLC'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED via the CM/ECF system which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 31st day of August 2010.

/s/ Darrell J. Solomon _____

Darrell J. Solomon

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

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