

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

MAUREEN TOFFOLONI, as)
Administrator and Personal)
Representative of the Estate)
of Nancy E. Benoit,)

Plaintiff,)

-vs-)

LFP PUBLISHING GROUP, LLC,)
doing business as Hustler)
Magazine,)

Defendant.)

Docket No. 1:08-CV-421-TWT

June 13, 2011
Atlanta, Georgia
9:38 a.m.

TRANSCRIPT OF THE JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE, AND A JURY

VOLUME I

APPEARANCES OF COUNSEL:

On behalf of the Plaintiff: Richard Decker
Francis Edwin Hallman, Jr.
HALLMAN & WINGATE

On behalf of the Defendant: Derek Bauer
Barry Armstrong
MCKENNA, LONG & ALDRIDGE

*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*

SUSAN C. BAKER, RMR, CRR
2194 U.S. COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GA 30303
(404) 215-1558

I N D E X

	<i>Page</i>
<i>Jury Selection</i>	6
<i>Opening Statements</i>	70
<i>Witness on Behalf of the Plaintiff:</i>	
DONNA HAHNER	
Cross (By Mr. Decker)	106
MAUREEN TOFFOLONI	
Direct (By Mr. Decker)	146
Cross (By Mr. Armstrong)	158

1 (Proceedings held in Atlanta, Georgia, June 13, 2011,
2 9:38 a.m., in open court.)

3 THE COURT: All right. This is the case of Maureen
4 Toffoloni versus LFP Publishing Group, Case Number 08-CV-421.

5 First let me ask counsel for the parties to identify
6 yourselves for the record and the parties you represent.

7 MR. DECKER: Good morning, Your Honor. Richard
8 Decker for the Plaintiff, Maureen Toffoloni.

9 THE COURT: Morning, Mr. Decker.

10 MR. BAUER: Morning, Your Honor. Derek Bauer for
11 Defendant LFP Publishing Group.

12 THE COURT: Morning, Mr. Bauer.

13 MR. ARMSTRONG: Barry Armstrong for Defendant as
14 well, Your Honor.

15 THE COURT: Morning, Mr. Armstrong.

16 Are you ready, Mr. Decker?

17 MR. DECKER: Yes, Your Honor.

18 THE COURT: Are you ready, Mr. Bauer?

19 MR. BAUER: Yes, Your Honor.

20 THE COURT: All right. We have distributed the
21 questionnaire that I prepared to the potential jurors, and I
22 think they have finished filling those out. It's going to be a
23 few minutes before we can get copies of those made for you. So
24 we will be in recess probably for about 10 or 15 minutes, and
25 we should have the jurors' responses to the written

1 questionnaire available. And we will begin with the responses
2 to the individual questions that you see on the screen in front
3 of you.

4 We will bring the jurors in and seat them on the
5 right-hand side of the courtroom, so everybody that's sitting
6 over there needs to move over to the other side of the
7 courtroom.

8 Any questions about the jury selection process?

9 Okay. We will be in recess for about ten minutes.

10 (A short recess was taken.)

11 THE COURT: Now, I've given each side
12 seven-and-a-half hours for the evidence in the case. With that
13 limitation, how long you think it's going to take to try this
14 case, Mr. Decker?

15 MR. DECKER: Your Honor, I'm sure I would be finished
16 tomorrow morning.

17 THE COURT: What about you, Mr. Bauer?

18 MR. BAUER: I think we need a little more than a half
19 day.

20 THE COURT: So if I tell the jurors this case is
21 going to take about three days to try, is that going to be
22 about accurate? Should I say two days?

23 MR. DECKER: I would say three, Judge, out of an
24 abundance of caution.

25 I had one question about that. I understand the

1 Court has indicated it's going to be bifurcated, and I think
2 that's correct. I'm not clear on exactly what's going to
3 happen in the first phase vis-a-vis the second phase, and that
4 controls my witness flow.

5 THE COURT: I think certainly the question of
6 compensatory damages and whether or not punitive damages should
7 be awarded and whether or not attorneys' fees and expenses of
8 litigation should be awarded will be addressed by the jury in
9 the first phase. If they decide that punitive damages should
10 be awarded and/or expenses of litigation, I would expect they
11 will decide the amount of those in the second phase.

12 MR. DECKER: And so in the second phase as the Court
13 has ordered, the second phase is where the attorney fees and
14 expenses evidence comes in?

15 THE COURT: Correct.

16 MR. DECKER: Not in the first phase?

17 THE COURT: Correct.

18 MR. DECKER: All right. Well, with that
19 clarification, Judge, my estimate for the Plaintiff is again
20 about a day and a half or a little less.

21 Your Honor, I would simply note my exception to the
22 bifurcation of the attorneys' fees question into the punitive
23 damages phase. But I hear you, and I understand. That's the
24 direction I will take.

25 THE COURT: All right. We are ready for the jurors.

1 We will bring the jurors in, have them seated on the
2 right-hand side of the courtroom. Y'all are welcome to turn
3 your chairs around, work off those two back tables if you want
4 to.

5 Mr. Bauer, you have a corporate representative here?

6 MR. BAUER: We do, Your Honor. This is Donna Hahner,
7 corporate vice president of LFP Publishing.

8 THE COURT: I'll let you introduce her at the
9 appropriate time.

10 MR. BAUER: Thank you.

11 (Prospective jurors entered the courtroom.)

12 - - -

13 JURY SELECTION

14 - - -

15 THE COURT: Good morning, Ladies and Gentlemen. You
16 are here to participate in the voir dire and jury selection
17 process in the case of Maureen Toffoloni as administrator and
18 personal representative of the estate of Nancy E. Benoit versus
19 LFP Publishing Group, LLC, doing business as Hustler Magazine.
20 This is a civil case in which the Plaintiff is suing LFP
21 Publishing Group for publishing unauthorized photographs of
22 Nancy Benoit and in which the Plaintiff is also seeking
23 punitive damages and expenses of litigation. And I will
24 explain all that in more detail later.

25 As I said, the Plaintiff in this case is Ms. Maureen

1 Toffoloni. Would you stand up, Ms. Toffoloni.

2 (Plaintiff rises.)

3 THE COURT: Thank you.

4 She is represented in the case by Mr. Richard Decker.
5 Would you stand, Mr. Decker.

6 (Mr. Decker rises.)

7 THE COURT: The Defendant in the case is LFP
8 Publishing Group which is represented in the case by Mr. Derek
9 Bauer and Mr. Barry Armstrong.

10 (Mr. Bauer and Mr. Armstrong rise.)

11 THE COURT: Mr. Bauer, you have a corporate
12 representative you'd like to introduce?

13 MR. BAUER: We do, Your Honor.

14 Thank you for being here this morning, Ladies and
15 Gentlemen. This is Donna Hahner. Donna, if you would stand
16 up. She is the corporate vice president of LFP Publishing
17 Group.

18 (Ms. Hahner rises.)

19 THE COURT: Let me ask you, Ladies and Gentlemen, are
20 any of you related by blood or marriage to the Plaintiff,
21 Ms. Maureen Toffoloni?

22 (No response.)

23 THE COURT: Are any of you officers, employees,
24 stockholders, shareholders, directors, agents of the Defendant,
25 LFP Publishing Group?

1 (No response.)

2 THE COURT: All right. Gentlemen, the jurors appear
3 to be qualified.

4 THE CLERK: Ladies and Gentlemen, we have a list of
5 questions that we would like for you to respond to in statement
6 form. They are on the large monitors in front of you, plus I
7 have got a sheet here that you can handle if you need to do
8 that. We will ask you to use this microphone. You need to
9 hold it close to your mouth so that we can hear you here in the
10 courtroom.

11 We will begin with the juror on the front row up
12 against the wall. If you will stand. First thing you need to
13 do is state your name and then respond to the questions in
14 statement form. Remain standing briefly in case the Court has
15 some follow-up questions. If not, then pass the microphone and
16 the sheet of questions to the next juror.

17 When we reach the end of the row, then we need to
18 pass the microphone and the sheet of questions to the jurors in
19 the row behind you up against the wall. The court security
20 officer will be here to assist you in that.

21 PROSPECTIVE JUROR: My name is Sharon Williams. I
22 live in Fulton County, and I have lived there for over 15
23 years. I am divorced. My former husband is a physician. I
24 have three children. One is deceased. The ages are 43 and 39.
25 They are employed. My daughter who's 43 is a hospital

1 administrator at Hugh Spalding Children's Hospital. And my son
2 who's 39 is a college professor at Strayer University.

3 I am employed. I'm a registered nurse, and I work
4 for Atlanta Public Schools. And I have been there for over 20
5 years. My educational background, I am a registered nurse and
6 I have a Master's in education.

7 I have served on a jury in Fulton County Superior
8 Court. However, I was dismissed due to illness. So I didn't
9 serve the full time. And I have never served on a grand jury.

10 THE COURT: Thank you very much, Ms. Williams.

11 Let me ask you are there any social, political,
12 civic, church, professional or other organizations that you are
13 active in?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: Could you tell me a little bit about
16 those, please.

17 PROSPECTIVE JUROR: I am active with the Georgia
18 Association of School Nurses. I am a grief counselor with
19 Compassionate Friends.

20 Let's see. I am a member of a Southern Baptist
21 Church. I think that's all.

22 THE COURT: Thank you very much, Ms. Williams.

23 PROSPECTIVE JUROR: My name is Ross Van Zyl. I live
24 in DeKalb County. Before that I lived in Gwinnett County. Not
25 married, don't have a spouse, not divorced, don't have

1 children. Not currently employed. Previously I was employed
2 by True Media Production as a video editor. I am a junior at
3 the University of Georgia. I have never served on a jury
4 before, and I have never served on a grand jury.

5 THE COURT: Mr. Van Zyl, are there any social,
6 political, civic, church, professional or other organizations
7 that you are active in other than attending school?

8 PROSPECTIVE JUROR: I am involved with my church and
9 a campus ministry at the University of Georgia.

10 THE COURT: Thank you very much.

11 PROSPECTIVE JUROR: Hello. My name is Mike Shepard.
12 I live in Fulton County. I have lived in the Bay Islands of
13 Honduras for two years approximately eight years ago. I am
14 married. My spouse is employed. She's in sales, communication
15 sales. I do have children. I have two of my own and I have
16 two stepchildren, ages 7, 11, 13 and 15. They are not
17 employed. I am employed. I am director of a communications
18 company.

19 What else?

20 I've never served on a jury, never been on a grand
21 jury.

22 THE COURT: Mr. Shepard, tell me a little bit about
23 the kind of work you do for the company you are employed as
24 communications director for.

25 PROSPECTIVE JUROR: I am the director of network

1 services. Basically, communications, internet, voice services.

2 THE COURT: And are there any social, political,
3 civic, church, professional or other organizations that you are
4 particularly active in?

5 PROSPECTIVE JUROR: No, there's not.

6 THE COURT: Thank you very much.

7 PROSPECTIVE JUROR: My name is James Turner. I live
8 in DeKalb County. Before that I lived in Leon County in
9 Florida and Athens-Clarke County and then Fayette County before
10 that. I am married. My wife works in marketing. Don't have
11 any children. I'm employed with -- I am an urban planner with
12 the City of Roswell. Before that I worked for Reynold, Smith
13 and Hills in Florida and nothing really before that.

14 I got my Bachelor's from Georgia, Master's from
15 Florida State. And I have never served on a jury or a grand
16 jury.

17 THE COURT: Mr. Turner, are there any social,
18 political, civic, church, professional or other organizations
19 that you are particularly involved in?

20 PROSPECTIVE JUROR: Yeah. With the Georgia Planning
21 Association and at my church, Dunwoody Baptist.

22 THE COURT: Thank you, sir.

23 PROSPECTIVE JUROR: My name is Lisa Dunn. I have
24 lived in Fulton County for 15 years. I am not married, no
25 children. I work as a hairstylist for an employer in a salon

1 in Atlanta for the last ten years. And I have never served on
2 a jury or grand jury. I think that's it.

3 THE COURT: Ms. Dunn, are there any social,
4 political, civic, church, professional or other organizations
5 that you are particularly active in?

6 PROSPECTIVE JUROR: No.

7 THE COURT: Thank you, ma'am.

8 PROSPECTIVE JUROR: My name is Cyrano Hardy. I live
9 in Clayton County. Before that I lived in Montgomery, Alabama.
10 I am married. My spouse is employed. She is a web banner
11 editor for AT&T. We don't have any children. I am employed.
12 I am a video editor. I hold a Master's degree. I've never
13 served on a jury before.

14 THE COURT: Mr. Hardy, tell me a little bit about
15 your job as a video editor for Turner Broadcasting.

16 PROSPECTIVE JUROR: I edit promos, things that's
17 coming up on air for TNT, TBS, Cartoon Network.

18 THE COURT: Any adult material that you are involved
19 in working with?

20 PROSPECTIVE JUROR: Adult material such as?

21 THE COURT: Involving nudity, sex, that sort of
22 thing.

23 PROSPECTIVE JUROR: Not nudity, not sex. If it can
24 be broadcast on TNT, TBS or TruTV, to that extent. But that
25 doesn't involve like exposure of any of the private parts.

1 THE COURT: Are there any social, political, civic,
2 church, professional or other organizations that you are
3 particularly involved in?

4 PROSPECTIVE JUROR: I am a member of Alpha Phi Alpha
5 Fraternity and a member of the National Association for
6 Multicultural Diversity in Media.

7 THE COURT: Thank you, Mr. Hardy.

8 PROSPECTIVE JUROR: My name is Lori Coonce. I live
9 in Gwinnett County. Prior to that, six years ago I lived in
10 Jackson, Michigan. I'm divorced. My husband owns a
11 restaurant. And I have children, ages 16 -- three children,
12 16, 16 and 19. And the 19-year-old works in construction. I
13 work for a CVS Pharmacy. I am a photo lab supervisor and a
14 front-end sort of manager. I have worked there for three
15 years. So before that I have just -- I have been an
16 administrative assistant. I have an Associate's degree. And I
17 have never served on a jury or a grand jury before.

18 THE COURT: Ms. Coonce, are there any social,
19 political, civic, church, professional or other organizations
20 that you are particularly active in?

21 PROSPECTIVE JUROR: No.

22 THE COURT: Thank you, ma'am.

23 PROSPECTIVE JUROR: My name is Karen Fripps. I live
24 in DeKalb County. I was in the military stationed at Keesler
25 Air Force Base for a short time in Biloxi, Mississippi. I'm

1 not married. I don't have any children. I'm employed as a
2 registered nurse. I work for several hospitals in the Atlanta
3 area. I have a Bachelor's of Science in nursing, thinking
4 about going back to school for my Master's. I have never
5 served on a jury before or a grand jury.

6 THE COURT: Ms. Fripps, are there any social,
7 political, civic, church, professional or other organizations
8 that you are particularly active in?

9 PROSPECTIVE JUROR: Yes. I'm very active in the
10 animal rescue area.

11 THE COURT: Thank you, ma'am.

12 PROSPECTIVE JUROR: My name is Doris Scales. I live
13 in Clayton County. Prior to that, I lived in DeKalb County. I
14 am not married, divorced. My ex-husband is deceased. I do not
15 have children. I am employed. I am the scheduler for
16 Congressman Hank Johnson, Georgia 04 District. Prior to that,
17 I worked for the DeKalb County Board of Commissioners as the
18 office manager. I went to business college.

19 I have never -- I have served on a jury before, many
20 years before. And this was like a case -- it was a civil case.
21 I have not -- we were not deadlocked. We did come to a verdict
22 conclusion. And I have never served on a grand jury.

23 THE COURT: Ms. Scales, are there any social,
24 political, civic, church, professional or other organizations
25 that you are particularly active in?

1 PROSPECTIVE JUROR: Yes. I am a member of Soka
2 Gakkai International which is a Lay Buddhist organization.

3 MR. DECKER: I'm sorry. I didn't understand.

4 PROSPECTIVE JUROR: I am a member of Soka Gakkai
5 International which is a Lay Buddhist organization.

6 MR. DECKER: Thank you.

7 PROSPECTIVE JUROR: My name is Carltedes Caldwell. I
8 stay in Fulton County, previously Cobb County. I'm not
9 married, do not have any children, currently unemployed. I
10 worked at a U.S. Post Office previously. I'm a junior at
11 Albany State University and never served on a jury.

12 THE COURT: Mr. Caldwell, are there any social,
13 political, civic, church, professional or other organizations
14 that you are particularly active in?

15 PROSPECTIVE JUROR: Yes, sir. My church, Wings of
16 Faith.

17 THE COURT: Thank you.

18 PROSPECTIVE JUROR: Thank you.

19 PROSPECTIVE JUROR: Hi. My name is Chaila Welch. I
20 live in Cobb County. Before that I lived in Paulding County.
21 I am married. My spouse works. He works in a warehouse. I
22 have three kids. Their ages are 11, 14, 15. None of them
23 work. Yes, I am employed. I work for Taco Bell as a manager.
24 I finished school. I never worked on a jury before, and I
25 never worked on a grand jury.

1 THE COURT: Ms. Welch, when you say you finished
2 school, you graduated from high school?

3 PROSPECTIVE JUROR: Yes.

4 THE COURT: And are there any social, political,
5 civic, church, professional or other organizations that you are
6 particularly active in?

7 PROSPECTIVE JUROR: Just my church, HM White.

8 THE COURT: Thank you.

9 PROSPECTIVE JUROR: Hi. My name is Nichole Dixon. I
10 live in Cobb County. I have lived there over 15 years. I'm
11 not married. I have one child. He is 11 years old. I'm
12 currently employed with Empire Distributors. I graduated from
13 Banneker High School in 1995. I have never served on a jury
14 duty before or a grand jury before.

15 THE COURT: Ms. Dixon, are there any social,
16 political, civic, church, professional or other organizations
17 that you are particularly active in?

18 PROSPECTIVE JUROR: No, sir.

19 THE COURT: Thank you.

20 PROSPECTIVE JUROR: My name is Laura Elledge. I live
21 in Cherokee County. Previous to that, I lived in Cobb County.
22 I am married. My husband is a lieutenant for the Cobb County
23 Police Department. I have children, three: 12, 9 and 7. I'm
24 employed. I am a registered nurse in labor and delivery at
25 Northside Hospital in Atlanta. I have been there almost 14

1 years, have a Bachelor's of Science in nursing. I have never
2 served on any sort of jury or grand jury before and am a member
3 of a Baptist Church in my community.

4 THE COURT: Any other social, political, professional
5 or other organizations that you are particularly active in,
6 Ms. Elledge?

7 PROSPECTIVE JUROR: No, sir.

8 THE COURT: Thank you.

9 PROSPECTIVE JUROR: My name is Jon Wunderlich. I
10 live in Gwinnett County. I have been there for 20 years. I'm
11 divorced. My ex-wife is a school teacher with Gwinnett County.
12 I have two children, ages 9 and 12. I have my own business,
13 self-employed as a piano technician. I have some college but
14 no degree. I served on a jury in Gwinnett County some years
15 ago, a civil case. I was not the foreperson. There was a
16 verdict. I have never served on a grand jury.

17 THE COURT: Mr. Wunderlich, are there any social,
18 political, civic, church, professional or other organizations
19 that you are particularly active in?

20 PROSPECTIVE JUROR: No, sir.

21 THE COURT: Thank you.

22 PROSPECTIVE JUROR: Hello. My name is Danielle
23 Rountree. I currently stay in DeKalb County. I have also
24 stayed in Gwinnett and North Carolina, Charlotte. I am not
25 married. I do have two kids, five and four months. I am

1 currently employed with ADP. It's a payroll company. I did
2 graduate from high school. And I have never served on a jury
3 or grand jury before.

4 THE COURT: Ms. Rountree, are there any social,
5 political, civic, church, professional or other organizations
6 that you are particularly active in?

7 PROSPECTIVE JUROR: Yes. My church, Berean
8 Christian.

9 THE COURT: Thank you.

10 PROSPECTIVE JUROR: I'm Michael Page. I live in
11 DeKalb County and have for 15 years. I am married, have four
12 children. Their ages are 17, 15, 9 and 7. My wife is employed
13 in the advertising industry. I work for Emory University. I
14 have never served on a jury before. And I have a Master's
15 degree in geography.

16 THE COURT: Mr. Page, tell me a little bit about the
17 work you do for Emory University.

18 PROSPECTIVE JUROR: I am a geographer.

19 THE COURT: And what does that --

20 PROSPECTIVE JUROR: I teach and do research in
21 geography.

22 THE COURT: Are any social, political, civic, church,
23 professional or other organizations that you are particularly
24 active in?

25 PROSPECTIVE JUROR: I'm involved in the Association

1 of American Geographers, the North American Cartographic
2 Information Society and Veterans of Foreign Wars.

3 THE COURT: Thank you, Mr. Page.

4 PROSPECTIVE JUROR: My name is Jill Colsson. I live
5 in Gwinnett County. I have lived there for 13 years. And
6 prior to that, I lived in Fulton County. I am married. My
7 husband is self-employed. And we have four kids, 30, 27, 23
8 and 21. Our oldest son works for VeriC. He is a systems
9 analyst. Our daughter, 27, works for Advanced Micro Systems
10 and is a web designer. Our 23-year-old son is an accountant.
11 And our 21-year-old daughter is a junior at GCSU in nursing
12 school.

13 I'm self-employed. For the past 17 years, I have
14 been a manufacturer's rep in the giftware industry. And I
15 attended Georgia Southern and Georgia State. I studied social
16 work. I have never served on a jury or a grand jury.

17 THE COURT: Ms. Colsson, you said that your husband
18 is self-employed. What kind of work does he do?

19 PROSPECTIVE JUROR: We own a couple of companies.
20 One, he has some real estate in South Carolina. And the other
21 one is just a small company that we have recently started
22 manufacturing a gift item.

23 THE COURT: And are there any social, political,
24 civic, church, professional or other organizations that you are
25 particularly active in?

1 PROSPECTIVE JUROR: I currently am just involved at
2 my church, 12th Stone in Lawrenceville.

3 THE COURT: Thank you.

4 PROSPECTIVE JUROR: Uh-huh.

5 PROSPECTIVE JUROR: My name is Kathleen Sneed. I
6 live in Cobb County. I lived there for the past -- well, all
7 my life. I'm not married. I have no children. I am employed
8 by Cobb County School District. I have a Master's degree and a
9 specialist degree. I have never served on a jury before or any
10 sort of a jury.

11 THE COURT: Ms. Sneed, are you married?

12 PROSPECTIVE JUROR: No.

13 THE COURT: And are there any social, political,
14 civic, church, professional or other organizations that you are
15 particularly active in?

16 PROSPECTIVE JUROR: I am a member of the Professional
17 Association of Georgia Educators and the Georgia and National
18 Art Educators Association.

19 THE COURT: Thank you, Ms. Sneed.

20 PROSPECTIVE JUROR: My name is Beverly Thomas. I
21 live in Gwinnett County. We moved 23 years ago from Riyadh,
22 Saudi Arabia, where my husband was an engineer for the Corps of
23 Engineers. I am married for 43 years. I have two children.
24 They are 34 and 32. The girl is an elementary teacher, and the
25 boy is a construction engineer.

1 I am not employed; but I am retired from Gwinnett
2 County where I taught third, fifth and kindergarten. And I
3 have booths at different places and sell items and antiques,
4 and that's what I have done since I retired.

5 I have been on a jury. It was here. We successfully
6 came to a verdict after three days and without having any
7 problems. And I go to First Baptist Church of Snellville.

8 THE COURT: Ms. Thomas, is your husband retired?

9 PROSPECTIVE JUROR: Yes. He has a yard business.

10 THE COURT: And he was an engineer for the Corps of
11 Engineers; is that right?

12 PROSPECTIVE JUROR: Yes. And we worked in Riyadh,
13 Saudi Arabia.

14 THE COURT: Are there any social, political, civic,
15 church, professional or other organizations that you are
16 particularly active in?

17 PROSPECTIVE JUROR: Beside the community that we live
18 in, there's a social group there, and the First Baptist Church
19 of Snellville.

20 THE COURT: Thank you, Ms. Thomas.

21 PROSPECTIVE JUROR: Thank you.

22 PROSPECTIVE JUROR: My name is Phetric Trimble-Smith.
23 I live in DeKalb County. I have lived there for the last 15
24 years. I'm not married. I am divorced. My former husband is
25 a truck driver. I have one son, and he has just previously

1 graduated. So he is not employed at this time.

2 I am a former first-grade teacher with the Atlanta
3 Public Schools. For the last two years, I have been resigned
4 from my position to be the caregiver for my mother. And I have
5 a Bachelor of Science in early education. And I have not
6 served on any jurors.

7 THE COURT: Ms. Trimble-Smith, are there any social,
8 political, civic, church, professional or other organizations
9 that you are particularly active in?

10 PROSPECTIVE JUROR: Just with my church at this time.

11 THE COURT: Thank you, ma'am.

12 PROSPECTIVE JUROR: My name is Donna Watford. I live
13 in Rockdale County. I have lived in Fulton County. And prior
14 to moving to Fulton County, I lived in Voorhees, New Jersey.
15 I'm from the Philadelphia area. I am married. I have been
16 married for six years. And my spouse is a police officer. We
17 are actually going through a divorce right now. We have no
18 children.

19 I'm currently unemployed, but I am working on a
20 faith-based -- I'm awaiting approval for exempt status for a
21 non-profit organization, a faith-based organization that's a
22 publishing company where I will be publishing health care
23 magazines. And I have also written a book, as well as I have
24 published that.

25 My education, I have an Associate's degree in

1 nursing. I have a Bachelor's degree in sociology and health
2 studies. And I'm currently enrolled at Drexel for my Master's
3 in nursing. I have never served on a jury before. I have
4 never served on a grand jury.

5 THE COURT: Ms. Watford, are there any social,
6 political, civic, church, professional or other organizations
7 that you are particularly active in?

8 PROSPECTIVE JUROR: I attend church, but I am not a
9 member of a church right now.

10 THE COURT: Thank you very much.

11 PROSPECTIVE JUROR: Hi. My name is Lillian Perri. I
12 live in Fulton County. I have lived there for over 15 years.
13 I am married. My spouse is employed outside the home in
14 medical sales. And I have four children, ages 16, 15, 13 and
15 12. I am not employed. I'm a homemaker. My educational
16 background is I have a B.S. in biology. And I have never
17 served on a grand jury before or another jury.

18 THE COURT: Ms. Perri, have you ever worked outside
19 the home?

20 PROSPECTIVE JUROR: Yes, I have.

21 THE COURT: Tell me a little bit about that, please.

22 PROSPECTIVE JUROR: Okay. I worked outside the home
23 for a Danish company known as Nunc in medical sales both in the
24 Atlanta territory and the New York City territory.

25 THE COURT: Are there any social, political, civic,

1 church, professional or other organizations that you are
2 particularly active in?

3 PROSPECTIVE JUROR: Just a member of my church.

4 THE COURT: Thank you.

5 PROSPECTIVE JUROR: Morning. My name is Donna
6 Thorne. I have lived in Gwinnett County for five years and
7 previously lived in Virginia in Loudoun County. I have been
8 married for 33 years. My husband is a tractor-trailer driver
9 for Pro-Build in Norcross. I have two stepdaughters, 39 and
10 37. They both work for the government in Washington, D.C.. My
11 31-year-old daughter is an accountant for Alpha Delta Pi here
12 in Midtown.

13 I retired after 37 years with the CIA in Washington,
14 D.C.; and I am employed as a full-time grandmother. I
15 graduated from high school with honors, and I have never served
16 on a jury before.

17 THE COURT: If you can't answer this question,
18 Ms. Thorne, I'll understand. But can you tell us anything
19 about what kind of work you did for your previous employer?

20 PROSPECTIVE JUROR: Well, I started as a clerk. And
21 I was an intelligence analyst and adjudicator. And my last
22 position I was an HR representative, human resources manager.

23 THE COURT: Are there any social, political, civic,
24 church, professional or other organizations that you are
25 particularly active in?

1 PROSPECTIVE JUROR: I attend Antioch Lithonia in
2 DeKalb County.

3 THE COURT: Thank you.

4 PROSPECTIVE JUROR: My name is Andrea Harmon. I have
5 lived in Douglas County for over 15 years. I'm not married. I
6 am divorced. My former spouse is self-employed. He owns a
7 tractor-trailer repair shop. I have two children, 20 and 12.
8 Neither are employed. I am employed. I work for a uniform
9 company. I have some college. I have served on a jury before
10 in Douglas County about ten years ago. It was a criminal case.
11 I wasn't the foreperson. We reached a verdict. And I have
12 never served on a grand jury.

13 THE COURT: Ms. Harmon, are there any social,
14 political, civic, church, professional or other organizations
15 that you are particularly active in?

16 PROSPECTIVE JUROR: No, sir.

17 THE COURT: Thank you.

18 PROSPECTIVE JUROR: My name is Natarish Haylock. I
19 live in Clayton County, been there for over 15 years. I am
20 married. My spouse is a superintendent for a construction
21 company. I have three children, 15, 12 and 4. I'm
22 self-employed, contracted with Atlanta Gastrologist Associates
23 where I do -- I'm working as a medical sonographer. I have
24 been on the jury before for the county on a child molestation
25 case. We reached a verdict. Never served on a grand jury.

1 THE COURT: Ms. Haylock, are there any social,
2 political, civic, church, professional or other organizations
3 that you are particularly active in?

4 PROSPECTIVE JUROR: Yes. I attend Mount Sinai
5 Baptist Church.

6 THE COURT: Thank you.

7 PROSPECTIVE JUROR: Good morning. My name is Michael
8 Caldwell. I live in DeKalb County and have lived there for 25
9 years. I'm married for 40 years. My spouse is employed with
10 her own business inside the home. She designs high-heeled --
11 pain-free high-heeled shoes and sells them. I have one child.
12 He is 26 years old. He's a medical student in New York.

13 I am employed. I am an attorney with the law firm of
14 Delong, Caldwell, Bridgers and Fitzpatrick. I have worked with
15 that firm for -- with various last two names have changed, but
16 the first two names have always been the same -- for over 20
17 years. My educational background, I have a Bachelor's degree
18 in dramatics and a J.D. degree. I have never served on a jury
19 before whether a grand jury or a petit jury.

20 THE COURT: Mr. Caldwell, what kind of work generally
21 does your firm do?

22 PROSPECTIVE JUROR: The firm does general business
23 litigation. I am a labor and employment lawyer. And that's
24 practically all I do is labor and employment work or work
25 connected with the workplace representing both employers and

1 employees both.

2 THE COURT: Have you ever done any personal injury
3 work?

4 PROSPECTIVE JUROR: I can't remember a personal
5 injury case that I have done except for there are aspects of
6 employment law that are personal injury. But it doesn't --
7 none come to mind. I have been doing it for 40 years, so my
8 memory may not be that great. But I can't think of one that I
9 have done, no.

10 THE COURT: Other than the usual bar association
11 organizations, are there any social, political, civic, church,
12 professional or other organizations that you are particularly
13 active in?

14 PROSPECTIVE JUROR: I am active in the St. Thomas
15 More Society for Catholic lawyers. I am active in my church
16 which is All Saints at Dunwoody. And the bar and my job take
17 up the rest of my activity.

18 THE COURT: Thank you, sir.

19 PROSPECTIVE JUROR: My name is Michael Henley, and I
20 live in Gwinnett County. I have recently moved there from
21 Rockdale County where before I lived there I was in Polk
22 County, Florida. And before that I was back in Gwinnett
23 County. I am not married. I do not have any children.

24 I just accepted a position doing computer sales at
25 Best Buy. Before that I was a security officer for Walt Disney

1 World, Florida. Before that I was a security officer for IBC
2 International Corporation working at Simon Property Group.

3 I currently attend college. I am taking online
4 courses with Virginia College. I did complete my high school
5 at Dacula High School. I've never served on a jury, never
6 served on a grand jury.

7 THE COURT: Mr. Henley, are there any social,
8 political, civic, church, professional or other organizations
9 that you are particularly active in?

10 PROSPECTIVE JUROR: I am a staff member with Free IT
11 in Athens. They provide free IT services for low-income
12 families to the Athens-Clarke County.

13 THE COURT: Thank you, sir.

14 PROSPECTIVE JUROR: Your Honor, there was one piece
15 of information I did not give that totally escaped my mind. I
16 am general counsel of the Georgia Association of Chiefs of
17 Police and very active in the association.

18 THE COURT: Thank you, Mr. Caldwell.

19 PROSPECTIVE JUROR: My name is David Goode. I live
20 in Cobb County; previous to that, Buford County, South
21 Carolina. I am married. My wife works in revenue management
22 for Starwood Hotels. I have a six-year-old who's not employed.
23 I am employed as a key account manager for an alcohol wholesale
24 distributor. Attended Penn State University, although did not
25 graduate. And I have not been on a jury before.

1 THE COURT: Mr. Goode, are there any social,
2 political, civic, church, professional or other organizations
3 that you are particularly active in?

4 PROSPECTIVE JUROR: Just professional, Quarter Master
5 Sommeliers and the Society of Wine Educators.

6 THE COURT: Thank you, sir.

7 PROSPECTIVE JUROR: I'm Ron Richardson. I live in
8 Cobb County for over 30 years. I am married. My wife is a
9 counselor at an elementary school. I have two children, one 26
10 and one 20. The oldest one is a speech pathologist in the
11 elementary school. I am employed with Ricoh -- I have been for
12 30 years -- working on high-speed printers and copiers. I
13 graduated high school and two years of electronic technology at
14 now Chattahoochee Tech. I've never served on a grand jury of
15 any kind.

16 THE COURT: Mr. Richardson, are there any social,
17 political, civic, church, professional or other organizations
18 that you are particularly active in?

19 PROSPECTIVE JUROR: Powder Springs First Baptist and
20 AOC, Atlanta Outdoor Club.

21 THE COURT: Thank you, sir.

22 PROSPECTIVE JUROR: Hello. My name is Justin Haga.
23 I currently live in Fulton County. I previously lived in
24 Davidson County in Tennessee and Cobb County here in Georgia as
25 well. I am married. My wife is a 7th grade science teacher in

1 Fulton County. We have two children, a five-year-old and a
2 two-year-old.

3 I am currently employed doing PRN work in an
4 emergency room as a unit clerk. During the school year, I take
5 care of my two children during the day and then do various odds
6 and ends for money, repair work and housework and things like
7 that.

8 I have a Bachelor of Science in biology. I also
9 currently study in a small seminary group theology and
10 philosophy. I have never served on a jury before, and I have
11 never served on a grand jury.

12 THE COURT: Mr. Haga, are there any social,
13 political, civic, church, professional or other organizations
14 that you are particularly active in?

15 PROSPECTIVE JUROR: I do some speaking and
16 songwriting for various churches in the local Atlanta area.

17 THE COURT: Thank you, sir.

18 PROSPECTIVE JUROR: My name is Chuck Kersnick --
19 Charles Kersnick -- sorry. I live in Cobb County. I have
20 lived there for 17 contiguous years. I am married to my wife
21 Leona for 11 years. She works in -- as an assistant teacher at
22 the Goddard School. I have an eight-year-old son George and a
23 ten-year-old daughter Natalie. I work for Georgia Pacific
24 Corporation as a technical sales rep in the packaging division.
25 I have a Bachelor's degree in business administration. I have

1 not served on a petit jury, but I have served on a grand jury
2 in Cobb County last spring in March/April.

3 THE COURT: Mr. Kersnick, are there any social,
4 political, civic, church, professional or other organizations
5 that you are particularly active in?

6 PROSPECTIVE JUROR: I am on the board of my church,
7 St. Mary of Egypt Russian Orthodox Church. And I am active
8 with my son's Cub Scout troop.

9 THE COURT: Thank you, sir.

10 PROSPECTIVE JUROR: My name is Bryan Brown. I live
11 in Gwinnett County. Before that it was DeKalb County. Before
12 that East Hartford, Connecticut, and Greensboro, North
13 Carolina. I am married. My wife is employed. She is in
14 marketing for Heatcraft Refrigeration. I have two children,
15 ages nine and one. They are not employed unfortunately.

16 I am the owner of a start-up electrical contracting
17 company. I worked as an engineer for a few companies, GE,
18 Pratt & Whitney, a couple other people. I have a Bachelor's
19 degree in engineering physics, a Master's degree in electrical
20 engineering. I have never served on a jury of any type.

21 THE COURT: Mr. Brown, are there any social,
22 political, civic, church, professional or other organizations
23 that you are particularly active in?

24 PROSPECTIVE JUROR: I am active in my church, and I
25 am active in Omega Psi Phi Fraternity.

1 THE COURT: Thank you, sir.

2 PROSPECTIVE JUROR: My name is Cynthia Butler. I
3 have lived in Cobb County for the last 21 years. I am single.
4 I have no children. I am employed by the United States
5 Treasury Department. Prior to that, I worked as a marketing
6 coordinator for an architectural firm. And I have also worked
7 for Georgia Department of Family and Children Services. I am a
8 college graduate. I have never been a juror with any
9 jurisdiction, including the grand jury.

10 THE COURT: Ms. Butler, in your work for the United
11 States Treasury Department, do you ever get involved in
12 litigation?

13 PROSPECTIVE JUROR: No.

14 THE COURT: Are there any social, political, civic,
15 church, professional or other organizations that you are
16 particularly active in?

17 PROSPECTIVE JUROR: I am a member of a church.

18 THE COURT: Thank you.

19 PROSPECTIVE JUROR: My name is Stanley Cooper. I am
20 a lifetime resident of Gwinnett County. I am married. My
21 spouse is currently unemployed. Previously she was in the
22 mortgage industry. We do have two children, ages 20 and 16.
23 The 20-year-old is a college student and also works part time
24 at our local Kroger. Sixteen-year-old is just a high school
25 student.

1 I'm employed by the State of Georgia in the
2 Department of Early Care and Learning for the past five years.
3 Prior to that, I was with the General Motors Acceptance
4 Corporation for 17 years. I do have a Bachelor of Business
5 Administration from Georgia State University. I have never
6 served on a jury or a grand jury.

7 THE COURT: Mr. Cooper, tell me what you do generally
8 for the State of Georgia.

9 PROSPECTIVE JUROR: Okay. I have worked in the
10 finance department as a grant specialist. I administer federal
11 child care grants, also audit those and am responsible for
12 paying employee travel.

13 THE COURT: Are there any social, political, civic,
14 church, professional or other organizations that you are
15 particularly active in?

16 PROSPECTIVE JUROR: Yes, sir. I am active in our
17 church and also a member of the Stone Mountain Harley Owners
18 Group.

19 THE COURT: That's Harley as in motorcycles?

20 PROSPECTIVE JUROR: Yes, sir.

21 THE COURT: Thank you.

22 PROSPECTIVE JUROR: My name is Thomas Valentine. I
23 am a current resident of Fulton County, have been for the last
24 four-and-a-half years; prior to that was in Cincinnati, Ohio,
25 Hamilton County; prior to that was back here in Fulton County.

1 I am married happily for 20-plus years. My spouse currently is
2 a housewife, was formerly in the mortgage finance business. We
3 do have two children, 25 and 11. The 25-year-old is currently
4 seeking employment in the IT world up in Cincinnati.

5 I am self-employed and an entrepreneur as well.
6 Currently we represent -- my company represents third-party
7 logistics companies in solutions. And I also own a men's and
8 women's apparel company as well. Prior to that, being in the
9 logistics business for over ten years, prior to that through
10 the '80s and '90s I was branch manager for a semiconductor
11 distribution company out of California.

12 My educational background, college graduate with a
13 B.S. in marketing and a minor in computer science. And I was
14 chosen for a jury in Columbus, Ohio, years ago but was
15 dismissed because it was a medical case and my father-in-law
16 was at that time a family practitioner. Other than that, I was
17 not chosen for any grand jury.

18 THE COURT: Mr. Valentine, are there any social,
19 political, civic, church, professional or other organizations
20 that you are particularly active in?

21 PROSPECTIVE JUROR: Yes, sir. I am involved in our
22 church, Alpharetta First United Methodist. I head up the
23 Adopt-a-College-Student program, as well as I sit on the board
24 of ACBS which is the Alabama College Stewards Association.

25 THE COURT: Thank you, sir.

1 Ladies and Gentlemen, that completes the first half
2 of the voir dire process. We are going to take a break at this
3 time. During the break, feel free to step out into the
4 hallway, use the facilities. Please do not leave this floor.
5 And don't talk to anybody that you recognize as being involved
6 in the case.

7 When you come back into the courtroom, sit in exactly
8 the same seat that you are in right now. The attorneys may
9 have made their notes in the form of a seating chart, and it'll
10 get everybody confused if y'all start moving around. So you
11 are excused for 15 minutes, and we will resume the trial at
12 that time.

13 Court's in recess for 15 minutes.

14 (A short recess was taken.)

15 THE COURT: Ladies and Gentlemen, next I'm going to
16 ask you some general questions that the attorneys have
17 submitted to me. The reason for doing it this way is so we
18 don't have to ask the same questions to all 35 of you 35
19 different times. These questions are not intended to embarrass
20 you or unduly pry into your personal affairs, but they are
21 designed to give the attorneys the information they think they
22 need to select a jury in the case. If you think that any of
23 the responses to the questions would be unduly embarrassing or
24 prying into your personal affairs, you can ask to answer the
25 question up here at the bench with just me and the attorneys

1 present.

2 What I'm going to ask you to do is if you have an
3 affirmative response to any of these questions, stand up and
4 remain standing until I get your name and get your response to
5 the question. It's very hard to hear in this courtroom, so
6 what I'm going to ask you to do is to wait until you get the
7 portable microphone before you start responding to the
8 questions.

9 You may think it'll speed the process up if you start
10 talking before you get the microphone. Most of the time
11 somebody's not going to hear what you had to say, and you are
12 going to have to repeat it all over again after you get the
13 microphone. And you will see how it works in a few minutes.
14 You will just pass the microphone back among yourselves, and
15 the court security officer will assist you in doing that.

16 Each time that you speak you need to state your name.
17 Before this is over with, you may think we should know your
18 name; and maybe we should. But for the court reporter to get
19 an accurate record of this proceeding, you are going to have to
20 state your name every time that you speak.

21 So what I'm going to ask you to do is if you have an
22 affirmative response, stand up, remain standing until you get
23 the portable microphone, state your name, give your response to
24 the question and then you can -- and any follow-up questions
25 that I may ask, and then you may sit down.

1 All right. Other than Mr. Caldwell obviously, have
2 you or anyone in your close family ever worked for a lawyer or
3 law firm?

4 PROSPECTIVE JUROR: My wife's uncle.

5 THE COURT: You need to give us your name first.

6 PROSPECTIVE JUROR: Justin Haga. Sorry, Your Honor.
7 My name is Justin Haga, and my wife's uncle is a lawyer in the
8 Washington, D.C., area.

9 THE COURT: Thank you, sir.

10 PROSPECTIVE JUROR: Bryan Brown. My sister-in-law is
11 a tax attorney.

12 THE COURT: Thank you, Mr. Brown.

13 PROSPECTIVE JUROR: I'm Cynthia Butler, and I worked
14 for a brief time with an Atlanta lawyer.

15 THE COURT: What kind of law did he practice,
16 Ms. Butler?

17 PROSPECTIVE JUROR: I guess it would be civil. As I
18 stated, I was only there for a short time doing some
19 collections kind of work for him. So...

20 THE COURT: Thank you, ma'am.

21 PROSPECTIVE JUROR: Doris Scales. My significant
22 other is an attorney. He is a criminal attorney and --

23 THE COURT: Give me your name again, please, ma'am.

24 PROSPECTIVE JUROR: Doris Scales. My significant
25 other is an attorney.

1 THE COURT: And he does criminal work did you say?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: Does he do any civil personal-injury type
4 work?

5 PROSPECTIVE JUROR: He does, yes.

6 THE COURT: Do you talk to him about his work?

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: Is there anything about that relationship
9 that makes you think you would not be a fair and impartial
10 juror if you were selected in this case?

11 PROSPECTIVE JUROR: Nothing at all.

12 THE COURT: Thank you very much.

13 PROSPECTIVE JUROR: You are welcome.

14 PROSPECTIVE JUROR: Laura Elledge. My brother-in-law
15 is an attorney, and my husband as a police officer has
16 independently testified for attorneys in the past.

17 THE COURT: Thank you, ma'am.

18 PROSPECTIVE JUROR: Kathleen Sneed. And my dad was a
19 lawyer, but that was before I was born.

20 THE COURT: Thank you, ma'am.

21 PROSPECTIVE JUROR: Excuse me. Cynthia Butler. I
22 worked for the DeKalb County District Attorney's Office as a
23 child support enforcement agent for several years as well.

24 THE COURT: Thank you, Ms. Butler.

25 Have any of you or a member of your immediate family

1 like mother, father, brothers, sisters, wife, husband ever had
2 any training or been employed in the publishing industry; and
3 that would include magazines, books, newspapers, periodicals of
4 any kind?

5 PROSPECTIVE JUROR: In my eighth-grade year I wrote.

6 THE COURT: Name, please.

7 PROSPECTIVE JUROR: Ross Van Zyl. Eighth-grade year
8 I wrote and published a book with Tate Publishing Corporation.

9 THE COURT: Can you tell me generally the subject
10 matter of the book.

11 PROSPECTIVE JUROR: It was a fantasy novel.

12 THE COURT: Thank you.

13 PROSPECTIVE JUROR: James Turner. My wife worked for
14 a magazine, an entertainment magazine, 11th Hour, in Macon.

15 THE COURT: Thank you, sir.

16 PROSPECTIVE JUROR: Michael Page. I co-authored a
17 book that was published by Mercer University Press. And my
18 wife works in the interactive marketing, so they produce
19 websites.

20 THE COURT: What was the subject matter of the book,
21 Mr. Page?

22 PROSPECTIVE JUROR: It's called Sacred Places. It's
23 a guidebook to the Civil Rights Movement here in Atlanta.

24 THE COURT: Thank you, sir.

25 PROSPECTIVE JUROR: Jill Colsson. I worked in

1 advertising for two major daily newspapers, Dallas Times Herald
2 and the Gwinnett Daily News.

3 THE COURT: Thank you.

4 PROSPECTIVE JUROR: Donna Watford. I started a
5 publishing company, and I self-published my book. It's a
6 memoir. It's a spiritual memoir.

7 THE COURT: Thank you, ma'am.

8 PROSPECTIVE JUROR: Michael Caldwell. My father was
9 a newspaper publisher. He was general manager of Scripps
10 Howard Newspapers.

11 PROSPECTIVE JUROR: Donna Watford. I'm sorry. I
12 forgot to mention that I am starting a non-profit. We are
13 looking to start a health care magazine.

14 PROSPECTIVE JUROR: Chuck Kersnick -- Charles
15 Kersnick -- I'm sorry. Years ago I was a manufacturing
16 consultant and worked for Acadia Graphics as a management
17 consultant and interfaced with publishing companies
18 occasionally.

19 THE COURT: Have any of you heard or read anything
20 about an incident in June of 2007 when a professional wrestler
21 named Chris Benoit, B-e-n-o-i-t, murdered his wife and child in
22 their home in Fayette County, Georgia? Any of you heard
23 anything about that?

24 (Jurors stood.)

25 THE COURT: Let's -- y'all can sit down on that side,

1 and I'll go over here on this side and just get your names.

2 PROSPECTIVE JUROR: My name is Sharon Williams, and I
3 followed the case in the news and in the newspaper.

4 THE COURT: Thank you, Ms. Williams.

5 PROSPECTIVE JUROR: James Turner. I am from Fayette
6 County, so I followed it in the local newspaper. And I have a
7 relative who is the sheriff of Fayette County.

8 PROSPECTIVE JUROR: Just following it on the news --

9 THE COURT: Need your name.

10 PROSPECTIVE JUROR: I'm sorry. Lisa Dunn.

11 PROSPECTIVE JUROR: Cyrano Hardy. Just following it
12 on the news and newspaper.

13 PROSPECTIVE JUROR: Karen Fripps. Ditto.

14 PROSPECTIVE JUROR: Doris Scales. Through the media.

15 PROSPECTIVE JUROR: Carltedes Caldwell. Through the
16 news and watching wrestling.

17 PROSPECTIVE JUROR: Chaila Welch. Through the news.

18 PROSPECTIVE JUROR: Jon Wunderlich. Through the
19 news.

20 PROSPECTIVE JUROR: Danielle Rountree. Through the
21 news.

22 THE COURT: Give me your name again, please.

23 PROSPECTIVE JUROR: Danielle Rountree.

24 THE COURT: Thank you, ma'am.

25 PROSPECTIVE JUROR: Jill Colsson. Again, just

1 following it through the news.

2 PROSPECTIVE JUROR: Kathleen Sneed. Through the
3 news.

4 PROSPECTIVE JUROR: Beverly Thomas. Through the
5 news, and then he killed his family.

6 PROSPECTIVE JUROR: Donna Watford. Through the news.

7 PROSPECTIVE JUROR: Donna Thorne. Through the news.

8 PROSPECTIVE JUROR: Andrea Harmon. Through the news.

9 PROSPECTIVE JUROR: Natarish Haylock. Through the
10 news.

11 PROSPECTIVE JUROR: Michael Caldwell. Whatever was
12 on TV.

13 PROSPECTIVE JUROR: Michael Henley. I also followed
14 it through the news.

15 THE COURT: All right. Now on the left side.

16 PROSPECTIVE JUROR: David Goode. Just through the
17 news.

18 PROSPECTIVE JUROR: Ron Richardson. Just through the
19 news.

20 PROSPECTIVE JUROR: Justin Haga. TV and internet
21 news.

22 PROSPECTIVE JUROR: Charles Kersnick. Did not follow
23 it but heard it on the radio.

24 PROSPECTIVE JUROR: Bryan Brown. News.

25 PROSPECTIVE JUROR: Cynthia Butler. Newspaper and

1 television.

2 PROSPECTIVE JUROR: Stanley Cooper. Television news.

3 PROSPECTIVE JUROR: Thomas Valentine. Through the
4 radio and local media.

5 THE COURT: Other than what you have learned in the
6 courtroom this morning, have any of you read or heard anything
7 about this case?

8 (No response.)

9 THE COURT: Ladies and Gentlemen, as I indicated to
10 you earlier, this is a suit against LFP Publishing Company
11 which publishes Hustler Magazine. The nature of the suit is
12 that the Plaintiff is suing to obtain compensation for the
13 magazine's unauthorized publication of photographs of the
14 Plaintiff's daughter and her claim for punitive damages and
15 expenses of litigation and the amount of those if awarded.

16 Are there any of you who have such strong feelings
17 about pornography or the publishers of pornography or the
18 publishers of adult magazines like Hustler that feel you could
19 not be a fair and impartial juror if you were selected in this
20 particular case?

21 Again, just give me your names, please.

22 PROSPECTIVE JUROR: Sharon Williams.

23 PROSPECTIVE JUROR: Ross Van Zyl.

24 PROSPECTIVE JUROR: Jon Wunderlich.

25 PROSPECTIVE JUROR: Jill Colsson.

1 PROSPECTIVE JUROR: Beverly Thomas.

2 PROSPECTIVE JUROR: Lillian Perri.

3 THE COURT: Thank you very much.

4 Other than what you may have heard in the news, did
5 any of you know Nancy Benoit, B-e-n-o-i-t?

6 (No response.)

7 THE COURT: Have any of you participated in a lawsuit
8 whether as a Plaintiff, a Defendant or a witness other than
9 Mr. Caldwell? Anybody been involved in a lawsuit?

10 PROSPECTIVE JUROR: James Turner. I was a witness in
11 a civil lawsuit about a car wreck.

12 THE COURT: A car wreck?

13 PROSPECTIVE JUROR: Yes, sir.

14 THE COURT: Thank you.

15 PROSPECTIVE JUROR: Jon Wunderlich. My ex-wife and I
16 tried to get compensated for an accident that happened at an
17 oral surgeon, and it wasn't accepted by the Court. But we --

18 THE COURT: Did your case go to trial,
19 Mr. Wunderlich?

20 PROSPECTIVE JUROR: Pardon?

21 THE COURT: Did your case go to trial?

22 PROSPECTIVE JUROR: No. It was dismissed under
23 summary judgment, I think.

24 THE COURT: Thank you, sir.

25 PROSPECTIVE JUROR: David Goode. I was a Defendant

1 in an auto accident.

2 THE COURT: Did the case go to trial, Mr. Goode?

3 PROSPECTIVE JUROR: It did not. It settled.

4 THE COURT: Thank you.

5 PROSPECTIVE JUROR: Charles Kersnick. I was a
6 Defendant in a damaging a property case when I was much younger
7 and also in a Defendant being convicted of a DUI.

8 THE COURT: Either of the civil cases go to trial,
9 Mr. Kersnick?

10 PROSPECTIVE JUROR: Jury trial?

11 THE COURT: Yes, sir.

12 PROSPECTIVE JUROR: No jury trial, no.

13 THE COURT: Thank you.

14 PROSPECTIVE JUROR: Stanley Cooper. I was a
15 Defendant in an auto claim. I'm not sure if it went to -- it
16 was handled by my insurance company, so I have no idea if it
17 went to trial or settled. I was also called as a witness in a
18 wrongful-death suit, but that was settled prior to taking the
19 stand.

20 THE COURT: Thank you, sir.

21 PROSPECTIVE JUROR: Michael Shepard. I'm currently
22 in a lawsuit with a car accident, pain and suffering.

23 THE COURT: Are you the person suing or being sued,
24 Mr. Shepard?

25 PROSPECTIVE JUROR: My wife and I are the people

1 suing.

2 THE COURT: For your injuries in a car wreck?

3 PROSPECTIVE JUROR: For our injuries along with three
4 others that were in the car, yes.

5 THE COURT: Thank you, sir.

6 PROSPECTIVE JUROR: Donna Watford. I am currently in
7 a divorce. I'm not sure if that's something I need -- okay.

8 THE COURT: Not interested in divorce cases.

9 All right. Ladies and Gentlemen, my best estimate is
10 it's going to take about three days to try this case. Jury
11 service is almost always inconvenient. If I excused everybody
12 for whom service on this jury is inconvenient, I'd probably
13 send everyone of you out the door. Nevertheless, a jury trial
14 is important. It's so important that our forefathers actually
15 guaranteed the right to jury trial in the Seventh Amendment to
16 the Constitution of the United States.

17 So with that in mind, let me ask you this last
18 question. Are there any of you for whom you think that service
19 on this jury if you were selected would be such a hardship that
20 you ask to be excused?

21 (No response.)

22 THE COURT: Thank you very much.

23 Finally, are there any of you for any reason that
24 feel that you could not be a fair and impartial juror in this
25 case?

1 Mr. --

2 PROSPECTIVE JUROR: Wunderlich.

3 THE COURT: And was that because of the pornography
4 question?

5 PROSPECTIVE JUROR: Yes.

6 THE COURT: Other than the pornography question, are
7 there any of you other than those who responded affirmatively
8 to that question who for other reasons feel that you cannot be
9 a fair and impartial juror?

10 All right.

11 PROSPECTIVE JUROR: Are you talking just the magazine
12 or what is in the magazine?

13 THE COURT: I have already covered the pornography
14 issue. If that's the only reason you are standing, you can sit
15 down. I'm saying for any other reason that you don't think you
16 could be a fair and impartial juror.

17 (No response.)

18 THE COURT: All right. Ladies and Gentlemen, let me
19 ask you to step outside for a minute. There may be a few of
20 you that I ask to come back in and respond to particular
21 matters. But unless you are asked to come back in the
22 courtroom, step out in the hallway and wait there until we tell
23 you to come back in.

24 (Prospective jurors exited the courtroom.)

25 THE COURT: All right. Counsel, we had, I believe,

1 six jurors who said they couldn't be fair in the case because
2 of the pornography issue. How do you want to approach this?
3 Do you want to ask follow-up questions of those jurors? You
4 want me to just excuse those jurors?

5 What's your suggestion, Mr. Decker?

6 MR. DECKER: Judge, I would like to have a shot at
7 trying to rehabilitate those jurors. Obviously, if they can
8 say that they can set aside their personal feelings and listen
9 to the evidence and listen to the judge, then I think they can
10 be rehabilitated. At least we ought to ask them those
11 questions and give them an opportunity. I mean, probably they
12 are going to say they just can't do it; but I still think it's
13 worth the effort to see if they can set aside those feelings
14 and listen to the evidence and listen to the charge.

15 THE COURT: What do you say, Mr. Bauer?

16 MR. BAUER: I was going to go back up, Your Honor,
17 and look at the question you asked. But I think you subsumed
18 in your question the point Mr. Decker just made. You asked
19 them directly if they could be fair and impartial, and they
20 told you they can't. I don't believe they can be rehabilitated
21 if they have already told us that under these circumstances
22 they can't be fair and impartial to the Defendant. We have a
23 large panel to select from, and we think they ought to be
24 excused for cause.

25 THE COURT: With all due respect, Mr. Decker, I think

1 any effort to rehabilitate them is a waste of time; but I am
2 going to let you do it if you insist.

3 MR. DECKER: Well, Judge, I'd like to try. I also
4 think if we can't -- if we have to excuse those people for
5 cause that we are going to need some more jurors. Is that the
6 Court's plan?

7 THE COURT: No.

8 MR. DECKER: Because then that takes us down to --
9 are we going to go with less than 12?

10 THE COURT: No.

11 MR. DECKER: All right. At any rate, I would like to
12 ask the boilerplate questions, Judge, to see if they can set
13 aside those personal feelings and listen to the evidence and
14 listen to the charge.

15 THE COURT: Ask Sharon Williams to step back in the
16 courtroom and seat her right here where I can see her on that
17 front row.

18 (Prospective juror entered the courtroom.)

19 THE COURT: Ma'am, the lawyers may have a couple of
20 follow-up questions for you.

21 PROSPECTIVE JUROR: All right.

22 THE COURT: Mr. Decker?

23 MR. DECKER: Ms. Williams, my name is Richard Decker.
24 I represent Maureen Toffoloni in this case. It is a lawsuit by
25 her on behalf of her daughter's estate against Hustler

1 Magazine, and I heard your response to the Court. My question
2 to you is notwithstanding your personal feelings could you
3 listen to the evidence, listen to the judge's instructions on
4 the law and render a fair and impartial verdict based on the
5 evidence and the testimony notwithstanding your personal
6 feelings? Could you do that?

7 PROSPECTIVE JUROR: I could try. I could try. I
8 can't say -- 'cause my personal feelings are so strong against
9 pornography. I could try to do that, though.

10 THE COURT: Thank you.

11 Have you got any follow-up, Mr. Bauer?

12 MR. BAUER: Ms. Williams, are your views, your
13 personal views that you expressed about pornography based on
14 your religious and philosophical views?

15 PROSPECTIVE JUROR: Yes. And also knowing some lives
16 that have been ruined as a result of internet pornography.

17 MR. BAUER: Thank you. We appreciate your time.

18 PROSPECTIVE JUROR: All right.

19 THE COURT: Ask Mr. Van Zyl to step in, please.

20 (Prospective juror entered the courtroom.)

21 THE COURT: All right, Mr. Decker.

22 MR. DECKER: Good morning, Mr. Van Zyl. As you
23 probably picked up, my name is Richard Decker; and I represent
24 Maureen Toffoloni, the Plaintiff in this case. And we have
25 heard your responses to the judge about the fact that this case

1 is against Hustler Magazine and you for some reason don't think
2 you could be a juror in this case.

3 Can I ask you why you feel that way?

4 PROSPECTIVE JUROR: I have had experiences with
5 pornography, and I find it to be addictive and destructive to
6 certain people. And I just really don't like any part of it at
7 all.

8 MR. DECKER: Okay. And I hear you. And, you know,
9 given that, do you think that in this case as a juror you could
10 set aside your personal feelings, listen to the evidence,
11 listen to the judge's instruction on what the law is and render
12 a fair and impartial verdict based on the evidence and the law
13 and not your personal feelings? Do you think you could do
14 that?

15 PROSPECTIVE JUROR: Honestly, I don't know if I could
16 just because there's a large part of me that just despises the
17 pornography industry. And it's hard -- this is kind of buried
18 too deep for me to kind of separate myself from it.

19 MR. DECKER: All right. Thank you.

20 THE COURT: Mr. Bauer, any questions?

21 MR. BAUER: None, Your Honor.

22 THE COURT: Thank you, sir.

23 If you will ask Mr. Wunderlich to step in.

24 (Prospective juror entered the courtroom.)

25 THE COURT: Mr. Decker?

1 MR. DECKER: Good morning. My name is Richard
2 Decker. I think you've probably picked up on that. And I
3 represent the Plaintiff, Maureen Toffoloni.

4 We heard your response to the judge's questions about
5 being able to serve as a juror in this case, and I think you
6 said you thought that you could not do so.

7 Can you tell me why you feel that way?

8 PROSPECTIVE JUROR: Can we approach the bench and
9 talk about this?

10 MR. DECKER: Sure. Can we do that, Your Honor?

11 THE COURT: Sir, it's going to take a whole lot of
12 time.

13 Let me ask you this. Can you set aside any personal
14 feelings that you may have and decide the case based strictly
15 on the evidence and my instructions to you on the law, or do
16 you feel that you have had some personal experience or feelings
17 that would make it just impossible for you to be a fair and
18 impartial juror?

19 PROSPECTIVE JUROR: I have had some profound personal
20 experiences that would prevent me from being a fair juror here.

21 THE COURT: Any follow-up, Mr. Bauer?

22 MR. BAUER: No, Your Honor.

23 THE COURT: Thank you, sir.

24 Ask Ms. Colsson to step in, please.

25 (Prospective juror entered the courtroom.)

1 THE COURT: Ms. Colsson, the lawyers have some
2 follow-up questions for you on one subject.

3 PROSPECTIVE JUROR: Okay.

4 MR. DECKER: Hi, Ms. Colsson. Richard Decker for the
5 Plaintiff.

6 We've heard your answer to the judge about serving as
7 a juror in this case. Could you tell me briefly why you feel
8 that way.

9 PROSPECTIVE JUROR: I guess when he asked the
10 question I just felt like I might have a hard time being
11 unbiased based on the way I feel about that magazine and that
12 industry.

13 MR. DECKER: Okay. And given that, do you think that
14 you could set aside your personal feelings as a juror and set
15 aside your personal feelings and listen to the evidence and
16 listen to the judge's instructions on what the law is and
17 render a verdict based on the evidence and the law and setting
18 your personal feelings aside? Do you think you could do that?

19 PROSPECTIVE JUROR: I'd like to think that I could.
20 But, you know, I think setting your personal feelings aside,
21 you know, is easier said than done sometimes. But, yeah, I
22 would like to think that I could do that.

23 MR. DECKER: Okay. Thank you.

24 THE COURT: Follow-up, Mr. Bauer?

25 MR. BAUER: Ms. Colsson, do you think it would be

1 difficult for you to do that?

2 PROSPECTIVE JUROR: It's just hard for me to say. I
3 mean, I want to try to give a straightforward, honest answer to
4 you folks. But I -- I mean, I'd like to think that I could do
5 that. But I just wanted to be honest and upfront that I think
6 it could be a challenge.

7 MR. BAUER: You are not certain?

8 PROSPECTIVE JUROR: Right.

9 MR. BAUER: Thank you. One more question for you.

10 Are the feelings that you have expressed about my
11 client's magazine and that industry in general, are your
12 feelings about that defined by your religious views or your
13 philosophical views?

14 PROSPECTIVE JUROR: I would say so, yes.

15 MR. BAUER: Thank you very much.

16 PROSPECTIVE JUROR: Uh-huh.

17 THE COURT: All right. Ask Ms. Beverly Thomas to
18 step in.

19 (Prospective juror entered the courtroom.)

20 THE COURT: Ms. Thomas, the lawyers have some
21 follow-up questions they may want to ask you on one subject.

22 MR. DECKER: Hello, Ms. Thomas. My name is Richard
23 Decker. I represent Maureen Toffoloni.

24 We heard your answer to the judge's question about
25 being able to serve as a juror in this case. Can you tell me

1 briefly why you think that you could not be a juror in this
2 case.

3 PROSPECTIVE JUROR: I could be a juror, but I know
4 already the way I'd vote is what I'm saying.

5 MR. DECKER: Do you think --

6 PROSPECTIVE JUROR: I am a grandmother of three
7 little girls.

8 MR. DECKER: Do you think you could set aside your
9 personal feelings --

10 PROSPECTIVE JUROR: No. I'm very strong.

11 MR. DECKER: Okay. All right. Thank you.

12 PROSPECTIVE JUROR: I'm one of the oldest on the
13 jury. I couldn't help but noticing that.

14 MR. DECKER: I noticed that too. Thank you.

15 PROSPECTIVE JUROR: Thank you.

16 THE COURT: Any questions, Mr. Bauer?

17 MR. BAUER: No, Your Honor. Thank you.

18 THE COURT: All right. Ask Ms. Lillian Perri to step
19 in, please.

20 (Prospective juror entered the courtroom.)

21 THE COURT: Ms. Perri, the lawyers may have some
22 follow-up questions for you on one subject.

23 MR. DECKER: Hello, Ms. Perri. Richard Decker for
24 the Plaintiff, Maureen Toffoloni.

25 We heard your comments about jury service in this

1 case. Could you tell me briefly why you feel you might have a
2 hard time being a juror.

3 PROSPECTIVE JUROR: Well, I am predisposed against
4 pornographic magazines. I just think it's wrong.

5 MR. DECKER: Do you think that you could -- given
6 what you said -- and I hear you -- do you think that you could
7 set aside your personal feelings if you were selected as a
8 juror and listen to the evidence and listen to the judge's
9 instructions as to the law and render your decision based on
10 those things setting aside your personal feelings?

11 PROSPECTIVE JUROR: No, I can't.

12 MR. DECKER: Okay. Thank you.

13 THE COURT: Questions, Mr. Bauer?

14 MR. BAUER: No, Your Honor.

15 THE COURT: Thank you, ma'am.

16 All right. Between the combination of the written
17 questionnaire, between the voir dire, between the individual
18 questioning of jurors who think they have problems, I think
19 everybody has all the information you need to pick a jury in
20 this case.

21 Either of you have any additional follow-up questions
22 that you want me to ask of any individual jurors?

23 MR. BAUER: Your Honor, particularly with respect to
24 the folks that answered the written questionnaire and said they
25 had never seen a Hustler Magazine before, we think it would be

1 appropriate for the Court to follow up and ask them if they
2 would have difficulty viewing images that were taken from the
3 magazine as part of their service. That question hasn't been
4 asked I don't believe.

5 THE COURT: Well, I think I got close enough to it,
6 Mr. Bauer, in asking about the pornography and publishers of
7 pornography. So I'm not going to do that.

8 MR. BAUER: All right. Thank you, Your Honor.

9 MR. DECKER: Judge, I had requested and would again
10 request the Court to ask the jurors their general feelings
11 about litigation and if they are just religiously or morally
12 opposed to litigation in general and punitive damages in
13 particular.

14 THE COURT: I don't think I'm going to ask that,
15 Mr. Decker.

16 MR. BAUER: One more question, Your Honor. Can we
17 safely assume that the six that we have just attempted to
18 rehabilitate are going to be excused for cause?

19 THE COURT: Well, we are going to address that right
20 now.

21 Mr. Decker, any challenges for cause?

22 MR. DECKER: No, Your Honor.

23 THE COURT: Mr. Bauer, any challenges for cause?

24 MR. BAUER: Well, certainly to each of the six that
25 we just saw. And if you will give me one moment, I will tell

1 you if there are any others.

2 Your Honor, our Juror Number 3, Michael Wayne
3 Shepard, who disclosed that he is a Plaintiff in a lawsuit
4 right now seeking emotional distress damages and physical
5 injuries damages, we would like to have him come back in and
6 just ask him whether he feels like he can be fair to both sides
7 in a civil lawsuit under those circumstances.

8 THE COURT: All right. Ask Mr. Michael Shepard to
9 step back in, please.

10 (Prospective juror entered the courtroom.)

11 THE COURT: Mr. Shepard, the lawyers may have some
12 follow-up questions for you on one subject.

13 PROSPECTIVE JUROR: Okay.

14 MR. BAUER: Mr. Shepard, I'm Derek Bauer. I am here
15 for the Defendant. I wanted to ask you a question.

16 You did at the end of the last session tell the Court
17 you are currently a Plaintiff along with your wife in a
18 lawsuit, civil lawsuit seeking damages for physical injuries.
19 Will you be seeking some emotional distress-type recovery as
20 well?

21 PROSPECTIVE JUROR: Pain and suffering.

22 MR. BAUER: Under those circumstances, do you think
23 in a civil lawsuit such as this one you can be fair to both
24 sides? Are you predisposed to the Plaintiff given your current
25 stature?

1 PROSPECTIVE JUROR: I'm just talking honestly and
2 openly if that's okay.

3 MR. BAUER: We appreciate that.

4 PROSPECTIVE JUROR: Okay. It goes a bit deeper than
5 that simply because my wife tried to commit suicide just after
6 the accident for pain and suffering, so it's a much deeper dive
7 into it. And under those circumstances, I mean, on the outside
8 I don't think that -- well, I'm getting emotional now. So I
9 don't know how to answer the question, you know, without being
10 involved with the case.

11 Openly like right when I first came in here I didn't
12 even think about it, but now that you are talking about it
13 right now it's kind of emotionally hitting me because of what
14 happened afterwards.

15 MR. BAUER: I understand, and I appreciate your
16 honesty.

17 Do you think you will have difficulty under these
18 circumstances reviewing the case from the side of the defense?

19 PROSPECTIVE JUROR: I think it's possible that I
20 will.

21 MR. BAUER: Okay. Thank you for that. Appreciate
22 it.

23 THE COURT: Thank you, sir.

24 PROSPECTIVE JUROR: Is that all?

25 THE COURT: That's it.

1 All right. Mr. Bauer, any challenges for cause?

2 MR. BAUER: Your Honor, we would like to strike
3 Mr. Shepard for cause as well.

4 THE COURT: What do you say, Mr. Decker?

5 MR. DECKER: Judge, I don't think he is there. I
6 don't think he disqualified himself at all. I mean, I think
7 that he said he would try to be impartial.

8 THE COURT: All right. I'm going to excuse Juror
9 Number 1 for cause based on the answer to the pornography
10 question.

11 I'm going to excuse Juror Number 2 for cause based on
12 the answer to the pornography question.

13 I'm going to excuse Juror Number 3 based on his
14 response to Mr. Bauer's question about being involved in a
15 lawsuit.

16 I'm going to excuse Juror Number 14 based on his
17 answer to the pornography question.

18 I'm going to excuse Juror Number 17 based on her
19 answer to the pornography question, excuse Juror Number 19
20 based on her answer to the pornography question, excuse Juror
21 Number 22 based on her answer to the pornography question.

22 According to my count, that leaves us with 28 jurors.
23 I can give -- again, check my math -- but I can give each side
24 eight strikes and we will have 12 jurors, I think.

25 Anybody think differently?

1 MR. BAUER: No, Your Honor. Your math is good.

2 THE COURT: Okay. Y'all need some time to decide on
3 your strikes?

4 MR. DECKER: Yes, sir.

5 THE COURT: All right. We will be in recess until
6 12:15. We will bring the jurors back in, pick the jury. And
7 I'll probably give them their preliminary instructions before I
8 send them to lunch, and then we will proceed with opening
9 statements after lunch.

10 Court's in recess until 12:15.

11 (A short recess was taken.)

12 THE COURT: Ready, Mr. Decker?

13 MR. DECKER: Yes, sir.

14 THE COURT: Ready, Mr. Bauer?

15 MR. BAUER: Yes, Your Honor.

16 THE COURT: All right. Each side has eight strikes.
17 You can -- and, Ladies and Gentlemen, whether you are selected
18 on this jury or not you are going to get a lunch break. I know
19 it's about that time, but I really want to get the jury
20 selected before we take a lunch break.

21 All right. You can exercise your strikes by calling
22 out the juror number on the left. Each side will strike
23 alternately until we have selected the jury.

24 Mr. Decker?

25 MR. DECKER: Your Honor, Number 5.

1 THE CLERK: Plaintiff strikes Number 5.
2 MR. BAUER: Your Honor, we strike Number 9.
3 THE CLERK: Defendants strike Number 9.
4 MR. DECKER: Number 27.
5 THE CLERK: Plaintiff strikes Number 27.
6 MR. BAUER: Number 21, Your Honor.
7 THE CLERK: Defendants strike Number 21.
8 MR. DECKER: 29.
9 THE CLERK: Plaintiff strikes Number 29.
10 MR. BAUER: Number 11, Your Honor.
11 THE CLERK: Defendants strike Number 11.
12 MR. DECKER: Number 8.
13 THE CLERK: Plaintiffs strike Number 8.
14 MR. BAUER: Number 12.
15 THE CLERK: Defendants strike Number 12.
16 MR. DECKER: Number 6.
17 THE CLERK: Plaintiff strikes Number 6.
18 MR. BAUER: Number 20.
19 THE CLERK: Would you repeat the number, please.
20 MR. BAUER: Number 20.
21 THE CLERK: Defendant strikes Number 20.
22 MR. DECKER: Number 24.
23 THE CLERK: Plaintiff strikes Number 24.
24 MR. BAUER: Number 25.
25 THE CLERK: Defendant strikes Number 25.

1 MR. DECKER: Number 32.

2 THE CLERK: Plaintiff strikes Number 32. You have
3 one strike remaining.

4 MR. BAUER: Number 33.

5 THE CLERK: Defendant strikes Number 33. You have
6 one strike remaining.

7 MR. DECKER: Number 26.

8 THE CLERK: Plaintiff strikes Number 26.

9 MR. BAUER: Number 30.

10 THE CLERK: Defendants strike Number 30.

11 Ladies and Gentlemen, as I call your name if you will
12 make your way to the jury box the court security officer will
13 assist you in reaching your seat. You do not need to stay in
14 order as I call your name. Gather any personal items that you
15 have with you as you make your way to the jury box.

16 James Turner, Lori Coonce, Carltedes Caldwell, Laura
17 Elledge, Danielle Rountree, Michael Page, Kathleen Sneed, Donna
18 Thorne, David Goode, Charles Kersnick, Stanley Cooper, Thomas
19 Valentine.

20 THE COURT: Counsel, is this the jury you selected?

21 MR. DECKER: Yes, Your Honor.

22 MR. BAUER: Yes, Your Honor.

23 THE COURT: Any motions, specifically any Batson-type
24 motions?

25 MR. DECKER: None from the Plaintiff, Your Honor.

1 MR. BAUER: None from Defendant.

2 THE COURT: All right. Ladies and Gentlemen, those
3 of you who were not selected to serve on the jury, we
4 appreciate your participation in the process and your patience.
5 Those of you who were not selected, you are excused. You do
6 not have to go back to the 22nd floor unless you have got
7 questions. You do need to call in tonight as usual and get
8 your instructions.

9 Thank you very much. You are excused.

10 (Unselected jurors exited the courtroom.)

11 THE CLERK: Ladies and Gentlemen, if you will please
12 stand and raise your right hand.

13 (Jurors placed under oath by the clerk.)

14 THE CLERK: Thank you.

15 THE COURT: Ladies and Gentlemen, we are going to
16 take a lunch break now. During the break, don't discuss the
17 case with anyone. Don't allow anyone to discuss the case in
18 your presence. Don't even begin discussing the case among
19 yourselves yet. After the lunch break, I'm going to give you
20 some brief preliminary instructions. Then the lawyers will
21 make their opening statements, and then we will begin the
22 witnesses and evidence in the case this afternoon.

23 As I said, we think the case is going to take about
24 three days. We will start at 9:30 in the morning, take a
25 morning break at about 11:00 for 15 minutes, take a lunch break

1 usually sometime between 12:15 and 12:30 until 1:30, take an
2 afternoon break around 3:00 for 15 minutes, maybe take a
3 shorter break later in the afternoon depending on how things
4 are going, and we will adjourn every day somewhere between 5:00
5 and 5:30 so you won't be having to stay here late or anything.

6 So if you will go with the court security officer, he
7 will show you how to get to your jury room, show you where to
8 go for lunch and, most importantly, show you how to get back
9 where you are supposed to be; and we will resume the trial
10 after the lunch break. You are excused until 1:45 for lunch.

11 (Jury exited the courtroom.)

12 THE COURT: How long you think you need for opening
13 statements, Mr. Decker?

14 MR. DECKER: About 20 minutes, Your Honor.

15 THE COURT: Mr. Bauer?

16 MR. BAUER: Same or less.

17 THE COURT: Each side will have 20 minutes for
18 opening statements.

19 Anything else before we take our lunch break?

20 MR. DECKER: Nothing, Your Honor.

21 THE COURT: All right. We will be in recess until
22 1:45 for lunch.

23 (A lunch recess was taken.)

24 THE COURT: We're ready for the jury.

25 (Jury entered the courtroom.)

1 THE COURT: Y'all go ahead and be seated.

2 Ladies and Gentlemen, you have now been sworn as the
3 jury to try this case. By your verdict, you will decide the
4 disputed issues of fact. I will decide all questions of law
5 and procedure that arise during the trial. And before you
6 retire to the jury room at the end of the trial to deliberate
7 upon your verdict and decide the case, I will explain to you
8 the rules of law that you must follow and apply in making your
9 decision.

10 The evidence presented to you during the trial will
11 primarily consist of the testimony of the witnesses and
12 tangible items, including papers or documents, called exhibits.
13 You should pay close attention to the testimony because it will
14 be necessary for you to rely upon your memories concerning what
15 the testimony was.

16 Although as you can see the court reporter is making
17 a stenographic record of everything that is said, typewritten
18 transcripts will not be prepared in sufficient time or
19 appropriate form for your use during your deliberations; and
20 you should not expect to receive them. On the other hand, any
21 exhibits admitted in evidence during the trial will be
22 available to you for detailed study if you wish during your
23 deliberations. So if an exhibit is received in evidence but is
24 not fully read or shown to you at the time, don't be concerned
25 because you will get to see and study it later during your

1 deliberations.

2 If you would like to take notes during the trial, you
3 may do so. On the other hand, you are not required to take
4 notes, of course, if you do not want to. That will be left up
5 to each of you individually. If you do decide to take notes,
6 do not try to write everything down because you will get so
7 involved in note-taking that you might become distracted from
8 the ongoing proceedings. Just make notes of names or dates and
9 places, things that might be difficult to remember. Also, your
10 notes should be used only as aids to your memory. And if your
11 memory should later differ from your notes, you should rely
12 upon your memory and not your notes.

13 If you do not take notes, you should rely upon your
14 own independent recollection or memory of what the testimony
15 was; and you should not be unduly influenced by the notes of
16 other jurors. Notes are not entitled to any greater weight
17 than the recollection or impression of each juror concerning
18 what the testimony was.

19 During the trial, you should keep an open mind and
20 should avoid reaching any hasty impressions or conclusions.
21 Reserve your judgment until you have heard all of the testimony
22 and evidence, the closing arguments or summations of the
23 lawyers and my instructions or explanations to you concerning
24 the applicable law. Because of your obligation to keep an open
25 mind during the trial coupled with your obligation to then

1 decide the case only on the basis of the testimony and evidence
2 presented, you must not discuss the case during the trial in
3 any manner among yourselves or with anyone else; nor should you
4 permit anyone to discuss it in your presence.

5 And you should avoid reading any newspaper articles
6 that might be published about the case. I don't know whether
7 there will be any; but if there are, you should avoid reading
8 them.

9 You should also avoid seeing or hearing any
10 television or radio comments about the trial. Again, I don't
11 know whether there will be any; but if there are, you should
12 avoid them.

13 From time to time during the trial, I may be called
14 upon to make rulings of law on objections or motions made by
15 the lawyers. You should not infer or conclude from any ruling
16 or other comment I may make that I have any opinions on the
17 merits of the case favoring one side or the other. And if I
18 should sustain an objection to a question that goes unanswered
19 by a witness, you should not guess or speculate what the answer
20 might have been; nor should you draw any inferences or
21 conclusions from the question itself.

22 During the trial, it may be necessary for me to
23 confer with the lawyers from time to time out of your hearing
24 with regard to questions of law or procedure that require
25 consideration by the Court or judge alone. On some occasions,

1 you may be excused from the courtroom for the same reason. I
2 will try to limit these interruptions as much as possible, but
3 you should remember the importance of the matter you are here
4 to determine and should be patient even though the case may
5 seem to go slowly.

6 The order of the trial's proceedings will be as
7 follows. In just a moment the lawyers for each of the parties
8 will be permitted to address you in turn and make what we call
9 their opening statements. The Plaintiff will then go forward
10 with the calling of witnesses and presentation of evidence
11 during what we call the Plaintiff's case in chief. When the
12 Plaintiff finishes by announcing rest, the Defendant will
13 proceed with witnesses and evidence, after which within certain
14 limitations the Plaintiff may be permitted to again call
15 witnesses or present evidence during what we call the rebuttal
16 phase of the trial. The Plaintiff proceeds first and may rebut
17 at the end because the law places the burden of proof or burden
18 of persuasion upon the Plaintiff as I will further explain to
19 you as a part of my final instructions.

20 When the evidence portion of the trial is completed,
21 the lawyers will then be given another opportunity to address
22 you and make their summations or final arguments in the case,
23 after which I will instruct you on the applicable law and you
24 will then retire to deliberate upon your verdict.

25 Now we will begin by affording the lawyers for each

1 side an opportunity to make their opening statements in which
2 they may explain the issues in the case and summarize the facts
3 they expect the evidence will show. I caution you that the
4 statements that the lawyers make now, as well as the arguments
5 they present at the end of the trial, are not to be considered
6 by you either as evidence in the case or as your instruction on
7 the law. Nevertheless, these statements and arguments are
8 intended to help you understand the issues and the evidence as
9 it comes in as well as the positions taken by both sides.

10 So I ask that you now give the lawyers your close
11 attention as I recognize them for purposes of opening
12 statements.

13 Mr. Decker, you wish to make an opening statement on
14 behalf of the Plaintiff?

15 - - -

16 OPENING STATEMENTS

17 - - -

18 MR. DECKER: Yes, Your Honor. May it please the
19 Court.

20 Good afternoon again, Ladies and Gentlemen. I want
21 to first begin by thanking you for your attention during the
22 jury selection process. It can be a boring process. But it's
23 necessary, something we have to go through, and I appreciate
24 your attention to that.

25 I'd like to remind all of you in case some of you may

1 have forgotten my name is Richard Decker -- some people call me
2 Rick -- and I represent the Plaintiff in this case,
3 Mrs. Maureen Toffoloni, who is seated there at counsel table
4 with me.

5 Assisting me today are Ed Hallman and Cathy Sims who
6 are in the second table. And over there, the gentleman, the
7 big guy in the blue coat is Paul Toffoloni, Mrs. Toffoloni's
8 husband.

9 As Judge Thrash just told you, at this stage of the
10 trial of the case the Court allows the lawyers for each side to
11 make an opening statement. And while it is not evidence, what
12 I'm telling you is not evidence, it is instead my opportunity
13 to outline the case for you and to tell you what I think is
14 going to happen and how the evidence is going to unfold over
15 the next couple of days. I don't anticipate this being a
16 lengthy case because one of the things I am going to tell you
17 in a minute. But we will have some evidence, and we will go
18 over that in a little bit of detail over the next day and a
19 half or so.

20 Mrs. Toffoloni is the administrator of her deceased
21 daughter's estate. In Georgia like some other states, if you
22 die without a will the person who is selected to wind up your
23 affairs is called an administrator. If you leave a will, that
24 person is usually called an executor. But if you die without a
25 will, the person in our state is called an administrator. I

1 think that's even been changed more recently to be called
2 personal representative.

3 At any rate, Mrs. Toffoloni is the administrator or
4 personal representative of her daughter, her deceased daughter
5 Nancy Benoit's estate. And she is the person bringing this
6 lawsuit on behalf of the estate, not for herself, not for her
7 own person but in her official capacity as the administrator of
8 the estate.

9 This is a lawsuit by Mrs. Toffoloni as administrator
10 against something called LFP Publishing Group, LLC, doing
11 business as Hustler Magazine. And what all that means is is
12 that there's a company that owns and that does business as
13 Hustler which is in turn owned as the evidence will be 100
14 percent by a person by the name of Larry Flynt. And that
15 entity doing business as Hustler Magazine is the Defendant in
16 this case.

17 This lawsuit has been brought by Mrs. Toffoloni as
18 the administrator of her daughter's estate because of
19 photographs that Hustler published of Nancy about seven months
20 after her death, nude photographs that had been taken 23, 24
21 years ago that Hustler published in its so-called March 2008
22 edition without consent, without permission, without even
23 attempting to get the authority from the estate to do that.
24 And that is the basis of this lawsuit that Mrs. Toffoloni filed
25 in February of 2008.

1 Now, I'd like to get one thing out of the way here at
2 the very beginning; and that is before I go any further -- and
3 that is something I believe Judge Thrash will talk to you
4 further about in his concluding remarks. But what I'd like to
5 tell you now is that it has already been decided as a matter of
6 fact and as a matter of law that Hustler is liable to the
7 estate for having published these photographs without
8 permission. The question of legal responsibility, of
9 liability, that's already been decided. So you are not going
10 to have to decide as a part of your duty in this case if
11 Hustler is liable to the estate for having done this, for
12 having published these photographs without permission back in
13 its March 2008 edition because that issue has already been
14 decided by the Court. And that's not going to be a part of
15 your responsibility.

16 Let me say that another way. The Defendant has
17 already been found legally responsible to the estate of Nancy
18 Benoit for publishing the photographs without permission.
19 That's already been decided.

20 Your duty in this case as the jurors in this case
21 will be to listen to the evidence, to consider the documents
22 and to award the appropriate amount of compensatory damages to
23 the estate for this violation of what is called the right of
24 publicity which is an aspect and an offshoot of the right of
25 privacy. But it's the right of a person and if that person's

1 dead that person's estate to control the use of their image by
2 others for commercial purposes. And so Hustler having already
3 been found liable for violation of Nancy Benoit's and her
4 estate's right of publicity, you are now going to be called
5 upon to listen to the evidence and to award the appropriate
6 amount of damage for Hustler having done that.

7 Now, there are two other claims that go to make up
8 this entire lawsuit and the first being compensatory damages,
9 what are the proper, the appropriate amount of compensatory
10 damages to be awarded, but also whether and how much punitive
11 damages should be awarded against Hustler to punish them and to
12 deter them from doing this again to somebody else in the future
13 and also the legal expenses incurred by the estate in pursuing
14 this claim over these last three years.

15 So let me say it again. Your duty will be to
16 determine compensatory damages, whether and how much there
17 should be an award of punitive damages and whether and how much
18 there should be an award of expenses of litigation. You will
19 not be asked to decide if Hustler did something wrong because
20 that's already been decided.

21 So with respect to what you will be asked to decide,
22 I will tell you that the evidence will be that at the time of
23 her death in or about June of 2007 Nancy -- and I call her
24 Nancy because I feel like I know her; I have represented her
25 mother for the last three years -- Nancy was a wife. She was a

1 mother of an eight-year-old boy. And she was the manager of
2 her husband's pretty famous -- if you are a wrestling fan --
3 career. But she was not in public life.

4 She had been a swimsuit model, a small-time swimsuit
5 model. She had been a woman wrestler. She had been what they
6 call in the wrestling world a diva who is on the sidelines of
7 the ring and interacts with the wrestlers and has this ongoing
8 soap-opera-type saga. She had done all those things, started
9 out at the very bottom and risen fairly high in the wrestling
10 world. But at the time of her death in June of 2007 she was
11 not in public life. She was a wife, a mother and the manager
12 of her husband's career.

13 The evidence will be, Ladies and Gentlemen, that
14 earlier in her life she had posed many times in swimsuits, in
15 wrestling garb, in evening wear as a part of her career but
16 never in the nude except for this one time when she was barely
17 20 years old and she was married to a man by the name of Jim
18 Daus. She allowed herself to be talked into posing nude for a
19 small-time disc jockey and photographer down in Orlando,
20 Florida, by the name of Mark Samansky.

21 Mark Samansky was originally a Defendant in this
22 case. He was sued along with Hustler Magazine when these
23 photos came out 23 years later, but Mark Samansky filed
24 bankruptcy immediately after the lawsuit was filed, and so the
25 case could not go forward against him. Then about a month ago

1 he died, and so he will not be testifying in this case. And
2 the case proceeds against Hustler Magazine for having published
3 the photographs in its March 2008 edition. And that's why
4 Samansky, the photographer, is not here.

5 But let's go back, back to Orlando in about 1984.
6 Nancy was married to Jim Daus. She was just starting out her
7 career. She didn't know if she wanted to be a model. She
8 didn't know if she wanted to get into professional wrestling.
9 She didn't know exactly what she wanted to do. She had been in
10 some bikini contests. She was a beautiful young woman. She
11 had been in some bikini contests. She had been in some wet
12 T-shirt contests down in the Orlando area that this Mark
13 Samansky had organized at the various bars down in that area.

14 And it was on one night when she and her husband Jim
15 Daus had had too much to drink they went over to Samansky's
16 house, and she posed in the nude. The idea was that she was
17 going to maybe submit these to Penthouse, maybe to Playboy to
18 jump-start her career like a lot of aspiring young actresses or
19 models do. But the evidence will be -- and Hustler does not
20 contest this -- the evidence will be that almost immediately
21 she changed her mind. Almost the next day, if not the day
22 after, she changed her mind.

23 And she and her husband called this Mark Samansky
24 person and said, We're not going in that direction with my
25 career. Destroy the photographs. Destroy everything. We

1 don't want to submit those to anybody. We're not going that
2 way.

3 And he told them that he did. The evidence is
4 undisputed -- undisputed Nancy never gave her consent and never
5 signed a release for those photographs to be used in any way
6 and, in fact, asked that the photographs and the negatives be
7 destroyed.

8 Twenty-three, twenty-four years later Nancy is
9 married to Chris Benoit, big-time wrestler. They have a little
10 boy Daniel, eight years old. They are living in this house in
11 Fayette County. She -- Chris is a pretty famous wrestler if
12 you are a wrestling fan. She takes care of the house. She
13 takes care of Daniel. She takes care of his business.
14 Wrestlers are independent contractors with the organization
15 they work for, and so she managed his career.

16 For reasons that no one really knows -- and I think
17 most of you, if not all of you, stood up when you were asked
18 about this -- for reasons that none of us understand and no one
19 really knows, on or about June the 22nd, 2007, Chris killed
20 Nancy, killed their little boy and then killed himself in their
21 home in Fayette County. Seven months later -- and, of course,
22 that was big news. I mean, you all heard about her. Most of
23 you heard about it. Seven months later Hustler Magazine comes
24 out with these photographs that had been taken 24 years ago
25 which Nancy thought had been destroyed which she asked that

1 they be destroyed.

2 It turns out obviously that Samansky did destroy the
3 photographs, but he did not destroy a videotape that he had
4 been making during the photo shoot. And he took stills -- he
5 extracted still photographs from the video and sold them to
6 Hustler, and they published them in what they call their March
7 2008 edition. The evidence will be it actually came out in
8 early January. It's labeled March of 2008, but it actually hit
9 the newsstands in early January.

10 As I told you earlier, I'll tell you one more time,
11 there's no dispute that Hustler did not have the legal right to
12 publish those photographs. They did not seek permission. They
13 did not get permission. They did not ask for a release. They
14 did not get a release. They just went ahead and did it, and
15 they have been found legally responsible and were legally
16 liable for doing that. It is a violation of the right of
17 publicity which is an aspect of privacy that everyone has to
18 control their own image against the commercial use by other
19 people of their image. We have all got that right, and that is
20 what Hustler was found to have violated.

21 So I said your duties in this case will be to
22 consider the evidence and to award the appropriate amount of
23 compensatory damages. The evidence will be from Hustler's own
24 records which you will have in evidence to consider that
25 Hustler made a significant amount of money off --

1 MR. BAUER: Objection, Your Honor. I hate to object
2 during his opening, but relevance. We have covered that
3 ground. That's not the measure of damages in this case, and
4 Mr. Decker knows that.

5 THE COURT: What do you say, Mr. Decker?

6 MR. DECKER: Your Honor, that's a quote from your
7 opinion.

8 THE COURT: I sustain the objection.

9 MR. DECKER: The evidence will be that these images
10 have been published in Hustler Magazine. They are on the
11 internet. You can see them today if you were of a mind to do
12 so. They are still out there. It's continuing. The violation
13 is continuing.

14 The evidence will be that Mrs. Toffoloni would never
15 have allowed Hustler to publish these images if she had been
16 given the right as she should have been given the right to
17 express her desires on that subject.

18 And I'll tell you upfront, Ladies and Gentlemen, as
19 part of our case we are going to be required to introduce into
20 evidence the cover, the table of contents and the article
21 itself so that you can see -- you will see exactly what
22 happened and what Hustler published, and I apologize in advance
23 for having to do that. But the evidence will be that because
24 Mrs. Toffoloni would never have allowed that to happen Hustler
25 never even asked for permission and just went ahead and did it

1 knowing that they would not get permission from her mother,
2 from her estate. And the evidence will be that Hustler
3 arrogantly did not ask for permission. They published these
4 24-year-old images for their own financial gain and let the
5 chips fall where they may.

6 The evidence will also be, Ladies and Gentlemen, that
7 as soon as Mrs. Toffoloni found out about this she immediately
8 contacted me. I immediately contacted Hustler, wrote them a
9 letter dated January the 16th, 2008, which you will see which
10 is Plaintiff's Exhibit Number 1 which will be in evidence and
11 told them that they did not have the right to publish these
12 photographs, not to do it, if they did do it to stop doing it;
13 but they refused, arrogantly refused and went ahead. And the
14 magazine was on the newsstands for at least until a time in
15 February of 2008 when it came off sale, but it's still on the
16 internet presumably forever.

17 In my experience, Ladies and Gentlemen, one of the
18 hard things about being a juror is that you don't get to ask
19 questions of the witnesses. You just have to sit there and
20 listen to the lawyers ask the questions. And there are
21 frequently sometimes questions that you want to know the answer
22 to that nobody asks; and I can't guarantee you that I will ask
23 all of them, but I will do my best to ask most of them.

24 In this case, you will see from the evidence that
25 Hustler published these images without permission for its own

1 financial gain and needs to pay damages and to be punished
2 appropriately; and that is what we will be asking you to do in
3 this case.

4 Thank you.

5 THE COURT: Mr. Bauer, you wish to make an opening
6 statement on behalf of the Defendant?

7 MR. BAUER: Yes, Your Honor.

8 Good afternoon. May it please the Court, Ladies and
9 Gentlemen of the Jury.

10 This case is not about whether Hustler asked for
11 permission or not. It's about why Hustler Magazine didn't ask
12 for permission but, more importantly, why Hustler Magazine
13 didn't think it needed to ask permission. It's not about
14 pornography. It's not about Larry Flynt. It's not about
15 arrogance. It's not about Hustler Magazine and anything you
16 have ever heard about it.

17 This is a very limited case. There are only two
18 issues. And the first issue is why did Hustler Magazine, why
19 did the editors of Hustler Magazine not believe that they
20 needed to go ask Mrs. Toffoloni's permission to publish images
21 of Nancy Benoit, a public figure, a celebrity who is the
22 subject of massive news and media coverage in a news article
23 published in its magazine just like almost every other media
24 organization in the world. This was an international story.

25 During our voir dire, during jury selection, Judge

1 Thrash referenced to you the importance of the Seventh
2 Amendment, the constitutional right to a jury trial. Well, the
3 First Amendment comes first. It's the very first one in there,
4 and that's the world the editors of Hustler Magazine operate
5 in. That's the world -- that's the context in which you are
6 going to be asked to judge whether they believed that they had
7 the lawful right to publish a news story about Nancy Benoit
8 that included images of her. And if they reasonably believed
9 it, then they don't have to ask permission. They are protected
10 under the First Amendment, and you can't award punitive
11 damages.

12 That's issue number one.

13 Issue number two that this case is about is the
14 difference between a commercial use of an image like the models
15 that are published in Sports Illustrated and a news use of an
16 image like the people who are photographed in People Magazine
17 or in the newspaper every day when the newspaper writes a
18 story. The compensatory damages issue in this case you are
19 going to be asked to decide is about the fact that the courts
20 ruled three years after the article was published by Hustler's
21 editors with the belief that it was part of a news story and
22 they had the right to do it, the courts have said, No, Hustler,
23 you didn't have the right to treat those as images illustrating
24 a news article. You had the right to publish the news article,
25 but you didn't have the right to publish the images.

1 So now we have to find out how much those images were
2 worth to Hustler as if a model had posed for Hustler because
3 that's what the images are now. They are commercial use.

4 MR. DECKER: Objection, Your Honor. That's not the
5 appropriate measure of damages.

6 THE COURT: Overruled.

7 MR. BAUER: Ladies and Gentlemen, that is the
8 appropriate measure of damages. The measure of damages for how
9 much these images were worth has nothing to do with what the
10 Plaintiff wants from them, how much money Hustler made from
11 them. What these are worth for purposes of your role in this
12 case is now that they are not news, now that the courts have
13 told us this is commercial use how much does Hustler pay for
14 such uses, what does it pay its models. We are going to give
15 you all of the evidence that you need to make a fair
16 determination about that. We have to pay her. We will tell
17 you that we tried and that she rejected it.

18 But before we get there, let me introduce myself. My
19 name is Derek Bauer. I am an attorney with the law firm here
20 in Atlanta of McKenna, Long & Aldridge. I represent LFP
21 Publishing Group. That is the company that publishes Hustler
22 Magazine. We are going to talk a little bit about what Hustler
23 Magazine is because we have to.

24 With me from Hustler Magazine or from LFP Publishing
25 Group is Donna Hahner. She is the corporate vice president.

1 She was introduced to you earlier. Also with me at counsel
2 table is my law partner, Barry Armstrong; our colleague Darrell
3 Solomon; and our paralegal, Kim Bookout.

4 So we know what the two issues are. Let's talk about
5 the compensatory damages, what was the image worth for the time
6 and manner in which Hustler used it. Apparently, it's not a
7 news article. Now it's like a model. So we have got to tell
8 you for a two-page editorial feature in our magazine what we
9 would have paid a model to pose for those types of images.

10 We are going to give you that evidence, and the
11 evidence we are going to give you is going to show you that
12 those images would not have been paid for by Hustler Magazine's
13 editors any more than within a range of \$1,000 to \$6,000. That
14 may be shockingly low, but that is the fact. And we would
15 never have paid more than \$10,000 and don't pay more than
16 \$10,000 for those types of images.

17 The second issue, whether punitive damages ought to
18 be awarded in this case, it's also very simple. Did the
19 editors of Hustler Magazine publish these images with a
20 sincere, reasonable belief they did not need to ask Plaintiff's
21 permission to do so?

22 Just like every other newspaper editor who publishes
23 a news article doesn't seek permission, just like anybody who's
24 involved in a celebrity news story doesn't get their permission
25 asked before it's published, that's the question you have to

1 decide. And we believe the evidence will show you that Hustler
2 not only had a reasonable and sincere belief that it had the
3 constitutional right to publish a news story, a celebrity news
4 story just like all the other media you are going to hear about
5 that wrote about this story, but that that belief was clearly
6 reasonable.

7 Now, you heard from Mr. Decker a whole lot of facts
8 that he says he is going to prove. And I am going to tell you
9 what I think the facts are going to show. We are the lawyers.
10 We are not the witnesses. But this part of the case is when we
11 tell you what we think the evidence is going to be, and you
12 have to hold us to it because I don't believe that Mr. Decker
13 can keep the promise he just made to you about some of the
14 evidence that he expects to show you. And I will tell you what
15 I think he is going to miss on so that you can look out for it.

16 We know that this story was news. And when Judge
17 Thrash asked everyone to stand up who heard of this, almost
18 everybody in the room did. It was huge news. We are not here
19 to relive what was indisputably a terrible, terrible event.
20 This is not a case about hurt feelings or injury to reputation
21 or embarrassment. This is a business case. How much are those
22 images worth, how much do models in Hustler Magazine get paid
23 for those types of images, and how on Earth could Hustler
24 believe that it had the right to write a story about her and
25 illustrate it, those are the issues. All of that other stuff

1 is extraneous.

2 What the evidence is going to show you as Mr. Decker
3 said is that Chris Benoit was a huge star. He was at the top
4 of his field in the professional wrestling field. He was a
5 bona fide star. And the story initially got a lot of attention
6 as you will probably recall because it was believed that he did
7 what he did, the awful things that he did in a steroid rage
8 because he abused anabolic steroids. But the story also got
9 attention because of who Nancy Benoit was.

10 She was not just a housewife. She was a public
11 figure. She wasn't not in the public life. She was also a
12 star. She might not have been the star that Chris Benoit was
13 at that time, but she was herself a star. And every media
14 outlet in the world -- we will show you a lot of them; I think
15 I overstate when I say every media outlet in the world -- but
16 we will show you that most of the media outlets that you have
17 heard of and a lot you haven't probably reported on this story;
18 and most of them were writing about Nancy Benoit. They were
19 writing about not necessarily just her murder. They were
20 writing about her life and her career because it was
21 interesting. It was news. CNN, Time, ESPN, People, The Today
22 Show, Geraldo, Larry King, British newspapers, German
23 magazines, Japanese magazines and, yes --

24 MR. DECKER: Your Honor, objection. It has already
25 been decided that the photographs were not newsworthy. That's

1 already been decided.

2 THE COURT: Overruled.

3 MR. BAUER: And what that's about, folks, he is
4 right. The courts have said three years later that those
5 photos aren't news, but that's not the question you are being
6 asked to decide. The question you are being asked to decide is
7 when Hustler's editors made the decision to publish it were
8 they reasonable to believe that it was news. That's it. And
9 that's what that objection is about. Mr. Decker doesn't want
10 you to understand or hear about how much media attention was
11 given to not just the circumstances of Nancy Benoit's death but
12 also her life.

13 Now, yes, in addition to all of those other media
14 outlets, most of whom I think we can all agree are fairly
15 reputable, Hustler Magazine also reported about this story.
16 They didn't just publish images of Nancy Benoit. They wrote an
17 article. And you will hear that it was an exclusive article.
18 It was news content about her life that no other media outlet
19 had.

20 And all of those entities, including Hustler
21 Magazine's editors, they all shared one thing in common if not
22 much else; and that is they were all very interested in her and
23 her life and not just about the murder but where did she come
24 from, who was she before she was a professional wrestler and
25 the victim of what we all understand to be a terrible, terrible

1 crime. It was chasing that angle we will show you that the
2 media hound everyone. They don't just hound her immediate
3 family. They hound her first husband she hadn't been married
4 to in more than 25 years. They hound her second husband. They
5 hound her sister, and so on.

6 The media go looking for any angle they can get. And
7 what the evidence will show you is that the media is chasing
8 this story, not just the murder again but Nancy Benoit's life
9 because she was interesting; she was news.

10 So why was she news?

11 Mr. Decker gave you a little bit about her backstory.
12 She was one of the first ever female professional wrestlers.
13 And this is what everybody knew. This is not exclusive
14 content. This is what all the media were reporting.

15 She performed as a pro wrestler, one of the first in
16 the early '80s as a Satanic Fallen Angel character. It was one
17 of the many characters that she played. It helped her gain
18 some fame and notoriety. She joined a wrestler named Kevin
19 Sullivan's entourage. Unless you are a fan of pro wrestling
20 and really old-school fan, you probably don't know who he was
21 or is; but he was one of the fledgling stars of Florida
22 professional wrestling. And she joined his entourage.

23 You will learn that shortly after she joins the world
24 of professional wrestling Nancy Benoit divorced her high school
25 sweetheart who was with her when the images that are the

1 subject of this lawsuit were made. And she marries Kevin
2 Sullivan; and the two became a very popular, probably the first
3 ever husband-and-wife professional wrestling team. He was a
4 Satanic wild man, and she was his Satanic wild woman. And it
5 was an interesting story and was a very popular story line in
6 pro wrestling.

7 Then you will learn that in a remarkable twist of
8 wrestling fiction becomes reality what was supposed to be a
9 scripted affair between Nancy Benoit and Kevin Sullivan's arch
10 rival, Chris Benoit, turns real. And she leaves Kevin
11 Sullivan, and she marries Chris Benoit. And the story becomes
12 fairly tragic after that.

13 But that's what everybody knew about her. I mean,
14 she was an interesting lady. It was not your normal murder
15 story. And her life was interesting. And it is in the wake of
16 this media frenzy of the media hounding the family, hounding
17 the first husband, hounding the second husband, hounding
18 anybody they can find to get information about her, this
19 interesting lady, that a gentleman named Mark Samansky comes to
20 Hustler's editors and he brings a new angle, he brings
21 information nobody else has.

22 Remember, this is three years ago. This is right
23 when it happened. He comes to Hustler in July of 2007, a month
24 later. This stuff is still all over the news. He offers to
25 sell Hustler a story that nobody else has, the early pursuit of

1 modeling by Nancy Benoit long before she ever becomes a pro
2 wrestler and the subject of this international news story and
3 images capturing that time of her career that nobody had ever
4 seen and nobody ever knew about. So it's an exclusive story,
5 and it sheds new light on Nancy Benoit and who she was.

6 His story is as Mr. Decker told you a little bit
7 about, she was a Hawaiian Tropic swimsuit girl. She is
8 traveling around wet T-shirt and bikini contests in Florida
9 with her husband. She meets Mark Samansky. He's a prominent
10 deejay, and he emcees these bikini contests and wet T-shirt
11 contests. She tells him, I want to be a model, I'm interested
12 in submitting photos to Penthouse. He has connections. He
13 knows photographers. And Nancy Benoit you will hear from the
14 evidence and her husband, Jim Daus, they decide willingly,
15 voluntarily, enthusiastically to go for it.

16 And so they ask Mr. Samansky to set up a photo shoot,
17 and he does. And he brings in a professional photographer.
18 And you will hear that none of this was a mistake, none of this
19 was an accident. Nancy Benoit and her then husband, Jim Daus,
20 they knew exactly what they were doing. And they go into the
21 photo shoot, and a professional photographer named Chris Helton
22 takes the pictures. Mark Samansky videotapes this shoot.
23 Everybody knows about it. Everybody has given their
24 permission. There's nothing untoward. And it's that videotape
25 that produced the images that later get published in Hustler

1 Magazine.

2 Now, Hustler does not dispute that Nancy Benoit
3 decided not to submit the photos to Penthouse. They never made
4 it there. You will hear from Hustler's witnesses that Mark
5 Samansky told Hustler's editors when he sold them this story
6 that she asked him to destroy the photos from the shoot but not
7 the videotape. You'll hear that --

8 MR. DECKER: Objection, Your Honor. He is arguing
9 hearsay now, and that's not the evidence, and it's not proper
10 for opening statement.

11 THE COURT: Overruled.

12 MR. BAUER: Excuse me. Where was I?

13 I was about where the evidence is that Mark Samansky
14 tells the Hustler editors when he is offering them this story
15 that she never told him to destroy the videotape, but you will
16 hear that he wasn't the photographer who took the pictures. He
17 hired a professional photographer named Chris Helton who came
18 in, and he is the gentleman who had the negatives. He is the
19 gentleman who had the photos. He still does. You will hear
20 his testimony. He will tell you nobody ever asked him to
21 destroy anything. He probably still has it in a box somewhere.

22 And you will hear from Jim Daus who's on the
23 Plaintiff's witness list; and I expect he is going to tell you
24 what Mr. Decker said he was going to say, that these images
25 were supposed to be destroyed. There was no question about it.

1 They were never supposed to see the light of day.

2 Yet somehow you will hear from Mr. Daus that he still
3 has, or at the very least when I took his deposition last year,
4 he still had one. And you will hear how he offered to sell
5 that picture, a nude photo of Nancy Benoit from that very same
6 photo shoot that was supposed to have been destroyed at their
7 behest, he tried to sell it to Hustler's editors when he
8 learned they were going to publish this story. That is what
9 the evidence will show you.

10 So Mr. Samansky contacts Hustler to sell this story.
11 He sends them an e-mail. Hustler's editors set up an
12 interview. They have a long interview with him in depth. He
13 tells the editors of Hustler the story that I've just told you,
14 how she was interested in appearing in Penthouse, how he came
15 to make the videotape. He describes the images for Hustler's
16 editors.

17 Not all of them are nude. Some of them are clothed.
18 Some of them are partially nude. And there are some nude
19 images. All of them are taken from a more-than-20-year-old
20 videotape, VHS videotape that's been sitting in a drawer.

21 So with this information, Hustler's editors do decide
22 they want to write this story. It is you will hear of unique
23 interest to Hustler's readers not just because there's nudity;
24 you will hear that many of Hustler's readers are of the same
25 demographic as professional wrestling fans. It was a new side

1 to Nancy Benoit that was never known, and it is an exclusive
2 story and one of the hottest stories in the media at that time.
3 And Hustler believes that it has the absolute -- and with a
4 sincere belief, it believes it has the absolute legal right to
5 publish them just as it publishes news stories in every single
6 issue of Hustler Magazine because it was news commentary on a
7 matter of interest to the public and to the press.

8 And that's the world of First Amendment, the very
9 first one in the Bill of Rights, the one that governs what all
10 press does, including Hustler Magazine.

11 So is Hustler Magazine really news?

12 It's a fair question. You are going to have to
13 evaluate it.

14 What right did these people think they have to write
15 a news story like CNN or ESPN writes?

16 Well, you will hear the law on that; and you will
17 hear that Hustler Magazine gets the same free press rights as
18 everybody else.

19 Let's not be under any illusions here. Hustler
20 Magazine is an adult men's magazine. It is certainly not for
21 everyone, and they do not pretend to be anything else. But it
22 is a fact. It is an indisputable fact that every single issue
23 of Hustler Magazine for more than 30 years has contained a lot
24 more than just adult content -- news, actual news, opinion.

25 You all may have heard of the Falwell versus Flynt

1 case that went all the way up to the U.S. Supreme Court. It's
2 a landmark constitutional case about protection under the First
3 Amendment for opinion. And there's opinion in every single
4 Hustler Magazine issue -- political commentary, exposés on
5 senators misbehaving, humor, global warming news, environmental
6 news, satire. And every single issue also contains celebrity
7 news, entertainment news and gossip.

8 And you will hear that for Hustler's editors they
9 believed that the Nancy Benoit images and the article that they
10 illustrated were not a pictorial. They were nothing like the
11 model pictorials that Hustler Magazine publishes. They are not
12 pornographic images. They thought it was news commentary.

13 I told you a little bit about what we expect the
14 evidence will show from Mr. Daus, Nancy Benoit's first husband,
15 if he is here to testify. If he is not, we will show you his
16 deposition so that you can hear it from him. I told you how
17 when he heard that Hustler was going to publish this story he
18 didn't call up and express indignation or make demands. He
19 called up and says as you will hear, What do I deserve for
20 this? I was married to her at the time.

21 And then this is a very key part of the conversation
22 that you will hear. He then says when he is told, I am sorry,
23 Mr. Daus, you are not entitled to any money for this
24 publication, he says, Well, how can you do this -- and this is
25 before the images were ever published -- How do you have the

1 right to do this if we never gave you permission to publish
2 those photos?

3 And what the Hustler editors told him because this is
4 what they believed at the time they made the decision to
5 publish, I'm sorry, sir; it's legal because it's newsworthy.

6 And you have to believe -- you will have to believe
7 that Hustler knew and it was lying and knew it was wrong about
8 that months before this article was published in order to find
9 that punitive damages are appropriate in this case. And then
10 you will also hear that Mr. Daus after Hustler told him they
11 believed this was lawful and newsworthy, they didn't need his
12 permission to publish the pictures, he then offers to sell them
13 more.

14 Now, Mr. Decker talked to you about what happened
15 after the images were published. But before we go there, let
16 me just make one more comment on Mr. Daus. Mr. Decker told you
17 -- and, again, I want you to hold both of us to everything we
18 tell you the evidence is going to prove -- he described this as
19 one night, that Nancy Benoit got talked into this photo shoot
20 and it was one night, one mistake. The evidence is going to
21 show you that is not true.

22 We talked a little bit about what happened after they
23 were published, that two weeks or more after the images were
24 already on the newsstands, already sent to subscribers, but as
25 soon as Mrs. Toffoloni learned of them she got her lawyer on

1 the phone and had him send a letter; and he did send a letter.
2 And we will show you how Hustler responded. They responded
3 almost immediately through their lawyers, different lawyer but
4 their lawyers who said, This is absolutely protected speech.
5 You are wrong. We are sorry for the circumstances. We
6 understand you may not like it, but we have a First Amendment
7 right to comment on this story just like everybody else.

8 And you will hear that Mr. Decker's response the next
9 day was to say, I'm going to sue you anyway. And he did, and
10 this litigation followed. This litigation was filed less than
11 a month after the issue was published. And you will learn
12 exactly why Hustler believed and it's reasonable for Hustler to
13 have believed that it had the legal right to publish this and
14 that it's not nearly as clear that it was wrong and not news as
15 it was determined three years later by the courts not to be as
16 Mr. Decker has argued that it is.

17 So on the compensatory damages claim, here's the
18 evidence we are going to give you. We are going to show you
19 exactly what we pay models for the commercial use. Since the
20 Court just said our use of these images is now commercial and
21 not news, we'll show you what we pay for similar pictures. We
22 are not going to show you those pictures. We don't need to.
23 But we will give you the information that you need -- for a lot
24 more, a lot higher quality, the kind of images that actually
25 the readers of Hustler Magazine for adult content are

1 interested in, very different than the images of the Benoit
2 feature. But we will show you how much we pay for those
3 models.

4 And we will give you the testimony of Chris Helton.
5 He was the professional photographer who took the photo shoot.
6 He took the same images that were extracted from the videotape
7 that became part of this news article. He still has them 30
8 years later. He has been photographing celebrities and rock
9 stars and models for 30 years. He knows what the images we
10 published are worth. He knows how much he could sell them for,
11 and we will share that information with you.

12 And we are going to show you a little bit about Nancy
13 Benoit's career, who she was, how she promoted herself in her
14 career. And you can judge for yourself whether there's a
15 similarity between the ways that Nancy Benoit promoted her own
16 image during her career and the images that Hustler published
17 in its article about the early phase of her career. But what
18 all of those elements of proof are going to prove to you is
19 that these images are not valuable to the tune of tens of
20 thousands of dollars. The evidence is going to show you that
21 Hustler Magazine would not pay more than \$10,000 for these
22 images, that Hustler Magazine, in fact, offered that amount to
23 Plaintiff and Mr. Decker; and they rejected it because they
24 want more.

25 Now, let me apologize -- I'm almost done, but let me

1 just apologize in advance for the volume of video deposition
2 testimony that you are going to have to see. All of our
3 witnesses are from out of state. Actually, all of the
4 witnesses in this case for both sides are from out of state.
5 There's not one witness from Georgia, much less Atlanta.

6 We expect and hope that the judge will instruct you
7 that video testimony is to be considered for all intents and
8 purposes to be live. Some of this testimony was actually taken
9 remotely where we were in one room and the witness is in
10 another room halfway across the country, and so there are
11 technical difficulties. And we want to thank you in advance
12 for your patience and understanding about that.

13 Once all that evidence is in and you have seen all
14 that video testimony, you will hear some live testimony, that's
15 the time that Mr. Decker and I are going to argue our clients'
16 positions to you, tell you what conclusions we want you to draw
17 from the evidence. I don't think Mr. Decker wants you to make
18 a decision on the facts. I think he wants you to make a
19 decision based on whatever dislike you may have for Hustler
20 Magazine and its notoriety and for all of its content that is
21 not at issue in this case.

22 We will ask you at the close of the evidence to
23 reject that tactic; and we will ask you not to be governed by
24 emotional response but to follow the law that the judge
25 instructs you on, follow the facts as you find them in

1 testimony and evidence. And we will ask you at that time on
2 compensatory damages not to award the Plaintiff an amount
3 greater than \$10,000. And we will ask you at that time not to
4 find that Hustler should be liable for punitive damages because
5 we believe you will find that Hustler did not knowingly and
6 intentionally violate the Plaintiff's right of publicity when
7 it published this article and images to illustrate what is
8 undisputedly a constitutionally protected news article.

9 Thank you.

10 THE COURT: Ladies and Gentlemen, ordinarily I wait
11 until the end of the case to give you your instructions on the
12 law. In light of the statements made by some of the lawyers or
13 by the lawyers in opening statement that may have been
14 confusing to you, I'm going to try to tell you what I think I'm
15 going to tell you in my closing instructions about the law that
16 is to govern this case.

17 In the state of Georgia, the law is that a person is
18 entitled to control the manner and means by which their own
19 name or likeness is used. That's called the right of
20 publicity. There is an exception to that, and a publisher is
21 entitled to use an image or a likeness of another person if the
22 use of that image is newsworthy. It has been decided in this
23 case that the photographs that Hustler published regarding
24 Ms. Benoit were not newsworthy; and, therefore, Hustler is
25 liable to the Plaintiff for compensatory damages for publishing

1 the photographs without permission.

2 Compensatory damages in a case such as this is
3 measured by the unjust enrichment of the Defendant, in other
4 words, the value of the unauthorized publication and not by the
5 injury to the Plaintiff's feelings or reputation or to the
6 Plaintiff's own commercial interests. So Hustler is liable for
7 compensatory damages in an amount to be determined by you based
8 upon the value to Hustler of the images.

9 Now, you will also hear testimony I expect about
10 whether Hustler thought it had the right under the First
11 Amendment to publish these pictures. It did not. But you may
12 consider what Hustler's agents and employees thought and
13 believed on the question of whether or not you should award
14 punitive damages in this case and for that reason only.

15 So the lawyers have given you an outline of what they
16 expect the evidence will be. I'm giving you an outline of what
17 I expect the law is that is to determine your deliberations,
18 and we will revisit these issues again in my final instructions
19 to you at the end of the case before you begin your
20 deliberations.

21 Let's take a 15-minute break. During the break,
22 remember my instructions not to discuss the case with anyone,
23 not to allow anyone to discuss the case in your presence.
24 Don't even begin discussing the case among yourselves yet.

25 Court's in recess for 15 minutes.

1 (A short recess was taken.)

2 THE COURT: All right. Each side has
3 seven-and-a-half hours for your evidence. That includes any
4 evidence that you may remit in the second stage of the trial if
5 the jury finds in favor of the Plaintiff on punitive damages
6 and attorneys' fees and expenses.

7 MR. DECKER: Judge, I have one evidence problem.
8 First of all, I intend to introduce which I think is consistent
9 with your ruling on Friday the front cover, the table of
10 contents and the article about Nancy Benoit as among my first
11 exhibits to the witness. And I think that that's all right.

12 MR. BAUER: That's all right so long as he is not
13 showing the other pages. The exhibit Mr. Decker just proposed
14 to me in the hallway to use goes a lot further than that.

15 MR. DECKER: Well, Judge, what I did not do is deal
16 with the back of the front cover.

17 MR. BAUER: And the back of the other pages.

18 MR. DECKER: And the backs of the table of contents.

19 MR. BAUER: And you have got the wrong table of
20 contents on that one again.

21 MR. DECKER: Well, no --

22 MR. BAUER: No, you are right. That one is Canadian.
23 There was confusion. He showed me an exhibit that had the
24 Canadian table of contents which has very different content in
25 it than the U.S., and it actually isn't even published by LFP.

1 So I am not trying to complicate things, but we do want to make
2 sure that what gets shown to the jury is consistent with what
3 the Court ruled and nothing more.

4 MR. DECKER: So could I have another five minutes
5 taken off of my time so I can get this document straight?

6 I guess that's my request.

7 THE COURT: Yes, sir.

8 MR. DECKER: I understand it'll be taken -- it'll be
9 deducted from my seven-and-a-half hours; but I need time
10 because apparently the cover was put on the wrong contents,
11 table of contents. So I need to straighten that out.

12 THE COURT: Are you asking me to recess for five
13 minutes?

14 MR. DECKER: Yes, sir, or at least hold the jury for
15 five minutes so I can get that straightened out.

16 THE COURT: All right. It comes out of your time.

17 MR. DECKER: All right.

18 MR. BAUER: We want to make sure that the Court's
19 ruling is clear, though, that only the cover, table of contents
20 and the actual article pages with the images are what the jury
21 is to see, that what's on the back side of those pages that has
22 nothing to do with that content is not coming in.

23 THE COURT: Do you want me to leave, Mr. Decker; or
24 are you going to have somebody else go do that?

25 MR. DECKER: Well, I'm going to do it as quickly as I

1 can. And, you know, the Court can stay or go back. It'll take
2 me five or six minutes to shuffle these pages. What I have got
3 is -- and I might as well address it right now. Once I
4 introduce this Plaintiff's exhibit, I intend to publish it to
5 the jury.

6 Will I be permitted to do that?

7 THE COURT: If it's admitted.

8 MR. DECKER: All right. So I will need about five
9 minutes then.

10 THE COURT: All right. We will be in recess for five
11 minutes.

12 (A short recess was taken.)

13 THE COURT: Are you ready, Mr. Decker?

14 MR. DECKER: Yes, sir.

15 MR. BAUER: Your Honor, we are going to have an
16 objection before he starts; and we'd like the Court to take up
17 an evidentiary objection before he starts his use of the
18 exhibit. Mr. Decker has shown me what he intends to use as
19 Plaintiff's Exhibit 3 which he knows from having deposed Donna
20 Hahner in this case is not even published by LFP Publishing.
21 It's a separate company in Canada that's unrelated to the Flynt
22 company. It's a licensee.

23 He wants to use that exhibit, Your Honor, even though
24 he knows it's not published by Defendant because there are some
25 additional photos on the table of contents completely unrelated

1 to any issue in the case or the Benoit piece. But clearly it's
2 intended to titillate the jury or inflame their emotional
3 response. And I don't know how his witness can authenticate
4 the document anyway, but he already knows from the evidence he
5 has taken in this case that it's not even a document published
6 by Defendant.

7 THE COURT: What do you say, Mr. Decker?

8 MR. DECKER: Judge, I don't know that. I know at the
9 very least it's a licensee under the cover of Hustler which
10 contains my client's images in it. It could not have been
11 published without the authority of Hustler Magazine. That's
12 the whole point of this case that Hustler got these images as
13 the testimony is unequivocal from --

14 THE COURT: Mr. Decker, I am very familiar with the
15 case. I have been living with it as well as you have for three
16 years. Have you got a copy of the American edition of the
17 magazine?

18 MR. DECKER: Yes.

19 THE COURT: Let me see it.

20 (The Court reviewed the document.)

21 THE COURT: All right. I sustain the objection to
22 Plaintiff's Exhibit Number 3. Plaintiff's Exhibit Number 2 is
23 admissible.

24 Are you ready?

25 MR. DECKER: Yes, sir.

1 THE COURT: We are ready for the jury. That took 15
2 minutes.

3 (Jury entered the courtroom.)

4 THE COURT: All right. Mr. Decker, call your first
5 witness.

6 MR. DECKER: Your Honor, at this time the Plaintiff
7 would call for purpose of cross-examination the Hustler
8 representative, Donna Hahner.

9 THE COURT: Last name again?

10 MR. DECKER: Hahner.

11 THE COURT: How do you spell that?

12 MR. DECKER: I'm not sure I know how, Your Honor. I
13 think it's H-a-n-h-e-r.

14 MR. BAUER: H-a-h-n-e-r.

15 THE COURT: All right. Ms. Hahner, if you will come
16 up to the witness stand, please.

17 Ladies and Gentlemen, in a civil case like this, the
18 parties are allowed to call a representative of an opposing
19 party for cross-examination; and that's what's happening now.
20 Mr. Decker is going to be cross-examining Ms. Hahner as a
21 representative of the Defendant LFP Publishing Group, LLC.
22 When he finishes, she will go back and sit down. If Mr. Bauer
23 wants to question her, he can call her later in the Defendant's
24 case.

25 THE CLERK: Ma'am, if you will raise your right hand,

1 please.

2 (Witness placed under oath by the clerk.)

3 THE CLERK: Please have a seat, then state your name
4 for the record.

5 THE WITNESS: Donna Hahner, H-a-h-n-e-r.

6 THE CLERK: Thank you. You can be seated. If you
7 will get up close to the microphone.

8 MR. DECKER: Your Honor, may I place the exhibits on
9 the witness table for the witness to refer to?

10 THE COURT: Yes, sir.

11 - - -

12 DONNA HAHNER,
13 having been first duly sworn, was examined and testified as
14 follows:

15 CROSS-EXAMINATION

16 BY MR. DECKER:

17 Q. Good afternoon, Ms. Hahner. As you may recall, my name is
18 Rick Decker. I represent the Plaintiff, Mrs. Toffoloni, in
19 this case.

20 Give us your address, please, ma'am.

21 THE COURT: No. Don't ask her address. The court
22 reporter has to redact the transcript if it's got addresses.
23 Just ask her where she lives.

24 BY MR. DECKER:

25 Q. Where do you live, ma'am?

1 A. I live in Woodland Hills, California.

2 Q. And by whom are you employed?

3 A. LFP Publishing Group, LLC.

4 Q. And is LFP Publishing Group, LLC, the publisher of Hustler
5 Magazine?

6 A. Yes, it is.

7 Q. Ma'am, and who is the president of LFP Publishing Group?

8 A. The president is Michael Klein.

9 Q. Do you know who the owner of LFP Publishing Group is?

10 A. Yes, I do.

11 Q. Who is that?

12 A. Larry Flynt.

13 Q. All right. Do you know if he has any shareholders or
14 partners in that organization?

15 A. No, he does not.

16 Q. All right. Ma'am, are you the person who signed the
17 various affidavits verifying the accuracy of documents produced
18 by Hustler Magazine in this case?

19 A. I signed, I think, several affidavits.

20 Q. Let me ask you to look at what is a stack of documents in
21 front of you, the first of which is Plaintiff's Exhibit 19.

22 And if you will turn to the last page and tell me --

23 second-to-the-last page and tell me if that is your signature.

24 A. Yes, it is.

25 Q. All right. And did you understand what you were doing

1 when you signed that document?

2 A. I read it and signed that it was correct -- or I believe
3 that's what I was doing.

4 Q. The verification says that you are authorized to make the
5 verification and that the statements in the foregoing Defendant
6 LFP Publishing Group, LLC's responses to the Plaintiff's first
7 interrogatories are true and correct to the best of your
8 knowledge, information and belief; is that right?

9 A. Yes.

10 Q. So you were responsible for getting information necessary
11 to respond to the Plaintiff's questions to Hustler Magazine in
12 this case?

13 A. Yes, I was responsible. I don't know if I was the only
14 one responsible; but, yes, I took the lead.

15 Q. All right. And you got the information together, and you
16 formulated it, and then you signed the verification?

17 A. Yes.

18 Q. All right. And the same question is true with respect to
19 the next document in front of you, Plaintiff's Exhibit 20,
20 which is Defendant LFP Publishing's responses to the
21 Plaintiff's first request for production of documents; and I
22 would ask you again are you the person who signed the
23 verification testifying that those documents were correct?

24 A. Is there a signature page here?

25 Q. I don't see a page for your signature on it.

1 Do you recall getting the information together for this
2 document?

3 A. Oh, I'm sorry. Yes, sir, I am.

4 Q. All right. And look at Plaintiff's Exhibit 21. And let
5 me ask you again were you the person responsible for assembling
6 that information for the Defendant, Hustler Magazine?

7 A. Yes. I was instrumental in providing this information.

8 Q. And then the last one is Plaintiff's Exhibit 22. I ask
9 you did you -- were you the person responsible for assembling
10 that information?

11 A. Yes, I was.

12 Q. Okay. Now, one of the questions that was asked of Hustler
13 Magazine in these documents that I have placed in front of you
14 -- and I would draw your attention to Plaintiff's Exhibit 21,
15 and it is Question Number 12.

16 Do you see that?

17 A. Yes.

18 Q. And the question was: Identify the person or persons who
19 made the decision to publish or authorize the publication and
20 licensing of nude and partially nude images of Ms. Benoit in
21 the so-called March 2008 edition of Hustler Magazine.

22 And the response was: See Larry Flynt, publisher of
23 Hustler Magazine.

24 A. Yes.

25 Q. Okay. And you had previously responded that Mr. Bruce

1 David and Mr. Tyler Downey were responsible for the decision to
2 publish the images of Nancy Benoit in the March 2008 edition.

3 Do you recall that?

4 A. Yes. Tyler Downey was the one that wrote the article. He
5 was the one that was contacted by Mark Samansky. He then
6 presented it to the editorial director, Bruce David, who then
7 reviewed it and decided that it was something that Hustler
8 Magazine should publish.

9 Q. Did it then go upstairs to Mr. Flynt for his ultimate
10 decision? I mean, is that how he got involved in the process?

11 A. Yes. At some point during the putting together of each
12 issue of the magazine, Bruce David would go to Mr. Flynt and
13 review all the articles, everything that was going to go into
14 the magazine.

15 Q. So would it be fair to say that the Nancy Benoit pictorial
16 published in the March 2008 edition could not have been
17 published without Mr. Flynt's consent?

18 A. That's correct.

19 Q. All right. If Mr. Downey had wanted to do it, Mr. David
20 wanted to do it, they couldn't have done it without Mr. Flynt's
21 okay; is that true?

22 A. Well, yes. They go to him -- again, Bruce David goes to
23 Mr. Flynt at some point during the process and gives him the
24 lineup sheet of everything that's going to be published in the
25 magazine.

1 Q. Would you look at Plaintiff's Exhibit 4 which I believe is
2 in the stack in front of you.

3 A. Exhibit 4?

4 Q. Yes.

5 All right. Do you identify that document?

6 A. Yes. This is a photocopy of pages 40 and 41 of Hustler
7 March 2008 issue.

8 Q. Is it an internal document that has the initials of some
9 Hustler employees?

10 A. Yes, it is.

11 Q. So that's not just a copy of a page out of a magazine, is
12 it?

13 A. No. It's actually what we call a laser proof. It's a
14 black-and-white printout once the magazine has been designed by
15 the art director then copy edited.

16 Q. And so do you recognize Plaintiff's Exhibit 4 as that
17 document, as the laser proof of the Nancy Benoit article?

18 A. Yes.

19 MR. DECKER: Your Honor, I would offer Plaintiff's
20 Exhibit 4 into evidence.

21 THE COURT: No objection being stated in the pretrial
22 order, it's admitted without objection.

23 BY MR. DECKER:

24 Q. Ms. Hahner, would you read to the jury the notations in
25 the middle of the document.

1 A. Yes. Okay, LF per BD, 11-9-07.

2 Q. And what does that mean?

3 A. Okay, Larry Flynt, per Bruce David, and the date November
4 9th, 2007.

5 Q. So was Mr. David indicating that Larry Flynt had said okay
6 to the Nancy Benoit article?

7 A. Yes.

8 Q. All right. Now, Ms. Hahner, it's true, isn't it, that
9 Hustler Magazine makes its money primarily through the
10 depiction of men and women in nude or sexually suggestive
11 postures? Is that true?

12 A. Yes, Hustler Magazine publishes photographs of -- actually
13 what we call pictorials of nude women, and there's usually one
14 of a man and a woman.

15 Q. And that is the main way in which Hustler Magazine makes
16 its money is by publishing articles concerning men and women
17 having sex in their magazine?

18 A. Well, it does publish nude photographs. That's correct.
19 It also publishes articles, exposés. There are many cartoons,
20 humor, jokes. There's music reviews. There's pieces about
21 gadgets, reviews about video games, interviews with
22 celebrities, articles written by government -- or former
23 government officials, columnists like Robert Scheer who used to
24 write for the Los Angeles Times.

25 The magazine also interviews famous people, Vincent

1 Bugliosi, even some movie stars, Woody Harrelson -- I'm
2 blanking out. But, again, it does, yes. You're correct. It
3 does publish nude photographs, nude pictorials -- sorry -- nude
4 pictorials. But it also publishes other material, other
5 articles and columns.

6 Q. And maybe my question wasn't clear.

7 Is it fair to say that Hustler primarily makes its money
8 publishing nude photographs of men and women engaged in sexual
9 activity, primarily?

10 A. Well, yes, the magazine is known for publishing nude
11 photographs. That's what it's known for.

12 Q. Usually the people depicted in Hustler Magazine are paid
13 models, are they not?

14 A. That's correct.

15 Q. You have something called the Beaver Hunt in Hustler
16 Magazine?

17 A. Yes.

18 Q. And what is that?

19 A. That's where women can submit their nude photographs as an
20 amateur model, and they are submitted to the editors. And if
21 their image is selected, then the magazine publishes it and
22 pays them \$250.

23 Q. And Hustler sometimes pays what you might call celebrities
24 to pose nude in Hustler Magazine?

25 A. We did -- well, we did publish, I believe, it was a

1 five-, six-page nude pictorial of Carmen Electra. We paid her
2 agency \$6,000. We didn't hire her and hire a photographer to
3 photograph her. We purchased the use of her photographs.

4 Q. Obviously, you got a release from Carmen Electra?

5 A. We did not personally get a release, no. We purchased
6 them from the agency.

7 Q. The agency got a release from Carmen Electra?

8 A. I would -- I don't know, but I would presume so.

9 Q. The lady -- the young women you publish in the Beaver Hunt
10 edition, how often does that come out, by the way?

11 A. Well, the Beaver Hunt is part of the magazine. It's
12 usually five, six pages. And there are anywhere from five to
13 seven or eight individual models that submit their photos or
14 that are chosen for that particular issue. So it comes out in
15 every issue of the magazine.

16 Q. So every issue you have the Beaver Hunt and those -- you
17 pay those people too, don't you?

18 A. Yes. We pay them \$250.

19 Q. And you get a release from them?

20 A. Yes.

21 Q. Those are people who choose to be in Hustler Magazine?

22 A. Yes. They submit the photographs.

23 Q. And they get paid?

24 A. Correct.

25 Q. They sign the release?

1 A. Correct.

2 MR. DECKER: All right. Your Honor, at this time I
3 would like to offer Exhibits 19 through 22 which are the
4 discovery responses signed by Ms. Hahner.

5 MR. BAUER: We will object on relevance grounds, Your
6 Honor. There's a lot of extraneous information in those
7 exhibits that have nothing to do with the issue in the case.

8 THE COURT: Let me see them, Mr. Decker.

9 MR. DECKER: They are in the Court's brief book, 19
10 through 22.

11 MR. BAUER: It includes evidence of damages that
12 aren't at issue, Your Honor, specifically in Exhibit 20. It
13 contains a fair amount of discovery objections that have no
14 bearing on the case at all.

15 To the extent there's factual information that
16 Mr. Decker wants to question the witness on, we wouldn't have
17 any issue about that unless it's an issue that's not relevant.

18 THE COURT: I sustain the relevance objection under
19 403.

20 MR. DECKER: I'm sorry. I didn't hear the last part.

21 THE COURT: I sustain the relevance objection and
22 exclude the material under 403.

23 MR. DECKER: May I refer the witness to a specific
24 question and response that she verified?

25 THE COURT: Certainly.

1 BY MR. DECKER:

2 Q. Let me ask you to look at paragraph six.

3 A. Exhibit 20?

4 Q. Plaintiff's Exhibit 19.

5 A. I'm sorry. Paragraph six? Number six?

6 Q. Paragraph six.

7 MR. BAUER: And, Your Honor, we will object to
8 questions about this particular paragraph. The Court has
9 already ruled it's not relevant.

10 THE WITNESS: I'm sorry, but do I go by the numbers?
11 When you say paragraph six, do I count the paragraphs or do I
12 go number six?

13 BY MR. DECKER:

14 Q. The numbered paragraphs.

15 A. I'm sorry.

16 THE COURT: I sustain the objection.

17 MR. DECKER: Your Honor, can I be heard?

18 THE COURT: Yes, sir.

19 MR. DECKER: This is consistent with the Court's
20 prior ruling in terms of one of the measures of damages, this
21 information about revenue fees, income of other things of
22 value. It's just entirely consistent with the Court's previous
23 ruling.

24 THE COURT: I sustain the objection. The total
25 revenue produced from the entire issue is not relevant. It's

1 not the measure of damages. It's the value of the images
2 themselves. So I sustain the objection.

3 BY MR. DECKER:

4 Q. I ask you to look at Document Number 22. And the question
5 was: Identify every instance when the Defendant paid a model,
6 celebrity, actor or other performer or private individual for
7 the use of nude images of any such persons and the amount paid
8 to each such person.

9 And what was your response?

10 A. I am looking at Exhibit 22, Item 14?

11 Q. Yes.

12 A. And my response?

13 Q. And you can begin with the second paragraph.

14 A. For the time period -- okay. Amateur models have been
15 paid 250 to 350 dollars -- oh, and an amateur model who won an
16 annual Beaver Hunt contest was paid \$2,500. Actually, that's
17 correct. The magazine did that for many, many years. And I
18 believe it was after '07 or -- that the magazine stopped
19 selecting a Beaver Hunt winner of the year. So that's correct.

20 Q. So can you read that paragraph for us again, please.

21 A. Yes.

22 The time period 2006 to the present amateur models have
23 been paid 250 to 350 dollars for appearing in an issue of
24 Hustler. For 2006 to 2007, an amateur model who won Hustler's
25 annual Beaver Hunt contest was paid \$2,500 for a commissioned

1 photo shoot. From 2008 to the present, there has been no
2 annual Beaver Hunt winner.

3 Q. All right. The next paragraph?

4 A. Shall I read it?

5 Q. Please.

6 A. For 2006 to 2007, Hustler models were paid \$2,500 for a
7 centerfold and \$500 for a front cover. From 2008 to the
8 present, Hustler models have been paid a total of \$1,350 for a
9 centerfold which was \$750 paid by LFP and \$600 paid by the
10 photographer. And they are no longer paid any additional money
11 for a front cover.

12 Q. Again, ma'am, these were people who wanted to be in
13 Hustler and for whom you paid the amount of money stated and
14 from whom you got a release?

15 A. Yes.

16 Q. Is that all true?

17 A. Yes.

18 Q. All right. Please read the next paragraph.

19 A. For 2006 to 2007, Hustler models were paid \$1,200 for a
20 girl-girl or boy-girl non-cover, non-centerfold photo set and
21 \$1,500 for a single-girl, non-cover, non-centerfold photo set.

22 From 2008 to the present, Hustler models have been paid a
23 total of \$1,000 for any non-cover, non-centerfold photo set,
24 \$400 by LFP and \$600 by the photographer.

25 Q. All right. And the next paragraph.

1 A. LFP paid Carmen Electra \$6,000 for her appearance in the
2 front cover photo and in nude photos on four inside pages of
3 the March 2006 issue of Hustler.

4 Q. And the last paragraph.

5 A. LFP paid Wendy Cortez, a prostitute hired over a lengthy
6 period of time by Senator David Vitter of Louisiana, \$45,000
7 for the following services: One, revealing in Hustler that
8 Senator Vitter was her client and telling her story; two, a
9 press conference; three, radio and television interviews; four,
10 a news story in the holiday 2007 issue with a cover roof line
11 and main cover line, including four-page story with photos;
12 and, five, a second story in the January 2008 issue which
13 included a five-page nude photo set shot by a Hustler
14 photographer, a front cover inset photo and cover roof line.

15 Q. And, once again, Wendy Cortez was a person who wanted to
16 be in Hustler Magazine?

17 A. Yes.

18 Q. She was a prostitute, correct?

19 A. Correct.

20 Q. And she approached Hustler Magazine, wanted to sell her
21 story and pose nude in Hustler Magazine for which you paid her
22 \$45,000 and got a release?

23 A. Yes.

24 Q. Let me ask you to look at what has been marked as
25 Plaintiff's Exhibit 2 and ask you if you can identify it.

1 A. This is the front cover of the March 2008 issue of Hustler
2 Magazine.

3 Q. All right. This -- excuse me. Go ahead.

4 A. I'm sorry. The issue published by LFP Publishing Group.

5 Q. All right. And the front cover on the left-hand side
6 would you read that to the jury, please.

7 A. All of the cover lines?

8 MR. DECKER: Well, first of all, let me do this.
9 Your Honor, let me offer Plaintiff's Exhibit 2 in evidence,
10 please.

11 THE COURT: All right. Plaintiff's Exhibit 2 is
12 admitted over objection.

13 MR. BAUER: We don't have an objection, Your Honor.

14 THE COURT: You are withdrawing your objection?

15 MR. BAUER: We don't assert one to this particular
16 document if it's the one that Mr. Decker showed me during the
17 break. It's not the same document that was on his exhibit list
18 in the pretrial order.

19 THE COURT: Plaintiff's Exhibit 2 is admitted without
20 objection.

21 MR. DECKER: May I publish it to the jury, Your
22 Honor?

23 THE COURT: Yes, sir.

24 MR. BAUER: We would like a copy, Your Honor.

25 BY MR. DECKER:

1 Q. All right. Ma'am, on the cover of the magazine it says:
2 Wrestler Chris Benoit's Murdered Wife Nude.

3 You see that?

4 A. Yes.

5 Q. And then in the table of contents there is a similar
6 reference to what is depicted inside. It says -- and there's a
7 40 beside it, and it says: Nancy Benoit Exclusive Nude Pics of
8 Wrestler's Doomed Wife.

9 That's the table of contents?

10 A. Yes, correct.

11 Q. Then the article itself begins on page 40, and it is a --
12 has a paragraph of script and ten photographs of Nancy Benoit,
13 right?

14 A. Yes, correct.

15 Q. Okay. You admit that Hustler Magazine had no release from
16 Nancy Benoit or at the point at which Hustler Magazine obtained
17 these images from her estate? Do you admit that?

18 A. No, we did not have a release. We did not believe we
19 needed a release.

20 Q. The fact is you did not have one?

21 A. No, we did not have one. We believed we didn't need one.

22 Q. You did not have one, and you did not try to get one?

23 A. We didn't try to get one because Ms. Benoit was deceased.

24 Q. But you knew that there was somebody in the world who
25 would have authority to deal on her behalf, didn't you, as a

1 business woman?

2 A. No, not at that time. No, I did not. No, we did not.

3 Q. Did you make any inquiry about who was handling her estate
4 or if there was an estate or anything like that?

5 A. The thought never entered my mind or, I think, entered our
6 mind. We thought we were publishing a news story, an exclusive
7 news story about Ms. Benoit's life.

8 Q. Well, first of all, who would have been in charge of
9 getting the release from Mrs. Benoit's estate? Would that be
10 you?

11 A. No, no. It would either be most likely one of the editors
12 or the editorial assistant. Usually it's the editorial
13 assistant that collects releases or IDs or verification of
14 copyright.

15 Q. It wouldn't have been Mr. Flynt?

16 A. No.

17 Q. Okay. Let me ask you to look at paragraph -- rather,
18 Plaintiff's Exhibit 6.

19 And what is this document, ma'am?

20 A. Oh. This is a press release. For a year or two we would
21 about -- I think about two weeks before an issue would go on
22 sale at the newsstand we would release a document to the press
23 telling them what is coming in the magazine.

24 MR. DECKER: Your Honor, I offer Plaintiff's Exhibit
25 6.

1 THE COURT: No objection being stated in the pretrial
2 order, it's admitted without objection.

3 MR. DECKER: Your Honor, I have a blowup of it. May
4 I display it to the jury?

5 THE COURT: Yes, sir.

6 BY MR. DECKER:

7 Q. Okay. That is -- you describe that as a press release?

8 A. Yes.

9 Q. And where was this sent?

10 A. It would be e-mailed to various news outlets. I believe
11 at that time we had an editorial assistant who had an e-mail
12 list of, again, various news outlets; and then he would send
13 out an e-mail.

14 Q. Do you know what news outlets it was sent to?

15 A. No, I do not.

16 Q. And you recognize that this was a -- this is a nude
17 photograph of Nancy Benoit? Do you see that on the document
18 you have in front of you?

19 A. Yes, I do.

20 Q. And this was a press release sent all over the world?

21 A. I don't know if it went all over the world. I believe it
22 was sent -- I believe that the list of news outlets is in the
23 United States, again, e-mail addresses from whether it be CNN
24 or even different radios, radio stations, newspapers. Again, I
25 have not seen the list of addresses or who is in that e-mail

1 list.

2 Q. The next-to-the-last sentence in this Plaintiff's Exhibit
3 6 says -- and I'm quoting; you can read along with me if you
4 wish -- while the original negatives were destroyed at Nancy's
5 behest, a video survived.

6 You see that?

7 A. Yes.

8 Q. All right. So you -- and when I say you, I don't mean you
9 personally, ma'am; I mean Hustler Magazine who you represent --

10 A. Yes.

11 Q. -- you knew when you issued the press release that Nancy
12 Benoit wanted the photographs destroyed; is that true?

13 A. Yes.

14 Q. And the press release, would it be fair to say, ma'am,
15 plays up the aspect that she wanted the photographs destroyed?

16 A. It says that she wanted the original negatives destroyed.

17 Q. Well, and I'm asking you to editorialize. You can do
18 that, can't you? I mean, you are an editor, aren't you?

19 A. I'm not an editor, no.

20 Q. Okay. You work for a magazine?

21 A. Yes.

22 Q. Is it fair to say that Hustler Magazine was playing up the
23 fact in this press release that she wanted -- that they knew
24 that she wanted --

25 THE COURT: Mr. Decker, if you are going to raise

1 your voice, you have to stand back behind the podium now.

2 BY MR. DECKER:

3 Q. -- that she knew that you knew that she wanted the
4 photographs destroyed? Is that a fair characterization of that
5 press release?

6 A. Yes. We knew that she wanted those photographs destroyed.

7 Q. Because you made a point of mentioning it in the press
8 release, right?

9 A. Yes.

10 Q. I mean, you could have just said, We have got nude
11 photographs of Nancy Benoit; they are coming out in our March
12 edition. But what you did say was that she wanted the
13 photographs destroyed?

14 A. Yes, we did say that.

15 Q. All right. Let me ask you to look at Plaintiff's Exhibit
16 1.

17 A. I'm sorry. Which one is Exhibit 1?

18 Q. Do you have Plaintiff's Exhibit 1 with you, ma'am?

19 A. Is it in the folder?

20 Q. Perhaps you do not.

21 A. Thank you.

22 Q. Let me give you that.

23 Now do you have it?

24 A. Yes, I do.

25 Q. Okay. Let me draw your attention to Plaintiff's Exhibit 1

1 and ask you if you can identify it.

2 A. Yes, I can.

3 Q. And what is it, please, ma'am?

4 A. It's a letter dated January 16th, 2008, from you, your
5 office addressed to Mr. Sean Barrios and Mr. David Carillo,
6 custodian of records at LFP Publishing Group, LLC.

7 Q. Do you acknowledge that Hustler Magazine received this
8 letter in the middle of January shortly after the date posted
9 at the top of the page?

10 A. Yes.

11 Q. Is it true, ma'am, that after receiving that document
12 Hustler Magazine took no action to withdraw the magazine from
13 newsstands around the country -- around the world?

14 A. At that time it had already -- no, we did not. At that
15 time the magazine had been on the newsstands for well over two
16 weeks; 80 to 90 percent of the magazines had already been sold.
17 And we believed that we had a right to publish this news
18 article.

19 Q. Yes, ma'am.

20 But the question is did you take any action to withdraw
21 whatever was left out there from the newsstands after getting
22 my letter?

23 A. No, because we believed we were on firm legal ground
24 because it was a news story, an article.

25 Q. Can you look at -- do you have Plaintiff's Exhibit 5 there

1 with you, ma'am?

2 A. Yes, I do.

3 Q. And will you look at that document for a moment and
4 familiarize yourself with it.

5 MR. BAUER: Your Honor, we are going to object to
6 this exhibit on relevancy grounds which I'm happy to elaborate
7 if the Court wants me to.

8 THE COURT: No objection being stated in the pretrial
9 order, the objection's overruled.

10 BY MR. DECKER:

11 Q. All right. Looking at Plaintiff's Exhibit 5, can you tell
12 the jury what that document is.

13 A. It is a photocopy of some information of sales of Hustler
14 Canada. The publisher is Northland Media, Inc., which is the
15 -- which is a Canadian foreign licensee.

16 MR. BAUER: Your Honor, if I may, the reason we
17 haven't objected to this document in the pretrial order is
18 because if there's a second phase of this case it's clearly
19 relevant; but it's not relevant in this phase of the case.

20 THE COURT: There's no objection, Mr. Bauer. It's
21 waived.

22 MR. BAUER: Well, Your Honor, there's going to be
23 other exhibits just like this that we wouldn't state an
24 objection in the pretrial order if there's going to be a clear
25 relevancy. And this was before, of course, the Court ruled on

1 the bifurcation issue. So I mean, we hope the Court isn't
2 suggesting we have waived all our objections to similar
3 evidence Mr. Decker may use. We understand the ruling on this
4 one.

5 THE COURT: Go ahead, Mr. Decker.

6 BY MR. DECKER:

7 Q. Ma'am, I'd like you to look on the first page of that
8 document about three entries down where there's an asterisk and
9 it says March '08.

10 You see that?

11 A. Yes.

12 Q. First of all, whose handwriting is it on that document?

13 A. Actually, it's two people's. At the top it says,
14 Attention, Donna Hahner, from Chris Kennedy. Chris Kennedy is
15 the publisher. He is Northland Media; and he is our foreign
16 licensee, publishes a Canadian edition. And then at the top it
17 says Toffoloni case, Hustler Canada sales figures. And that's
18 my handwriting.

19 Q. All right. Now, about three entries down it says March
20 '08. And then it says -- there's another column that says off
21 sale 2-25-08.

22 You see that?

23 A. Yes.

24 Q. What does that mean?

25 A. That's the date when the Canadian issue would have gone

1 off sale.

2 Q. So when did it go on sale?

3 A. I don't know.

4 Q. When did the international version go on sale?

5 A. The what issue?

6 Q. The one that you called for the rest of the world,
7 whatever the other edition is called.

8 A. We call it the domestic issue which is the issue that's
9 published in the United States. It's distributed in the United
10 States, and it's also distributed in several countries in
11 Europe. And we call that for the rest of the world because it
12 goes to several other countries outside of the United States.

13 Q. Okay. Let's look at Plaintiff's Exhibit -- let's back up
14 just a minute and look at Plaintiff's Exhibit 2 again.

15 And Plaintiff's Exhibit 2 says Hustler for the rest of the
16 world.

17 A. Oh. This is the front cover?

18 Q. Yes.

19 A. Yes.

20 Q. For the rest of the world.

21 And what countries other than the United States is Hustler
22 sold, is this version of Hustler sold?

23 A. Let me see if I remember. They are primarily in Europe.
24 I know it's on the exhibit list. It is sold in Germany, the
25 Netherlands, I think a few copies are distributed to Israel,

1 Portugal, Spain, maybe Brazil. I'm not sure. Finland. I
2 think there are about ten countries, but I can't recall them
3 all. Maybe Croatia, maybe Greece. I'm sorry. I can't
4 recollect the exact countries, but I believe there are about
5 ten and primarily in Europe.

6 Q. Are they primarily English-speaking countries or all
7 languages?

8 A. All languages.

9 Q. And is Hustler translated into any other languages other
10 than -- does it appear other than in English?

11 A. We only publish an English edition. And the issue that's
12 distributed in the United States is the same one that we
13 distribute in approximately ten countries in Europe.

14 Q. Do you have Plaintiff's Exhibit 5 still with you, ma'am?

15 A. Yes, I do.

16 Q. And that was the document in which I was asking you the
17 off-sale date of February the 25th?

18 A. Yes.

19 Q. 2008?

20 A. Yes.

21 Q. So does that mean it was at least until February the 28th,
22 2008, that that edition, the March 2008 edition containing
23 images of Nancy Benoit, were available for sale?

24 A. Yes, until -- yes, I believe it says February 25th.

25 Q. February 25th?

1 A. Does it say 2-25-08?

2 Q. Okay. February 25th?

3 A. Yes.

4 Q. And you have already said you took no action to withdraw
5 from sale any of the remaining editions after you -- even after
6 you got my letter in mid-January; is that true?

7 A. Yes, that's true. But after we received your letter, you
8 know, our attorney -- we turned it over to our attorney. He
9 responded saying that we had full legal right, we had freedom
10 of the press, et cetera. And then at that time, I believe, in
11 your letter it implied a possible lawsuit. So at that time I
12 called our internet department, asked them to remove the photos
13 and the article from the internet.

14 I contacted our foreign licensees or our foreign licensee
15 division and asked them to notify all the foreign licensees not
16 to publish the article which they did. However, the Canadian
17 edition was already printed and on its way. I also notified
18 our back-issues department that we are not going to sell back
19 issues. And this was all to potentially avoid a suit.

20 We couldn't pull the issue from the newsstand. Besides,
21 we felt that we had the legal right. And, sure enough, I think
22 within a week you had filed the suit against us, I think hardly
23 two weeks after we received your letter. And I believe you
24 filed a temporary restraining order; and I believe that this
25 Court denied it which told us that we were in the right, that

1 we did have a legal --

2 MR. DECKER: Objection, Your Honor. That's not the
3 chronology, and I move that be stricken.

4 THE COURT: Overruled.

5 BY MR. DECKER:

6 Q. Ma'am, I appreciate all that information. But the
7 question was you did nothing to withdraw or even attempt to
8 withdraw the magazine from the newsstand; is that true?

9 A. I said that the magazine had been on the newsstand for
10 over two weeks, our U.S. edition. And the April edition was
11 already in route to the newsstand to replace it. When we
12 received your letter -- I think I saw it around January 17th or
13 maybe 18th -- we immediately turned it over to our attorneys.
14 And --

15 Q. Can you answer the question --

16 A. I'm sorry.

17 Q. You did nothing to withdraw the magazine from the
18 newsstand? Can you just answer that yes or no?

19 MR. BAUER: I will object, Your Honor. She is
20 entitled to explain her answer.

21 THE COURT: Overruled for now.

22 THE WITNESS: Oh, I answer?

23 THE COURT: Yes.

24 THE WITNESS: I'm sorry. Yes, you are correct. I
25 did not call our national distributor saying that we had to

1 pull the magazine from the newsstand. No, I did not do that
2 because in my mind that was unreasonable. Our national
3 distributor has many, many wholesalers that it interacts with;
4 and the wholesalers have thousands of retailers. We don't even
5 know who those retailers are. And our distributor, our
6 national distributor I don't think even has the list. The
7 wholesalers keep the list of thousands of actual retailers a
8 big secret.

9 So, no, I did not call our national distributor to
10 attempt to pull the magazine from the newsstand and --

11 BY MR. DECKER:

12 Q. You could have made one call to your national distributor
13 and say, Withdraw the magazine from the newsstand? You could
14 have done that, couldn't you?

15 A. I could have, but I didn't think I had to do that.

16 Q. Okay. And the legal advice that you just said your lawyer
17 -- you turned it over to your lawyer, and he wrote me saying
18 that Hustler had the legal right to do that. You understand
19 that he was wrong, that's wrong? You don't have the right to
20 do that, do you?

21 A. Well, I think we just found out that it was wrong last
22 fall in November, I believe.

23 Q. But you understand that it was wrong -- wrong, wrong,
24 wrong?

25 A. We have been told by the Court in November of last year

1 that we did not have the right to publish the nude photos. We
2 did have the right to publish the article. We don't understand
3 that, but that's what we have been told.

4 Q. It wasn't June the 25th, 2009, that you heard that you
5 were wrong, was it?

6 A. That was when -- okay. That was when the 11th Circuit
7 Court of Appeals, I believe, reversed Judge Thrash's ruling.
8 Actually, I believe Judge Thrash dismissed the claim saying
9 that our article was newsworthy; and I think it was October
10 2008. And then I believe you appealed to the 11th Circuit
11 Court; and I believe that ruling came, like you said, in June
12 of 2009. And the 11th Circuit reversed Judge Thrash's ruling
13 that we -- that our article was newsworthy.

14 Q. So have you sued your lawyer for malpractice for telling
15 you that you had the right to do something that you don't have
16 the right to do?

17 MR. BAUER: Objection, Your Honor. That's
18 inflammatory, irrelevant, prejudicial.

19 THE COURT: Overruled.

20 THE WITNESS: We believed that --

21 BY MR. DECKER:

22 Q. That's yes or no.

23 A. Oh, I'm sorry.

24 Q. Then you can explain.

25 A. I'm sorry.

1 Q. Have you sued the lawyers who told you that you had the
2 legal right to publish these 23-year-old nude images of Nancy
3 Benoit?

4 A. No, we did not.

5 Q. The document Plaintiff's Exhibit Number 5, the second page
6 lists the wholesalers and the countries to which Hustler
7 Magazine is directed, does it not?

8 A. Yes.

9 Q. Did you contact any of those people to withdraw the
10 magazine?

11 A. No, I did not. That would be through the national
12 distributor. They would know who to contact.

13 Q. That's the list of your wholesalers and a list of the
14 countries that Hustler Magazine produced in discovery in this
15 case under your signature; is that accurate?

16 A. This is I believe we were asked for a list of the foreign
17 countries that the U.S. edition of Hustler was distributed to,
18 and that's what this document is. It lists the countries, the
19 foreign countries.

20 Q. Let me ask you to turn to Plaintiff's Exhibit 16.

21 Can you identify that document?

22 A. I have never seen it before.

23 Q. You have never seen it before.

24 Do you know who Mark Johnson is?

25 A. Yes, I do.

1 Q. And who is Mark Johnson?

2 A. At that time he was the -- I think he was the research
3 director of Hustler Magazine.

4 Q. Is he still employed by Hustler?

5 A. No, he's not.

6 Q. When did he leave?

7 A. He left a year ago, I believe, this month. A year ago in
8 June, so 2010. I believe June 2010.

9 Q. Why did he leave?

10 A. He wanted to, as he says, explore other options. He
11 wanted to do additional freelance writing, and he didn't want
12 to have to keep office hours.

13 Q. According to Mark Johnson, he believed Hustler Magazine
14 believed that millions of people will want to see nude pictures
15 of Nancy Benoit.

16 A. Is that what it says here?

17 Q. Do you understand that to be his opinion when he was the
18 research director at Hustler?

19 A. I don't know if that was his opinion.

20 Q. Did you ever discuss it with him?

21 A. No.

22 Q. Have you, ma'am -- well, first of all, let me ask you are
23 you familiar with back issues, the availability of back issues
24 of Hustler Magazine, for example, March -- the 2008 edition?

25 A. Am I familiar with them?

1 Q. Yes.

2 A. We don't have March 2008 issues available.

3 Q. Well, where are they?

4 A. They were all destroyed.

5 Q. Who destroyed them?

6 A. I had our warehouse destroy them.

7 Q. All right. Are you familiar with companies online who
8 handle back issues of magazines?

9 A. Not personally, no.

10 Q. Are you familiar with a company by the name of
11 oldmagazinesandbackissues.com?

12 A. No.

13 Q. And usedmagazines.com?

14 A. No.

15 Q. Have you ever attempted to find whether Hustler Magazine,
16 old issues of Hustler Magazine are available online?

17 A. No, I haven't; and I'll tell you why. Once magazines are
18 delivered to the retailers and the whole -- well, the
19 wholesalers first, they then distribute to the retailers. All
20 the unsold copies are then picked up by the wholesalers from
21 the retailers. The wholesalers sign an affidavit which they
22 give to the national distribution company saying that they
23 destroyed all of those unsold issues. And they are supposed to
24 shred them.

25 We have known through the years that there are some

1 unscrupulous wholesalers that have kept some of those unsold
2 copies, and then they sell them other ways. We have even tried
3 to track them down. At one time we even tried to code
4 magazines in a certain area. We were suspicious of a certain
5 wholesaler in the northeast of the country. We coded the
6 issues trying to track it to them and prove it. But it's
7 something that is beyond our control.

8 Q. Have you tried to obtain a back issue of the March 2008
9 edition of Hustler Magazine?

10 A. No, I have not.

11 Q. Do you know if that can be done?

12 A. I don't know.

13 Q. You don't know one way or the other?

14 A. No, I do not. I do know that no one can obtain a back
15 issue from us.

16 Q. But you can't say that it can't be obtained somewhere
17 online on the internet?

18 A. I cannot say. I do not know.

19 Q. Do you know if the nude photographs that Hustler published
20 in the March 2008 edition can still be seen online? Do you
21 know that?

22 A. I do not personally know that.

23 Q. You have not looked to see?

24 A. No.

25 THE COURT: Ladies and Gentlemen, let's take a quick

1 ten-minute break. During the break, don't talk about the case.

2 Court's in recess for ten minutes.

3 (A short recess was taken.)

4 THE COURT: Counsel, here's the first draft of my
5 charge. The way I do the charge conference is I first go
6 through it and ask if you've got objections to the charge as
7 drafted, so you will need to familiarize yourself with it
8 before the charge conference. I'll be very disappointed if you
9 are trying to read it for the first time during the charge
10 conference.

11 Are you ready, Mr. Decker?

12 MR. DECKER: Yes, sir.

13 THE COURT: We're ready for the jury.

14 (Jury entered the courtroom.)

15 THE COURT: All right, Mr. Decker.

16 BY MR. DECKER:

17 Q. Ma'am, would you look at Plaintiff's Exhibit 9 which I
18 believe is in front of you.

19 A. Yes.

20 MR. BAUER: Your Honor, we'll object to references to
21 this exhibit on relevancy grounds.

22 THE COURT: All right. Mr. Bauer, I'm going to give
23 you until nine o'clock tomorrow morning to submit a supplement
24 to the pretrial order stating any additional objections you
25 have to the Plaintiff's exhibits. No objection to me means no

1 objection.

2 What do you say, Mr. Decker?

3 MR. DECKER: Well, Judge, it's admissible for that
4 reason but also because it goes to -- it's part of the package
5 of damages. It's, you know, a Hustler document concerning the
6 March '08 edition.

7 THE COURT: I sustain the objection.

8 MR. DECKER: And the same tender with respect to
9 Plaintiff's Exhibit 13, Your Honor.

10 MR. BAUER: We would have the same objection.

11 MR. DECKER: A more detailed recitation.

12 MR. BAUER: And we can supplement our objections
13 right now if you'd like us to.

14 THE COURT: I want them in writing, Mr. Bauer.

15 MR. BAUER: Yes, sir.

16 THE COURT: I sustain the objection for now to
17 Plaintiff's Exhibit 12 -- excuse me -- 13.

18 BY MR. DECKER:

19 Q. Ma'am, you sent Mrs. Toffoloni a check for \$10,000 plus
20 interest of \$215 three months ago, March of 2011, in which you
21 said this was payment for the use of her daughter's images in
22 the March '08 edition of Hustler Magazine.

23 Do you recall that?

24 A. Yes, I do.

25 Q. Ma'am, do you not concede that those images have never

1 been for sale?

2 A. We were told by the Court in November 2010 --

3 MR. DECKER: Objection, Your Honor. That's not
4 responsive.

5 THE COURT: That's not responsive, ma'am.

6 THE WITNESS: I'm sorry.

7 THE COURT: Respond to the question.

8 THE WITNESS: Would you repeat it?

9 BY MR. DECKER:

10 Q. Do you not understand and concede that those images have
11 never been for sale to anyone, including Hustler Magazine?

12 A. I have been told that now, yes.

13 Q. Do you understand that?

14 A. Yes.

15 Q. You testified or, rather, your counsel made a statement
16 that Hustler -- and I think maybe you made a statement to this
17 effect in one of your responses to my question -- would not
18 have paid more than \$10,000 for the images of Nancy Benoit?

19 A. That's correct.

20 Q. All right. So you confirm that statement to me right now?

21 A. Yes.

22 Q. Would not have paid more than \$10,000.

23 And you concede that you know that they have never been
24 for sale?

25 A. That's correct.

1 Q. So you unilaterally just sent a check to Mrs. Toffoloni
2 trying to buy something for \$10,000 that wasn't for sale; is
3 that a fair characterization?

4 A. Yes. But we were told by the ruling, I believe, in
5 November that we did owe Mrs. Toffoloni compensation for those
6 photos. And since \$10,000 would be the very most the magazine
7 would ever pay anyone for photos, that's why we sent that
8 check.

9 Q. So in Hustler world you decided that they were worth
10 \$10,000, and that's the check that you sent to Mrs. Toffoloni
11 even though it was never asked for and you knew that the images
12 weren't for sale; is that fair?

13 A. I'm sorry. Would you say that one more time?

14 Q. In Hustler world you decided that those images were worth
15 \$10,000 even though you have just told me you knew they were
16 never for sale?

17 A. They weren't necessarily worth as much as \$10,000 to us.
18 But since that's the maximum that we would pay and were told in
19 November that we had to pay, that's why we issued the check,
20 the top amount.

21 Q. You were told in June of 2009 that you had caused damage
22 to Maureen Toffoloni, weren't you?

23 MR. BAUER: Objection.

24 BY MR. DECKER:

25 Q. In June of 2009?

1 MR. BAUER: Calls for a legal conclusion. It's a
2 misstatement of fact.

3 THE COURT: Rephrase your question, Mr. Decker.

4 BY MR. DECKER:

5 Q. You were told in no uncertain terms in June of 2009 that
6 Hustler Magazine had violated Mrs. Toffoloni's dead daughter's
7 right of publicity? Weren't you told that?

8 MR. BAUER: Same objection.

9 THE COURT: Overruled.

10 THE WITNESS: Yes. That court ruled that we were not
11 allowed to publish those nude photos.

12 BY MR. DECKER:

13 Q. So two years later Hustler world decides to send a check
14 to this lady for \$10,000 for something that was never for sale?

15 THE COURT: I'm going to let you ask that one more
16 time, Mr. Decker.

17 MR. DECKER: That's the last time, Judge, if she will
18 answer.

19 THE WITNESS: Yes, Hustler Magazine did send a check
20 to Mrs. Toffoloni for \$10,000.

21 BY MR. DECKER:

22 Q. Tell me, ma'am -- tell this jury one instance where
23 Hustler has published 23-year-old photographs of a dead woman
24 without the consent or the permission of her mother or her
25 estate. Tell me one instance.

1 A. I cannot recall an instance.

2 Q. How long have you been at Hustler?

3 A. I have worked for the company for 27 years.

4 Q. In 27 years, give me one instance in which Hustler
5 unilaterally published photographs of a dead woman, 23-year-old
6 photographs, without the permission of her estate or the
7 permission of her mother.

8 A. I cannot do that.

9 Q. So in this case, instead of contacting Mrs. Toffoloni for
10 her permission and asking for her consent and if she had so
11 desired bargaining with her about a price, none of which ever
12 happened, you just went ahead and published; is that the way it
13 happened?

14 A. Well, yes, we did publish because we felt we had the legal
15 right to publish.

16 Q. And it wasn't you who did that. It was Larry Flynt. And
17 he was the one who gave the okay to go ahead, not you?

18 A. Well, yes, the editorial director did take the layout
19 along with the rest of the magazine for Mr. Flynt to sign off
20 on.

21 Q. But he is the one who had to sign off; he is the one whose
22 opinion counted, right?

23 A. Yes. He signed off on it, correct.

24 Q. When did you -- by the way, what exactly is your job?

25 A. I oversee the publishing division. So I oversee the

1 advertising department, the editorial department, the
2 subscription department, the circulation department.

3 Q. You oversee the legal department?

4 A. No, I do not.

5 Q. Do you have one?

6 A. Not in-house, no, we do not.

7 Q. Outside?

8 A. Yes, we do.

9 Q. When did you first see modeling photographs of Nancy
10 Benoit in order to even understand that she had once been a
11 model?

12 A. When did I personally or the magazine?

13 Q. No, you.

14 A. Probably not until the laser proofs were being circulated;
15 so I would think that might have been in mid, late October. I
16 usually see what goes into the magazine at a later stage.

17 Q. No, I'm not talking about the nude images that Hustler
18 published in the March 2008 edition. I'm asking you if you
19 ever saw examples of Nancy Benoit as a swimsuit model or a
20 wrestling figure or anything like that, if you ever saw it and,
21 if you did, when.

22 A. No, I did not.

23 Q. So you didn't -- of course, you didn't make the
24 decision -- we have already established that -- to publish
25 these documents, these photographs, did you?

1 A. No, I did not make the decision.

2 MR. DECKER: That's all I have of this witness, Your
3 Honor.

4 THE COURT: All right. Ms. Hahner, you may step
5 down.

6 Call your next witness.

7 MR. DECKER: Your Honor, my next witness is fairly
8 lengthy; and the cross-examination would probably be lengthy.

9 THE COURT: Very well.

10 MR. DECKER: Shall we proceed?

11 THE COURT: Yes, sir.

12 THE CLERK: Ma'am, if you will raise your right hand,
13 please.

14 (Witness placed under oath by the clerk.)

15 THE CLERK: Please have a seat and state your name
16 for the record.

17 THE WITNESS: My name is Maureen Toffoloni.

18 - - -

19 MAUREEN TOFFOLONI,
20 having been first duly sworn, was examined and testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. DECKER:

24 Q. Good afternoon, ma'am.

25 A. Hi.

1 Q. Mrs. Toffoloni, are you nervous?

2 A. Yes.

3 Q. Okay. Well, try not to be.

4 Tell us where you live.

5 A. Daytona Beach, Florida.

6 Q. All right.

7 THE COURT: Ms. Toffoloni, it's very hard to hear in
8 this courtroom. You are going to need to talk right into that
9 microphone.

10 THE WITNESS: Daytona Beach, Florida.

11 BY MR. DECKER:

12 Q. And how long have you lived there?

13 A. I have been there about 30 years.

14 Q. And before you moved to Daytona Beach, where did you live?

15 A. I lived in Deltona, and then I lived in Boston. We're
16 from -- originally from Massachusetts.

17 Q. What kind of -- are you still working?

18 A. No, I'm not.

19 Q. What kind of work did you do when you were working?

20 A. I was a cosmetologist. I owned my own hair-styling shop.

21 Q. All right.

22 A. And I also worked for other people.

23 Q. And how long did you do that?

24 A. About 25 years. 25, 30 years.

25 Q. And you are married?

1 A. Yes.

2 Q. And what is your husband's name?

3 A. Paul Toffoloni.

4 Q. And you and -- what is -- and is that Paul back there in
5 the blue coat?

6 A. Yes, it is. Yes.

7 Q. What does Paul do?

8 A. He is an insurance inspector.

9 Q. And you and Mr. Toffoloni have children?

10 A. Yes, we do.

11 Q. And who are they?

12 A. Right now I have one daughter, Sandra.

13 Q. All right. And your other daughter was Nancy?

14 A. Nancy Benoit.

15 Q. Okay. And Paul is Nancy and Sandra's father?

16 A. Yes.

17 Q. All right. Was Nancy Benoit your oldest daughter?

18 A. Yes, she was.

19 Q. Did she have any children?

20 A. Yes, she did.

21 Q. And who was that?

22 A. Daniel.

23 Q. Chris -- rather, Nancy's husband was Chris Benoit?

24 A. Yes.

25 Q. And Chris Benoit was as we have discussed a pretty famous

1 professional wrestler?

2 A. Yes, he was.

3 Q. He was Daniel's father?

4 A. Yes, he was.

5 Q. How often did you see Nancy and Daniel and Chris once you
6 moved to Florida?

7 A. We saw them very often because I was the only one that
8 baby-sat, and Paul had a lot of work in Georgia. So we stayed
9 at the home. We had an apartment in the first floor. So I
10 would say four months out of a year, maybe five we were always
11 with them.

12 Q. Can you describe her lifestyle during the years that you
13 would visit them in Fayette County.

14 A. She was a wife and mother, stay-at-home mom. And she took
15 care of Chris's affairs and, you know, helped him manage him.

16 Q. Manage his career as a professional wrestler?

17 A. Yes, he -- yes.

18 Q. Did they have a company that handled that?

19 A. Wolverine Sports it was called.

20 Q. Wolverine Sports?

21 A. Yes.

22 Q. And what was her involvement in that company if you know?

23 A. I think she did most of the paperwork and just managed
24 everything for him from home when he was on the road.

25 Q. Would she visit with you in Florida and you visit with her

1 in Fayetteville?

2 A. Yes.

3 Q. How often during a typical year would that happen?

4 A. Probably about I would say maybe about ten times.

5 Q. Ten times a year?

6 A. Yes.

7 Q. As we have discussed in this courtroom, Mrs. Toffoloni, in
8 June of 2007 Chris killed Nancy and Daniel and then himself in
9 their home in Fayetteville?

10 A. Yes.

11 Q. All right. And where were you at the time?

12 A. I was in Florida.

13 Q. Okay. And, obviously, you found out about that?

14 A. Yes, we did. And we just drove up to Georgia.

15 Q. Were you ultimately appointed to be administrator of Nancy
16 and Daniel's estate?

17 A. Yes, I was.

18 Q. In this case in which we are in court today, you were
19 appointed the administrator of Nancy's estate?

20 A. Her estate and anything to do with whether pay bills or,
21 you know, any property or anything, her image, anything I was
22 in charge.

23 Q. Let me show you Plaintiff's Exhibit 28, ask you if you can
24 identify it.

25 A. Yes. That is the letter of administration.

1 MR. DECKER: Offer Plaintiff's Exhibit 28, Your
2 Honor.

3 MR. ARMSTRONG: No objection, Your Honor.

4 THE COURT: It's admitted without objection.

5 BY MR. DECKER:

6 Q. Mrs. Toffoloni, what generally did you understand your
7 duties and responsibilities as the administrator of Nancy's
8 estate to be?

9 A. I was to take care of all the bills and everything. I was
10 to protect her and Daniel.

11 Q. All right. And have you done that during the years since
12 she has been dead?

13 A. Yes.

14 Q. All right. What did you understand was your duties and
15 obligations with respect to whatever property rights might
16 exist concerning her or her estate or her image or photographs
17 or anything like that? What did you understand?

18 A. Well, I understand that I was in charge of everything, in
19 charge of the property, in charge of anything to do with my
20 daughter or my grandson.

21 Q. In this connection, ma'am, can you give the jury a brief
22 outline of Nancy's career up to the time of her death in June
23 of 2007.

24 A. When she was young, she was a swimsuit model. From there
25 she went to -- started in the wrestling business. From there

1 she went into entertainment and management in the wrestling
2 business. And then she decided she wanted to be a stay-at-home
3 mom, and she left the business and wanted to have a child. So
4 that's when she stayed home and took care of Daniel and managed
5 Chris.

6 Q. At about what year would you say that she retired from
7 public life and became a stay-at-home mom as you said?

8 A. I'm trying to -- I think it was '98, '99. Daniel was born
9 in 2000; so it was probably a year, maybe a little bit more.

10 Q. You are aware, are you not, that in 1984 Nancy apparently
11 posed nude for a photographer in the Orlando, Florida, area,
12 Mark Samansky or people associated with Mark Samansky?

13 A. Yes, I'm aware.

14 Q. All right. She was about 20 years old?

15 A. Yes.

16 Q. All right. Did you know until this controversy arose that
17 those images even existed?

18 A. No, I did not know anything about them.

19 Q. All right. Did you know that Nancy had had a swimsuit
20 modeling and wrestling career?

21 A. Yes.

22 Q. But you knew nothing about these photographs?

23 A. No, knew nothing.

24 Q. These ones that showed up in Hustler in the March '08
25 edition?

1 A. I didn't know anything about them.

2 Q. After Nancy's death in June of 2007, after you were
3 appointed the administrator of her estate -- and, by the way,
4 what is the date on that document?

5 A. August '07.

6 Q. August of '07. So about two months after her death?

7 A. Uh-huh.

8 Q. Is that right?

9 A. Yes.

10 Q. Okay. And do you recall basically the procedure that you
11 went through in connection with becoming her administrator?

12 A. I had to go to court to become the administrator of her
13 and Daniel, and Mr. Benoit from Canada came down to be Chris's
14 administrator.

15 Q. All right. Chris's father was his administrator, and you
16 were Nancy and Daniel's administrator?

17 A. Yes, I was.

18 Q. And that was something that was accomplished in August of
19 2007?

20 A. Yes, it was.

21 Q. Do you recall if there was any publication, legal
22 publication that was associated with that process?

23 A. We did have to go to court, yes.

24 Q. All right. Now, after you became the administrator of her
25 estate, did anyone from Hustler Magazine ever approach you

1 about publishing images of Nancy that had been taken during her
2 career?

3 A. No.

4 Q. Did you ever hear from them in any way?

5 A. No.

6 Q. If you had been contacted by Hustler Magazine, what would
7 you have said about selling images of your daughter to that
8 magazine?

9 A. I would have said no.

10 Q. And why is that?

11 A. Because the magazine is hardcore pornography to me and
12 which I never seen the magazine until yesterday.

13 Q. When did you become aware of Hustler's efforts or intent
14 to publish images of your daughter, Nancy Benoit?

15 A. I think it was January after she was deceased. I think it
16 was January.

17 Q. Of?

18 A. 2008.

19 Q. All right. And how did you become aware of that?

20 A. My daughter. My youngest daughter Sandra told me about
21 it.

22 Q. When you found out that Hustler intended to publish images
23 of your daughter, what did you do?

24 A. I called you.

25 Q. Did you cause a letter to be written to Hustler?

1 A. Yes. I asked if you could stop.

2 Q. Let me show you or let me ask you to look at Plaintiff's
3 Exhibit 1 if we can find it here and ask you if you can
4 identify it.

5 A. Yes. That is the letter that you sent.

6 MR. DECKER: Offer Plaintiff's Exhibit 1, Your Honor.

7 THE COURT: No objection being stated in the pretrial
8 order, it's admitted without objection.

9 BY MR. DECKER:

10 Q. As far as you know, Mrs. Toffoloni, as a result of your
11 association with this matter that we are involved in today did
12 Hustler accede to your wishes as expressed in my letter? Did
13 they accept what you were asking them to do and refrain from
14 publishing those photographs?

15 A. No, they did not.

16 Q. As far as you know, did they make any effort to withdraw
17 from publication or circulation --

18 A. No.

19 Q. -- documents containing Nancy's images?

20 A. No.

21 Q. Have you seen excerpts from the image -- rather, from the
22 editions in which Nancy's image appears? Have you seen the
23 excerpts that contain her image?

24 A. Yesterday, that's the first time I have seen them.

25 Q. This Plaintiff's Exhibit -- excuse me. Plaintiff's

1 Exhibit 2, is that what you are referring to?

2 A. Yes. That's what I'm referring to, yes.

3 Q. You have seen as of yesterday the actual layout of Hustler
4 containing the images of your daughter?

5 A. Yes.

6 Q. All right. Now, you are aware, are you not, ma'am, that
7 the Court has ruled that Hustler is legally liable to Nancy's
8 estate for publishing images of her without legal authority,
9 without consent, without permission, without compensating the
10 estate?

11 A. Yes, I am aware.

12 Q. You are aware of that.

13 So what is your purpose here today as the administrator of
14 her estate?

15 A. Well, I'm here today to protect her image for punitive
16 damages, for making sure this doesn't happen to another family.

17 Q. Since her death, have you made any use of Nancy's image?

18 A. No.

19 Q. Since her death, have you established a foundation in her
20 name?

21 A. Yes, I have.

22 Q. And what is that?

23 A. The Nancy and Daniel Benoit Foundation.

24 Q. What is the purpose of that foundation?

25 A. The purpose is to educate young children, young adults,

1 their parents on the effects of steroids and also for abused
2 women and children.

3 MR. DECKER: Thank you.

4 THE COURT: Cross-examination, Mr. Bauer?

5 MR. ARMSTRONG: Your Honor, could we have a
6 five-minute break just to discuss -- we may have very limited
7 cross. We might be able to finish it up today if you want to
8 do that.

9 THE COURT: I'm going to charge it against your time.

10 MR. ARMSTRONG: That's fine. We will probably save
11 more than that by having a conference.

12 THE COURT: All right. We will be in recess for five
13 minutes.

14 (A short recess was taken.)

15 MR. DECKER: Judge, I do have one more question on
16 direct if I may.

17 THE COURT: All right. We're ready for the jury.

18 (Jury entered the courtroom.)

19 THE COURT: You have something else, Mr. Decker?

20 MR. DECKER: Yes, Judge, I did have one more.

21 BY MR. DECKER:

22 Q. Mrs. Toffoloni, have you tried to determine if the images
23 of your daughter published in the March 2008 edition of Hustler
24 Magazine can still be viewed on the internet?

25 A. Yes, they can. I was on yesterday, and they were on

1 there. Yes.

2 Q. The same images that appeared in Hustler Magazine --

3 A. Yes.

4 Q. -- March 2008?

5 A. It said Hustler on them.

6 MR. DECKER: Thank you. That is now all, Judge.

7 THE COURT: Mr. Armstrong, are you going to have more
8 than a couple of minutes of cross?

9 MR. ARMSTRONG: No, sir. It'll be very brief.

10 THE COURT: All right.

11 - - -

12 CROSS-EXAMINATION

13 BY MR. ARMSTRONG:

14 Q. Good afternoon, Mrs. Toffoloni.

15 A. Good afternoon.

16 Q. I will try to make this quick.

17 Just following up real quick on that last question, the
18 images on the internet, that was not at a Hustler-related
19 website that you saw those images, correct?

20 A. It said Hustler across the top of it. If you Google her
21 name, everything comes up. And then you just scroll down, and
22 it has Hustler, and then you can click onto it. Yes, it was.

23 Q. But to be clear, that was not an actual website managed or
24 maintained by Hustler; that was some other website that had an
25 image that had been previously published --

1 A. It said Hustler. When I clicked on it, it came up Hustler
2 Magazine.

3 Q. Can you tell us what the website address was?

4 A. No, I could not. I just Googled her name, and a lot of
5 websites come up.

6 Q. So at this point you don't know whether that was the
7 Hustler-owned website or not that it came up on; is that
8 correct?

9 A. I thought it was because it said Hustler.

10 Q. I understand you thought it was, but do you know whether
11 it is? Can you tell us the website address?

12 A. No, I don't know the website address exactly.

13 Q. Thank you.

14 And a couple of questions related to when you first
15 learned that these images were going to be published -- and you
16 contacted Mr. Decker, correct?

17 A. Yes, I did.

18 Q. And you had retained Mr. Decker a few days after your
19 daughter's death to represent you in the administration of the
20 estate, correct?

21 A. Yes, I did.

22 Q. He brought several other lawsuits for you as well; is that
23 correct?

24 A. Not really because what we did was try to settle
25 everything out of court. You know, there were two other

1 children. Chris had two other children. So we were trying to
2 do it as easy and, you know, to make sure everybody was happy
3 with everything -- all our decisions. And everything was split
4 50-50, and the children were taken care of. So we agreed. We
5 didn't go to court.

6 Q. Fifty percent to the children and fifty percent to you; is
7 that correct?

8 A. Yes.

9 Q. And you were the sole heir of the estate of your daughter,
10 correct?

11 A. Yes.

12 Q. You also had brought a lawsuit against the physician who
13 prescribed the drugs for Chris Benoit, correct?

14 A. I did, but he was also -- I think the government was --

15 Q. Prosecuting him?

16 A. -- prosecuting him, and he went to jail. So we really
17 didn't pursue that.

18 Q. Now, going -- I'll kind of jump back here. But going back
19 to when you contacted Mr. Decker about the images that you
20 heard Hustler was going to publish, at that point you
21 understood that Mr. Decker sent a letter to Hustler asking them
22 not to publish the images, correct?

23 A. Correct.

24 Q. And were you aware that the lawyers for Hustler then sent
25 a letter in response saying Hustler believed it had the legal

1 right to publish those images?

2 A. I don't know if I -- he might have told me, but I didn't
3 see the letter.

4 Q. And were you aware that Mr. Decker then filed a lawsuit in
5 the name of the estate shortly after receiving those letters
6 from Hustler's lawyers?

7 A. Yes, I am aware.

8 Q. And in that lawsuit, he asked for what's called a
9 temporary restraining order.

10 Were you aware of that?

11 A. Yes.

12 Q. And did you understand that a temporary restraining order
13 --

14 MR. DECKER: Objection, Your Honor. Irrelevant,
15 immaterial.

16 THE COURT: What do you say, Mr. Armstrong?

17 MR. ARMSTRONG: Your Honor, this already came in with
18 Ms. Hahner during her cross-examination by Mr. Decker. There
19 was detailed discussion of the TRO, this Court's ruling, as
20 well as the appellate process.

21 THE COURT: Well, that's true. But any further
22 discussion of it is irrelevant, Mr. Armstrong; and any
23 relevance is outweighed by the potential unfair prejudicial
24 value. I will sustain the objection.

25 MR. ARMSTRONG: Thank you. In that case, Your Honor,

1 I have no further questions.

2 THE COURT: All right. You may step down,
3 Ms. Toffoloni.

4 THE WITNESS: Thank you.

5 THE COURT: Ladies and Gentlemen, we are going to
6 recess for the day. During the recess, remember my
7 instructions to you not to discuss the case with anyone, not to
8 allow anyone to discuss the case in your presence. Don't even
9 begin discussing the case among yourselves yet. And
10 particularly in this case, let me ask you to follow carefully
11 this instruction.

12 Don't try to do any research about this case. Don't
13 get on the internet and try to find out anything about this
14 case or any of the people that you have heard about or any of
15 the lawyers that are appearing in the case or anybody that's
16 associated with this case. Don't communicate with anybody with
17 e-mail, with Twitter, with Facebook, with anything, any social
18 media. Don't do any investigation, any research. Just forget
19 about this case until tomorrow morning at 9:30. We will resume
20 the trial at 9:30 tomorrow morning.

21 Now, you know what Atlanta traffic is like. If you
22 leave the house expecting to get here at 9:30, you are probably
23 going to be late. And if even one of you is late, we can't
24 start the trial. So as an added incentive for you to get here
25 early, we will have pastries, doughnuts, breakfast food for you

1 here in the jury room. But you can only enjoy that if you get
2 here early enough to take advantage of our hospitality.
3 There's a coffee machine in there, coffee that you can make
4 coffee.

5 And we will resume the trial at 9:30 tomorrow
6 morning, and I expect we will run a full day tomorrow.

7 There are two temperatures in this courtroom, too hot
8 and too cold. If it's too hot, I'll complain. If it's a
9 little on the chilly side, I won't because then they'll get it
10 too hot. So you may want to bring a jacket, a sweater or
11 something you can put on or take off depending upon which
12 extreme of temperature we are experiencing at the time. And
13 you are excused for the evening. We will resume the trial at
14 9:30 tomorrow morning.

15 (Jury exited the courtroom.)

16 THE COURT: What are we going to do tomorrow,
17 Mr. Decker?

18 MR. DECKER: Judge, I have a live witness first
19 thing; and then I have two video depositions that I intend to
20 play. And I think I will be well within my seven-and-a-half
21 hours.

22 THE COURT: You think you will rest tomorrow morning?

23 MR. DECKER: Yes, sir. I'll rest tomorrow afternoon,
24 probably at the noon hour.

25 THE COURT: All right. Are you going to be ready,

1 Mr. Bauer?

2 MR. BAUER: We will.

3 I have a question that we may want to resolve now
4 about the video depositions that Mr. Decker wants to show. He
5 didn't designate in the pretrial order any actual excerpts, and
6 there are some evidentiary rulings that the Court has made that
7 would be implicated by just running those video depositions
8 from start to finish. So we don't have a bunch of objections
9 when he tries to play it in the morning, I thought we might try
10 to resolve that now.

11 THE COURT: Well, who are the depositions, Mr. Bauer?

12 MR. BAUER: I don't know who he intends to show.

13 MR. DECKER: It's Larry Flynt and Mark Johnson. And
14 they're both about 20 minutes long.

15 THE COURT: All right. Mr. Decker, have a copy of
16 the transcript at my office at nine o'clock tomorrow morning.

17 MR. DECKER: Should I be there with the transcript or
18 just the transcript?

19 THE COURT: I just want the transcript.

20 MR. DECKER: All right.

21 MR. BAUER: I can tell the Court exactly what the
22 issues are that you have already ruled on that are implicated
23 by each just so you get a preview.

24 With Mark Johnson, Mr. Decker does question him about
25 the DVDs that the Court has already excluded. With Mr. Flynt,

1 I believe he may have asked him about the DVDs, but he also
2 asked him about the Meredith Emerson materials which the Court
3 has also excluded reference to. And those are the key issues
4 from those two depositions that need to be excised.

5 THE COURT: All right. The Plaintiff has used one
6 hour and 16 minutes of your time. The defense has used 15
7 minutes of your time. And we will be in recess until 9:30
8 tomorrow morning.

9 (Proceedings adjourned at 5:10 p.m.)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 165, are a true and correct copy of the proceedings in the case aforesaid.

This the 6th day of July, 2011.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court