No. 09-625 NOV 25 2009

In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
d/b/a Hustler Magazine,
Petitioner,

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in refusing to hold as a matter of law that the Freedom of the Press Clause of the First Amendment insulates Petitioner publisher from liability on Respondent Estate Administrator's claim alleging that non-obscene nude photographs of her public figure Decedent, in an article in Petitioner's national magazine on Decedent's life and death, violated the Georgia common law posthumous right of publicity, where Decedent's murder was a national news story of great public interest. .

2. Is publication of nude, non-obscene photographs of a murdered public figure as part of a national magazine article on her life and death to be deemed "newsworthy" and insulated from liability by the First Amendment right of freedom of the press, where Decedent's murder by her public figure husband was a national news story?

DISCLOSURE OF PARTIES (RULE 14.1(b))

The parties to the proceedings are: Petitioner (and Defendant) LFP Publishing Group, LLC; Respondent (and Plaintiff) Maureen Toffoloni; and Defendant Mark Samansky, who has not appeared in the action.

DISCLOSURE OF PARENT COMPANIES (RULE 29.6)

Petitioner LFP Publishing Group, LLC is wholly-owned by LE Publishing Advisors, LLC, which is in turn 90% owned by L.F.P., Inc., which has no corporate parent. All such entities are privately owned.

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TABLE OF CONTENTS

Page(s)

Blank Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

ARTICLE

TREATISE

OPINIONS AND ORDERS BELOW

On October 6, 2008, the United States District Court for the Northern District of Georgia, Hon. Thomas W. Thrash, Jr., entered an Order with opinion granting Petitioner's motion to dismiss the removed Complaint of Respondent Maureen Toffoloni, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim for relief on Respondent's single substantive claim that Petitioner allegedly violated her Decedent daughter's Georgia common law posthumous right of publicity; on October 7, 2008, the Court Clerk entered Judgment dismissing the action. The Order and Judgment are reprinted herein at Appendix 24a, 35a.

On June 25, 2009, the United States Court of Appeals for the Eleventh Circuit entered a decision reversing the district court's dismissal of the action and remanding the case for further proceedings, in an opinion reported as Toffoloni v. LFP Publishing Group, LLC, et al., 572 F.3d 1201. The opinion is reprinted herein at Appendix 1a.

On August 27, 2009, the United States Court of Appeals for the Eleventh Circuit entered an Order denying Petitioner's motion for Rehearing and Rehearing En Banc of its opinion reversing the district court's dismissal of this action; said Order is reprinted herein at Appendix 33a.

JURISDICTION OF THIS COURT

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for rehearing and rehearing en banc of its earlier order reversing the order of the district court for the Northern District of Georgia dismissing Respondent's complaint, was entered on August 27, 2009. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 13 of the Rules of the Supreme Court.

Jurisdiction in the federal court of original instance was based on the removal provisions of 28 U.S.C. § 1441(a), due to diversity of citizenship.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case presents an important issue of national significance - whether pursuant to the right of the freedom of the press as set forth in the First Amendment to the United States Constitution, Petitioner's publication of non-obscene nude photographs of a public figure Decedent in its national magazine in a two-page article on her life and death, is immunized from liability for an alleged violation of the Georgia common law posthumous right of publicity, where Decedent's death was a national news story. The case also raises the issue of whether the determination of "newsworthiness" of otherwise lawful nude photographs of a murdered public figure is to be made by the publisher, or by the courts. The opinion of the Eleventh Circuit refusing to recognize Petitioner's First Amendment rights flies in the face of prior rulings of this Court and other Circuits. particularly insofar as the court of appeals' decision is premised on the faulty notion that the First Amendment right to publish need be weighed against community morals.

A. Proceedings Below

This is a lawsuit brought by Respondent Maureen Toffoloni (hereinafter "Respondent") as Administrator of the Estate of her late daughter, Nancy Benoit (hereinafter "Decedent" or "Benoit") against Petitioner LFP Publishing Group, LLC (hereinafter "Petitioner" or "LFP"), the publisher of the internationally known adult-themed gentlemen's publication, *Hustler* magazine. The action concerns Petitioner's publication of a two-page news article on

the life and death of Decedent Benoit, published in the March, 2008 issue of *Hustler*, including fully and partially nude, posed photographs of Ms. Benoit extracted from a videotape previously made by Defendant Mark Samansky ("Samansky")[1] who is not a party to this Petition.

Respondent commenced this action in the Fayette County, Georgia Superior Court seeking a temporary restraining order to prevent publication of the subject photographs of Benoit in *Hustler* magazine, and asserting a single substantive cause of action against LFP for damages for its alleged violation of the Georgia common law posthumous right of publicity. Petitioner removed the case to the district court for the Northern District of Georgia based on diversity of citizenship, 28 U.S.C. § 1441(a).[2] The district court denied Respondent's motions for a temporary restraining order and for a preliminary injunction against publication, and she served her Complaint (Appendix D hereto).

Petitioner LFP moved in the district court to dismiss the action for failure to state a claim for relief pursuant to Rule 12(b)(6) of the Federal Rules

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[1] Defendant Samansky previously filed for bankruptcy in the District of Colorado where he presumably resided, has not appeared in this action, and is not a party to the instant Petition. Samansky is not represented by counsel for Petitioner LFP.

[2] Respondent alleges she is a resident of the State of Florida and that Decedent was a resident of the State of Georgia; Petitioner is a Delaware limited liability company with its principal offices located in California; the amount in controversy exceeds $75,000, exclusive of interest.

of Civil Procedure. The lower court granted the dismissal motion on the grounds that the story of Decedent's life and death, and the accompanying nude photographs of Decedent, were newsworthy and outside the ambit of the Georgia right of publicity. The district court found it was undisputed by Respondent that "Ms. Benoit's death was a 'legitimate matter of public interest and concern,'" and accordingly "publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for [LFP]" (28a) – which would be a prerequisite for a right of publicity claim. Thus, LFP's publication of the subject photographs was protected by "the freedom of press exception to the right of publicity" as a matter of law (29a).

Respondent appealed, and an Eleventh Circuit panel reversed and reinstated the Complaint, in an opinion published at 572 F.3d 1201. That court held that the photographs of Benoit taken more than 20 years before their publication "were neither related in time nor concept" to the story of admitted public interest, and therefore proclaimed that "these photographs do not qualify for the newsworthy exception to the right of publicity" (572 F.3d at 1213). Central to the court's analysis was its opinion that right of privacy protected by the Due Process Clause of the Fourteenth Amendment is as established and fundamental as the right of freedom of speech and of the press explicitly set forth in the First Amendment. Consequently, since the right of privacy impliedly guaranteed by the Due Process Clause exists on the same constitutional plane as the explicit rights stated in the First Amendment, the court reasoned that Petitioner's constitutional right

to publish must be balanced against "that which resonates with our community morals." (572 F.3d at 1208). The court did not discuss the First Amendment implications or the chilling effect of its opinion, but remanded to the trial court for further proceedings (23a). LFP then petitioned the Eleventh Circuit for a rehearing or rehearing of its decision en banc, which petition was denied in an Order of August 27, 2009 (33a).

LFP now petitions this Court to grant a writ of certiorari as to the Eleventh Circuit panel decision reversing dismissal of the instant Complaint, on grounds of Petitioner's First Amendment right of freedom of the press.

B. Factual Background

On Petitioner's motion to dismiss for failure to state a claim for relief, the facts are taken from the Respondent's Complaint, filed in the Georgia Superior Court (37a), and the opinions already issued herein (24a-30a; 1a-23a).[3]

Respondent Toffoloni is the mother and Administrator of the Estate of the late Nancy Benoit. In June, 2007 (A-38, ¶15), Benoit and her son were apparently murdered by their respective husband and father Christopher Benoit, a well-known professional wrestler, who then committed suicide

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[3] Under the familiar federal standard, on a motion to dismiss the courts must take all factual allegation of the complaint as true, but need not accept as true "a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).

(41a, ¶15; 2a). At the time of her murder, Benoit was herself a model and professional woman wrestler, and a well-known public figure in her own right (41a, ¶15).

Some 20 years prior to her death, Benoit had voluntarily posed fully and partially nude for photographs and a videotape, taken by named Defendant Mark Samansky, a professional photographer, in the presence of her then- husband (38a, ¶3; 40a, ¶9; 50a, ¶5). After the photographs and videotape were taken, Benoit allegedly changed her mind about having the pictures published, and instead requested Samansky to destroy them. While allegedly agreeing to do so, Samansky apparently destroyed the photographs but kept the videotape (40a-41a, ¶¶12,13; 41a, ¶16). After the Benoit murder-suicide became national and international news (2a), Samansky retrieved the videotape, extracted photographs therefrom (including the nude photographs of Benoit taken as a young woman), and conveyed the right to publish his copyrighted images to Petitioner LFP for publication in *Hustler* Magazine (41a-42a, ¶¶16,17).

When Respondent discovered the forthcoming publication of the nude photos of Benoit in *Hustler*, she demanded that publication cease (42a, ¶18), but Petitioner refused her request based on its rights to publish newsworthy material under Georgia law and the First Amendment, as advised by its counsel (55a-59a); moreover, publication had already occurred. Respondent then brought suit in Georgia state court, seeking a temporary restraining order against the publication, and Petitioner removed the action to

federal court by reason of diversity of citizenship. By the time district court hearings were held in February 2008 on Respondent's motions for a temporary restraining order and later a preliminary injunction, the subject nude photographs of Decedent Benoit had already been published in the March 2008 issue of *Hustler*,[4] rendering the motions moot; the motions for injunctive relief were then denied by the district court (25a).

Respondent asserted a single substantive cause of action for monetary damages, based on LFP's alleged violation of Decedent Nancy Benoit's right of publicity under Georgia common law (45a, ¶30). Petitioner LFP moved to dismiss pursuant to Rule 12(b)(6), which motion was granted by the court, Hon. Thomas W. Thrush, and Respondent appealed (3a). The dismissal was reversed by the Eleventh Circuit panel on June 25, 2009, reported at 572 F.3d 1201, and remanded to the district court for further proceedings (23a). A petition for rehearing and rehearing en banc was denied on September 25, 2009 (33a).

The nude pictures of Benoit had been voluntarily posed in the presence of her then-husband (50a, ¶5), were not obscene, and were published as part of a full two-page news article on her life and death in the March 2008 issue of *Hustler* Magazine. Benoit was admittedly a public figure prior to her death, and her murder was concededly a media story of great public interest. Petitioner LFP

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[4] *Hustler* magazine is published 13 times a year (12 monthly issues plus an extra Holiday issue); thus a new issue come out every four weeks.

asserts that as part of a news story of legitimate public concern, the article did not violate the Georgia right of publicity. However, even if the photographs are assumed to violate Georgia law for purposes of this Petition, a finding of liability in this action would be in violation of LFP's right of freedom of the press pursuant to the First Amendment to the United States Constitution, and result in a chilling effect on publishers in general, not just adult-themed magazines such as *Hustler*. Moreover, the decision of whether or not to publish otherwise lawful, non-obscene photographs of a deceased public figure illustrating a story of public interest should be made by the editors of *Hustler* Magazine and other publishers, and not by the courts, as has been stated by this and other courts in various opinions.

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO THE ELEVENTH CIRCUIT OPINION, THE FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS PROSCRIBES RESPONDENT ESTATE ADMINISTRATOR'S CLAIM FOR VIOLATION OF THE GEORGIA RIGHT OF PULICITY AS TO NUDE PHOTOGRAPHS OF HER DECEDENT.

A. The Benoit Nude Photographs are Protected by the First Amendment.

It is long settled law that the First Amendment to the United States Constitution, stating as relevant: "Congress shall make no law . . .

abridging the freedom of speech or of the press . . . ." applies to the states as well as to the federal government by virtue of the Fourteenth Amendment. See, e.g., Virginia v. Black, 538 U.S. 343, 358 (2003). It is also established that even indecent, non-obscene sexual expression is protected by the First Amendment. Reno v. American Civil Liberties Union, 521 U.S. 844, 874-75 (1997); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). The protection of the First Amendment has been specifically applied to nudity. See, Jenkins v. Georgia, 418 U.S. 153 (1974). Thus, the nude photographs of Decedent Benoit, which are not obscene, constitute expression protected by the First Amendment with regard to Respondent's instant claim.

Here, Respondent Toffoloni asserts a single substantive cause of action for violation of Decedent Nancy Benoit's right of publicity (45a, ¶ 30), first recognized as a posthumous common law right in Georgia in Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982). It may be noted that Respondent does not and can not assert a substantive claim for an alleged violation of the Georgia right of privacy, since such a cause of action expires with the death of the person whose right of privacy has purportedly been violated. See 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 9:1, pp. 394-95 (2d ed. 2009) [Privacy rights protect human dignitary values measured by mental and physical suffering and reputational damages; "Such classic 'privacy' rights die with the person whose privacy was allegedly invaded."].

Accord, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 210 (1905).

B. The Georgia Right of Publicity has an Exemption for Newsworthy Matters.

Even aside from the First Amendment, the Georgia common law right of publicity carries its own newsworthiness exemption from liability. Thus, in the leading Martin Luther King case, supra, the Georgia Supreme Court found liability for defendant's commercial sale of busts of Dr. King over the plaintiff's objections. In first enunciating its authorization of posthumous publicity rights, the Georgia court expressly limited that right of publicity to those circumstances in which use of the claimant's name or photograph "is not authorized as an exercise of freedom of the press." 250 Ga. at 143. Thus, even aside from First Amendment rights, Georgia case law itself expressly limits the state's right of publicity claim to actions that do not violate the freedom of the press.

Here, the district court held that this limitation would necessarily be fatal to Toffoloni's claim; otherwise, "no newspaper might identify any person or any incident of his life without accounting to him for violation of his 'right of publicity'." (29a), citing the Martin Luther King decision, 250 Ga. at 151-52.

In its opinion below, the Eleventh Circuit itself recognized that Georgia follows a "newsworthiness" exception to an action asserting

the right of publicity. 572 F.3d at 1208. As the court below stated:

> The Supreme Court of Georgia has held that "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344, 348 (1956). (572 F.3d at 1208).

Georgia's newsworthiness exemption was summarized by the Eleventh Circuit: "where a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press." (572 F.3d at 1208).

Thus, the Eleventh Circuit correctly recognized – at least in principle – the "newsworthiness" exception to the Georgia right of publicity. Where that court went terribly wrong, however, was its determination that even though the nude photographs of Benoit were used as part of an article on a deceased public figure whose murder was unquestionably a matter of great public interest – rather than for a purely commercial or advertising use – it nevertheless found that said photographs, "do not qualify for the newsworthiness exception to the right of publicity." (572 F.3d at 1213). Under applicable law and precedent, that determination was erroneous.

II. THE ELEVENTH CIRCUIT'S OPINION IS CONTRARY TO THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS DECLARING THAT UNDER THE FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS, THE "NEWSWORTHINESS" OF NUDE PHOTOGRAPHS OF A MURDERED PUBLIC FIGURE USED TO ILLUSTRATE A MAGAZINE ARTICLE OF PUBLIC INTEREST ON DECEDENT'S LIFE AND DEATH IS TO BE DETERMINED BY THE PUBLISHER, NOT THE COURTS.

A. Under this Court's Opinions "Newsworthiness" is Determined by Publishers.

The crux of this Petition is a seemingly simple question. Given an article of public interest on the life and murder of a public figure, who should decide whether or not the publication of non-obscene, posed nude photographs of her to illustrate the article is "newsworthy"? Such a determination must be made within the limits of the freedom of the press afforded to publishers by the First Amendment to the United States Constitution – the Crown Jewel of the Bill of Rights.

It is long-established in this country that First Amendment guarantees of freedom of speech and of the press are not confined to political expression and comment, but go far beyond that. As stated by Justice Brennan in the seminal opinion in Time, Inc.

v. Hill, 385 U.S. 374 (1967), regarding the widespread publication of personal matters:

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. (385 U.S. at 388).

Given this broad language as to what is protected by Constitutional freedom of the press, as stated by Professor McCarthy, it is no wonder that: "Judges are uncomfortable with deciding that some information which is demanded by some people is of 'no concern' to the public." Accordingly, "most judges in fact have adopted a laissez faire attitude and 'simply accept the press's judgment about what is and what is not newsworthy.'" 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 8:51, p.181 (2d ed. 2009).

In this case, the Eleventh Circuit panel concluded on its review of the subject article that the nude photographs of Benoit published by Petitioner were not incidental to a newsworthy article; rather, the article was incidental to the photographs. (572 F.3d at 1213). However, such a determination is contrary to the spirit and opinions of this Court and other circuits as to who should decide newsworthiness under the First Amendment.

Thus, in Regan v. Time, Inc., 468 U.S. 641 (1984), this Court recognized that, "A determination concerning the newsworthiness or educational value of a photograph cannot help be based on the content of the photograph and the message it delivers." 468 U.S. at 648. Accordingly, the government's approval of a photograph is often message - dependent, and therefore discriminates based on the content of the message, which cannot be tolerated under the First Amendment. 468 U.S. at 648-49.

Shortly thereafter, the Court, citing the Second Circuit dissent in the opinion below, stated: "As Judge Meskill wisely noted, '[c]ourts should be chary of deciding what is and what is not news.' (Citations omitted)." Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985).[5] Accord, Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984) ["[C]ourts are, and should be,

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[5] To the extent *Hustler* magazine may be considered by some a publication not primarily known for presenting "hard" news, it is long-established that "entertainment, as well as news, enjoys First Amendment protection." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977). *Hustler* magazine regularly presents social and political news and commentary within its pages, in addition to entertainment news.

reluctant to define newsworthiness"], cert. denied, 471 U.S. 1054 (1985).

In a somewhat different context involving remedies for defamatory statements against private individuals, this Court earlier wrote generally with regard to reporting on matters of public interest, as herein:

> ...it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." We doubt the wisdom of committing this task to the conscience of judges. (Citation omitted).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

The foregoing has been largely summarized by Dean Prosser in a well-known law review article, William L. Prosser, "Privacy," 48 California Law Review, 383, 412 (1960)["[t]o a very great extent, the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news"].

B. The Eleventh Circuit Misinterpreted the Constitutional Standard for Newsworthiness.

Notwithstanding the foregoing caveats by this Court as to avoiding judicial interference with a publisher's determinations of what it deems "newsworthy," the Eleventh Circuit has nevertheless leapt into the fray with its own interpretation thereof.

Thus, the court below initially went through concepts of privacy, and the history of Georgia common law with regard to the right of privacy evolving into the right of publicity, from the early decision in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905) [seminal case in Georgia right of privacy], through Cabaniss v. Hipsley, 114 Ga. App. 367 (1966) [first Georgia appellate court to recognize a separate right of publicity], through the leading case of Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982) [setting parameters for Georgia common law posthumous right of publicity].

In the Martin Luther King case, the Georgia Supreme Court indicated that a right of publicity existed for public and private citizens alike not to have their names and photographs used for the financial gain of the defendant without consent, "where such use is not authorized as an exercise of freedom of the press." 250 Ga. at 143. Thus, the Georgia Supreme Court recognized that the right of publicity was necessarily subordinated to the freedom of the press, and required a showing of

financial gain by the unauthorized user. It is noteworthy that the relevant early Georgia cases such as Pavesich, supra, involved the right of privacy where the plaintiff's photograph was used in a commercial advertisement without permission. Similarly, in the Martin Luther King case, a bust of the late Dr. King was produced and sold by defendant without authorization in a direct profit-making activity without any specific public interest component. That is not the case here, where the photographs of decedent Nancy Benoit were used to illustrate a magazine article of public interest on her life and death, as opposed to being part of an advertisement or the direct sale of a product bearing her name or likeness.

These cases finding liability stand in stark contrast to the Georgia Supreme Court decision in Waters v. Fleetwood, 212 Ga. 161 (1956). There, the court held there was no actionable right of privacy under Georgia law, even for publication of gratuitous, sensational photographs alongside a legitimate news article. Rather, the court denied a mother's claim to recover damages for invasion of privacy under Georgia law arising from a newspaper's publication and sale of photographs of the partially decomposed body of her 14-year-old murder victim daughter, after the body was removed from a river. 212 Ga. at 161-62. In addition to the newspaper article, the court also insulated from liability the defendant newspaper's separate sale of copies of the photographs which had appeared in the newspaper aside from the newspaper story, stating that "the same rule must apply as would apply to the publication of the photographs in the paper." 212

Ga. at 167. Petitioner submits that the photographs of the decomposed body of a young girl (which were not voluntarily posed) are far more egregious than the nude photographs of Decedent and public figure Nancy Benoit as part of an article of general public interest on her life and death.

Nevertheless, assuming *arguendo* that the Eleventh Circuit correctly found the subject nude photographs of Benoit violated the Georgia right of publicity for purposes of this Petition, such a claim would still be an unconstitutional violation of Petitioner LFP's First Amendment right of freedom of the press.

In seemingly seeking to become Editor-in-Chief of *Hustler* magazine, the Eleventh Circuit has arrogated to itself the decision that publication of the subject nude photographs of Nancy Benoit was not newsworthy within the protection of the First Amendment freedom of the press. In its analysis, the court failed to cite any of the leading Supreme Court decisions in this area set forth above, such as Hill, Regan, or Harper & Rowe. Rather, the only opinion of this Court cited below was its decision in Zacchini v. Scripps-Howard Broadcast Co., 433 U.S. 562 (1977), that the right of publicity protects the economic value inherent in the right of publicity. 572 F.3d at 1207. However, that case is entirely distinguishable on its facts, involving the defendant's videotaping and televising the plaintiff's complete "human cannonball" entertainment act without his permission. The Court's 5-4 decision narrowly ruled that a television station's appropriating a performer's entire commercial act

crossed the line and was not insulated from liability by the First Amendment. Here, there is little or no commercial value to the nude images of Benoit, since her mother, Respondent Toffoloni, has only indicated a desire to suppress the nude photographs of her daughter, not to publish them.

Moreover, the Eleventh Circuit opined without reference to legal authority, that the rights of freedom of speech and press guaranteed by the First Amendment and the right of privacy guaranteed by the Due Process Clause are equal fundamental constitutional rights that must be balanced in a particular case by weighing the First Amendment right of publication against the community morals. 572 F.3d at 1207-08. It then stated that the Georgia courts have accordingly adopted the "newsworthiness" exception to the right of publicity, citing Waters v. Fleetwood, supra, 532 F.3d at 1208.

The circuit court substantially misapprehends the law herein. While courts have duly recognized a constitutional right of privacy under certain circumstances, as already demonstrated above, the right of privacy is a personal one that dies with the individual who possesses it. Rather, this case involves the very different right of publicity, which in Georgia survives the death of the publicity right holder (here Nancy Benoit) because it is a state property right – as opposed to a personal right – that may be assigned or devised to others. However, the Georgia right of publicity is merely a creation of the state common law, and therefore cannot be deemed a fundamental constitutional right capable of

counterbalancing and outweighing LFP's express First Amendment right of freedom of the press to publish an article of public interest on the highly publicized murder of a public figure. Thus, there can be no balancing of rights to be applied in this case. Here, the explicit First Amendment right of freedom of the press must prevail over the Decedent's common law posthumous right of publicity, or perhaps some amorphous claim of substantive due process, and state law must yield to the federal Constitution.

The Eleventh Circuit itself, following Georgia law, agreed that even a commercial use in a right of publicity context must give way to the freedom of the press for a newsworthy publication. However, its referenced Georgia cases of Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905), and Waters v. Fleetwood, 212 Ga. 161 (1956), cited by the court (572 F.3d at 1708), primarily equate a commercial use to an advertisement.[6] Here, it is undisputed that the subject photographs were part of an article on a matter of public interest, and not in an advertisement or a direct commercial sale of any kind.

Again, the Eleventh Circuit, without any attempt to analyze this Court's First Amendment freedom of the press cases disfavoring a judicial determination of newsworthiness, conjured up a "straw man" to knock down, asserting that had LFP published the nude photographs of Benoit by

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[6] Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982), involved a direct commercial sale of a bust in the image of Dr. King.

themselves without a corresponding article, that publication would unquestionably not qualify for the newsworthiness exception. 572 F.3d at 1209. However, that is just not the case herein – the photographs were part of a full two-page article on Benoit's life and death. Thus, the Eleventh Circuit was left with the task of asserting that the publication of the photographs was merely incidental to its commercial purpose. The court contended that:

> Although LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case. These photographs were not incidental to the article. Rather, the article was incidental to the photographs. (572 F.3d at 1209; emphasis supplied).

Unfortunately, this type of "review" by an appellate court is exactly the type of judicial analysis that this Court warned about avoiding in Harper & Rowe, et al., supra.

In an attempt to justify its conclusion that the publication was primarily commercial, the court notes that the cover of the March 2008 issue of *Hustler* states in capital letters, "Wrestler Chris Benoit's Murdered Wife Nude." However, this proclamation was just one of nine cover statements describing -+material inside the March 2008 issue, along with a large picture of the cover model and a

title in large capital letters of the name of the magazine and other material therein. The reference to the "Murdered Wife" occupies but a small fraction of the cover (which specifies wrestler Chris Benoit and does not mention Nancy Benoit by name at all) and simply cannot convert the entire article and photographs into a "commercial use" sufficient to negate Petitioner's First Amendment rights.

Perhaps the primary rationalization of the Eleventh Circuit is its setting up a false scenario that, under LFP's arguments, any notorious death would result in a carte blanche right to publish all images of that person taken during his or her lifetime, "regardless of whether those images were intentionally kept private, and regardless of whether those images are of any relationship to the incident currently of public concern." (572 F.3d at 1210).

In fact, LFP has not made that argument. Petitioner agrees that actual photographic images of Benoit used principally for advertising purposes or for direct sale to the public would be "commercial speech" that would likely not defeat a right of publicity claim against it. Moreover, Decedent Nancy Benoit was not just any person, but a conceded public figure in her own right prior to her murder. However, like a common law suit for defamation, any claim by her under the right of privacy died with her, leaving only a right of publicity. That right itself applies only to commercial uses, such as advertising or direct sales of a product bearing decedent's likeness, as in the Martin Luther King case.

Here, the subject nude photographs of Decedent are not on the cover of *Hustler* magazine, but on the inside on pp. 40-41, and are part of an article on the life and death of a person very much in the national and international news at the time of the publication of the magazine. For a court to declare that these pictures are not newsworthy and outside of the protection of the First Amendment is simply in contravention of this Court's jurisprudence, as well as the learned opinions of Professors McCarthy and Prosser, supra. Moreover, such a precedent would apply not just to *Hustler* magazine and its publisher Larry Flynt, but to other more "mainstream" books and magazines as well. If allowed to stand, this decision would cast a chilling effect over the entire concept of freedom of the press.

In its rationale attempting to explain why the subject nude photographs of Benoit were not newsworthy, the Eleventh Circuit stated that they were not related to the "incident of public concern," which it found to be limited to Benoit's death. 572 F.3d at 1211. However, that is an erroneous analysis of the newsworthy issue. The editors of *Hustler* magazine found that the life and death of Decedent Benoit was of interest to the magazine's readers. As part of Benoit's life story, she unquestionably posed for nude photographs as a young woman – a true fact about her life. *Hustler* then chose to publish photographs illustrating that portion of Benoit's life, as of interest to its readers. Under the applicable legal principles, those photographs were clearly related to an article of public interest, and were therefore part of the newsworthiness exception to the Georgia right of

publicity; if they were not, they were surely protected by the First Amendment.

The panel opinion extensively relied upon the earlier opinion in Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985). There, defendant publisher (a predecessor of Petitioner) was found liable for damages under plaintiff's false light privacy claim, as well as for commercial appropriation of her rights, by publishing nude pictures of her (originally taken for *Playboy* magazine) without her permission.

The Douglass case is readily distinguishable. There, plaintiff Robyn Douglass was a living, professional model, fully entitled to assert false light and other claims under the right of privacy, wherein she was regularly compensated for her pictures. The nude photographs taken of her were not remotely related to a newsworthy story of national media concern – there was no event of public interest (such as a sensational murder) that thrust her into the national news and made her the subject of substantial public interest. The court therein even noted that the subject nude photographs of Ms. Douglass were uncopyrighted, wheras the nude photographs of Benoit were authorized by Defendant Samansky, the photographer and copyright holder.

In Douglass, the Seventh Circuit's comments with regard to plaintiff's lack of consent for publication of her nude photographs and the First Amendment are of particular relevance:

> To forbid *Hustler* to publish any photographs of people without their consent merely because it is an offensive, though apparently a lawful magazine, would pretty much put *Hustler* out of the news business, would probably violate the First Amendment, and would in any event cross outside the accepted bounds of the right of publicity. (769 F.2d at 1139).

The Eleventh Circuit below made no mention of this aspect of the Douglass case. Moreover, had Benoit still been living while nude photographs of her taken in private were published without her consent, this would be a very different case with regard to her right of privacy, as in Douglass. In any event, to the extent the Eleventh Circuit opinion rests on the alleged desire of Decedent Benoit to keep her nude photographs from being published, that is just an allegation made by Respondent Toffoloni, taken to be true for purposes of Petitioner's dismissal motion and not for any other reason. Surely the desire of a public figure to keep unflattering photographs of her from publication cannot be allowed to limit the freedom of the press to publish such photographs if they are related to a newsworthy event of public interest. Otherwise, celebrities photographed in public in a drunken stupor or without their makeup in a candid photograph could prevent publication thereof simply because such pictures do not present them in the way their publicists would like.

To conclude this aspect, the Eleventh Circuit ultimately found that even though the article on Benoit's life and death may have been of public interest, her nude photos taken at least 20 years earlier had no relationship to the "incident of public concern" of Benoit's murder. 572 F.3d at 1211. Thus, the court attempted to distinguish the Georgia Supreme Court decision in Waters v. Fleetwood, 212 Ga. 161 (1956), involving a newspaper's publication of photographs of a murdered child's partially decomposed body, on the grounds that there the photographs of the body were directly related to the "incident of public interest," namely her murder.

There is no basis for such a distinction; nor does the Eleventh Circuit cite any authority for such a "timeliness" requirement. It is noteworthy that in its well-known decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), this Court rejected such a premise, ruling that a *Life Magazine* article on the opening of a new play based on a real incident was a matter of public interest, though the actual incident was several years old at the time. This Court wrote:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. (Citation omitted)." (385 U.S. at 388)

Lower federal courts have similarly written that there is no requirement limiting newsworthiness to strictly recent events. See, Time,

Inc. v. Johnston, 448 F.2d 378, 381-82 (4th Cir. 1971) ["No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."]; William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) ["The 'news' exception is not restricted to current events; the [press] may legitimately inform and entertain the public with the reproduction of past events ... ."] (Interior citations and quotations omitted). Thus, the unsupported assertion by the Eleventh Circuit that the passage of time negates the newsworthiness of the subject photographs of Benoit, lacks foundation, and is contrary to much more persuasive authority.

C. Other Circuits Hold that "Newsworthiness" is to be Broadly Construed Under the First Amendment.

Contrary to the Eleventh Circuit opinion in this case, other circuits have taken a much broader approach with regard to First Amendment protections of freedom of the press concerning publication of matters of public interest. For example, the Fifth Circuit gave a more expansive description of what is newsworthy and protected by the First Amendment in its extensive discussion in Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th Cir. 2007). There, the court stated in general:

> The test for determining newsworthiness is to be construed broadly, extending beyond "the dissemination of news either in the sense of current events or commentary upon public affairs" to include "information concerning interesting phases of human activity embrac[ing] all issues about which information is appropriate so that individuals may cope with the exigencies of their period." (Citation omitted). (487 F.3d at 250).

In Lowe, the Fifth Circuit further explained its rationale with regard to media determinations of newsworthiness as opposed to courts acting as "super editors." There, the circuit court further explained:

> "[W]e are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern." (Citations omitted). . . . This Circuit has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were "substantially related" to the story. (Citation omitted) (rejecting a challenge even where the media's use of certain material "reflected the media's insensitivity" and "embarrassed" the subject of the article). (487 F.3d at 251).

Thus, unlike the Eleventh Circuit, the Fifth Circuit has declined to become involved in editorial decisions as to newsworthiness.

A similar analysis was recently undertaken by the Tenth Circuit involving publication of highly sensitive material, in Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007). There, an alleged rape victim brought an action against a television news reporter and others concerning the release to the media and the television airing of a videotape depicting her rape. The court noted in its ruling affirming summary judgment dismissing the claim, that state law torts involving media publication must take into account First Amendment restrictions therein, as set forth by this Court. This protects the right of the press to disseminate highly sensitive or embarrassing newsworthy information which can affect private individuals like the plaintiff therein, who had not sought publicity or consented thereto, where a legitimate subject of public interest becomes involved. 499 F.3d at 1235-36. In an extensive passage equally applicable to the instant case, and in sharp conflict with the philosophy of the Eleventh Circuit, the Tenth Circuit wrote:

> ...Anderson argues the videotape was highly personal and intimate in nature. While the sensitive nature of the material might make its disclosure highly offensive to a reasonable person, that does not make the videotape any less newsworthy so long as the material as a whole is substantially relevant to a legitimate matter of public concern.

> (Citation omitted). (noting that "[o]ther courts also appear to give 'public interest' status to news material on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private." (Citation omitted). (499 F.3d at 1236)

The Tenth Circuit duly noted that the plaintiff might find the public display of her case distressing, but since it would be difficult to say that there was no legitimate public interest therein, there could be no liability in that matter. 499 F.3d at 1237. There, the plaintiff was a living person who could assert a right of privacy.[7]

Anderson is similar to this Court's decision in The Florida Star v. B.J.F., 491 U.S. 524 (1989), reversing an award of damages against a newspaper which published the name of a living plaintiff rape victim in violation of a Florida statute proscribing such publication. The majority held that under the First Amendment, to avoid potential self-censorship, imposing liability for a newspaper's publication of truthful information otherwise lawfully obtained may be justified, if at all, "only when narrowly tailored to a state interest of the highest order" (491 U.S. at 541), not therein found.

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[7] Cf. Montana v. San Jose Mercury News, Inc. (1995) 34 Cal.App.4th 790, 793, dismissing privacy and publicity claims under California law by a famous professional football player as to posters of newspaper pages featuring his photograph and an artist's rendering of him ["no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it."].

Here, the publication of nude, but non-obscene photographs of Nancy Benoit, originally posed by her with the intent to publish same, are part of a newsworthy article on her life and death and should not subject Petitioner, as publisher thereof, to liability under the Georgia right of publicity. To intrude on a decision to publish said photographs by the editors of *Hustler* magazine can only lead to a chilling effect on further publication by publishers of any private and/or embarrassing material of public interest concerning public figures and, indeed, would present a threat to the freedom of the press for the future.

CONCLUSION

Hustler magazine is an admittedly controversial publication not for everyone's taste. However, this Court has not hesitated to defend its First Amendment rights in the past. See, Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ["'Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action' (citation omitted)"]. Here, the Eleventh Circuit's ruling below would cast a chilling effect on publishers in general if courts are to be allowed to act as "super editors" as to non-obscene photographs of public figures in connection with events of public interest.

For the reasons set forth above, from the opinions of this Court to the conflicting rulings of other circuits, the decision to publish lawful photographs of a public figure as part of a newsworthy article on her life and death should be

in the province of editors, and not of the courts. The First Amendment right of freedom of the press demands no less.

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