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, *et al.*,

Defendants.
_____/

GAWKER DEFENDANTS' SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO DISMISS

The Gawker Defendants, through their undersigned counsel, hereby submit the following Supplemental Reply to address the arguments presented in the "Response of Plaintiff Terry Gene Bollea to Gawker Defendants' Supplemental Memorandum (Styled a 'Reply') in Support of Motion to Dismiss" (the "Response"). In that Response, plaintiff understandably seeks to minimize the District Court of Appeals' ruling in this case, *see Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1202, 1203 (Fla. 2d DCA 2014) (the "DCA Ruling"), variously contending that it is not law of the case or even that it has no precedential value *at all* here.

1. As framed by plaintiff's Response, the issues before this Court are exceptionally narrow. Plaintiff does not take issue with the Gawker Defendants' characterization of the central holdings of the DCA Ruling. Nor does plaintiff dispute that those holdings, if applicable at this stage, foreclose any possibility that he has stated, or could state, viable causes of action against the Gawker Defendants.[1] Rather, the sole remaining dispute is whether the DCA Ruling applies

[1] Plaintiff also filed yet another opposition to the Gawker Defendants' motion to dismiss ("Third Opp."). While that brief contends that his specific causes of action are viable, it is expressly premised on his assertion that the DCA Ruling "is not controlling legal authority on the issues in this motion to dismiss proceeding," Third Opp. at 7, and does not address the question of whether, if the DCA Ruling applies, plaintiff's claims can survive dismissal.

to this motion, and, on that issue, plaintiff is simply incorrect. The notion that these proceedings should continue as if the District Court had not already resolved the central legal issues in the case defies both Florida law and basic common sense.

2. **Standard of Review:** Plaintiff initially argues that the DCA Ruling cannot control because it addressed whether plaintiff was entitled to a prior restraint, not, as here, whether plaintiff has alleged viable causes of action. Resp. at 2-4. This ignores what the District Court actually held. The District Court *did* conclude that the temporary injunction represented an unconstitutional prior restraint. *Bollea*, 129 So. 3d at 1202, 1203. But it did so based on its determination that, *as a matter of law*, the Gawker Story and Excerpts address matters of public concern and are protected by the First Amendment. Flowing from that central holding, the District Court also concluded as a matter of law that the publications are not commercial in nature, even assuming Gawker profited from them; and cannot be punished, even if they report on a tape that was itself illegally recorded. *See id.* at 1200-03; Gawker Defendants' Reply at 2-3.

3. These are threshold legal determinations, which conclusively settle those issues going forward, regardless of the procedural posture in which they initially arose. The analysis in *Bradenton Group, Inc. v. State of Florida*, 970 So. 2d 403 (Fla. 5th DCA 2007), is instructive on this precise point. There, the District Court, in reversing a trial verdict in favor of the plaintiff, held that an earlier ruling by the Florida Supreme Court in the same case at the temporary injunction stage – specifically, that the conduct at issue did not violate Florida's so-called "Bingo Statute" – "barred the action," and, therefore, should have been the basis for dismissal on remand. *Id.* at 411. This was true, even though the standard of review governing the Supreme Court's temporary injunction decision was not the same standard of review that governed the District Court's later assessment of the merits. So, too, here. Because the District Court's legal determinations were not tied to the governing standard of review, those determinations are not

limited to that procedural setting, just as legal principles articulated in the summary judgment context are applicable at the motion to dismiss stage and vice-versa.

4. **Law of the Case:** Nor is plaintiff on any stronger ground in contending that the DCA Ruling does not apply because rulings made on appeal from a temporary injunction proceeding are not law of the case. This is an incorrect statement of Florida law. To be sure, there are cases declining to find that a temporary injunction ruling becomes law of the case, typically because the particular ruling merely predicts whether the plaintiff is likely to succeed on the merits, including based on an assessment of the factual record then before the court. But, as other authorities make plain, where a dispositive legal issue is conclusively resolved at the temporary injunction stage, it is indeed law of the case. For example, in *Globe Data Systems v. Johnson*, 745 So. 2d 1101 (Fla. 5th DCA 1999) ("*Globe I*"), the District Court reversed the trial court's denial of a temporary injunction, finding that a dispositive legal issue required that an injunction be issued. In a later opinion, the District Court held that its prior decision in *Globe I* mandated the issuance of a permanent injunction, finding that "*Globe I* was the law of the case" on the dispositive legal issue presented on the merits. *Johnson v. Globe Data Systems*, 785 So. 2d 1290, 1291 (Fla. 5th DCA 2001) ("*Globe II*"). In so holding, the District Court affirmed the trial court, which had understood itself to be bound by the *Globe I* temporary injunction ruling, even though it continued to disagree with the decision. *See Globe II*, 785 So. 2d at 1292 (trial court properly understood "role and authority of the appellate courts"); *see also CHS Financial Servs., Inc. v. Small Bus. Consultants, Inc.*, 722 So. 2d 245, 246-47 (Fla. 2d DCA 1998) (legal determination made by trial court in temporary injunction proceeding became law of the case when it was not appealed). Thus, where, as here, an earlier injunction decision resolves a dispositive legal issue – such as whether a publication is protected by the First Amendment because it involves a matter of public concern – the law of the case doctrine applies.

5. **Controlling Precedent:** Moreover, even if the legal determinations made by the District Court are not law of the case, they nevertheless operate here as controlling precedent. As explained below, the DCA Ruling, at the very least, establishes the governing legal framework in Florida for assessing claims arising out of a publication that reports about, and excerpts from, a celebrity sex tape. That such a legal framework was established in this very case does not deprive it of precedential force in this action going forward.

6. Plaintiff is therefore wrong in contending that the DCA Ruling is not, at a minimum, controlling precedent. Plaintiff does not dispute that temporary injunction decisions by appellate courts establish applicable precedent outside of the injunction context, but instead contends that this principle is limited to circumstances in which the prior injunction decision turned on a "pure legal" issue. *See* Resp. at 5-6. Even putting aside that the DCA Ruling made a series of legal determinations, that makes no sense. As plaintiff concedes, whether a prior decision applies to a particular case turns on whether "the material facts of the prior case" are "sufficiently similar to the case at bar." *Id.* at 5-6 (citing *Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005)). Precedent established in the temporary injunction context is no different.[2]

7. That, in fact, is the crux of the matter: this case is materially indistinguishable from the DCA Ruling *because it is the same case*. Prior to the DCA Ruling, although there were other Florida precedents imposing substantial limitations on plaintiff's claims, there was no Florida law addressing the causes of action he asserts in the precise context of publications

[2] To the extent plaintiff is suggesting that appellate decisions in the temporary injunction context do not establish binding precedent where they involve the application of law to facts, that is simply not true. *See, e.g.*, *Bradenton Group*, 970 So. 2d at 411 (Florida Supreme Court's application of "Bingo Statute" to conduct at issue in temporary injunction context foreclosed plaintiff's action on the merits); *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 165 (Fla. 5th DCA 2003) (describing application of law to facts in *3299 N. Federal Highway, Inc. v. Board of Cnty. Comm'rs of Broward Cnty.*, 646 So. 2d 215 (Fla. 4th DCA 1994), a temporary injunction decision, as "controlling precedent" as to issue presented on summary judgment).

involving celebrity sex tapes. Consequently, plaintiff was free to argue, as he inexplicably continues to do in his latest opposition, that "no case holds that explicit, surreptitiously recorded footage of sexual activity is newsworthy." Third Opp. at 2. Similarly, plaintiff was also free to argue that *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) ("*Michaels I*") – itself a preliminary injunction decision – supplies the law applicable to this case. But, now there is a published Florida appellate decision adjudicating these very questions and conclusively rejecting the positions plaintiff advances – including for example that the Gawker Story and Excerpts are not newsworthy or that *Michaels I* is applicable here. *See Bollea*, 129 So. at 1200-02. As such, plaintiff's continuing reliance on those arguments, *see* Third Opp. at 2, 8-12, has no place in this case. *See Daniel v. Fla. State Tpk. Auth.*, 237 So. 2d 222, 222 (Fla. 1st DCA 1970) (rejecting appellant's arguments on appeal from final judgment where they had been "rejected by the Supreme Court earlier when appellant sought review of an interlocutory order denying appellant's prayer for a temporary injunction").[3]

8. Regardless of whether the legal determinations of the DCA Ruling are law of the case or merely controlling precedent, under that decision plaintiff has not stated, and cannot state, viable causes of action arising out of the publication at issue. Indeed, while the Gawker Defendants have amassed substantial evidence rebutting the various factual contentions of plaintiff's First Amended Complaint, the Gawker Defendants accept them as true for purposes of this motion, as required. The District Court's likewise predicated its opinion on those factual allegations, including that (a) the full Sex Tape at issue was made without plaintiff's "consent or

[3] Plaintiff is similarly incorrect in contending that the District Court's ruling that the federal court's prior decision – in a different case – was not entitled to "preclusive" collateral estoppel effect somehow strips the DCA Ruling of any precedential value. The District Court described that prior ruling as "unquestionably persuasive," *Bollea*, 129 So. 3d at 1204, and its conclusions and reasoning largely tracked those of the federal court. Unlike a federal trial court, whose precedents are not controlling in this Court, the DCA Ruling – issued unanimously by a superior court – establishes the governing law here.

knowledge," (b) "the Sex Tape was created in violation of the law," (c) plaintiff "never consented to the Sex Tape's release or publication," and (d) Gawker profited from publishing the "report with video excerpts to the extent that it increase[d] traffic to Gawker Media's website." *Bollea*, 129 So. 3d at 1198, 1202 n.6, 1203; *compare, e.g.*, First Am. Compl. ¶¶ 1-2, 26-30 (alleging same). The point of the DCA Ruling is that, even crediting those factual allegations, plaintiff cannot state a claim as a matter of law because the challenged publication involves a matter of public concern and is therefore protected by the First Amendment.

CONCLUSION

For the foregoing reasons, as well as those stated in the Gawker Defendants' prior motion papers, the claims asserted against the Gawker Defendants should be dismissed with prejudice.

Dated: April 21, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of April 2014, 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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