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

GAWKER MEDIA, LLC, *et al.*,

Defendants.
_____/

DEFENDANTS' BENCH MEMORANDUM REGARDING THE DETERMINATION OF WHETHER THE PUBLICATION AT ISSUE IS RELATED TO A MATTER OF PUBLIC CONCERN

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding how the jury should be instructed with regard to whether the publication at issue relates to a matter of public concern.

As an initial matter, Defendants believe that whether a publication addresses a matter of public concern is a question of law that is not properly decided by a jury. To the extent that the issue is submitted to a jury, the law is clear that the video excerpts about which Plaintiff complains are not actionable if they *relate* to a matter of public concern. Moreover, that question may not be answered only by considering the video excerpts in isolation. Rather, the excerpts must be viewed in the context of the full report and commentary with which they appeared, which, in turn, must be viewed in the broader context of public interest in, and discussion of, the subject matter of the report and commentary.

In this regard, Plaintiff's proposed jury instructions significantly misstate the law. In Plaintiff's Proposed Jury Instruction No. 6, Plaintiff proposes that the jury be instructed that it is Defendants' position that "the video they posted was protected by the First Amendment because

the images of Terry Bollea naked and engaged in sexual activity ***is*** a matter of legitimate public concern" (emphases added). In Proposed Jury Instruction No. 11, he proposes to instruct the jury that "Defendants maintain that the ***images*** of plaintiff naked and engaged in consensual sexual activity in a bedroom ***as depicted in the video***, ***was*** a legitimate public concern" (emphases added). And in Proposed Jury Instruction No. 31, he states that the jury should be told that "[t]he issue for you to decide on defendants' First Amendment defense is whether the uncensored ***images*** of Terry Bollea naked and engaged in consensual sexual activity in a bedroom, as ***depicted in the video*** which defendants posted on the website Gawker.com, ***was*** of legitimate public concern" (emphases added). These proposed instructions would provide the jury with erroneous and incomplete statements of the law because they instruct the jury to consider whether the video excerpts, viewed in isolation, are *themselves* a matter of public concern, without regard to either the full publication in which they appear or the broader context of public discussion in which that post was published. To instruct the jury in that manner would be plain error.

1. The images must be viewed in the context of the publication as a whole.

First, the public concern analysis properly looks at whether the *topic* of the publication *as a whole* relates to a matter of public concern, rather than engaging in a piecemeal review of only those images in the publication about which Plaintiff complains. Thus, in *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426, 427-28 (Fla. 5th DCA 1982), the court held that a newspaper's publication of a photograph of the plaintiff naked except for a dish towel – a photograph the court observed "could be considered by some to be in bad taste" – was not an actionable invasion of privacy when viewed in the context of the larger article that addressed an "occurrence of public interest" (namely, the plaintiff's kidnapping). That result directly conflicts with the legal test Plaintiff's proposes that the jury apply.

This approach is consistently applied by courts, even for publications that involve images of sex and/or nudity. For instance, in *Michaels v. Internet Entertainment Group, Inc.*, 1998 WL 882848, at *6 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*"), the plaintiff argued that the inquiry should focus on the narrow question of whether defendant needed to report where viewers could watch a full sex tape involving plaintiff. The court rejected that approach of focusing on only a part of the publication, explaining that "the problem with this contention is that it requires the Court to sit as a 'superior editor' over [defendant]'s decisions on how to present the story." *Id.*; *see also Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (explaining that even though a publication contains material "of a sensitive nature," it is not "any less newsworthy so long as the material *as a whole* is substantially relevant to a legitimate matter of public concern") (emphasis added); *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1221 (10th Cir. 2007) (stating that "courts have not defined the tort of public disclosure of private facts in a way that would obligate a publisher to parse out" and publish only "concededly public interest information"). Similarly, in *Lee v. Penthouse International, Ltd.*, 1997 WL 33384309, at *5 (C.D. Cal. Mar. 19, 1997), the court reasoned that "the sex life of [plaintiffs]" was "a legitimate subject for an article," and that focusing *only* on the "intimate nature of the photographs" included in that publication "is simply not relevant for determining newsworthiness." Again, that analysis makes no sense if, as Plaintiff proposes, the application of the public-concern test is narrowly focused on just the challenged images themselves.

2. The constitutional test is whether the publication *relates to* a matter of public concern.

Second, the public concern analysis revolves around whether the publication as a whole *relates to* a matter of public concern, which is a lower threshold than Plaintiff's proposed instruction that the Publication itself must be "*of* legitimate public concern." As the Second

District Court of Appeal has explained in interpreting U.S. Supreme Court precedent: "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) (emphases added and citations and quotation marks omitted)). Similarly, in *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1378 (Fla. 1989), the Florida Supreme Court concluded that "confidential child abuse information" published by defendant passed the public concern test because it "***related to*** [a child abuse] case" that had resulted in an acquittal that defendant "considered to be a questionable judicial determination." (emphasis added).

CONCLUSION

In sum, the public concern analysis properly looks at whether the publication has a relationship or nexus to a subject of public controversy or public discussion – not whether the publication (much less a part of a publication) constitutes a matter of public concern standing on its own. *See, e.g.*, *Michaels II*, 1998 WL 882848, at *10 (concluding that "the private matters broadcast bore a substantial nexus to a matter of public interest"); *Alvarado*, 493 F.3d at 1221 (looking at whether a publication is "substantially relevant to a newsworthy topic"); *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989) (finding "a logical nexus between [publication of] a rape victim's name and a matter of legitimate public concern").

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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