IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY BOLLEA'S MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORDS AND FOR PROTECTIVE ORDER EXCLUDING THE PUBLIC AND PRESS AT TRIAL FOR CERTAIN EVIDENCE AND ARGUMENT

Plaintiff Terry Bollea hereby moves this Court, pursuant to Florida Rules of Judicial Administration Rule 2.420(e) and the inherent power of the Court, for a Protective Order determining that certain evidence and argument to be presented at trial is confidential, and excluding the public and press from those parts of the trial.

In support of his motion,[1] Mr. Bollea states the following:

1. Mr. Bollea's claims in this case arise out of Defendants' publication of a secretly filmed recording of Mr. Bollea naked and engaged in sexual relations with Heather Clem (the "Sex Video"). Mr. Bollea has brought claims for invasion of privacy and related torts. The

[1] The supporting affidavit of Charles Harder will be filed on June 15, 2015.

central defense is that the publication of the Sex Video is protected by the First Amendment as a matter of "legitimate public concern."

2. The parties intend to introduce certain evidence and argument regarding Mr. Bollea that is private, intrusive, and potentially offensive, most notably the Sex Video itself, and possibly the full 30-minute version of the sex tape received by Gawker (if permitted to be introduced against Mr. Bollea's objections and motion in limine), and images from the videos.

3. A court has the inherent power to control the conduct of its own proceedings in order to "preserve order and decorum in the courtroom, to protect the rights of parties and witnesses and generally to further the administration of justice." *State ex rel. Gore Newspapers Co. v. Tyson*, 313 So.2d 777, 782 (Fla. 4th DCA 1975), overruled on other grounds in *English v. McCrary*, 348 So.2d 293 (Fla. 1977). That inherent authority includes "the power of the court to exclude the public and the press." *Id.*; *see generally* Florida Rules of Judicial Administration Rule 2.420 ("Public Access to and Protection of Judicial Branch Records").

4. "It is impossible to catalog every instance where exclusion is justified; it must depend upon the particular factual circumstances measured by a consideration of the various interests affected." *Tyson*, 313 So.2d at 782. As recognized in *Tyson*, the public and press have been excluded in such instances where the testimony of witnesses was of such a nature that it could not be freely and completely presented to the public without serious detrimental effects to the "fair trial" concept, where the nature of the testimony was such as to be offensive, where the witnesses would be embarrassed, where a scandalous trial would affect any persons, or where a witness would thereby be unable to testify as to the material facts of the case. *Id.* at 782-83.

5. In civil cases, "[i]n determining the restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to the litigation

with those of the public and press." *Tyson*, 313 So.2d at 787. "The type of civil proceeding, the nature of the subject matter and the status of the participants are factors to be considered when evaluating the cogent reasons for excluding the public and press from access to the courts." *Id.* (holding that parties in civil litigation are not entitled to exclude the public and press merely because they request a closed hearing).

6. The Florida Supreme Court further detailed the factors that must be considered to determine a request for closure of a civil proceeding, including: "closure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. We find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f). … Further, we note that it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted. However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure." *Baron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 118 (1988).

7. Further, "the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive

closure necessary to accomplish its purpose." *Id.*; *see generally* Florida Rules of Judicial Administration Rule 2.420(e) ("Request to Determine Confidentiality of Trial Court Records in Noncriminal Cases").

8. The Florida public policy recognizes a fundamental right to privacy. The Florida Constitution provides at Article 1, Section 23: "Every natural person has the right to be let alone and free from governmental intrusion into his private life." *See also Doe v. State*, 587 So.2d 526, 531 (Fla. 4th DCA 1991) approved sub nom. *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So.2d 549 (Fla. 1992) ("The right of privacy has traditionally been applied to sexual intimacies conducted in a private setting.") (Barkett, J., specially concurring).

9. The law specifically provides a remedy for an invasion of that privacy. *Allstate Insurance Co. v. Ginsberg*, 863 So.2d 156, 162 (Fla. 2003) (stating that the tort vindicates the "right of a private person to be free from public gaze"); *see also* Fla. Stat. Ann. § 934.09(10) (stating that an aggrieved person in any trial, hearing, or proceeding may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted).

10. Excluding the public from a very limited presentation of argument and evidence in this case complies with the established public policy of privacy. The very essence of Mr. Bollea's claims is that his privacy was invaded by Gawker's posting online on Gawker.com, video and audio footage showing Mr. Bollea naked and engaged in sexual intercourse. Further, the secret recording of Mr. Bollea was unlawful, violating Florida's security of communications statutes (Fla. Stat. Ann. § 934.01 et seq.). Mr. Bollea has already suffered significant harm from the publication of the Sex Video.

11. Additionally, excluding the public from a very limited presentation of argument and evidence in this case also will ensure that Mr. Bollea receives a fair trial. Having the public present during presentation of the Sex Video likely will prejudice Mr. Bollea with the jury. Giving an audience to the playing of the Sex Video may legitimize its publication by Gawker with the jury, and audible and visually recognizable reactions from the public likely will taint the jurors' own perception.

12. Further, excluding the public from a very limited presentation of argument and evidence in this case will preserve order and decorum in the courtroom and further the administration of justice. The intimate and sexual nature of the Sex Video likely will be offensive to certain persons in the gallery, especially having the video and images viewed in a public setting. Such a public viewing will likely incite disorder in the courtroom and distract the jury from the evidence. *See Ocala Star-Banner v. State*, 697 So.2d 1317, 1318 (Fla. 5th DCA 1997) (holding that "the sealed documents and testimony concerning sexually transmitted diseases were properly excluded from public disclosure").

13. Lastly, no reasonable alternative is available to accomplish the desired result, and Mr. Bollea is seeking the least restrictive closure necessary to accomplish its purpose. Mr. Bollea is not seeking to exclude the public from all testimony and evidence at trial, just the explicit imagery that invaded his most intimate privacy.

For the foregoing reasons, Mr. Bollea requests that the Court enter an Order excluding the public from certain evidence or argument during trial.

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 12th day of June, 2015 to the following:

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