Filing # 12582559 Electronically Filed 04/16/2014 02:40:14 PM

ELECTRONICALLY FILED 4/16/2014 2:37:44 PM: KEN BURKE, CLERK OF THE CIRCUIT COURT, PINELLAS COUNTY

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.
_____/

OPPOSITION OF PLAINTIFF TERRY GENE BOLLEA TO GAWKER MEDIA, LLC'S MOTION TO DISMISS[1]

I. INTRODUCTION

This is an opposition to a motion that Gawker Media, LLC ("Gawker") has never even properly brought before the Court. In the present action, Gawker has recycled a motion it originally filed after it purported to remove this action to the United States District Court. After the District Court rejected Gawker's improper removal, and remanded this case back to this Court, Gawker simply "renoticed" its motion, which had been originally filed under different

[1] Mr. Bollea filed an opposition to Gawker's motion in federal court. However, given that over a year has passed since the original motion and opposition was filed, no formal opposition was ever filed in this Court after remand, and Gawker purported to file a "reply" with new arguments two weeks before the hearing, Mr. Bollea believes that it is appropriate to file a formal opposition to Gawker's motion in this Court.

court rules before a different judge. Gawker has not properly brought a motion in this Court, and its motion should be denied on procedural grounds.

Substantively, Mr. Bollea has pleaded claims upon which relief may be granted—invasion of privacy, negligent infliction of emotional distress, violation of the right to publicity, and violation of Florida's surreptitious recording laws.

With respect to invasion of privacy, Gawker published a surreptitiously recorded video of Mr. Bollea while he was in a private bedroom, naked and having sex—unaware that he was being recorded. There is no doubt that this was a disclosure of private facts and an intrusion upon Mr. Bollea's seclusion. Nor can Gawker claim a newsworthiness defense: no case holds that explicit, surreptitiously recorded footage of sexual activity is newsworthy. To the contrary, the case law is clear that surreptitiously-recorded, sexually explicit footage is **not** newsworthy. Even in situations where a newsworthy topic relates to sex, journalists report on the topic without broadcasting recordings of sexual activity, or at the very least, journalists mask or blur any footage that is disseminated so as to preserve the privacy of the subjects of the story. Gawker deliberately chose to air unmasked, unblurred, unblocked footage of Mr. Bollea naked, aroused and having sex, not to "report the news," but because such explicit footage would bring millions of viewers to its website and the profits would be tremendous.

Gawker's defenses of its egregious actions are that Mr. Bollea supposedly discussed his sex life in press interviews and appearances and thus waived his right to privacy, and that case law has granted the media a privilege to disseminate illegally made recordings under certain circumstances. Neither of these defenses has merit. Mr. Bollea never consented to the recording or dissemination of a sex tape in any of his public appearances. If simply talking about sex in interviews—as many celebrities and some non-celebrities do in our current popular

culture—permits any publisher to unearth actual footage of a person's sexual activities and publish that footage, then the right to privacy is completely lost. Gawker conflates two different things: information about the sexual relationships of a celebrity, which could be newsworthy, and surreptitiously recorded explicit footage of the person naked and having sex, which is not.

While case law has permitted the media to publish illegally made recordings that relate to public issues (such as audio recordings of politicians and union leaders engaging in unethical conduct), the Supreme Court has indicated emphatically that this extraordinary doctrine does not extend to publishing sex tapes that do not relate to issues of important public concern.

Mr. Bollea's other causes of action also are properly pleaded. Mr. Bollea has pleaded facts sufficient to establish that Gawker intruded upon his seclusion by publishing the sex tape. He has further pleaded that Gawker benefitted commercially from the publication of the sex tape, which utilizes his name and likeness, thereby sufficiently stating a cause of action for violation of his right of publicity. He has stated a cause of action for damages based on intentional infliction of emotional distress, and for injunctive relief for negligent infliction of emotional distress, which was an entirely foreseeable result of publishing this sort of private, intimate material. And finally, he has stated a cause of action for violation of Florida's statute that requires both parties' consent before audio recordings may be made or published. Again, while these statutes are subject to a newsworthiness defense where the material concerns an important public issue, the public's prurient curiosity into the sex life of Mr. Bollea does not constitute the sort of extraordinary public interest that justifies granting constitutional protection to the publication of a surreptitious recording.

Because Mr. Bollea has properly pleaded his claims, it is time for Gawker to answer them, and for Mr. Bollea's claims to be tried on the merits. Gawker's motion should be denied.

II. STATEMENT OF FACTS[2]

Mr. Bollea is professionally known as the famous wrestler and celebrity Hulk Hogan. *First Amended Complaint* ("FAC") Preface. Gawker is a limited liability company that operates Gawker.com and many other websites. FAC ¶¶ 12, 20. Several years ago, Mr. Bollea was secretly videotaped without his consent engaging in private, consensual sexual relations in a private bedroom with defendant Heather Clem (the "Full Sex Video"). FAC ¶¶ 1, 26. Gawker admitted that its employee, Kate Bennert, edited the Full Sex Video. A.J. Daulerio, *Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work But Watch It Anyway*, http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway (visited April 8, 2014). The result was a one minute and forty-one second "highlight reel" of the sexual activity taken from the Full Sex Video (the "Gawker Sex Video"), which Gawker posted on its website on or about October 4, 2012. FAC ¶¶ 1, 27. The Gawker Sex Video included explicit footage (unblocked and unblurred) of Mr. Bollea nude and having sex. FAC ¶ 1. The Gawker Sex Video was accompanied by an explicit description, written by Defendant A.J. Daulerio, of the contents of the Full Sex Video, including detailed descriptions of Mr. Bollea's genitals and sex acts. FAC ¶ 1.

Mr. Bollea did not know that he was being recorded and never consented to the recording or dissemination of the Full Sex Video, or any portion thereof, including the Gawker Sex Video. FAC ¶¶ 2, 26, 29. Mr. Bollea had a reasonable expectation of privacy when he engaged in the private, consensual sexual relations in a private bedroom that were recorded. FAC ¶¶ 2, 26. Had Mr. Bollea known that he was being filmed, he never would have engaged in the sexual activity

[2] Because this is a motion to dismiss, the allegations of the First Amended Complaint are taken as true.

with Ms. Clem. FAC ¶ 26. Millions of people viewed the Gawker Sex Video as a result of Gawker's actions, generating massive amounts of revenue for Gawker. FAC ¶ 30. Once the Gawker Sex Video was published, Mr. Bollea immediately sent multiple cease and desist letters and emails to defendants Gawker and its CEO Nick Denton, demanding removal of the Gawker Sex Video. Gawker refused to remove the video. FAC ¶¶ 5, 28. This lawsuit was filed promptly thereafter, and Mr. Bollea sought an immediate injunction for the removal of the Gawker Sex Video from Gawker.com. As a result of Gawker's actions, Mr. Bollea has suffered immense damages, including substantial emotional distress. FAC ¶ 31. Further, permanent injunctive relief is necessary because any further publication of the Gawker Sex Video by Gawker will inflict further substantial economic and emotional distress damages upon Mr. Bollea. FAC ¶ 35.[3]

III. STANDARD OF REVIEW

A motion to dismiss may only be granted 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** and all allegations therein are **taken as true**

---

[3]As the Court is aware, earlier in these proceedings, it granted Mr. Bollea's motion for a temporary injunction. During the time when that injunction was in effect (before it was stayed by the Court of Appeal), Gawker defiantly insulted this Court, refusing to comply with the injunction, and calling Judge Campbell "risible and contemptuous of centuries of First Amendment jurisprudence," and stating that she "seemed to fail to understand" basic First Amendment principles. John Cook, *A Judge Told Us to Take Down Our Hulk Hogan Sex Tape Post. We Won't*, http://gawker.com/a-judge-told-us-to-take-down-our-hulk-hogan-sex-tape-po-481328088 (visited April 8, 2014).

In addition to disrespecting this Court, Gawker's CEO, Nick Denton, disrespects privacy altogether. He stated in a recent interview that "every infringement of privacy is sort of liberating" and that "[y]ou could argue that privacy has never really existed." Jeff Bercovici, *The Playboy Interview: A Candid Conversation with Gawker's Nick Denton*, http://playboysfw.kinja.com/the-playboy-interview-a-candid-conversation-with-gawke-1527302145 (visited April 8, 2014).

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) (internal quotation omitted). 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).

IV. ARGUMENT

A. Gawker Failed to File a Proper Legal Memorandum in Support of Its Motion.

Gawker brought the instant motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) on or about January 4, 2013, in the United States District Court for the Middle District of Florida, after purporting to remove this case to the U.S. District Court. The U.S. District Court found Gawker's removal to be improper, and remanded the matter back to this Court. Rather than making a motion to dismiss in this Court, pursuant to Florida Rules of Civil Procedure, Gawker merely purported to re-notice its previously filed federal motion, which argues that the FAC should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Under Fla. R. Civ. Proc. 1.140(b), a motion to dismiss must state both the grounds and any legal arguments "specifically and with particularity." Nothing could be less "specific" or "particular" than recycled motion papers from a different proceeding, in a different court, based on different rules and legal standards. As such, Gawker's motion to dismiss is insufficient to challenge Mr. Bollea's FAC, and should be denied on this basis alone.

//

//

B. The Court of Appeal's Decision Does Not Require Dismissal.

Gawker has argued, in its "reply" brief filed with this Court on or about April 9, that the Florida District Court of Appeal's decision reversing this Court's grant of a temporary injunction requires dismissal of Mr. Bollea's claims. As this argument applies to all of the Gawker Defendants and is based on an intervening event that occurred after initial briefing, Mr. Bollea has filed a separate response to this argument. In short, the decision is not controlling legal authority on the issues in this motion to dismiss proceeding, and the Court is free to exercise its independent judgment in resolving these motions.

C. Mr. Bollea Has Sufficiently Pleaded Causes of Action for Invasion of Privacy.

Gawker has not established any substantive ground for dismissal. Mr. Bollea brings two privacy-related causes of action: publication of private facts and invasion of privacy by intrusion upon seclusion. Both claims withstand Gawker's motion to dismiss.

For over a hundred years, legal scholars have recognized the threat that the combination of voyeurism and technology pose for privacy rights. "Gossip . . . has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers." Charles Warren & Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193, 196 (1890). "The common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?" *Id.* at 220. "In Western society, one of the most fundamental and universal expectations of privacy involves the ability to control exposure of one's body." Lance E. Rothenberg, *Re-Thinking Privacy: Peeping*

Toms, Video Voyeurs, And the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space, 49 American Univ. L. Rev. 1127, 1135 (2011).

Gawker's broadcast to millions of people of a secretly-recorded video of Mr. Bollea having private, sexual relations in a private bedroom was a public disclosure of private facts. Gawker's only argument to the contrary is that other websites had reported on the **existence** of the Full Sex Video, though no video was played, and at least one website posted some still photographs from that video, but the photos were of such quality that Mr. Bollea could not even be recognized in any such photos, and no nudity could be seen. Disclosure of the fact that a video **exists**, however, does not eviscerate the private nature of the video itself. *Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998) ("*Michaels I*") ("The Court notes, however, a critical distinction which IEG has attempted to blur in its papers. The fact that the Tape **exists** . . . [and] disseminating the **contents** of the Tape.") (emphasis added). In any event, Gawker's argument is a **factual** one. The extent of such prior disclosure is not something that can be resolved by the Court on a motion to dismiss.

Gawker also contends that the Gawker Sex Video was "newsworthy," and thus Gawker's publication of the video is supposedly protected by the First Amendment and non-actionable. The case law says otherwise. Where a public disclosure of private facts is established, as here, the First Amendment precludes civil remedies **only** if the invasive material is of **legitimate public concern**. The contents of a clandestinely recorded sex tape depicting full frontal nudity and private sexual activity, in the bedroom of a private home, do not qualify as matters of legitimate public concern. In *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001), the U.S. Supreme Court declined to extend constitutional protection for disclosure of the contents of illegal recordings to "domestic gossip or other areas of purely private concern." *See also, id.* at 540

(Breyer, J., concurring) (stating that a case involving the broadcast of a celebrity sex tape constitutes a "truly private matter" not protected by the First Amendment); *id.* at 541 (Rehnquist, C.J., dissenting) (stating that disseminating the contents of illegal recordings is not protected by the First Amendment); *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (holding that broadcasts of sexual activity on the Internet are not matters of public concern). "All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest." *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 483–84 (Cal. 1998) (emphasis in original). A number of authorities hold that the publication of private nude photographs and private sex tapes constitute actionable invasions of privacy. In *Toffoloni v. LFP Publ'g Group, LLC*, 572 F.3d 1201, 1212 (11th Cir. 2009), for example, the Eleventh Circuit rejected a First Amendment defense because, if accepted, "[the defendant] would be free to publish any nude photographs of almost anyone without permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.'" In other words, the Court rejected the precise argument made by Gawker in this case.

Moreover, in *Michaels I*, the District Court held that the online publication on the Internet of a sex tape of actress Pamela Anderson and rock star Brett Michaels was **not protected by the First Amendment** because "the visual and aural details of their sexual relations" were "facts which are ordinarily considered **private** even for celebrities." 5 F. Supp. 2d at 840 (emphasis added).[4]

---

[4] In *Michaels I*, the court enjoined the broadcast of a celebrity sex tape of Pamela Anderson and Brett Michaels, and held:

> It is also clear that Michaels has a privacy interest in his sex life. While Michaels's voluntary assumption of fame as a rock star throws open his private life to some extent, even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives.

The cases cited by Gawker are all distinguishable because they all involved expression of legitimate public concern, which is not the case here:

- The *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011), case involved protesters at military funerals who were commenting on military policies relating to LGBT service members.
- The *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988), case involved a parody of an advertisement mocking a famous evangelical leader (and which was not claimed to be an invasion of privacy).
- The *Anonsen v. Donahue*, 857 S.W.2d 700, 703-04 (Tex. App. 1993), case involved a disclosure concerning the sexual abuse of a minor, which had occurred years earlier. Not surprisingly, the fact that a member of the community escaped punishment for raping a child was held to be a matter of public concern. By contrast, here, the clandestine recording of a private sexual encounter is not comparable.
- The *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), case involved a false light claim (not a public disclosure of private facts claim) based on *Life* magazine's reporting of a hostage-taking. The Supreme Court held that the "actual malice" standard for defamation of public figures applied to false light claims. Again, the details of a hostage taking, a serious crime, are a matter of public concern, and cannot be likened to a publication of the contents of a clandestine recording of a private sexual encounter.

---

* * *

> The Court notes that the private matter at issue here is not the fact that Lee and Michaels were romantically involved. Because they sought fame, Lee and Michaels must tolerate some public exposure of the fact of their involvement. . . . The fact recorded on the Tape, however, is not that Lee and Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.

Michaels I, 5 F. Supp. 2d at 840.

- The *Jones v. Turner*, 1995 WL 106111 (S.D.N.Y. Feb. 7), case involved the publication of nude photographs of a woman who had voluntarily posed for photographs and who, at the time, was suing the President of the United States, and denied that she had ever posed nude. Thus, the photographs concerned the credibility of her allegations in a lawsuit of great public concern. Gawker cannot make a credible argument likening the facts of this case to those in *Jones*.
- The *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA 1982), case involved the publication of a photograph of a crime victim who escaped captivity while covering herself with a dish towel. The photograph was not explicit and was taken in a public place, and thus the case is inapposite to the facts pleaded here.
- The *Konikoff v. Prudential Insurance Co.*, 234 F.3d 92, 102 n. 9 (2d Cir. 2000), case was a defamation case involving a real estate appraiser who was accused of bias. The court's discussion of public concern has no bearing on whether a clandestine recording of a private sexual encounter is of legitimate public concern.

Gawker takes a quote from *Post-Newsweek Stations v. Guetzloe*, 968 So.2d 608, 612 (Fla 5th DCA 2007) out of context, and claims that privacy rarely trumps the First Amendment. In fact, the Court stated that "[a]lthough these precedents are somewhat instructive because they suggest that privacy will rarely trump the First Amendment, all of these cases are distinguishable from the situation that we are confronted with here." *Id.* The Court held that the particular items in that case (recovered from a storage facility when Guetzloe failed to pay his storage bill) were not protected by the right to privacy, but that **more private materials would be**. *Id.* "We do not think that Appellee's status as a public figure means that every aspect of his private life is of public concern." *Id.*

Given that even the cases relied on by Gawker make clear that some aspects of people's lives remain private, Gawker's arguments in opposition to the motion to dismiss give rise to the question of exactly what activities Gawker would concede receive protection under the public disclosure of private facts tort. If it is conceded, as *Guetzloe* says, that not every aspect of a public figure's private life is of public concern, there is no way that clandestine video of the person having sex can be a matter of public concern, because if that **is** a matter of public concern, it is inconceivable that anything would not be.

Gawker repeatedly cites to *Michaels v. Internet Entertainment Group, Inc.*, 1998 WL 882848 (C.D. Cal. Sep. 11) ("*Michaels II*"), wherein the court granted summary judgment to television producers who ran **censored** footage of the same sex tape at issue in *Michaels I*. This holding is of no benefit to Gawker, because Gawker could have chosen to edit the Gawker Sex Tape in such a way that no explicit footage of Mr. Bollea was included (which is what a legitimate journalist might do to demonstrate that a tape exists while **not** invading Mr. Bollea's privacy), but instead Gawker chose not to censor the video and instead sought to maximize the traffic to its website and profit based on its invasion of Mr. Bollea's privacy. *Michaels I* (*Michaels v. Internet Entertainment Group*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998)) is particularly instructive because the court **enjoined** the publication and distribution of a celebrity sex tape. *See supra* n. 4.

Gawker makes much of the fact that it took a 30 minute video and edited it down to one minute and 41 seconds. However, the case law is clear in many areas that it is **what is shown**, not what is left out, that determines the issue of liability. *Michaels II* is one example of this; the key point was that the defendants sanitized the footage, not how much of it they ran. Similarly, in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), the court held that the publication

of just 400 words from a 500 page book was not a protected fair use under copyright law where those 400 words constituted the "heart" of the book. And in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the broadcast of just 15 seconds of a 30 minute human cannonball act was held to be an actionable violation of the right to publicity, because the 15 seconds showed the performer being shot out of the cannon. Gawker showed Mr. Bollea nude and having sex; it showed the "heart" of the work. The length of the excerpts is not relevant when Gawker chose to include in them explicit footage that it did not need to show to report the news.

Further, Gawker cites to statements that Mr. Bollea allegedly made to media outlets about his sex life, as if these statements make audio and visual recordings of his sexual activities fair game for news reporting. Gawker is incorrect. As Judge Posner pointed out in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232, 1239 (7th Cir. 1993), just because it is public knowledge that everyone goes to the bathroom (and indeed, that people might tell others that they are going), does not mean that what goes on **in** the bathroom is not private. Gawker is using newsworthiness "as an excuse for publicizing controversial images along with shocking stories." Maayan Y. Vodovis, Note, *Look Over Your Figurative Shoulder: How to Save Individual Dignity And Privacy on the Internet*, 40 Hofstra L. Rev. 811, 819 (2012). The First Amendment was not meant to be abused in this way.

Additionally, the merits of Gawker's newsworthiness defense cannot be resolved on a motion to dismiss. *See Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762, 772 (Cal. App. 1983) (holding that the question of "[w]hether a publication is or is not newsworthy depends upon contemporary community mores and standards of decency" and thus "is largely a question of fact").

In addition to the public disclosure tort, the FAC alleges a prima facie case for invasion of privacy by means of intrusion upon seclusion. The intrusion tort is available where a defendant, "physically or otherwise," intrudes upon the solitude or seclusion of another or his or her "private affairs or concerns." *Restatement (Second) of Torts* § 652B. The FAC alleges that this occurred. FAC ¶¶ 67–74.

The cases cited by Gawker do not establish otherwise. The key holding of the Florida Supreme Court's decision in *Allstate Insurance Co. v. Ginsberg*, 863 So.2d 156, 162 (Fla. 2003), is that the intrusion upon seclusion tort "is a tort in which the focus is the right of a private person to be free from public gaze." *Id.* The FAC alleges that Mr. Bollea had a reasonable expectation of privacy in a private place—a private bedroom with the door closed—and that he has the right to be free from the very public gaze of the millions of persons who went to Gawker's website to view the secretly-recorded sex video. Mr. Bollea's allegations go to the "focus" of Florida's intrusion upon seclusion tort, and are sufficient.

The other cases cited by Gawker are inapposite. In *Spilfogel v. Fox Broadcasting Co.*, 433 Fed Appx. 724, 726 (11th Cir. 2011), the court held that videotaping on a public street is not an intrusion. Recording Mr. Bollea in a bedroom without his knowledge or consent is the opposite of taking video of a public street. In *Stasiak v. Kingswood Co-op, Inc.*, 2012 WL 527537 (M.D. Fla. Feb. 17), the court found that an inquiry into the plaintiff's credit history was not an intrusion. The conduct alleged in the case at bar—clandestine recording of private sexual activity—is unquestionably far more intrusive.

D. <u>Mr. Bollea Has Properly Alleged a Violation of His Right to Publicity.</u>

The elements of a right of publicity cause of action are the unauthorized use of a person's name or likeness to obtain some benefit. *Agency for Health Care Administration v. Associated*

Industries, 678 So.2d 1239, 1252 n. 20 (Fla. 1996). The FAC alleges that Gawker misappropriated Mr. Bollea's name, likeness, image, identity, and persona and used the Gawker Sex Video for the purpose of commercial gain, without Mr. Bollea's consent. FAC ¶ 78. This is sufficient to allege a violation of Mr. Bollea's right to publicity.

Gawker's argument that the purpose of the publication of the Gawker Sex Video was not "commercial," as that term is construed by Florida case law interpreting Fla. Stat. §540.08, should fail. First, the cases cited by Gawker construe Florida's **statutory** right to publicity, which arguably has a narrower definition of commercial purpose from the common law action brought by Mr. Bollea. That statute expressly provides that it does not displace the broader common law action. Fla. Stat. §540.08(7). In fact, in its decision considering what constitutes a "commercial purpose," the Florida Supreme Court explains: "We approve the Fourth District's logical construction of section 540.08 in *Loft*. This construction has been applied to cases construing the statute for more than thirty years, and the statute has remained unchanged by the Legislature for this period." *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So.2d 802, 806 (Fla. 2005). Thus, the definition endorsed by the court is expressly based on a statutory interpretation as well as legislative conduct. The common law definition is not so limited.

Second, even if the *Tyne* interpretation of commercial purpose applies here, Mr. Bollea has sufficiently alleged that Gawker had a commercial purpose. In *Tyne*, the court "agree[d] with the reasoning of these decisions and *Loft* that the purpose of section 540.08 is to prevent the use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with **something else**." *Id.* at 808 (emphasis added). Here, that "something else" is all of Gawker's affiliated websites, such as Deadspin, Jalopnik, Jezebel, etc., all of which were promoted by their association with Mr.

Bollea's name and likeness. FAC ¶ 1 (listing Gawker's "purpose" in publishing the Gawker Sex Video as being, among other things, "the long-term financial benefit of the Gawker Defendants and their **numerous affiliated websites**, and additional revenues from the substantial new viewers brought to the Gawker Site and its **affiliated websites** by the Video and Narrative") (emphasis added).

Third, Gawker's so-called "constitutional concerns" with a broader definition of commercial purpose than that articulated in *Tyne* cannot be sustained. Reply n.3. The facts of this case are analogous in some ways to *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). In that case, the only right of publicity case considered by the United States Supreme Court, the Court held that the defendants' television broadcast on the local evening news of a 15 second clip of the plaintiff's 30 minute human cannonball act was actionable and not protected by the First Amendment, because those 15 seconds depicted the "heart" of the plaintiff's act—when he was shot out of a cannon, sailed through the air and landed in a net. Gawker, like the news broadcasters in *Zacchini*, deliberately chose to use footage of Mr. Bollea nude and having sex—the "heart" of the Full Sex Video. Like the broadcasters in *Zacchini*, Gawker got "for free some aspect of the plaintiff that would have market value and for which [it] would normally pay." *Id.* The U.S. Supreme Court did not have any "constitutional concerns" with its holding in *Zacchini*, which concerned a **news broadcast**, and neither should this Court.

E. Mr. Bollea Has Properly Pleaded Causes of Action for Infliction of Emotional Distress.

It should go without saying that Mr. Bollea has alleged intentional, outrageous conduct by Gawker, which was likely to inflict severe emotional distress on a reasonable person and did inflict it on Mr. Bollea. Incredibly, however, Gawker challenges the causes of action for

emotional distress.

First, Gawker argues that Mr. Bollea has not pleaded that Gawker's conduct was outrageous. Publishing an illegally-taken, clandestine recording of two people having sex in a private bedroom without the consent of the participants is outrageous. In any event, "the question of outrageousness is for the jury to decide." *Williams v. City of Minneola*, 575 So.2d 683, 692 (Fla. 5th DCA 1991).

Second, Mr. Bollea has sufficiently alleged Gawker's intent. "[A]ll that need be shown is that [the defendant] intended his specific behavior and knew or should have known that the distress would follow." *Dominguez v. Equitable Life Insurance Society*, 438 So.2d 58, 59 (Fla. 3d DCA 1983). Mr. Bollea has alleged conduct that **any** reasonable person would know was likely to cause emotional distress to Mr. Bollea. FAC ¶ 86.

Third, Mr. Bollea has alleged severe emotional distress. FAC ¶¶ 31, 92.

Fourth, Gawker challenges Mr. Bollea's claim for negligent infliction of emotional distress, based on the "impact rule," which limits claims for damages to the effects of physical injury. However, the impact rule relates only to **damages** claims. *Southern Baptist Hospital v. Welker*, 908 So.2d 317, 320 (Fla. 2005) ("before a plaintiff can recover **damages** for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries") (emphasis added). Mr. Bollea's prayer for injunctive relief thus states a cause of action. Gawker's characterization of the holding in *R.J. v. Humana of Fla., Inc.*, 652 So.2d 360, 364 (Fla. 1995), is incorrect. That case concerned a negligent infliction of emotional distress claim for damages, which, as described above, requires allegations of physical injury in order to avoid the impact rule. Mr. Bollea's claim is not a damages claim and thus *Humana* and the impact rule do not apply.

F. Mr. Bollea Has Stated a Cause of Action Under the Wiretap Act.

Both the original clandestine recording of Plaintiff's and Ms. Clem's private sexual encounter, and Gawker's publication of the Gawker Sex Video, violated Florida's Wiretap Act. Fla. Stat.§ 934.10 (providing for a civil claim against anyone who "discloses" or "uses" an illegal audio recording). Gawker does not contest the terms of the statute, but contends that *Bartnicki* immunizes its illegal conduct. This contention misconstrues *Bartnicki's* holding. The rule announced in *Bartnicki*, which allowed the publication of certain illegally recorded materials, was expressly limited to news of public importance. All of the justices stated, more or less specifically, that **publication of illegally recorded celebrity sex tapes is not protected under the *Bartnicki* rule**. *Bartnicki,* 532 U.S. at 533, 540–41. Other than its mis-citation to *Bartnicki*, Gawker makes no substantive argument that it did not violate the Wiretap Act.

Gawker cites a number of other cases that, consistent with *Bartnicki*, hold that illegally obtained information **regarding matters of important public interest** can be published. None of them come close to holding that publication of clandestine, illegal "Peeping Tom"-style recordings of private sexual activity are protected by the First Amendment (a position that, as noted above, is **expressly rejected by *Bartnicki***). *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (publication of identity of rape victim); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (same); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (publication of identity of juvenile offender).

The limitation recognized in *Bartnicki* that declines to extend protection to illegal recordings of private sexual activity is extremely important given the well-established market for celebrity sex videos. Large Internet media corporations are willing to pay significant sums of money for footage of celebrities in the nude or having sex. **If Gawker's position were accepted**

as the law, this would create a huge incentive for people to make illegal recordings of celebrities in the nude or engaging in sexual activity in locations such as hotel rooms and homes where they have reasonable expectations of privacy. The invasion of privacy that ESPN reporter Erin Andrews endured (where footage of her in the nude was clandestinely filmed through a hotel room peephole) would become commonplace. Those who make such recordings could then "fence" them to websites for publication and profit handsomely, and the proprietors of the websites would then assert First Amendment defenses against their own liability while attempting to use media shield laws to prevent disclosure of the source of the video. The First Amendment was not meant to create a market for illegal recordings of the private activities of celebrities, and the framers of our Bill of Rights, themselves celebrities, would be flabbergasted by such an interpretation.[5]

V. SHOULD GAWKER'S MOTION BE GRANTED, MR. BOLLEA SHOULD BE GRANTED LEAVE TO AMEND.

Gawker's argument that the FAC should be dismissed without leave to amend, where Mr. Bollea has been given no opportunity to even attempt to correct any alleged deficiencies, borders on the frivolous. "[T]he trial court is required to exercise the utmost liberality by giving the pleading party every opportunity to correct the defects in the challenged pleading, by dismissing it without prejudice and with leave to amend, provided that the pleading party requests leave to amend." Bruce J. Berman, *Berman's Florida Civil Procedure*, ¶ 1404.4[2][e] at 180 (2013). "Dismissal without leave to amend a petition at least one time has been held to be an abuse of

[5] Gawker cannot assert a good faith defense under the Wiretap Act, because *Bartnicki* is clear that its protections do not extend to the recording of private sexual activity. *Bartnicki,* 532 U.S. at 540. In any event, the good faith defense is an issue of fact that cannot be resolved on a motion to dismiss. Fla. Stat. § 934.10(2)(c); *Wood v. State*, 654 So.2d 218, 220 (Fla. 1st DCA 1995).

discretion, particularly where it is not clear the complaint could not be made more definite and certain." *Orbe v. Orbe*, 651 So.2d 1295, 1298 (Fla. 5th DCA 1995).

Gawker argues, for the first time in its "reply," that amendment is impossible because of the Court of Appeal's ruling on the temporary injunction appeal. As noted elsewhere in these papers and in Mr. Bollea's supplemental briefing regarding the effect of the DCA decision, the DCA decision is not preclusive as to the factual issues that it purports to resolve on a limited record. However, even if the Court agrees with Gawker as to the extent to which the DCA decision controls, Gawker has not even attempted to prove that there is no possible cause of action that Mr. Bollea could allege against Gawker under those circumstances. This is precisely why the case law condemns attempts by defendants to cut off leave to amend until it is clear that amendment is futile. "[D]oubts should be resolved in favor of allowing amendment unless and until it appears that the privilege to amend has been abused." *Petterson v. Concrete Construction, Inc.*, 202 So.2d 191, 197 (Fla. 4th DCA 1967). "This is true even though the trial judge is of the opinion that the proffered amendments will not result in the statement of a cause of action." *Id.* at 197–98. Here, Mr. Bollea has not even been afforded the privilege of amending his complaint after a dismissal order, let alone abused it. It would be an abuse of discretion to deny Mr. Bollea an opportunity to amend his complaint if the Court grants Gawker's motion.

VI. CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied in its entirety. Should any portion of Gawker's motion be granted, Mr. Bollea should be granted leave to amend.

DATED: April 16, 2014

/s/ Charles J. Harder
Charles J. Harder, Esq.

PHV No. 102333
HARDER MIRELL & ABRAMS LLP
1925 Century Park East, Suite 800
Los Angeles, California 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 by E-Mail via the e-portal system this 16th day of April, 2014 to the following:

Barry A. Cohen, Esquire
Michael W. Gaines, Esquire
Barry Cohen, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1000
Tampa, Florida 33602
bcohen@tampalawfirm.com
mgaines@tampalawfirm.com
jrosario@tampalawfirm.com
Counsel for Heather Clem

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com

Julie B. Ehrlich, Esquire
Levine Sullivan Koch & Schultz, LLP
321 West 44th Street, Suite 1000
New York, NY 10036
jehrlich@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

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

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

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

/s/ Kenneth G. Turkel
Attorney