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.
_____/

**PLAINTIFF TERRY BOLLEA'S**
**OPPOSITION TO MOTION TO EXCLUDE TESTIMONY OF MIKE FOLEY**

## I. INTRODUCTION

Terry Bollea (professionally known as Hulk Hogan), intends to offer expert testimony from his designated expert, Mike Foley of the University of Florida's School of Journalism, regarding the customs and practices of the journalism field, a profession in which he has served as a leader and educator (including working as a reporter, a newspaper executive, and a journalism educator) for decades. Specifically, Mr. Foley will testify that Gawker.com's publication of a one minute and 41 second sex video showing Mr. Bollea fully naked and having uncensored sex in a private bedroom, where he was secretly recorded (the "Sex Video"): (1) did not serve any valid journalistic purpose; and (2) violated fundamental principles of journalism. Mr. Foley's opinions are based on his more than 40-year career as a journalist, newspaper

executive, and educator and on the Ethical Guidelines promulgated by the Society of Professional Journalists.

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (together, the "Gawker Defendants") seek to exclude Mr. Foley's testimony under Fla. Stat. §90.702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The basis for their motion is two-fold, arguing first that Foley's testimony constitutes "pure opinion," and therefore should be excluded; and arguing second that Mr. Foley's opinions about newsworthiness are inadmissible because that is a legal issue. Both arguments are without merit, and the motion to exclude should be denied, for at least the following reasons:

***First***, Mr. Foley's testimony is not "pure opinion," and it is admissible under Florida's standards for expert admissibility. The *Daubert* standard for admissibility of expert testimony originated in cases involving scientific expert testimony, such as testimony as to causation in tort cases. That standard, however, **does not prohibit** other forms of expert testimony, such as that offered by Mr. Foley—*i.e.*, experts testifying about the customs and practices and prevailing ethical standards of an industry based on their personal experience.

***Second***, Mr. Foley's testimony as to "newsworthiness" is a proper subject for expert testimony. The standards and practices of journalism form part of the inquiry of whether private facts are a matter of public concern, and ample case law holds that expert testimony is helpful to the trier of fact on this issue.

***Third***, Mr. Foley's testimony also is admissible as to other issues in the case. Gawker Defendants' systematic disregard of ethical rules in its reporting practices is relevant to the intent element of the intentional torts that are alleged in this case, and to show the mental state necessary for a punitive damages claim.

Mr. Foley's analysis of the facts of this case, and his application of his decades-long experience and the applicable ethical guidelines to those facts, will assist the jury in assessing Gawker Defendants' principle defenses in this case—namely, whether their publication of a recording of Mr. Bollea naked, aroused, and engaged in consensual sexual relations in a private bedroom where he was secretly filmed was newsworthy, and whether they acted in good faith in publishing the material. It is not surprising that Gawker Defendants want to exclude all facts and testimony rebutting their defenses, but their efforts to exclude Foley's informed and reasoned opinions should fail, and the jury should be allowed to weigh his opinions in their deliberations.

## II. FACTUAL BACKGROUND OF MIKE FOLEY'S TESTIMONY

Mike Foley has an extensive background as a professional journalist. He holds a Bachelor's Degree in Journalism and a Master's Degree in Mass Communication. Ex. A (Foley Tr. at 15:20–16:19).[1] He worked as a reporter and editor for the *Tampa Bay Times*, for 22 years until 1992. *Id.* (Foley Tr. at 19:1–35:16). He then worked as an executive at the *Times* for another seven years. *Id.* (Foley Tr. at 35:14–39:25). Since 2001, he has taught Journalism at the University of Florida. *Id.* (Foley Tr. at 43:7–9, 46:23–47:23). He currently is the Master Lecturer in the Journalism Department in the College of Journalism and Communications at the University of Florida. Ex. B (Foley Aff. ISO Plaintiff's Opp. to MSJ, ¶2). Mr. Foley is the first recipient of the Hugh Cunningham Professor in Journalism Excellence Award and was named the university's Teacher of the Year in 2006–2007. *Id.* He received the Distinguished Teaching in Journalism Award, a national honor, from the Society of Professional Journalists in 2013 and was selected as one of *The Best 300 Professors* by the Princeton Review in 2012. *Id.* Among

[1] Exhibit A, attached hereto, is a copy of Foley's complete deposition testimony. Cited excerpts are highlighted for the Court's convenience.

the courses he teaches is a course on Journalistic Ethics, which covers the issue of Privacy. Ex. A (Foley Tr. at 48:6–49:14).

Mr. Foley bases his opinions in this case on his experience, background, training, education, and in-depth knowledge of the craft and mission of journalism from his long career in that field. Ex. A (Foley Tr. at 77:2–10). In addition to his decades of experience, Mr. Foley relied on the Ethical Guidelines promulgated by the Society of Professional Journalists. *Id.* (Foley Tr. at 79:24–80:18). Mr. Foley also relied on professional seminars he had attended, including seminars on reporting in the Internet age. Ex. C (Foley Expert Report, at 1). Finally, Mr. Foley did extensive research specific to this case, including reviewing content on Gawker.com and the statements of Gawker executives, and reviewing the Sex Video itself. *Id.* (Foley Expert Report, at 2).

Mr. Foley's central opinions are that Gawker Defendants' publication of the Sex Video did not serve any valid journalistic purpose, and that it violated fundamental principles of journalism. *Id.* (Foley Expert Report, at 2). His report cites established ethical rules, relies on his own experience at the *Tampa Bay Times*, and analyzes numerous real-world journalistic ethics issues in coming to those opinions. *Id.* (Foley Expert Report, at 3–6).

At his deposition, Gawker Defendants' counsel thoroughly attempted to cross-examine Mr. Foley regarding how he applied rules of journalistic ethics during his time as a newspaper reporter and editor. Ex. A (Foley Tr. at 125:21–24, 128:6–23, 128:24–129:10, 147:5–13, 147:21–148:8). Counsel also questioned Mr. Foley about the various incidents where Mr. Foley believed that Gawker had acted inconsistently with journalistic ethics, including Gawker's publication of paparazzi photos of a topless Kate Middleton on vacation and a photo of Brett Favre's penis. *Id.* (Foley Tr. at 151:11–152:7, 152:15–23, 167:6–17). In sum, Mr. Foley offered

an opinion based on his extensive experience as a journalist, editor, newspaper executive, and educator, and based on his careful study of Gawker Defendants' actions as well as the relevant ethical and professional guidelines. He spelled out the details of that opinion at deposition, and answered extensive questions regarding its basis.

## III. MR. FOLEY'S OPINIONS ARE ADMISSIBLE UNDER *DAUBERT*

The parties agree that Fla. Stat. §90.702 incorporates the standard of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 573 (1993). The parties disagree, however, as to how that standard applies to testimony such as that offered by Mr. Foley. Gawker Defendants mischaracterize *Daubert* as precluding any expert testimony other than rigorous scientific surveys. The characterization is unsupported. In fact, *Daubert* repeatedly has been held to **permit** testimony by expert witnesses regarding industry practices they have learned from their work experience.

For example, in *In re US Foodservice Inc. Pricing Litigation*, 729 F.3d 108, 130 (2d Cir. 2013), the Court of Appeals affirmed the admission of expert testimony regarding whether consumers would customarily be aware of the prices charged by the defendant pursuant to the customs and practices of the industry. No detailed analysis of the scientific methodology of the testimony was required.

In *Campbell v. Metropolitan Property and Cas. Ins. Co.*, 239 F.3d 179, 185 (2d Cir. 2001), a lead poisoning case, the Court of Appeals affirmed the admission of the testimony of a doctor who treated lead poisoning cases every day in his practice. Such day-to-day testing of his theories was held to provide all of the real world testing required under *Daubert*.

In *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995), the court held that *Daubert* would permit doctors to testify regarding the dangers of inhaling glue fumes based on their

"extensive practical experience," and that disputes over credentials, methodology, or the alleged lack of scientific support for the opinions were matters for cross-examination at trial, not bases to exclude the experts under *Daubert*.

In *United States v. Davis*, 397 F.3d 173 (3d Cir. 2005), a police officer's testimony that presence of extensive weaponry in a car is consistent with inference that occupants were involved in criminal activities was admissible under *Daubert* based on police officer's "years of experience." The court held that, for testimony such as the officer's, specific *Daubert* factors have "little bearing." *Id.*at 178.

As the Fifth Circuit stated in *First Tennessee Bank Nat. Assn. v. Barreto*, 268 F.3d 319 (6th Cir. 2001): "After reviewing [expert witness's] trial testimony, we cannot say that the district court abused its discretion by allowing him to testify as an expert witness. In reaching this conclusion, **we find the *Daubert* reliability factors unhelpful in the present case, which involves expert testimony derived largely from [expert witness's] own practical experiences throughout forty years in the banking industry. Opinions formed in such a manner do not easily lend themselves to scholarly review or to traditional scientific evaluation.**" *Id.* at 335 (emphasis added).

The four factors in the *Daubert* test are **advisory**, and are not rigid rules for all expert testimony. In *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir. 2002), an electrical engineer's testimony that Ford's design could have contributed to the cause of an accident was held properly admitted, even though there was no peer review, no proof that the engineer's theory would occur in the real world, and no testing of the error rate. The nature of the engineer's

testimony rendered those *Daubert* factors less relevant, and the jury could evaluate any flaws in the theory.[2]

Under these principles, Mr. Foley's testimony is unquestioningly admissible under the *Daubert* framework. Mr. Foley has decades of practical experience working in journalism—as a reporter, editor, executive, and educator—and has extensive knowledge of the ethical standards that govern the profession. Gawker Defendants' arguments against Mr. Foley's opinions, such as their claim that Internet journalism is different than the sorts of journalism that Foley practiced, go to **weight** rather than admissibility, and can be made to the jury.

## IV. FOLEY'S OPINIONS ARE ADMISSIBLE AS TO NEWSWORTHINESS

Gawker Defendants are plain wrong in arguing that Mr. Foley is not permitted to testify about the issue of newsworthiness as it relates to journalistic ethics. This sort of testimony repeatedly has been held to be **admissible**. In *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Cal. App. 2001), the players on a youth sports team whose coach was accused of child molestation brought suit for invasion of privacy and emotional distress against media entities that ran a team picture depicting them (and thereby implying that they were victims of abuse). In holding that the case should survive an anti-SLAPP motion (a California procedure requiring a factual showing before certain cases that implicate First Amendment rights can proceed), **the Court relied on the declarations of two journalism experts who averred that the use of faces of team members was "not consistent with journalistic standards and practices" and**

[2] Gawker Defendants concede that the purpose of the revisions of Section 90.702 was to apply the *Daubert* standard to Florida courts. Thus, Gawker Defendants' argument that the reference in *Giamo v. Florida Autosport, Inc.*, 154 So.3d 385, 388 (Fla. 1st DCA 2015), to the legislature barring "pure opinion testimony" somehow refers to experts who testify as to custom and practice based on their personal experience cannot hold water. There is extensive case law holding that the sort of custom and practice evidence that Foley will offer is permissible under *Daubert*.

**that the "faces in the team photograph could have been obscured."** *Id.* at 514 (emphasis added).

In *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996), the family of the CEO of a health insurance company obtained an injunction against television reporters placing their home under surveillance. **The Court relied on the testimony of the plaintiffs' expert, a Pulitzer Prize winner, about the tactics of television reporters** in planning "ambush interviews." *Id.* at 1424.

Gawker Defendants argue that there is a *per se* rule against testimony about ethical standards, but their authorities do not support that conclusion. *In re Trasylol Products Liability Litigation*, 08-MD-01928, 2010 WL 1489793 (S.D. Fla. Feb. 24, 2010), is, as its name implies, a case involving a strict liability claim against a drug company. In that instance, whether the drug company acted ethically was not relevant to the claims asserted. Additionally, *Trasylol Products Liability Litigation* is an unpublished trial court opinion with little persuasive value.[3]

*Parsi v. Daioleslam*, 852 F. Supp. 2d 82, 89-90 (D.D.C. 2012), another trial court opinion cited by Gawker Defendants, **rejects** Gawker Defendants' argument and holds that journalistic ethics testimony in a defamation case is, in theory, permissible under *Daubert*. *Id.* at 89 ("Aikat's methodology might be described as identifying 'applicable professional standards and the defendants' performance in light of those standards,' **which clearly is an acceptable area for expert testimony**.") (emphasis added). In that case, the testimony offered by the expert was rejected because it did not refer to any specific rules of journalistic ethics, not because that type

[3] Similarly, *In re Rezulin Products Liability Litigation*, 309 F. Supp. 2d 531, 542–44 (S.D.N.Y. 2004), another trial court ruling in a strict products liability case cited by Gawker Defendants, excludes ethics testimony on the grounds that it offered nothing more than an opinion that the defendants had an obligation to act honestly (which the jury could presumably determine on its own) and where defendants' ethics were not relevant to any element in the case. *Resulin Products Liability Litigation* is therefore distinguishable.

of testimony was generally inadmissible. Mr. Foley's testimony refers to and applies the ethical rules from the Society of Professional Journalists.[4]

The cases that Gawker Defendants cite for the proposition that testimony regarding newsworthiness is inadmissible are distinguishable and unpersuasive. In *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007), the court declined to consider a journalism professor's testimony that a videotape was not newsworthy where the reason given by the professor was that the videotape added to the plaintiff's victimization. That stands in stark contrast to Mr. Foley's report and testimony, which relies on established ethical rules of journalism and analyzes specifically whether the Sex Video was a matter of public concern and not simply whether it victimizes Mr. Bollea.

Finally, Gawker Defendants cite one more unpublished trial court order, *Toffoloni v. LFP Publishing Group, LLC*, 1:08-CV-421-TWT, 2010 WL 4877911 at *3 (N.D.Ga. Nov. 23, 2010), which excludes testimony from both sides on newsworthiness on the ground that the issue is a question of law that was already decided by the Eleventh Circuit. *Toffoloni* is incorrect that the public concern test is one of law—it will be submitted to the jury in this case—and the opinion contains no information as to the substance of the testimony that was offered by the experts. In light of *M.G.*, *Wolfson*, and *Parsi*, it simply is not persuasive on this point.

Thus, contrary to Gawker Defendants' claims, there is no rule precluding the testimony of journalistic ethics experts in privacy cases. Such testimony, like all expert testimony, must be

[4] Gawker Defendants' argument that the Society of Professional Journalists' standards are non-binding is a desperate attempt to have this Court usurp a jury function. Outside of a few professions, ethical standards are **always** just that, standards. Gawker Defendants' argument is akin to arguing that, in a case where legal ethics are at issue, a party cannot introduce testimony as to the ABA Model Rules of Professional Conduct because they are ethical guidelines and not binding statutes. It is up to the jury to determine the extent to which the Society of Professional Journalists' guidelines are applicable to this case.

sufficiently helpful to the trier of fact. Mr. Foley's report, which sets out the considerations that journalists must balance in determining when to run sensitive footage (such as footage of intimate activity), and which sets out the relevant ethical standards of the profession, will be helpful to the jury in evaluating this question.

## V. MR. FOLEY'S OPINIONS ARE ADMISSIBLE AS TO GAWKER DEFENDANTS' CLAIMED GOOD FAITH AND OTHER ISSUES

Mr. Foley's testimony is admissible to assist the jury on a number of other issues in the case that involve Gawker Defendants' claim that they acted in good faith in determining the newsworthiness of the Sex Video. Those issues include: (1) Gawker Defendants' argument that they did not have a commercial purpose in publishing the Sex Video, asserted in defense of Mr. Bollea's publicity claim; (2) Gawker Defendants' argument that they acted in good faith, asserted in response to Mr. Bollea's wiretap claim; and (3) Gawker Defendants' argument that they did not have the requisite mental state for a claim of punitive damages. On all of those issues, the conclusions of an expert that Gawker Defendants' conduct represented an extreme departure from journalistic standards is relevant to the issue of whether Gawker Defendants actually acted in good faith, as they claim.

## I. CONCLUSION

For the foregoing reasons, Gawker Defendants' motion to exclude Mr. Foley's testimony should be denied.

Respectfully submitted,

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## 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 1st day of June, 2015 to the following:

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