

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
SUPPLEMENTAL OBJECTIONS TO PLAINTIFF’S EXHIBIT LIST**

COMES NOW, Plaintiff, Maureen Toffoloni, as Administratrix and
Personal Representative of the Estate of Nancy E. Benoit, through counsel and files
this Her Response To Defendant’s Supplemental Objections to Plaintiff’s Exhibit List
(hereinafter “Supplemental Objections”) with this Court as follows:

In its Supplemental Objections, Defendant objects to Plaintiff’s “Exhibits
5, 7, 8, 9, 10, 11, 12, 13, 14, and 15 on the grounds that each is irrelevant and

immaterial to any issue in the first phase of this case,” without defining the basis for its claim that the exhibits are “irrelevant” and “immaterial” or “the first phase of this case.” The Plaintiff and Defendant are each limited to 7½ hours of time to present each side of the case to address all of these issues. This Court has made it clear that there will be a bifurcated evaluation of the types of evidence by the Jury in determining first, compensatory damages and second, punitive damages and attorneys’ fees.

I. THE TRIAL OF THIS CASE IS CONTROLLED BY THIS COURT’S DEFINITION OF COMPENSATORY DAMAGES.

After confirming that liability has been established, this Court in its Order dated November 23, 2010 established very clearly and specifically the standard for the award of compensatory damages as follows:

Second, Toffoloni has produced sufficient evidence that she suffered damages. The measure of damages in a right of publicity case is the value of the use of the appropriated publicity. Martin Luther King, Jr. Ctr. for Soc. Change, 250 Ga. at 143. The evidence shows that LFP made significant profits off of the March 2008 issue and that the reaction to the Benoit photographs was ‘huge and overwhelmingly positive.’ (Johnson Dep. at 11.)

See November 23, 2010 Order, p. 10.

Indeed, the Court stated in its remarks to the Jury today that the compensatory damages are the “unjust enrichment” obtained by the Defendant as a result of its illegal conduct.

Contrary to the totally unsupported argument by Defendant that the listed exhibits are “irrelevant” and “immaterial,” all of the exhibits that Defendant attempts to exclude are totally relevant and material to the Court’s established measure of damages based upon:

(1) the Court’s clear directions about the measure of compensatory damages in its November 23, 2011 Order that includes Defendant’s “significant profits;” and

(2) the Court’s “unjust enrichment” directions to the Jury today. Plaintiff’s Exhibits 5, 7, 9, 10, 11, 12, 13, 14 and 15 are the very evidence of “significant profits” that this Court was referencing in its November 23, 2011 Order.

It is clear from the Defendant’s opening argument and objections to Exhibits 9, 13, 19, 20, 21, and 22, during the trial today, that the Defendant is attempting to ignore the agreed-upon Pretrial Order and this Court’s established parameters for determining compensatory damages. If such conduct is allowed, and

the Defendant can constantly change the Pretrial Order during trial, there is no reason for a Pretrial Order.

The Defendant is attempting to create an imaginary new standard of damages that is based upon what Defendant's magazine, *Hustler*, would pay for photographs from a willing seller, and thereby argue that the referenced Exhibits are "irrelevant" and "immaterial to compensatory damages." Such a standard is not only without any basis in law, but it is totally contrary to this Court's and the Eleventh Circuit Court of Appeals' Orders. *See, Toffoloni v. LFP Publ'g Group, LLC*, 572 F.3d 1201, 1208-09 (11th Cir. 2009). In addition, such a standard as proposed by Defendant would mean that any Defendant could illegally publish images and then pay the harmed party whatever amount the thief of the images chooses to pay based upon what it pays others. There would be no difference between obtaining permission for the images and stealing them, since the compensation would be the same in either circumstance.

II. THE PRETRIAL ORDER CONTROLS AND SHOULD NOT BE ALTERED.

This Court spent much time with the parties to agree upon a Pretrial Order that, among other agreements created by an absence of objections, deemed Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, and 22 admitted for

the trial. Indeed, the Defendant listed Plaintiff's Exhibits 5 through 15 in its list of exhibits to be used at trial. Not only has the Plaintiff prepared the presentation of her case in reliance upon the measure of damages established by this Court, but Plaintiff relied upon the Pretrial Order for eliciting testimony about the referenced agreed-upon exhibits to prove her case. It is fundamentally unfair and trial by ambush to now entertain the Defendant's motion to exclude evidence that is directly relevant and material to this Court's established measure of compensatory damages, after the Exhibits have been deemed admitted by Plaintiff and Defendant and after the trial has started.

III. THE REFERENCED EXHIBITS ARE RELEVANT TO ALL FORMS OF COMPENSATION.

The evidence of Defendant's profits and "unjust enrichment" is relevant and material to the compensatory damages, because that measure of damages, as established by this Court, is directly related to the profits obtained by the Defendant. It is also probative to the issue of punitive damages because the profits are a very plausible reason why the Plaintiff's ownership of the images was ignored by the Defendant. The issue of punitive damages is always bifurcated to the jury, and prior to trial, the Defendant failed to segregate any evidence according to the two parts of

the trial. Accordingly, the Defendant is bound by the Pretrial Order and must not be allowed to ambush Plaintiff with these untimely objections.

IV. CONCLUSION

Because the Defendant agreed during negotiation of the Pretrial Order that the referenced Exhibits were admitted, and because the referenced Exhibits are totally relevant to the measure of damages as established by the Eleventh Circuit Court of Appeals and by this Court, Defendant's Objections to Plaintiff's Exhibit List should be denied and the trial should proceed based upon the Pretrial Order agreed upon and signed by this Court before the trial began.

Respectfully submitted June 13, 2011.

/s/ Richard P. Decker

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CERTIFICATE OF SERVICE

This is to certify that on June 13, 2011, I have electronically filed the foregoing Plaintiff's Response to Defendant's Supplemental Objection to Plaintiff's Exhibit List 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
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