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. 12012447CI-011

vs.

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.
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PLAINTIFF TERRY BOLLEA'S COMBINED OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON PROPOSED CLAIM FOR PUNITIVE DAMAGES AND REPLY IN SUPPORT OF LEAVE TO ADD CLAIM FOR PUNITIVE DAMAGES

Plaintiff Terry Gene Bollea, known professionally as Hulk Hogan ("Bollea"), responds to the "Combined Brief on Punitive Damages" filed by Defendants Gawker Media, LLC ("Gawker"), Nick Denton ("Denton") and A.J. Daulerio ("Daulerio") (collectively, the "Gawker Defendants"), and states as follows:

I. INTRODUCTION

Gawker Defendants believe they are above the law. Under the guise of "news," they intentionally violated Mr. Bollea's privacy rights by using secretly-recorded footage of Mr. Bollea naked and engaged in sexual intercourse to create a pornographic viral marketing video (the "Sex Video") to lure millions of visitors to their website so that advertisers would

shower them with dollars. Now, they want to avoid the consequences of their actions by convincing this Court to deny Mr. Bollea due process and ignore Florida's well-established policy requiring **juries** to decide factual disputes. Remarkably, Gawker Defendants even go so far as to suggest that they are entitled to an unprecedented right to an adjudication (by the Court) of the underlying factual disputes surrounding Mr. Bollea's claim for punitive damages **before** that claim has even been pled.

The entire premise of Gawker Defendants' argument flies in the face of Florida's policy against summary judgment and the requirements of Section 768.72, Florida Statutes. Before Mr. Bollea can assert his claim for punitive damages, he has to proffer sufficient record evidence to establish a reasonable factual basis to support an award of punitive damages. Making this requisite showing renders it impossible for the Court to simultaneously conclude (as it must to grant summary judgment) that there is not a scintilla of evidence supporting Mr. Bollea's claim.

Nevertheless, Gawker Defendants believe they are entitled to their own special procedure: bypassing Mr. Bollea's right to a jury trial and allowing the Court to decide disputed issues of fact at the summary judgment stage. In so doing, Gawker Defendants invite this Court to commit reversible error by usurping the role of the jury and deciding the **facts** of this case on at least four quintessential jury issues: Intent, Belief, Motive, and Good Faith.

Gawker Defendants' Motion for Summary Judgment should be denied, and Mr. Bollea's Motion for Leave to Add Claim for Punitive Damages should be granted, for at least the following reasons:

First, Gawker Defendants do not seriously contest Mr. Bollea's ability to satisfy the standard for allowing a plaintiff to amend his complaint to plead punitive damages. Mr. Bollea has proffered evidence that:

Gawker Defendants knew the Sex Video was secretly and illegally recorded; knew Mr. Bollea did not consent to its publication; and knew publishing the Sex Video would cause Mr. Bollea harm, before publishing it as well as immediately after publishing it, but they went ahead and published the Sex Video anyway, and kept it up at Gawker.com for more than six consecutive months.

Gawker Defendants make their disdain for the privacy rights of others a tenet of their business and philosophy, and routinely violate others' privacy rights, even while being called to task for doing so. In certain instances, Gawker Defendants have stated that other publications of unauthorized and/or surreptitiously-taken naked photographs and video are invasive, improper, and plain wrong, but nevertheless, Gawker Defendants published the Sex Video anyway.

Gawker Defendants had the ability to edit out, blur, or pixelate privacy-invasive material; they had taken advantage of this ability on occasion for other people about whom they have reported (even celebrities), yet they published the "exclusive" Sex Video unblurred, unblocked, and unpixelated anyway.

Gawker Defendants operate with a singular motive—to drive traffic and thereby revenues and profits—and that was their motive in publishing the Sex Video. Gawker Defendants used social media to virally market the Sex Video to millions of Internet users; they refused to remove it in the face of Mr. Bollea's demands and this Court's order; and they published additional articles linking to and directing more and more readers to the Sex Video.

A jury easily could conclude (let alone infer) from the foregoing evidence the requisite showing of Gawker Defendants' conscious disregard of the rights of Mr. Bollea. Mr. Bollea should be allowed to amend his complaint and make this presentation to the jury.

Second, what Gawker Defendants **believed** at the time of publication, as well as their **intent** in publishing, are quintessential jury questions that cannot be decided on summary judgment. Gawker Defendants conveniently fail to mention that the *Toffoloni II* case, on which they heavily rely, was preceded by a decision **denying the publisher defendant summary judgment on punitive damages** on grounds that "**what [the defendant] believed at the time of publication is a question for the jury**." *Toffoloni Dist. Crt*, *15 (emphasis added).[1]

Third, there are material factual disputes as to Gawker Defendants' belief and intent, and those questions must be decided by a jury. The jury is entitled to, and must, evaluate the facts supporting the parties' competing claims: (1) Gawker Defendants knowingly, willfully, and recklessly invaded Mr. Bollea's privacy rights by publishing one minute and forty-one seconds of his private, secretly-recorded sexual encounter with Heather Clem in a private bedroom without his consent and against his objections in order to drive traffic and revenues; ***versus*** (2) Gawker Defendants supposedly carefully weighed Mr. Bollea's privacy rights against the supposed newsworthiness of the Sex Video in deciding what to publish.

There is a fundamental factual dispute between the parties as to what the facts are, how they should be interpreted, and what a jury should infer from them, thus rendering it improper to deny Mr. Bollea his right to trial by jury on his punitive damages claim. Mr. Bollea's motion should be granted and Gawker Defendants' motion should be denied.

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[1] There are three *Toffoloni* judgments relevant to this motion. Gawker Defendants cite to *Toffoloni v. LFP Publishing Group*, 572 F.3d 1201 (11th Cir. 2009) as "*Toffoloni I*" and to *Toffoloni v. LFP Publishing Group*, 483 Fed. Appx. 561 (11th Cir. 2012), as "*Toffoloni II*." Bollea hereby incorporates those abbreviations.

Gawker Defendants, however, fail to cite to *Toffoloni v. LFP Publ. Group, LLC*, No. 1:08-CV-421-TWT; 2010 U.S. Dist. LEXIS 124733, *15 (N.D. Ga. Nov. 23, 2010), which Mr. Bollea will refer to in this pleading as "*Toffoloni Dist. Crt.*"

II. REPLY RE: MOTION FOR LEAVE TO PLEAD PUNITIVE DAMAGES CLAIM

The standard for pleading punitive damages claims is not rigorous. All that is required is a "reasonable" showing of evidence that establishes a "reasonable basis for recovery of such damages." Fla. R. Civ. Proc. 1.190(f). In other words, Mr. Bollea does not have to show that the jury will accept his claims and award punitive damages. He also does not have to show that the Court, post-trial, will not entertain a motion by Gawker Defendants to reduce the verdict. A pre-trial claim for punitive damages is sufficient so long as there is **some** evidence that **could** support a punitive damages award.

A motion for leave to add a claim for punitive damages is determined under the liberal rules of pleading: the court must construe the evidence in a light most favorable to Mr. Bollea, the moving party. *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 644 (Fla. 5th DCA 2005). Thus, in *Holmes v. Bridgestone/Firestone, Inc.*, 891 So.2d 1188, 1191 (Fla. 4th DCA 2005), cited by Gawker Defendants, the court held that evidence that a tire manufacturer delayed in warning the public about a tread separation issue for financial reasons was sufficient to permit amendment of the pleadings, because a jury **could infer** from that evidence the requisite showing of conscious disregard of the rights or safety of the public.

Further, where the substantive claims alleged include a scienter requirement of intentional harm, a showing of sufficient evidence on the intent element satisfies the standard for allowing the punitive damages claim to go forward. The *Espirito Santo Bank v. Rego*, 990 So. 2d 1088, 1090 (Fla. 3d DCA 2007) holding, relied on by Gawker Defendants in their papers, confirms this.

Under these liberal standards, Mr. Bollea easily meets the minimal evidentiary threshold to plead a punitive damages claim. As set forth in his moving papers, Mr. Bollea has presented **extensive evidence** of the following:

1. Gawker Defendants knew the Sex Video was secretly recorded, knew that Mr. Bollea was not involved in the recording or distribution of the Sex Video, and knew that Mr. Bollea objected to its publication.[2]

2. Gawker's editors and executives repeatedly expressed a disdainful attitude towards privacy, often using highly vulgar language to express their disdain.[3]

3. Gawker Defendants engaged in conduct in other circumstances that showed that they were aware that people had legitimate claims of privacy and that Gawker Defendants could not publish anything they desired.[4]

4. Gawker Defendants repeatedly published content that outrageously invaded people's privacy and violated basic societal norms.[5]

5. Gawker's business model involves using stories containing nudity, sex, and pornographic content, including invasions of personal privacy, to drive traffic and generate revenue; thus, violating people's privacy rights is part and parcel of Gawker's business model.[6]

Under *Holmes*, this evidence is more than sufficient. Just as a reasonable jury could infer that Bridgestone/Firestone acted in conscious disregard of the rights and safety of the public when it failed to warn about a known danger with its product for financial reasons (891 So.2d at 1191), a reasonable jury here can conclude that Gawker Defendants did not care about Mr. Bollea's privacy rights when invading them would bring Gawker increased traffic and profits. The motion for leave should be granted.

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[2] Plf. Motion. p.15; Ex. 17 to Plf. Motion.
[3] Plf Motion. p.13; Ex. 1 to Plf. Motion.
[4] Plf. Motion. p.12; Exs. 24–26 to Plf. Motion.
[5] Turkel Aff., Ex. A (BOLLEA 000678–000681); Turkel Aff., Ex. B (BOLLEA 003114–003115); Plf. Motion, p. 4; Exs. 11 & 27 to Plf. Motion.
[6] Plf. Motion, p.3; Exs. 2 & 6 to Plf. Motion.

III. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

A. Standard for Summary Judgment

The importance of the lens though which this Court is required to view the evidence at the summary judgment stage cannot be ignored. Every fact offered by Mr. Bollea in support of his claim for punitive damages must be taken in the light most favorable to him and accepted as true. *Carns v. Fender*, 936 So.2d 11, 13 (Fla. 4th DCA 2006). At the summary judgment stage, the Court must take all facts that the opposing party states as true, and must draw all reasonable inferences in his favor. *Bradford v. Bernstein*, 510 So.2d 1204, 1206 (Fla. 2d DCA 1987). Further, "it should be assumed that every fact as to which the party moved against has any appreciable evidence may at a trial be established to the satisfaction of a jury." *Id.* (citing *Connolly v. Sebeco, Inc.*, 89 So.2d 482, 484 (Fla. 1956)).

All inferences, doubts, conclusions and factual questions must be construed in favor of Mr. Bollea. *Wilder v. Hills County Hosp. Authority*, 686 So.2d 617, 618 (Fla. 2d DCA 1996); *Smith v. Harr*, 571 So.2d 575, 577 (Fla. 5th DCA 1990). "An inference is a permissible deduction from the evidence which the jury may reject or accord such probative value as it desires, and it is descriptive of the factual conclusion that a jury may draw from sufficient circumstantial evidence." *Little v. Publix Supermarkets, Inc.*, 234 So.2d 132, 133–34 (Fla. 4th DCA 1970).

"Even where the facts are uncontroverted, the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts." *Albelo v. Southern Bell*, 682 So.2d 1126, 1129 (Fla. 4th DCA 1996). The Court may not try or weigh facts on a motion for summary judgment. "If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises **even the slightest**

doubt that an issue might exist, that doubt must be resolved against the moving party, and summary judgment must be denied." *Dahly v. Department of Children and Family Services*, 876 So.2d 1245, 1249 (Fla. 2d DCA 2004) (emphasis added); *see also Christian v. Overstreet Paving Co.*, 679 So.2d 839, 840 (Fla. 2d DCA 1996) (same). "On a motion for summary judgment, unless and until material facts at issue presented to the trial court are so crystallized, conclusive, and compelling as to leave nothing for the court's determination but questions of law, those facts, as well as any defenses, must be submitted to the jury for its resolution." *Dreggors v. Wausau Insurance Co.*, 995 So.2d 547, 550 (Fla. 5th DCA 2008).

B. What Gawker Defendants Believed At The Time Of Publication, And Their Intent In Publishing, Are Quintessential Jury Questions That Cannot Be Decided On Summary Judgment

Issues relating to state of mind or intent almost always are inappropriate for summary judgment. *Burch v. Sun State Ford, Inc.*, 864 So.2d 466, 473 (Fla. 5th DCA 2004) (state of mind ordinarily a question of fact for jury and summary judgment is improper); *Sanders v. Wausau Underwriters Ins. Co.*, 392 So.2d 343, 345 (Fla. 5th DCA 1981) ("ordinarily, intent is a question of fact that should not be decided on a summary judgment."). Florida law is clear that whether a party acted in good faith or with malice are factual issues for a jury to decide. *Finkel v. Sun Tattler Co.*, 348 So.2d 51, 52 (Fla. 4th DCA 1977) (presence or absence of malice precludes entry of summary judgment); *Southern Air Transport, Inc. v. Post-Newsweek Stations, Florida, Inc.*, 568 So.2d 927, 928 (Fla. 3d DCA 1990) (summary judgment reversed due to factual issues as to "malice"); *Lake Hosp. & Clinic, Inc. v. Silversmith*, 551 So.2d 538, 542–543 (Fla. 4th DCA 1989) (evidence created issue of fact as to whether defendants acted in good faith and without malice); *Travelers Ins. Co. v. Jefferson Nat'l. Bank*, 404 So.2d 1131, 1133 (Fla. 3d DCA 1981) ("Good faith and reasonable commercial standards are factual questions to be determined by the trier of fact.").

Under this standard, summary judgment on the issue of whether the requisite mental state for punitive damages can be met is almost never appropriate. Thus, the cases where such summary judgments have been granted have almost all been ordinary negligence cases, as discussed below, where it was clear that the defendant was nothing more than careless. It would be unprecedented and unfair to grant summary judgment in a case where, as here, substantial evidence supports claims of deliberate violations of the plaintiff's rights. Gawker Defendants would need to show that no reasonable jury could make even a reasonable inference about their mental state. They have not made that showing.

Notably, while Gawker Defendants cite to *Toffoloni I* and *Toffoloni II*, a case involving *Hustler* magazine's publication of naked photographs of the wife of a professional wrestler, Gawker Defendants failed to inform this Court of the district court's intervening opinion **denying the publisher defendant's motion for summary judgment**. *Toffoloni Dist. Crt.*[7] In that opinion, the district court addressed the issue of punitive damages in the context of summary judgment:

> Here, LFP says it acted innocently because it believed that the [nude] photographs were subject to the newsworthiness exception. However, **what LFP believed at the time of publication is a question for the jury**. Accordingly, LFP is not entitled to summary judgment.

Id. at 16 (emphasis added). The *Toffoloni Dist. Crt.* opinion also found that the plaintiff was entitled to summary judgment with respect to liability, relying on the *Toffoloni I* decision holding that **the newsworthiness exception did not apply** to *Hustler's* publication of the nude photos of the wrestler's wife. Gawker Defendants cannot ignore these opinions, and for the same reasons held in *Toffoloni Dist. Crt.*, Gawker Defendants cannot prevail on summary judgment.

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[7] This omission is particularly troubling because Gawker Defendants cite this opinion in support of their Motion to Exclude the Expert Testimony of Mike Foley. (*Daubert* Motion re: Foley, p. 10, ¶18.)

Gawker Defendants' reliance on *Toffoloni II*'s reversal of a punitive damages award is misplaced and irrelevant at this stage in the case. The *Toffoloni II* decision demonstrates the necessity of a jury trial. The Eleventh Circuit's decision to vacate the punitive damages award was **after the jury trial**, and was based on "uncontroverted" evidence supporting *Hustler* magazine's good faith belief in the naked photos' newsworthiness—evidence that is not uncontroverted in our case. *Toffoloni II*, 562–563.

In stark contrast, the facts presented in our case show substantial controverted evidence demonstrating that Gawker Defendants **knew** what they were doing was wrong and would cause harm, but did it anyway.[8] Gawker Defendants have a disdain for privacy rights and believe they can publish anything and everything they want under the guise of news. Unlike *Hustler*, Gawker Defendants use the First Amendment as a sword, not a shield, all in the name of financial fortune. A reasonable jury certainly can conclude by clear and convincing evidence that Gawker Defendants acted maliciously and callously. If, after weighing the evidence, a jury finds that punitive damages are warranted, Gawker Defendants are entitled to move post-trial, as *Hustler* did in *Toffoloni II*, that the evidence did not support the finding. But we are not at that procedural stage yet, and Gawker Defendants may not jump the gun and seek to circumvent the province of the jury.

Gawker Defendants' **state of mind** as to newsworthiness is inappropriate for decision on summary judgment, as is the newsworthiness defense itself. Within the context of privacy

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[8] The other cases Gawker Defendants cite simply hold that, on the **facts** of those cases, punitive damages were not appropriate. In **all** of those cases, however, the punitive damages claim **went to the jury**, and then, when all the evidence was in, courts examined whether the plaintiff made a legally sufficient showing **at trial**. *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA 1982) (appeal from jury verdict); *Genesis Publications, Inc v. Goss*, 437 So.2d 169 (Fla. 3d DCA 1983) (same); *Weinstein Design Group, Inc. v.* Fielder, 884 So.2d 990 (Fla. 4th DCA 2004) (same).

claims and the Gawker Defendants' "newsworthiness" defense, the issue of **intent** is paramount, as are several other fact-intensive issues. When determining where the boundaries of "newsworthiness" fall, the Eleventh Circuit is guided by the commentary on the permissible publicity of private facts in the Restatement (Second) of Torts. *Toffoloni I*, 1210. Recognizing that an individual may be rendered subject to public scrutiny by some newsworthy event, the extent of the authority to make public private facts is not unlimited:

> [e]ven public figures, like actresses, may be entitled to keep private some intimate details… such as sexual relations… the line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, **and becomes a morbid and sensational prying into private lives for its sake, with which a reasonable member of the public, with decent standards, would say that he had no concern…** the limitations… are those of **common decency**, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure… some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.

Toffoloni I, 1211 (emphasis added).

Thus, the issue of "newsworthiness" itself implicates issues of fact that a jury must decide, including: whether Gawker Defendants' publication of the video was a morbid and sensational prying into private lives for its own sake; and whether a reasonable member of the public, with decent standards, would say they had no concern, and "common decency." Indeed, these issues have all the hallmarks of "community standards" which juries are entitled to decide. *Austin v. State*, 67 So.3d 403 (Fla. 1st DCA 2011) (discussing jury instructions for obscenity charges). *See also*, *Winstead v. Sweeny*, 517 N.W.2d 874, 878 (Mich. Ct. App. 1994) (reversing summary disposition based on newsworthiness and noting that factual disputes on newsworthiness are appropriate for the jury when reasonable minds could differ concerning newsworthiness of information).

None of the summary judgment cases cited by Gawker Defendants come close to holding that a court may resolve the sort of factual disputes at issue here and prohibit a punitive damages claim:

Tiger Point Golf and Country Club v. Hipple, 977 So.2d 608 (Fla. 1st DCA 2007), involved a claim for ordinary negligence in an accident that occurred because a country club failed to properly maintain a handrail. The maintenance failure leading to injury was not "willful and wanton." *Id.* at 609. These facts are not comparable to the intentional disregard of Mr. Bollea's rights at issue here.

In re Leli, 420 B.R. 568 (M.D. Fla. 2009), involved alleged misrepresentations in a property sale. The court held that the undisputed evidence failed to reach even the level of gross negligence and on that basis granted summary judgment to the defendant on the punitive damages claim. *Id.* at 571 ("[T]his Court is satisfied that neither of the Defendants were engaged in intentional misconduct or gross negligence and therefore [the motion for summary judgment is granted]."). Mr. Bollea has presented substantial evidence of Gawker Defendants' intentional disregard for Mr. Bollea's rights. Thus, *Leli*, where there was no evidence even of gross negligence, is distinguishable.

Taylor v. Gunter Trucking Co. Inc., 520 So.2d 624 (Fla. 1st DCA 1988), involved a truck that was negligently parked in a lane of traffic. Again, this sort of ordinary negligence is not in any way comparable to the deliberate conduct in conscious disregard of Mr. Bollea's rights that is evidenced here.

Curry v. Cape Canaveral Hospital, 426 So.2d 64 (Fla. 5th DCA 1983), was a medical malpractice claim arising out of a failure to treat a ruptured appendix. Again, it was an ordinary negligence claim and has no similarity to the facts in our case.

Thompson v. City of Jacksonville, 130 So.2d 105 (Fla. 1st DCA 1961), was yet another negligence case where a punitive damages claim was disallowed, involving a negligent search by the police.

In sum, while summary judgment is theoretically available against a punitive damages claim where it is absolutely undisputed that the defendant did not have the mental state necessary to justify an award (such as in an ordinary negligence case), **Gawker Defendants cannot identify a single case that permits summary judgment on a contested factual record where substantial evidence supports a claim that the defendant intentionally invaded the plaintiff's privacy.** There are triable issues of fact, and the punitive damages claim therefore must go to trial.

Given the evidence Mr. Bollea has presented, which is described more fully below and in Mr. Bollea's moving papers, Gawker Defendants cannot ask this Court to determine as a matter of law that Gawker Defendants' alternative storyline is the correct one. The jury, as the trier of fact, is entitled to, and must, evaluate the **facts** supporting the parties' **competing claims**.

C. Gawker Defendants' Evidentiary Showing Establishes a Conflict in the Evidence, Which Precludes Summary Judgment

Mr. Bollea has uncovered substantial evidence demonstrating that Gawker Defendants **knew** their conduct was wrong, and did it anyway, and Gawker Defendants also admitted that their conduct was an invasion of privacy:

- Max Read (who subsequently became Editor-in-Chief of Gawker.com) posted an article on Gawker concerning "fusking"—the practice of finding nude photos of people on Photobucket.com (photos that people consensually took but believed were private) and exploiting the site's privacy settings to obtain and then post the nude pictures online.[9]

[9] Plf. Motion, p.6; Ex. 15 to Plf. Motion

- Mr. Read wrote: "'Don't share or steal people's private things' may be anathema to the internet, but it asks people to be **decent**, rather than paranoid. 'Don't put private things in public places,' as a **moral** imperative, **blames victims and excuses the behavior of thieves and creeps**."[10]

- Gawker has publicly denounced "revenge porn" sites, noting that "people who are **harassed** in this **particularly vile way** can't convince anyone to do anything about it."[11]

- Gawker has reported on stories involving criminal photos or videos of women naked **without posting** those photos or videos, and has criticized others for publishing them.[12]

Yet Gawker has repeatedly shown that, despite its knowledge that such publications invade people's privacy, and despite its ability to report on such stories without invading people's privacy, Gawker is willing to publish privacy-invasive material when Gawker believes it will result in high traffic and profits:

- Gawker's executives, including Nick Denton, repeatedly express contempt for the concept of privacy.[13]

- Emma Carmichael (Editor-In-Chief of Gawker's women's blog, Jezebel), who served as Managing Editor of Gawker.com when the Sex Video was published, testified that **Gawker has the right to publish secret videos, sex, and full frontal nudity even if the subjects did not know that they were being photographed or filmed**.[14]

- Gawker and Daulerio linked to the surreptitious recording of Erin Andrews naked in a hotel room.[15]

- Yet Gawker knew that it was wrong to invade Erin Andrews' privacy in this way—and even criticized other news outlets for doing so.[16]

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[10] Id. (emphasis added)
[11] Plf. Motion, p.6, 8; Exs. 16, 23 & 25 to Plf. Motion (emphasis added)
[12] Plf. Motion, p.8; Exs. 22 & 24 to Plf. Motion
[13] Plf. Motion, p.13; Ex. 1 to Plf. Motion
[14] Ex. 21 to Plf. Motion (Carmichael Depo. Tr. 86:17–87:13)
[15] Turkel Aff., Ex. B (BOLLEA 003114–003115)
[16] Plf. Motion, p.5; Exs. 8–11 to Plf. Motion

- Gawker posted a consensually recorded, but private, video of Eric Dane, Rebecca Gayheart and Kari Ann Peniche engaged in a "naked threesome" at both its pornography website, Fleshbot.com, and Defamer.com. [17]

- Gawker censored their private anatomy in the video posted at Defamer.com, but ignored cease and desist demands from the individuals to take down the videos. Gawker eventually settled the lawsuit filed by Dane and Gayheart. [18]

Here, the evidence shows that Gawker Defendants had actual knowledge that their publication of the Sex Video was wrong, unauthorized, and an invasion of Mr. Bollea's privacy, but decided to publish the Sex Video anyway, and decided to continue to publish it for six months, and continue to encourage people to watch it even after the Court ordered it taken down.

- Months before Daulerio was approached about a Hulk Hogan "sex video"—Gawker had **actual knowledge** that the video footage was secretly recorded, obtained illegally, and being distributed without Mr. Bollea's permission.[19]

- Gawker received the video anonymously and never contacted Mr. Bollea, or his lawyer, David Houston, or Heather or Bubba Clem; never took any steps to confirm that the taping was illegal; never attempted to find out how the video came into the possession of the "anonymous" sender; and never attempted to find out the sender's motives for leaking the video, such as revenge porn or extortion. Instead, Gawker, Denton and Daulerio produced and published a one minute and forty-one second "highlight reel" of the footage, where millions of people worldwide could view the private encounter.[20]

- Gawker Defendants invaded Mr. Bollea's privacy by publishing footage of him naked, fully aroused, and engaging in sexual intercourse, knowing full well that Mr. Bollea did not want the footage published and that the Sex Video depicted intimate, private activities.[21]

- Mr. Bollea's lawyer, David Houston, sent multiple cease and desist communications immediately after Gawker published the video, pleading with Gawker and its founder, Denton, to remove the video because it was

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[17] Plf. Motion, p.5–6; Exs. 11–14 to Plf. Motion
[18] *Id.*
[19] Plf. Motion, p.6–7; Exs. 17–19 to Plf. Motion
[20] Plf. Motion, p.7; Exs. 18–19 to Plf. Motion
[21] Plf. Motion. p.6; Ex. 17 to Plf. Motion

illegal and private, and its publication was harmful to Mr. Bollea.[22] Gawker continued to refuse to remove the video because, in Nick Denton's words, Mr. Bollea's demands were "not persuasive."[23]

- Gawker left the video online for six months, taking it down only after Judge Campbell ordered Gawker to do so; and even then, Gawker provided its readers with a link to watch the Gawker-produced sex video at another website.[24]

- Gawker Defendants' publication of the Sex Video was part of a conscious business strategy that used the publication of privacy-invasive, voyeuristic content to drive traffic to Gawker.com, bring in income, and grow the value of the company.[25]

Moreover, Gawker Defendants used the video—not the article—as viral marketing for their business and website on Gawker's Facebook page. Specifically, Gawker posted:

> "Hulk Hogan's sex tape is the heavyweight champion of sex tapes"
>
> and
>
> "It's probably time you watched this snippet from the Hulk Hogan sex tape with a woman some claim is Bubba the Love Sponge's wife. Work's over. You're fine."[26]

Further, Gawker Defendants continued to promote and drive traffic to the video through various follow-up posts on Gawker.com (including one that threatened Bollea, stating that the entire sex video, as opposed to the Gawker-produced "highlight reel" would remained unpublished "unless there's more attention brought to this story than necessary")[27] and on Deadspin, Gawker Media's website dedicated to sports news.[28]

Gawker Defendants' competing factual story, where they supposedly cared about privacy and published the Sex Video based on a good faith belief in the newsworthiness of the Sex

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[22] Plf. Motion, p.7; Ex. 19 to Plf. Motion
[23] Plf. Motion, p.7 Ex. 2 to Plf. Motion (Denton Depo. Tr. 243:4–244:11)
[24] Plf. Motion, p.7; Ex. 20 to Plf. Motion
[25] Plf. Motion, p.3; Exs. 2 & 6 to Plf. Motion
[26] Turkel Aff., Ex. C (BOLLEA 005162–005165)
[27] Turkel Aff., Ex. D (BOLLEA 000445–000447)
[28] Turkel Aff., Ex. E (BOLLEA 000448–000450)

Video, is the epitome of a jury question—only the jury can evaluate why Gawker Defendants published the Sex Video and weigh the credibility of their storyline, resolve the factual disputes between the parties, and determine whether they acted with malice or in good faith. This evidence must be weighed by the jury. **If the jury awards punitive damages, then Gawker Defendants can seek review of the award on a full evidentiary record, just as *Hustler* did in the *Toffoloni* case. Gawker Defendants' motion puts the cart before the horse. Summary judgment is inappropriate.**

D. The Types Of Disputed Issues Of Fact Presented Here Are Inappropriate For Resolution On Summary Judgment

Gawker Defendants' central argument in favor of summary judgment is that they "believe" they acted in good faith. Citing the same First Amendment case law they used to argue the merits of the case, Gawker Defendants claim that they could not have consciously disregarded Mr. Bollea's rights because they believed they had a right to publish the Sex Video. As the case law cited in Section III-C above makes clear, however, issues involving intent, good faith, malice and even a "belief" something is newsworthy **must be determined by the jury**.[29] Gawker Defendants are free to present their evidence and make their argument to the jury that

[29] *Finkel v. Sun Tattler Co.*, 348 So.2d 51, 52 (Fla. 4th DCA 1977) (presence or absence of malice precludes entry of summary judgment); *Southern Air Transport, Inc. v. Post-Newsweek Stations, Florida, Inc.*, 568 So.2d 927, 928 (Fla. 3d DCA 1990) (summary judgment reversed due to factual issues as to "malice"); *Lake Hosp. & Clinic, Inc. v. Silversmith*, 551 So.2d 538, 542 (Fla. 4th DCA 1989) (evidence created issue of fact as to whether defendants acted in good faith and without malice); *Travelers Ins. Co. v. Jefferson Nat'l. Bank*, 404 So.2d 1131, 1133 (Fla. 3d DCA 1981) ("Good faith and reasonable commercial standards are factual questions to be determined by the trier of fact.").

Mr. Bollea is incorrect about their motives and that they were acting in reasonable reliance on their interpretation of the law.[30] **It will be up to the jury to resolve this factual dispute.**

Gawker Defendants would have the Court simply ignore all of the evidence filed by Mr. Bollea because of their self-serving, hindsight claim that they genuinely believed that the subject of their report was "newsworthy."[31] According to the defendants, their self-serving testimony that they "believed" the publication of the video was newsworthy is the **only** evidence that matters. This argument would mean that punitive damages could **never** be awarded if a defendant claimed that he believed his actions were justified. The case law is clear, however, that where there are triable issues of fact such as those presented here (*i.e.,* numerous instances of defendants admitting that what they did was wrong and hurt people, coupled with conduct demonstrating callous indifference to privacy rights), summary judgment as to punitive damages is inappropriate.

The district court's denial of *Hustler's* motion for summary judgment in *Toffoloni Dist. Crt.* should be dispositive of Gawker Defendants' Motion. Whether a publisher believes nude photos are subject to the newsworthiness exception is a jury issue—even in a case with far less evidence (indeed, **no** evidence) of the malicious, callous and intentional misconduct exhibited by Gawker Defendants here for the purpose of financial gain and intended to harm Mr. Bollea. This case, just like *Toffoloni*, should be submitted to the jury. If the jury awards punitive damages

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[30] Mr. Bollea feels it would be redundant to once again repeat his arguments as to why Gawker Defendants' conduct was not protected by the First Amendment and the Sex Video was not a matter of public concern herein, given that whether Gawker Defendants acted in good faith is so clearly a jury question not resolvable on summary judgment. Accordingly, to the extent that such arguments are relevant to this motion, Mr. Bollea incorporates by reference his opposition to Gawker Defendants' Motion for Summary Judgment on the merits, where those arguments are made in extensive detail.

[31] Defendant's Statement of Undisputed Material Facts on Punitive Damages, ¶¶24–34.

and—like in *Toffoloni II*—the overwhelming, substantial, consistent and uncontroverted evidence only demonstrates that Gawker Defendants reasonably and honestly believed the Sex Video was subject to the newsworthiness exception, this Court and/or the DCA can act accordingly. But we are not there yet. We are at the summary judgment phase, which, under the evidence presented, and consistent with *Toffoloni Dist. Crt.*, requires the Court to allow the jury to receive the evidence, determine the facts, and apply those facts to the law provided by the Court. As the evidence in this memorandum and Mr. Bollea's motion for leave makes clear, however, there is substantial, overwhelming and uncontroverted evidence that Gawker Defendants acted unreasonably and with the intent to harm Mr. Bollea, which allows a reasonable jury to award punitive damages if it is so inclined.

In *Halpin v. Kraeer Funeral Homes, Inc.*, 547 So.2d 973 (Fla. 4th DCA 1989), the court held that where the plaintiff had shown evidence that would support a claim of intentional infliction of emotional distress based on the mishandling of a corpse by a funeral home, that showing also was sufficient as a matter of law to preclude summary judgment as to punitive damages.[32] It was **up to the jury** to determine whether the conduct was egregious enough to justify an award of punitive damages. *Id.* at 974 ("When determining a punitive damage claim, the jury considers the degree of the proven outrageous conduct.").

In *Ryder Truck Rental, Inc. v. Partington*, 710 So.2d 575 (Fla. 4th DCA 1998), summary judgment on a punitive damages claim was reversed where the plaintiff introduced evidence that the defendant's employee had been drinking with his fellow employees and his supervisor before

[32] Gawker Defendants cite a number of cases that hold that the **substantive showing of intent** necessary for a punitive damages award is greater than simply the intentional act element of some torts. Gawker Bf. at 8. However, none of these cases hold that this is an issue that may be resolved on **summary judgment**. *Halpin* holds that it cannot be. Gawker's argument that its scienter does not rise to the level sufficient to justify punitive damages is one that cannot be considered until all the evidence is in.

crashing the company vehicle and injuring the plaintiff. The court held that this raised a triable issue of fact that the employer was on notice that the employee was driving drunk. Similarly here, there is substantial evidence that Gawker Defendants were on notice that they were violating Mr. Bollea's rights and knew that what they were doing was wrong, but did it anyway.

There is persuasive authority from other jurisdictions supporting denial of summary judgment in this matter. *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510 (Ill. Ct. App. 1998), involved a claim for punitive damages brought by a plaintiff who had consented to being videotaped installing tile for an instructional video, when the footage was used in a television commercial without her consent. The court held that even though punitive damages claims were disfavored under Illinois law, **the evidence of lack of consent**, along with the fact that the commercial **continued to run after she demanded it be taken off the air**, constituted "evidence from which the finder of fact could infer that Century acted with malice or reckless indifference to his rights." *Id.* at 652 (emphasis added).

In *Zieve v. Hairston*, 598 S.E.2d 25 (Ga. Ct. App. 2004), the court affirmed a punitive damages award where a hair replacement clinic's client's "before and after" photos were used in an advertisement without his consent. The court held that among the pieces of evidence that supported the punitive damages award was the fact that the defendant laughed at the plaintiff and said that he had made the plaintiff famous when the plaintiff asked for the advertisement to be terminated, and that the defendant had said that he had done the same thing before. *Id.* at 33.

In *Kuhn v. Account Control Technology, Inc.*, 865 F. Supp. 1443 (D. Nev. 1994), a defendant's motion for summary judgment on the issue of punitive damages was denied when a debt collector made a series of phone calls to the plaintiff's workplace, which disrupted her work. *Id.* at 1449.

E. Gawker Defendants' Other Arguments Similarly Fail

Gawker Defendants, despite their efforts, cannot escape the fact that: (1) punitive damages are available in invasion of privacy and right of publicity cases, and (2) summary judgments are improper in such cases where the facts are in dispute. Even so, Gawker Defendants make a number of arguments in an attempt to exclude the mountain of evidence, presented in Mr. Bollea's moving papers, which create a triable issue of fact on the issue of punitive damages. None of these arguments has merit.

First, Gawker proposes yet another special rule for itself by arguing that punitive damages are only available in cases involving physical injuries. Gawker Bf. at 9–13. There is no such rule. In fact, such a "rule" is **expressly contradicted by the plain meaning of the Florida punitive damages statute**. Fla. Stat. § 768.72(2)(b) provides for punitive damages awards in cases involving "conscious disregard or indifference to the life, safety, **or rights** of persons exposed to such conduct." (Emphasis added.) The legislature's inclusion of "rights" in the statute, in addition to "life" and "safety," ends the matter—Florida law does not limit punitive damages awards to cases involving physical injuries. Indeed, were Gawker Defendants' position the law, even victims of financial fraud could not obtain punitive damages.

Florida law allows punitive damages in right to privacy actions, *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 12 (5th Cir. 1962) (citing *Cason v. Baskin*, 30 So.2D 635 (Fla. 1947)), right of publicity actions, *Sun Internat'l Bahamas, Ltd. v. Wagner*, 758 So.2d 1190, 1191 (Fla. 3d DCA 2000), and intentional infliction of emotional distress actions, *In re Standard Jury Instructions Civil Cases No. 94-1*, 645 So.2d 999, 1001 (Fla. 1994).

Second, Gawker Defendants argue that the evidence of **similar** acts, such as their publication of a link to the Erin Andrews video,[33] their publication of topless surreptitious photos of Kate Middleton, and their publication of a private nude hot tub video recorded by celebrities Eric Dane and Rebecca Gayheart, is inadmissible. Mr. Bollea strongly disagrees with this argument, but even if accepted, it is not sufficient to defeat summary judgment, because the jury could still consider Gawker Defendants' statements about privacy, Gawker's profit motive, and the publication of the Sex Video itself in determining whether to award punitive damages.

Moreover, Gawker Defendants' argument that these acts are insufficiently "similar" is not cognizable on summary judgment. On summary judgment, the facts and inferences **must** be taken in the light most favorable to Mr. Bollea. *Bradford v. Bernstein*, 510 So.2d 1204, 1206 (Fla. 2d DCA 1987). Gawker Defendants essentially ask this Court to resolve a highly contested factual issue about how "similar" posting a link to the Erin Andrews video is to posting the Sex Video depicting Mr. Bollea. These sorts of determinations need to be made by the jury.

Additionally, on the merits, the incidents identified by Mr. Bollea **are** "similar." Similar does not mean the "same." *See* Gawker Bf. at 19 (arguing that similarity requirement is not met unless the conduct was the "same"). In each case, Gawker made available to the public private footage that included nudity and seriously invaded the privacy of the victim. Those are substantial similarities. Gawker Defendants argue that some of the incidents identified by Mr.

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[33] Gawker Defendants argue that the link to the Erin Andrews video was dead. However, AJ Daulerio gave an interview to *GQ* magazine, wherein he is reported to have posted a link to the video—presumably meaning that the link was live, not dead, at the time it was posted. Turkel Aff., Ex. F (BOLLEA 000682–000686). There is no evidence that Daulerio ever demanded a retraction of this claim.

Given that the Erin Andrews video was illegally recorded by a criminal, it is not surprising that the link later died, even if it was live at the time it was posted. Further, Daulerio's testimony makes no sense and the jury is entitled to disbelieve it—what would be the point of posting a **dead** link, and if Gawker cared about privacy (or even legal exposure), why would it take the risk of posing a link that might later go live again?

Bollea involve the publication of explicit images of private individuals not engaged in newsworthy activity. However, this is a half-hearted dodge—Gawker Defendants do not even attempt to argue how Erin Andrews' and Eric Dane's videos, and Kate Middleton's photographs, were not "similar."

Third, Gawker Defendants mistakenly rely upon decisions from the federal district court and Second DCA at the **temporary injunction stage** of this case in support of their subjective "belief" of newsworthiness. These decisions were not rulings on the merits of Gawker Defendants' good faith defense against a punitive damages claim. They arose in the context of a motion for temporary injunction and decided, based on a limited factual record, that the injunction order was a prior restraint on speech. That determination was not in any way dependent on a finding that Gawker Defendants acted in good faith. Further, substantial and significant evidence contradicting their self-serving beliefs has been uncovered and filed since the district court and DCA ruled on preliminary issues in this case. This is precisely why Florida law recognizes that decisions associated with such provisional issues have no conclusive effect:

> The issuance or denial of a preliminary injunction is the paradigmatic circumstance where a determination is made by a court without the benefit of a full hearing of the issues. See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (internal quote omitted). Because a decision based on less-than-full-hearing – such as the issuance or denial of a preliminary injunction – is by its very nature provisional, it would be nonsensical to give it binding effect on the subsequent pleadings in the same case. This is true, of course, even where the tentative determination of a trial court has been the subject of interlocutory appellate review.

Klak v. Eagles' Reserve Homeowners' Ass'n. Inc., 862 So.2d 947, 952 (Fla. 2d DCA 2004).

IV. CONCLUSION

There is extensive evidence from which a reasonable jury can award punitive damages. Gawker Defendants' claims of good faith are arguments that they must make to the jury, as there

are contested issues of material fact. Mr. Bollea's motion for leave to amend should be granted, and Gawker Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 22nd day of May, 2015 to the following:

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