

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
as Administrarix 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 BRIEF IN SUPPORT OF MOTION IN LIMINE

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and Personal Representative of the Estate of Nancy E. Benoit (“Plaintiff”), through counsel, and files this her Brief in Support of Motion In Limine to exclude various documents, testimony and subject matters from introduction and use during the upcoming trail as follows:

I. INTRODUCTION

On February 4, 2008, Plaintiff brought suit against Defendant LFP Publishing Group, LLC (“Defendant”), claiming violation of the right to publicity for the unauthorized publication of nude images of Ms. Nancy Benoit. This Court granted Defendant’s Motion to Dismiss on October 3, 2008, on the grounds that the images came under the “newsworthiness” exception to the right of privacy. Plaintiff appealed to the Eleventh Circuit Court of Appeals, which reversed the District Court’s ruling, and held that the images were not newsworthy, and that Ms. Benoit’s and Plaintiff’s right of publicity had been violated. *See Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009).

On November 23, 2010, this Court granted Plaintiff’s Motion for Partial Summary Judgment with respect to liability of Defendant for publishing nude images of Ms. Benoit without her or her Estate’s consent, in violation of her right of publicity. The Court found that Defendant published the subject images for financial gain, that the Estate of Nancy Benoit suffered damages, and that the Eleventh Circuit’s ruling on the legal issue of newsworthiness in *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201 (11th Cir. 2009) was conclusive resolution of the issue of newsworthiness in this case. *See* Order dated November 23, 2010, pp. 10-12. This Court also declined

to grant Defendant's Motion for Summary Judgment as to punitive damages, ruling that the issue must be decided by a jury. See Order dated November 23, 2010, pp. 12-13. Therefore, the only remaining issues in this case are:

- (1) the value to the Defendant of the images of Nancy Benoit that were illegally published by Defendant;
- (2) whether punitive damages should be assessed against Defendant;
- (3) if punitive damages are awarded, the amount to be assessed for punitive damages; and
- (4) Plaintiff's attorneys' fees and expenses of litigation under O.C.G.A. 13-6-11.

The trial of this case is scheduled for the trial calendar beginning June 6, 2011. Plaintiff has reason to believe that, at trial, Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence related to several matters that are wholly irrelevant and unrelated to the remaining issues in the case. Namely, Plaintiff believes that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence related to:

- (1) Defendant's reliance on the advice of legal counsel as a defense to punitive damages;

- (2) evidence that Ms. Benoit allegedly, immediately prior to or during the photo shoot where the nude images of Ms. Benoit at issue in this case were taken, engaged in sexual activity with her husband, Jim Daus, while being videotaped by Mark Samansky;
- (3) this Court's initial October 3, 2008 Order granting Defendant's Motion to Dismiss based upon the newsworthiness exception of the right of publicity;
- (4) the deposition testimony of Tyler Downey;
- (5) the deposition testimony of Christopher Helton;
- (6) the deposition testimony of William Otten;
- (7) the deposition testimony of Kevin Sullivan;
- (8) the deposition testimony of James Daus;
- (9) documents numbered 1, 2, 3, and 4 of Attachment G-2 of the March 28, 2011 Pretrial Order; and
- (10) documents numbered 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of Attachment G-2 of the March 28, 2011 Pretrial Order.

As further detailed below, these testimonies, documents, and issues are irrelevant to the remaining issues of the case, prejudicial to Plaintiff, and should

properly be excluded from introduction and use at trial. Plaintiff's Motion in Limine seeking to exclude these matters should therefore be GRANTED.

II. ANALYSIS AND CITATION TO AUTHORITY

The Federal Rules of Civil Procedure allow for the introduction of evidence that is relevant to the issues to be decided in the case. If evidence is not relevant to the remaining issues in the case, it is inadmissible and therefore may not be introduced at trial. *See* Federal Rule of Evidence 402.

Even if relevant to the issues in the case, evidence may still properly be excluded from use at trial if its probative value is substantially outweighed by its prejudicial effect on the opposing party, or if the evidence is overly confusing, misleading, or a waste of time. *See* Federal Rule of Evidence 403. Much of the evidence that Defendant is seeking to introduce for use at trial falls under this category.

A. Any Evidence of Hustler's Reliance on the Advice of Legal Counsel as a Defense to Punitive Damages Must Be Excluded.

Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to inject into this case argument or evidence that the Defendant relied upon the advice of legal counsel when deciding whether to publish the nude images of

Nancy Benoit that are at issue in this case. To attempt to introduce such a defense at this stage of the litigation is both impermissible and improper.

Defendant has already clearly stated in its Response to Interrogatory Number 1 of Plaintiff's Third Continuing Interrogatories that it does not intend to use reliance on the advice of legal counsel as a defense to Plaintiff's claim for punitive damages. Defendant has also consistently informed any witnesses that have been deposed not to discuss the advice Defendant's legal counsel gave with regards to the publication of the nude images of Nancy Benoit. For example, counsel for Defendant forbade Mr. Downey from discussing what the lawyers for Defendant stated concerning the publication of the nude images during Mr. Downey's deposition. *See* Downey Deposition, pp. 28, 29, 59, 60, and 61. To later allow Defendant to argue that it relied upon the advice of counsel in publishing the nude images of Nancy Benoit, after specifically forbidding discovery on the issue, is wholly improper and fundamentally unfair. Defendant may not use, or even mention, reliance on the advice of counsel as a defense against punitive damages, as Plaintiff has been denied the ability to conduct any discovery in the matter.

Defendant cannot argue that it relied upon the advice of counsel that the images of Nancy Benoit were newsworthy in order to avoid liability for punitive

damages. Therefore, any reference to any advice of counsel received by Defendant with regard to the nude images of Nancy Benoit must be excluded from use at trial.

B. Any Evidence of an Alleged Video Depicting Sexual Activity Between Mr. Benoit and Jim Daus Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to Nancy Benoit's past modeling history. More specifically, Plaintiff anticipates that Defendant and/or Defendant's counsel may attempt to introduce oral testimony evidence that Ms. Benoit, immediately prior to or during the photo shoot where the nude images of Ms. Benoit at issue in this case were taken, allegedly engaged in sexual activity with her husband, James Daus, while being videotaped by Mark Samansky. *See* Samansky Affidavit, ¶ 6.

As conclusively established by the Samansky Affidavit, the alleged videotape was destroyed by Mr. Samansky at the direction of Mr. Daus, and no copies of the videotape exist. *See* Samansky Affidavit, ¶ 10. There is no evidence that the alleged videotape depicting sexual activity between Ms. Benoit and her husband, Mr. Daus, was ever sold, distributed, or even ever seen by anyone. Not one of the anticipated witnesses in this case have ever seen the videotape, or can truthfully

describe its contents. As such, the videotape and the actions of Ms. Benoit and Mr. Daus have absolutely no bearing on the current issues in this case, namely (1) the value to the Defendant of the photographs published by Defendant; (2) whether punitive damages should be assessed against Defendant; and (3) if punitive damages are awarded, the amount to be assessed for punitive damages.

Plaintiff can only conclude that Defendant may attempt to introduce evidence of this alleged videotape in an attempt to sully the character of Ms. Benoit, and/or to imply that Ms. Benoit would have consented to the publication of her image in a magazine such as *Hustler*. The fact remains, however, that any reference to the alleged videotape depicting sexual activity between Ms. Benoit and her husband is irrelevant, has no probative value, and is prejudicial to Plaintiff. The undisputed evidence is that Ms. Benoit never did consent to appearing in a pornographic magazine such as *Hustler*. As such, any reference to such videotape should properly be excluded from use at trial.

C. The October 3, 2008 Order Granting Defendant's Motion to Dismiss Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to this Court's October 3, 2008 Order granting Defendant's Motion to Dismiss based upon the newsworthiness

exception of the right of publicity. This Court originally found that “Ms. Benoit’s death was a ‘legitimate matter of public interest and concern.’ Therefore the publication of Ms. Benoit’s nude photographs cannot be described as a mere commercial benefit for [Defendant].” *Toffoloni v. LFP Publishing Group*, No. 1:08-CV-421-TWT, 2008 U.S. Dist. LEXIS 82287, at *6 (N.D. Ga. 2008).

As this Court is well aware, Plaintiff appealed to the Eleventh Circuit Court of Appeals, which overturned this Court’s October 3, 2008 Order, and remanded the case back to the District Court for further consideration. The Eleventh Circuit conclusively held that the images of Ms. Benoit did not qualify as newsworthy, did not relate to the incident of newsworthiness in question (Ms. Benoit’s death), and that the images were published for the economic benefit of Defendant. *See* June 25, 2009 Order.

On remand, this Court held that Defendant’s liability to Plaintiff for violation of the right of publicity was conclusively established, and that the Eleventh Circuit’s opinion had determined the issue that the images of Ms. Benoit did not qualify as newsworthy under the newsworthy exception to the right of publicity. *See* November 23, 2010 Order.

Plaintiff anticipates that Defendant may attempt to introduce this Court's October 3, 2008 Order as evidence that Defendant could have reasonably believed the nude images of Ms. Benoit to be newsworthy at the time of publication as a defense against punitive damages. However, the introduction of such evidence is improper, has no probative value, would undermine the authority of this Court, would cause confusion, and would be prejudicial to Plaintiff.

“[a] general vacation by an appellate court of the lower court's judgment vacates the entire judgment below, divesting the lower court's earlier judgment of its binding effect. *See United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992). *See also, Johnson v. Board of Educ. of City of Chicago*, 457 U.S. 52, 102 S. Ct. 2223 (1982); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675 (11th Cir. 1984). “[T]he effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position quo ante, subject, of course, to the holdings of the court of appeals.” *See Young v. Georgia*, 464 U.S. 1057, 1060, 104 S. Ct. 740 (1984), quoting *Young v. State*, 251 Ga. 153, 155, 303 S.E.2d 431 (1983).

The legal effect of the reversal of a judgment on appeal is to nullify the judgment below and place the parties in the same position in which they were before judgment. The legal effect of the Eleventh Circuit's June 25, 2009 reversal and

remand of the District Court's October 3, 2008 Order is to place the parties in the same position they were in before the October 3, 2008 Order was rendered. The October 3, 2008 District Court Order, for all intents and purposes in this case, never existed.

Defendant, therefore, may not make any reference whatsoever to the October 3, 2008 District Court Order, whether to add credence to Defendant's argument that it judged the nude images of Ms. Benoit as newsworthy or otherwise. As such, any reference to this Court's October 3, 2008 Order, as well as the Order itself, document number 6 of Attachment G-2 of the March 28, 2011 Pretrial Order, must be excluded.

D. The Deposition Testimony of Tyler Downey Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to the deposition testimony of Tyler Downey. Mr. Downey's deposition was taken on April 21, 2011.

During his deposition, Mr. Downey testified as to his former employment with Defendant at the time the images of Ms. Benoit were published, as well as his current relationship with Defendant as a freelance writer. While Mr. Downey did testify to some degree as to the decision process for the publication of the images of

Ms. Benoit, such as how the images were originally obtained by Defendant from Mr. Samansky, Mr. Downey does not provide any concrete testimony as to any of the three key issues that remain in this case.

When asked “do you have any knowledge whatsoever as to the value that accrued to *Hustler Magazine* as a result of it publishing the images of Nancy Benoit without her permission?” Mr. Downey responded “No, I do not.” *See* Downey Deposition, p. 77. Mr. Downey was also not involved in setting the price paid by Defendant to Mr. Samansky for the photographs of Ms. Benoit. *See* Downey Deposition, p. 23 wherein Mr. Downey states:

I showed the photos to Bruce David, who took them, I believe, to Larry -- I don't know if -- actually, I don't know if he took them to Larry Flynt or not, but that was the number that was come -- that came back to me. I didn't come up with that thousand dollar number. That was a number that was told to me.

Mr. Downey, therefore, cannot speak in any relevant capacity as to the value to the Defendant of the images published by Defendant, either the value paid by Defendant or the value received by the publication of Ms. Benoit's image.

With regard to punitive damages, Mr. Downey states that:

the simple fact that she had been in the news so much was something that really -- you know, was really attractive about the article for us, in that, you know, it's an addition to the current reporting going on with her. So we thought we would be good on that grounds. She was deceased, which, you know, right to privacy and that kind of thing becomes a little bit different once a person is not living anymore.

See Downey Deposition pp. 29, 30.

Not only is Mr. Downey incorrect in his assumption that death eviscerates the right to publicity (See *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983)), but Mr. Downey also states that because Ms. Benoit was in the news, any photographs published of her were “newsworthy.” As this Court and the Eleventh Circuit have conclusively ruled, this is not, and has never been, the law. There is no evidence that Mr. Downey was aware of any analysis conducted by Defendant as to whether the images of Ms. Benoit related in any way to the subject matter of her newsworthiness, namely, her untimely murder. Mr. Downey can provide no relevant testimony, other than his biased and uninformed opinion or the hearsay testimony relating to other of Defendant’s employees, that Defendant truly believed the images of Nancy Benoit to be newsworthy at the time they were published. Similarly, Mr. Downey can provide

no relevant testimony concerning the amount of damages that should be assessed for punitive damages.

Mr. Downey's testimony is therefore wholly irrelevant to the remaining issues in this case, and must be excluded from use at trial.

E. The Deposition Testimony of Christopher Helton Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to the deposition testimony of Christopher Helton. Mr. Helton's deposition was taken on April 22, 2011.

During his deposition, Mr. Helton testified as to the circumstances surrounding the photo shoot during which the images of Nancy Benoit at issue were taken, as well as Mr. Helton's experience of the typical amounts paid for the sale of his photographs of other models. However, Mr. Helton does not provide any relevant testimony as to the three remaining issues in this case, and his testimony must therefore be excluded from trial.

Concerning the value received by *Hustler* for the publication of the images of Mr. Benoit, Mr. Helton testified as follows:

Q. Do you have any information about the value received by Hustler Magazine in publishing the images of Nancy Benoit?

A. No.

Q. Do you have any information about how much money Hustler Magazine made in connection with its publishing images of Nancy Benoit?

A. No, I don't.

See Helton Deposition, p. 18.

Concerning the decision-making process undertaken by *Hustler* in deciding to publish the photographs of Nancy Benoit, Mr. Helton testified as follows:

Q. Do you have any information concerning the decision-making process at Hustler Magazine concerning their publication of the images of Nancy Benoit?

A. No, I do not.

See Helton Deposition, p. 18.

Any information Mr. Helton does provide as to the payment *he* receives for his own photographs that he sells is completely irrelevant and inapplicable to this case. Mr. Helton employs different models and sells photographs to different publications than the images of Ms. Benoit at issue in this case. In addition, Mr. Helton states that he does not sell his photographs to pornographic magazines. *See* Helton Deposition, p. 17. The photographs of Ms. Benoit are unique in that they were the only nude photographs of Ms. Benoit known to exist and they were published without her or her estate's knowledge or permission after her infamous murder.

Mr. Helton, therefore, has absolutely no information on either the value received by *Hustler*, or whether punitive damages are appropriate in this matter, which are the only remaining issues in the case. His testimony is therefore wholly irrelevant and will not assist the trier of fact in any respect in resolving these remaining issues. Mr. Helton's testimony must therefore be excluded from use at trial.

F. The Deposition Testimony of William Otten Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to the deposition testimony of William Otten. Mr. Otten's deposition was taken on April 1, 2010.

Mr. Otten testified as to the circumstances surrounding the photo shoot where the nude images of Ms. Benoit were taken, as well as Ms. Benoit's wrestling career and Mr. Otten's experience with payment for wrestling photographs he has taken. Defendant has specified that it intends to introduce certain sections of Mr. Otten's deposition at trial. See March 28, 2011 Pretrial Order, p. 13.

As stated in the Pretrial Order, Plaintiff objects to the introduction and use of Mr. Otten's deposition, as his testimony has nothing whatsoever to do with the remaining issues in this case. Mr. Otten has no knowledge of, and provides absolutely no testimony relating to, the value received by Defendant for the publication of the nude images of Nancy Benoit, whether punitive damages should be assessed in this case, and if so, the amount of punitive damages to be assessed. Because Mr. Otten's testimony is irrelevant to any of the remaining issues in this case, it must be wholly excluded from use at trial.

G. The Deposition Testimony of Kevin Sullivan Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to the deposition testimony of Kevin Sullivan. Mr. Sullivan's deposition was taken on March 1, 2010.

Mr. Sullivan testified as to Ms. Benoit's wrestling career and the promotional endeavors he and Ms. Benoit undertook to further their wrestling careers. Defendant specified that it intends to introduce certain sections of Mr. Sullivan's deposition at trial. *See* March 28, 2011 Pretrial Order, p. 13.

As stated in the Pretrial Order, Plaintiff objects to the introduction and use of Mr. Sullivan's deposition, as his testimony has nothing whatsoever to do with the remaining issues in this case. Mr. Sullivan has no knowledge of, and provides absolutely no testimony relating to, the value received by Defendant for the publication of the nude images of Nancy Benoit, whether punitive damages should be assessed in this case, and if so, the amount of punitive damages to be assessed. Because Mr. Sullivan's testimony is irrelevant to any of the remaining issues in this case, it must be excluded from use at trial.

H. The Deposition Testimony of James Daus Must Be Excluded.

Plaintiff also anticipates that Defendant and/or Defendant's counsel may attempt to reference and/or introduce evidence relating to the deposition testimony of James Daus. Mr. Daus' deposition was taken by Defendant on April 2, 2010.

Mr. Daus testified as to the circumstances surrounding the photo shoot where the nude images of Ms. Benoit at issue in this case were taken. Defendant

specified that it intends to introduce certain sections of Mr. Daus' deposition at trial. See March 28, 2011 Pretrial Order, p. 13.

As stated in the Pretrial Order, Plaintiff objects to the introduction and use of Mr. Daus' deposition, as his testimony has nothing whatsoever to do with the remaining issues in this case. Mr. Daus has no knowledge of, and provides absolutely no testimony relating to, the value received by Defendant for the publication of the nude images of Nancy Benoit, whether punitive damages should be assessed in this case, and if so, the amount of punitive damages to be assessed. Because Mr. Daus' testimony is irrelevant to any of the remaining issues in this case, it must be excluded from use at trial.

I. The Documents Numbered 1, 2, 3, and 4 of Attachment G-2 of the March 28, 2011 Pretrial Order Must Be Excluded.

In the March 28, 2011 Pretrial Order, Defendant specifies certain documents that it intends to introduce for use at trial. The documents are listed, numbered 1 through 30, in Attachment G-2 of the Pretrial Order. Plaintiff objected to several of the documents listed by Defendant in Attachment G-2 on the grounds that they are irrelevant to the remaining issues in the case, constitute hearsay, and were

not produced by Defendant in discovery. Plaintiff now further argues that these documents should not be admitted or introduced at trial, and must be excluded.

Document 1 (Hustler Magazine, March 2006), Document 2 (Hustler Magazine, Holiday 2007), Document 3 (Hustler Magazine, January 2008), and Document 4 (Hustler Magazine, March 2008) of Attachment G-2 of the Pretrial Order must be excluded from use at trial because they are not complete copies of the referenced magazine, and they omit relevant information that could affect the damages owed to Plaintiff.

Attachment G-2 specifies that the magazine issues referenced in documents 1-4 consist of the cover and article excerpt of the magazine only. They do not include the other material typically included in each issue of Hustler Magazine. This additional material includes materials that are highly offensive to certain community standards, such as the DVD that was included in the sale of the March 2008 issue of Hustler Magazine depicting graphic sexual intercourse. These materials, as well as the full content of each magazine issue, may be necessary for the trier of fact to review in order to learn the full extent of the violation of the right of publicity that occurred in this case, and the value gained by Defendant by the publication of Ms. Benoit's image. Ms. Benoit, or her estate, has the legal right to

control her image, and the uses of her image, and the right to refrain from being associated with the offensive content found in the typical issue of *Hustler Magazine*. The trier of fact must have access to that offensive content to judge the full scope of damages in this case.

Copies of writings and other documents may be excluded from evidence if they are incomplete. *See Thrower v. C.I.R., T.C. Memo. 2003-139*, 2003 WL 21107675, 85 T.C.M. (CCH) 1312 (U.S. Tax Court 2003) where the court sustained petitioner's objection to the admission of photocopied pages into evidence, where the photocopies were incomplete and therefore unreliable. Because full and complete copies of the *Hustler Magazine* in question must be made available to the trier of fact in order to make a fully informed decision on damages in this case, documents 1-4 of Attachment G-2 are inadmissible, and should be replaced with the full and complete copies of these specific issues *Hustler Magazine*.

J. The Documents Numbered 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 30 of Attachment G-2 of the March 28, 2011 Pretrial Order Must Be Excluded.

In the March 28, 2011 Pretrial Order, Defendant specifies certain documents that it intends to introduce and use at trial. The documents are listed, numbered 1 through 30, in Attachment G-2 of the Pretrial Order. Plaintiff objected

to several of the documents listed by Defendant in Attachment G-2, on the grounds that they are irrelevant to the remaining issues in the case, constitute hearsay, and were not produced by Defendant in discovery. Plaintiff now further argues that these documents should not be admitted or introduced at trial, and must be excluded.

1. Document 5 - Representative Entertainment Media Exhibit.

This exhibit has nothing whatsoever to do with the value received by Defendant through publication of Ms. Benoit's image, or whether punitive damages should be assessed in this case, and if so, what amount should be assessed. As such, document 5 is irrelevant to the issues to be decided in this matter, and should not be admitted or introduced at trial. *See* Federal Rule of Evidence 402.

In addition, there is no authentication of document 5, which is being introduced to prove the truth of the matter asserted therein. As such, this document constitutes inadmissible hearsay that does not fall under any recognized exception. Document 5 is therefore inadmissible at trial, and must be excluded by this Court.

2. Document 6 - October 3, 2008 Order Issued by Hon. Thomas W. Thrash.

Document 6, dated October 3, 2008, is listed as the "Dismissal Order Issued by Hon. Thomas W. Thrash, Docket Index 13." As discussed in Section C

above, this Court's Order granting Defendant's Motion to Dismiss may not be allowed into evidence in this case, and is therefore inadmissible. The Eleventh Circuit's June 25, 2009 reversal of this Court's October 3, 2008 decision has the legal effect of placing the parties in the same position as if the Order granting Defendant's Motion to Dismiss had never been issued. It is therefore improper to introduce this Court's October 3, 2008 Order into evidence during the trial of the remaining issues in this case.

3. Document 9 - LFP March 2008 Geographic Circulation Analysis.

Document 9, dated March, 2008, is listed as "LFP March 2008 Geographic Circulation Analysis." During the course of discovery, Plaintiff requested "all documents which reflect the total number of Hustler Magazines produced and the total number of Hustler Magazines sold worldwide for each month in calendar years 2006, 2007, 2008 and 2009, to date." *See* Plaintiff's First Request for Production of Documents Number 13. However, the March 2008 Geographic Circulation Analysis was never produced by Defendant. Though possibly relevant to the issue of damages, Plaintiff cannot conclusively make such a determination, as Plaintiff and her counsel have not had the opportunity to review the document. Because document 9 was not produced in discovery, Defendant may not introduce such document for use at trial.

4. Document 10 - Sport Review Wrestling, May 1983.

Document 10 is listed as “Sport Review Wrestling, May 1983 (Otten Ex. 2).” This exhibit was introduced during the deposition of William Otten. As discussed in Section F above, the entirety of Mr. Otten’s deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten’s deposition must also be excluded. Exhibit 2 to Mr. Otten’s deposition is a wrestling magazine which contains photographs of Nancy Benoit and another female model posing and wrestling in swimsuits. Both models are clothed in the photographs. Mr. Otten testified that he was paid \$250 for the photographs, of which he gave Ms. Benoit \$75. In addition, Mr. Otten testifies that Ms. Benoit signed a release in order to have these photographs published by the magazine, and that Ms. Benoit’s main form of compensation was the publicity that the photographs would provide within the wrestling community. *See* Otten Deposition, pp. 29-31.

The pictures themselves are entirely dissimilar from those published by Defendant, and were both taken, and published, at an entirely different time in Ms. Benoit’s life and career than those images published by Defendant after Ms. Benoit’s

death. The value of the photographs in Exhibit 2 of Mr. Otten's Deposition holds absolutely no relevance to the value realized by Defendant by the publication of Ms. Benoit's nude image. Document 10, therefore, has no probative value relating to the issues to be decided at trial, and may in fact be prejudicial to Plaintiff. Document 10 must therefore be excluded from use at trial.

5. Document 11 - Photograph Is Ms. Benoit on the Cover of The Grapevine.

Document 11 is listed as "Photo of Nancy Benoit used on the cover of The Grapevine (Otten Ex. 3)." As discussed in Section F above, the entirety of Mr. Otten's deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten's deposition must also be excluded. Exhibit 3 to Mr. Otten's deposition is a photograph of Ms. Benoit used for the cover of the wrestling magazine The Grapevine. The amount Ms. Benoit was paid for the use of the photograph in Document 11 is entirely irrelevant to the value received by Defendant in publishing Ms. Benoit's nude image. The photograph in Document 11 was taken at a different time in Ms. Benoit's life and career than the images published by Defendant. In addition, the images in Document 11 were published by a different

magazine, and did not depict nudity. Document 11 is therefore irrelevant to the remaining issues to be decided in this case, and must be excluded from use at trial.

6. Document 12 - Advertisement Featuring Fallen Angel Photographs.

Document 12 is listed as “Advertisement featuring Fallen Angel photographs (Otten Ex. 5).” As discussed in Section F above, the entirety of Mr. Otten’s deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten’s deposition must also be excluded. Exhibit 5 to Mr. Otten’s deposition is a photograph of Ms. Benoit labeled under her wrestling alter ego, “Fallen Angel.” This photograph was published in various wrestling magazines in an advertisement to sell photographs of Ms. Benoit to the public.

While the photograph in Document 12 may give the implication of nudity, it does not depict Ms. Benoit’s nude body. The photographs were taken at a different time in Ms. Benoit’s life and career, and were published at a different time and in a different magazine than the nude images published by Defendant in this case. In addition, Ms. Benoit signed a release in connection with these photographs, and received compensation for the photographs. *See* Otten Deposition, pp. 45-46. The

photograph in Document 12 is irrelevant to the remaining issues to be decided in this case. Document 12 is therefore inadmissible, and must be excluded by this Court.

7. Document 13 - “Fallen Angel” Photographs

Document 13 is listed as ““Fallen Angel’ photographs (Otten Ex. 6).” As discussed in Section F above, the entirety of Mr. Otten’s deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten’s deposition must also be excluded. Exhibit 6 to Mr. Otten’s deposition are photographs of Ms. Benoit labeled under her wrestling alter ego, “Fallen Angel.” These photographs were used for sale to the general public pursuant to advertisements in various wrestling magazines.

The photographs in Document 13 are totally irrelevant to the issues to be decided at trial in this case. While the photographs in Document 13 may give the implication of nudity, they do not depict Ms. Benoit’s nude body. The photographs were taken at a different time in Ms. Benoit’s life and career, and were published at a different time than the nude images published by Defendant in this case. In addition, Ms. Benoit signed a release in connection with these photographs, and received compensation for these photographs. *See* Otten Deposition, pp. 45-46. The

photographs in Document 13 are irrelevant to the remaining issues to be decided in this case. Document 13 is therefore inadmissible, and must be excluded by this Court.

**8. Document 14 - Edited Advertisement
Featuring Fallen Angel Photographs.**

Document 14 is listed as “Edited Advertisement featuring Fallen Angel photographs (Otten Ex. 7).” As discussed in Section F above, the entirety of Mr. Otten’s deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten’s deposition must also be excluded. Exhibit 7 to Mr. Otten’s deposition is a photograph of Ms. Benoit labeled under her wrestling alter ego, “Fallen Angel.” This photograph was published in various wrestling magazines in an edited advertisement to sell photographs of Ms. Benoit to the public.

The photograph in Document 14 does not depict Ms. Benoit’s nude body. The photograph was taken at a different time in Ms. Benoit’s life and career, and was published at a different time and in a different magazine than the nude photographs published by Defendant in this case. In addition, Ms. Benoit signed a release in connection with this photograph, and received compensation for the photograph. *See* Otten Deposition, pp. 45-46. The photograph in Document 14 is irrelevant to the

remaining issues to be decided in this case. Document 14 is therefore inadmissible, and must be excluded by this Court.

9. Document 15 - Nancy Benoit Photographs Taken from the Internet.

Document 15 is listed as “Nancy Benoit photographs taken from the Internet (Otten Ex. 8).” As discussed in Section F above, the entirety of Mr. Otten’s deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten’s deposition must also be excluded. Exhibit 8 to Mr. Otten’s deposition consists of several photographs of Ms. Benoit taken by Defendant’s counsel from the Internet. The photographs have nothing whatsoever to do with the remaining issues to be decided in this case. The photographs in Document 15 do not depict Ms. Benoit’s nude body. They were taken and published at a different time in Ms. Benoit’s life and career, and never appeared in any pornographic magazine, unlike the nude photographs published by Defendant in this case.

The photographs in Document 15 do not relate in any way to the value received by Defendant for the publication of Ms. Benoit’s nude image. The photographs in Document 15 do not relate in any way as to whether punitive damages

should be assessed against Defendant, and if so, the amount of punitive damages to be assessed. Document 15 is therefore irrelevant to the remaining issues in this case, and must be excluded from use at trial.

10. Document 16 - Composite.

Document 16 is listed as “Composite Otten Ex. 9.” As discussed in Section F above, the entirety of Mr. Otten’s deposition testimony must be excluded from use at trial, as it is irrelevant to the remaining issues to be decided in this case.

Similarly, any exhibits to Mr. Otten’s deposition must also be excluded. Exhibit 9 to Mr. Otten’s deposition consists of several wrestling magazines and photographs of Nancy Benoit. The photographs have nothing whatsoever to do with the remaining issues to be decided in this case. The photographs in Document 16 do not depict Ms. Benoit’s nude body. They were taken and published at a different time in Ms. Benoit’s life and career, and never appeared in any pornographic magazine, unlike the nude photographs published by Defendant in this case.

The photographs in Document 16 do not relate in any way to the value received by Defendant for the publication of Ms. Benoit’s nude image. The photographs in Document 16 do not relate in any way as to whether punitive damages should be assessed against Defendant, and if so, the amount of punitive damages to

be assessed. Document 16 is therefore irrelevant to the remaining issues in this case, and must be excluded from use at trial.

11. Document 17 - Email from Mark Samansky to LFP.

Document 17, dated July 11, 2007, is listed as “Email from Mark Samansky to LFP (LFP 0073 - 0074).” The email consists of an offer from Mr. Samansky to sell the nude images of Ms. Benoit to Defendant. However, the email itself does not discuss value in any way, nor does it discuss the potential newsworthiness of the images. Because the value received by Defendant for publication of the nude images, as well as the issue of punitive damages, are the only matters left to be decided in this case, and because the July 11, 2007 email from Mr. Samansky substantially addresses neither of these issues, it is irrelevant and must therefore be excluded from use in this case.

In addition, there is no authentication of Document 17, which is being introduced to prove the truth of the matter asserted therein. As such, Document 17 constitutes inadmissible hearsay that does not fall under any recognized exception. Document 17 is therefore inadmissible at trial, and must be excluded by this Court.

12. Document 18 - Independent Contractor Agreement.

Document 18, dated January 22, 1996, is listed as “Independent Contractor Agreement between Nancy Benoit and World Championship Wrestling, Inc. (UWC 005 - 016). This is the employment agreement signed by Ms. Benoit when she worked as a wrestling personality for World Championship Wrestling.

This Agreement has absolutely nothing to do with the remaining issues in this case, and is therefore inadmissible. Document 18 does not relate in any way to the value received by Defendant for the publication of Ms. Benoit’s nude image. Document 18 does not relate in any way as to whether punitive damages should be assessed against Defendant, and if so, the amount of punitive damages to be assessed. These are the only issues left to be decided in this case, and because Document 18 does not even remotely address any of these issues, it is irrelevant and must be excluded from use at trial.

In addition, there is no authentication of Document 18, which is being introduced to prove the truth of the matter asserted therein. As such, Document 18 constitutes inadmissible hearsay that does not fall under any recognized exception. Document 18 is therefore inadmissible at trial, and must be excluded by this Court.

III. CONCLUSION

Defendant is attempting to cloud and confuse the remaining issues in this case by introducing irrelevant and prejudicial evidence for use at trial. Only three issues remain to be determined by the trier of fact:

- (1) the value to Defendant of the images published by Defendant;
- (2) whether punitive damages should be assessed against Defendant;
and
- (3) if punitive damages are awarded, the amount to be assessed for punitive damages.

All of the issues and materials discussed above and listed in Plaintiff's Motion in Limine have nothing whatsoever to do with these three core issues. All tangential issues and documents attempting to be introduced by Defendant are therefore irrelevant and must be excluded at trial. This Court must therefore GRANT Plaintiff's Motion in Limine to exclude all irrelevant evidence from use at trial.

Respectfully submitted May 23, 2011.

/s/ Richard P. Decker

RICHARD P. DECKER

State Bar of Georgia #215600

rdecker@hallmanwingate.com

F. EDWIN HALLMAN, JR.

State Bar of Georgia #319800

ehallman@hallmanwingate.com

For HALLMAN & WINGATE, LLC

Attorneys for Plaintiff

166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060
(404) 588-2530

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 May 23, 2011, I have electronically filed the foregoing Motion in Limine and Brief in Support thereof 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.
Lipsitz, Green, Scime, Cambria, LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202

/s/ Richard P. Decker
RICHARD P. DECKER
State Bar of Georgia #215600

For HALLMAN & WINGATE, LLC
Attorneys for Plaintiff

166 Anderson Street, S.E.
Suite 210
Marietta, Georgia 30060
(404) 588-2530