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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 17, 2011
Atlanta, Georgia
9:35 a.m.

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

VOLUME V

APPEARANCES OF COUNSEL:

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

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

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

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

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1 (Proceedings held in Atlanta, Georgia, June 17, 2011,
2 9:35 a.m., in open court.)

3 THE COURT: Good morning, counsel.

4 MR. DECKER: Good morning, Judge.

5 MR. BAUER: Good morning, Your Honor.

6 THE COURT: All right. Yesterday I told y'all I was
7 going to follow the pattern jury instruction on punitive
8 damages from the 2005 pattern jury instructions. I said
9 something about the 2010 edition. There is no 2010 edition.
10 2005 is the latest. 2010 is criminal only. So what I intend
11 to do is what I said yesterday from the 2005 pattern
12 instructions.

13 Are you ready, Mr. Decker?

14 MR. DECKER: Your Honor, I am. Will I be permitted
15 to open and conclude the argument within my time limits?

16 THE COURT: Yes, sir.

17 Ready, Mr. Bauer?

18 MR. BAUER: Yes, Your Honor.

19 We would just for the record ask the Court to
20 reconsider the punitive damages charge from the 11th Circuit
21 pattern jury instruction given the annotation that clearly
22 references the State Farm case and the recent pronouncements
23 from the U.S. Supreme Court. I don't know if that is in the
24 hard-copy book version that you have. It's certainly on the
25 11th Circuit's website copy of the jury instructions.

1 THE COURT: Well, it is in my copy of it. And
2 notwithstanding the fact that they talk about that stuff, it
3 still has the pattern instruction that I read to you yesterday.

4 MR. BAUER: It certainly does. We think that the
5 suggestion in the annotations and comments are meant to allow
6 the Court to instruct the jury appropriately when the factors
7 enunciated in the State Farm case apply as they would in this
8 case.

9 THE COURT: I'm going to continue doing what the 11th
10 Circuit has said in this case whether I agree or disagree with
11 it, and that's the pattern.

12 MR. BAUER: Thank you, Your Honor.

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

14 (Jury entered the courtroom.)

15 THE COURT: Good morning, Ladies and Gentlemen.
16 Thank you for all being here on time so we could resume the
17 trial promptly this morning.

18 All right, Mr. Decker.

19 - - -

20 CLOSING ARGUMENTS - PUNITIVE DAMAGES

21 - - -

22 MR. DECKER: Thank you, Your Honor.

23 Good morning again, Ladies and Gentlemen.

24 We have all had a long week. I know I have. I know
25 you have. So, fortunately, I'm going to be brief. I just want

1 to say a few things, and then I'll put my client in your hands
2 for the last time.

3 First, I want to thank you for your verdict.
4 Mrs. Toffoloni thanks you. I thank you. It speaks the truth,
5 and that's what the word verdict means. It comes from two
6 Latin words which mean to speak the truth, and I believe that
7 your verdict does speak the truth, and thank you.

8 We have one more thing to ask of you today, and that
9 is the amount of punitive damages. But before we get to that,
10 I'd like to say a couple other things.

11 I can't deny, Ladies and Gentlemen, that I was hoping
12 for a little remorse from Hustler yesterday. Even at this late
13 stage of the game, even after three-and-a-half years, I was
14 still hoping for a little remorse; but it didn't happen. I was
15 hoping that Ms. Hahner would say something to you to let you
16 know that they are sorry and they understand the seriousness of
17 what they did, but it didn't happen. I thought maybe there
18 might be some apology for this, for what they did; but it
19 wasn't forthcoming.

20 What you got yesterday was the same old, same old,
21 smoke and mirrors and ducking and dodging. There was no
22 remorse. I guess they were just too busy out in California
23 thinking about who was going to play them in the movie that is
24 going to be made of this case. They certainly weren't thinking
25 about Mrs. Toffoloni. But I am, and I think you are thinking

1 about her.

2 Also, Ladies and Gentlemen, I don't blame Ms. Hahner
3 too much for not knowing what she's doing here because I know
4 why she's here and I think you know why she's here. She's here
5 to repeat the company line. She's not responsible for this.
6 Hustler, LFP, Larry Flynt is responsible. They could have sent
7 anyone. They could have sent Larry Flynt himself. They could
8 have sent an army of accountants, but they didn't.

9 They sent this one lady so that she could say, Well,
10 I'm not sure about what all that means. She couldn't even tell
11 me what LCF means when the fella testified his name is Larry
12 Claxton Flynt. I don't blame her entirely. I blame them. And
13 I think you should blame them too for sending her to face the
14 music, to face you on the day of reckoning.

15 What Mrs. Hahner couldn't deny, the documents about
16 Hustler's income, about their net worth. That's the documents
17 that I put in evidence, Plaintiff's Exhibits 9, 11, 13, 14 and
18 15 which you will have in a few moments when you think about
19 the amount of punitive damages that should be awarded. And
20 these documents once again speak volumes. They speak louder
21 than I could.

22 This is a pornographic empire. It makes millions.
23 You will see that on these pieces of paper that they produced
24 in this case. And it all belongs to the guy who made the
25 decision to publish these photographs, these 24-year-old

1 photographs of this dead woman, seven months after her death
2 for his own financial gain. That's what it's all about.

3 But, Ladies and Gentlemen, that's really beside the
4 point because Judge Thrash will tell you in a few moments that
5 the purpose of punitive damages which you have announced in
6 your verdict yesterday you intend to award, the purpose of
7 punitive damages is to punish the Defendant for wrongful
8 conduct and to deter the Defendant, to prevent the Defendant
9 from doing the same thing again to somebody else in the
10 future -- to punish and to deter, to punish and to deter.

11 And in order to do that, you get to take into
12 consideration the Defendant's financial resources because it
13 doesn't take the same amount of money to punish a fella who
14 makes a hundred dollars a week as it does to punish the guy who
15 makes a million dollars a week. So, obviously, you have to
16 take into consideration the Defendant's financial resources as
17 to what's going to be enough.

18 We know that Hustler -- that LFP that owns Hustler
19 who LFP, the Defendant in this case, makes -- is worth millions
20 upon millions of dollars. I didn't make that up. You'll see
21 it in a few minutes. And Ms. Hahner testified -- I didn't ask
22 her this. Hustler's own lawyer asked her this. This is just
23 the tip of the iceberg. It's not the casinos and the gambling
24 and the videos and the movies and all the other stuff. This is
25 just Hustler Magazine and a few other magazines, Beaver Hunt

1 and those kinds of things that go into making up LFP.

2 When I was asking her yesterday about the finances of
3 the company, she didn't seem to know much. She didn't seem to
4 know what the initials LCF mean. But when Hustler's lawyer was
5 asking questions, she all of a sudden became a financial
6 expert.

7 But here's where we are. That doesn't matter. All
8 of that is smoke and mirrors. This is the truth. These are
9 their own documents, and here's where we are in this case.

10 You have to ask yourselves one question: How much
11 will it take to send a message to Hustler Magazine not to do
12 this again?

13 That's the question you have to ask yourselves as a
14 group: How much will it take to make sure as sure as you can
15 that they won't do this to another family somewhere down the
16 road?

17 Obviously, you weren't fooled by that nonsense that
18 Larry Flynt didn't make the decision to publish these
19 photographs. Obviously, he did. So what's it going to take to
20 make a person like that realize that he can't get away with it,
21 he just can't get away with it, you are not going to let him
22 get away with it?

23 Now, again, this is not about people being able to
24 look at Hustler Magazine. The men and women who want to pose
25 in Hustler Magazine and the people who want to read that

1 magazine, that's fine with me. I don't care. They can do
2 whatever they want. But I do care when they put my client's
3 dead daughter's photograph in there without her permission,
4 photographs they knew she never wanted published, photographs
5 they knew she didn't want published. I do care about that, and
6 I think you care about it too.

7 It's not about the First Amendment. It's not about
8 who can read what they want to read. It's about taking
9 somebody's image and using it for your own financial gain.

10 So, again, the question you have to ask each other:
11 What's it going to take?

12 You've got to take the financial incentive away from
13 Hustler Magazine. That's the only answer. You've got to take
14 the financial incentive away. A few million dollars is a lot
15 of money to me. It's a lot of money to Mrs. Toffoloni. It's a
16 lot of money to you. It's a lot of money to most people. But
17 to Hustler Magazine it's nothing. They make that in a week
18 according to the documents. The net worth of that company in
19 2008 when this happened was about 200 million dollars.
20 Mrs. Hahner didn't know what it is now. But, I mean, you can't
21 dodge the black and white on this page. And that's after all
22 expenses, all deductions, including the taking out the money
23 from one pocket and putting it in the other that Larry Flynt is
24 engaged in.

25 So, again, what's it going to take?

1 Well, the first part of that answer is it's entirely
2 up to you. You're the jury. You're the conscience of the
3 community. You're the voice of the community. So you get to
4 decide. It's not a law question. It's a jury question. So
5 you get to decide what that number is.

6 What are you going to use to guide you in your
7 decision as to how much it will be to send a message to Hustler
8 Magazine in this case?

9 I can suggest an amount to you, but it's just my
10 opinion. It's my suggestion. I think it's based on the
11 evidence, and I think it's rational. But it's your decision as
12 the conscience of the community.

13 Ms. Hahner, the corporate vice president, the company
14 representative, the lady they sent out here, didn't know what
15 the company is worth today. But we know that in 2008 it was
16 worth \$196,037,000. That's, you know, pretty close to
17 200,000,000. Ten percent of that is \$19,000,000. Five percent
18 is about \$10,000,000. One percent is about \$2,000,000.

19 Well, one percent gets into the category where I told
20 you I didn't think that was enough to send the message. That's
21 water off a duck's back. That's not going to make an
22 impression on anybody out there. I think 5 to 10 percent of
23 the net worth is something that will register out in
24 California. I think it's something that will send a message,
25 will get their attention as much as anything will ever get

1 their attention.

2 Sitting together as the jury in this case, you are
3 the conscience of this community. I remember the Walt Disney
4 character Jiminy Cricket said in everything you do let your
5 conscience be your guide, and that's what is going on here.
6 That's what you get to do. You get to let your conscience be
7 your guide in this case.

8 And, once again, I place Mrs. Toffoloni in your
9 hands; and I feel comfortable doing that.

10 Thank you.

11 THE COURT: Mr. Bauer?

12 MR. BAUER: Thank you, Your Honor.

13 Well, good morning once again and probably for the
14 last time, let's hope.

15 We have heard, we acknowledge, we accept your
16 verdict. Obviously, it's not what we hoped for. Obviously, we
17 are disappointed. But it is clear that your verdict is
18 deliberate and thoughtful; and my client and I very much
19 appreciate exactly how much time and care that you, each of you
20 put into this important process.

21 You have heard a lot about First Amendment this week
22 and significance of the First Amendment in this case, and I'm
23 going to talk about it just a very little bit more. But you
24 have also by your commitment and your thoughtful assessment of
25 the issues in this case and the questions that you submitted

1 and the time that you devoted to your deliberations made it
2 clear that you have proven and confirmed for my client and for
3 me the equal importance and significance of the Seventh
4 Amendment, the right to a jury trial.

5 The significance of your compensatory damages award
6 is recognized by the publishers of Hustler Magazine.
7 Ms. Hahner may not have said that on the stand yesterday, but
8 that's not what yesterday afternoon's mini trial was about.
9 And it wasn't about the time or the place for her to speak to
10 Mr. Decker and satisfy his emotional need.

11 But what your award means is that Nancy Benoit's
12 family will be compensated far more than any other celebrity in
13 the history of Hustler Magazine has ever been compensated for
14 their images; and that award has sent a message to Hustler
15 Magazine, a message that it receives loud and clear as will all
16 other publishers in the industry. This is not the type of news
17 that Hustler should ever pursue again.

18 Please consider when you deliberate once more that a
19 disproportionate punishment would not serve the interests of
20 justice and will inevitably chill our access, your access, my
21 access, everyone's access to some speech, some information that
22 we can all agree is valuable and worth protecting. And for
23 this reason, there is still some law you must follow when
24 making your next decision.

25 The judge will tell you that what you do next if it

1 follows the applicable law of our great land must not be based
2 on who and what Hustler Magazine is, how much you disapprove of
3 or dislike its message or its publisher or its owner, but
4 instead what you do next must have a clear and convincing and
5 unequivocal connection to the single wrong that this trial has
6 been about and nothing else.

7 So I do ask you humbly and with deference to the
8 significance of the award that you have already made to please
9 also consider the following in your deliberations. Please
10 consider that Hustler Magazine's publication of the Nancy
11 Benoit feature did not, in fact, produce a windfall to Hustler
12 Magazine. Millions were not reaped by this mistake in
13 judgment. And you have the sales figures you need and the
14 testimony you need to evaluate that point.

15 Let me just briefly reference Mr. Decker's suggestion
16 to you that you have net worth evidence. You don't. All you
17 have is a balance sheet. It shows assets and liabilities.
18 That is not net worth. And I urge you not to be distracted by
19 a large number and assign to it a significance that it doesn't
20 have and the evidence certainly doesn't support.

21 Please also consider that once it received
22 Mr. Decker's letter on January -- mid-January of 2008 Hustler
23 did not do nothing. While Hustler undisputedly did not try to
24 recall magazines that had already been on the stands for
25 several weeks and the Court told it two weeks later that it did

1 not need to do so, Hustler Magazine did do what was within its
2 direct power and control to do to lessen the impact of the
3 story on the Plaintiff.

4 It removed the images from any Hustler or
5 Hustler-related websites. It pulled the content from its
6 foreign licensees who had not published the magazine so that
7 the story could not be published further. And it destroyed the
8 back issues even though it did not believe at the time that it
9 had the legal obligation to do so.

10 Finally, I would ask you to please consider once
11 again the fact that by necessity in order to preserve our way
12 of life in this country the boundaries of the First Amendment's
13 protections for the press and for each of us individually are
14 flexible and lasting. Where the breaking point lies is simply
15 not a clearly defined marker or barrier. And unlike punishing
16 a drug manufacturer which deliberately conceals harmful side
17 effects of its drug or an investment advisor who steals from
18 his clients, to excessively punish a publisher, even one that
19 like Hustler lives on the fringes, for mistaking the limits of
20 our tolerance for some viewpoints will inevitably shrink the
21 boundaries of the First Amendment protections for all of us.
22 And to that point, please remember again that our best legal
23 minds disagree about where those lines are drawn.

24 So let me say through your -- again, through your
25 careful deliberation, your reasoned and purposeful

1 considerations of the evidence and the law of this land
2 reflected in the size of your compensatory award and your
3 decision to award punitive damages, Hustler's publishers have
4 heard your message loud, clear, convincingly and unequivocally.
5 And I would respectfully submit to you that there is no further
6 need in this case for a windfall award, and the amounts that
7 you have just been asked to award are just that.

8 You have proven yourselves this week to be the right
9 kind of jury for this job. You have adhered to the rule of
10 law, and you have shown deference to the important
11 constitutional interests at stake in this case. And that is
12 needed once again now.

13 On behalf of Hustler Magazine, I thank you for your
14 time, your attention, your careful deliberation; and it's been
15 an honor to argue this case to you.

16 Thank you.

17 THE COURT: Mr. Decker?

18 MR. DECKER: Good. I'll be brief.

19 I'll say again one more time this has never been
20 about the First Amendment. I'm sure my colleague, Mr. Bauer,
21 has gotten the message. I know Hustler hasn't. This has never
22 been about the First Amendment. Hustler can find people who
23 are willing to pose nude in their magazine. They can find
24 people who are willing to read their magazine. But what they
25 can't do is take someone's image without their permission and

1 put it in their magazine and do that knowingly, and that's what
2 this case is all about.

3 Mr. Bauer said millions were not reached, and he
4 wants you to look at the sales figure, and I do too. They're
5 Defendant's Exhibit -- I'm not sure what the exhibit number is.
6 You will have it. It's got a blue sticker on it. Millions
7 were reached, and the sad fact is it's still out there. It's
8 still out there on the internet and always will be. This thing
9 is enduring and will go on forever.

10 The boundaries, Ladies and Gentlemen, are clear. You
11 don't expose unwilling women and their families to this kind of
12 exposure. You just -- without their permission, without their
13 consent. You just don't do it for your own financial gain.
14 And I ask you to take that into consideration.

15 Thank you.

16 - - -

17 CHARGE TO THE JURY - PUNITIVE DAMAGES

18 - - -

19 THE COURT: Ladies and Gentlemen, pursuant to your
20 verdict yesterday, the law will allow you in your discretion to
21 assess punitive damages against the Defendant as punishment and
22 as a deterrent to others. When assessing punitive damages, you
23 must be mindful that punitive damages are meant to punish the
24 Defendant for the specific conduct that harmed the Plaintiff in
25 the case and for only that conduct.

1 For example, you cannot assess punitive damages for
2 the Defendant being a distasteful individual or business.
3 Punitive damages are meant to punish the Defendant for this
4 conduct only and not the conduct that occurred at another time.
5 Your only task is to punish the Defendant for the actions it
6 took in this particular case. If you find that punitive
7 damages should be assessed against the Defendant, you may
8 consider the financial resources of the Defendant in fixing the
9 amount of such damages.

10 Ladies and Gentlemen, we will provide you with a
11 verdict form to assist you in making that decision. I forgot
12 to do it earlier, so it'll take me a minute to prepare it. But
13 you will have one in a few minutes with you in the jury room.
14 So I will ask you to go with the court security officer to your
15 jury room and resume your deliberations.

16 (Jury exited the courtroom.)

17 THE COURT: Mr. Decker, any objections to the charge?

18 MR. DECKER: No, Your Honor.

19 THE COURT: Mr. Bauer, any objections to the charge?

20 MR. BAUER: No, Your Honor.

21 Your Honor, are you going to send a copy of the
22 charge back with the jury?

23 THE COURT: Yes, sir.

24 The verdict form I suggest is: We, the jury, award
25 the sum of blank dollars as punitive damages.

1 MR. DECKER: That's acceptable to the Plaintiff, Your
2 Honor.

3 MR. BAUER: Yes, Your Honor.

4 THE COURT: All right. I'll have that typed up in
5 just a minute and send it back to the jury, and we'll be in
6 recess to await the verdict of the jury.

7 (A recess was taken from 10:03 a.m. to 11:52 a.m. to
8 await the verdict of the jury.)

9 THE COURT: All right. I understand we have a
10 verdict.

11 We're ready for the jury.

12 (Jury entered the courtroom.)

13 THE COURT: Mr. Cooper, has the jury reached a
14 verdict?

15 THE FOREPERSON: Yes, sir, we have.

16 THE COURT: If you'll hand the verdict to the court
17 security officer, he will hand it to the clerk.

18 All right. I'll ask the clerk to publish the
19 verdict.

20 - - -

21 VERDICT - PUNITIVE DAMAGES

22 - - -

23 THE CLERK: In the United States District Court for
24 the Northern District of Georgia, Atlanta Division, Maureen
25 Toffoloni, as administrator and personal representative of the

1 estate of Nancy E. Benoit, Plaintiff, versus LFP Publishing
2 Group, LLC, doing business as Hustler Magazine, Civil Action
3 File Number 1:08-CV-421-TWT, Verdict:

4 We, the jury, award the sum of \$19,603,600 as
5 punitive damages. This 17th day of June, 2011; and it's signed
6 by the foreperson.

7 THE COURT: Counsel, you wish to inspect the verdict
8 form?

9 MR. DECKER: Yes, Your Honor.

10 (Attorneys inspected the verdict form.)

11 THE COURT: Anything further before the jury is
12 discharged?

13 MR. DECKER: I'm sorry, Your Honor. I didn't hear.

14 THE COURT: Anything further before the jury is
15 discharged?

16 MR. DECKER: No, Your Honor.

17 MR. BAUER: No, Your Honor.

18 THE COURT: All right. Ladies and Gentlemen, let me
19 ask you to step back into your jury room, please.

20 (Jury exited the courtroom.)

21 THE COURT: Typically, I go back and thank the jurors
22 for their service, answer any questions that they may have if
23 they're appropriate, tell them they are free to talk about the
24 case to anybody they want to. And I'm going to do that, and
25 then I'm going to come back in here and I'm going to rule on

1 the Defendant's motion for judgment as a matter of law that I
2 took under advisement sometime this week.

3 So I'll be back in a few minutes. Court's in recess
4 until further order.

5 MR. DECKER: Judge, will the lawyers be allowed to
6 talk to the jury?

7 I'm not clear.

8 THE COURT: I tell them they can.

9 MR. DECKER: Okay. Thank you.

10 THE CLERK: Court is in recess until further order.

11 (A short recess was taken.)

12 THE COURT: All right. Mr. Bauer, you want to say
13 anything else on your motion for judgment as a matter of law on
14 punitive damages?

15 MR. BAUER: No, Your Honor.

16 THE COURT: Mr. Decker?

17 MR. DECKER: Yes, Judge.

18 I mean, I think there was clearly enough evidence to
19 go to the jury on punitive damages at this stage in which the
20 motion was made in the nature of the judgment -- or, rather, a
21 motion for directed verdict or judgment as a matter of law.
22 That's what was before the Court. Clearly there was enough
23 evidence to go to the jury. The question of intent is always a
24 jury question. That question has been answered.

25 But if you go back to the point at which the motion

1 was made, the state of the record at that point in time, was
2 that sufficient to send the case to the jury to determine the
3 question of intent, and I think it clearly was. And so it
4 should be denied.

5 THE COURT: Well, I think the question of whether
6 there was evidence that would support any award of punitive
7 damages is a pretty close one. The jury necessarily given my
8 instructions had to find that the Defendant acted unreasonably
9 in publishing the photographs based upon its claim that they
10 were newsworthy, and I think that under the decision of the
11 11th Circuit in this case the jury was probably authorized to
12 reach that conclusion.

13 I will point out that there's a lot of evidence on
14 the newsworthiness issue that was introduced during the trial
15 of this case that was not before me when I ruled on the motion
16 to dismiss. And in hindsight, it was probably a mistake on my
17 part to try to address that issue just based on the pleadings
18 rather than a full evidentiary record. But that's water under
19 the bridge long, long ago.

20 The other question, though, however, is was there
21 evidence of a specific intent to harm the Plaintiff. And if
22 you want to address that, Mr. Decker, I'll hear from you.

23 MR. DECKER: Yes, sir.

24 I think under the Court's charge it was made plain
25 that there was evidence to support that. You know, as I think

1 I diagramed for the jury, if the Defendant intended the
2 consequences of its action and that is that it would publish
3 without specific permission, and if they did it out of an
4 interest, a motive of interest which in this case was their own
5 financial interest then that's sufficient under Georgia law to
6 support a finding of specific intent.

7 And, again, Your Honor, I think clearly it's a jury
8 question which was answered in the affirmative. The issue of
9 weighing the evidence is not the function of the Court. It's
10 whether there's legally sufficient evidence, and I believe
11 there was. And, again, it was -- it's self-fulfilling that the
12 jury found that because of their conduct they had specifically
13 intended the consequences of their action and did so out of
14 their own financial interest. And that's where you need to be
15 with respect to that second box that they checked yes.

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

17 MR. BAUER: Your Honor, I think Mr. Decker is arguing
18 that anybody who intends to take an act can be deemed to have
19 intended to specifically harm anyone who necessarily suffers a
20 consequence from the act; and that's very different than acting
21 with the specific intent to harm an individual. And merely the
22 fact that the editors of Hustler Magazine intended to publish
23 pictures cannot automatically impute a specific intent to harm
24 the Plaintiff who Mr. Decker, you know, admitted in his
25 argument that the editors of Hustler didn't even know existed.

1 There's no evidence that the editors of Hustler knew
2 that Nancy Benoit had any family that survived her that enjoyed
3 the rights of publicity. There's just nothing in the record
4 that can support a suggestion that Hustler's editors
5 specifically targeted the Toffolonis with their decision to
6 publish. In fact, I think that the record is replete with
7 evidence to the contrary, that misguided and misjudged as it
8 may have been their decision was based on their what I
9 understand the jury's found to be an unreasonable belief that
10 they had a legally privileged, constitutionally privileged
11 right to publish.

12 The First Amendment cannot countenance Mr. Decker's
13 interpretation of what kind of evidence supports a showing of
14 specific intent to harm. Every publisher in our country is
15 vulnerable if his position has credit, has merit. There has to
16 be something more to support that finding. There has to be
17 something specific. That's why the word specific is there.

18 THE COURT: All right. I'm going to grant the motion
19 for judgment as a matter of law with respect to the issue of
20 whether there was specific intent on the part of the Defendant
21 to harm the Plaintiff. I don't think there's any evidence that
22 would support that finding.

23 The evidence is that the Defendant didn't even know
24 who Mrs. Toffoloni was until they received Mr. Decker's letter.
25 They had already published the magazine. They had already made

1 the editorial decisions to publish the pictures. The only
2 evidence of motive in that was that they wanted to sell
3 magazines in my opinion. And even after Mr. Decker wrote his
4 letter, that did not convert that motive into a specific motive
5 to injure Mrs. Toffoloni.

6 There was a great deal of evidence that the Defendant
7 published the pictures with the belief that it was a matter of
8 newsworthiness. That was supported by the testimony of the
9 editor and by Mr. Otten who testified that other publications
10 contacted him seeking photographs of Ms. Benoit from her early
11 career because of the media news storm that surrounded her
12 death. So I'll grant the motion with respect to the specific
13 intent.

14 That means that the \$250,000 cap applies. So I'll
15 direct the clerk to enter a judgment in favor of the Plaintiff
16 in the amount of \$125,000 in compensatory damages and \$250,000
17 in punitive damages.

18 And I will say that in my opinion given the factors
19 set forth in State Farm versus Campbell that I would probably
20 have had to do that anyway even if there wasn't the cap under
21 Georgia law.

22 All right. Anything further, gentlemen?

23 MR. DECKER: Note my exception, Your Honor.

24 MR. BAUER: Nothing from the Defendant, Your Honor.

25 THE COURT: All right. Thank you very much. Court's

1 in recess until further order.

2 (Proceedings adjourned at 12:13 p.m.)

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UNITED STATES DISTRICT COURT:
NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 500 through 524, are a true and correct copy of the proceedings in the case aforesaid.

This the 6th day of July, 2011.

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