

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA

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

v. )

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

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

**PLAINTIFF’S RESPONSE TO DEFENDANT’S  
MOTION IN LIMINE TO EXCLUDE EVIDENCE**

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and  
Personal Representative of the Estate of Nancy E. Benoit (hereinafter “Plaintiff”)  
through counsel and files this her Response to Defendant’s Motion in Limine to  
Exclude Evidence and shows this Court the following:

Defendant LFP Publishing, LLC d/b/a Hustler Magazine (hereinafter  
“Hustler” or “Hustler Magazine”) has filed a Motion in Limine which seeks to prevent

Plaintiff from introducing four particular items of evidence at trial. Plaintiff will respond to Hustler's Motion in the order in which it was presented.

**A. The DVD which was packaged and sold with newsstand copies of the March 2008 edition of Hustler Magazine. (Plaintiff's Exhibit 2).**

The March 2008 edition of Hustler Magazine (Plaintiff's Exhibit 2), which contained images of Nancy Benoit published by Hustler without permission or consent, also contained a "free" DVD sold with each newsstand edition of the magazine. The DVD was packaged and wrapped with the magazine and was part and parcel of the newsstand edition. A buyer of the magazine could not purchase the magazine without also getting the DVD, and could not purchase the DVD without getting the magazine. The DVDs were provided by Hustler to "boost sales" of the magazine. See Deposition of Bruce David, p. 14.

As it turns out, every edition of Hustler Magazine, at least for five months before the March 2008 edition, and for the six months after, also contained a "free DVD." See Plaintiff's Exhibits 29 through 33. Thus, apparently, each issue of Hustler Magazine comes with a "free" DVD. The DVDs are therefore an indispensable part of each magazine, presumably to "boost sales" of the newsstand edition, just like any other photo spread or feature within the magazine itself.

It is also indisputably true that the DVDs, including the March 2008 edition DVD, contain what can only be described as extreme hard core pornography, including scenes of violent sexual battery. The DVDs are disturbing; some would say disgusting, vile and horrible, but are quite similar to much of the content of the magazine itself. Be that as it may, however, the fact that the DVD's might be disturbing to the average person is the fault of the Defendant, not the Plaintiff.

The finder of fact in this case must review the entire magazine for the purposes of determining damages in this case. Such a review must include all the photo spreads, articles, and advertisements within the magazine, as well as the included DVD material, and not just the images of Nancy Benoit. To refuse the review of the DVD would be to provide the finder of fact with an incomplete picture of what was sold to the public, and thus, what profits from the sale of the magazine are attributable to the illegal images of Ms. Benoit.

As established by the Eleventh Circuit's opinion in this case, Ms. Benoit, or her estate, has the legal right to control her image, as well as 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 all of that offensive content in order to judge the full scope of damages in this case.

As the Eleventh Circuit said in its review of this case in 2009:

We agree with the Seventh Circuit that this ‘unauthorized publication’ impaired the commercial exploitation of Benoit’s image. Certainly an important aspect of the right of publicity is being able to control the place as well as time and number of one’s public appearances. Crude though the concept may seem in this context, Toffoloni is entitled to control when and whether images of her daughter are made public in order to maximize the economic benefit to be derived from her daughter’s posthumous fame.

*Toffoloni v. LFP Publishing LLC, d/b/a Hustler Magazine*, 572 F.3d 1201, 1213 (11<sup>th</sup> Cir. 2009).

The “place” where *Hustler Magazine* chose illegally to publish images of Nancy Benoit is a pornographic magazine that is packaged with a pornographic DVD. The items are sold together, the content is sold together, and presumably, both the magazine and the DVD are viewed together by each purchaser. To artificially exclude the DVD because it is vile or disturbing to the average person, which is Defendant’s implicit argument, would be the same as tearing pages from the magazine in order to present a sanitized, less shocking version of the magazine to the jury. Neither practice would be consistent with presenting the jury with the actual facts of the case.

The Defendant, not the Plaintiff, chose to create this DVD; the Defendant, not the Plaintiff, chose to include it as part of its magazine; and the Defendant, not the Plaintiff, chose to publish images of Plaintiff's decedent alongside these pornographic images, for its own financial gain. The Defendant should be stuck with its entire unsanitized handiwork in front of the jury in order for the finder of fact to properly establish damages in this case.

**B. The Meredith Emerson Material (Plaintiff's Exhibit 17).**

The horrible murder of Meredith Emerson in the North Georgia mountains occurred in January, 2008, about the time Hustler illegally published images of Nancy Benoit. By the time Ms. Emerson's murder investigation was completed, in March of 2010, Hustler had already received the opinion of the Eleventh Circuit Court of Appeals dated June 25, 2009, condemning Hustler's conduct in the *Toffoloni* case. Undeterred by the Eleventh Circuit's opinion, and the United States Supreme Court's refusal to review that decision, in February of 2010 Hustler nonetheless aggressively sought to obtain the Georgia Bureau of Investigation crime scene photographs of Ms. Emerson's nude and decapitated body. Hustler's efforts in this regard are memorialized in Plaintiff's Exhibit 17, which Defendant seeks to exclude.

According to the Supreme Court of the United States, one of the well-accepted grounds for the imposition of punitive damages is the Defendant's "recidivism." *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996).

To determine a defendant's reprehensibility-the most important indicium of a punitive damages award's reasonableness-a court must consider whether: ... the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. *Gore*, 517 U.S., at 576-577, 116 S.Ct. 1589. It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575, 116 S.Ct. 1589.

*See State Farm Mut. Auto. Ins. Co. v. Campbell* at 409.

Recidivism is defined as "a tendency to relapse into a habit of criminal activity or behavior." *See Black's Law Dictionary* 1021 (7<sup>th</sup> ed. 2000). In this case, on June 25, 2009, Hustler received a virtual road map from the Eleventh Circuit Court of Appeals, spelling out in plain terms the legal limits of the "newsworthy" doctrine in this Judicial Circuit. Apparently, the lesson did not take, because on February 25, 2010 Hustler was back in Georgia again, petitioning the Georgia Bureau of

Investigation to obtain crime scene photographs showing the nude and decapitated body of the victim of a horrible crime. Only a public outcry by the victim's family, and action by the Georgia General Assembly, prevented *Hustler Magazine* from obtaining and publishing the crime scene photographs in its magazine. As a part of her claims for punitive damages, Plaintiff should be entitled to show the jury Hustler's recidivist conduct in this matter.

Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

*See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576-77, 116 S. Ct. 1589 (1996) (internal citations omitted)

Because Defendant has repeatedly engaged in the prohibited conduct of publishing nude images of women without their consent, while knowing that such conduct is unlawful, evidence of Defendant's recidivist conduct must be admitted.

### **C. The Prior Actions.**

As is well settled under Federal Rule of Evidence 404(b), similar acts, including similar claims and litigation, may be introduced into evidence to establish

a party's motive, intent, state of mind, or absence of accident or mistake. See Fed. R. Evid. 404(b). This is especially true in cases in which a claim for punitive damages for violation of the right of publicity is being made. In this case, the state of mind of Defendant, and whether the Defendant truly believed that the publication of Ms. Benoit's images were newsworthy at the time they were published, is critical to the issue of whether punitive damages should be awarded, and if so, the amount to be assessed.

In this case, Plaintiff seeks to show that Hustler Magazine has been repeatedly successfully sued for damages because it has repeatedly published images of women without their consent, violating their right to privacy, and right to publicity. Indeed, one of the cases being offered by Plaintiff (Plaintiff's Exhibit 23), Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985)) was extensively quoted by the Eleventh Circuit Court of Appeals in its opinion in the Toffoloni case. Obviously, the Eleventh Circuit has already held that the Douglass case (Plaintiff's Exhibit 23) and the case at bar are substantially similar. In fact, a review of the facts of both cases clearly shows that Hustler's conduct in both cases is disturbingly consistent. Judge Posner stated in his opinion in the Douglass case that over the years Hustler has shown a "propensity, well-documented in several cases ... to invade people's legal



rights.” *Douglass* at 1145. This propensity demonstrates Defendant’s knowledge that, at the time the images of Ms. Benoit were being published, Defendant knew what it was doing was wrong, and the action was therefore done with malice and reckless indifference.

In considering punitive damages, the jury is entitled to know that *Hustler Magazine* has committed almost exactly the same conduct at least five (5) times in the past. *See State Farm Mut. Auto. Ins. Co. v. Campbell, BMW of N. Am., Inc. v. Gore, supra.*

**D. *The Sun* Article Quote Attributed to *Hustler Magazine* Employee, Mark Johnson.**

In its Order dated November 23, 2010, granting summary judgment to Plaintiff on the issue of Defendant’s liability, this Court quoted part of the statement attributed to *Hustler Magazine* employee, Mark Johnson, as follows: “The feedback was huge and overwhelmingly positive.” Order, p. 10. Thus, there is no doubt that the Court believes that Mark Johnson said to *The Sun* magazine the words attributed to him in the article; indeed, he admitted saying or writing these words to *The Sun* in his deposition. *See* Johnson Deposition, pp. 11-12. The article is admissible to show Defendant’s state of mind at the time the images of Nancy Benoit were published, and

is therefore relevant for the purpose of establishing punitive damages. *See* Fed. R. Evid. 401, 404(b).

As stated in *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635 (1979), in reference to the case of *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975 (1967), a libel action against a magazine publisher in Georgia, evidence is properly introduced to discover the defendant's state of mind for the purposes of punitive damages.

In *Butts*, the Court affirmed the substantial award of punitive damages which in Georgia were conditioned upon a showing of “wanton or reckless indifference or culpable negligence” or “ ‘ill will, spite, hatred and an intent to injure . . . .’ ” 388 U.S., at 165-166. Neither Mr. Justice Harlan, *id.*, at 156-162, nor Mr. Chief Justice Warren, concurring, *id.*, at 165-168, raised any question as to the propriety of having the award turn on such a showing or as to the propriety of the underlying evidence, **which plainly included direct evidence going to the state of mind of the publisher and its responsible agents.**

*Herbert* at 162-163 (emphasis added).

Direct evidence of Defendant's and its responsible agents' state of mind is necessary for a showing of punitive damages in this case. The quote from Mr. Johnson is the best evidence available to show Defendant's state of mind at the time the images of Ms. Benoit were illegally published.

CONCLUSION

Not one of the documents objected to by Defendant is inadmissible on the grounds stated by Defendant in its Motion. Each document is relevant to the remaining issues to be decided at trial. Therefore, Defendant's Motion in Limine should be denied.

Respectfully submitted May 27, 2011.

*/s/ Richard P. Decker*

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**CERTIFICATE OF SERVICE**

This is to certify that on May 27, 2011, I have electronically filed the foregoing Response to Defendant's Motion in Limine to Exclude Evidence with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

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

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