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.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

REPLY IN SUPPORT OF PUBLISHER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGES

Hogan concedes, as he must, that to obtain punitive damages he is required to present **clear and convincing evidence** that the defendant had actual subjective **knowledge** or **awareness** that his conduct was unlawful. But he completely sidesteps the detailed factual record the Publisher Defendants presented, including a 43-paragraph Statement of Undisputed Material Facts, submitting no counterstatement, limited exhibits (and few dealing with *this* story), and extremely limited testimony. And, he substitutes soaring rhetoric like "the Gawker Defendants believe they are above the law," Opp. at 1, for reasoned legal argument.

Hogan's motion is based on three fundamental errors of law. First, he wrongly asserts that the numerous cases cited by the Publisher Defendants adjudicating punitive damages issues as a matter of law are somehow inapposite because some of them were decided after trial rather than on summary judgment. Second, he contends that whether defendants believed in the lawfulness of their conduct is necessarily and automatically a jury question, despite substantial case law to the contrary. Third, he argues that Gawker's past behavior entitles him to punitive

damages here, even though it actually confirms that the Publisher Defendants only publish when they believe that something is newsworthy.

A. Where, As Here, There Is No Jury Question, Summary Judgment is Warranted.

Hogan concedes that there are a host of cases that find that punitive damages are unavailable where, as here, there is no clear and convincing evidence that the defendant had subjective knowledge or awareness that his conduct was unlawful. Opp. at 9, 10 n.8, 12-13. He also concedes that there are a number of cases that decide that issue on summary judgment. Opp. at 12; *see also* Pub. Def.'s Combined Punitive Damages Br. ("Pub. Def. Br.") at 6-7 (citing cases). His main contention is that the decisions rejecting punitive damages claims in circumstances similar to those here are inapplicable because they were only decided after trial.

To make this point, Hogan relies principally on the district court opinion in *Toffoloni v. LFP Publishing Group*, 2010 WL 4877911 (N.D. Ga. Nov. 23, 2010) ("*Toffoloni Dist. Ct.*"), which arose from *Hustler* magazine's publication of twenty-year-old modeling photographs of a then-recently murdered wrestler, Nancy Benoit. Hogan correctly notes that the trial court denied summary judgment on the issue of punitive damages and held that "what LFP believed at the time of publication is a question for the jury." *Id.* at *5. Hogan's reliance on this is remarkable because the trial court's holding that the publisher's belief is a jury question ***was reversed by the Eleventh Circuit***. *See Toffoloni v. LFP Publ'g Grp.*, 483 F. App'x 561 (11th Cir. 2012) ("*Toffoloni II*"). The Eleventh Circuit's opinion makes clear that the lower court's ruling was "affirmed in part and vacated and remanded in part": specifically, the district court's adjudication of summary judgment *on the merits* was affirmed, *see id.* at 562 n.3, but its ruling on punitive damages was reversed and remanded with instructions to vacate the punitive damages award as a matter of law.

While Hogan is correct that the Eleventh Circuit's ruling was reversing a jury verdict, the Court made clear that, on the record before it, this was not a jury question at all. Specifically, the Eleventh Circuit held: "We agree with [defendant] that no reasonable jury could find clear and convincing evidence to support the imposition of punitive damages." *Id.* at 563; *see also id.* at 564 ("we conclude that no reasonable jury could find by clear and convincing evidence that punitive damages were warranted in this case"). Where an appellate court holds as a matter of law that "no reasonable jury could find clear and convincing evidence to support the imposition of punitive damages," that means that the issue is not a jury question, that there are no factual questions that are properly submitted to a jury, and that on that record the defendant was entitled to judgment as a matter of law.[1]

Indeed, had the Eleventh Circuit believed that summary judgment was properly denied, that there were fact questions about the publisher's belief in the lawfulness of its actions, and that that those fact questions were properly submitted to a jury, it would have deferred to the jury's finding that *Hustler* and its publisher had engaged in the egregious conduct required to support an award of punitive damages. But the Court did no such thing.

Instead, it reviewed the undisputed evidence, evidence that looks very much like the undisputed evidence submitted here by the Publisher Defendants. First, the publisher, Larry Flynt, "testified that when the Benoit images were proposed for publication, he thought that they

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[1] Hogan chides the Publisher Defendants for failing to mention the district court decision in its punitive damages motion, while at the same citing it in one of their *Daubert* motions. *See* Opp. at 9 n.7. But that motion relies on a *different* holding in the *Toffoloni* opinion about the admissibility of expert testimony, one that, unlike the punitive damages holding, was not disturbed on appeal. *See Toffoloni Dist. Ct.*, 2010 WL 4877911, at *3 (holding that expert "testimony is not admissible for purposes of showing that the photographs were newsworthy. Whether the photographs are protected as newsworthy is a question of law.").

were 'clearly' newsworthy and thus LFP did not need . . . permission to publish them." *Id.* Second, the author of the *Hustler* story at issue testified "that LFP did not need permission to publish the photographs because Benoit had been 'in the news so much.'" *Id.*; *see also id.* (author similarly testifying "that he believed that no permission was necessary because he did not see any legal distinction between these photographs of Benoit and paparazzi photographs of celebrities that were published in other magazines without the celebrities' permission"). Another executive at *Hustler* testified, "everyone in the company felt we were on firm, solid legal ground that we had the right to freedom of press, that we had the right to publish photographs. They were newsworthy. We were writing a news article amidst a flurry of news reporting about Nancy Benoit's early life." *Id.* at 564. And, just as Hogan sent a cease and desist letter here, "about a week after the issue was publically released in the United States, Toffoloni's counsel sent a letter to LFP demanding that the photographs not be published." *Id.* at 563-64.

> LFP's legal advisors . . . drafted a response to Toffoloni's counsel [which] insisted that no permission was necessary because the photographs were 'being used to illustrate a legitimate and serious news article . . . on [Benoit's] life. . . . Thus, we are not dealing with a commercial exploitation of Ms. Benoit's image for monetary gain, but as part of a legitimate news story.'

Id.

Based on all this evidence, and despite the obvious fact that *Hustler* magazine routinely publishes pornography for a profit, the *Toffoloni II* court held that "[t]here was substantial, consistent, and uncontroverted testimony from numerous LFP employees showing that they honestly and reasonably (albeit mistakenly) believed at the time that the photographs fit under the newsworthiness exception to the right of publicity." *Id.* at 563. In language that is particularly instructive here, the Court added: "The strongest evidence supporting our conclusion that this mistake on LFP's part was reasonable is the fact that the district court in this

case initially dismissed Toffoloni's case because the court agreed with LFP that the photographs met the newsworthiness exception"; even though that holding was later reversed, "we do not believe that publishers should be held to a higher standard than that of the learned district judge." *Id.* at 564.

Just as in *Toffoloni*, the undisputed facts here confirm the Publishers Defendants' belief that *this* Publication was newsworthy and therefore lawful. For example, the author of the Publication, A.J. Daulerio, testified that he "thought it was newsworthy" and that the video excerpts "would give a little more insight into the stuff that was already in the public record and also show some inconsistencies in what Hulk had stated publicly and what there was as visual evidence." Daulerio Dep. (Smith Aff. Ex. 6) at 124:14-22, 159:5-7; *see also id.* at 214:24 – 215:8 (testifying that the tape's overall "newsworthiness at that point was both . . . the existence of the tape and verifying its existence, and then my own personal commentary about celebrity sex tapes and the one in particular involving Hulk Hogan"). Gawker's CEO Nick Denton likewise testified that he "believe[d]" in the story's "newsworthiness" and believed that the video excerpts were "an essential part of the whole story." Denton Dep. (Smith Aff. Ex. 5) at 224:19-21, 243:16-17. Emma Carmichael, who was the Managing Editor of gawker.com at the time, testified that the story was properly published because it concerned "a public figure" and "contextual stories related to this incident . . . were already out in the public," explaining that, as a result, she "was very comfortable with the way we framed the story and the context we gave the story." Carmichael Dep. (Smith Aff. Ex. 4) at 55:14-16, 60:6-12. And Scott Kidder, Gawker's COO, testified on behalf of the company that Gawker "felt that . . . the video along with the narrative was extremely newsworthy, and that was the primary motivation in publishing it." Kidder Dep. (Smith Aff. Ex. 10) at 235:17-20. Mr. Kidder further explained:

> The video, when taken with the post, looked at a well-known American celebrity who had put himself out there by appearing in television shows, showing himself as a 1950s-style father, had written at length in a book about, about his marriage, contemplating suicide, cheating . . . on his wife. The video had been rumored online, but there was no . . . evidence that it . . . truly exist[ed]. And in addition to that A.J.'s narrative described how celebrity sex at the end of the day is rather boring and pedestrian . . . .

Id. at 235:23 – 236:13.

And, just like the defendant in *Toffoloni*, when Gawker received a cease-and-desist letter shortly after the Publication was published, Gawker's then-counsel explained that Gawker believed in the "newsworthiness of the video":

> The existence and the content of the video were widely reported prior to Gawker's publication. Indeed, various news outlets had already identified the woman in the video and her husband [and] the video depicts Mr. Bollea having sex with a married woman in the woman's home. . . . [T]he one minute clip shows very little sexual activity and is clearly newsworthy given the public interest in Mr. Bollea's marriage, divorce and his extramarital activities.

Smith Ex. 14 (Oct. 9, 2012 email from Gawker's counsel to D. Houston); *id.* (also explaining that "the video is not being used for a 'commercial' purpose (as the law defines it), is true, and is newsworthy"). Mr. Denton testified that even after receiving the cease and desist letter, he continued to believe that the publication was newsworthy. *See* Denton Dep. (Smith Aff. Ex. 5) at 243:13-17 ("Q: After [the cease and desist] letter was received, why did Gawker not remove the sex tape from its site? A: Because we continued to believe in its newsworthiness."). And, John Cook, the editor who succeeded Daulerio shortly after the Publication was published, testified that he "absolutely" believed that "the tape was clearly newsworthy," explaining that:

> The existence of the tape, the circumstances under which it was made, the identity of the participants . . . had been the subject of the intense scrutiny by TMZ and other news organizations and it was something circulating . . . in the talk radio community. . . . And it was of sufficient interest that Hulk Hogan himself called in to TMZ to discuss it. But the actual tape that we are talking about was a

> lacuna, it was a missing piece. No one knew what the actual tape was. No one knew what they were talking about. The post actually let people know what everyone was talking about. It is informative in that context.

Cook Dep. (Smith Aff. Ex. 15) at 103:6-7, 104:2-20. *See generally* Punitive Damages SUMF ¶¶ 24-43, and the exhibits to the Smith Affidavit referenced therein.

Thus, just as in *Toffoloni*, all of the people involved in the Publication uniformly testified that they believed – and continue to believe – that the Publication was newsworthy and therefore lawful. And, just as in *Toffoloni*, the fact that a judge – here, four judges – concluded that the Publication was newsworthy and therefore lawful means that as a matter of law the Publisher Defendants' belief was not unreasonable, even if Hogan and ultimately this Court disagree with that belief. As a result, just as in *Toffoloni*, that means that "no reasonable jury could find by clear and convincing evidence that punitive damages [are] warranted in this case." *Toffoloni II*, 483 F. App'x at 563; *id.* at 564 (same).

Hogan does not dispute *any* of this, and has not presented a *shred* of testimony or other evidence that the Publisher Defendants' did not in fact believe in the newsworthiness of their Publication to rebut this undisputed record. Instead, Hogan theorizes that Gawker published the sex tape gratuitously to make money. *See, e.g.*, Opp. at 6 (a jury "*can conclude* that the Gawker Defendants did not care about Mr. Bollea's privacy rights when invading them would bring Gawker increased traffic and profits") (emphasis added). But here again, the facts are undisputed. It is undisputed that Gawker did *not* publish or otherwise capitalize on the full 30-minute sex tape that it received, Smith Aff. Ex. 9 at 8-10, and instead prepared brief excerpts running one minute and forty-one seconds, containing just nine seconds of sexual activity, and omitting substantial additional sexual activity depicted on the full 30 minute tape, *id.* at 8. Indeed, there is no question that the defendant in *Toffoloni* sold its publication for a profit, and

highlighted the photos in question on its cover. *Toffoloni Dist. Ct.*, 2010 WL 4877911, at *2, *5. But that made no difference to the outcome of the case, because virtually all publishers operate to make a profit, and that does not speak to whether they believed a particular story to be newsworthy. *See also* Pub. Def. Br. at 15-18 (citing additional authorities).

At bottom, Hogan contends that, even if no reasonable jury could find clear and convincing evidence to support an award of punitive damages, the Court should nevertheless submit that issue to a jury only to find after trial that it was not in fact a jury question. That simply makes no sense. Neither justice nor efficiency is served by allowing a claim to proceed to trial where it is abundantly clear at the summary judgment stage that there is no "clear and convincing evidence" to support submission to a jury. *See* Fla. R. Civ. P. 1.510.[2]

B. Where, as Here, the Facts As to a Publisher's Belief Are Undisputed, Summary Judgment is Warranted.

Hogan also cites a series of cases claiming they stand for the proposition that "summary judgment on the issue of whether the requisite mental state for punitive damages can be met is almost never appropriate." Opp. at 9; *see also* Opp. at 4, 8 (a defendant's "belief" about something is a "quintessential jury question that cannot be decided on summary judgment"). But this is simply not true as a matter of law. Florida courts regularly decide that where, as here, the evidence is undisputed, a defendant's belief is not a jury question.

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[2] Moreover, while Hogan tries to make much of the fact that the Publisher Defendants supposedly knew that Hogan did not consent to the Publication, the appeals court in *Toffoloni* emphasized that, "[i]f the images had been newsworthy, LFP would not have needed permission to publish them. Thus, the fact that LFP knew that it had never received permission from Benoit or Toffoloni is not helpful to Toffoloni's case." *Toffoloni II*, 483 F. App'x at 564. Indeed, even the *Toffoloni* district court ruling on which Hogan now relies held that "[w]hether Ms. Benoit consented is irrelevant to [the newsworthiness] inquiry." *Toffoloni Dist. Ct.,* 2010 WL 4877911, at *4. *See also* Pub. Def. Br. at 14-15 (explaining same, and citing additional cases).

Indeed, Hogan ignores the body of Florida case law holding that unauthorized publication of images – including images of nudity – with the belief that doing so is lawful cannot sustain a claim for punitive damages **as a matter of law**. *See* Pub. Def. Br. at 9-10. *See also, e.g.*, *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 428 (Fla. 5th DCA 1982) (overturning award of punitive damages claim as a matter of law in case arising from publication of nearly nude photograph of private figure plaintiff, where photograph was newsworthy); *Genesis Publ'ns, Inc. v. Goss*, 437 So. 2d 169, 170 (Fla. 3d DCA 1983) ("corporate officer's testimony that, despite the requirement that permission be obtained [to publish nude photo of plaintiff], his company never did so," was insufficient as a matter of law to constitute clear and convincing evidence of a type that would permit award of punitive damages); *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 997, 999-1001 (Fla. 4th DCA 2004) (where evidence showed that defendant used photo believing use was proper, "the trial court erred by . . . submitting the punitive damages claim to the jury"); *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1313 (M.D. Fla. 2010) (holding as a matter of law that "punitive damages are not warranted because the evidence does not show that the defendants acted in 'intentional, wanton, and malicious disregard' for the plaintiff's rights when they used her self-portrait on the packaging of their pornographic movie DVD"); *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 77-78 (Fla. 4th DCA 2010) (no punitive damages as a matter of law despite tortious conduct that included various "press conferences, flyers, airplane banners, and television, newspaper, and radio ads, including spoofs using [plaintiff's] name, voice, and likeness"). Hogan relegates these on-point, dispositive cases to a one-sentence footnote, *see* Opp. at 10 n.8, in favor of cases whose fact patterns and legal claims are far afield and wholly inapposite, *see, e.g.*, *id.* at 19-20 (citing cases involving, *inter alia*, handling of dead bodies, drunk driving, and debt collectors).

Hogan's position is also inconsistent with the large body of case law routinely granting summary judgment in defamation cases based on the substantively identical issue of whether the defendant had actual knowledge or subjective awareness that its publication was false and therefore unlawful. Just as a plaintiff seeking punitive damages must submit clear and convincing evidence that the defendant had actual knowledge or subjective awareness that his conduct was unlawful, to recover in a libel case, public officials and public figures are required to show clear and convincing evidence that the defendant had actual knowledge or subjective awareness that the publication was false and therefore unlawful (known as "actual malice"), but published anyway. Thus, in substantively identical cases summary judgment is regularly granted, despite plaintiffs' frequent contention that their state of mind is a jury issue. *See, e.g.*, *Dockery v. Fla. Dem. Party*, 799 So. 2d 291 (Fla. 2d DCA 2001) (affirming summary judgment where plaintiff "has not presented any record evidence which would clearly and convincingly demonstrate to a jury that [defendant] knew, at the time of" publication, that the information was false); *Don King Prods., Inc. v. Walt Disney Co.*, 40 So. 3d 40 (Fla. 4th DCA 2010) (affirming summary judgment where "evidence, even taken as a whole, [was] not sufficient to prove, by clear and convincing evidence, that [defendant] acted with" knowledge or awareness of falsity/unlawfulness, and where the plaintiff had "not presented any evidence that [defendant] in fact doubted" the lawfulness of its report); *Cronley v. Pensacola News-Journal, Inc.*, 561 So. 2d 402 (Fla. 1st DCA 1990) (affirming summary judgment where defendants demonstrated a lack of "actual malice"/subjective awareness of falsity in libel case, noting "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence"); *Newton v. Florida Freedom Newspapers, Inc.*, 447 So. 2d 906, 907 (Fla. 1st DCA 1984) (affirming

summary judgment on issue of whether defendant had subjective belief that its publication was truthful and therefore lawful); *Reeves v. Knight-Ridder Newspaper, Inc.*, 490 So. 2d 1333, 1334 (Fla. 3d DCA 1986) (same).

Thus, Hogan is simply wrong in contending that summary judgment is improper when the issue turns on whether the defendant actually knows or is subjectively aware that its conduct was unlawful. Hogan cannot escape summary judgment simply by contending that a jury is entitled to disbelieve the defendants' evidence; his failure to proffer any direct evidence, let alone clear and convincing evidence, is fatal. *See Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) (A party opposing summary judgment "must come forward with counterevidence sufficient to reveal a genuine issue . . . It is not enough for the opposing partly merely to assert that an issue does exist."); *Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So. 2d 841 (Fla. 4th DCA 2002) (granting summary judgment based upon uncontroverted testimony that publisher believed publication was lawful); *Carbonell v. BellSouth Telecomms., Inc.*, 675 So. 2d 705, 706 (Fla. 3d DCA 1996) (granting summary judgment based solely on unrebutted testimony of witness for moving party); *Fleming v. Peoples First Fin. Sav. & Loan Assoc.*, 667 So. 2d 273, 273-74 (Fla. 1st DCA 1995) (granting summary judgment on issue involving state of mind where party opposing summary judgment failed to submit admissible evidence that would permit a jury to rule in its favor).

In addition to contending that belief is always a jury issue, Hogan also argues that, even if summary judgment on punitive damages claims may sometimes be appropriate in negligence cases, it is never appropriate in intentional tort cases. Again, he is wrong. The relevant question on *every* punitive damages claim is: Did the defendant engage in the conduct at issue knowing or aware that it was unlawful? Fla. Stat. § 768.72(2). This question is equally applicable

whether the underlying claim is for negligence or for an intentional tort. Indeed, Florida courts have made clear that negligence claims may support an award of punitive damages,[3] and, on the flip side, just because a defendant may have committed an intentional tort does not mean that a claim for punitive damages is automatically available.[4]

Thus, Hogan's attempts to distinguish the numerous additional cases granting summary judgment on punitive damages are unavailing. Opp. at 12 (citing *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608 (1st DCA 2007); *In re Leli*, 420 B.R. 568 (Bankr. M.D. Fla. 2007); *Taylor v. Gunter Trucking Co., Inc.*, 520 So. 2d 624 (Fla. 1st DCA 1988); *Curry v. Cape Canaveral Hosp.*, 426 So. 2d 64 (Fla. 5th DCA 1983); *Thompson v. City of Jacksonville*, 130 So. 2d 105 (Fla. 1st DCA 1961)). In each of those cases, the courts granted summary judgment where the plaintiff had not submitted clear and convincing evidence that would warrant a finding that the defendant engaged in "willful and wanton misconduct." *Tiger Point*, 977 So. 2d at 610; *see also In re Leli*, 420 B.R. at 571 (granting summary judgment on punitive damages claim where there was "no evidence in th[e] record" that defendants "were engaged in intentional

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[3] *See, e.g.*, *Tampa Med. Assoc., Inc. v. Estate of Craig*, 915 So. 2d 660 (Fla. 2d DCA 2005) (affirming punitive damages award in negligence case); *Matalon v. Lee*, 847 So. 2d 1077 (Fla. 4th DCA 2003) (same).

[4] *See, e.g.*, *Air Ambulance Professionals, Inc. v. Thin Air*, 809 So. 2d 28, 30 (Fla. 4th DCA 2002) (just because "record evidence may support an intentional tort," it does not "necessarily [support] an award of punitive damages"); *see also* Pub. Def.'s Br. at 8 n.2 (citing additional cases). Indeed, there are many examples of Florida courts granting summary judgment, or denying leave to amend to add a claim for punitive damages, in cases where the underlying claim is an intentional tort. *See, e.g.*, *In re Leli*, 420 B.R. 568 (M.D. Fla. 2009) (granting summary judgment on punitive damages where underlying claim was intentional tort); *Ayers v. Wal-Mart Stores, Inc.*, 941 F. Supp. 1163 (M.D. Fla. 1996) (same); *Cherestal v. Sears Roebuck & Co.*, 2014 WL 644727 (M.D. Fla. Feb. 19, 2014) (same); *Endacott v. Int'l Hospitality, Inc.*, 910 So. 2d 915 (Fla. 3d DCA 2005) (affirming denial of motion for leave to amend to add punitive damages claim in intentional tort case); *GEICO Gen. Ins. Co. v. Hoy*, 136 So. 3d 647 (Fla. 2d DCA 2013) (same).

misconduct" or had the "specific intent" necessary to sustain a punitive damages claim); *Taylor*, 520 So.2d at 627 (affirming summary judgment over dissent's objection that defendant had engaged in a "deliberate act in direct violation of law that created an obvious and imminent danger of serious injury"); *Curry*, 426 So. 2d at 64 (affirming summary judgment where "the record contains no basis to conclude [that the defendants] acted with malice, gross negligence or fraud"); *Thompson*, 130 So. 2d at 106-109 (finding record insufficient to support punitive damages claim in invasion of privacy case). Simply put, in the absence of such evidence, summary judgment is required.

C. The Undisputed Evidence Negates Hogan's Contention that the Publisher Defendants "Knew" that This Publication Was Unlawful.

Finally, Hogan contends that evidence of other examples of things Gawker published and did not publish (and criticized others for publishing) means that the Publisher Defendants knew that *this* Publication was unlawful. Opp. at 13-15, 22. That is both incorrect factually, and immaterial as a matter of law. First, Hogan's contention that these other examples are "similar" rests on a misunderstanding of how the newsworthiness analysis works. Hogan has conceded that "courts examine the **context** of the publication, as well as its content, when evaluating First Amendment public concern arguments." Bollea SJ Opp. at 43 n.16. A defendant necessarily considers the same things in formulating a belief as to whether a particular publication is newsworthy and therefore lawful. Thus, by definition, because the determination about whether a publication addresses a matter of public concern depends on its particular context and content, relying solely on decisions about publishing *other* things, while completely ignoring the undisputed testimony about *this* Publication from multiple witnesses, is unavailing.

Moreover, that problem aside, for Hogan's argument to work, he would need to show that Gawker has a routine practice of invading people's privacy without regard to newsworthiness, and that they followed that practice here. But even the extremely limited evidence he has submitted shows the opposite. Indeed, it shows that sometimes the Publisher Defendants believe something is newsworthy and publish, while other times they believe something is not newsworthy, and do not publish, frequently criticizing others who do. Even if the Court were to determine that the Publisher Defendants' judgments about the newsworthiness of the content of *different* stories with *different* contexts was somehow relevant here (and was willing to engage in separate mini-trials about each of them to determine whether they were newsworthy or otherwise lawful, and whether defendants actually knew or were aware that those other publications were unlawful), there is simply no evidence that Gawker engaged in a pattern or practice of disregarding of people's rights no matter the circumstances.[5]

[5] Although the Publisher Defendants' beliefs regarding *different* publications are in no way relevant to the question of whether they believed that *this* Publication was newsworthy, they nevertheless feel constrained to set the record straight on the question of whether they published a live link to the video of Erin Andrews naked in her hotel room. *See* Opp. at 14, 22 n.33. **They did not.** *See* Pub. Def. Br. at 21. Mr. Daulerio testified under oath that "I didn't post actually a link to the [Erin Andrews] video." Daulerio Dep. (Smith Aff. Ex. 6) at 87:25 – 88:2. And, the article itself (which Hogan both does not attach and ignores), confirms that the link identified therein was dead, specifically noting: "the video's been removed." Smith Aff. Ex. 18. Hogan simply asserts that "Daulerio's testimony makes no sense and the jury is entitled to disbelieve it," but that is argument, not evidence, and it is evidence that is required to overcome summary judgment. Fla. R. Civ. P. 1.510.

CONCLUSION

For the foregoing reasons, and for the reasons stated in their opening brief on punitive damages, the Publisher Defendants respectfully request that this Court grant their motion for summary judgment on punitive damages.

Dated: May 27, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*
Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Tel: (813) 984-3060; Fax: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Tel: (202) 508-1122; Fax: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of May 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199; Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirellr@HMAfirm.com
Sarah Luppen, Esq.
sluppen@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600; Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1950
Tampa, FL 33602
Tel: (813) 225-1655; Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ Gregg D. Thomas
Attorney