IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA, professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
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RESPONSE OF PLAINTIFF TERRY GENE BOLLEA TO GAWKER DEFENDANTS' SUPPLEMENTAL MEMORANDUM (STYLED A "REPLY") IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Temporary injunction proceedings do not prevent later litigation involving the facts of a case. *See Hasley v. Harrell*, 971 So.2d 149, 152 (Fla. 2d DCA 2007) ("a true temporary injunction is not law of the case"). The Gawker Defendants' "Reply" in support of their Motions to Dismiss[1] fails to even mention this well-established rule, much less attempts to distinguish it. Instead, the Gawker Defendants invent an argument, without any supporting authority, that *Gawker Media, LLC v. Bollea*, 129 So.3d 1196 (Fla. 2d DCA 2014), the Florida

[1] While the Gawker Defendants call their brief a "reply" brief, it actually addresses a new, previously unbriefed argument concerning the effect of the later-filed District Court of Appeal decision. Thus, it is more properly considered a supplemental brief, to which Mr. Bollea certainly has the right to respond.

Second District Court of Appeal (the "Second DCA") ruling concerning Mr. Bollea's **temporary injunction motion**, should somehow control the outcome of the Gawker Defendants' **motions to dismiss**. This argument is flatly "wrong." It is nothing less than an attempt to evade the well-established rule that temporary injunction proceedings are **not** the law of the case. In Florida, the doctrine of *stare decisis* affords controlling weight to decisions that resolve **pure legal issues**, and the Second DCA's decision did not resolve pure legal issues. The Second DCA made factual determinations (while also addressing mixed questions of law and fact) based on an abbreviated and incomplete factual record.

The Second DCA's decision also expressly **rejects** the argument that Gawker tries to make here. Specifically, the Second DCA found that temporary injunction proceedings are not final and have no collateral estoppel effect—a holding never mentioned in the Gawker Defendants' Reply.

The Second DCA decision in no way prevents Mr. Bollea from developing the factual record in support of his claims, and it certainly does not require dismissal of any of his claims. This Court is free to exercise its independent judgment in resolving these motions. Accordingly, the Gawker Defendants' motions to dismiss should be denied on their merits for the reasons discussed below and in Mr. Bollea's concurrently filed oppositions.

II. THE STANDARD OF REVIEW ON A MOTION TO DISMISS IS MUCH MORE LIBERAL THAN THAT ON A TEMPORARY INJUNCTION MOTION REGARDING AN ALLEGED PRIOR RESTRAINT ON SPEECH

Motions to dismiss are determined under a liberal standard of review where all facts are taken at face value. By contrast, a temporary injunction motion determines facts based on the parties' affidavits. The Gawker Defendants ignore this fundamental and liberal standard of review for motions to dismiss. Gawker instead falsely claims that rulings tentatively resolving factual disputes in affidavits somehow are relevant to whether Mr. Bollea has properly **pled** his

claims. This Court should not be misled. A motion to dismiss may be granted **only** where the **complaint** cannot be construed to state **any** cause of action against a defendant. *Nicholson v. Kellin*, 481 So.2d 931, 936 (Fla. 5th DCA 1985). The **pleadings** are liberally construed, **all allegations therein are taken as true** and all inferences are made in the plaintiff's favor. *Wallace v. Dean*, 3 So.3d 1035, 1042–43 (Fla. 2009). "The court must confine itself strictly to the allegations **within the four corners of the complaint**." *Pizzi v. Central Bank & Trust Co.*, 250 So.2d 895, 897 (Fla. 1971) (emphasis added; internal quotation omitted). Indeed, **it is reversible error for the Court to consider extrinsic evidence in ruling on a motion to dismiss**. *Pesut v. National Ass'n of Securities Dealers*, 687 So.2d 881, 882 (Fla. 2d DCA 1997) (reversing trial court dismissal order where trial court considered representation of defendant as to its conduct in deciding to dismiss). Thus, the only issue is whether Mr. Bollea's operative complaint properly pleads his causes of action. The contested facts in this litigation are not at issue in these motions.

Additionally, the Second DCA's determinations are inescapably tied to the fact that the Second DCA characterized this Court's temporary injunction order as a prior restraint. "A temporary injunction aimed at speech, as it is here, is a classic example of prior restraint on speech triggering First Amendment concerns…, and as such, it is prohibited in all but the most exceptional cases." *Bollea*, 129 So.3d at 1199 (citation and internal quotation omitted). Thus, the Second DCA applied an extraordinarily strict standard of review, where the injunction would only be upheld if it was established "that there are no less extreme measures available to mitigate the effects of unrestrained publication and that the restraint will indeed effectively accomplish its purpose." *Id.* at 1199–1200 (internal quotation omitted). Factual **and** legal determinations made under such a specific and rigorous standard do not prevent Mr. Bollea from seeking remedies

that do not constitute such alleged prior restraints. Specifically, for instance, the Second DCA's decision does not mean that Mr. Bollea's claims for **damages** have no legal merit; claims for damages are evaluated under a standard that does not implicate prior restraint doctrine. *See Near v. Minnesota*, 283 U.S. 697, 718–19 (1931).

III. THE SECOND DCA'S DECISION IS NOT CONTROLLING IN THIS PROCEEDING

A. The Second DCA's Decision Reviewing The Temporary Injunction Order Is Not Law Of The Case

It is well established that a ruling on "a true temporary injunction is not law of the case." *Hasley v. Harrell*, 971 So.2d 149, 152 (Fla. 2d DCA 2007). "Underpinning this doctrine is the fact that, at the preliminary injunction stage, the parties are not required to completely prove their cases. Thus, an appellate court's ruling on a preliminary injunction, where review is made based on a record made at a less-than-full hearing, is not binding at a later trial on the merits." *Id.* The *Hasley* holding distinguishes a situation where a trial court conducts a full trial before granting an injunction; in that situation, the appellate ruling would be law of the case. *Id.* In contrast, this Court's temporary injunction was granted by a noticed motion based on affidavits and with no evidentiary hearing. Law of the case does not apply here.

In *Whitby v. Infinity Radio, Inc.*, 951 So.2d 890, 896 (Fla. 4th DCA 2007), the 4th DCA reversed a trial court order denying a temporary injunction enforcing a covenant not to compete. This reversal, however, did not constitute law of the case with respect to subsequent proceedings seeking relief for breach of the covenant. Similarly, in *Ladner v. Plaza del Prado Condominium Ass'n*, 423 So.2d 927, 928–29 (Fla. 3d DCA 1982), the court held that an opinion of the 3d DCA, issued in a proceeding appealing a temporary injunction that the condominium was selectively enforcing its rules, was *not* law of the case in a later proceeding where the trial court held that the enforcement was not selective. Importantly, **the rule that a temporary injunction ruling is not**

law of the case for later proceedings applies even when the later proceedings involve "the same facts." *Belair v. City of Treasure Island*, 611 So.2d 1285, 1289 (Fla. 2d DCA 1989) (emphasis added).

Accordingly, the Second DCA's ruling does not govern here. The legal and factual conclusions that were made in the process of ruling on whether Mr. Bollea was entitled to a preliminary injunction simply have no application to the Gawker Defendants' motions to dismiss.

B. The Second DCA's Decision Is Not Controlling Precedent With Respect To The Present Motions Under The Doctrine Of *Stare Decisis*

In an attempt to evade the limitations of the law of the case doctrine, the Gawker Defendants argue that the Second DCA's decision is entitled to *stare decisis* effect. This argument fails because *stare decisis* does not afford controlling authority to determinations of factual questions, or mixed questions of law and fact, unless the facts are the same. The facts are not the same here because temporary injunctions are decided on a limited record. Also, the only issue currently before this Court is whether Mr. Bollea has properly pled his claims. Since he has done so, he has the right to develop the factual record in support of those claims, and this Court is not bound by any of the determinations that the Second DCA made based on a limited set of facts.

As the Florida Supreme Court has long held, "[s]tare decisis relates only to the determination of questions of law. It has no relation whatever to the binding effect of determinations of fact." *Forman v. Florida Land Holding Corp.*, 102 So.2d 596, 597 (Fla. 1958). "It is elementary that the holding in an appellate decision is limited to the actual facts recited in the opinion." *Adams v. Aetna Casualty & Surety Co.*, 574 So.2d 1142, 1153 (Fla. 1st DCA 1991). Thus, in *Shaw v. Jain*, 914 So.2d 458, 461 (Fla. 1st DCA 2005), the 1st DCA

declined to give controlling effect to a prior appellate ruling where the material facts of the prior case were not sufficiently similar to the case at bar. *Accord Jaylene, Inc. v. Moots*, 995 So.2d 566, 570 (Fla. 2d DCA 2008).[2]

The Gawker Defendants cite a string of cases in a footnote where appellate decisions in temporary injunction proceedings were followed as precedents. Because they all involved the resolution of purely **legal** issues, all of these decisions are inapposite to Gawker's argument here:

- *Department of State v. Mangat*, 43 So.3d 642, 649 (Fla. 2010), cites to *Sancho v. Smith*, 830 So.2d 856 (Fla. 1st DCA 2002), a temporary injunction appeal regarding the purely legal issue of statutory interpretation.
- *Ostrow v. Imler*, 27 So.3d 237, 239 (Fla. 4th DCA 2010), cites to *Gasilovsky v. Ben-Shimol*, 979 So.2d 1179 (Fla. 3d DCA 2008), a temporary injunction appeal likewise addressing the purely legal issue of statutory interpretation.
- *Zurich American Insurance Co. v. Ainsworth*, 18 So.3d 9, 11 (Fla. 3d DCA 2009), cites to *Environmental Services Inc. v. Carter*, 9 So.3d 1258 (Fla. 5th DCA 2009), a temporary injunction appeal concerning the purely legal issue of the proper appellate standard of review in contract cases.
- *Maxson v. Department of Children & Families*, 869 So.2d 653, 655 (Fla. 4th DCA 2004), cites to *Daniel v. State Turnpike Authority*, 213 So.2d 585 (Fla. 1968), a temporary injunction appeal discussing the purely legal issue of deference to administrative agency rulings.

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[2] *Miller v. State*, 980 So.2d 1092, 1094 (Fla. 2d DCA 2008), cited by the Gawker Defendants, repeats the truism that district court of appeal decisions are binding on trial courts. However, *Miller* does not state that **factual** determinations of appellate courts are binding, even in cases where a different factual record is subsequently developed. The issue involved in *Miller*—whether the state had the authority to order pretrial detention of a criminal defendant—was a purely legal question.

- *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So.2d 565, 568 (Fla. 1st DCA 1994), cites to *T.J.R. Holding Co., Inc. v. Alachua County*, 617 So.2d 798, 800 (Fla. 1st DCA 1993), a temporary injunction appeal involving the purely legal issue that the meaning of a statute's words is not susceptible to expert testimony.

The Gawker Defendants also cite *Florida Carry, Inc. v. University of North Florida*, 2013 WL 6480789 (Fla. 1st DCA Dec. 10, 2013), a case where a motion to dismiss and temporary injunction were heard simultaneously and then appealed, and where the central issues were all legal—specifically, the interpretation of a statute and the Florida Constitution. No factual disputes were discussed. *Florida Carry* establishes nothing other than the unremarkable proposition that, in some cases, the facts will be undisputed and courts can decide certain legal issues at an early stage of the proceedings. However, this is clearly not true here. The Second DCA's decision made factual determinations on a limited record that Mr. Bollea **does** emphatically dispute. The Second DCA decision does not prevent him from pleading his claims, taking discovery, or developing a fuller factual record.

In other words, notwithstanding their extensive search of Florida Supreme Court and District Court of Appeal decisions citing appellate decisions in temporary injunction proceedings, the Gawker Defendants do not identify a single example of a court holding the prior decision to be controlling on a **factual** issue or a mixed question of law and fact. The reason for this is quite clear; the rule of *stare decisis* simply does not apply to the factual determinations and mixed determinations of law and fact that the Second DCA made on a limited record. The Second DCA's decision is not controlling authority on those questions.

Examining the Second DCA's specific determinations makes clear that those determinations were intertwined both with the factual record before the Court **and** the procedural

context (specifically, a temporary injunction claimed to be a prior restraint). They were not the sorts of **pure legal issues** that were resolved in the cases cited by the Gawker Defendants. Specifically:

1. Public concern. The Second DCA based its determination of the "public concern" issue on an analysis of Mr. Bollea's supposed willingness to discuss his sex life in public, including the encounter that resulted in the sex video. *Bollea*, 129 So.3d at 1200-01; *id.* at 1201 n. 5. The Second DCA also based its determination on its **factual** finding regarding the extent of prior publicity about the sex video. *Id.* at 1201.
2. First Amendment protection. The Second DCA based its determination that posting the sex video was protected by the First Amendment on its finding that the speech involved a matter of public concern. As noted above, this was a **factual** finding based on Mr. Bollea's public comments about the sex video. *Id.* at 1200.
3. Not commercial. The Second DCA based its determination that Gawker's publication of the sex video was not a commercial use on **factual** findings that Gawker supposedly had not attempted to profit commercially from the video. *Id.* at 1202.
4. Unlawful recording does not affect First Amendment right to publish. The Second DCA based this determination on its **factual** finding that the sex video was a matter of public concern, a finding again based on Mr. Bollea's public comments about the sex video. *Id.* at 1203.

All of the Second DCA findings were either pure factual determinations or mixed questions of law and fact. All of them required an examination of the factual record. None of them control Gawker's motion to dismiss. With respect to each of them, Mr. Bollea should be

given the opportunity to develop a complete factual record. Mr. Bollea should not be precluded from doing so based on a temporary injunction proceeding where the factual record was extremely limited. [3]

Finally, the Second DCA's decision expressly rejected the same argument that the Gawker Defendants make here. On appeal, the Gawker Defendants argued that the Second DCA need not reach the merits of its appeal because, in an earlier action, the U.S. District Court issued a decision denying a temporary injunction that should be given collateral estoppel effect. The Second DCA's decision **rejected** that argument on the ground that temporary injunction proceedings are not final and, therefore, do not have collateral estoppel effect. The Second DCA held that "the federal court did not draw any decisive conclusions on the merits," merely finding that "Mr. Bollea was not entitled to injunctive relief at a preliminary stage in the proceedings;" thus, the federal court's ruling was not binding on the Second DCA. *Bollea*, 129 So.3d at 1204. On this point, the Second DCA's analysis is equally applicable here. Based on the limited factual record available to it, the Second DCA did not, and could not, reach "decisive conclusions on the merits" concerning factual issues such as whether Mr. Bollea's public statements regarding his private life were sufficient to make the sex video a matter of public

[3] In addition, the Second DCA's footnote 5, which speculates as to whether Mr. Bollea wanted to keep the sex video private, demonstrates how limited the factual record before the Second DCA was at that time. Discovery, in fact, has shown that Mr. Bollea repeatedly and consistently stated that he was filmed without his knowledge, never authorized any dissemination of the sex video and, to the contrary, sought in every instance to have the sex video removed from the internet and destroyed.

concern. Based on the Second DCA's own analysis of this issue, its temporary injunction ruling does not bind this Court.[4]

IV. CONCLUSION

For the foregoing reasons, the Gawker Defendants' attempt to give the DCA's *Bollea* opinion preclusive effect should be rejected.

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[4] The Gawker Defendants' argument that pretrial dispositions are especially appropriate in free speech cases ignores the fact that the cases cited involved no factual disputes that required a trial. *Stewart v. Sun Sentinal Co.*, 695 So.2d 360, 363 (Fla. 4th DCA 1997) ("**Where the facts are not in dispute** in defamation cases, however, pretrial dispositions are especially appropriate . . . .") (emphasis added, internal quotation omitted); *Karp v. Miami Herald Publishing Co.*, 359 So.2d 580, 581 (Fla. 3d DCA 1978) ("there was no genuine issue of material fact").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 16th day of April, 2014 to the following:

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