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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 15, 2011  
Atlanta, Georgia  
9:33 a.m.

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

VOLUME III

APPEARANCES OF COUNSEL:

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HALLMAN & WINGATE  
  
On behalf of the Defendant: Derek Bauer  
Barry Armstrong  
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*Proceedings recorded by mechanical stenography  
and computer-aided transcript produced by*

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1                   (Proceedings held in Atlanta, Georgia, June 15, 2011,  
2 9:33 a.m., in open court.)

3                   THE COURT: Good morning, counsel.

4                   MR. DECKER: Good morning, Judge.

5                   THE COURT: Y'all got a copy of the charge?

6                   MR. DECKER: Yes, sir.

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

8                   MR. DECKER: Yes, I am, Judge.

9                   THE COURT: We are ready for the jury.

10                  MR. DECKER: May I have a minute to set up my easel?

11                  THE COURT: Sure. Go ahead and do it now.

12                  MR. BAUER: Your Honor, I want to clarify one thing.

13 In our motion for a directed verdict, I think it was clear from  
14 my argument that we were moving for directed verdict on both  
15 the punitive damages and attorneys' fees claims; and all we  
16 think needs to be submitted to the jury is compensatory  
17 damages. I wanted to make sure that was clear from my  
18 argument.

19                  THE COURT: That was my understanding, Mr. Bauer.

20                  MR. BAUER: Thank you, Your Honor.

21                  (Jury entered the courtroom.)

22                  THE COURT: Good morning, Ladies and Gentlemen.

23 Thank you for all being here on time so we could resume the  
24 trial promptly this morning.

25                  As I said, the next stage of the trial is the closing

1 arguments of the attorneys. Mr. Decker will go first, then  
2 Mr. Bauer will go next, and Mr. Decker will conclude the  
3 argument if he has reserved any time.

4 Mr. Decker, you wish to make a closing argument on  
5 behalf of the Plaintiff?

6 MR. DECKER: Yes, Your Honor, I do.

7 THE COURT: All right.

8 - - -

9 CLOSING ARGUMENTS

10 - - -

11 MR. DECKER: Good morning, Ladies and Gentlemen.

12 Well, I'm back in front of you one more time, this  
13 time as the judge said for closing argument. You're probably  
14 glad to hear that. Frankly, I'm glad myself. I'm getting a  
15 little tired of hearing my own voice.

16 But, anyway, before I begin, I want to thank you for  
17 your attention and your service. We, all of us who work in the  
18 court system, know that we couldn't do it without you. And we  
19 thank you for that.

20 I'd like to begin, Ladies and Gentlemen, by saying  
21 that this, the way we do things in our system, this is my  
22 client's only day, only week in court. For all practical  
23 purposes, there is no tomorrow. This is it. And for that  
24 reason, I'll ask you to bear with me while I am careful to go  
25 over the evidence that you have heard and to try to sum up our

1 position as I help Mrs. Toffoloni in her effort to protect the  
2 image of her deceased daughter as the administrator of her  
3 estate. And so I need to be careful to do that, and I'm going  
4 to ask you to bear with me for a few minutes this morning while  
5 I do that.

6 Now, I will say on her behalf that Mrs. Toffoloni was  
7 -- didn't want to be here. She had no choice but to take on  
8 this Defendant for what it did in connection with her  
9 daughter's image. So I ask you again to bear with me while I  
10 go over the evidence in some detail.

11 First of all, Ladies and Gentlemen, I want you to  
12 look back to my opening statement way back on Monday and to  
13 think about what I told you that this case would be about and  
14 to as Mr. Bauer said in another context to hold me to what I  
15 told you that this case would be about and to see if that is  
16 not indeed the case. I told you that it has already been  
17 established and proven beyond any doubt, beyond any fact,  
18 beyond any law that the Defendant, Hustler Magazine, violated  
19 Nancy Benoit and now her estate's rights by publishing these  
20 24-year-old images in its March 2008 edition without permission  
21 and without consent.

22 Now, if anything that I have said during the last  
23 two-and-a-half days is clear, that point is the clearest. And  
24 the judge will tell you that when Judge Thrash gets around to  
25 instructing you on the law. Hustler violated their rights, no

1 question. And for that violation, they have to pay damages.  
2 And we'll talk about that in a little more detail later.

3 But before we get there, I would like for you to  
4 simply consider this, that this case is about one thing.  
5 Hustler sought to exploit Nancy Benoit's image for its own  
6 financial gain by printing 24-year-old photographs that Nancy  
7 never wanted to see the light of day to which they had no right  
8 to do and then try to justify it by saying, Well, we thought it  
9 was news. Twenty-four-year-old photographs published seven  
10 months after her death, we thought that was news.

11 Now, Ladies and Gentlemen, it's going to be your duty  
12 to decide if that's plausible or not, if that's reasonable or  
13 not, because for a matter of law it is absolutely wrong and has  
14 been held. And the question is: Did Hustler reasonably think  
15 that what they were doing was news, 24-year-old photographs  
16 published seven months after her death; that's news?

17 No way.

18 So let's look at the evidence, Ladies and Gentlemen.  
19 Hustler knew beyond a shadow of a doubt that Nancy did not want  
20 these photographs published. They knew that beyond a shadow of  
21 a doubt. You only have to look at their own document to come  
22 to that conclusion. That's Plaintiff's Exhibit 6. This  
23 document speaks volumes. It speaks louder and more strongly  
24 than I ever could.

25 It says: "While the original negatives were

1 destroyed at Nancy's behest, a video survived" -- Hustler's own  
2 words. This is repeated in the actual photo spread itself.  
3 This is the first page of Plaintiff's Exhibit 2 which contains  
4 the contents of this magazine which I apologize in advance you  
5 have to look at and the article about Nancy.

6 This concept of this is something she didn't want to  
7 see the light of day is repeated over and over again by Hustler  
8 Magazine.

9 Why?

10 Well, it's obvious. It was the titillation effect.  
11 It was the secret, we've got something that this lady doesn't  
12 want you to see; come over here and we'll show it to you. Look  
13 inside. We've got something secret that nobody else has.

14 That's not news, Ladies and Gentlemen. That's  
15 appealing to the lowest interest.

16 Second, Hustler knew that the photographs would be a  
17 financial windfall to their company. Mark Johnson, former  
18 editorial assistant who has left the company since I took his  
19 deposition in April of 2010 -- I didn't know that -- Mark  
20 Johnson, the former editorial assistant for Hustler Magazine,  
21 said -- and I'm quoting -- "Publishing the photographs of Nancy  
22 was a no-brainer. She was beautiful and popular. We knew  
23 millions of people would want to see these pictures."

24 I couldn't have prepared that quote for him to show  
25 Hustler's intent if I had done it myself. What could possibly

1 be a clearer expression of Hustler's motivation in this case,  
2 their real motivation in this case than what he said?

3 "We knew millions of people would want to see these  
4 pictures."

5 In other words, we, Hustler Magazine, want to sell  
6 magazines. We want to sell internet content. We're not going  
7 to worry about the consequences.

8 Tyler Downey testified -- and I will go into this in  
9 a little more detail later -- that he got an e-mail from Donna  
10 Hahner, the lady seated over at counsel table, which said this  
11 is going to be a big story for us. So this was the concept,  
12 the idea that was circulating in Hustler Magazine. This is  
13 going to be big for us. This is going to be a winner. We're  
14 going to run with this. We're Hustler. We can do what we  
15 want. We can hide behind the First Amendment. And if we get  
16 caught, we can always say, Hey, we thought it was news.

17 But that didn't work, Ladies and Gentlemen, in this  
18 case. The First Amendment doesn't protect them, and it  
19 shouldn't, and it didn't. And the Court has said so.

20 Third, Hustler knew that it did not have Nancy or her  
21 mother's who is the representative of her estate's permission;  
22 and they knew they would never get it.

23 Let me quote again to you the words of Tyler Downey  
24 who was an editorial assistant at Hustler Magazine again when  
25 this thing came out, the guy who worked on this article. He



1 testified for Hustler by video:

2 Q. Do you believe that Nancy Benoit or her mother  
3 should have had the right to decide if her image was  
4 associated with Hustler Magazine?

5 A. No. The subjects of a news story do not get to  
6 decide whether their images are used or not.

7 Q. And you get to decide if it's news? You get to  
8 decide if it's a news story?

9 A. I don't personally; but Hustler Magazine in  
10 conjunction with their legal team does, yeah.

11 So in Tyler Downey and Larry Flynt's world, in the  
12 Hustler world, Hustler gets to do what it wants. And if it  
13 gets caught, if someone calls them on it, they say, Hey, this  
14 is news. We thought it was news.

15 I think you will also remember I asked Ms. Hahner  
16 who, by the way, is the only Hustler employee who managed to  
17 show up in this court this week so you could look at them, look  
18 them in the eye while they testified, judge their credibility  
19 -- and the judge will talk to you about witness credibility in  
20 his instructions -- you will recall I asked Ms. Hahner:

21 Tell me, Madam, one instance in the 27 years that you  
22 have worked for Hustler Magazine, one instance where you  
23 published 24-year-old photographs, 24-year-old nude photographs  
24 of a deceased person without the approval of that person's  
25 estate and that was found to be okay because it was news, one

1 time.

2 And she couldn't do it because there was no such  
3 situation. Never happened.

4 Obviously, Ladies and Gentlemen, it's not plausible.  
5 It's a ploy. It's a sham. It's justification after the fact.  
6 In the Hustler world, it's a lot easier to ask for forgiveness  
7 than it is for permission because that's what they do.

8 Those 24-year-old photographs wouldn't have been news  
9 the day after Nancy died, much less seven months later. Those  
10 24-year-old photographs wouldn't have been news the day after  
11 she died when there was all the uproar about what happened, and  
12 most of you heard and read about it. But those photographs  
13 wouldn't have been news that day. It was what the tragedy that  
14 occurred that was news, not the nude -- 24-year-old nude  
15 photographs. And Hustler knew that.

16 This is a ploy, Ladies and Gentlemen, to justify a  
17 money-making, money-grabbing scheme by Hustler who sells  
18 photographs that they had no right to sell. It's really that  
19 simple.

20 And then, finally, with respect to Hustler's conduct  
21 before this hit the newsstand, what did they do after they got  
22 my letter on January the 17th, 2008?

23 Now, unfortunately, even though it's called the March  
24 2008 edition, it came out in early January. We didn't know  
25 about it until a few days later in January. And I wrote that

1 letter, Plaintiff's Exhibit 1, on January the 16th. They got  
2 it according to Mrs. Hahner on January the 17th.

3 Plaintiff's Exhibit 5 is the compilation of -- and I  
4 want you to look at it if you will -- Plaintiff's Exhibit 5 is  
5 the compilation of when the magazines, and in particular the  
6 March 2008's magazine, went on the market and went off the  
7 market. It's called the on-sale and the off-sale date. The  
8 on-sale date is shown to be January the 8th, 2008, Plaintiff's  
9 Exhibit 5. The off-sale date is February the 25th, 2008, 39  
10 days.

11 Ms. Hahner admitted that Hustler got my letter on  
12 January the 17th, 2008. January 17th to February the 25th is  
13 39 days. That's an eternity for this magazine to be out there,  
14 39 days. For 39 days, Hustler did nothing. They did -- they  
15 did have time to get their New York law firm, their New York  
16 lawyer to write me a letter giving me all the reasons why  
17 Hustler had the right to run these photographs. They did have  
18 time to do that.

19 And everything that he said in his letter was wrong,  
20 wrong, wrong according to the Court. But they did have time to  
21 do that. But they didn't have time to step back and say, We  
22 better be careful what we are doing here, we better take this  
23 thing off the market, we better call our national distributor  
24 and do what we can to get this thing out of circulation.

25 They didn't have time to do that. No, they didn't do

1 that at all. They kept on selling.

2 The arrogance, Ladies and Gentlemen, I submit to you  
3 of Hustler and the people who we could get into court to  
4 testify is astounding. They reserve to themselves the right to  
5 declare that something is news. They think that's their right  
6 to run pictures in a pornography magazine -- and that's what it  
7 is, and you'll see it; you will see the table of contents -- to  
8 run their pictures in their pornography magazine that they knew  
9 the family would never agree to. And when they get caught,  
10 they try to tell you, We thought that this was news. That's  
11 the theme of this case.

12 And then to add insult to injury, three-and-a-half  
13 years later, three years and three months later they send this  
14 lady a check for \$10,000 saying, Here's payment, now go away.

15 This case, Ladies and Gentlemen, has been going on  
16 three years and six months. This lady has had to chase them  
17 for three years and six months. Three months before we started  
18 this trial, three months before they have to come into court  
19 and look you in the face they send her a check for \$10,000 to  
20 pay for something that was never for sale and would never be  
21 for sale. I call that arrogance.

22 You think about a cherished home or an antique car or  
23 the portrait of a loved one, something that would never be for  
24 sale; and somebody comes up and says, I'm buying this house,  
25 I'm buying this car, I'm buying this portrait and here's what

1 I'm going to pay for it and you got to take it because I'm who  
2 I am, and here's the money, now go away, it's mine -- that's  
3 not the way things work.

4           And they didn't really think that she was going to  
5 take that check three months ago, March the 10th, 2011, with  
6 this courthouse looming on the near horizon. They didn't  
7 really think that she would take that money. They wanted to  
8 try to come in here and say, Oh, well, we finally realize we  
9 were wrong, we tried to pay.

10           That's not what's going on. I don't think you  
11 believe that, and I don't think they believe that, and I know  
12 you don't believe it. And I don't think they believe that she  
13 would take that money. It was a ploy.

14           When I took Mr. Flynt's deposition, the owner of  
15 Hustler, in April of 2010, I have to tell you, Ladies and  
16 Gentlemen, I never dreamed that he would not show up in court  
17 and testify and look you in the eye and try to convince you  
18 that what he did was because he thought it was news and it was  
19 okay. I never thought that he would not come here and try to  
20 tell you that. But he didn't. He didn't come. Don't know  
21 why, but he didn't. So I played his deposition in court. And  
22 here's what he had to say about publishing the Nancy Benoit  
23 images:

24           Q. Do I understand correctly that you ultimately  
25           made the decision to publish images of Nancy Benoit which

1 appeared in the March 2008 edition of Hustler Magazine?

2 A. I didn't make that decision, but I'm aware that  
3 it was made.

4 Q. Okay. So you personally did not make that  
5 decision?

6 A. No.

7 Q. Do you know who did?

8 A. It would have been the editorial staff.

9 Q. Including Mr. David?

10 A. Yes.

11 Q. All right. But if as I sit here today and I ask  
12 you if Mr. Flynt made that decision, you would say no?

13 A. That's true.

14 Well, now, Ladies and Gentlemen, it's a narrow point  
15 but one that I think is important. I think it has larger  
16 implications.

17 You look at Plaintiff's Exhibit 4 which is the  
18 so-called laser proof of this article. It's kind of a big  
19 piece of paper that you have in evidence. And right in the  
20 middle of it there's the legend in handwriting. Okay, LF, per  
21 BD, 11-9-07.

22 Now, I certainly was pretty sure I knew what that  
23 meant. But you will recall I asked Ms. Hahner what that meant;  
24 and she said that means okay, Larry Flynt, per Bruce David,  
25 November the 9th, 2007. So we know from the document and from

1 Ms. Hahner's testimony that on November the 9th, 2007, Larry  
2 Flynt gave his okay, the owner of the company. The big boss  
3 gave his okay to publish these photographs. But when I asked  
4 him if he was involved and made the decision to publish these  
5 photographs, he said no.

6 Now, why would he do that? Why would he deny  
7 responsibility or partial responsibility?

8 He says he didn't make the decision. He is aware  
9 that it was made. Well, maybe that's the reason why he didn't  
10 show up this week to confront that question.

11 In formal written answers to formal written  
12 questions, I asked who made the decision to publish the Nancy  
13 Benoit images; and Larry Flynt was one of three people who were  
14 identified as having made that decision. But he denied it  
15 under oath.

16 Why?

17 I suggest, Ladies and Gentlemen, it's because he  
18 really doesn't want to be associated with this case. He  
19 doesn't want to have to justify his conduct, and so he denies  
20 responsibility. He lets it be defended by other people.

21 I can't make him come to Atlanta from California. I  
22 can only do what I did which is take his deposition and play it  
23 for you which is what happened. And I asked him the questions,  
24 and you heard his answers which were untrue.

25 Now, Judge Thrash is going to instruct you about

1 witness credibility; and he will tell you that you may believe  
2 or disbelieve any witness. And one of the important things to  
3 consider is did the witness have a personal interest in the  
4 outcome of the case. Obviously, Mr. Flynt has a personal  
5 interest in this case. He's the 100 percent owner of Hustler  
6 Magazine. He has a huge personal stake in the financial  
7 windfall, what I would call financial windfall. What the law,  
8 what Judge Thrash will tell you is unjust enrichment, he has a  
9 huge personal stake in the unjust enrichment of Hustler  
10 Magazine as a result of their use of this property without  
11 permission, without consent and without compensation.

12           Hustler Magazine when it used these images without  
13 any effort to pay for them obtained what's called unjust  
14 enrichment. Larry Flynt testified that he doesn't know how  
15 much Hustler's worth because anyone who knows how much he is  
16 worth isn't worth very much. So if you look at what he said  
17 and in the context of what he said, you begin to understand why  
18 he would testify untruthfully about his involvement in the  
19 case.

20           And the same can be said, Ladies and Gentlemen, for  
21 Tyler Downey. He was terminated from Hustler Magazine. He  
22 says he quit. But when this lawsuit was filed, suddenly he's  
23 back writing articles for Hustler Magazine for \$1,500 each.

24           Now, how did that happen?

25           Well, it's pretty simple really when you think about



1 it. He called up -- he admitted in his deposition testimony  
2 that was played for you, he admitted that he called up Hustler  
3 Magazine and spoke to Ms. Hahner when he saw this lawsuit on  
4 Google. He calls her up and he says, I can help in this case.  
5 And, presto, he's back being paid \$1,500 an article. He has  
6 been paid for one. He has got two more in the hopper for which  
7 he will make \$1,500. He's got a big interest in this case.  
8 He's got a big interest in keeping Hustler happy, and Hustler  
9 has a big interest in keeping him happy. And you can consider  
10 his testimony in that context.

11 So two out of the three people who decided to use  
12 these images without permission have a big financial interest  
13 in this case. And you should consider that when you consider  
14 their credibility when they tell you, Hey, we thought this was  
15 news.

16 There's some other quotes from Mr. Downey which I  
17 really couldn't believe my ears when I heard them, and I don't  
18 think you can believe your ears either. He testified:

19 Q. Your logic, if I can call it that, in this  
20 situation was you knew she didn't want the photographs  
21 published; but you thought it was okay to publish the  
22 video images?

23 A. It was okay. I mean, to be honest, I mean, her  
24 -- first of all, she's deceased. Second of all, it's a  
25 news story. You know, I'm sure a lot of people would like

1 images not to be published if they are a news story; but  
2 they don't get to make that decision.

3 He also testified that as I told you earlier he got  
4 -- everybody in the company got an e-mail from Ms. Hahner when  
5 this thing was ginning up to get ready to be printed and  
6 published that this is going to be really big for us. So this  
7 is the guy that Hustler Magazine wants you to believe that he  
8 and Larry Flynt really, really, really thought this was a news  
9 story. And that's what this was all about, a news story,  
10 24-year-old photographs seven months after she died. That's  
11 what it boils down to.

12 So right now I'd like for you to take a look at the  
13 jury verdict form that's going to go out with you and that will  
14 be what you work on in this case. It's a three-page -- it's a  
15 three-page verdict form. I have had them blown up. This is  
16 the first page which we will talk about first. There's the  
17 second page, and then the third page is simply a signature page  
18 for the foreperson who you elect to kind of be in charge of the  
19 proceedings. But the real substance is on the first two pages.

20 And the first page is compensatory damages, and  
21 really the way you see that it's not a matter of if but how  
22 much. It's just a matter of filling in that blank that the  
23 Court has provided.

24 The judge, Ladies and Gentlemen, I believe, will  
25 instruct you with respect to compensatory damages as follows:

1           I charge you that the appropriation of another's name  
2           and likeness without consent and for the financial gain of  
3           the Defendant is a tort in Georgia. It has been  
4           determined as a matter of law that the Defendant is liable  
5           to the Plaintiff for compensatory damages for such a  
6           misappropriation of the images of Nancy Benoit. The  
7           measure of damages for a violation of a person's right of  
8           publicity is the value of the benefit derived by the  
9           person appropriating the other's name or likeness. This  
10          is measured by the unjust enrichment of the Defendant and  
11          not by the injury to the Plaintiff's feelings, reputation  
12          or commercial interests.

13                 So what is the evidence of what the appropriate  
14          amount of compensatory damages should be?

15                 Well, we know that the Defendant paid \$45,000 to a  
16          prostitute who was willing and wanted very much to sell her  
17          story and her pictures to Hustler Magazine, a willing seller  
18          and a willing buyer. We know they were willing to pay \$45,000  
19          for that kind of story from that kind of person.

20                 So how much would it be worth to the Defendant whose  
21          employees have testified they knew millions of people or  
22          thought millions of people would want to see these  
23          photographs -- how much would this kind of story, this kind of  
24          pictures be worth if they were for sale?

25                 All of the employees at Hustler testified that this

1 was a big thing for them. Tyler Downey, Donna Hahner sent out  
2 an e-mail: "This is a great article, going to be a big  
3 seller." That's a direct quote.

4 Mark Johnson: "Millions of people would want to see  
5 these photographs."

6 So based on that evidence from these two Hustler  
7 employees, I suggest that the Nancy Benoit photographs would  
8 have been if they were the result of an open bargain and sale  
9 situation which they were not, but if they were they would be  
10 worth much more to Hustler Magazine than the \$45,000 that it  
11 admittedly paid to the prostitute for her story.

12 So I'm going to suggest, Ladies and Gentlemen, the  
13 figure of a hundred thousand dollars. That seems appropriate  
14 to me based on the evidence that I can recommend to you. You  
15 may have a different number. But because it's your decision,  
16 you get to decide that.

17 Like the Hustler guy said, we get to decide what's  
18 news; but you get to decide what the damages are. And that's  
19 my suggestion. But you may have a different number, and it may  
20 be higher or lower. But I want to keep in mind -- I want you  
21 to keep in mind and I want to emphasize that it's never been  
22 about the money for Mrs. Toffoloni. These photographs were  
23 never for sale.

24 She told you that she would have never sold the  
25 photographs to anyone, especially Hustler Magazine. But,

1 unfortunately, it's like if you get run over and you break your  
2 leg or you slip and fall and hurt yourself or you have some  
3 other injury, nothing -- the law can't take and make your leg  
4 whole again. It can't fix your back. All it can do is award  
5 monetary damages. That's the only way our system can work.

6           The law doesn't have the ability to swoop down and  
7 make everything better again. The only way to address a  
8 wrongdoing in our society, in our system is money damages. And  
9 it's completely inadequate in many situations, I grant you.  
10 And in this case, it's even more inadequate. And it's never  
11 been about the money. But because we are here and because we  
12 are doing what we are doing, that's what I suggest to you is  
13 reasonable.

14           However, Ladies and Gentlemen, the next category is  
15 much more important -- much more important. And here's the  
16 reason why. In this next category, we are going to talk about  
17 you have the opportunity which is rare to get Hustler's  
18 attention. You have the opportunity to send a message. You  
19 have an opportunity to say this is not right, don't do this  
20 again. You have a chance to try to deter and punish if you  
21 wish the Defendant in this case. And let me show you why.

22           Under the punitive damages section, you will be asked  
23 two questions: Did the Defendant act with premeditation or  
24 knowledge and consciousness of the appropriation and its  
25 continuation sufficient to support an award of punitive

1 damages? Yes or no.

2 And those I will be the first to concede at least to  
3 me are very cumbersome legal words. They come from legal  
4 precedent years and years and years ago. And they just have an  
5 archaic flavor to them, premeditation or knowledge and  
6 consciousness of the appropriation and its continuation  
7 sufficient to support an award of punitive damages, yes or no.

8 So what I have done is I have broken out the  
9 keywords: Knowledge, consciousness, appropriation,  
10 continuation.

11 Knowledge. Well, knowledge means that you know  
12 something, that you know about it. Knowledge, you know. You  
13 know something.

14 Consciousness means that you are aware of something.  
15 You have an awareness.

16 Appropriation means taking something that doesn't  
17 belong to you.

18 And continuation means you keep on doing it.

19 Four words: Knowledge, consciousness, appropriation  
20 and continuation.

21 So what is the evidence of this in this case?

22 Well, we have talked about it a lot already. And I  
23 know you are probably getting to the saturation point, but I  
24 will go over it briefly one more time.

25 Knowledge. Hustler knew that -- what was Hustler's

1 knowledge in this case, in this situation?

2 Hustler knew that Nancy Benoit did not want the  
3 photographs published. That was, you know, the very point of  
4 their story.

5 Consciousness. They were conscious. They were aware  
6 that Mrs. Toffoloni would never, ever agree to sell these  
7 photographs to them.

8 Appropriation. Hustler knew that it did not have  
9 permission to use the images, taking something that doesn't  
10 belong to you.

11 And continuation. Hustler did nothing to stop the  
12 sale even when I implored them to do so. And it went on for at  
13 least 39 days. And Mrs. Toffoloni testified yesterday sadly if  
14 you go on the internet -- when she went on the internet the day  
15 before this case started, she saw them again. They're still  
16 there, and they will be there.

17 So all of those elements are there. All of the  
18 elements, knowledge, consciousness, appropriation and  
19 continuation are there. And you check yes.

20 Next you are going to be asked if the Defendant acted  
21 with the specific intent to harm Mrs. Toffoloni. Now, that  
22 sounds pretty gruesome. You know, you might think if somebody  
23 comes up and pulls a gun on her or shoots her or whatever  
24 there's specific intent to harm. But that's not quite what it  
25 means.

1           Judge Thrash is going to instruct you that a party,  
2 the Defendant, possesses specific intent to cause harm when  
3 that party desires to cause the consequences of its act or  
4 believes that the consequences are substantially certain to  
5 occur -- desires to cause the consequences of its act or  
6 believe that those consequences are going to occur.

7           Now, what is the evidence of this?

8           Well, to use the words of Hustler, former Hustler  
9 employee Mark Johnson, it's a no-brainer. Obviously, Hustler  
10 intended to use the images of Nancy Benoit. It wasn't an  
11 accident. Obviously, they knew they didn't have permission.  
12 They didn't have a forged consent form. They didn't have  
13 somebody telling them they represented Nancy and they had their  
14 authority. They knew that they didn't have permission. It  
15 wasn't an accident, and they did it intentionally. They did  
16 what they did intentionally.

17           Publishing the nude images, 24-year-old nude images  
18 seven months after her death was the direct and only cause of  
19 the violation of her right which is a part of the right of  
20 privacy. Hustler did not mistakenly believe that it had  
21 permission. It just did it. And now after the fact it comes  
22 in and says, Well, we thought it was news. Hustler intended  
23 the consequence of its act, and so you check this yes.

24           And, finally, there's a final box for expenses of  
25 litigation, the cost of this lawsuit which Mrs. Toffoloni has



1 the right to claim. And the question that you are going to  
2 have to answer is: Did the Defendant act in bad faith such as  
3 a breach of a known duty through some motive of interest or ill  
4 will?

5 Now, ill will, I mean, did they hate Mrs. Toffoloni?

6 Well, they didn't even know Mrs. Toffoloni. So I'm  
7 not going to stand here and tell you that they hated  
8 Mrs. Toffoloni 'cause they had ill will. But what is obvious,  
9 it's a no-brainer is that they did what they did, they violated  
10 Nancy Benoit's right of publicity for their own financial  
11 interest, a motive of interest to advance their own financial  
12 interests. And that's what supports the claim for attorneys'  
13 fees and expenses of litigation in this case. Again, to  
14 publish 24-year-old photographs of a dead woman which they  
15 believed millions of people would want to see and without the  
16 messy business of trying to get permission and to pay for them  
17 is obvious intent to pursue your own financial interests, the  
18 consequences be damned.

19 They thought that there was nobody who was going to  
20 do anything about it. They thought that this lady down in  
21 Florida was not going to do anything about it. They were  
22 wrong. Mrs. Toffoloni is here. But, more importantly, you're  
23 here; and that's what's important.

24 So I'm going to ask you, Ladies and Gentlemen, to  
25 look at the evidence, to think about what I have been saying to

1 you and to come to the right conclusion. I know you will. And  
2 so I'm going to sit down now and let the lawyers for Hustler  
3 talk to you.

4 Thank you.

5 THE COURT: Mr. Bauer?

6 MR. BAUER: Thank you, Your Honor.

7 Good morning again.

8 THE COURT: Mr. Decker, how about taking your boards  
9 down, please.

10 MR. DECKER: Yes, sir.

11 MR. BAUER: Your Honor, may it please the Court.

12 Ladies and Gentlemen of the Jury, good morning once  
13 again.

14 Well, we have just spent 45 minutes in Decker world.  
15 We heard him talk about Hustler's world, and I don't think  
16 Hustler has its own world. And to me Decker world was a  
17 strange place for us to journey to, particularly in these  
18 surroundings.

19 I look at the American flag. This is a beautiful  
20 federal courtroom. I look at that seal above Judge Thrash.  
21 And I wondered for 45 minutes where we were because in Decker  
22 world, that very strange place, there are no newspapers, there  
23 are no magazines, there's no TMZ, apparently there is no First  
24 Amendment because in Decker's world anytime the media makes a  
25 mistake it's intentional and it has to be punished, not

1 compensated for the mistake but punished. That is a scary  
2 place. At least it is to me.

3 Now, I don't know where you get your news from. But  
4 I can tell you in Decker's world it's at risk, and it won't  
5 survive very long. Maybe there's something to Decker's world.  
6 You know, after one-and-a-half years after this magazine was  
7 published and the article about Nancy Benoit was published  
8 one-and-a-half years later we learned that in Decker's world he  
9 was right and everybody else was wrong. Hustler's editors were  
10 wrong. Their longtime outside counsel lawyers were wrong. I  
11 was wrong. Judge Thrash was wrong. Everybody was wrong but  
12 Rick Decker.

13 And I got to give him that, so maybe there's  
14 something to Decker's world after all. But it's a scary place  
15 for us to live. I can tell you that.

16 Now, you have heard a day and a half of testimony.  
17 And a lot of it on video is very tedious, and we thank you for  
18 your patience and your attention to it. I think at this point  
19 you figured out that this case is not really about any of the  
20 atmospheric issues that they would like this case to be  
21 about -- Larry Flynt's notoriety, his health, the pornographic  
22 content in Hustler Magazine, how many magazines Hustler sells  
23 or distributes or how much money Hustler Magazine makes, these  
24 windfalls that Mr. Decker keeps talking about that you have  
25 heard no evidence about whatsoever.

1           We have tried to make this case about the key  
2 promises that I made to you at the beginning. I hope and  
3 believe we proved them. This was a huge story. It was picked  
4 up by media not just across the country but around the world.  
5 They weren't just writing about the murder; they were writing  
6 about Nancy Benoit's life and career. And they wanted to know  
7 about the same period of her life and career that Hustler wrote  
8 about.

9           I promised you that we would prove to you that  
10 Hustler analyzed the situation carefully, they did their due  
11 diligence, they talked to their lawyers, they analyzed what  
12 their competitors were writing and they thought they were on  
13 rock-solid legal ground. They thought they had a First  
14 Amendment right to publish what they published.

15           And we told you we'd prove what the fair value of the  
16 images was, that the prevailing fair rate in those photos was  
17 somewhere between two and six thousand dollars but nothing more  
18 than ten thousand dollars. And we were ready to pay that. And  
19 I think we have kept those promises. We certainly have tried  
20 to do so. And if you agree that we kept those promises and you  
21 follow the law that Judge Thrash will soon instruct you to  
22 follow, I do not believe that you can find that there is  
23 evidence, much less clear and convincing evidence -- those are  
24 important words, clear and convincing evidence -- in this  
25 record that Hustler Magazine unequivocally knew, unequivocally

1 knew that it had no right to publish the Nancy Benoit feature  
2 but did so anyway knowingly with premeditation and  
3 intentionally and with the malicious intent, the specific  
4 malicious intent to cause harm to Mrs. Toffoloni.

5 Now, let me make a brief comment on punitive damages  
6 and attorneys' fees, those claims in particular. You may have  
7 deduced at this point that procedurally this case is a bit  
8 messy. And ordinarily in any case, but particularly a case  
9 like this, you would not have the kind and certainly the amount  
10 of testimony that you heard about previous rulings in this case  
11 by our presiding judge or rulings of the appellate courts in  
12 the case. But those matters have been prominent in this trial  
13 and in the testimony and evidence in this case, almost all of  
14 it solicited by Mr. Decker and not by us, because the existence  
15 of those prior rulings shows just how unclear the line is  
16 between what is news and what is not news and the difficulty  
17 that arises when you try to use the courts to try to sort that  
18 question out and because, as you have learned, even the learned  
19 judges of our federal courts disagree about those matters.

20 Now, we will talk in detail but not too much detail,  
21 I promise, about what the evidence showed with respect to  
22 Hustler Magazine's belief that it had a legal right to publish  
23 the images. None of that testimony, I believe, has been  
24 contradicted by Plaintiff. Nobody stood up here and said that  
25 anything you heard from Hustler's witnesses was anything but

1 true and sincerely held beliefs.

2 But as we do discuss that evidence, I would like for  
3 you to consider the following question. And I want you to  
4 consider this question in the context of what Mr. Decker just  
5 argued to you. He told you, quote, no way -- those were his  
6 words -- no way Hustler or anyone else for that matter could  
7 possibly believe that this Benoit feature was actually news,  
8 24-year-old photos, seven months after her death, no way anyone  
9 could find that that was news or believe it was. Then he said  
10 obviously it was a ploy, obviously it was a sham.

11 That's his argument. That's his case. And with that  
12 background, I want you to ask yourself as we discuss the  
13 evidence how can I as a member of this jury find that  
14 unequivocally it was clear to Hustler Magazine's editors that  
15 they had no First Amendment right to publish the Benoit article  
16 without first seeking permission from Ms. Toffoloni when even  
17 the federal judge presiding in this case, the judge who will  
18 soon instruct you what the law of this land is that you are to  
19 apply to this case, decided twice that Hustler Magazine was on  
20 solid legal ground when it did so.

21 How could Hustler's conduct at the time when it  
22 decided to publish these images be so malicious, so  
23 premeditated that it could be done with knowledge that it was  
24 wrong to publish photos when even the best legal minds  
25 disagree?

1           I hope you will consider that question carefully  
2 while we talk about the evidence.

3           The burden of proof, Mr. Decker talked a little bit  
4 about that to you. And you have heard me use the word  
5 unequivocal several times already. I did not and do not use  
6 the word unequivocal accidentally or lightly. It is a word  
7 that Judge Thrash will soon use very soon when he tells you the  
8 legal standard you are to apply to this case. He will tell you  
9 what I am quite sure -- he will also tell you what I am quite  
10 sure you already know is it's Mr. Decker's and Ms. Toffoloni's  
11 burden to prove their case on all three claims, compensatory  
12 damages, whether punitive damages should be awarded, whether  
13 attorneys' fees should be awarded. It's not Hustler Magazine's  
14 burden. We have nothing to prove to you.

15           And he will tell you that on the question of whether  
16 to award punitive damages or attorneys' fees, that is on the  
17 question of whether Hustler's editors unequivocally knew and  
18 that they unequivocally had no reason to believe that they had  
19 the right to publish the Benoit feature without permission,  
20 Mr. Decker and Ms. Toffoloni must prove that fact unequivocally  
21 by clear and convincing evidence which means that you can have  
22 no substantial doubt in your mind. The evidence must be,  
23 quote, clear and explicit -- you will hear that from Judge  
24 Thrash -- and, again, unequivocal -- you will hear that word  
25 from Judge Thrash -- that Hustler knew it was wrong, not should

1 have known but knew it was wrong but published anyway for them  
2 to carry their evidentiary burden.

3           And you will hear that instruction from Judge Thrash.  
4 And what this means with less legalese is after all of the  
5 evidence you have heard if you still have questions, if there's  
6 anything unanswered about who knew what and when they knew it  
7 and whether they really believed it to be true, if there are  
8 any doubts whatsoever, it falls on them and they have not  
9 carried their burden of proof. And if that's the case, you  
10 should say no to punitive damages and no to attorneys' fees.

11           One more point on their burden of proof. The word  
12 unequivocal leaves no wiggle room. It is not enough for  
13 Mr. Decker to have argued to you that Hustler should have known  
14 that it needed Ms. Toffoloni's permission. They must have  
15 proven to you that Hustler Magazine's editors unequivocally  
16 knew that they did not need -- or that they needed such  
17 permission, they unequivocally knew they had to have it, but  
18 they published anyway. And if you have heard the same  
19 testimony I have, I believe you must say no to punitive damages  
20 and to attorneys' fees if you correctly apply that standard.

21           Let's talk about what proof Mr. Decker could possibly  
22 claim exists on the punitive damages questions. There are only  
23 nine witnesses total in this case. Five of them were his. He  
24 put up five witnesses to prove his case. So let's take a very,  
25 very, very quick look for what he has got for each of the



1 witnesses on his point.

2 First witness, he called Donna Hahner, Hustler  
3 Magazine's corporate vice president. You heard her testify  
4 that she was not the person responsible for making the decision  
5 to publish the Benoit feature, and nobody has contradicted  
6 that. And you heard her testify that while Mr. Flynt  
7 ultimately consents to the content that's published in the  
8 magazine the actual decision-making responsibility when it  
9 comes to deciding whether the magazine should publish something  
10 rests with the editorial department, in particular the  
11 editorial director, a gentleman named Bruce David.

12 But there was no disagreement at Hustler Magazine  
13 according to Ms. Hahner's testimony about their view, all of  
14 their view that this was a huge story, definitely something  
15 their readers would be interested in, definitely newsworthy,  
16 certainly appropriate to publish in accordance with their First  
17 Amendment rights of protected speech and protections for the  
18 press. And that belief wasn't contradicted until 2009, two  
19 years after the magazine was published.

20 You will recall that Mr. Decker cross-examined  
21 Ms. Hahner at length on when she learned that Hustler was -- he  
22 said it again today -- wrong, wrong, wrong to publish the  
23 images without Plaintiff's permission. And here is the  
24 timeline that evolved from that testimony. Again, I didn't ask  
25 Ms. Hahner to tell you this. This all came from Mr. Decker's

1 case.

2 We learned that in July 2007, not a month after the  
3 tragic deaths while it was still very, very hot news Hustler's  
4 editors got an e-mail from Mark Samansky saying, I got the  
5 story for you. We know that at some point over the next couple  
6 months the March 2008 issue was planned out, content pulled  
7 together and vetted, everything goes to legal as it always does  
8 and comes back.

9 We know that in December 2008 -- or 2007, excuse me  
10 -- Jim Daus called up Hustler and said, How do you have the  
11 right to do this? And they told him, Because it's news.

12 The issue was then published in early January 2008,  
13 sent out to wholesalers; and from there it was out of Hustler's  
14 hands. Approximately ten days later Mr. Decker sent his letter  
15 telling Hustler not to publish. This is weeks after it's  
16 already on the stands, 90 percent of the magazines are likely  
17 sold already. Hustler's lawyers respond a few days later, This  
18 is news, they can print it, they had every right.

19 You all have these letters. You can read them when  
20 you go back to do your deliberations, and you can see for  
21 yourself why Hustler believed it had the legal right to do what  
22 it did. It's spelled out. There were no secrets. They  
23 weren't hiding anything.

24 Mr. Decker responds on January 29th. You can read  
25 his response. He says, I'm going to sue you anyway.

1           Hustler's lawyers respond the next day, We still  
2 think we are right. Please don't sue us. But if you do, send  
3 your lawsuit to us.

4           And four days later Mr. Decker and Ms. Toffoloni sue.  
5 You heard that it ended up in this very same courtroom, the  
6 same room we are sitting in now on February 8th, 2008, on a TRO  
7 hearing. They ask for an injunction: Judge, stop them. Stop  
8 them. Stop them from publishing.

9           Judge Thrash denied the injunction, said, I'm sorry,  
10 it's news.

11           Six months later you heard in October 2008 Judge  
12 Thrash dismissed the case for the same reason: It's news. You  
13 don't have a case.

14           Almost a year later, June 2009, the Court of Appeals  
15 reversed, said the news article was news, that is  
16 constitutionally protected; but the images were not.

17           Let's pause and think about this for a minute because  
18 it's still difficult for me to get my arms around what that  
19 means. You have read the article. If you haven't, you have  
20 the opportunity to. It'll be in evidence with you. The  
21 article is about the existence of the images and how these  
22 never-seen-before, never-known-to-exist-before images captured  
23 this part of her life that nobody had ever known about. I  
24 mean, without the images there is no article.

25           And the 11th Circuit Court of Appeals says in June of

1 2009, a year and a half later, that Hustler had every legal  
2 right to write that article. It was news, clearly news,  
3 clearly protected by the First Amendment because the press and  
4 the public -- that's us -- have the right to learn that  
5 information.

6 But the images are not news. In other words, we have  
7 the right to learn about them. We have the absolute  
8 constitutional right to learn these images exist. We can  
9 describe in painstaking detail in a news article -- which we  
10 didn't, but if it had we could -- every little nuance of these  
11 pictures and what they depict. But you can't see them. You  
12 have every right to have an interest in, and it's natural and a  
13 legitimate interest of yours, to learn about every detail of  
14 the images, how they were made, why they were made, what they  
15 show, but you have no right to actually see them.

16 It is bizarre, I submit to you. And it is a clear  
17 indication, I believe, that it is anything but clear on this  
18 record that Hustler Magazine's editors knew what they did was  
19 wrong when they decided to publish the article. And I submit  
20 to you that it's anything but clear on this record that even in  
21 June between when that decision came down that they could know  
22 from that decision that it was clearly wrong. The  
23 contradiction is evident.

24 Well, the case continued. It's sent back to Judge  
25 Thrash. It's sent back to this courtroom, and it goes on for

1 about a year and a half. And in November of 2010 -- actually,  
2 it was the day before Thanksgiving; for me it was an unhappy  
3 day -- Judge Thrash issued a final order implementing the Court  
4 of Appeals ruling holding that Hustler must pay compensatory  
5 damages to Mrs. Toffoloni.

6 And in March of 2011, Hustler sends her a check --  
7 you heard about this -- unconditionally for \$10,000, not a  
8 settlement offer. It says, Here it is, take it. She rejects  
9 it. All that correspondence will go back with you. It's in  
10 the record.

11 That's what we got from Ms. Hahner's testimony in  
12 their case. I would like to think that we can all agree from  
13 this witness, from Ms. Hahner Mr. Decker has not obtained clear  
14 and convincing proof that Hustler unequivocally knew that it  
15 was in the wrong when it published the images in January 2008.  
16 So hopefully we can all agree that witness number one doesn't  
17 get them where they need to go.

18 So witness number two he called Mrs. Toffoloni, and I  
19 would like to think that Mr. Decker would agree she did not  
20 give you any testimony about what Hustler believed, nor when,  
21 nor could she.

22 So we go to witness number three, Mark Johnson. He's  
23 a former Hustler employee, said he had nothing to do with the  
24 Benoit article or the decision to publish. Mr. Decker did not  
25 give you any evidence to contradict that, said he was asked to

1 give a quote that he barely recalls to a British newspaper when  
2 they were doing press and marketing for the image. And I  
3 submit to you that type of information is not clear and  
4 convincing or unequivocal proof that Hustler's editors -- that  
5 Mr. Johnson testified he had nothing to do with their decision  
6 to publish -- that they knew what they were doing was wrong.

7 And if a former employee that did not work on the  
8 Benoit feature at all or have anything to do with the decision  
9 to publish it is their best witness for showing Hustler  
10 Magazine's supposed purposeful and intentional choice to  
11 violate Ms. Toffoloni's rights, I would hope we could all agree  
12 that that evidence is not clear, convincing and unequivocal.

13 Witness four, Larry Flynt. Well, what did Mr. Flynt  
14 say on this point?

15 He said he thought it was newsworthy, and he told you  
16 why he thought it was newsworthy. And Mr. Decker gave us no  
17 evidence to contradict that testimony. You saw the video of  
18 Mr. Flynt. I'm not going to tell you what conclusions you  
19 should draw about his health and condition. I'm going to leave  
20 that to you. But it's not a contradiction of that testimony  
21 for Mr. Decker to argue to you that Mr. Flynt's not here,  
22 therefore, he was lying. And I would hope we can all agree  
23 that the simple testimony alone from Mr. Flynt saying he  
24 believed no permission was needed cannot be clear and  
25 convincing or unequivocal proof that he knew otherwise.

1 Something more is needed, and it's lacking here.

2           Witness five, Jim Daus, Nancy Benoit's first husband,  
3 we could talk a lot about Mr. Daus. What an interesting fellow  
4 and a curious tactician, pretending to sell to Hustler Magazine  
5 the same images he told us he demanded to be destroyed.  
6 Nevertheless, he is unwittingly a key witness for Hustler  
7 Magazine in its defense of this case.

8           For what he proved to you is not that Hustler  
9 Magazine invented a story after the fact as Mr. Decker has  
10 argued that it believed it had the right to publish only after  
11 Mr. Decker ceded, but instead he proved to us that long before  
12 Mr. Decker's too-late demand letter, long before his lawsuit  
13 Hustler had evaluated its legal footing and believed itself to  
14 be protected. And Mr. Daus told us that that is exactly what  
15 Hustler's associate editor, not even the guy who made the  
16 decision to publish, told him in late December before the  
17 magazine was ever published. He said they said it was  
18 newsworthy, we have done no wrong. Now, I would like to think  
19 that we can also agree that Mr. Daus has not proved by clear,  
20 convincing and unequivocal evidence that Hustler knew this  
21 wasn't news but published it anyway.

22           Now, that's it. That was his case. He didn't have  
23 any other witnesses. That was all of his evidence. We have  
24 just walked through it. And unless I'm missing something huge,  
25 there is nothing there that's clear, convincing and unequivocal

1 to carry their burden.

2 But there's a key -- there is a key piece of evidence  
3 missing, and that is who was not among their witnesses. Again,  
4 their burden. We don't have to prove their case for them. We  
5 put a lot of evidence on to help you make a decision in this  
6 case, but it wasn't our burden to do so.

7 Who did they not provide to you?

8 They didn't provide to you the testimony of the  
9 decision-maker. Donna Hahner told you who it was, Bruce David,  
10 head of our editorial department. Tyler Downey said he told  
11 you all about his conversations with Bruce David. He is the  
12 one who made the decision. Larry Flynt said -- and Mr. Decker  
13 quoted this testimony in his closing argument -- if it wasn't  
14 you, Mr. Flynt, who made the decision?

15 It was the editorial guy, Bruce David. Actually, he  
16 said it was the editorial department. Mr. Decker said, You  
17 mean Bruce David? And Larry Flynt said, Yes.

18 Why on Earth did they not show you the testimony of  
19 the guy who made this decision?

20 This whole case is about when Hustler made the  
21 decision to publish. What did they know? What did they think?

22 He took his deposition. He could have showed it to  
23 you. He showed you everything else. Because he doesn't want  
24 you to make your decision based on anything but extraneous  
25 information, he doesn't want you to make your decision based on



1 the guy who actually made the call in this case.

2           So I can't tell you what Mr. David said in his  
3 deposition because they didn't put it in evidence. But there's  
4 a reason they didn't do so. And this was a key witness's  
5 testimony they decided not to share with you. And you  
6 remember, of course, it's their burden, not ours. But I know  
7 that each of you can deduce why you didn't hear from the head  
8 of Hustler's editorial department, the guy that everybody told  
9 you is the one who made this decision. You can deduce what his  
10 testimony would have shown.

11           So that was his case, including a glaring omission,  
12 the one witness you actually needed to hear you didn't. So did  
13 we somehow unwittingly prove his case for him with our  
14 witnesses?

15           I don't think so. We played the deposition of Chris  
16 Helton for you. Did Chris Helton, the professional  
17 photographer, did he somehow prove that Hustler acted with  
18 malice and knowledge and intent; or did his testimony reinforce  
19 that in the publishing industry you don't seek permission to  
20 use photos of notable people or celebrities when you are  
21 writing an article about them or even just publishing about  
22 them whether you have a news article or not, which clearly  
23 Hustler did, and a protected news article at that?

24           I don't think so.

25           Did Tyler Downey prove that Hustler acted with

1 malice; or did he confirm that Hustler's editors were simply  
2 trying to write an interesting story for his readers on a  
3 matter of major public and media interest, in particular,  
4 interest to the people who read Hustler Magazine?

5 Did Bill Otten make their case for them, the  
6 professional photographer -- the other professional  
7 photographer who told us, Mr. Decker -- remember -- this was so  
8 obviously not news, everybody knew the only news could be about  
9 the murders, nobody could have any interest in 24-year-old  
10 photos of this woman seven months after she died?

11 Well, Bill Otten, one of her friends, he told us that  
12 he gave 25-year-old wrestling photos of Nancy Benoit to a  
13 German magazine writing a story about her early years. He gave  
14 them one -- actually, he gave them three and they published  
15 one. He told us they called him to illustrate an article about  
16 that period of her life. He was upset because People demanded  
17 images.

18 Decker says this isn't news. That's his tactic. And  
19 if that's the case, will that tactic, will his next tactic be a  
20 lawsuit against Bill Otten or the German magazine or People  
21 Magazine or ESPN which also published photos?

22 And, by the way, you remember Mr. Daus's testimony.  
23 He gave an interview to ESPN about her early life too, and  
24 there were other people quoted in that article as well.

25 Now, with respect -- I would respectfully submit to

1 you that each of the witnesses presented to you reinforced the  
2 same evidence the witnesses gave to us. This was a big story.  
3 It was interesting -- I thought it was interesting. I hope  
4 some of it was interesting to you. It was reported on by  
5 everybody, not just Hustler Magazine. They weren't just  
6 chasing information about the murder. They were chasing  
7 information about Nancy Benoit's early life and career just  
8 like Hustler did. And no one pays for images when they are  
9 published in connection with a news story.

10           So let's talk a little bit about Mr. Decker's  
11 argument. And I will start to move a little faster here. You  
12 have heard enough.

13           He said that Ms. Toffoloni had no choice but to bring  
14 this lawsuit; she had no choice but to take on Hustler. Well,  
15 we don't really have the right to challenge her decision to at  
16 this point seek compensatory damages. The courts have ruled on  
17 it. We all know that. We are going to have to deal with how  
18 to value these images.

19           But nobody put a gun to Ms. Toffoloni's head and said  
20 you have to pursue punitive damages to trial. Nobody said you  
21 have got to come in here and spend two days and a lot of  
22 taxpayer money fighting over something that I submit to you is  
23 blatantly obvious that these people thought it was news. They  
24 didn't even know who she was, Ms. Toffoloni. They couldn't  
25 have acted maliciously toward her with intent. Mr. Decker told

1 you they didn't know who she was.

2           And I would submit to you that she did have a choice  
3 not to make this case into something other than it is, how much  
4 is the fair market value of those images and not into what it  
5 is he says it's not, about money. But that's what this case,  
6 that's what 90 percent of his argument here is about, punitive  
7 damages, 'cause that's the only claim that matters to them  
8 'cause they know these images don't have the kind of value to  
9 reflect the money they want.

10           And here are other things that Mr. Decker argued that  
11 we have to address. He told you over and over and over that  
12 Hustler knew that it did not have Plaintiff's permission to  
13 publish the images, it did not seek Plaintiff's permission, did  
14 not have consent, published it anyway, knew it was wrong and,  
15 therefore, knew it was wrong because they knew they didn't have  
16 permission. They knew they didn't seek permission. They knew  
17 they didn't seek consent.

18           I think we have all seen the value of the logic. You  
19 have all heard over and over and over again that Hustler did  
20 not seek permission for the very simple reason and did not  
21 think it needed to for the very simple reason that it thought  
22 this was news and, therefore, permission was unnecessary. I  
23 will not belabor this point any further.

24           Second, Mr. Decker told you that because Hustler  
25 understood and believed that Nancy Benoit had wanted those

1 images destroyed it somehow was charged with knowledge,  
2 unequivocal knowledge that they could not be news. Well, this  
3 argument is the one that I warned you about, one of the  
4 arguments I warned you about at the beginning of this case. It  
5 is the argument that is designed to elicit from you an  
6 emotional response, a sympathetic response rather than a  
7 deliberative decision based on the actual standards of the  
8 case.

9 I know you have watched how Mr. Decker has tried the  
10 case, and you are attuned to that issue, and I ask you to  
11 reject the tactic. We all know that the subjects of news don't  
12 get to choose whether they are news or not. And we all know  
13 that the fact that the subject of a news article doesn't want  
14 their photo associated with it does not define what news is.

15 You could just ask Representative Anthony Wiener  
16 about that. I think we can all agree that there are a lot of  
17 photos about him that he would prefer not be published lately,  
18 but he doesn't have that right. And the fact that he doesn't  
19 want them published or that he thought whoever he sent them to  
20 might have destroyed them doesn't change the fact that they are  
21 news. That argument is a fallacy.

22 Mr. Decker has also told you that you can find that  
23 Hustler knowingly and intentionally violated Ms. Toffoloni's  
24 rights because the images were not published by accident; they  
25 didn't mistakenly publish the images thinking they were

1 publishing something else. Well, of course, they weren't. The  
2 issue plainly isn't whether Hustler meant to publish the image.  
3 The issue is whether they meant to do it knowing they had to  
4 have permission but did it anyway and that they did it with the  
5 intent to hurt Ms. Toffoloni in the commercial sense. And I  
6 know you will see through the fallacy of that logic as well.

7           Mr. Decker has also suggested that Hustler knew this  
8 was going to be a financial windfall and make a lot of money  
9 off these images. He loves that Mark Johnson quote. There's  
10 no evidence of that at all. And you are going to have to apply  
11 the appropriate standard, the appropriate measurement of  
12 damages in this case regardless of Mr. Decker's belief that  
13 there was some financial windfall that you have heard nothing  
14 about, you have gotten -- no proof existed.

15           So there's no evidence of that nature in the record  
16 and despite Mr. Decker's repeated efforts to get it in. And  
17 that's because as you will learn from the Court's  
18 instructions -- and I'm sure you have already picked it up from  
19 the Court's rulings throughout this trial -- that is not how  
20 damages are to be measured.

21           And in this claim, compensatory damages under Georgia  
22 law are not based on what they would have wanted for the  
23 images, what they would have negotiated had they been for sale.  
24 It's totally irrelevant. It was the fair market value to  
25 Hustler for those commercial images, commercial images of that

1 type and used in the same way, in other words, not what they  
2 want, not what they would have negotiated but what Hustler  
3 would have paid for them. And I trust you will faithfully  
4 ignore that part of Mr. Decker's argument when it comes time  
5 for you to deliberate.

6           Before we talk about the compensatory damages claim,  
7 let me leave you with one final thought on -- a couple final  
8 thoughts on Plaintiff's punitive damages claim. Hustler  
9 Magazine and its place in our society -- as Mr. Decker calls  
10 it, Hustler's world -- well, Hustler lives in our world, right?  
11 It lives in the same world and the same Bill of Rights that the  
12 rest of us do.

13           And no one is arguing what Hustler Magazine publishes  
14 and the content Hustler Magazine publishes is for everyone.  
15 And it may not be my preferred news source, may not be one of  
16 your news sources either. And the feature about Nancy Benoit  
17 that it published may not be the kind of news that you or I are  
18 likely to seek out. But clearly for Hustler's readers it is of  
19 interest, and from the evidence I submit you can fairly  
20 question the good taste of Hustler Magazine's editor. But I  
21 submit to you also that you cannot say that no one in this  
22 great nation of ours could possibly be interested in that  
23 story, particularly in light of the fact that the Court of  
24 Appeals said it was newsworthy, the story itself, even if the  
25 images are apparently not.

1           So I won't belabor this point either, but Hustler's  
2 viewpoint clearly is not shared by everyone. But it has been  
3 in business for a long, long time; and its viewpoint is clearly  
4 valued by some, if not many. And I think -- well, I hope that  
5 we all agree that we are fortunate to live in a country where  
6 our government, including our esteemed, underappreciated  
7 judges, are not supposed to tell us, the people, what we are  
8 permitted to find interesting or informative, that is,  
9 newsworthy.

10           So here is the request on punitive damages and  
11 attorneys' fees that we told you we would make. We ask that  
12 you find from all of the evidence that you have heard in this  
13 case that there is not clear, convincing and unequivocal proof  
14 that the editors of Hustler Magazine knew they needed  
15 Plaintiff's permission but went ahead and published without it,  
16 that there is not clear, convincing and unequivocal proof that  
17 Hustler editors acted with malice and a purposeful intent to  
18 harm Ms. Toffoloni and that you say no to punitive damages and  
19 to an award of attorneys' fees to Plaintiff.

20           Now, when you say as we hope you will no to punitive  
21 damages and attorneys' fees, it means that you recognize that  
22 Hustler was not malicious when it decided to publish the photos  
23 of Nancy Benoit at the time it decided to do so. Indeed, as  
24 you have learned, reasonable legal minds agreed that it was  
25 reasonable to do so and lawful to do so.



1           When you as we hope you will say no to punitive  
2 damages and attorneys' fees, it means you recognize that this  
3 case is not about Hustler Magazine, particularly whether you  
4 like or dislike Hustler Magazine, think it's good, bad or  
5 otherwise, but rather you recognize that it's about putting a  
6 fair market value on the photographs as the Court has told us  
7 we must do and that that's what this case is about.

8           When you say as we hope you will no to punitive  
9 damages and attorneys' fees, it means you recognize the  
10 importance of any publisher in our country -- any publisher,  
11 not just USA Today or CNN -- but any publisher to exercise its  
12 First Amendment rights to freedom of speech and of the press.  
13 Remember, the First Amendment isn't just about our rights. It  
14 actually talks about the press too. They have their own  
15 special rights. And when you say no to punitive damages and  
16 attorneys' fees in this case, it means you recognize the  
17 importance of publishers in this country, of that right as this  
18 Court did twice with reason and analysis two different  
19 occasions previously in this very same case.

20           And when you say as we hope you will no to punitive  
21 damages and attorneys' fees, it will speak volumes to  
22 publishers everywhere who are chilled and paralyzed by the  
23 procedural posture of this case and concerned about its  
24 implications for free speech in this country.

25           So compensatory damages, I'm going to be very, very

1 brief. The Court's ruled we have to pay fair value. As you  
2 know, we tried to pay more than that; and they rejected it.  
3 You know how to determine what that value is. As I told you in  
4 the opening statement, that value is measured by looking at the  
5 value Hustler places on the commercial use of other images  
6 within its magazine that are as close as you can find in  
7 comparison.

8           And, of course, it's actually Mr. Decker's burden to  
9 prove that information to you. And from what I recall, the  
10 only relevant damages information that he gave you was a  
11 recitation from Donna Hahner of what we actually paid for the  
12 images, a thousand dollars. And it was not just for the  
13 images; it was for the story too. A thousand dollars, that's  
14 what Hustler actually paid. So it would not be unreasonable  
15 for you to infer that that's what they are worth to Hustler.

16           She also said what Hustler Magazine has paid to its  
17 models and to Carmen Electra, a celebrity who agreed to pose in  
18 the magazine. And you heard Larry Flynt's testimony that his  
19 magazine has paid -- has never paid more than \$10,000 for the  
20 type of images published in the Benoit feature. That's the  
21 only evidence, relevant evidence on compensatory damages that  
22 Mr. Decker gave you in this case.

23           Now, I think you can fairly make your decision based  
24 on that evidence alone. But we believed that you may have  
25 unanswered questions about how such images are valued both

1 specific to Nancy Benoit and how she used her commercial image  
2 and profited from it during her career and also throughout the  
3 publishing industry with respect to magazines other than  
4 Hustler, and that's why we gave you the testimony and evidence  
5 from Bill Otten so you can see that Hustler Magazine's offer to  
6 the Plaintiff was far in excess of any amount Nancy Benoit ever  
7 received for her own efforts for any pictures she ever posed  
8 for as far as we can tell, including the Fallen Angel images  
9 which are the closest we can find to what Hustler published.  
10 And you heard his testimony that Nancy Benoit made a couple of  
11 thousand dollars at best from her own efforts to commercialize  
12 her image.

13           And that's why we also gave you the testimony of  
14 Chris Helton who has been doing this for a long time. And he  
15 told you he took nearly identical pictures, professionally shot  
16 pictures that look virtually identical but for their higher  
17 quality to what Hustler published. He told you what he thinks  
18 they are worth, somewhere between 50 and 100 dollars per photo  
19 maximum. He said that most of the time he would expect less  
20 than that. So ten photos we published at the maximum, a  
21 hundred dollars per photo, Chris Helton says a thousand  
22 dollars, told us he actually thought that was high.

23           I think you all were taking very good notes during  
24 Ms. Hahner's testimony about the range of payments that Hustler  
25 makes to its models. Because that testimony only came in

1 through oral testimony, though, and you don't have any  
2 documentary evidence to take back with you, I just want to  
3 mention it briefly and tell you again just to refresh your  
4 memory.

5 Amateur models from 2006 to the present were paid 250  
6 to 350 dollars for appearing in the magazine. Hustler used to  
7 pay amateurs who won an annual contest if they don't do any  
8 more \$2,500 for a commissioned photo shoot, so multiple  
9 pictures. But they haven't done that since 2008.

10 From 2006 to 2007, Hustler models used to be paid  
11 \$2,500 for a centerfold -- you all know what a centerfold is --  
12 and \$500 for a front cover. And from 2008 to present, they  
13 have been paid actually only \$1,350 for a centerfold and are no  
14 longer paid any additional money if they appear on the cover.

15 For multiple model spreads, from 2006 to 2007 models  
16 were paid \$1,200, non-cover, non-centerfold, \$15 [sic] for  
17 single-model, non-cover, non-centerfold photo set. And that  
18 number dropped in 2008 down to a thousand dollars for  
19 non-cover, non-centerfold photo sets -- photo sets.

20 Ms. Hahner told you that Carmen Electra, actually her  
21 agency was paid, not her directly, \$6,000 in 2006 for her  
22 appearance on the front cover and in nude photos,  
23 professionally shot, high-quality photos on four inside pages,  
24 four pages inside the magazine. So cover, four high-quality  
25 pages, \$6,000.

1           And then Ms. Hahner talked about Wendy Cortez who is  
2 the prostitute that David Vitter, Louisiana senator, frequented  
3 apparently. And Mr. Decker made a special note of trying to  
4 shoehorn this case into that scenario, so we can talk about it  
5 for just a second. They paid this woman \$45,000, and here's  
6 what Ms. Hahner told you.

7           They paid her for breaking the story that a U.S.  
8 senator, a particularly conservative U.S. senator who talks  
9 about marital fidelity regularly, was himself breaking the law  
10 and frequenting a prostitute, a reasonably big story; a press  
11 conference to promote the story; radio and television  
12 interviews; a second news story with a cover roof line and main  
13 cover line, including a four-page news story with photos in the  
14 holiday 2007 issue; and then a second story in the January 2008  
15 issue which included a five-page nude photo set shot by a  
16 Hustler photographer, a front cover inset photo and a cover  
17 roof line. That's what the \$45,000 to Ms. Cortez was for.

18           The images that you have to evaluate are, frankly,  
19 like none of those. They don't look like the model pictures.  
20 They don't look like the Carmen Electra pictures. They don't  
21 look like the Wendy Cortez pictures or scenario at all. It's  
22 one-and-a-fraction pages. They are not professional-shot  
23 photos. They're grainy screen shots from a 20-year-old VHS  
24 tape. They're not even of the same type of subject matter that  
25 those models' photo shoots consisted of.

1           So you've got to figure out a way to shoehorn your  
2 valuation of these images into those categories and figure out  
3 what it's closely aligned with. And to the extent Mr. Decker  
4 wants you to use Wendy Cortez because it was a big story, yes,  
5 they paid Wendy Cortez for the story. Well, we paid Mark  
6 Samansky for this story. This case isn't about what we would  
7 have paid to Nancy Benoit for her story. We are only at this  
8 point talking about the fair value of those images. So you  
9 need to take that into consideration in your deliberations,  
10 please.

11           All right. We are in the home stretch now.

12           This is a business case. Nobody needs to be  
13 punished. It's a business case and nothing more. But you have  
14 got to figure out the value, and Judge Thrash is going to tell  
15 you that the way you measure it is for the time and manner of  
16 its use by Hustler Magazine.

17           So we just talked about the time was one issue. They  
18 just used it once in one issue. The manner, one and a half --  
19 one-and-a-fraction pages, grainy, non-explicit, ten-picture  
20 pictorial. That's the world we are in now, confined to  
21 one-and-a-fraction pages in the magazine.

22           So given that evidence, we trust that you will place  
23 a fair value on the images and we trust you will find an  
24 objective way to do so. We ask given this evidence and the  
25 appropriate measure of damages in the case as I told you, we

1 would ask that you not assign a value in excess of \$10,000. We  
2 ask you to say yes to compensatory damages in accordance with  
3 Judge Thrash's November 2010 ruling and in accordance with the  
4 appropriate way to value these images; and we ask you to say no  
5 to punitive damages and attorneys' fees and to remember this is  
6 not a case about windfalls, a tragedy of what Chris Benoit did  
7 or the mother's loss of a daughter. It is only about what the  
8 Court has told us it is about -- fair value of the images.

9 And we appreciate your consideration. It has been an  
10 honor to argue and try this case in front of you. Thank you  
11 very much for your attention, and I know you will do the right  
12 thing.

13 Thanks.

14 THE COURT: Mr. Decker, you've got 12 seconds left if  
15 you wish to use them.

16 MR. DECKER: 12 seconds, Judge?

17 THE COURT: Yes.

18 MR. DECKER: How can I say this more clearly?

19 There was a minor blip in the road. This has never  
20 been newsworthy. It has never been newsworthy. The courts  
21 have said it's never been newsworthy. It was a ploy. It was  
22 an afterthought to justify their conduct to try to pull the  
23 wool over her eyes and now your eyes. It's never been about  
24 newsworthiness. It's been about an abuse of power, and that is  
25 what you need to consider in this case.

1           Hustler is not a news publication. It is hardcore  
2 pornography. Just take a look at Plaintiff's Exhibit 2. If  
3 Hustler thought this was a news article, why wasn't it  
4 published in July of 2007?

5           It was published seven months later. It was a shot  
6 at a porno article is all it was.

7           They are now in court staring down the barrel of a  
8 jury verdict; and they want you to believe that they really,  
9 really thought this was news. Well, it's never been news; and  
10 they never really thought that. They thought they could get  
11 away with it, but they haven't. And that's the simple fact.

12           Is my time over, Judge?

13           THE COURT: Time's up, Mr. Decker.

14           Ladies and Gentlemen, that completes the closing  
15 arguments of the attorneys. The next stage of the trial will  
16 be my instructions to you on the law.

17           Let's take a 15-minute break. During the break,  
18 don't discuss the case with anyone. Don't allow anyone to  
19 discuss the case in your presence. Don't even begin discussing  
20 the case among yourselves yet. And you are excused until  
21 11:25.

22           Court's in recess until 11:25.

23           (A short recess was taken.)

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

25           (Jury entered the courtroom.)



1                                   - - -

2                                   CHARGE TO THE JURY

3                                   - - -

4                   THE COURT:  Members of the Jury, I will now explain  
5 to you the rules of law that you must follow and apply in  
6 deciding this case.  As I do this, I suggest that you not take  
7 notes.  I will have my court reporter type up a transcript of  
8 these instructions, and you will have that transcript with you  
9 in the jury room for your use if you wish to do so.  So for now  
10 I suggest you just concentrate on listening to the instructions  
11 as I give them to you orally.

12                   When I have finished, you will go to the jury room  
13 and begin your discussions, what we call your deliberations.  
14 In deciding the case, you must follow and apply all of the law  
15 as I explain it to you whether you agree with that law or not;  
16 and you must not let your decision be influenced in any way by  
17 sympathy or by prejudice for or against anyone.

18                   The fact that a corporation is involved as a party  
19 must not affect your decision in any way.  A corporation and  
20 all other persons stand equal before the law and must be dealt  
21 with as equals in a court of justice.  When a corporation is  
22 involved, of course, it may act only through people as its  
23 employees; and, in general, a corporation is responsible under  
24 the law for any of the acts and statements of its employees  
25 that are made within the scope of their duties as employees of

1 the company.

2           In your deliberations, you should consider only the  
3 evidence, that is, the testimony of the witnesses and the  
4 exhibits I have admitted in the record. But as you consider  
5 the evidence, both direct and circumstantial, you may make  
6 deductions and reach conclusions which reason and common sense  
7 lead you to make.

8           Direct evidence is the testimony of one who asserts  
9 actual knowledge of a fact such as an eyewitness.  
10 Circumstantial evidence is proof of a chain of facts and  
11 circumstances tending to prove or disprove any fact in dispute.  
12 The law makes no distinction between the weight you may give to  
13 either direct or circumstantial evidence.

14           Remember that anything the lawyers say is not  
15 evidence in the case; and except for my instructions to you on  
16 the law, you should disregard anything I may have said during  
17 the trial in arriving at your decision concerning the facts.  
18 It is your own recollection and interpretation of the evidence  
19 that controls.

20           Now, in saying that you must consider all of the  
21 evidence, I do not mean that you must accept all of the  
22 evidence as true or accurate. You should decide whether you  
23 believe what each witness had to say and how important that  
24 testimony was. In making that decision, you may believe or  
25 disbelieve any witness in whole or in part. Also, the number

1 of witnesses testifying concerning any particular dispute is  
2 not controlling.

3 In deciding whether you believe or do not believe any  
4 witness, I suggest that you ask yourself a few questions:

5 Did the witness impress you as one who was telling  
6 the truth? Did the witness have any particular reason not to  
7 tell the truth? Did the witness have a personal interest in  
8 the outcome of the case? Did the witness seem to have a good  
9 memory? Did the witness have the opportunity and ability to  
10 observe accurately the things he or she testified about? Did  
11 the witness appear to understand the questions clearly and  
12 answer them directly? Did the witness's testimony differ from  
13 other testimony or other evidence?

14 You should also ask yourself whether there was  
15 evidence tending to prove that the witness testified falsely  
16 concerning some important fact or whether there was evidence  
17 that at some other time the witness said or did something or  
18 failed to say or do something which was different from the  
19 testimony the witness gave before you during the trial. You  
20 should keep in mind, of course, that a simple mistake by a  
21 witness does not necessarily mean that the witness was not  
22 telling the truth as he or she remembers it because people  
23 naturally tend to forget some things or remember other things  
24 inaccurately. So if a witness has made a misstatement, you  
25 need to consider whether that misstatement was simply an

1 innocent lapse of memory or an intentional falsehood; and the  
2 significance of that may depend on whether it has to do with an  
3 important fact or with only an unimportant detail.

4 In this case, it is the responsibility of the  
5 Plaintiff to prove every essential part of the Plaintiff's  
6 claim by a preponderance of the evidence. This is sometimes  
7 called the burden of proof or the burden of persuasion. A  
8 preponderance of the evidence simply means an amount of  
9 evidence that is enough to persuade you that the Plaintiff's  
10 claim is more likely true than not true.

11 In deciding whether any fact has been proved by a  
12 preponderance of the evidence, you may consider the testimony  
13 of all of the witnesses regardless of who may have called them  
14 and all of the exhibits received in evidence regardless of who  
15 may have produced them. If the proof fails to establish any  
16 essential part of the Plaintiff's claim by a preponderance of  
17 the evidence, you should find for the Defendant as to that  
18 claim.

19 Ladies and Gentlemen, I charge you that the  
20 appropriation of another's name and likeness without consent  
21 and for the financial gain of the Defendant is a tort in  
22 Georgia. It has been determined as a matter of law in this  
23 case that the Defendant is liable to the Plaintiff for  
24 compensatory damages for such a misappropriation of the images  
25 of Nancy Benoit. The measure of damages for a violation of a

1 person's right of publicity is the value of the benefit derived  
2 by the person appropriating the other's name or likeness. This  
3 is measured by the unjust enrichment of the Defendant and not  
4 by the injury to the Plaintiff's feelings, reputation or  
5 commercial interests.

6 In this case, the proof of the value for the time and  
7 manner in which the images were appropriated is the value of  
8 the Defendant's use of the images in a two-page feature in the  
9 March 2008 issue of Hustler Magazine.

10 You are also being asked to deliberate on whether  
11 punitive damages should be awarded to the Plaintiff for the  
12 Defendant's use of the Benoit images without her permission.  
13 Under Georgia law, punitive damages may only be awarded for the  
14 Defendant's violation of Ms. Benoit's right of publicity if you  
15 find by clear and convincing evidence that the acts of the  
16 Defendant have been of such a character to import premeditation  
17 or knowledge and consciousness of the appropriation and its  
18 continuation.

19 Clear and convincing evidence is a higher standard of  
20 proof to meet than proof by a preponderance of the evidence.  
21 To be clear and convincing, the evidence must leave no  
22 substantial doubt in your mind. Clear and convincing evidence  
23 is evidence that is highly probable, clear, explicit and  
24 unequivocal.

25 As you heard during the trial, the United States

1 Court of Appeals for this circuit has held in this case that  
2 the photographs published by the Defendant do not qualify for  
3 the newsworthiness exception to the right of publicity. This  
4 is the law that governs this case. However, if you find that  
5 the Defendant actually and reasonably believed that its  
6 publication of the Benoit images was lawful and protected by  
7 the First Amendment to the United States Constitution, you may  
8 not award punitive damages. In considering whether it was  
9 reasonable for the Defendant to believe its publication of the  
10 Benoit images without the Plaintiff's permission was lawful and  
11 protected by the First Amendment, you may consider that an  
12 individual's right of publicity is limited by the fundamental  
13 rights to freedom of speech and freedom of the press guaranteed  
14 by the United States Constitution.

15           Accordingly, the Georgia Supreme Court has adopted a  
16 newsworthiness exception to the right of publicity where an  
17 incident is a matter of public interest or the subject matter  
18 of a public investigation, a publication in connection  
19 therewith can be a violation of no one 's legal right of  
20 privacy. In other words, where the publication is newsworthy,  
21 the right of publicity gives way to freedom of the press.

22           If you decide to impose punitive damages, you should  
23 further specify whether you find that the Defendant acted with  
24 specific intent to cause harm to the Plaintiff. A party  
25 possesses specific intent to cause harm when that party desires

1 to cause the consequences of its act or believes that the  
2 consequences are substantially certain to result from it.  
3 Intent is always a question for the jury. It may be shown by  
4 direct or circumstantial evidence.

5           The expenses of litigation are not generally allowed  
6 as a part of the damages. But if the Defendant has acted in  
7 bad faith or has been stubbornly litigious or has caused the  
8 Plaintiff unnecessary trouble and expense, you may allow them.  
9 You should determine from the evidence the attorneys' fees or  
10 other expense, if any, as will be allowed. Attorneys' fees may  
11 not be awarded if you find that the Defendant actually and  
12 reasonably believed that it had the right to publish the Benoit  
13 images without first seeking the Plaintiff's permission.

14           Bad faith requires more than bad judgment or  
15 negligence; rather, the statute imports a dishonest purpose or  
16 some moral obliquity and implies conscious doing of wrong and a  
17 breach of known duty through some motive of interest or ill  
18 will. Bad faith is bad faith connected with the transactions  
19 and dealings out of which the cause of action arose rather than  
20 bad faith in defending or resisting the claim after the cause  
21 of action has already arisen.

22           Of course, the fact that I have given you  
23 instructions concerning the issue of the Plaintiff's damages  
24 should not be interpreted in any way as an indication that I  
25 believe the Plaintiff should or should not prevail in this case

1 except as to her claim for compensatory damages.

2 Any verdict you reach in the jury room must be  
3 unanimous. In other words, to return a verdict you must all  
4 agree. Your deliberations will be secret. You will never have  
5 to explain your verdict to anyone.

6 It is your duty as jurors to discuss the case with  
7 one another in an effort to reach agreement if you can do so.  
8 Each of you must decide the case for yourself but only after  
9 full consideration of the evidence with the other members of  
10 the jury. While you are discussing the case, do not hesitate  
11 to re-examine your own opinion and change your mind if you  
12 become convinced that you were wrong; but do not give up your  
13 honest beliefs solely because the others think differently or  
14 merely to get the case over with.

15 Remember that in a very real way you are judges --  
16 judges of the facts. Your only interest is to seek the truth  
17 from the evidence in the case.

18 When you go to the jury room, you should first select  
19 one of your members to act as your foreperson. The foreperson  
20 will preside over your deliberations and will speak for you  
21 here in court.

22 A verdict form has been prepared for your  
23 convenience, and you will have this verdict form with you in  
24 the jury room. You will see it has the name of the case,  
25 Maureen Toffoloni versus LFP Publishing Group, LLC. Then it



1 says Verdict: One, compensatory damages. We, the jury, award  
2 the Plaintiff the sum of blank dollars as compensatory damages.

3 And you will insert the amount of money that you  
4 believe the Plaintiff should be awarded as compensatory damages  
5 in the case for that item.

6 Next you will see it has, two, punitive damages: Did  
7 the Defendant act with premeditation or knowledge and  
8 consciousness of the appropriation and its continuation  
9 sufficient to support an award of punitive damages?

10 And you will have two alternatives there, yes or no.  
11 If your answer to that question is yes, then your foreperson  
12 will put a check mark next to the word yes. If your answer is  
13 no, then your foreperson would put a check mark next to the  
14 word no.

15 You have a second question that you need to answer  
16 under punitive damages, and that is: Did the Defendant act  
17 with the specific intent to harm the Plaintiff?

18 And, again, you have the alternatives yes or no. And  
19 your foreperson would put a check mark next to the word that  
20 expresses your verdict.

21 Then, three, expenses of litigation: Did the  
22 Defendant act in bad faith such as a dishonest purpose or  
23 breach of a known duty through some motive of interest or ill  
24 will?

25 And, again, you will answer that question either yes

1 or no.

2           You will take the verdict form to the jury room; and  
3 when you have reached unanimous agreement you will have your  
4 foreperson fill in the verdict form, date it and sign it on the  
5 third page of the verdict form and then return to the  
6 courtroom. If you should desire to communicate with me at any  
7 time, please write down your message or question and pass the  
8 note to the court security officer who will bring it to my  
9 attention. I will then respond as promptly as possible either  
10 in writing or by having you returned to the courtroom so that I  
11 can address you orally. I caution you, however, with regard to  
12 any message or question you might send that you should not tell  
13 me your numerical division at the time.

14           Ladies and Gentlemen, that completes my instructions  
15 to you on the law that you are to apply in deciding the case.  
16 In just a few minutes you will go with the court security  
17 officer to your jury room. You can go ahead and select your  
18 foreperson, but do not begin your deliberations until we send  
19 in the verdict form and the evidence that's been admitted in  
20 the case. Once you get the verdict form and the evidence, you  
21 can begin your deliberations if you wish to do so.

22           And you may decide that you want to go to lunch and  
23 begin your deliberations after lunch. That'll be entirely up  
24 to you. Just let the court security officer know what you want  
25 to do.

1           As I said, the court reporter will type up a  
2 transcript of the instructions that I have just given you.  
3 It'll take her a little while to do that. It'll take me a  
4 little while, not long, but a little while to proofread it.  
5 Once we do that, you will have those instructions with you in  
6 the jury room. So you may decide you want to go ahead and go  
7 to lunch. You may decide you want to start your deliberations.  
8 That'll be up to you.

9           All right. At this time I'll ask that you go with  
10 the court security officer to your jury room. You can select  
11 your foreperson, but don't begin deliberating until you get the  
12 verdict form and all the evidence.

13           (Jury exited the courtroom.)

14           THE COURT: Mr. Decker, any exceptions to the charge?

15           MR. DECKER: Thank you, Your Honor.

16           The Plaintiff excepts to the charge as given which is  
17 named and styled Defendant's Request to Charge Number 16,  
18 punitive damages. Your Honor, the phraseology beginning with  
19 the word "In considering whether it was reasonable for the  
20 Defendant to believe" and down to the bottom of the page, Your  
21 Honor, is not a correct statement of the law. Your Honor, the  
22 photographs at issue in this case have been held not to be  
23 newsworthy; and the language of this instruction allows the  
24 jury to consider that the photos might be newsworthy. And for  
25 that reason, the Plaintiff excepts to that charge as given,

1 Your Honor.

2 Plaintiff also excepts to the second paragraph of the  
3 charge denominated Defendant's Request to Charge Number 23,  
4 attorneys' fees, the second paragraph again saying that  
5 attorneys' fees may not be awarded if you find that the  
6 Defendant actually and reasonably believed it had the right to  
7 publish the Benoit images without first seeking the Plaintiff's  
8 permission. Again, this is not a correct statement of Georgia  
9 law, Your Honor. Every intentional tort carries with it a  
10 specie of bad faith, and that is the instruction which the  
11 Plaintiff sought.

12 That concludes my exceptions, Your Honor.

13 THE COURT: Mr. Bauer, any exceptions to the charge?

14 MR. BAUER: No, Your Honor.

15 THE COURT: Do you agree with either of Mr. Decker's  
16 objections to my charge?

17 MR. BAUER: No, Your Honor. We think he is patently  
18 wrong and his understanding of both the legal standards for  
19 punitive damages and for an award of attorneys' fees under  
20 Georgia law are grossly mistaken. If Mr. Decker's view of the  
21 attorneys' fees charge is correct and his claim that he need  
22 not prove bad faith because the Court has found that there's  
23 liability for compensatory damages on the right of publicity  
24 claim, then effectively he is suggesting that every single tort  
25 in Georgia is not only an intentional tort but every

1 intentional tort automatically is entitled to an award of  
2 attorneys' fees.

3 That's clearly not the legal standard. That's  
4 clearly not the Georgia law, and that's clearly an error. We  
5 think the Court appropriately charged the jury.

6 THE COURT: All right. I'm going to leave the charge  
7 as it is.

8 Y'all check the evidence and make sure that the  
9 evidence that's going out with the jury is what has been  
10 admitted.

11 (Attorneys checked the evidence.)

12 MR. DECKER: It is, Your Honor.

13 MR. BAUER: It is.

14 THE COURT: All right. We'll be in recess to await  
15 the verdict of the jury.

16 (A recess was taken from 11:51 a.m. to 2:28 p.m. to  
17 await the verdict of the jury.)

18 THE COURT: Counsel, I've got a note from the jurors.  
19 It says:

20 Number one, please define measure of damages. Is it  
21 value of amount paid for photos or is it the amount derived  
22 from use of photos (compensatory).

23 Two, if punitive damages are awarded, are we, the  
24 jury, responsible for determining that amount?

25 Three, do both questions under Section 2, punitive

1 damages, have to be answered in the affirmative in order to  
2 award punitive damages?

3 Four, are sales and circulation figures available for  
4 2007 and '8?

5 Let's just go through them one at a time.

6 What do you say as to number one, Mr. Decker?

7 MR. DECKER: Judge, I say I think the simplest way  
8 out of this wicket is to recharge on the measure of damages  
9 with respect to question number one.

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

11 MR. BAUER: Your Honor, I think your charge to the  
12 jury is appropriate and as clear as it can possibly be under  
13 Georgia law, you know, short of the charges that we submitted.  
14 And I think we have to tell the jury that they are going to  
15 have to make that decision on their own based on the law that  
16 you provided.

17 THE COURT: What about question number two,  
18 Mr. Decker?

19 MR. DECKER: Well, that's a little more -- should I  
20 stand, Your Honor?

21 Yes, I should. I can't really see it from where I  
22 was standing.

23 Judge, that's a little more difficult because the  
24 jury is responsible for the amount in the second phase. But  
25 what the problem is is they may think they have to do it now,

1 and I think that's what that question is directed to, and I'm  
2 not sure how to respond to that. I guess again that the best  
3 way to do it is to say it's your duty to determine whether  
4 punitive damages should be awarded at this stage or words to  
5 that effect.

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

7 MR. BAUER: I think that's correct, Your Honor. I  
8 think that you can tell the jury appropriately that the only  
9 question before them that should be answered by them on the  
10 evidence that's been given to them is the question of whether  
11 punitive damages should be awarded and not how much.

12 THE COURT: What do you say about question number  
13 three, Mr. Decker?

14 MR. DECKER: Judge, the correct answer is no.

15 THE COURT: Mr. Bauer?

16 MR. BAUER: I would agree.

17 THE COURT: I think that's right.

18 What about number four?

19 MR. DECKER: Judge, I think you probably ought to say  
20 something like: No. And the case needs to be decided on the  
21 evidence before you.

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

23 MR. BAUER: I think that's correct, Your Honor.

24 THE COURT: You can bring the jury in.

25 (Jury entered the courtroom.)

1           THE COURT: Ladies and Gentlemen, I've received your  
2 note with the four questions. With respect to question one,  
3 Please define measure of damages, is it value of amount paid  
4 for photos or is it the amount derived from use of photos, the  
5 only way I can answer that question is tell you again that the  
6 measure of damages for a violation of a person's right of  
7 publicity is the value of the benefit derived by the person  
8 appropriating the other's name or likeness. This is measured  
9 by the unjust enrichment of the Defendant and not by the injury  
10 to the Plaintiff's feelings, reputation or commercial  
11 interests. And it is for you to determine what the value of  
12 the benefit is based on the evidence that you have heard in the  
13 case.

14           Two, if punitive damages are awarded, are we, the  
15 jury, responsible for determining that amount, the only thing  
16 that is before you to determine at this time is whether or not  
17 punitive damages are to be awarded and not how much.

18           Three, do both questions under Section 2, punitive  
19 damages, have to be answered in the affirmative in order to  
20 award punitive damages, the answer to that is no.

21           Four, are sales and circulation figures available for  
22 2007 and 2008, the answer is no. You have to decide the case  
23 based on the evidence that you have heard.

24           All right. I'll ask that you return to the jury room  
25 and resume your deliberations.



1 (Jury exited the courtroom.)

2 THE COURT: Mr. Decker, any objection to the response  
3 to the questions?

4 MR. DECKER: No, Your Honor.

5 THE COURT: Mr. Bauer, any objection to the response  
6 to the questions?

7 MR. BAUER: No, Your Honor.

8 THE COURT: All right. We will be in recess to await  
9 the verdict of the jury.

10 (A recess was taken from 2:35 p.m. to 4:52 p.m. to  
11 await the verdict of the jury.)

12 THE COURT: The jurors told the court security  
13 officer they wanted to go home at five o'clock, so I'm going to  
14 send them home for the evening.

15 We're ready for the jury.

16 (Jury entered the courtroom.)

17 THE COURT: Ladies and Gentlemen, it's about the time  
18 of day when we usually adjourn court. Unless your foreperson  
19 tells me you are just on the verge of reaching a verdict, I'm  
20 going to let you go home for the evening and resume your  
21 deliberations tomorrow morning.

22 THE FOREPERSON: All right.

23 THE COURT: All right. You are excused until 9:30  
24 tomorrow morning. As soon as all 12 of you get in the jury  
25 room, you can resume your deliberations. You don't have to

1 wait for me to say anything to you or do anything. Just go  
2 back to deliberating. So you are excused until 9:30 tomorrow  
3 morning.

4 (Jury exited the courtroom.)

5 THE COURT: All right. We will be in recess to await  
6 the verdict of the jury. Let me ask y'all to stay in here for  
7 a little while, let them get in the elevators and be on their  
8 way before you leave the courtroom.

9 Court's in recess.

10 (Proceedings adjourned at 4:56 p.m.)

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UNITED STATES DISTRICT COURT:  
NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 384 through 457, are a true and correct copy of the proceedings in the case aforesaid.

This the 6th day of July, 2011.

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Susan C. Baker, RMR, CRR  
Official Court Reporter  
United States District Court