

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
as Administratrix and Personal)
Representative of the)
ESTATE OF NANCY E. BENOIT,)
)
Plaintiff,)

v.)

CIVIL ACTION
FILE NO. 1:08-CV-0421-TWT

LFP PUBLISHING GROUP, LLC,)
d/b/a Hustler Magazine,)
MARK SAMANSKY, an Individual,)
and other distributors and sellers of,)
Hustler Magazine, as)
Defendants X, Y, and Z,)
)
Defendants.)

**PLAINTIFF’S RESPONSE TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit (“Plaintiff”), through counsel, and files this her Response to LFP Publishing Group, LLC’s (“Defendant” or “Hustler”) Motion for Summary Judgment and Brief in Support thereof with this Court as follows:

I. INTRODUCTION

Defendant filed its Motion for Summary Judgment on July 30, 2009, yet again claiming that the images of Nancy Benoit published by Hustler were “newsworthy,” and that punitive damages are not merited in this case. Plaintiff hereby responds to Defendant’s recycled arguments.

II. ARGUMENT AND CITATION TO AUTHORITY

Upon a first reading of Hustler’s Motion for Summary Judgment, one immediately asks what is it about the words of the Eleventh Circuit: “we hold that these photographs do not qualify for the newsworthiness exception to the right of publicity,” that Hustler does not understand? *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009). Hustler has filed multiple Affidavits (from current and former Hustler employees) and an “expert” report, all apparently designed to overrule the Eleventh Circuit Court of Appeals. We are forced to ask how Hustler’s contentions can control or change the rulings of law issued by the Eleventh Circuit?

No amount of evidence or affidavits that have been submitted by Hustler during discovery or with its Motion for Summary Judgment or Statement of Undisputed Material Facts can change the factors considered by the Eleventh Circuit in issuing its

opinion, or the theories of law used by that Court in finding that the images of Nancy Benoit published by Hustler were conclusively not newsworthy. Hustler's Motion for Summary Judgment is a thinly veiled attempt to deflect this Court's attention and to deprive a jury from considering the egregiousness of its conduct in calculating punitive damages.

In deciding a Motion for Summary Judgment, the burden of proof is on the movant, in this case the Defendant, to establish that there is "no genuine issue as to any material fact," and any doubt as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Facts presented by the moving party are to be construed in favor of the non-moving party, while evidence presented by the non-moving party will generally be regarded as true. *See Scott v. Harris*, 550 U.S. 372 (2007).

A. The Benoit Images Are Not Newsworthy.

Defendant and Defendant's expert are under the mistaken impression that the public appetite for celebrity gossip, and the rise in circulations of magazines and websites devoted to celebrities, somehow legally affect whether the images of Nancy Benoit published by Hustler qualify as newsworthy. As conclusively ruled by the

Eleventh Circuit, these images are not newsworthy. Citing the Restatement (Second) of Torts § 652D cmt. h., the Eleventh Circuit held that:

the line is to be drawn when the publicity ceases to be the giving of information to which the public is *entitled*, and becomes a morbid and sensational prying into private lives for its own sake, *with which a reasonable member of the public, with decent standards, would say that he had no concern.*

Toffoloni at 1211 (emphasis supplied). This established principle of law has been repeatedly ignored by Hustler and its expert.

Hustler's assertion that "a primary interest of the American public is 'news' of the private lives of celebrities (including a celebrity's decision to pose nude)" (Hustler Motion p. 3) conflicts with the Eleventh Circuit's opinion and all legal authority.

The Eleventh Circuit held that, "were we to hold otherwise, LFP would be free to publish nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.' Surely that debases the very concept of a right to privacy." Toffoloni at 1212. The Eleventh Circuit made clear that the determination of newsworthiness involves a requirement that the Court "engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals." Toffoloni at 1208.

Defendant argues that, because this case came to the Eleventh Circuit on a 12(b)(6) motion to dismiss, that the Eleventh Circuit cannot make any determinations of fact in this case, and that its opinion ruling that the images of Ms. Benoit were not newsworthy does not control. In its 12(b)(6) review of this Court's dismissal of this case, the Eleventh Circuit accepted every fact plead in Plaintiff's Complaint as true. A review of the facts relied upon by the Eleventh Circuit in reaching its decision shows that those facts remain as pled in Plaintiff's Complaint. Nothing that Defendant produced during discovery or submitted its Motion for Summary Judgment has altered or refuted the facts upon which the Eleventh Circuit relied in its decision.

The Eleventh Circuit's findings were based exclusively on a review of the images published by Defendant, and their relation to the accompanying article and to the event of Ms. Benoit's murder.¹ These facts have not changed nor have they been refuted by Defendant. The Court's newsworthiness investigation required "an

¹ "The magazine cover advertises 'WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE.' The table of contents lists 'NANCY BENOIT Exclusive Nude Pics of Wrestler's Doomed Wife.' Neither the cover nor the table of contents makes any reference to the accompanying article. The article is entitled 'NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife.' The title and page frame, which reads 'EXCLUSIVE PICS! EXCLUSIVE PICS!,' comprise about one-third of the first page. A second third of the page is devoted to two nude photographs of Benoit. The final third of the page discusses Benoit's murder and her nude photo shoot. The second page of the article is entirely devoted to photographs, displaying eight additional photographs of Benoit." *Toffoloni* at 1209.

intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern – Benoit’s murder.” *Id.* at 1208.

These conditions, which are the sole factual basis upon which the Eleventh Circuit based its opinion, have not changed, and Defendant has presented nothing to contradict these facts. As such, the Eleventh Circuit’s conclusive ruling that the images of Ms. Benoit are not newsworthy is binding on Defendants in this case.

“To properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.” *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981). The Eleventh Circuit found that the matter of legitimate public interest in this case was Ms. Benoit’s murder, and that the images had nothing to do with furthering that interest. Therefore, the newsworthiness exception did not apply. *Toffoloni* at 1210-1212. This fact has remained unchanged throughout discovery.

The three “undisputed” facts that Hustler relies upon in its Motion for Summary Judgment are disputed by Plaintiff in her Response to Defendant’s Statement of

Undisputed Material Facts and are irrelevant to the Eleventh Circuit's detailed and specific consideration of the newsworthiness of the images of Nancy Benoit.²

The fact remains that Hustler has to pay Ms. Benoit's Estate for the use of her image. Hustler cannot now force these images into the newsworthiness exception of the right of publicity to attempt to avoid compensation to the appropriate party.

B. Punitive Damages Are Appropriate in this Case.

In addition to the denial of Hustler's Motion for Summary Judgment as to Defendant's "newsworthiness" claims, Hustler's Motion for Summary Judgment as to punitive damages should also be denied.

Hustler shows a surprisingly naive understanding of the Georgia law of privacy, even though that law was articulated by the Eleventh Circuit in this case.

Hustler's misunderstanding of Georgia law appears to be intentional and calculated in order to avoid punitive damages. Judge Posner stated in *Douglass v.*

² (1) Whether Ms. Benoit requested the video footage to be destroyed or not, the fact remains undisputed that Ms. Benoit never signed a release allowing Hustler to publish her image; (2) The basis upon which the Eleventh Circuit found that the article accompanying the images of Ms. Benoit was a mere "pretext" (the space dedicated to the article, versus the space and publicity dedicated to the images) remains unchanged and unrefuted; and (3) As detailed in Plaintiff's Motion to Strike the expert testimony of Defendant's expert, Dr. Lisby, the Eleventh Circuit found that the images of Ms. Benoit are not newsworthy, and therefore, are not "typical," "pervasive" or "of real interest to the public." *See* Defendant's Motion for Summary Judgment p. 16.

Hustler Magazine, Inc., 769 F.2d 1128 at 1145 (7th Cir. 1985), that over the years Hustler has shown a “propensity, well-documented in several cases ... to invade people’s legal rights.” This signifies either a profound ignorance of Georgia privacy law, or Hustler’s calculated effort to lead this Court into error. This Court should deny Hustler’s Motion for Summary Judgment.

1. Georgia Law Regarding Punitive Damages Fits the Facts of this Case.

It is fundamental Georgia law that punitive damages may be awarded in tort actions in which it is proven by clear and convincing evidence that the defendant’s actions showed willful misconduct. In a tort case, if the jury finds that the defendant acted with the specific intent to cause harm, there is no limitation regarding the amount of punitive damages. *See* O.C.G.A. §§ 51-12-5.1(b) and (f).

Under Georgia law, punitive damages are awarded to punish, penalize, or deter the defendant. Where there are circumstances of aggravation or outrage, including the “deliberate disregard of the rights of others,” punitive damages may be awarded by the jury. *Banks v. ICI Americas, Inc.* 266 Ga. 607, 610, 469 S.E.2d 171 (1996). The purpose of punitive damages under Georgia law is to deter the defendant from similar conduct in the future. *E.g., WMH, Inc. v. Thomas*, 260 Ga. 654, 398 S.E.2d 196 (1990).

The imposition of punitive damages is a question for the jury. *Baumann v. Snider*, 243 Ga. App. 526, 532 S.E.2d 468 (2000). The controlling issue is whether there is any evidence authorizing such an award. *Artzner v. A & A Exterminators, Inc.*, 242 Ga. App. 766, 531 S.E.2d 200 (2000). Whether the defendant's actions are willful, wanton, or evidence want of care as to the rights of others so as to authorize punitive damages by clear and convincing evidence is normally an issue for consideration by a jury. *Keith v. Beard*, 219 Ga. App. 190, 464 S.E.2d 633 (1995).

2. Punitive Damages in a Case Involving Intentional Violation of the Right of Publicity.

The appellate courts of Georgia, in several cases, have imposed punitive damages in cases involving invasions of privacy. Fundamentally, under Georgia law, punitive damages may be awarded upon the same basis as in other torts, where a “wrongful motive or state of mind is present” e.g., *Brown v. Capricorn Records, Inc.*, 136 Ga. App. 818, 222 S.E.2d 618 (1975). While mere negligence on the part of a defendant in publicizing photographs of a plaintiff without permission would not generally justify punitive damages, if the violation is intentional or with knowledge, punitive damages may be awarded. *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966). Georgia courts have “long recognized that one who makes an unsanctioned appropriation of another's name or likeness for his own benefit may be

liable to that person in tort.” To deter the inverse condemnation of a name, the jury may award punitive damages when it finds such an appropriation, and it finds “that the acts of the defendant have been of a character to import premeditation or knowledge and consciousness of the appropriation and its continuation.” *Alonso v. Parfet*, 253 Ga. 749, 325 S.E.2d 152 (1985).

- 3. Evidence of Record From Which a Jury Might Find Hustler’s Premeditation or Knowledge and Consciousness of the Appropriation and its Continuation**
 - a. Jim Daus Demanded that Hustler Not Publish the Images. He was Ignored.**

In late-December, 2007, or early-January 2008, “10 days or two weeks” before the March 2008 edition of *Hustler* was released to the public, Jim Daus, who was married to Nancy Benoit at the time the Samansky video was made, and who was present at all times when the events occurred, called Hustler and spoke with Tyler Downey, a Hustler employee at the time. Mr. Daus had seen on a wrestling website that Hustler intended to publish nude images of Nancy Benoit. Mr. Daus was present when the nude images were made, and he knew that he and Nancy has requested that the images be destroyed. Because of that, Mr. Daus asked Hustler not to publish the images.

Q. When you had your conversation with this Tyler person at Hustler Magazine prior to the publication, did you in words or substance tell him that you did not want him to publish nude photographs of Nancy?

A. I did, yes.

Q. And why did you tell him that?

A. Because she never gave permission to anybody. She never would have wanted it; and how much it would hurt her family because it was no way it should ever [have] been done and that was all supposed to be destroyed and we were told it was destroyed.

See Daus Deposition, p. 53, lines 11-21.

In an internal Hustler email dated July 11, 2007, Samansky had already informed Hustler that Nancy “never signed any kind of release” with respect to the images in question. See LFP 0039, attached as Exhibit A to Affidavit of Richard P. Decker filed contemporaneously herewith; see also Plaintiff’s Statement of Additional Material Fact No. 1.

Additionally, Tyler Downey of Hustler, in an internal Hustler email dated November 16, 2009, claimed the following:

(a) Samansky told Downey that he had “destroyed the photos that she [Nancy] had asked to be destroyed. What we printed were stills from a video that he took at the same time when they were just horsing around. She had never requested

that the video be destroyed because it wasn't going to be something that was submitted anywhere.” See LFP 0102 attached as Exhibit B to Affidavit of Richard P. Decker filed contemporaneously herewith; see also Plaintiff's Response to Defendant's Statement of Material Fact Number 45.

(b) Jim Daus called Downey “right before we ran the photos,” although Downey claims in this email that Daus wanted money. In any event, it is undisputed that Hustler knew prior to publication that: (1) Nancy never signed a release in favor of Samansky, or anyone, relating to the images; and (2) Hustler knew, prior to publication, that Nancy and her husband at the time, Jim Daus, did not want the images published.

Though Hustler claims in its Motion for Summary Judgment that it believed it had the right to publish the images of Ms. Benoit without seeking permission, Defendant's long experience in the world of publishing should have alerted it that it did not have that right, and Downey's email acknowledges that it did not have that right. Defendant has never denied that it did not receive consent from Ms. Benoit, or her Estate, for the use of her images in *Hustler Magazine*. See Plaintiff's Statement of Additional Material Fact No. 2. Defendant has exclusively relied upon the

newsworthiness exception of the right of publicity to attempt to shield itself from liability, even though Hustler knows this exception was not applicable.

Despite Hustler's contention that the copyright to the images may have been owned by Mr. Samansky (which Plaintiff denies), Hustler nevertheless was required to obtain the consent of Ms. Benoit or her Estate for the use of the images. The case most directly on point with this factual scenario is *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y.A.D. 1st Dept. 1981). In *Brinkley*, the model Christie Brinkley brought suit to enjoin the unauthorized publication, distribution, and sale of a poster bearing her image in violation of her right of privacy and to recover damages sustained as a result of this unauthorized, commercial use of her photograph.

Brinkley had voluntarily posed for a photo shoot during which defendant took pictures that all parties knew would presumably be used for the production and sale of a poster. During the photo shoot, and with Brinkley's consent, a separate production company filmed the photo shoot. This film was later produced and aired on HBO.

After the photo shoot and the airing of the HBO special, Brinkley worked directly with defendant in choosing a photograph for the poster and overseeing editing and touch-ups to the photograph. Nevertheless, even though defendant claimed that

he obtained Brinkley's oral consent to use the agreed-upon picture to produce the poster, no written consent was ever signed by Brinkley allowing defendants to use her likeness. The court found that:

Plaintiff never authorized distribution of the particular photograph or poster. While she undoubtedly permitted photographs of herself to be taken which might be used on a poster for commercial sale, she reserved the right, prior to their commercial exploitation, to reject or approve the use to which the photographs would be put. As already noted, **a model's photograph is customarily used only after a written release has been obtained.** The executed release not only authorized dissemination of the photograph but delineates the extent to which it may be used. Here, plaintiff never gave final approval to the poster nor did she give oral or written consent to its release.

Brinkley at 434 (emphasis added).

Even though Brinkley freely posed for photographs, which she knew could and probably would be used in the creation of a poster, and even though Brinkley personally worked with the defendant to select the best photographs and oversee their editing and touching-up, defendant still was not legally authorized to use Brinkley's image without her express consent. Thus, the images of Nancy Benoit could not have been published by Hustler without the express consent of Nancy Benoit for the use of those images in *Hustler Magazine*. Assuming that Mr. Samansky owned the copyright to the images of Nancy Benoit, and even assuming that Ms. Benoit never explicitly directed Mr. Samansky to destroy the images, (both of which scenarios

Plaintiff disputes), Mr. Samansky and Hustler would still have to produce evidence that Ms. Benoit gave her express consent that the images could be used in Hustler Magazine.

The Brinkley case confirms that the existence of other photographers and images from the photo shoot of Nancy Benoit is wholly irrelevant to Plaintiff's claim for violation of the right of publicity. The fact remains that Ms. Benoit's image was appropriated by Hustler for a commercial purpose and without her express consent. Such appropriation is a violation of her right of publicity.

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) is likewise applicable to this case. In Douglass, the plaintiff allowed a photographer to take nude pictures of her with the intention that the pictures would be published in Playboy Magazine. Several of the pictures were eventually published in Playboy. Several years later, the photographer sold several unused pictures from the same photo shoot to Hustler Magazine, which published the pictures. The plaintiff sued for violation of her right to publicity, claiming that it was her understanding that the pictures were only to be used in Playboy, and that she signed releases stating the pictures would only be used in Playboy. The photographer claimed that the releases were general releases that allowed him to do with the pictures as he pleased.

The court found that the plaintiff had stated a claim for violation of the right to publicity. The court ruled that Hustler:

... cannot use photographs made by others for commercial purposes and (temporarily) withheld from public distribution. The unauthorized publication did impair the commercial exploitation of Douglass'[] talents, though probably not as much as she asserts and mainly because of where they were published. But an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances; for example, no celebrity sells his name or likeness for advertising purposes to all comers. In any event, Douglass was not paid by *Hustler* for the right to publish nude photos of her.

Douglass at 1138.

The defendant argued that the pictures published by *Hustler* were from the very same photo shoot as those previously published by *Playboy*, so that the plaintiff could not claim that she had sustained any damages. The court disagreed, finding that the plaintiff's image in *Hustler Magazine* created the impression that plaintiff was associated with that publication, and that the impression of an association with *Hustler Magazine* could damage her career and devalue her image, even if she had previously posed nude for *Playboy*.

[I]n another issue *Hustler's* chairman, Larry Flynt, had announced in an editorial column that he does not publish photographs of women without their consent. It is (or so a jury could find) as if *Hustler* had said, 'Robyn Douglass is proud to pose nude for *Hustler* magazine.' To complete this part of her argument Douglass asserts that voluntary association with *Hustler* as a nude model is degrading.

Douglass at 1135.

After comparing the content of both *Hustler* and *Playboy*, the court ruled that one could reasonably find that a voluntary association with *Hustler* could be damaging to one's reputation, even if a voluntary association with *Playboy* existed.

Here, even if Nancy Benoit posed for nude photographs with the knowledge that such photographs could be published in a "gentlemen's" magazine, Ms. Benoit still had the right to choose where those nude images could be published. As the court in *Douglass* indicated, a reasonable jury could find a significant difference in the public perception of those who willingly associate with *Playboy*, as opposed to those who willingly associate with *Hustler*. Nancy Benoit had the right to choose when and where the nude images of her could be published pursuant to her right of publicity, and Hustler knowingly violated this right when it published the images of her for financial gain without her or her Estate's express permission. Hustler's knowledge that it violated the rights of Nancy Benoit is shown by its participation in the *Douglass* case.

b. Counsel for Plaintiff's Written Demand that Hustler Refrain from Publishing the Photographs was Ignored.

It is undisputed that Hustler received a written demand from the undersigned counsel for Plaintiff in mid-January, 2008, demanding that the images not be

published in any way. *See* Exhibit C to Plaintiff’s Verified Complaint. *See also*, Hahner Deposition, p. 38, lines 15-25, p. 39, lines 1-14. Despite this demand, Hustler published the images and continued to sell copies of the issue well into February and March of 2008, and, as demonstrated below, did not even attempt to recall or limit the number of issues made available to the public.

c. Hustler Made No Attempt to Recall Unsold Magazines from Wholesale or Retail Outlets, Even After Receiving Written Demand from Counsel for Plaintiff.

Willfully and knowingly, Hustler made absolutely no attempt to halt sales of the March 2008 issue or to recall unsold copies after receiving a written demand from counsel for Plaintiff. Despite claims of “impossibility,” Hustler has acknowledged that efforts could have been made to recall the unsold copies of the March 2008 edition, but Hustler took no steps whatsoever to prevent distribution of this edition.

Hustler employee Donna Hahner:

Q. Was any effort made by the company to re-call the unsold editions of Hustler Magazine that contained the Nancy Benoit images?

A. That would have been impossible.

Q. So the answer is “no”? No effort was made?

A. No.

...

Q. Do you have a nationwide distributor?

A. Yes we do.

Q. Was any effort made to contact the nationwide distributor and say, "Get back as many copies of that magazine as you can?"

A. No, because they couldn't have gotten them back either.

Q. Okay. But the answer is "no" and then you gave the reason that they couldn't have done it.

A. Correct.

Q. But the answer to my question is no such call was made?

A. Correct. I believe that's correct.

...

Q. Well, first of all, let's clarify. The images of Nancy Benoit that are the subject of this lawsuit, you're familiar with those, aren't you?

A. Yes.

Q. And you're familiar with the proposition that they appeared in the March 2008 edition of Hustler magazine?

A. Yes.

Q. Along with the other content for that month?

A. Yes.

Q. And it was the goal of the company in publishing that edition to make money?

A. Yes. That's what we're in business for.

See Hahner Deposition, pp. 42-45.

Ms. Hahner's testimony as a 30(b)(6) witness for Hustler is contrary to the testimony of Larry Flynt, the sole owner of LFP and, thus, Hustler Magazine:

Q. Do you know what, if any, efforts were made by the company to stop distribution or minimize distribution of the magazine that contained the Nancy Benoit images after receipt of the letter --

A. No.

Q. -- from me in mid January?

A. Well, once a magazine is printed, regardless if you've got an injunction or whatever, once a magazine is printed it's almost virtually impossible to stop the distribution.

Q. And so do you recall what, if any, efforts were made in that regard?

A. No.

Q. You would not have been involved in those?

A. No.

Q. In your career as a magazine publisher have you ever tried to recall an edition once it went to the distributor?

A. There has been some cases where there's been concern, and I believe there was one that involved an injunction, but neither one of those really affected distribution because, let's say, once you print it you're already in the pipeline so it's almost impossible to prevent the distribution.

...

Q. So that I can be clear before we leave this topic, are you saying unequivocally that there's nothing that you as the publisher can do to minimize the distribution once it leaves your printing facilities and gets on the trucks?

A. Not really. You know, I mean, you can call, you know, certain wholesalers and ask them, you know, not to distribute it, but I find that that's not very effective.

Q. And do you know whether or not that effort was made in this case with respect to the Nancy Benoit issue images?

A. No, I do not.

See Flynt Deposition, pp. 13-15.

Thus, clearly some effort could have been made by Hustler to minimize the sales and distribution of the magazines containing the Nancy Benoit images, but a conscious decision was made not to make any effort and, rather, to test the outcome of this litigation. From this conduct, a jury could clearly find a conscious indifference to the rights of the Plaintiff and an intent to cause harm.

In addition, the continuation requirement for punitive damages in a right of publicity case is met by the mere fact that, once Ms. Benoit's image was published by Hustler for the world to see, these images continued to be available, to be re-viewed and republished by Hustler readers at will. Once a bell has been rung, it can not be un-rung, and once Hustler wrongfully published images of Nancy Benoit, and sold them to the public, those images can never be recovered, and they will remain in the public domain forever.

d. Hustler's Statement to Other Media About its Decision to Publish the Nancy Benoit Images Shows Intent and Indifference.

A short time after the March 2008 issue of Hustler was on the newsstands and the internet, other media outlets, both print and online, began to comment about Hustler's tasteless decision to publish Ms. Benoit's image. One outlet actually contacted Hustler to discuss its decision to publish. John Roth and Simon Rothstein contacted Hustler and spoke with Mark Johnson, a Hustler employee. An interview ensued, which was published in an article that appeared on *The Sun*'s website. A copy of the article is attached to the deposition of Mark Johnson as Exhibit 1, wherein the following quote was attributed to Mr. Johnson:

Publishing the photos of Nancy Benoit was a no-brainer. She was beautiful and popular. We knew millions of people would want to see

the pictures. The feedback has been huge and overwhelmingly positive. Some questioned our decision, but the piece was presented in a tasteful, respectful fashion and people recognize that.

When questioned in deposition about the article and the quote attributed to him, Mr. Johnson admitted that he had said those words and that such words were approved by Mr. Johnson's supervisor. *See* Johnson Deposition, p. 11, lines 5-15.

Clearly, Hustler believed that "millions" of its readers would want to see nude images of a murdered woman. In addition, Mr. Johnson fails to mention the accompanying "article," and focuses only on the pictures, revealing Defendant's true motive for publication of the photographs. Hustler eagerly exploited the images of Nancy Benoit for its own commercial advantage, without any regard to the rights of the Benoit Estate or the Toffoloni family.

e. Larry Flynt, the Sole Owner of *Hustler Magazine* Made No Effort to Obtain the Permission of the Benoit Estate or to Compensate the Benoit Estate, Justifying His Failure to Do So on the Discredited and Erroneous Notion That the Images Were "Newsworthy."

Larry Flynt is the sole owner of LFP Publishing Group, LLC, which does business as *Hustler Magazine*. *See* Flynt Deposition, p. 6, line 25; p. 7, lines 1-25.

At page 10 of Mr. Flynt's deposition, the following exchange took place:

Q. Is it accurate to say, Mr. Flynt, you and no one within the Hustler Magazine organization sought the permission of Maureen Toffoloni to publish the images of Nancy Benoit?

A. We felt it was clearly under - what's the term? Not just fair usage, but there's another term as well.

Q. Newsworthy?

A. Yeah, both of those factors, you know, came into play. You know, if we didn't feel that they were newsworthy, you know, and -- we wouldn't have published them.

Q. Yes, sir, so my point is -- my question is: you did not seek the permission of Maureen Toffoloni to publish the Nancy Benoit images? You don't deny that?

...

A. No, but we didn't do it out of arrogance. If we felt it would have been necessary, we would have done it.

Q. You did not think it was necessary, and you didn't do it?

A. No.

See Flynt Deposition, pp. 10-12.

Mr. Flynt and his "editorial board" decided they did not need the Plaintiff's consent. They published first, and let the chips fall where they may. Then, after getting a letter from Plaintiff's counsel, they made no attempt to minimize the damage

to Nancy Benoit or her family. A jury could easily find that such actions need deterrence by an award of punitive damages.

f. Hustler Knowingly Associated Nancy Benoit, Her Image, and Her Memory, with the Worst Kind of Pornography Imaginable.

The damage to Nancy Benoit's image, as the result of her involuntary association with the worst form of pornography, is almost incalculable. *See Douglass*, supra. *Hustler Magazine* unabashedly styles itself as "Harder and Raunchier." *See* LFP 0003. To add insult to injury, sold along with the March 2008 edition, which contains Nancy's Benoit's images, was a free DVD. This DVD was an integral part of the March 2008 issue of the magazine. *See* Flynt Deposition, p. 18, lines 21-25; p. 19, lines 1-10. The sole purpose of the free DVD was to boost sales of the March 2008 edition containing the Nancy Benoit images. *See* David Deposition, p. 12, lines 10-25; pp. 13-14. Counsel for Plaintiff reluctantly files a copy of the DVD as Exhibit C to the Affidavit of Richard P. Decker filed contemporaneously herewith.

The economic expert hired by Plaintiff to assist her in trying to compute the economic damages in this case has testified that the use by Hustler of the Nancy Benoit images, without the permission of the Benoit Estate, has effectively destroyed

any market that may have existed for commercial use by the Estate of Nancy's image or memory. See Nair-Reichert Deposition, p. 58, lines 22-24.

If the Court, and ultimately the jury, decide to look at the March 2008 edition cover-to-cover and to play the DVD that was sold with it, it will be obvious how Ms. Benoit's image and memory have been intentionally and forever tainted by the Defendant. Without permission or legal authority of any kind, Hustler took it upon itself to steal Nancy Benoit's image, and then to display it along side the crudest forms of pornography imaginable. Neither Ms. Benoit nor her mother were given the chance to say "no" to Hustler; instead, Hustler chose not to ask, because, in the arrogant words of Larry Flynt himself, "if we felt it would have been necessary, we would have done it." See Flynt Deposition, p. 12, lines 3-5 (emphasis added).

g. Hustler Cannot Claim That it Relied upon Erroneous Legal Advice as its Authority to Publish the Nancy Benoit Images Without Permission.

Even though reliance upon erroneous legal advice is no defense to an intentional tort, and despite Larry Flynt's statements to the contrary, Hustler decided to appropriate the image of Nancy Benoit; to publish these images because they believed "millions of people would want to see them;" and then tried to justify their conduct after the fact by claiming it was "newsworthy." See Defendant's Response

to Plaintiff's Third Interrogatories attached hereto as Exhibit B. This conduct is more egregious than Hustler exhibited in the *Douglass* case, which involved Hustler's unsanctioned appropriation of Ms. Douglass' image, where Judge Posner found a basis for the jury to consider punitive damages. *See Douglass supra* at p. 1145.

III. CONCLUSION

The bottom line in this case is this: Hustler has paid a "media" expert \$25,000 to look on the internet, find photographs of nude celebrities, and then say that celebrity nudity is "newsworthy." This expert has made this statement even though the Eleventh Circuit Court of Appeals has already said that these images of Nancy Benoit are not newsworthy. Hustler apparently believes that it and its expert have the power to overrule the Eleventh Circuit by submission of irrelevant and baseless expert testimony, which the Supreme Court of the United States has declined to do in this case. If this conduct does not show a conscious and deliberate disregard of the rights of Nancy Benoit and her Estate, then this standard can never be met. Hustler's Motion for Summary Judgment as to Plaintiff's claim for violation of the right of publicity and for punitive damages should be denied.

Respectfully submitted August 31, 2010.

/s/ Richard P. Decker

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
as Administratrix and Personal)
Representative of the)
ESTATE OF NANCY E. BENOIT,)
)
Plaintiff,)

v.)

LFP PUBLISHING GROUP, LLC,)
d/b/a Hustler Magazine,)
MARK SAMANSKY, an Individual,)
and other distributors and sellers of,)
Hustler Magazine, as)
Defendants X, Y, and Z,)
)
Defendants.)

CIVIL ACTION
FILE NO. 1:08-CV-0421-TWT

CERTIFICATE OF SERVICE

This is to certify that on August 31, 2010, I have electronically filed the foregoing Response to Defendant's Motion for Summary Judgment with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

James Clifton Rawls, Esq.
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and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

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