

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

**PLAINTIFF’S REPLY TO
DEFENDANT’S RESPONSE TO PLAINTIFF’S
RENEWED MOTION FOR PARTIAL 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 Reply to LFP Publishing Group, LLC’s (“Defendant” or “Hustler”) Response to Plaintiff’s Renewed Motion for Partial Summary Judgment and Brief in Support thereof with this Court as follows:

I. INTRODUCTION

Plaintiff filed her original Motion for Partial Summary Judgment on October 16, 2009, asking this Court to make a determination that Hustler is liable for Plaintiff's right of publicity claim. On January 13, 2010, this Court issued an Order denying Plaintiff's Motion for Partial Summary Judgment, stating that, though "the Eleventh Circuit held that the photographs of Ms. Benoit were not a matter of public interest protected by the newsworthiness exception," summary judgment was not yet appropriate, as "the parties still dispute other issues related to liability, including whether Toffoloni is a party-in-interest with legal standing to assert a posthumous claim for the violation of Ms. Benoit's right of publicity; and whether Ms. Benoit signed a release or otherwise authorized the publication of the images." See Order dated January 13, 2010, p. 3.

This Court ruled that discovery was warranted in this case regarding:

... whether Toffoloni is a party-in-interest with ownership of Ms. Benoit's right of publicity claim and whether Ms. Benoit signed a release or otherwise authorized the publication of the photographs. (Bauer Aff. ¶ 7.) LFP believes that, particularly in light of her association with professional wrestling organizations, Ms. Benoit may have licensed or otherwise transferred substantial rights to commercially exploit her name and likeness. (Bauer Aff. ¶ 8.) According to LFP, many relevant facts, including the names of Ms. Benoit's agents,

licensees, and business partners, are within the control or personal knowledge of Toffoloni.

See Order dated January 13, 2010, p. 5 (emphasis added).

After discovery was completed, Plaintiff filed her Renewed Motion for Partial Summary Judgment on July 27, 2010, again confirming that the Eleventh Circuit Court of Appeals found Hustler to be liable in this case and addressing the limited issues for which this Court allowed additional discovery. The only issues that remained for this Court to determine after its January 13, 2010 Order were whether the Estate of Nancy Benoit exclusively owns the rights to the images of Nancy Benoit, and whether Ms. Benoit ever signed a release for those images.

Hustler has tried to ignore the finding of its liability by the Eleventh Circuit Court of Appeals by filing its misguided Response to Plaintiff's Renewed Motion for Summary Judgment on August 31, 2010, claiming that Plaintiff has not shown that the elements of a claim for violation of the right of publicity have been met. Namely, Defendant is trying to resurrect issues already ruled upon by the Eleventh Circuit and argues, without success, that the images of Nancy Benoit were not used for a "commercial purpose," that the images were in fact "newsworthy," and that Defendant was not unjustly enriched by its publication of the images of Nancy Benoit. Such arguments neither address the specific reasons for this Court allowing

discovery as to particular issues, nor do they in any way alter the holding by the Eleventh Circuit already conclusively resolving these issues and finding liability. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).

After months of additional discovery, nowhere in its Response does Defendant claim that Plaintiff is not a party-in-interest with ownership of Nancy Benoit's right of publicity claim, nor does Defendant contend that Ms. Benoit signed a release or otherwise authorized the publication of her nude image in *Hustler Magazine*. Instead, Defendant ignores the specific reasons for which this Court allowed discovery, and recycles the same arguments that Defendant has repeatedly paraded before this Court and the Eleventh Circuit. Defendant's attempt to rewrite the factual history in this case is a failed effort to persuade this Court to directly contradict the Eleventh Circuit's ruling that the images of Ms. Benoit published by Hustler are **not** newsworthy. *See Toffoloni* at 1212.

II. ARGUMENT AND CITATION OF AUTHORITY

Hustler's claim that Plaintiff has presented "no evidence" as to the essential elements of a claim for violation of the right of publicity is simply false, as shown by the Eleventh Circuit's decision. *Toffoloni* at 1213. Plaintiff has established

every required element under the law to prove her claim that Defendant violated Ms. Benoit's right of publicity.

To prove a claim for violation of the right of publicity in Georgia, a plaintiff must show "the **appropriation of another's name and likeness ... without consent and 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 (Ga. 1982) (emphasis added). Plaintiff clearly established that Hustler unquestionably: (1) appropriated Ms. Benoit's likeness; (2) without Ms. Benoit's or her estate's consent; (3) for financial gain. Any exceptions or additional factors that could be considered have been resolved by the Eleventh Circuit's opinion in this case. Because the three necessary elements have been conclusively established, and because no issue of material fact remains for this Court to consider based upon the discovery allowed by this Court, summary judgment as to Hustler's liability is warranted pursuant to Federal Rule of Civil Procedure 56(c).

A. Defendant Failed to Address the Issues Contemplated in the Court's January 13, 2010 Order Granting Discovery.

This Court denied Plaintiff's previous Motion for Summary Judgment based upon Defendant's arguments that Plaintiff may not have ownership of Ms.

Benoit's claim for violation of the right of privacy, and that it was possible that Ms. Benoit had previously signed a release for use of the images published by Hustler.

After many months of discovery, the Defendant has been unable to discover or produce any evidence to refute the conclusion that Plaintiff is the appropriate party in this case as the exclusive owner of the images of Nancy Benoit, and that Ms. Benoit never signed a release or gave her consent for nude images of her to be used by anyone, let alone Hustler. It is apparent that the arguments presented by Defendant regarding ownership of the claim and the possible existence of a release are red herrings, presented in a desperate attempt to collaterally attack the conclusive findings of the Eleventh Circuit.

Defendant attempts to mislead the Court by claiming in its Statement of Facts that "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." *See* Defendant's Response, p. 3. In stark contrast to this assertion, the evidence before the Court clearly proves that both Ms. Benoit and her then husband Mr. Daus, requested that **all** pictures and videotapes be destroyed shortly after they were created. *See* Plaintiff's Response to Defendant's Statement of Material Facts ¶¶ 22-24.

However, regardless of whether Ms Benoit and/or Mr. Daus directed that all tapes be destroyed, such a question is irrelevant to the matter of Defendant's liability, as there is NO evidence that Ms. Benoit or anyone else ever gave permission for Mr. Samansky to sell Ms. Benoit's images or for Defendant to publish those images. Even if Mr. Samansky was never specifically asked to destroy the second videotape, the fact remains unchallenged and unquestioned that neither Ms. Benoit nor her estate ever signed a release for the images extracted from that videotape to be published in Hustler Magazine. Such a release was required before Hustler could be legally authorized to publish the nude pictures of Ms. Benoit. See Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y. A.D. 1st Dept. 1981) and Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985).

Defendant completely failed to address the issues presented in this Court's January 13, 2010 Order, whereby the Court authorized discovery regarding specific issues in this case. Instead, Hustler ignored or abandoned these issues, and chose to simply recycle arguments relating to "newsworthiness" that have already been made by Defendant and ruled upon conclusively by the Eleventh Circuit.

**B. Defendant's Publication of Ms. Benoit's Image
was for a "Commercial Purpose."**

Defendant's argument that its use of Ms. Benoit's images in its publication was not for a "commercial purpose," is absurd. Hustler is a pornographic magazine sold for the images it contains. Despite Hustler's assertions, the obvious focal point of both the cover of the March 2008 issue, as well as the interior photo spread, are the nude images of Nancy Benoit. The cover of the March 2008 issue of *Hustler Magazine*, and the pages featuring Ms. Benoit's nude images, clearly indicate that the pictures were published by Hustler to sell magazines and make money based upon people's morbid desire to see nude pictures of a victim of an infamous and horrible double murder/suicide.

Upon review of the March 2008 issue, the Eleventh Circuit has already conclusively ruled contrary to the arguments advanced by Hustler. "[Defendant]'s brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs." *Toffoloni* at 1210. "The heart of this article was the publication of nude photographs – not the corresponding biography." *Id.* at 1209. "These photographs were not incidental to the article. Rather, the article was incidental to the photographs." *Id.* at 1213. No

amount of factual discovery, or attempts to spin the facts by the Defendant, can alter this ruling of the Eleventh Circuit.

The “commercial purpose” behind the publication of Ms. Benoit’s image is further evidenced by Defendant’s employee’s own testimony that *Hustler Magazine* is in business to make money (See Hahner Deposition, p. 45), that “millions of people would want to see the pictures,” and that feedback had been “huge and overwhelmingly positive.” See Johnson Deposition, p. 11.

Defendant claims that it “would not have published the Benoit images alone,” without the accompanying article. See Defendant’s Response p. 17. This assertion is irrelevant and of no significance, as the Eleventh Circuit has already concluded that the images were exploited for commercial purposes. *Toffoloni* at 1213. Not only do the words of Defendant’s employees prove that the images were published solely to make money, but the cover of the March 2008 issue, as well as the table of contents, only refer to the nude pictures of Nancy Benoit, and do not give any indication that there is even an article of any kind about Ms. Benoit’s life, career, or death. The Eleventh Circuit has already used these unalterable facts to determine that the article was merely incidental to the images of Ms. Benoit, and that those images were used for a commercial purpose. *Toffoloni* at 1209, 1210, and 1213. No amount

of discovery has changed or can change the contents of the March 2008 issue of Hustler Magazine, which was relied upon in the Eleventh Circuit's review of this case. There is no factual or legal basis to refute the Eleventh Circuit's conclusive findings of fact that support its decision, which is the established law of this case, that Defendant is liable for violating the rights of the Estate of Nancy Benoit to use and publish the images of Nancy Benoit.

C. Defendant's "Newsworthiness" Defense has been Conclusively Ruled-Upon, and Rejected, by the Eleventh's Circuit Opinion.

The newsworthiness issue has also already been conclusively ruled upon by the Eleventh Circuit and is now the law of the case. "Under the law-of-the-case doctrine, an issue decided at one stage of a case is binding at later stages of the same case." United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." Id. (citing 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478, at 788 (1981)).

Defendant claims that exceptions to the "law-of-the-case" doctrine are justified "when substantially different evidence is produced ... or when the prior

decision was clearly erroneous and would result in manifest injustice.” *See* Defendant’s Response p. 13 (citing *Jackson v. State of Alabama State Tenure Comm’n*, 405 F.3d 1276, 1283 (11th Cir. 2005)). Despite Defendant’s assertion, neither exception is found in this case.

As explained above, the facts used by the Eleventh Circuit in reaching its conclusion that the images of Nancy Benoit are not newsworthy have not been refuted or changed whatsoever through the course of discovery. 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. *Toffoloni* at 1208. These determinative facts have not changed and, indeed, cannot be changed. The Eleventh Circuit’s newsworthiness investigation required “an 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.* The Eleventh Circuit’s ruling that the images of Ms. Benoit are not newsworthy is binding and conclusive in this case.

Despite Defendant’s claim that the images were a part of an “editorial ‘feature’ article” and that the images were used only to illustrate an exclusive news

and entertainment story, the Eleventh Circuit determined that the short article on Ms. Benoit's life, career, and death was but a pretext for the publication for the nude images of Ms. Benoit. *Id.* at 1209, 1210, and 1213.

The Eleventh Circuit found that the public has no legitimate interest in seeing nude pictures of Nancy Benoit. "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. The photographs bear no relevance-let alone 'substantial relevance'-to the 'matter of legitimate public interest.'" *Id.* at 1212 (citing *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir.1981)). As cannot be overstated, the March 2008 issue of *Hustler Magazine* cannot be altered through any amount of discovery or attempted spin by the Defendant. The facts remain as they were when the Eleventh Circuit wrote its June 25, 2009 Order.

Defendant also blatantly misstates the testimony of Plaintiff's expert Dr. Usha Nair-Reichert. Defendant claims that "Plaintiff, through her proffered expert testimony, conceded that the 'unique' and 'scarce' nature of the Benoit images makes them 'newsworthy' and heightens the public's interest in the images." *See* Defendant's Response p. 5 (citing Defendant's Statement of Material Fact ¶ 78). Dr.

Nair-Reichert's actual testimony, however, and the actual text of Defendant's Statement of Material Fact ¶ 78, is that the "uniqueness" and "scarcity" of the nude images of Ms. Benoit has increased the value of such images. Neither Plaintiff nor her expert have *ever* conceded that the images of Ms. Benoit were in any way newsworthy. Any attempt by the Defendant to argue otherwise is ludicrous.

This Court's own January 13, 2010 Order stated that "the Eleventh Circuit held that the photographs of Ms. Benoit were not a matter of public interest protected by the newsworthiness exception." *See* Order dated January 13, 2010 p. 3. As much as Defendant protests, the issue of newsworthiness was settled by the Eleventh Circuit's opinion, as well as this Court's January 13, 2010 Order. The facts upon which these opinions are based have not changed or been refuted in any way.

D. Defendant Was Unjustly Enriched by the Publication of Nancy Benoit's Image.

Defendant also claims that Plaintiff has not shown that Hustler was enriched by the publication of nude images of Nancy Benoit. This argument is patently absurd.

The financial statements produced by Defendant in discovery clearly indicate that Defendant made a sizable profit on the March 2008 issue of *Hustler Magazine*. This very same issue prominently featured nude images of Nancy Benoit,

and advertized her images on its front cover. Plaintiff's expert has opined, based upon this financial information, as to the enrichment unjustly received by Defendant through its actions. See Expert Report of Dr. Usha Nair-Reichert. Hustler is in the business of selling magazines; any profit it acquired by publishing images without permission is unjust enrichment.

III. CONCLUSION

Because the Eleventh Circuit has ruled that the Plaintiff has established all of the elements required to prove a claim for violation of the right of publicity, because any exceptions, defenses, or additional requirements have been conclusively ruled-upon by the Eleventh Circuit, and because Defendant has not provided a scintilla of evidence related to the issues presented by this Court for discovery, Plaintiff once again respectfully requests that this Court GRANT Plaintiff's Renewed Motion for Partial Summary Judgment as to Defendant's liability in this case.

Respectfully submitted September 17, 2010.

/s/ Richard P. Decker

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CERTIFICATE OF SERVICE

This is to certify that on September 17, 2010, I have electronically filed the foregoing Reply to Defendant's Response to Plaintiff's Renewed Motion for Partial 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:

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