

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
STATEMENT OF UNDISPUTED MATERIAL FACTS**

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 Defendant’s Statement of Undisputed Material
Facts with this Court as follows:

(1)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 1.

(2)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 2.

(3)

Plaintiff admits that *Hustler* is a monthly magazine available on a subscription basis and on newstands. Plaintiff contends that the majority of the content of every *Hustler Magazine*, and the main draw for *Hustler Magazine's* customers, are pornographic depictions of nude women, and that the magazine is known as a "pornographic" magazine. *See* Deposition of Bruce David, p. 9, lines 13-15; *see also* Deposition of Mark Johnson, p. 8, lines 3-5.

(4)

Plaintiff admits Defendant's Statement of Material Fact Number 4.

(5)

Plaintiff admits Defendant's Statement of Material Fact Number 5.

(6)

Plaintiff contends that Defendant's Statement of Material Fact Number 6 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(7)

Plaintiff admits Defendant's Statement of Material Fact Number 7.

(8)

Plaintiff admits Defendant's Statement of Material Fact Number 8.

(9)

Plaintiff admits Defendant's Statement of Material Fact Number 9.

(10)

Plaintiff contends that Defendant's Statement of Material Fact Number 10 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(11)

Plaintiff contends that Defendant's Statement of Material Fact Number 11 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(12)

Plaintiff contends that Defendant's Statement of Material Fact Number 12 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(13)

Plaintiff contends that Defendant's Statement of Material Fact Number 13 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(14)

Plaintiff admits Defendant's Statement of Material Fact Number 14.

(15)

Plaintiff admits Defendant's Statement of Material Fact Number 15.

(16)

Plaintiff admits Defendant's Statement of Material Fact Number 16.

(17)

Plaintiff admits Defendant's Statement of Material Fact Number 17.

(18)

Plaintiff denies Defendant's Statement of Material Fact Number 18. Plaintiff states that testimony indicates that both Ms. Benoit and Mr. Daus may have been intoxicated and under the influence of alcohol at the time the video footage was taken, and therefore such activities may not have been undertaken "knowingly, willingly, and voluntarily." See Deposition of Jim Daus, p. 17, lines 15-17, p. 26, lines 4-6, p. 28, lines 16-24

(19)

Plaintiff admits Defendant's Statement of Material Fact Number 19.

(20)

Plaintiff denies Defendant's Statement of Material Fact Number 20. Plaintiff notes that nowhere in Defendant's Statement of Undisputed Material Facts does Defendant claim that Nancy Benoit ever signed a release for the photographs and images in question, or gave anyone permission to publish such images in Hustler Magazine. See Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.

(21)

Plaintiff denies Defendant's Statement of Material Fact Number 21. Plaintiff states that a question of material fact exists as to when Nancy Benoit requested that the images and video taken during her photo session be destroyed. According to Mr. Daus, who was present during both photo shoots, Mr. Samansky was called five minutes after the first photo shoot and explicitly told to destroy the video made during that shoot, as well as told two or three weeks after the second photo shoot to destroy all photos. Mr. Samansky assured Ms. Benoit and Mr. Daus that all images of Ms. Benoit had been destroyed. See Daus Deposition, pp.18-19, lines 24-13, pp. 21-22, lines 25-7, p. 26, lines 19-20.

(22)

Plaintiff denies Defendant's Statement of Material Fact Number 22. Plaintiff reiterates that Ms. Benoit and Mr. Daus repeatedly requested that Mr. Samansky destroy both the video and photographs taken from both photo shoots, and Mr. Samansky assured them that both the video and photographs had been destroyed. See Daus Deposition, pp.18-19, lines 24-13, pp. 21-22, lines 25-7, p. 26, lines 19-20.

(23)

Plaintiff denies Defendant's Statement of Material Fact Number 23. Plaintiff reiterates that Ms. Benoit and Mr. Daus repeatedly requested that Mr. Samansky destroy both the video and photographs taken from both photo shoots, and Mr. Samansky assured them that both the video and photographs had been destroyed. See Daus Deposition, pp.18-19, lines 24-13, pp. 21-22, lines 25-7, p. 26, lines 19-20. These requests occurred long before Ms. Benoit began wrestling professionally.

(24)

Plaintiff denies Defendant's Statement of Material Fact Number 24. Plaintiff reiterates that Ms. Benoit and Mr. Daus repeatedly requested that Mr. Samansky destroy both the video and photographs taken from both photo shoots, and Mr. Samansky assured them that both the video and photographs had been destroyed. See Daus Deposition, pp.18-19, lines 24-13, pp. 21-22, lines 25-7, p. 26, lines 19-20.

(25)

Plaintiff denies Defendant's Statement of Material Fact Number 25. Plaintiff notes that nowhere in Defendant's Statement of Undisputed Material Facts does Defendant claim that Nancy Benoit ever signed a release for the photographs and images in question, or gave Mr. Helton, or anyone else, permission to publish such

images in *Hustler Magazine*. *See* Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; *see also* Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.

(26)

Plaintiff contends that Defendant's Statement of Material Fact Number 26 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(27)

Plaintiff contends that Defendant's Statement of Material Fact Number 27 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(28)

Plaintiff contends that Defendant's Statement of Material Fact Number 28 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(29)

Plaintiff denies Defendant's Statement of Material Fact Number 29. Plaintiff denies that Ms. Benoit ever posed nude either before or after the photo shoot

with Mr. Samansky, Mr. Otten, and Mr. Helton. In any other “risque” photographs, Ms. Benoit was not nude, but was fully covered. See Daus Deposition, p. 52, lines 14-17; see also Daus Affidavit, ¶ 9. In addition, Plaintiff contends that Defendant’s Statement of Material Fact Number 29 is not material to this case and has no relevance to the issues presented in Defendant’s Motion for Summary Judgment.

(30)

Plaintiff contends that Defendant’s Statement of Material Fact Number 30 is not material to this case and has no relevance to the issues presented in Defendant’s Motion for Summary Judgment.

(31)

Plaintiff contends that Defendant’s Statement of Material Fact Number 31 is not material to this case and has no relevance to the issues presented in Defendant’s Motion for Summary Judgment.

(32)

Plaintiff contends that Defendant’s Statement of Material Fact Number 32 is not material to this case and has no relevance to the issues presented in Defendant’s Motion for Summary Judgment.

(33)

Plaintiff denies Defendant's Statement of Material Fact Number 33. Plaintiff contends that the Independent Contractor Agreement between Ms. Benoit and WCW did not convey to WCW all rights over Ms. Benoit's image, taken either before the contract or after the contract was terminated. WCW retained only ownership of "Work Product" created "pursuant to this Agreement" and "during the term of this Agreement." See Exhibit A to Affidavit of Derek Bauer, pp. UWC 008-009. In any event, neither Ms. Benoit nor WCW ever gave Mr. Samansky or Defendant their consent to publish images of Ms. Benoit in Hustler Magazine. See Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039. In addition, Plaintiff contends that Defendant's Statement of Material Fact Number 33 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(34)

Plaintiff denies Defendant's Statement of Material Fact Number 34. Plaintiff contends that none of those images or likenesses consisted of nude images, and none of the wrestling organizations or magazines who used such images were Hustler Magazine or any other publication owned by Defendant. See Daus

Deposition, p. 52, lines 14-17; see also Daus Affidavit, ¶ 9. In addition, Plaintiff contends that Defendant's Statement of Material Fact Number 34 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(35)

Plaintiff contends that Defendant's Statement of Material Fact Number 35 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(36)

Plaintiff admits Defendant's Statement of Material Fact Number 36.

(37)

Plaintiff admits Defendant's Statement of Material Fact Number 37.

(38)

Plaintiff denies Defendant's Statement of Material Fact Number 38. Plaintiff contends that neither Mr. Samansky nor Defendant ever obtained a release or permission from Ms. Benoit, or the Estate of Ms. Benoit, for the use of her image, or for her image to be sold to or published by Defendant. See Daus Deposition, p. 18,

lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.

(39)

Plaintiff admits Defendant's Statement of Material Fact Number 39.

(40)

Plaintiff denies Defendant's Statement of Material Fact Number 40. Plaintiff contends that Mr. Samansky never obtained a release or permission from Ms. Benoit, or the Estate of Ms. Benoit, for the use of her image, or for her image to be sold to or published by Defendant. See Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; see also Defendant's Responses to Plaintiff's Request for Production of Documents, LFP 0039.

(41)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 41.

(42)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 42.

(43)

Plaintiff denies that the Nancy Benoit images and article were promoted as an “editorial feature” or news items. The cover of the March 2008 issue of *Hustler Magazine* promotes “Wrestler Christ Benoit’s Murdered Wife Nude.” This title does not indicate there is an article of any kind regarding Nancy Benoit’s life or career, or even information regarding her newsworthy murder, but only indicates the presence of nude images within the publication. In addition, the “Monthly Features” section, which Defendant claims is reserved for “news” content, states “Nancy Benoit: Exclusive Pics of Wrestlers Doomed Wife.” This heading does not contain any reference to any article whatsoever, but specifically indicates the presence of nude pictures of Nancy Benoit within the publication. See Exhibit 3 to Charles Bruce David’s Affidavit.

(44)

Plaintiff can neither admit nor deny Defendant’s Statement of Material Fact Number 44.

(45)

Plaintiff denies Defendant’s Statement of Material Fact Number 45. Plaintiff contends that Defendant’s Statement of Material Fact Number 45 is not

material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment. In addition, a November 16, 2009 e-mail from Mr. Downey indicates that Mr. Downey and Defendant were on notice that Nancy Benoit sought to have all nude images of her destroyed shortly after they were taken. See Exhibit B to Affidavit of Richard P. Decker filed contemporaneously herewith.

(46)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 46.

(47)

Plaintiff denies Defendant's Statement of Material Fact Number 47. Plaintiff contends that Defendant's Statement of Material Fact Number 47 is not only immaterial to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment, but is also indicative of the pain caused to Nancy Benoit's family by Defendant's actions.

(48)

Plaintiff denies Defendant's Statement of Material Fact Number 48. There is evidence that Mr. Sullivan knew of nude images and video existed of Nancy

Benoit, and sought out the photographers who took such images to ensure that all such images were destroyed. See Daus Deposition pp. 52-53, lines 21-6.

(49)

Plaintiff admits Defendant's Statement of Material Fact Number 49.

(50)

Plaintiff admits Defendant's Statement of Material Fact Number 50.

(51)

Plaintiff denies Defendant's Statement of Material Fact Number 51.

Plaintiff contends that the vast majority of media coverage of Ms. Benoit dealt exclusively with her wrestling career, her husband, and her and her son's murder, and not "particularly ... the beginning of Ms. Benoit's career." See Deposition of Usha Nair-Reichert, p. 44, lines 5-7.

(52)

Plaintiff admits Defendant's Statement of Material Fact Number 52.

(53)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 53.

(54)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 54.

(55)

Plaintiff denies Defendant's Statement of Material Fact Number 55. Plaintiff denies that "a large portion of the article is devoted to describing Ms. Benoit's life before she became a professional wrestler." In fact, only three small paragraphs of the 6 page article discuss Nancy Benoit's life before becoming involved in professional wrestling, none of which mention any aspiration to become a model. See Exhibit A to Defendant's Statement of Undisputed Material Facts.

(56)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 56.

(57)

Plaintiff admits Defendant's Statement of Material Fact Number 57.

(58)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 58.

(59)

Plaintiff denies Defendant's Statement of Material Fact Number 59. Plaintiff contends that the images of Ms. Benoit were not used to "illustrate ... an exclusive news and entertainment story," but instead, the small article accompanying the images were but a pretext to the images' inclusion on the magazine. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1210 (11th Cir. 2009) ("LFP's brief biography of Benoit's life ... is merely incidental to its publication of her nude photographs").

(60)

Plaintiff denies Defendant's Statement of Material Fact Number 60. The cover of the March 2008 issue promotes "Wrestler Christ Benoit's Murdered Wife Nude." This title does not indicate there is an article of any kind regarding Nancy Benoit's life or career, or even information regarding her newsworthy murder, but only indicates the presence of nude images within the publication. In addition, the "Monthly Features" section, which Defendant claims is reserved for "news" content, states "Nancy Benoit: Exclusive Pics of Wrestlers Doomed Wife." This heading does not contain any reference to any article whatsoever, but specifically indicates the

presence of nude pictures of Nancy Benoit within the publication. See Exhibit 3 to Charles Bruce David Affidavit.

(61)

Plaintiff denies Defendant's Statement of Material Fact Number 61. The cover of the March 2008 issue promotes "Wrestler Christ Benoit's Murdered Wife Nude." This title does not indicate there is an article of any kind regarding Nancy Benoit's life or career, or even information regarding her newsworthy murder, but only indicates the presence of nude images within the publication. In addition, the "Monthly Features" section, which Defendant claims is reserved for "news" content, states "Nancy Benoit: Exclusive Pics of Wrestlers Doomed Wife." This heading does not contain any reference to any article whatsoever, but specifically indicates the presence of nude pictures of Nancy Benoit within the publication. See Exhibit 3 to Charles Bruce David's Affidavit.

(62)

Plaintiff denies Defendant's Statement of Material Fact Number 62. The cover of the March 2008 issue promotes "Wrestler Christ Benoit's Murdered Wife Nude." This title does not indicate there is an article of any kind regarding Nancy Benoit's life or career, or even information regarding her newsworthy murder, but

only indicates the presence of nude images within the publication. In addition, the “Monthly Features” section, which Defendant claims is reserved for “news” content, states “Nancy Benoit: Exclusive Pics of Wrestlers Doomed Wife.” This heading does not contain any reference to any article whatsoever, but specifically indicates the presence of nude pictures of Nancy Benoit within the publication. *See* Exhibit 3 to Charles Bruce David’s Affidavit.

(63)

Plaintiff denies Defendant’s Statement of Material Fact Number 63. The cover of the March 2008 issue promotes “Wrestler Christ Benoit’s Murdered Wife Nude.” This title does not indicate there is an article of any kind regarding Nancy Benoit’s life or career, or even information regarding her newsworthy murder, but only indicates the presence of nude images within the publication. In addition, the “Monthly Features” section, which Defendant claims is reserved for “news” content, states “Nancy Benoit: Exclusive Pics of Wrestlers Doomed Wife.” This heading does not contain any reference to any article whatsoever, but specifically indicates the presence of nude pictures of Nancy Benoit within the publication. *See* Exhibit 3 to Charles Bruce David’s Affidavit.

(64)

Plaintiff denies Defendant's Statement of Material Fact Number 64. Plaintiff denies that Defendant's expert's report may be relied on in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")

(65)

Plaintiff denies Defendant's Statement of Material Fact Number 65. Plaintiff denies that Defendant's expert's report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")

(66)

Plaintiff denies Defendant's Statement of Material Fact Number 66. Plaintiff contends that Defendant's Statement of Material Fact Number 66 is not

material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment. In addition, Plaintiff denies that Defendant's expert's report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")

(67)

Plaintiff denies Defendant's Statement of Material Fact Number 67. Plaintiff contends that Defendant's Statement of Material Fact Number 67 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment. In addition, Plaintiff denies that Defendant's expert's report may be relied on in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")

(68)

Plaintiff denies Defendant's Statement of Material Fact Number 68. Plaintiff contends that Defendant's Statement of Material Fact Number 68 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment. In addition, Plaintiff denies that Defendant's expert's report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")

(69)

Plaintiff denies Defendant's Statement of Material Fact Number 69. Plaintiff contends that Defendant's Statement of Material Fact Number 69 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment. In addition, Plaintiff denies that Defendant's expert's report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213

(11th Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)

(70)

Plaintiff denies Defendant’s Statement of Material Fact Number 70. *Hustler*, a pornographic magazine, is not in direct competition with main-stream celebrity gossip magazines such as *OK! Weekly*, *US Weekly*, *In Touch Weekly* and *The Star*, which do not typically feature nude photographs. The Affidavits of Mr. Davis and Mr. Flynt cited to by Defendant merely state that Hustler publishes some celebrity/entertainment content. However, neither their Affidavits, nor Dr. Lisby’s report, shows any indication that main-stream magazines such as *OK! Weekly*, *US Weekly*, *In Touch Weekly* and *The Star* would have published nude images of Nancy Benoit.

(71)

Plaintiff denies Defendant’s Statement of Material Fact Number 71. Dr. Lisby’s report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572

F.3d 1201, 1213 (11th Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)

(72)

Plaintiff denies Defendant’s Statement of Material Fact Number 72. Plaintiff denies that Defendant’s expert’s report may be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)

(73)

Plaintiff denies Defendant’s Statement of Material Fact Number 73. Dr. Lisby’s report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals, which ruled that the previously unpublished nude photographs of Ms. Benoit held no relation to the newsworthy even of her death. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1212 (11th Cir. 2009) (“The photographs published by LFP neither relate to the incident of public concern

conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny.”)

(74)

Plaintiff denies Defendant’s Statement of Material Fact Number 74. Defendant’s expert’s report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)

(75)

Plaintiff denies Defendant’s Statement of Material Fact Number 75. Defendant’s expert’s report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”)

(76)

Plaintiff denies Defendant's Statement of Material Fact Number 76. Defendant's expert's report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness or timeliness, as those issue have been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1212 (11th Cir. 2009) ("The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny.")

(77)

Plaintiff denies Defendant's Statement of Material Fact Number 77. Defendant's expert's report may not be relied upon in any way to assist the trier of fact in the determination of newsworthiness, as that issue has been conclusively decided by the Eleventh Circuit Court of Appeals. See Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.")

(78)

Plaintiff contends that Defendant's Statement of Material Fact Number 78 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(79)

Plaintiff contends that Defendant's Statement of Material Fact Number 79 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(80)

Plaintiff contends that Defendant's Statement of Material Fact Number 80 is not material to this case and has no relevance to the issues presented in Defendant's Motion for Summary Judgment.

(81)

Plaintiff denies Defendant's Statement of Material Fact Number 81. Plaintiff contends that the majority of the content of every *Hustler Magazine*, and the main draw for *Hustler Magazine*'s customers, are pornographic depictions of nude women, and that the magazine is known as a "pornographic" magazine. *See* David Deposition, p 9, lines 13-15; *see also* Johnson Deposition, p. 8, lines 3-5.

(82)

Plaintiff denies Defendant's Statement of Material Fact Number 82. Defendant, with its years of experience in the publishing industry, knew that the mere interest of its readers in nude photographs of Ms. Benoit does not shield Defendant from violations of right of privacy and right of publicity. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity."); *see also, Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 at 1145 (7th Cir. 1985). In addition, Defendant knew that obtaining such images from the copyright owner does not alone entitle Defendant to publish such images. Plaintiff also notes that nowhere in Defendant's Statement of Undisputed Material Facts does Defendant claim that Ms. Benoit ever signed a release for the photographs and images in question, or gave anyone permission to publish such images in *Hustler Magazine*. *See* Daus Deposition, p. 18, lines 8-10, p. 42, lines 3-5; *see also* Defendant's Response to Plaintiff's Request for Production of Documents, LFP 0039.

(83)

Plaintiff admits Defendant's Statement of Material Facts Number 83.

(84)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 84.

(85)

Plaintiff denies Defendant's Statement of Material Fact Number 85. Defendant could have attempted to limit the distribution of the March 2008 issue by calling wholesalers and asking them not distribute the issue, but Defendant failed to do so in this case. See Flynt Deposition, p. 15, lines 18-21.

(86)

Plaintiff denies Defendant's Statement of Material Fact Number 86. Plaintiff states that Defendant could have attempted to limit the distribution of the March 2008 issue by calling wholesalers and asking them not distribute the issue, but Defendant failed to do so in this case. See Flynt Deposition, p. 15, lines 18-21.

(87)

Plaintiff can neither admit nor deny Defendant's Statement of Material Fact Number 87.

(88)

Plaintiff denies Defendant's Statement of Material Fact Number 81. Plaintiff notes that the District Court's ruling granting Defendant's Motion to Dismiss was overturned by the Eleventh Circuit Court of Appeals Order dated June 25, 2009. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1213 (11th Cir. 2009) ("We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.").

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 Statement of Undisputed Material Facts 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.
S. Derek Bauer, Esq.
Barry J. Armstrong, Esq.

Darrell Jay Solomon, Esq.
Jeffrey F. Reina, Esq.
Paul J. Cambria, Esq.

and by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

William M. Feigenbaum, Esq.
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/s/ Richard P. Decker

RICHARD P. DECKER
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