IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,
as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC, d/b/a *Hustler* Magazine, et al,,

Defendant.

CASE NO. 1:08-cv-00421-TWT

REPLY IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE

NOW COMES Defendant LFP Publishing Group LLC, d/b/a *Hustler* Magazine ("LFP"), and respectfully submits this reply in support of its Motion *In Limine* To Exclude Evidence filed with the Court by Plaintiff Maureen Toffoloni ("Plaintiff").

I. Introduction

Plaintiff's response, Docket Index ("D.I.") 206, to Defendant's Motion *In Limine* confirms that Plaintiff clearly does not intend to confine her evidence or argument to the merits of the actual issues to be tried, *i.e.*, what would LFP have

paid to publish the Benoit images as a purely commercial, non-editorial "pictorial", and whether LFP sincerely believed that it had the right to publish the images without Plaintiff's permission. Instead, Plaintiff intends to make this trial an indictment of *Hustler* Magazine for its content and actions which are not actually at issue in the case.

None of the evidence sought to be excluded by Defendant in its Motion is relevant. This case has nothing to do with pornographic DVDs; Defendant's research for unpublished articles; or 25 year-old copyright infringement and false light cases brought by different plaintiffs, against a different corporate defendant, on different facts, and asserting different claims than those at issue here. Plaintiff should not be permitted to turn this trial of limited issues into a sensational and obvious smear campaign designed to elicit a jury verdict on anything but the actual issues of the case. We respectfully request that the Motion be granted.

II. Argument

A. The DVD(s)

According to her brief, D.I. 206 at 2-5, Plaintiff apparently wishes to show the jury not just the pornographic DVD packaged with the newsstand editions of the March 2008 issue of *Hustler* Magazine (the only issue which contained the Benoit images), but also DVDs packaged with any number of other issues of

Hustler Magazine having absolutely no connection to the publication of the Benoit images. Stripped of its rhetoric,[1] Plaintiff's argument is simply that the jury must watch the "offensive" contents of the DVDs in order to determine "what profits from the sale of the magazine are attributable to the illegal images of Ms. Benoit." (Id. at 3.) This argument lacks merit; and what is plain from it is that Plaintiff wishes to make the jury angry, not deliberative.

First, Defendant's profits from the March 2008 or any other issue of *Hustler* Magazine is not the legal measure of damages on Plaintiff's claim. Her recovery for compensatory damages is limited to the value of Defendant's use of the Benoit images "in the manner and for the time [they were] appropriated." *Cabaniss v. Hipsley*, 114 Ga. App. 367, 381, 151 S.E.2d 496, 506 (1966). Here, the appropriation was the unauthorized use of Ms. Benoit's image in an editorial photo spread most closely analogous to a one-time, non-centerfold, non-cover model pictorial. The measure of recovery is thus what Defendant would have paid for

[1] The suggestion that the DVDs contain depictions of criminal conduct, i.e. "scenes of violent sexual battery" or unwanted sexual contact, D.I. 206 at 3, is not only a fiction wholly of Plaintiff's counsel's creation, but also a clear warning that Plaintiff is likely to make grossly misplaced assertions during the trial of this case in order to provoke an emotional, but inappropriate response from the jury on extraneous matters. We respectfully submit that it is precisely this risk that warrants a ruling on Defendant's Motion before the trial of this case begins.

such images had it known it was required to, not Defendant's profits from the sale of the March 2008 issue of *Hustler* Magazine.

Second, Plaintiff's desire not to have Ms. Benoit's image associated with *Hustler* Magazine – or the contents of the DVDs sold with some issues of the magazine – is inapposite to the measure of compensatory damages. As the parties and the Court well know, there can be no recovery here for "injury to plaintiff's feelings or reputation." *Cabaniss* , 114 Ga. App. at 381, 151 S.E.2d at 506.

Third, there is no merit to the suggestion that the actual, known content of any of the DVDs drove sales of the magazines with which they were sold. This is because, as Plaintiff acknowledges and understands, the DVDs were sold sealed together in a package with newsstand copies of *Hustler* Magazine. No consumer could see the content of any of the DVDs before deciding to purchase the associated issues of *Hustler* Magazine, so Plaintiff's suggestion the jury must see the contents to decide what sales should be attributed to the DVDs, as opposed to some other content, misses the mark.

Finally, as Plaintiff knows, the DVDs do not contain any video footage or images of Ms. Benoit; do not reference Ms. Benoit in any way; and are not even produced or seen by the LFP employees who produce the content of *Hustler*

Magazine or played any part in the publication of the Benoit feature. (*E.g*., Bruce David Deposition at 13.)

The DVDs cannot be shown to make any fact that is of consequence to the determination of Plaintiff's claims more or less probable. Plaintiff merely wishes to incite the jury on issues far afield from the limited issues left for trial, "for the sake of . . . prejudicial effect." Fed. R. Evid. 403. We respectfully submit the DVDs should be excluded.

B. The Meredith Emerson Materials

Plaintiff argues, D.I. 206 at 5-6, that it is necessary for the jury to hear of the efforts by a freelance true crime journalist on assignment for *Hustler* Magazine to obtain, through an open records request, the Georgia Bureau of Investigation's closed investigative file regarding the murder of Meredith Emerson because it is evidence of LFP's "recidivism," that is, relapsing criminal conduct. No article about, much less any image of, Meredith Emerson has ever been published by Defendant; and there is no basis for Plaintiff to suggest, much less prove, to the jury that Defendant intended to publish any such images (much less crime scene images of the body of the victim).

We respectfully suggest the obvious: Plaintiff's purpose here is not to show the jury actual evidence of repeated, much less relevant, criminal conduct by

Defendant (there is none!), but to seize upon the jury's likely familiarity with the murder of Ms. Emerson and foster the entirely unfounded suggestion that Defendant intended to publish images of her "nude and decapitated body," D.I. 206 at 7. The lack of relevance of the proposed evidence is self-evident, as is the prejudice its admission would cause Defendant in the defense of this unrelated case.

C. The Prior Actions

Contrary to Plaintiff's argument, D.I. 206 at 8, none of the five (5) "prior actions" involving *Hustler* Magazine Plaintiff proposes to admit into evidence at trial is "substantially similar" to the case at bar. All are at least 25 years old. Two of the cases are copyright infringement cases (Blackman and Brewer); two are false light cases where non-parties were alleged to have stolen images of non-celebrity women, forged model's releases and submitted them for publication in *Hustler* Magazine under a false name (Ashby and Wood); only one, the Douglass case out of the 7th Circuit, involved a right of publicity claim, and there the court found evidence of a forged release and, of course, the subject of the images was not contemporaneously part of a significant international news story.

Plaintiff's efforts to conflate the issues notwithstanding, this case is nothing like the "prior actions," much less "exactly the same," D.I. 206 at 9. Plaintiff has

not explained, because she cannot, how these ancient cases on unrelated facts and claims could possibly help the jury decide whether Defendant believed that it had the legal right to publish the images as part of a news story. The "prior actions" are irrelevant, and should be excluded.

Moreover, Plaintiff's claim that the Prior Actions qualify for the "state of mind" exception to Fed. R. Evid. 404(b) is misplaced. The Prior Actions are so dissimilar to this case that neither the "state of mind" exception, nor any other exception to that rule, applies. For this reason, the Prior Actions are inadmissible under Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

D. *The Sun* Article Quote Attributed to Mark Johnson

In its summary judgment order, this Court cited the quote at issue and attributed to Mark Johnson as evidence that Plaintiff is entitled to recover damages because Defendant did benefit from publishing the Benoit images, but did not pay Plaintiff anything for them. (D.I. 173 at 10.) That is where the relevance of this hearsay evidence to this case ended, however.[2] The comments clearly have no

[2] Notably, Mr. Johnson testified he did not even specifically recall making the statements attributed to him, and if he did make them, they were comments made

relevance to the standard to the measure of damages in this case; that is, what Defendant would have paid to Plaintiff for the images. Nor could the comments, even if sufficiently authenticated (which they are not), be relevant to the issue of punitive damages: the comments do not even reflect Defendant's state of mind at the time it decided to publish the Benoit images – the comments attributed to Mr. Johnson were made on or about January 30, 2008, well after the decision to publish the Benoit feature had been made, and the images had been already been published. (*See* Pretrial Order, D.I. 176 at Attachment G-1, Plaintiff's Exhibit 15.)

Finally, the evidence is clearly double hearsay. Mr. Johnson never admitted the accuracy of the quote. No one from The Sun will testify about it either. Plaintiff could not possibly show the quote to be competent evidence.

We respectfully submit that the so-called "Mark Johnson quote" has no relevance to the issues remaining in this case for trial. The only effect it could have on the jury would be to cause confusion by falsely suggesting that the measure of damages in this case is how big of a media reaction Defendant's publication of the Benoit images received, not what Defendant should have paid Plaintiff for the use of the images. For this reason, it should be excluded.

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at the direction of his superiors to promote the magazine, and not literal statements about the value of the images to Defendant. (M. Johnson Deposition at 10-12.)

II. Conclusion

For all of the foregoing reasons, LFP respectfully requests that its Motion *in Limine* to Exclude Evidence, D.I. 199, should be granted.

Respectfully submitted this 31st day of May 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing REPLY IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE EVIDENCE via the CM/ECF system which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 31st day of May 2011.

/s/ Darrell J. Solomon
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