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. 12012447 CI-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.
_____/

PLAINTIFF'S OPPOSITION TO GAWKER MEDIA LLC'S MOTION FOR STAY PENDING APPEAL

I. INTRODUCTION

Gawker Media's latest motion for a stay pending review has no merit. Gawker Media has already moved this Court twice for a stay pending review, and both motions were denied. Gawker Media also has a pending motion before the District Court of Appeal for a stay pending review as well. This motion is a waste of court resources, and also of Plaintiff's resources.

First, the premise of Gawker Media's motion—that there is something wrong with a trial court continuing proceedings after denying a motion to disqualify—is incorrect. The ruling of this Court denying Gawker Media's motion for disqualification is not reviewable via interlocutory appeal; the authors of the Florida Rules of Appellate Procedure specifically

contemplated that proceedings would continue before the trial judge after a disqualification motion is rejected. There is no legal basis for a stay.

Second, even if Gawker Media seeks a disfavored extraordinary writ in the District Court of Appeal, Gawker Media has failed to make the required showing on the merits to justify a stay pending review. Gawker Media has not shown a likelihood of success on its motion for disqualification, because the facts show neither any improper *ex parte* contact nor any judicial bias against Gawker Media. Meanwhile, Gawker Media cannot continue to demand that the wheels of the justice system stop turning every time it disagrees with an interlocutory court ruling. The case should proceed, and expeditiously.

II. THE MOTION FOR A STAY SHOULD BE DENIED.

A. Gawker Media's Contention That All Proceedings Must Stop to Ensure That a Trial Judge Does Not Make a Ruling That Might Later Need to Be Reversed Has No Merit.

Unlike a temporary injunction, an order denying a motion to disqualify a trial judge is not an immediately appealable order. Fla. R. App. Proc. 9.130(a)(3) (stating that "[a]ppeals to the district courts of appeal of non-final orders are limited to" a list of interlocutory orders that does not include denials of motions to disqualify a judge). In other words, the authors of the Florida Rules of Appellate Procedure **rejected** Gawker Media's argument the alleged danger of continued proceedings before a judge who might later be disqualified by the District Court of Appeal was supposedly so great that an immediate review of the matter is necessary.

Numerous published appellate cases review a denial of a motion to disqualify **post-judgment**, that is, **after** proceedings continued to a conclusion before the challenged judge. *See Gilliam v. State*, 582 So.2d 610 (Fla. 1991); *Pinardi v. State*, 718 So.2d 242 (Fla. App. 1998);

Hayes v. State, 686 So.2d 694 (Fla. App. 1996). The case of *Livingston v. State*, 441 So.2d 1083, 1086 (Fla. 1983), cited by Gawker Media for the proposition that allegations of judicial prejudice present a sensitive and serious issue, involved a review of a denial of an order disqualifying a trial judge on direct appeal **after** a death sentence had been imposed by that same judge. If it was appropriate for the defendant in *Livingston* to be required to wait until he was **sentenced to death** for the court of appeal to review whether disqualification of the trial judge was proper, there is no emergency in this civil tort action justifying a departure from that rule.

Gawker Media has made no argument for a stay other than that the District Court of Appeal might eventually reverse the order granting disqualification, and if that were to happen then the new judge could potentially revisit this Court's rulings. That is definitionally true of any interlocutory ruling, and is legally insufficient to justify the granting a stay.

B. Gawker Media Has Failed To Make the Requisite Showing on the Merits To Obtain a Stay.

Should Gawker Media seek writ review of the Court's order denying the motion to disqualify, to prevail on a stay motion pending that review, Gawker Media is required to establish: "(1) a likelihood of success on the merits, and (2) a likelihood of harm absent the entry of a stay." *Id.* To determine whether it is appropriate to grant a stay, a court must consider and balance the interests of both parties. *Tampa Sports Authority v. Johnston*, 914 So.2d 1076, 1080 (Fla. 2d DCA 2005) (balancing potential harms to both plaintiff and defendant in determining that order enjoining use of suspicionless searches at football games should not be stayed pending review).[1]

[1] *Air Comfort Mechanical, Inc. v. Simmons*, 252 So.2d 285, 285 (Fla. 2d DCA 1971), cited by Gawker Media, is a two sentence opinion confirming that trial courts have broad discretion to stay proceedings. *Simmons* has no relevance to the present motion. Likewise, *Mann v. Brantley*,

Gawker is highly unlikely to succeed on the merits of its petition for a writ of prohibition reversing the Court's order denying its motion for disqualification. First, the writ of prohibiton is an extraordinary remedy that is "very narrow in scope, to be employed with great caution and utilized only in emergencies." *English v. McCrary*, 348 So.2d 293, 296 (Fla. 1977). Thus, Gawker Media will face an extremely high burden in seeking writ review of the Court's order.

Second, Gawker Media failed to show either improper *ex parte* contact or judicial bias in its motion to disqualify. The prohibition on *ex parte* communications extends only to communications regarding the substance of the case. The Court's receipt of a telephone call from Heather Clem's counsel indicating non-opposition to the motion for an injunction was a purely administrative matter, which is not considered an improper *ex parte* communication. "*Ex parte* communications regarding purely administrative, non-substantive matters . . . do not require disqualification." *Nudel v. Flagstar Bank, FSB*, 52 So.3d 692, 694 (Fla. 4th DCA 2010) (communications between judge and judge's staff and lawyer for one of the parties discussing calendaring of motion did not constitute improper *ex parte* communication).

Nor did the Court's comments regarding sensationalistic comments in the moving and opposition papers, which were directed at both parties, constitute judicial bias. *Ellis v. Henning*,

---

732 So.2d 1090, 1091 (Fla 4th DCA 1998), is distinguishable. *Mann* involves the sui generis situation of an order granting a new trial at the conclusion of the case, which the District Court of Appeal ruled should have been stayed. In that instance, there were to be no further substantive proceedings unless the new trial was conducted. Meanwhile, the trial court could not enter a final judgment while the new trial order was appealed. Thus, there is no reason not to wait until the new trial order was reviewed on appeal before starting the new trial. In contrast, here, a stay ruling will stop the progress of the case, including discovery, motion practice, trial setting, etc. *Mann* has no application here. Finally, *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063, 1065 (Fla. 2000), involved a trial judge who failed to obey the court rule requiring an immediate determination of a disqualification motion. The Court's rhetoric, quoted by Gawker Media, referring to a "cloud of prejudice" was describing a trial judge's continuing to preside over a case having not ruled on the disqualification motion. By contrast, this Court promptly ruled on Gawker Media's motion, and is under no further "cloud of prejudice".

678 So.2d 825, 827 (Fla. 4th DCA 1996) ("A trial judge's expression of dissatisfaction with counsel . . . alone does not give rise to a reasonable belief that the trial judge is biased . . ."); *Cooper Tire & Rubber Co. v. Rodriguez*, 997 So.2d 1124, 1126 (Fla. 3d DCA 2008) (finding that "holding the parties' feet to the fire" and admonishing them for not completing discovery and getting the case to trial is appropriate and not a ground for disqualification); *Nassetta v. Kaplan*, 557 So.2d 919, 920-21 (Fla. 4th DCA 1990) (rejecting disqualification motion based on judge's comment at bail reduction hearing that he did not care if the defendant got out of jail or not: "A judge's remarks that he is not impressed with a lawyer's, or his client's behavior are not, without more, grounds for recusal.").

Nor has Gawker Media shown a likelihood of harm absent a stay that outweighs Mr. Bollea's interest that the case go forward so he can seek redress for the massive invasions of privacy that he has pleaded. Contrary to Gawker Media's suggestion, a rejected motion for disqualification does not hang over a trial judge like a Sword of Damocles casting doubt on all future proceedings. Rather, applicable court rules provide that factual and legal rulings of a judge who is later disqualified are not automatically vacated, but instead can be reconsidered upon a duly noticed motion. Fla. R. Judicial Administration 2.330(h). It is entirely possible that even if Gawker Media were to succeed in obtaining writ relief disqualifying the trial judge, the Court's rulings on factual and legal matters would be left in full force and effect. There is no reason to stop the case so that Gawker Media can file piecemeal appeals of each and every interlocutory ruling.

III. CONCLUSION

For the foregoing reasons, the motion for a stay pending review should be denied.

Respectfully submitted,

Charles J. Harder, Esq.
PHV No. 102333
HARDER MIRELL & ABRAMS LLP
1801 Avenue of the Stars, Suite 1120
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com

-and-

Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Christina K. Ramirez, Esq.
Florida Bar No. 954497
BAJO CUVA COHEN & TURKEL, P.A.
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: cramirez@bajocuva.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail and U.S. First Class Mail this 15th day of May, 2013 to the following:

Barry A. Cohen, Esquire
D. Keith Thomas, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 East Kennedy Blvd.
Suite 1000
Tampa, FL 33602
bcohen@tampalawfirm.com
dkthomas@tampalawfirm.com
mgaines@tampalawfirm.com
Counsel for Heather Clem

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esq.
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
Counsel for Defendant Gawker

Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW
Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
Pro Hac Vice Counsel for
Defendant Gawker

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501

Attorney