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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

DEFENDANTS' BENCH MEMORANDUM REGARDING THE ELEMENTS OF PLAINTIFF'S CLAIMS

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding the elements of each of Plaintiff's claims in this case.

I. THE PUBLIC DISCLOSURE OF PRIVATE FACTS

The elements of the tort of publication of private facts are as follows:

1. A publication by the defendants. This element requires that the defendant's publication be widespread, to the public at large. *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989); *Restatement (Second) of Torts* § 652D cmt. a.

2. Of private facts. *Hitchner*, 549 So. 2d at 1377. To qualify, the challenged facts must be truthful. *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). In considering what may be deemed a "private fact," facts pertaining to a subject that a public figure has voluntarily placed in the public eye are not properly deemed to be private facts. *Restatement (Second) of Torts* § 652D cmt. e. ("One who voluntarily places himself in the public eye, by

engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him.").

3. That are highly offensive to a reasonable person. *Hitchner*, 549 So. 2d at 1377; *Restatement (Second) of Torts §* 652D.

4. That do not relate to a matter of public concern. *Hitchner*, 549 So. 2d at 1377.

This element is required both by Florida common law and the First Amendment. *Id.* at 1377-79. As a result, the constitutional definition of a "matter of public concern" controls the definition of this element of the tort. *Restatement (Second) of Torts* § 652D cmt. d. The most recent summary of the definition of a "matter of public concern" from the United States Supreme Court is as follows:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1200 (Fla. 2d DCA 2014) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations and quotation marks omitted)). Matters of public concern are not "limited to 'news'" in the traditional sense, but "extend[] also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment." *Restatement (Second) of Torts* § 652D cmt. j. Finally, the relevant inquiry is whether the subject-matter of the publication is a matter of public concern, and whether the challenged fact, photograph, or video footage relates to that subject-matter.

Gawker Media, 129 So. 3d at 1201; *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1221 (10th Cir. 2007); *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989); *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at *6 (C.D. Cal. Sept. 11, 1998).

5. The defendant knew that the challenged private facts did not relate to a matter of public concern, or entertained serious doubts about whether they did. *See Gawker's Bench Memorandum Regarding the Burden of Proof and the Element of Fault* at 2. In addition, for the reasons discussed at pages 5-7 of the same Bench Memorandum, the final two elements of a plaintiff's claim must be established by clear and convincing evidence.

II. INTRUSION INTO SECLUSION

The elements of this tort are:

1. An intrusion by the defendant, by physical or electronic means. *Allstate Ins. Co.*, 863 So. 2d at 162.

2. Into a place in which there is a reasonable expectation of privacy. *Id.* In other words, the relevant intrusion must be intrusion into some physical "'place' in which there is a reasonable expectation of privacy," not an abstract or merely metaphorical intrusion into one's private affairs or psyche. *Id.* at 162. Thus, the *publication* challenged in this case cannot be the basis of a claim for intrusion since placing the article on the Internet involves no physical or electronic entry into any private quarters occupied by Plaintiff. *Bradley v. City of St. Cloud*, 2013 WL 3270403, at *4-5 (M.D. Fla. June 26, 2013); *Oppenheim v. I.C. Sys., Inc.*, 695 F. Supp. 2d 1303, 1309 & n.2 (M.D. Fla. 2010); *see also Pearson v. Dodd*, 410 F.2d 701, 703-06 (D.C. Cir. 1969); *Doe v. Peterson*, 784 F. Supp. 2d 831, 843 (E.D. Mich. 2011).

3. The intrusion must be highly offensive to a reasonable person, meaning that it is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency'" and be deemed "'utterly intolerable in a civilized community.'" *Oppenheim*, 695 F. Supp. 2d at 1309 (quoting *Stoddard v. Wohlfahrt*, 573 So. 2d 1060, 1062 (Fla. 5th DCA 1991) (citations and quotation marks omitted)).

Although the publication of allegedly private material is not properly the basis of an intrusion claim, if the Court were nonetheless to permit the jury to find liability on that basis, Plaintiff would have the burden of establishing, by clear and convincing evidence, two additional elements of the cause of action required by the First Amendment:

4. That the allegedly intrusive publication does not relate to a matter of public concern. As the United States Supreme Court has recently made clear, the public concern requirement applies to any tort theory, including intrusion upon seclusion, which seeks to sanction allegedly distressing speech. *Snyder*, 562 U.S. at 458-60 (holding that speech that is a matter of public concern cannot be the basis of liability for intrusion or the intentional infliction of emotional distress).

5. The defendant knew that the challenged private facts did not relate to a matter of public concern, or entertained serious doubts about whether they did. *See Gawker's Bench Memorandum Regarding the Burden of Proof and the Element of Fault* at 2.

III. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The elements of the tort of intentional infliction of emotional distress are:

1. The defendant engaged in extreme and outrageous conduct. This means conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Eastern Airlines, Inc. v. King*, 557 So. 2d 574, 576 (Fla. 1990) (citations and quotation marks omitted).

2. The defendant intended to inflict emotional distress on the plaintiff, or acted in deliberate disregard of a high degree of probability that emotional distress would result from his conduct. *Id.*

3. The plaintiff suffered severe emotional distress. *Id.*; *Clemente v. Horne*, 707 So. 2d 865, 866-67 (Fla. 3d DCA 1998). This requires "emotional distress of such a substantial quality or enduring quality, that no reasonable person in a civilized society should be expected to endure it." *Kraeer Funeral Homes, Inc. v. Noble*, 521 So. 2d 324, 325 (Fla. 4th DCA 1988). Emotional distress that is "ordinary and commonplace" does not qualify as severe distress. *Chase v. Nova Southeastern Univ., Inc.*, 2012 WL 1936082, at *3 (S.D. Fla. May 29, 2012).

4. The defendant's conduct was the legal cause of such severe emotional distress.

In addition, because Plaintiff alleges that the Publisher Defendants intentionally inflicted emotional distress on him by their publication, he must prove, by clear and convincing evidence, that:

5. The allegedly intrusive publication does not relate to a matter of public concern. *Snyder*, 562 U.S. at 4458-60 (holding that speech that is a matter of public concern cannot be the basis of liability for intentional infliction of emotional distress).

6. The defendant knew that the challenged private facts did not relate to a matter of public concern, or entertained serious doubts about whether they did. *See Gawker's Bench Memorandum Regarding the Burden of Proof and the Element of Fault* at 2.

IV. MISAPPROPRIATION OF THE RIGHT OF PUBLICITY

The elements of this claim are:

1. The defendant's unauthorized use of the plaintiff's name or likeness. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1258 (S.D. Fla. 2010); *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1212 (M.D. Fla. 2002).

2. For a commercial purpose. The mere fact that a plaintiff's name or likeness was included in a publication that is sold for profit is not a "commercial purpose" for purposes of this claim. *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 806 (Fla. 2005); *Gawker Media*, 129 So. 3d at 1202; *Loft v. Fuller*, 408 So. 2d 619, 622-23 (Fla. 4th DCA 1981); *Fuentes*, 721 F. Supp. 2d at 1258. Rather, the name or likeness must be used to directly promote a product or service "separate and apart" from the publication itself. *Fuentes*, 721 F. Supp. 2d at 1258; *Tyne*, 901 So. at 808-10.

3. The defendant's publication was not related to a matter of public concern. This element is required both by Florida law and the First Amendment. *Snyder*, 562 U.S. at 458-60; *Gawker Media*, 129 So. 3d at 1201-02; *Loft*, 408 So. 2d at 622-23.

4. The defendant knew that the challenged private facts did not relate to a matter of public concern, or entertained serious doubts about whether they did. *See Gawker's Bench Memorandum Regarding the Burden of Proof and the Element of Fault* at 2.

V. FLORIDA WIRETAP ACT

The elements of this claim for purposes of this case are:

1. The defendant intentionally disclosed a wire, oral, or electronic communication of another. An "oral communication" is one that was made with a reasonable expectation of privacy, which requires that the plaintiff had both an actual, subjective expectation of privacy in the conversation and that expectation was objectively reasonable under the circumstances. Fla. Stat. § 934.02(2)-(3); *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985); *Abdo v. State*, 144 So. 3d 594, 596 (Fla. 2d DCA 2014). Only the audio portion of the tape excerpts at issue that contains Plaintiff's communications are potentially an "oral communication"; video footage is not a wire, oral or electronic communication under the statute. *Minotty v. Baudo*, 42 So. 3d 824, 830-32 (Fla. 4th DCA 2010).

2. The defendant knew, or had reason to know, that the information was obtained through the interception of Plaintiff's wire, oral, or electronic communication without his consent. Interception means acquiring the contents of any "oral communication through the use of any electronic, mechanical, or other device." An electronic, mechanical, or other device means "any device or apparatus which can be used to intercept a[n] … oral communication." Fla. Stat. § 934.02(03)-(04).

3. The defendant's disclosure was the legal cause of actual damages suffered by the Plaintiff. Fla. Stat. § 934.10(1)(b).

4. The defendant's disclosure did not relate to a matter of public concern. This element is expressly required by the First Amendment in any civil action asserted under any state of federal wiretap disclosure based on the use and/or disclosure, as opposed to the actual interception, of wire, oral or electronic communications. *Bartnicki v. Vopper*, 532 U.S. 514, 533-35 (2001); *Boehner v. McDermott*, 484 F.3d 573, 584 (D.C. Cir. 2007); *Jean v. Mass. State Police*, 492 F.3d 24, 29-33 (1st Cir. 2007).

5. The defendant knew that the challenged private facts did not relate to a matter of public concern, or entertained serious doubts about whether they did. *See Gawker's Bench Memorandum Regarding the Burden of Proof and the Element of Fault* at 2.

June 30, 2015

Respectfully submitted,

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I HEREBY CERTIFY that on this 30th day of June 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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