

Exhibit A

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

TERRY GENE BOLLEA, professionally known as HULK HOGAN, Plaintiff,

No. 12-012447-CI-011

vs.

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

Defendants.

DEPOSITION OF: MICHAEL F. FOLEY
DATE: March 20, 20156
TIME: 9:58 a.m. to 4:16 p.m.
PLACE: Riesdorff Reporting Group 100 Second Avenue South Suite 104-S St. Petersburg, Florida

PURSUANT TO: Notice by counsel for Defendant Gawker Media for purposes of discovery, use at trial or such other purposes as are permitted under the Florida Rules of Civil Procedure
REPORTED BY: Susan C. Riesdorff, RPR, CRR Notary Public, State of Florida

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EXHIBITS

9 Exhibit No. 158 Page 9 (Expert Report)
10 Exhibit No. 159 Page 91 (Gawker Article, "Lindsay Lohan Nude Pics Leaked to Promote The Canyons")
11 Exhibit No. 160 Page 112 (SPJ Code of Ethics)
12 Exhibit No. 161 Page 122 (Newspaper Photograph and Caption dated 6/11/88)
13 Exhibit No. 162 Page 126 (Newspaper Clip dated July 20, 1991)
14 Exhibit No. 163 Page 140 (Newspaper Clip dated December 4, 1999)
15 Exhibit No. 164 Page 143 (Newspaper Clip dated December 2, 1999)
16 Exhibit No. 165 Page 172 (List of Documents Relied Upon by Professor Mike Foley)
17 Exhibit No. 166 Page 177 (Newspaper Clip dated July 21, 1991)
18 Exhibit No. 167 Page 186 (Newspaper Clip dated May 22, 1990)

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1 APPEARANCES:
2 CHARLES J. HARDER, ESQUIRE Harder Mirell & Abrams, LLP 1925 Century Park East Suite 800 Los Angeles, California 90067 Attorney for Plaintiff
3
4
5 MICHAEL SULLIVAN, ESQUIRE Levine Sullivan Koch & Schulz, LLP 1899 L Street, N.W. Suite 200 Washington, D.C. 20036 - and -
6 RACHEL E. FUGATE, ESQUIRE Thomas & LoCicero, PL 601 South Boulevard Tampa, Florida 33606 Attorneys for Defendant Gawker Media, LLC
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1 MICHAEL F. FOLEY,
2 the witness herein, being first duly sworn on oath, was
3 examined and deposed as follows:
4 DIRECT EXAMINATION
5 BY MR. SULLIVAN:
6 Q. Could you state your full name for the record, please, and spell your last name?
7 A. Michael Frances Foley, F-o-l-e-y.
8 Q. Mr. Foley, my name is Michael Sullivan with the firm of Levine Sullivan Koch and Schulz. We represent the Gawker defendant in this case.
9 Have you ever had your deposition taken
10 before?
11 A. I have.
12 Q. Okay. And when was that?
13 A. Wow, I don't have the dates.
14 Q. Just approximately.
15 A. It had to be 25 years ago probably.
16 Q. Okay. What proceeding was that in connection with?
17 A. It was a libel case brought against the Times Publishing Company.
18 Q. And were you a defendant in the case?
19 A. I don't think I was named as a defendant. I honestly can't remember.
20
21
22
23
24
25

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- 1 Q. Were you involved in the reporting that was
2 at issue?
3 A. No. I was the managing editor.
4 Q. And what became of that case?
5 A. We won.
6 Q. At the trial?
7 A. Trial.
8 Q. Or preliminary motion?
9 A. At trial.
10 I've been deposed at least one other time in
11 a libel case brought by a doctor. I can't remember his
12 last name. That never made it to trial.
13 Q. Did you testify at trial?
14 A. No.
15 Q. And who was the plaintiff in that case?
16 A. The name Bonati comes to mind, but I'm not
17 positive.
18 Q. And just very, very briefly, what was the
19 gist of the dispute?
20 A. You're testing my memory today. I think, as
21 best as I can recall today, he had sued us because we
22 had written some stories about his medical or
23 chiropractic -- I can't remember exactly which --
24 practice.
25 Q. So he was a medical professional?

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- 1 A. I believe so.
2 Q. All right. And then you mentioned that
3 you've been deposed one other time, I believe.
4 A. Those are the two.
5 Q. Those are the two? Both in connection --
6 A. I wasn't deposed in that other case. I was
7 in court for that. I was at the defense table. The
8 first one I was deposed for was Bonati. And I was
9 deposed in another one. It just occurred to me. A TV
10 station, a local TV station sued the paper for
11 something, and I was deposed in that case also.
12 Q. Okay. And when was that?
13 A. Around the same -- I was managing editor, as
14 my exhibit will tell you, from 19 -- in the '80s. I
15 was managing editor for eight years and executive
16 editor for two. So it was during that period.
17 Q. And you indicated that it was a TV station
18 that sued the paper?
19 A. Yes.
20 Q. Was this like an intellectual property beef?
21 A. No. It was over defamation, I believe. It's
22 really, really fuzzy. That's a long time ago.
23 Q. You indicated that case went to trial?
24 A. No. The libel case that I wasn't deposed
25 in -- I was just at defense table -- that went to

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- 1 trial. That was a six-week trial in Tampa.
2 Q. I see. Did you testify in that case?
3 A. No.
4 Q. You just sat at the table as the
5 representative for the defendant?
6 A. I sat at the table in the John Short
7 defamation trial. I was deposed in the Channel 10, I
8 believe, defamation trial. And I was deposed in the
9 Bonati -- if it was Bonati -- defamation trial. I'm
10 sorry. I was confused. It's a long time ago.
11 Q. Right.
12 And the John Short trial was also a
13 defamation case?
14 A. Yes.
15 Q. Any other occasions?
16 A. I can't recall.
17 Q. Any other trials that you've participated in,
18 media-related trials?
19 A. No, I don't think so.
20 Q. What we're going to do this morning is I'm
21 going to ask you questions about the case. And I ask
22 that you listen carefully to my questions and answer to
23 the best of your ability.
24 Will you do that?
25 A. Yes.

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- 1 Q. All right. And if you don't hear one of my
2 questions, just tell me and I'll be happy to repeat it
3 or the court reporter can reread it for you. All
4 right?
5 A. Yes.
6 Q. If you don't understand one of my questions,
7 please tell me and we'll see if we can't make it more
8 clear. Is that acceptable?
9 A. Yes.
10 Q. And during the course of the deposition, I
11 will from time to time mark certain documents as
12 exhibits and I'll show you those and ask that you look
13 those over before answering.
14 Will you do that?
15 A. Yes.
16 Q. All right. Are you on any kind of
17 medications that would impair your ability to think
18 clearly or recall events?
19 A. No.
20 Q. If at any time during these proceedings you
21 want to take a break, get a drink, use the facilities,
22 stretch your legs, whatever, you just let us know and
23 you'll be welcome to do that. All right?
24 A. Yes.
25 MR. SULLIVAN: I'll ask the court reporter to

| | |
|--|--|
| <p>Page 9</p> <p>1 mark as -- I think the next exhibit is Defendant's 2 Exhibit 158. It's a multi-page document and it 3 appears to be a copy of the report that was 4 produced in this matter, your report. 5 THE WITNESS: Okay. 6 (Exhibit No. 158 marked for identification.) 7 BY MR. SULLIVAN: 8 Q. If you could, just take a moment and look 9 that over. I don't need you to read it, but just so 10 you understand what has been placed before you. 11 Let me see if I can save you time. Literally 12 I just want to -- so you can see what, okay, he's given 13 me a complete copy of my report. 14 What I'm going to do, Professor Foley, is 15 direct your attention to the last part of it. There's 16 like an attachment that gives your background, 17 professional and educational and what have you. 18 Have you had an opportunity to look over 19 Exhibit 158? 20 A. The exhibit? 21 Q. Yes, sir. 22 A. Okay. 23 Q. Do you see the last three pages of 24 Exhibit 158 starting with page 1 of that portion that's 25 titled Exhibit? Do you see that?</p> | <p>Page 11</p> <p>1 A. In 1999. 2 Q. It's a tad bit old. Do you have any kind of 3 more recent, like I say, kind of a traditional 4 presentation of your background? 5 MR. HARDER: Asked and answered. 6 THE WITNESS: I have a bio that I use for 7 various -- when I'm doing a public speaking job, 8 they'll ask for a bio like for introductory 9 purposes. But that's -- it's not a formal CV. 10 It's also on the college website. 11 BY MR. SULLIVAN: 12 Q. What I'm going to do then is kind of walk 13 through the information that's set forth here and see 14 if we can't kind of put it in a chronology, get some 15 dates, establish the order of things. Okay? 16 A. Uh-huh. (Indicates affirmatively.) 17 Q. All right. So I see here that you went to do 18 your undergraduate work at the University of Florida, 19 correct? 20 A. Correct. 21 Q. And when did you start at the University of 22 Florida? 23 A. 1968. 24 Q. And you received a degree from that 25 university?</p> |
| <p>Page 10</p> <p>1 A. Yes. 2 Q. And those last three pages, could you 3 identify that for the record, please? 4 A. I'm not sure I know what you mean. 5 Q. I just want -- so the record is clear what 6 we're looking at, I'll tell you what to me it looks 7 like. As I indicated, it looks like a summary of your 8 professional and educational background, those last 9 three pages. Is that fair? 10 A. That is correct. 11 Q. Okay. Super. 12 Now, it appears to me -- as I read it, it 13 appears to be kind of a general summary of your 14 education and work history. 15 Now, do you also -- in addition to that 16 document that's attached to your report, do you also 17 have a more what I will call traditional curriculum 18 vitae or resumé? 19 A. I have a resumé. I don't have an academic 20 CV. I have a regular resumé. 21 Q. Okay. Does that resumé give kind of a 22 chronological presentation of your work history and 23 educational background? 24 A. Yes. 25 Q. When was that resumé prepared?</p> | <p>Page 12</p> <p>1 A. I did. 2 Q. What year did you graduate? 3 A. 1970. 4 Q. 1970? 5 A. '70. 6 Q. Okay. So you graduated in two years? 7 A. I was a transfer student. 8 Q. I see. 9 Where did you go for your initial 10 undergraduate education? 11 A. University of South Florida. 12 Q. And when did you start there? 13 A. 1964. 14 Q. And how long did you study at the University 15 of South Florida? 16 A. I don't remember what the length of time was, 17 but two semesters. I don't know whether it was two 18 quarters, two trimesters. I can't remember. The state 19 was switching back and forth then. 20 Q. So did you complete your freshman year? 21 A. I did. 22 Q. And then where did you go for your sophomore 23 year? 24 A. The Clearwater branch of St. Petersburg 25 Junior College.</p> |

Q. And why did you leave the University of South Florida after one year?
 A. It was more expensive than junior college, and I had a girlfriend in Clearwater.
 Q. Okay. Tell me this. When did you start at the Clearwater branch?
 A. 19 -- I guess it would be the fall of '65.
 Q. And did you complete your sophomore year
 A. I did. I believe so.
 Q. So then what did you do after that?
 A. I went back to the University of South Florida, I believe in 1966.
 Q. And did you do your junior year there? How long did you spend there?
 A. In the meantime, I got married in 19 -- November of 1966. And I dropped out of school.
 Q. Okay. And what did you do while you were out
 A. I'm trying to think. I don't know if I dropped out that year or not. It may have been I dropped out in -- I'm starting to go fuzzy on that now. I was pretty good for a while. I know that after I dropped out in 1968, I got drafted.
 Q. This was not a good time to drop out, I take

A. It was the worst possible time.
 Q. So when you dropped out in '68, that was from which college?
 A. USF, University of South Florida.
 Q. And you got drafted?
 Q. And then what did you do?
 A. I was rejected for military service.
 Q. I take it medical issue.
 A. Blood pressure.
 Q. So then what did you do next then?
 A. Enrolled at the University of Florida.
 Q. You went back to University of Florida, okay. And then what year would you have been in your college
 A. I believe I was a junior, but it was kind of muddled because of all the transfers and changes in -- I think I was a junior for one semester or something
 Q. Let me ask you this. All along from the time you started college and you went to the different schools and what have you, were you pursuing a career in journalism?

Q. Did your majors change?
 A. It changed to journalism when I went to University of Florida.
 Q. What had it been before that?
 A. Math, psychology, maybe sociology. I can't
 Q. Okay. Now, when you came back to the University of Florida in 1968, you were focused on journalism?
 Q. And did you have to declare a major at that
 Q. Is there a specific journalism school, a formal journalism school?
 A. The college of journalism. At that time it was the school of journalism.
 Q. Okay. All right. And then you told us that you graduated in 1970.
 Q. What was your degree in?
 A. Bachelor of Science in journalism.
 Q. All right. Now, upon your graduation, did

you immediately -- I notice here that you at some point got a Master's. Did you immediately go into the Master's program?
 A. No. I got my Master's in 2004.
 Q. All right. And you got your Master's at
 Q. All right. Let's do this then. While we're on education, let's just wrap up your education. You obtained a Master's, as I understand it. The Master's, was it in journalism?
 A. Mass communication.
 Q. Mass communication.
 Is it not possible to get a Master's in
 A. That's what it was called, Master of Arts in mass communication.
 Q. And when did you receive that, did you say?
 A. 2004, I believe.
 Q. All right. And tell me this. Why at that point in 2004 did you decide to seek a Master's degree?
 A. It was essential to be put on the faculty.
 Q. At the University of Florida?
 A. That is correct.
 Q. Now, do you have a doctoral degree?

Q. I noticed in your -- the exhibit here that gives your professional and educational background, it refers to a degree. I guess that's an honorary

Q. Is that truly, as the name would suggest, an honorary kind of thing?

A. I gave the commencement speech for Tampa

Q. And then they gave you an honorary Ph.D.?

A. That's correct.

Q. All right. Professor Foley, in the course of your studies when you were pursuing journalism studies, did you ever take any courses in law?

A. I can't remember the exact name of it, but a requirement for graduation in the Bachelor's degree was law of mass communication.

Q. And was that kind of a general survey level course touching on kind of the law generally as it applies to media?

A. Yes. It had history and legal process, the

Q. And did it touch on a variety of areas? For example, for students that were going to pursue

journalistic careers in broadcasting, did it touch on

A. A little, yes. It's a long time ago.

Q. Right. Fair enough.

For students that were going to pursue public relations, that end of the media, did it touch on like advertising law and things like that?

A. I think as it pertained to these significant

Q. Okay. All right. Then did it touch on what I would call your kind of core areas of defamation, invasion of privacy, prior restraint, things like that?

Q. All right. Now, since then, perhaps when you were pursuing your Master's, did you take any courses in just media law?

A. I don't think so.

Q. All right. What I'd like to do now is kind of shift gears and focus on your history as a professional journalist, the work history part of that portion of the document. All right?

Q. What was your first job as a working

A. I was a reporter for the Evening Independent.

Q. And what -- I'm not real familiar with the papers at the time. What was the Evening Independent and what was its area?

A. The Evening Independent was the afternoon newspaper owned by the Times Publishing Company that covered local news primarily.

Q. And did the Times Publishing own a morning

A. It also owned the St. Petersburg Times.

Q. And that was the morning paper?

A. That is correct.

Q. All right. What year did you begin as a reporter for the Evening Independent?

Q. And were you a beat reporter?

A. I was a general assignment reporter for less than six months. Then I was assigned to beat.

Q. And what was your beat?

A. It was covering the cities of Pinellas Park and Kenneth City.

Q. What was the second one?

A. Kenneth City.

Q. Kenneth. Thank you.

And what type of reporting did you do there, just general municipality coverage?

Q. City government?

A. City government.

Q. Police matters?

A. Not so much police, but city government

Q. All right. And how long did you do that?

A. I'm going to say eight months, but that's an approximation.

Q. Okay. And then what was the next position

A. I became beat reporter for the St. Petersburg city government.

Q. For the same paper?

Q. I take it that was a promotion.

Q. And how long did you hold that position?

A. I'm going to approximate again. A couple of

Q. Was your title during this period just beat

Q. And then what was the next position you held?

A. Assistant city editor.

Q. Professor Foley, when would you have become the assistant city editor?

A. Wow, that goes way back. Maybe 1973, '74.

Q. Let me ask you this. During the time that you were a reporter, did you -- were you sued for any kind of -- any claims lodged against you, legal claims?

MR. HARDER: Objection to the term "you."

MR. SULLIVAN: I do mean him personally.

MR. HARDER: Okay.

THE WITNESS: No, not that I can recall.

BY MR. SULLIVAN:

Q. And then following up on Mr. Harder's point, was the paper sued for any of your reporting?

A. For my reporting?

Q. Now, I'm going to move over to the work you did as an editor in just a minute, but before we move on, I'd like to ask you this.

Did you receive any professional awards as a result of your work as a reporter?

A. I was named the staff writer of the year at the Evening Independent for the year 1971.

Q. Now, as I mentioned a moment ago, I would like to kind of shift our focus and look at and talk about your work serving in an editorial role. Okay?

Q. Now, you mentioned that in 1973, you were promoted to assistant city editor. How did that come

A. The Evening Independent had not had an assistant city editor and the city editor needed help, and I was given that job. I filled a position that had not existed prior to that.

Q. So it was a new position?

A. I think it was a new position. If not, it was a re-upping of an old position that had not been in existence in my time at the paper.

Q. I take it that was viewed as a promotion.

Q. Were you happy to move into that new role?

Q. The reason I'm asking is because some reporters just want to stay as reporters. The last thing they want to be is an editor. You know what I

Q. Any other professional awards?

A. Not that I can recall.

Q. Did you win any -- now I'm expanding to your entire career as a working journalist. Did you receive any professional awards as a result of your work as a

A. Several -- well, let me make sure. One as a professional journalist.

Q. And what was that?

A. Wait, I take it back. I take that back. I'm sorry. I'm confusing things here. No, I did not.

Q. All right.

A. I don't know if this counts. I was named distinguished alumnus of the University of Florida while I was at the newspaper in 1994.

Q. And was that in recognition of your work as a journalist or your -- I'm sorry.

A. At least in part certainly. It was in relation to my achievements, I believe, at the St. Petersburg Times.

Q. Rather than for recognition of your standing in the community or something like that?

A. I believe I was a corporate vice president at the time I got that award.

Q. Were you ever nominated for a Pulitzer Prize?

Q. All right. Now, just so I'm clear, that is still at the Evening Independent?

Q. And then what were your duties in this new

A. I would edit copy, discuss with the city editor story ideas, help plan coverage, help evaluate

I have a frog in my throat. Sorry.

Q. And how old were you at the time?

A. 1973 -- I started at the Independent when I was 24. So I was about 27 or 28.

Q. Professor, how long did you hold that

A. Maybe a year.

Q. And then what happened?

A. I became an assistant metro editor at the St. Petersburg Times.

Q. And that would have been roughly when?

Q. Okay. Again, I take it that was -- you viewed that as a promotion.

Q. And then what were your duties as an assistant metro editor?

A. I worked nights, weekends, holidays. I was in charge of coverage when the other editor -- when the metro editor and others went home. On weekends I was in charge of the coverage, local coverage.

Q. Now, in that position, I take it that was full-time editing. You weren't also reporting. You didn't have some limited beat that you were trying to cover, did you?

A. No, I did not.

Q. When you served in that capacity as assistant metro editor at the St. Petersburg Times, any of -- were you involved in any legal claims that were asserted against the paper for stories that you had a

MR. HARDER: Just let me object. Vague and ambiguous on "had a hand in."

BY MR. SULLIVAN:

Q. Do you know what I mean by that?

A. I don't know what you mean. I know what I

Q. You tell me what you mean.

A. Being sued for stories that I edited or assigned or handled.

A. I don't recall any. I don't recall any.

Q. All right. Now, what -- how long did you hold that position, assistant metro editor?

A. I truly don't recall.

Q. Okay. Do you have -- can you give us a rough sense? Are we talking a few months or years?

A. No. It was at least -- at least a year and

Q. All right. What was your next position at

A. City editor.

Q. And when were you -- when did you become city

A. I truly cannot recall the exact years, but it would be mid to -- '76, '77, something like that.

Q. That's helpful. I'm just trying to get a sense of how this developed.

A. That's fine. I haven't thought about this for a long time.

Now, how did you come to become the city

A. I think I did a very good job as assistant

Q. So I take it that, too, was a promotion.

Q. Once you moved into the city editor position, what were your duties in that capacity?

A. I was in charge of the day Times shift. I would make sure the reporters were assigned coverage, that events were covered, that the staff was working on stories. I edited -- I did the first edit on a number of stories. I worked Monday through Friday.

Q. I take it that beats nights and weekends.

A. And holidays. I was involved in some projects, too, you know, special projects, bigger

Q. Would these be -- when you say projects or bigger stories, are you referring to like investigative

A. Not so much investigative, but you have minor investigations, smaller investigations, and series of stories, longer term projects.

Q. Any other duties you had in that position?

A. I did the schedules for the reporters. I interviewed potential job candidates. I would

Q. So I take it in that capacity, you also had or undertook kind of a management role at the paper.

Q. Given that, I take it by the same token, you weren't reporting, hands-on reporting; you weren't doing -- you didn't have some limited beat that you were responsible --

Q. -- for? Okay.

MR. HARDER: Let him finish the question and then answer, because otherwise, she's typing part of a question, answer, rest of the question.

THE WITNESS: Sorry.

MR. SULLIVAN: Thanks.

BY MR. SULLIVAN:

Q. All right. Now, how long did you serve as the city editor?

A. About five years.

Q. So that would take us up to the early '80s?

Q. And just so we're clear, all of these roles, you were city editor for the St. Petersburg Times?

Q. You never -- just so we know and we don't have to keep going over it, you never went back to the Evening Times at some point?

A. Evening Independent, no.

Q. Sorry. Evening Independent. Okay. Great.

All right. So what was your next position then with the paper?

A. I believe I was metro editor.

Q. And was that a promotion as well?

Q. What is the difference between -- if you can just explain for us, what's the difference between what you did as city editor and what you did as metro

A. City editor primarily was responsible for St. Petersburg and southern Pinellas County. Metro editor took on some of the responsibility for the various news bureaus in outlying areas.

Q. So it was a larger scope of responsibility?

Q. And then what did you do when you served in

A. The city editor reported to me. I honestly can't recall how much -- I know that I dealt with the entire local news report, and that included bureaus in Clearwater, Pasco, Hernando, and some Citrus County.

Q. And how long did you serve as metro editor?

A. I'm going to guess. Maybe two years or so.

Q. So that takes us to the mid 1980s?

A. I believe so. Maybe earlier than that. I'm

a style section?

Q. It would touch on movies perhaps, entertainment matters?

A. Entertainment, fashion, advice.

Q. Okay. And anything else that was within your -- the scope of your duties?

A. Photos, illustrations.

Q. All right. Anything else?

A. Well, you know, I was responsible for the staff evaluations, critiques.

Q. So you had a management role as well?

Q. Okay. And then did you say you held that position for about a year?

Q. And let me just ask you this. In any of these positions that you held as an editor from the first one, which I asked you about subsequent to that, any lawsuits in which you were involved because of your

Q. Then what was the next position you held at

A. I was named managing editor.

fuzzy on the math.

Q. I may have mis-added. Maybe like 1983?

A. Early '80s, I believe.

Q. All right. So what -- I take it you advanced yet again at the paper.

Q. Okay. And what was your new position?

A. I took over the features department of the paper, the news features department, and was promoted to assistant managing editor.

Q. And how long did you hold that position?

Q. So does that now take us to the mid '80s?

A. Probably 1984.

Q. All right. What were your duties as the assistant managing editor and the person in charge of the features department?

A. I was in charge of Section D of the paper, which was a features section that had a staff of writers, copy editors, designers, plus our food section, our weekly food section, other special

Q. Professor Foley, when you say features, and you gave food as an example, is this -- would this be what some metropolitan papers would refer to as kind of

Q. And that was another promotion?

Q. How long did you serve as managing editor?

A. I think it was seven or eight years. The math is really getting fuzzy now.

Q. I think now by my calculations you're about 98 years old. I'm just kidding you.

Let me ask you this. So you were managing editor roughly seven or eight years?

A. (Indicates affirmatively.)

Q. What were your duties as the managing editor?

A. I reported to the editor. I was in charge of everything in the paper except the ads and the

Q. So you had responsibility for the complete news side; is that correct?

A. News, features, photos, illustrations --

A. -- correspondence, sports, budgets.

Q. All right. Any other duties when you served in that capacity?

A. I was a member of a couple -- I represented the paper to the Associated Press Managing Editors Association and the American Society of Newspaper

Q. So you were the rep for ASNE?

A. ASNE, APME.

Q. In all seriousness, I think the years are a little off because that would take us up to like '92 or

A. The years are off. We can work back, because after that I became executive editor.

Q. Okay. Fair enough.

Your next position then was executive editor?

Q. At the St. Petersburg Times?

Q. And do you know when that happened?

A. I believe that was through '92.

Q. When did you become --

A. It would have been '90. So we would have to work back and redo the math. Sorry.

Q. We can figure it back. So 1990, you became executive editor?

A. I believe that's correct.

Q. And if you could, explain to us what your duties were in that capacity.

A. About the same except that we had a managing editor who reported to me.

Q. Any other duties that you held in that

Q. And who then took your position as executive

A. I don't remember.

Q. I'll see if -- I saw some kind of a little news blurb that indicated that a Paul Tash -- does that refresh your recollection?

A. I believe he eventually became executive editor. I don't know if it was right away.

Q. He might have not stepped right into the

A. (Indicates affirmatively.)

Q. Okay. Now, if you could, what was your new

A. I was director of I believe either community affairs or community relations.

Q. And that took place in 1992?

Q. What were your duties in that capacity?

A. I was the face of the newspaper, of the Times Publishing Company. I was in the community. I served on various boards in the community. I represented the paper at functions. I did a lot of public speaking explaining the newspaper and what journalism is to various groups. I was in charge of all the trademarks, logos. I was in charge of community events that we

A. At some point I was appointed to the board of directors of the Times Publishing Company.

Q. Do you remember when that was?

A. 1988 perhaps.

Q. And then how long did you serve as executive

A. Two years.

Q. Two years.

What happened at the end of the two years?

A. I moved from the news department to the corporate side of the paper.

Q. Now, did you seek to move to the corporate

A. It's a difficult question because I made it clear to the boss, the editor of the paper and CEO, that I did not want to be the CEO.

Q. Had you been asked to be the CEO?

A. No. And that's what -- this is fuzzy because I recall the conversation something along the lines of I like being number two.

Q. Who was that conversation with?

A. Andrew Barnes. I believe he was editor and president at the time, or he was CEO. I can't remember

sponsored. I was in charge of promotion of community events that we sponsored. I oversaw the Times scholarship and grants program. And I was still on the board of directors.

Q. All right. You indicated that you represented the paper at functions. What kind of

A. I emceed a lot of charity events.

Q. In your report, you indicated that you were in charge of corporate giving.

Q. Is that money the paper would contribute to local charities, things like that?

Q. I take it from the broad scope of those duties that this was not a substantive news role. Is

A. It was not -- there was no news role at all.

A. Except, as I said, to explain to the public what we did and why we did it.

Q. Okay. So no reporting involved at all?

Q. No editing involved at all?

A. No. I was the official spokesman for the

paper, for the Times Publishing Company.

Q. When you say spokesman, if somebody wanted to get a quote for a story another paper were reporting and the Times were somehow involved, would you be the person they would come to?

Q. Let me ask you this. Did you miss being on

A. I think the first hurricane, I missed the action. After that I got fully into this role. I became a corporate vice president after that in terms of community affairs, community relations. I can't remember which. Or maybe both at one time or at separate occasions.

Q. And how long did you serve as director of community relations?

A. I think that was about maybe a year. Then I was named the vice president.

Q. Okay. So then after that your title would have been vice president?

A. Uh-huh. (Indicates affirmatively.)

Q. In charge of what?

A. Same thing. It was the same role, but

Q. Vice president in charge of community

A. A marketing person was brought in, I believe. I can't remember. Again, this is some time ago and, again, it's fuzzy. They wanted more of a marketing expertise and I didn't have a lot of marketing

Q. So the marketing person took over that portion of your duties?

A. Took over the department.

Q. Okay. When you moved back to become director of community affairs and spokesman, did you view that

Q. Let me ask you this. Did they cut your compensation?

Q. And then what were your -- when did -- you

Q. What were your duties in that new position?

A. Similar to the old position. I was still spokesman for the paper. I had a hand in events and giving away money, scholarships.

Q. All right. And then how long did you serve in that capacity?

A. Until September 1999.

A. Or community affairs. Again, as I said, the titles had changed. I don't remember which was which.

Q. All right. When you moved into that position, did your duties change?

A. I don't believe so. I had a full staff of event planners and other things. We did events and gave grants and scholarships throughout our entire

I also was the moderator for our monthly company forums. We would do one in the downtown office for the staff and then we would do one in each of the bureaus. This would bring together executives of the paper to talk to -- interact with the staff and report on finances and everything like that.

I also -- excuse me. One other thing. I was in charge of sponsorships when we became the sponsor of, say, the baseball team and the hockey team.

Q. Now, how long did you serve as vice president of community relations or community affairs?

A. I think that went until 1997 or '8.

Q. And then what did you do?

A. Then I went back to being director of I think community affairs and spokesman.

Q. And how did that come about?

Q. And what did you do in September 1999?

A. I left the paper.

Q. Were you asked to leave?

A. My job was eliminated.

Q. All right. Who on behalf of the paper were you dealing with at that point?

A. I don't remember his title, but he was the marketing kind of expert who was brought in. He was acting at the -- at the -- what's the word? At the request of the publisher.

Q. Okay. When they eliminated your job, did they offer you any other position on that community relations side of the operation?

Q. Did they offer you an opportunity to go back over to the news side where you had worked for many

A. I don't think so, no.

Q. Did you at any point request to go back over

Q. -- the news side?

MR. HARDER: Wait for him to finish the

THE WITNESS: Sorry.

BY MR. SULLIVAN:

Q. So, Professor, what did you do then?

A. Put together my resumé.

MR. HARDER: 1999, that's it.

THE WITNESS: I spent several months meeting with various contacts in the community that I had made over the years. I had a year's worth of professional employment counseling paid for by the Times Publishing Company.

BY MR. SULLIVAN:

Q. Is that designed to help you find a new

A. That's correct.

Q. Did you avail yourself of that?

A. I spent a year looking -- I had a number of consulting jobs as a -- public relations consulting, one or two for a year. And then I was contacted by the journalism department chair at the University of

Q. Did you -- during that period when you were doing the professional employment counseling, did you consider going back into the news side perhaps with another paper?

A. I would have considered it, but it just didn't happen. The Times was the Times.

week and let's give it a try. I did that for three and a half years. I would drive up on Tuesday morning, drive back on Thursday night.

Q. So you left the paper in 1999, and you took a year and looked into -- explored other options?

A. Uh-huh. (Indicates affirmatively.)

Q. And then would it have been in 2000 that you started teaching?

A. It was the spring of 2001.

Q. And that was when you were doing the -- where you would go up for two days --

A. That's correct.

Q. -- stay at his house, teach the class?

Q. How many classes were you teaching?

Q. Which two classes?

A. Two sections of reporting, the reporting

Q. I'd like to go into a little more detail on the teaching, but I just wanted to wrap up our discussion of your career in journalism. All right?

As I tally this, it looks like you spent your entire career as a journalist, about 22 years, in newspapers, correct?

Q. I'm not following you, if you mean the times being our times generally or the Times, the paper?

A. The St. Petersburg Times is one of the best newspapers in America. Time magazine called it one of the top ten. And I just didn't have that kind of desire anymore.

Q. Just before we move into your work as a professor, did you consider being involved in any other kinds of publishing, for example, giving your -- giving a shot at magazine publishing or something like that?

A. I don't recall I did.

Q. All right. So you were contacted by the department chair for the journalism department at the University of Florida. And what -- how did that go?

A. I knew him for quite some time. I had been on the advisory council of the journalism department for maybe 20 years, and I had hired him during breaks in the school year. He was a very skilled copy editor. So he called me and asked me if I would be interested

Q. And what did you say?

A. I said I'd like to give it a try. However, I lived in St. Petersburg and Gainesville is 155 miles away. He said, you can stay at my house two nights a

A. A total of 29 plus at the newspapers.

A. 1970 to 1999.

Q. Right. That's fair.

But as an actual practicing journalist, it

A. 22 years.

Q. -- 22 years.

Q. And that 22 years as a practicing journalist would have been in print journalism?

Q. In other words, newspaper journalism?

A. I did do appearances and for a while a small spot on a weekly TV show that we sponsored.

Q. All right. As of 1992, you were out of the newsroom, correct?

Q. Okay. And you never worked on a magazine,

A. In what time period?

Q. During the period up to the year 2000.

A. When I was managing editor, we started a weekly entertainment magazine that I was one of the

Q. Okay. And what was your role?

A. I would oversee it. But with the editor of that magazine, we decided what it would be and I critiqued it on a regular basis.

Q. Okay. Did you serve as one of the editors of the magazine?

A. Direct editor, no.

Q. Okay. Did you ever write for the magazine?

A. I don't believe so.

Q. Okay. And during your period working with the St. Petersburg Times, I take it you didn't work in online publishing.

A. I don't believe so.

Q. Have you ever worked for a web-based

Q. Professor Foley, what online publications do you read on a regular basis?

A. I read all my newspapers online.

Q. In other words, I take it what you're telling me is -- I think I saw somewhere in your report that you read, for example, the New York Times.

A. The St. Petersburg Times, the Gainesville Sun, U.S.A. Today.

Q. You indicated that you read those on your

days. What happened after that?

A. After a year of teaching those two courses, I was named course director. In addition to doing the two writing labs, I oversaw all the other labs. There were -- depending on the semester, they varied from ten to eight, ten in the fall, eight in the spring and five in the summer. Then I did the two writing labs, but I also did the lecture in the course that all of the lab students attended.

Q. What was that course called?

A. Reporting, news reporting.

Q. Is that what is referred to in your report there as basic reporting?

A. That is correct.

Q. Then I saw that you also referred to advanced

A. I started that class when I joined the

Q. When did you join the faculty?

A. I joined the faculty before I got my Master's degree with the condition that I get my Master's degree. So I think it was 2003 that I became a master

Q. And what does the advanced reporting course

Q. Okay. Do you read any what I will call specialty online publishers or people that are only online, blog, folks like that?

A. From time to time, yes.

Q. To give you a concrete example, the Huffington Post, do you read that?

A. From time to time.

Q. I take it you don't follow it on a daily

A. I guess I look at something every day online.

Q. How about something like Talking Points Memo, do you read that?

A. (Indicates negatively.)

Q. Do you read like Buzz Feed?

Q. Again, from time to time you look at that?

A. (Indicates affirmatively.)

MR. HARDER: You have to answer with words.

THE WITNESS: Yes.

BY MR. SULLIVAN:

Q. Okay. Now, going back to your career as an educator, you indicated that three and a half years you did the thing where you went up and taught the two

A. It's a senior level capstone course. All students are required to take one capstone course to fulfill their degree requirements. And this consists of in-depth writing. I don't grade papers. I edit them. And they are rewritten until I'm satisfied.

Q. And then you indicated in your report that you teach basic media law in your basic reporting

A. I have a lecture I do on media law.

Q. And what --

A. I teach actually two lectures, one on libel and one on ethics.

Q. All right. So do you -- you teach libel. You do one class on libel?

A. One lecture on libel.

Q. Do you teach a class on invasion of privacy?

A. It's part of the ethics class.

A. The ethics lecture.

Q. So the ethics is journalism ethics?

Q. And you include privacy in that?

Q. Do you include -- is this legal privacy? Are you telling students about the law of privacy, or are

you telling students about the concept of being sensitive to people's privacy interests?

A. I'm not a lawyer. We do have two lawyers on the faculty and they teach a course in law of the press. And another course is taught in ethics. Mine is just -- it's to give the students an awareness of the fact that these things exist and that journalists adhere to these principles.

Q. Okay. When you say these things exist, what things are you talking about?

A. Invasion of privacy, freebies. The other escapes me right now, but it's a number of things that they need to be aware of before they move on and as they're writing stories for publication.

Q. Do you cover the subject of misappropriation? And what I mean by that is, do you talk to these students about taking somebody's photograph, for example, and putting it on an advertisement for somebody's Internet service, things like that?

A. We have photo courses that they take that talk about that. But, yeah, I talk about -- I'm not sure I understand the question.

Q. That's fair. That wasn't the best question.

Let me see. The people that are in your class are true folks hoping to be working journalists,

I take it. This is a reporting class?

A. The reporting class is required of all journalism, public relations and now, as of last summer, all television -- we call it telecom and radio

Q. Then I misunderstood. I figured it was just students that wanted to be reporters and that wouldn't have the public relations people involved.

A. Public relations. And these are students who write for the student newspaper, for a newly-formed public relations and advertising agency that we are starting, that write for a website that we have on a

Q. All right.

MR. HARDER: Mike, I just want to mention, we've been going for about an hour and 15 minutes, so whenever you think would be a good time for a

MR. SULLIVAN: Let me see. I'll tell you what. I can probably in five or ten minutes get through the rest of this stuff on the teaching and then -- but if you want a break now, I'm happy to

MR. HARDER: I usually break every hour just so that we don't feel like it's an endurance test.

MR. SULLIVAN: Sure. I gotcha. I'm happy to

MR. HARDER: Okay.

(Recess taken from 11:13 a.m. to 11:22 a.m.)

BY MR. SULLIVAN:

Q. Professor, I just wanted to clear up one thing. When you started teaching in 2001, I think you said you handled two sections of reporting labs.

A. That's correct.

Q. How many students would be in each of those labs, just roughly?

Q. Okay. And then if I understood correctly, at some point when you went on the faculty, you became the course director and you would have supervised all of the folks teaching labs.

A. I became course director a year after I started in 2002. The --

Q. Okay. In that capacity, did the individuals who were doing the separate individual labs, did they then report to you?

Q. Did you -- as course director, were you the person responsible for lecturing to all of the

Q. And so if we took all the labs together, how many were in the basic reporting course altogether?

A. It varied from semester to semester, but the usual amount in those early days was 220 in the fall, 200 in the spring, and 80 to 100 in the summer.

Q. All right. Now, going back to when you were teaching basic reporting and when you were the course director, that period, what textbook did you use?

A. At first, I used Melvin Mencher's News Reporting and Writing.

Q. How do you spell his last name?

A. M-e-n-c-h-e-r, I believe. He's a professor emeritus at Columbia University.

A. And I also used the Associated Press Style Book. That was required. I also recommended When Words Collide. It's basic grammar and punctuation and such. I can't remember when I started recommending a dictionary, but that was part of it. That's the early days. Later, after I got my Master's degree, I required a course pack that consisted of my Master's project as part of it.

Q. What do you mean by a course pack?

A. It's something that -- you gather up material

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1 from various sources. It would include the course --
2 it's a bound book, paperback, eight and half by 11.

3 Q. Like Xerox -- like photocopied materials?

4 A. I think it -- I have a bookstore there that
5 does that for me. But it consists of the course
6 calendar, the required readings -- it's a syllabus
7 essentially -- some other various things on advice on
8 gathering news, dos and don'ts, how to get at the
9 truth, commonly misspelled words, one page of the most
10 used AP style notes, a thing called Sorcery on How to
11 Get People to Tell the Truth. And the bulk of it is my
12 Master's project.

13 Q. What was your Master's project?

14 A. It was a series of interviews with six people
15 who win -- or five of the people anyway who won the
16 Hearst College Writing Contest, which is considered the
17 Pulitzers of college writing. And then I added a sixth
18 writer because I just liked her story. But what the
19 purpose of it was -- it's called How I Got That Story.
20 In my early days of teaching, the students would say,
21 you keep using these examples from writers who are
22 older, won Pulitzers, how can I possibly do that? So
23 instead I got these writers who had won the Hearst
24 contest years ago and published their story that they
25 won when they were in college, when they were 20

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1 something years old. And then I did an interview with
2 each in depth on their early career, advice they would
3 give young journalists, how they won the Hearst
4 contest. And the students read those stories and the
5 interviews as part of it. They really seem to like it.

6 Q. Okay. So that is -- that is a set of
7 materials prepared, bound, eight and a half by 11 --

8 A. Yes.

9 Q. -- that is sold by the bookstore?

10 A. It is sold by the Florida bookstore.

11 Q. Now, do you still also require the other
12 materials that you mentioned to us when you were --
13 before you got your Master's?

14 A. I switched the first year that a book called
15 Inside Reporting came out by -- Harrower is the author.
16 I can't recall his name right this second -- which I
17 believe is still the best reporting textbook I've ever
18 seen.

19 Q. It's called Inside Reporting?

20 A. Inside Reporting.

21 Tim Harrower, H-a-r-r-o-w-e-r. I recommend
22 that.

23 Q. Any other texts?

24 A. Inside Reporting. When Words Collide I
25 recommend. AP Style Book is required. My course pack

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1 is required. And a dictionary. They need access to a
2 dictionary, the official AP dictionary, which is I
3 think Oxford Collegiate, fourth edition. And a daily
4 newspaper.

5 Q. Now, what textbook do you use to address the
6 media law topics?

7 A. That's in Inside Reporting. It has a section
8 on media law.

9 Q. I got you. Okay.

10 And then you indicated that you'll do a class
11 on defamation. You do a class on privacy concerns.

12 A. One -- I do all the ethics in one class and
13 the libel in another class, because we have courses in
14 those disciplines, full semester courses.

15 Q. Now, are you a tenured professor?

16 A. No.

17 Q. Are you on what they call a tenure track?

18 A. No.

19 Q. Are you on like an annual contract?

20 A. I guess. I'm not sure. I haven't signed a
21 contract in a long time. It renews itself from year to
22 year.

23 Q. Are you considered an adjunct professor?

24 A. No. I'm a full faculty member.

25 Q. What does that mean?

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1 A. I'm a master lecturer. I was hired as a
2 master lecturer. There are three levels of lecturer,
3 lecturer, senior lecturer, and master lecturer. It's
4 similar to the professor levels, associate, assistant,
5 and full.

6 Q. Okay. And then in that capacity, are you
7 compensated like a set sum, or are you compensated
8 based upon how many courses you teach?

9 A. No. I have a set salary.

10 Q. Okay. Got you. Okay.

11 A. It's a nine-month contract. I get paid extra
12 when I teach during the summer.

13 Q. I'd like to shift gears for a minute and
14 focus on writings that you've done as a professor.

15 You explained to us the work that you did for
16 your Master's thesis which has now been included in the
17 course materials. Have you published other things
18 during your time as a journalism professor?

19 A. No.

20 Q. Professor Foley, do you have a publications
21 list of any sort that shows writings over the -- your
22 years as a journalist and now as a professor?

23 A. No. It's not a job requirement. That's the
24 difference between a lecturer -- a master lecturer and
25 a tenured professor. They do research. I do two of

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1 the three duties of professors. I do teaching. I have
2 a large teaching load. And I do service. A tenured
3 professor would do teaching, serve -- less teaching
4 load, service, and research.

5 Q. When you say service, can you explain to us
6 what you mean by that?

7 A. Serve as marshals at -- it ranges from
8 serving as marshals at graduation to attending
9 conferences, representing -- conferences making
10 speeches to various organizations, advising student
11 organizations, advising the student newspaper. It's
12 different for every professor.

13 Q. The things that you've just named for us,
14 those are the things that you do?

15 A. I'm the advisor to the Society of
16 Professional Journalists chapter. I'm the unofficial
17 advisor to the Independent Florida Alligator, the
18 student newspaper. I speak to various groups,
19 community groups. I serve on panels. I'll moderate a
20 discussion next week for the -- our advisory council's
21 in town and I get a group of students together and I
22 moderate a discussion. I represent the Speakers Bureau
23 for the university. When they bring a speaker into
24 town who doesn't want to make a speech but will appear,
25 I will interview them on stage. I have moderated a

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1 high level of panels. I did one on the future of
2 education participated in by the president of the
3 university and the head of one of the large online
4 education services and the president of Santa Fe
5 Community College. I did a panel on -- I moderated a
6 panel involving the provost of the university and two
7 other distinguished professors on what is scholarship.

8 Q. I believe I understand what you told me about
9 the publication and academic publishing and the
10 difference with tenured professors and master
11 lecturers.

12 The other part of my question is focused on,
13 do you do other kinds of writing? For lack of a better
14 description, I'll say like popular writing. Do you
15 publish articles, guest editorials in the
16 St. Petersburg Times or --

17 A. No.

18 Q. -- that kind of writing, if you know what I
19 mean?

20 A. No.

21 Q. Okay. Do you -- are you a blog writer? Do
22 you publish a blog on a regular basis?

23 A. No.

24 Q. Any other kind of nontechnical academic
25 writing that you might do?

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1 A. No.

2 Q. Any reporting work that you do since you've
3 gone to the University of Florida?

4 A. No.

5 Q. And what I mean there is, you know, like have
6 you engaged in some reporting project with a colleague,
7 you did the reporting, but you're not writing up the
8 article, and then you funnel your work product to
9 others, things of that nature?

10 A. No.

11 Q. All right. Last thing on the teaching, have
12 you ever taught a course in media law at the University
13 of Florida?

14 A. Media law, no.

15 Q. I take it from what you said earlier, you
16 indicated to us -- you said, I'm not a lawyer.

17 Would you consider yourself qualified to
18 teach media law if they asked you?

19 MR. HARDER: Let me object. It calls for
20 speculation. It's vague and ambiguous.

21 Go ahead and answer.

22 THE WITNESS: I think I could, but -- I think
23 I could, yes.

24 BY MR. SULLIVAN:

25 Q. Do you consider yourself an expert in media

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1 law?

2 A. No.

3 Q. Okay. What I'd like to do now is shift our
4 focus and talk to you just a little bit about your work
5 as an expert witness. All right?

6 When did you first serve as an expert
7 witness?

8 A. I can't remember the year, but it involved
9 the New York Times and the Gainesville Sun.

10 Q. What was the -- what was the cause of action
11 in that case?

12 A. The developers of a local shopping center
13 were suing the Gainesville Sun, which was owned by the
14 New York Times, over several articles and the use of
15 certain words in the articles.

16 Q. Do you remember what the words were?

17 A. They were about to develop another phase of
18 the shopping center, and some of the words were
19 "massive," "super size." I think there was a third
20 one, but I can't remember.

21 Q. I take it from this, then, that it was a
22 defamation case?

23 A. It was a defamation case.

24 Q. Okay. Now, let me ask you this. Did you
25 serve as an expert when you were still at the paper, or

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- 1 is this after you left the paper?
 2 A. This is after I left.
 3 Q. And were you working as a master lecturer at
 4 the time?
 5 A. I can't remember. I think so, but I can't
 6 remember.
 7 Q. Which party retained you?
 8 A. The defense.
 9 Q. And did you prepare an expert report in that
 10 case?
 11 A. No.
 12 Q. Did you provide any sworn testimony in the
 13 case?
 14 A. No.
 15 Q. And just so we're clear, when I say sworn
 16 testimony, I mean by affidavit, sworn declaration,
 17 deposition, any of that.
 18 A. No.
 19 Q. Did you testify in the case?
 20 A. No.
 21 Q. And how was that case resolved?
 22 A. I think it was dismissed.
 23 Q. On a motion?
 24 A. I think.
 25 Q. Professor, if you could, describe for us the

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- 1 extent of your work on the case.
 2 A. I was consulted by the legal team. We talked
 3 quite a bit about it. I read voluminous material. I
 4 watched the videos -- the video depositions of the
 5 experts for the other side.
 6 Q. All right. And who were you working with?
 7 A. Thomas, Gregg Thomas.
 8 Q. All right. Because I noticed in your report
 9 at the very end of the report, you indicated that you
 10 had had two occasions, I guess, when you worked with
 11 Gregg's firm.
 12 A. Correct.
 13 Q. So this was one of those occasions?
 14 A. It was.
 15 Q. Okay. Can you -- strike that.
 16 Are there any other cases where you served as
 17 an expert witness?
 18 A. Another one with Gregg. I honestly don't
 19 recall what it was about, because it didn't seem to
 20 last very long.
 21 Q. What was the publication that was being sued
 22 I take it?
 23 A. I don't even remember that.
 24 Q. Was it -- was defamation the tort at issue?
 25 A. I believe that was the case, yes.

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- 1 Q. Was that case that you're talking about now,
 2 was it before or after the Gainesville Sun case?
 3 A. I think the Gainesville Sun was the first.
 4 Q. Can you tell us approximately when that
 5 second case would have been?
 6 A. I would be guessing. I really don't
 7 remember.
 8 Q. Okay. Did you prepare an expert report?
 9 A. No.
 10 Q. Did you provide any sworn testimony in the
 11 case?
 12 A. No.
 13 Q. Again, just so we're clear, I mean by
 14 affidavit, sworn declaration, or giving a deposition.
 15 A. No.
 16 Q. I take it from your answers, then, that -- I
 17 think I know the answer to this, but you did not
 18 testify at trial; is that correct?
 19 A. That's correct.
 20 Q. How was that case resolved?
 21 A. I don't remember. I think it was dismissed,
 22 but you can ask Gregg.
 23 Q. Let me ask you this. What was the extent of
 24 your work on that case?
 25 A. I think it was also reading material. In my

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- 1 recollection, that doesn't seem to have lasted very
 2 long.
 3 Q. Any other -- anything else you recall about
 4 that assignment?
 5 A. I remember meeting in downtown Tampa with
 6 another lawyer, whom I can't remember, and Gregg.
 7 Q. Any other instances where you served as an
 8 expert witness?
 9 A. I got a phone call from a lawyer in North
 10 Florida who I think had been referred to me by Gregg.
 11 I believe it was a false light case, but that just went
 12 away before anything happened. I didn't do anything.
 13 I didn't even bill.
 14 Q. So that really didn't go anywhere?
 15 A. No.
 16 Q. Any other instances?
 17 A. Not that I can recall.
 18 Q. So just so the record's clear, I take it
 19 you've never been qualified as a journalism expert in a
 20 case; is that correct?
 21 A. What does that mean?
 22 Q. To be qualified, you would actually appear at
 23 the trial, you would be offered as an expert witness,
 24 and the judge would pass on that and say, yes, I accept
 25 this individual as a journalism expert.

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1 A. I have not.

2 Q. I take it you have never been qualified as a
3 journalism ethics expert in an actual case; is that
4 correct?

5 A. That is correct.

6 Q. I take it that you have never been permitted
7 by a judge to present testimony to a jury in an expert
8 capacity.

9 A. Correct.

10 Q. All right. Shifting gears yet again, I would
11 like to now start to focus in on this particular case
12 and the work that you've done here. All right?

13 A. Yes.

14 Q. When did you first become aware of this
15 litigation?

16 A. Years ago, I read a story about it, I
17 believe.

18 Q. In the newspaper?

19 A. Probably the newspaper or online.

20 Q. And you learned about that there was
21 litigation, or did you -- did the story talk about the
22 actual incident? You know what I mean, the publishing
23 of the post, the disclosure of the excerpts of the sex
24 tape and all of that. Was it about litigation or the
25 underlying events?

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1 you can talk about the fact that you had
2 conversations, who you had them with and the
3 dates, things like that, and general subject
4 matter.

5 MR. SULLIVAN: Can we go off the record for
6 just a minute?

7 (Discussion off the record.)

8 BY MR. SULLIVAN:

9 Q. So you indicated that you got a call from a
10 colleague of Mr. Harder and that person had been
11 referred by a colleague of yours at the faculty for the
12 University of Florida, correct?

13 A. That is correct.

14 Q. What colleague was it of yours at Florida?

15 A. His name is Clay Calvert. He's a lawyer.

16 Q. Is he one of the individuals that teaches the
17 media law course?

18 A. That is correct.

19 Q. Now, focusing in or trying to get a sense of
20 timing, when to your best recollection did that contact
21 occur?

22 A. Six months maybe.

23 Q. Six months ago?

24 A. I think.

25 Q. And do you remember the name of the

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1 MR. HARDER: Vague and ambiguous.

2 Go ahead.

3 THE WITNESS: I can't recall exactly. I know
4 it was about the fact that the tape -- there was
5 such a tape existing and -- but I don't remember
6 whether the litigation was mentioned in that
7 story.

8 BY MR. SULLIVAN:

9 Q. All right. Do you remember where you read
10 it?

11 A. I don't.

12 Q. From that point, kind of moving forward in
13 time, when did you -- when did you first contemplate or
14 get approached or -- strike that.

15 When did you first consider being an expert
16 in the case?

17 A. Are you talking about time or incident?

18 Q. You can peg it whichever way is easiest for
19 you. If it helps you by incident, and then we'll try
20 to zero in on time.

21 A. I received a phone call from an associate of
22 Mr. Harder. She had been referred by one of my
23 colleagues on the faculty.

24 MR. HARDER: I'm just going to caution you,
25 discussions with attorneys is work product, but

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1 individual, the colleague of Mr. Harder's that you
2 spoke with?

3 A. Yes.

4 Q. And what is that person's name?

5 A. Sarah Luppen.

6 Q. I take it that was a phone call.

7 A. Correct.

8 Q. And how long did the call last?

9 A. 20 minutes, 30 minutes.

10 Q. All right. Did you agree to undertake the
11 assignment at the conclusion of that call?

12 A. I believe I did.

13 Q. Professor Foley, you are being -- I think I
14 got this from your report there, or maybe it was a
15 disclosure. But you're being paid 250 per hour for
16 your work on this case, correct?

17 A. Yes.

18 Q. In fairness. And for your testimony on the
19 case, you're being paid a rate of 350 per hour.

20 MR. HARDER: I'm going to object to the
21 wording, "and for your testimony." He's paid for
22 his time.

23 MR. SULLIVAN: I didn't mean -- there was
24 nothing -- I'll rephrase.

25 BY MR. SULLIVAN:

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1 Q. And you're paid 250 for your work on the case
2 generally, correct?

3 A. For my time, yes.

4 Q. And when you testify in deposition or at
5 trial, your rate is \$350 for that work, correct?

6 A. Yes.

7 Q. Now, how did you arrive at those hourly
8 rates?

9 A. I think I came up with a rate of \$200 when I
10 was working with Gregg. And then I was named teacher
11 of the year 2006 and 2007, and I raised it by 50 bucks.

12 Q. All right. Now, are you compensated for
13 travel expenses and out-of-pocket costs, things of that
14 nature?

15 A. Yes.

16 Q. And are you compensated for your travel time?

17 A. Yes.

18 Q. You presently live up in Gainesville?

19 A. Correct.

20 Q. Now, Professor Foley, how much time have you
21 put into the matter to date?

22 A. If I had a calculator, I could tell you.

23 Q. I can loan you my phone.

24 A. I'm sorry. Math is not my thing.

25 Q. Take your time.

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1 A. 60 hours approximately. That's just
2 approximately.

3 Q. Okay. And have you been paid for your
4 services thus far?

5 A. I have been paid through the week before
6 last.

7 MR. SULLIVAN: Now, let me direct this
8 question to Mr. Harder.

9 MR. HARDER: Should I get sworn?

10 MR. SULLIVAN: You don't need to be sworn.

11 In keeping with the discussion we had a little bit
12 ago in terms of the work product, would you be
13 willing to provide a copy of Professor Foley's
14 bill? I'm happy to -- this is not -- I'm happy to
15 tell you why. It helps me to see kind of what you
16 did, the chronology of the work. I don't want
17 communications with you. I mean, I would be happy
18 to give you like a sanitized version of a bill
19 that didn't disclose work product. I'm not
20 interested in your work product. I'm interested
21 in his work product. Personally, I find it
22 helpful to see like, okay, you know, he worked for
23 the first two weeks and he read some news
24 articles, he did some searches. He did -- it
25 just -- I find that of assistance. I find it

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1 saves some time. If you say I'm not comfortable
2 with that --

3 MR. HARDER: My comfort level would be
4 whatever the local rules or laws provide, I'm
5 comfortable with. I would have to consult with my
6 local counsel, because I'm not personally
7 familiar. If the rules say I have to, then I
8 will. If the rules say I don't have to, then I'm
9 not inclined to.

10 MR. SULLIVAN: Would you prefer not to?

11 MR. HARDER: I would have to consult with my
12 local counsel.

13 MR. SULLIVAN: All right. Maybe this will
14 save us some time.

15 BY MR. SULLIVAN:

16 Q. This is directed back to you, Professor.

17 What level of detail -- just give us in
18 general terms -- do you have in your bill? Do you
19 break it down with like precise tasks, or do you kind
20 of have a bill that says, you know, work on the case,
21 Tuesday, six hours?

22 MR. SULLIVAN: Do you want to confer?

23 MR. HARDER: I don't have a problem with him
24 answering.

25 THE WITNESS: I think it -- reading and then

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1 maybe what material, not by specific, but by
2 length of time. And then phone conversations.

3 MR. SULLIVAN: All right. It may be what I'm
4 looking for, there's not enough detail there to
5 make it meaningful, but we can follow up.

6 Do you know what the practice is?

7 MS. FUGATE: Yeah. And certainly talk to
8 Ken, because the practice can really vary from
9 case to case and depending on opposing counsel and
10 how well we're working together. And we are in a
11 little bit of flux because of the new federal
12 rules which Florida will follow, but that hasn't
13 panned out yet in practice and case law about how
14 this really works because before this very recent
15 change, you got all of that stuff. And we would
16 routinely get invoices of experts, too. But,
17 again, how this is all going to change and shape
18 out in the future, it really hasn't taken form
19 yet, you know, how the new rules are really going
20 to impact it. It is something that we would
21 routinely get in the past. Whether we will
22 continue to do so going forward, who knows.

23 MR. HARDER: During the next break, I'll give
24 him a call.

25 MR. SULLIVAN: See what he says. What I

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1 would propose to you, Charles, is that we treat
2 this like our other discussion we had a little
3 earlier off the record. We'll work out something.
4 We'll make it the same for each of us and just go
5 by that. It's not a big deal.

6 MR. HARDER: Okay.

7 BY MR. SULLIVAN:

8 Q. Professor Foley, back to you then. Let's
9 shift our focus again. I just want to talk to you a
10 little bit about kind of where we go from here.

11 Do you -- with respect to your role as a
12 journalism expert in this case, is there any additional
13 work that you contemplate doing?

14 A. Well, more reading, more preparation.

15 Q. Okay.

16 A. More meetings.

17 Q. Let's focus on the reading. Are there
18 categories of material or a group of material that you
19 really wanted to look at that you haven't had time to
20 review as of yet?

21 A. Maybe I should have said reread.

22 Q. Okay. That's all I'm trying to get a sense
23 of. Is there some body of research or study that you
24 feel you need to do to have a full report and a
25 developed opinion in this matter that you haven't had

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1 A. I just don't know.

2 Q. Have you been -- strike that.

3 Have there been any materials that you've
4 requested that have not been provided?

5 A. No.

6 Q. Now, have you done all the work on this case
7 yourself?

8 MR. HARDER: Vague as to "all the work on
9 this case."

10 THE WITNESS: My wife helped me with an
11 invoice.

12 BY MR. SULLIVAN:

13 Q. Let me ask you this. Have you obtained the
14 help of any assistants?

15 A. No.

16 Q. For example, given your position at the
17 university, have you used any teaching assistants,
18 folks like that to help you do any research?

19 A. No.

20 Q. Have any -- excluding counsel, has anyone
21 assisted you in formulating your opinion in the case?

22 A. No.

23 Q. Have you discussed the matter, in other
24 words, your expert work on the case, with anyone at the
25 University of Florida?

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1 the opportunity to undertake yet?

2 A. I honestly don't know.

3 Q. Do you have a sense of when you would plan to
4 do that additional work?

5 MR. HARDER: I'm just going to object to
6 vague, additional work. His answer was, I don't
7 know.

8 THE WITNESS: I don't know.

9 BY MR. SULLIVAN:

10 Q. All right. As you sit here today, do you
11 have a present intent to file a supplemental report?

12 A. I don't know.

13 Q. Well, you do know if you have a present
14 intent.

15 A. I don't know what you mean.

16 Q. All right. As you sit here right now with
17 us, do you have an intent like, okay, I'm going to do a
18 supplemental report, I've kind of known all along I was
19 going to do a supplemental report?

20 A. I don't know. I had not thought about it.
21 But then there is more reading perhaps to do.

22 Q. All right. Do you have an idea in terms of
23 what specific additional reading you would want to do?

24 A. If there were further depositions.

25 Q. All right. Anything else that comes to mind?

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1 A. I informed the dean and my department chair
2 that I was doing this. I have mentioned the content of
3 the case in terms of what has been published. That's
4 it.

5 Q. When you say you mentioned the content, in
6 what setting?

7 A. Stuff that's been in the paper.

8 Q. Is that in your conversations with the dean?

9 A. With the dean, department chair, Clay
10 Calvert, and a couple of other faculty members.

11 Q. All right. Have you discussed the case in
12 any of your classes?

13 A. No.

14 Q. So I take it that none of your students
15 provided any assistance in the work you've done on the
16 case.

17 A. No.

18 Q. If you can look back now at Exhibit 158 and
19 go back to the beginning, you'll see there that that
20 exhibit represents a copy of your expert report.

21 Do you see that?

22 A. Yes.

23 Q. Now, if you would look, please, at page 1.
24 And you'll see there there's question 1 and then it
25 says question 2, both in bold. Do you see that?

Q. And then if you look at the text that follows, the paragraph that follows immediately thereafter, it says, "I base my answers on my experience, background, training, education, and my in-depth knowledge of the craft and mission of journalism from a more than 40-year career in that

Do you see that?

Q. Now, what is the mission of journalism?

A. To search for the truth, to help people make sense of a confusing world, to explain, to expose corruption, to tell people what's going on, to give voice to minorities. It's a very large, large

Q. Anything else that you care to add?

A. I'm sure I can come up with a lot. It's as much a spiritual thing as it is physical.

Q. Do all journalists see the mission of journalism the same?

MR. HARDER: Calls for speculation.

THE WITNESS: I believe at its most basic

BY MR. SULLIVAN;

tell us roughly how many?

Q. Okay. But based on what you just explained to us, like the SPJ, ASNE, you're talking about actual sessions by a formal group discussing journalism ethics, I take it.

A. That's part of it.

Q. Okay. What I'm trying to get at or what I'm trying to understand is, I take it you're not also including newsroom like where you and a colleague were sitting around trying to grapple with an ethical issue.

A. Absolutely.

Q. You include that as well?

A. Ethics is a topic of discussion constantly.

Q. Right. Okay.

So these would include sessions when you worked at the newspaper?

Q. So we're talking here about formal sessions like at conferences or meetings of the SPJ and informal sessions in the course of your work in the newsroom, both would be included?

A. Uh-huh, yes.

Q. Now, if you -- if you look at the sentence that follows at the bottom of 1 and continues over on

Q. Do journalists at the New York Times see the mission the same as journalists at the Hollywood

MR. HARDER: I'm going to object. It calls for speculation.

THE WITNESS: I don't know.

BY MR. SULLIVAN;

Q. Now, I take it you've done no survey or study of journalists to try to drill down on what the mission of journalism is; is that correct?

A. Formal study, formal research, no.

Q. If you would look, sir, at the same paragraph but just kind of continuing down, you'll see at the bottom of that page a sentence that says, "Most importantly, for purposes of this report, I have attended and been involved in numerous sessions regarding journalism ethics."

Do you see that?

Q. How many sessions have you been involved in regarding journalism ethics?

A. I couldn't -- I couldn't estimate. I've been involved with everything from ASNE to APME to SPJ to the Poynter Institute.

Q. Okay. But sitting here today, you couldn't

to the top of page 2, you'll see it says, "I also am applying the standards and practices of the journalism industry including the standards of the Society of Professional Journalists and its Code of Ethics."

Do you see that?

Q. Professor Foley, how is the SPJ Code of Ethics relevant in this case?

A. It helped frame my opinion on why the Hulk Hogan sex video is not journalism. It's not newsworthy. It's not ethical.

Q. Let me ask you this. Who does the code of -- who does the Society of Professional Journalists Code of Ethics apply to?

Q. Okay. And who does the SPJ code say its Code of Ethics applies to?

A. Ethical journalists.

Q. And does the Society for Professional Journalists attempt to force its ethics code on

MR. HARDER: Calls for speculation.

MR. SULLIVAN: No. I'm asking for his --

BY MR. SULLIVAN;

Q. To your knowledge, does it attempt to force

| | |
|---|---|
| <p>Page 81</p> <p>1 its ethics code on nonmembers? 2 MR. HARDER: Same objection. 3 THE WITNESS: I don't know. 4 BY MR. SULLIVAN: 5 Q. You don't know, okay. 6 Are you aware of any evidence to suggest that 7 the folks at Gawker who were involved in preparing the 8 challenged publication were members of the Society for 9 Professional Journalists? 10 MR. HARDER: Calls for speculation. 11 THE WITNESS: I don't know. 12 MR. SULLIVAN: No, it doesn't call for 13 speculation. I'm asking him if he's aware of any 14 evidence. You either are or you aren't. 15 MR. HARDER: I'm just making an objection. 16 MR. SULLIVAN: All right. 17 BY MR. SULLIVAN: 18 Q. So are you aware of any evidence that these 19 folks were members? 20 MR. HARDER: Calls for speculation. 21 THE WITNESS: I don't know. 22 BY MR. SULLIVAN: 23 Q. Tell me this. Does the SPJ, the Society for 24 Professional Journalists, does it take the position 25 that its Code of Ethics imposes a legal standard on</p> | <p>Page 83</p> <p>1 THE WITNESS: I did not compare the two. 2 BY MR. SULLIVAN: 3 Q. All right. And just so we don't have 4 confusion or vagueness, when I refer to excerpt, I'm 5 talking about the minute and 40 some seconds that 6 actually appeared with the post on the Gawker website. 7 Is that acceptable to you? 8 A. Yes. 9 Q. Okay. Do you -- now, strike that. 10 Do you plan to at some future date compare 11 the excerpt with the complete sex tape, the 30-minute 12 sex tape? 13 MR. HARDER: I'm just going to have a 14 continuing objection to the term "excerpt." I 15 think it's vague and it mischaracterizes it. 16 THE WITNESS: I don't know. 17 BY MR. SULLIVAN: 18 Q. Would you want to do that at some point? 19 A. Maybe. 20 Q. And why would that be? 21 A. I don't know. 22 Q. If you will look back at your report, page 2, 23 you'll see kind of a dotted line across the page. Do 24 you see that? 25 A. I do.</p> |
| <p>Page 82</p> <p>1 nonmembers? 2 MR. HARDER: Calls for speculation. 3 THE WITNESS: I don't know. 4 BY MR. SULLIVAN: 5 Q. If you could look, please, on that same page, 6 page 2, and if you look at the next paragraph, you'll 7 see it says -- the first sentence of that says, "I also 8 have done extensive research for this case. I have 9 watched the video of Mr. Bollea (Hulk Hogan) that 10 Gawker posted on its website Gawker.com." 11 Do you see that? 12 A. I do. 13 Q. Okay. Did you also view the entire video of 14 the sex tape? 15 A. I did not. 16 Q. In other words, the complete 30-minute 17 version. 18 A. I did not. 19 Q. Did you at any point seek to compare that 20 tape with the portion that Gawker chose to excerpt? 21 A. I did not. 22 MR. HARDER: Objection. 23 Pause and let me get my objections in. 24 Objection to the term "excerpt" as vague. 25 Go ahead.</p> | <p>Page 84</p> <p>1 Q. Okay. Then below that, the first paragraph 2 appears that says, "The First Amendment protects our 3 rights of speech and press. It ensures freedom to 4 publish, and its scope is broad." 5 And then it goes on, "But journalists don't 6 see that power as unlimited. They see it in the 7 context of ethical standards and limitations, and they 8 respect the rights of the people they cover." 9 Do you see that? 10 A. Yes. 11 Q. Now, what is your basis for the assertion 12 that journalists see the First Amendment -- see First 13 Amendment rights in the context of ethical standards 14 and limitations? 15 A. I think journalists are human beings and, 16 therefore, they respect the rights of the people they 17 cover. 18 Q. Okay. But how do you know -- you, 19 Professor Foley, how do you know how other journalists 20 view their First Amendment rights? 21 MR. HARDER: I'm going to object to the term 22 "journalists" as just being vague and broad. 23 But, otherwise, feel free to answer the 24 question. 25 THE WITNESS: I think that journalists</p> |

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1 protect the First Amendment by respecting the
2 rights of others, as I said before.

3 BY MR. SULLIVAN:

4 Q. But when you talk here -- and one other
5 thing, just so we're on the same page, when I use the
6 term "journalists," I'm using it in precisely the same
7 way that you use it in the second line of that
8 paragraph of your report that I just read to you.

9 Do you understand that?

10 A. I'm not sure I understand that.

11 Q. Look there in the second line of your report.
12 You say, "But journalists don't see," and then your
13 sentence continues on, right?

14 A. Yes.

15 Q. Okay. The use of the term "journalists" in
16 my question is precisely as you yourself used it in
17 that line of your report.

18 Do you follow me?

19 A. I do not.

20 Q. What is unclear?

21 A. How do I know what you are saying?

22 Q. I'm not saying anything. I'm asking you what
23 you meant when you wrote this document and you used the
24 term "journalists." All right?

25 A. I'm talking about responsible -- excuse me --

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1 ethical journalists.

2 Q. Okay. Where we started down this road, I
3 asked you how you would know how other journalists
4 viewed their First Amendment rights. How would you
5 know, you, Professor Foley?

6 MR. HARDER: Vague and ambiguous, asked and
7 answered.

8 THE WITNESS: I can't read people's minds,
9 but I have talked to an awful lot of journalists
10 who agree that you must respect humanity to be a
11 journalist.

12 BY MR. SULLIVAN:

13 Q. Okay. Let me ask you this and put a finer
14 point on it. Since becoming a journalism professor,
15 have you conducted surveys of practicing journalists on
16 how they individually view their First Amendment
17 rights?

18 A. No.

19 Q. Since becoming a journalism professor, have
20 you conducted an online survey or website survey on how
21 individual journalists view their First Amendment
22 rights?

23 A. No.

24 Q. Since becoming a professor, have you
25 conducted any academic studies on journalists' views on

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1 how they perceive their First Amendment rights?

2 A. No.

3 Q. Now, if you would look, please, on that same
4 page and if you look down at the next paragraph, the
5 second sentence of that says, "The footage, its
6 distribution and its publication were all made without
7 Mr. Bollea's knowledge or consent."

8 Do you see that?

9 A. Uh-huh. (Indicates affirmatively.)

10 Q. What is your basis for that statement?

11 A. That's what I have been told. I believe I
12 have read that he has said that.

13 Q. Okay. When you say you read that, where did
14 you read that?

15 A. News accounts perhaps.

16 Q. Are you -- Professor, are you aware of
17 situations where a celebrity or his agent leaked
18 material, including nude photos, because they thought
19 the celebrity would benefit from the publicity?

20 MR. HARDER: I'm going to object. That lacks
21 foundation, calls for speculation. Are you asking
22 for his personal knowledge?

23 MR. SULLIVAN: I'm asking if he's aware.

24 MR. HARDER: If he has personal knowledge of
25 particular instances?

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1 MR. SULLIVAN: Yes.

2 THE WITNESS: I have no personal knowledge.

3 BY MR. SULLIVAN:

4 Q. Have you read -- you told us you did a fair
5 amount of reading. Have you read of situations like
6 that?

7 A. Do you have a specific?

8 Q. Right now I'm asking you if you have read of
9 any such situations.

10 A. Without a specific, I can't answer the
11 question.

12 Q. All right. Let me ask you this. Are you
13 aware of situations where material is leaked to create
14 buzz or public interest in a celebrity who has -- how
15 shall we say it -- faded from the limelight?

16 MR. HARDER: I'm just going to object. It
17 lacks foundation. It's vague and ambiguous.

18 THE WITNESS: I have no personal knowledge.

19 BY MR. SULLIVAN:

20 Q. All right. I note --

21 MR. HARDER: When it's an opportune time --
22 we've been going for an hour and a half -- I could
23 use a restroom break.

24 MR. SULLIVAN: Fine by me.

25 MR. HARDER: At an opportune time. I'm not

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1 trying to stop you now.
 2 MR. SULLIVAN: Let me finish this little
 3 passage and then we'll take a break. We also
 4 should talk about what we want to do lunch-wise.
 5 MR. HARDER: Okay.
 6 BY MR. SULLIVAN:
 7 Q. I note that in --
 8 MR. HARDER: Are you like two minutes away?
 9 I'm ready for a break.
 10 MR. SULLIVAN: Okay. Why don't we just break
 11 here.
 12 MR. HARDER: Thank you.
 13 (Recess taken from 12:27 p.m. to 12:38 p.m.)
 14 MR. SULLIVAN: There was a question pending
 15 at the time the break was taken, if you could read
 16 that back.
 17 (The reporter read the pending question.)
 18 BY MR. SULLIVAN:
 19 Q. Professor Foley, I note that in what was
 20 provided to us as Exhibit 5 of the expert disclosure,
 21 there were documents that look like they were things
 22 that you assembled in your work on the case. We got a
 23 list of documents including some testimony. We got a
 24 list of documents that bore identification numbers that
 25 have been produced in the case. And then there was a

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1 category that said not produced, and you've provided
 2 us, or perhaps counsel provided us on your behalf, with
 3 a whole bunch of other articles, web materials, things
 4 that I assume you gathered in the course of your work
 5 on this assignment.
 6 Are you familiar with those materials?
 7 A. Not specifically, no.
 8 Q. Let me see if this will help you. All I know
 9 is the manner in which it came to me. Maybe Mr. Harder
 10 can shed some light on this. But as part of the expert
 11 disclosures, we got this document here. And why don't
 12 you just take a second and flip through that.
 13 MR. SULLIVAN: So that the record is clear,
 14 I'm showing the witness a collection of materials
 15 produced to us in the case and identified as
 16 Exhibit 5 to plaintiff's expert disclosures.
 17 MR. HARDER: It's Mike Foley's expert -- is
 18 that our expert disclosure?
 19 MR. SULLIVAN: Here's the confusing part.
 20 Because all the experts were identified at the
 21 same time, it's expert 5 -- Exhibit 5 to that
 22 general thing, but I believe --
 23 MR. HARDER: It's Foley materials.
 24 MR. SULLIVAN: -- it pertains to Mr. Foley,
 25 yes.

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1 MR. HARDER: Just so you know, I didn't
 2 prepare that document. I wish I could help you.
 3 THE WITNESS: Some of this is familiar. I
 4 mean, there's 20 pounds here.
 5 MR. SULLIVAN: Right.
 6 Now, what -- I will mark or ask the court
 7 reporter to mark as Exhibit 159 a multi-page
 8 document which is an excerpt out of this expert
 9 disclosure Exhibit 5. And it appears to be a post
 10 that was published on Gawker dated August 2nd,
 11 2013, the title of which is, "Lindsay Lohan nude
 12 pics 'leaked' to Promote The Canyons [NSFW]."
 13 If you would, take a moment and look that
 14 over.
 15 (Exhibit No. 159 marked for identification.)
 16 MR. SULLIVAN: Sorry, Charles.
 17 MR. HARDER: Thank you.
 18 BY MR. SULLIVAN:
 19 Q. Have you had an opportunity to review
 20 Defendant's Exhibit 159?
 21 A. Yes.
 22 Q. Do you recognize 159?
 23 A. I think I saw it in passing, yes.
 24 Q. And was this a Gawker post that you assembled
 25 in the course of your -- doing your expert work in this

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1 case?
 2 A. It was part of the -- part of the reading
 3 material, yes.
 4 Q. Okay. Do you know why you focused on this
 5 particular article?
 6 MR. HARDER: Objection to the word "focused."
 7 THE WITNESS: This was just part of a huge
 8 batch of material.
 9 BY MR. SULLIVAN:
 10 Q. All right. If you look at the second page,
 11 you'll see the second full graph there says, "The Indie
 12 operation behind the film certainly hopes that's the
 13 case because they went through the trouble of "leaking"
 14 select clips from the film that emphasized the fact
 15 that Lindsay gets naked."
 16 Do you see that?
 17 A. I do.
 18 Q. Did you -- did you note this particular post
 19 because of the allegation of a leak of nude photos in
 20 an effort to garner attention?
 21 MR. HARDER: Objection to form of the
 22 question.
 23 THE WITNESS: No. I looked at this post
 24 because it featured nude photographs.
 25 BY MR. SULLIVAN:

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1 Q. All right. Have you done any investigation
2 in connection with your work in the case to ascertain
3 whether Hulk Hogan had any involvement in the leak of
4 the sex tape?

5 A. I have not.

6 Q. Did you consider that possibility in
7 performing your analysis?

8 A. Since the source of the sex tape is
9 supposedly unknown, I considered all sorts of things
10 in my analysis.

11 Q. Let me ask you this. Would your analysis
12 change if it turned out that Hulk Hogan did have some
13 involvement in the disclosure of the sex tape?

14 MR. HARDER: I'm just going to object to the
15 form of that question.

16 THE WITNESS: I would have to think about
17 that. I would have to give that some
18 consideration.

19 BY MR. SULLIVAN:

20 Q. Okay. Are you aware that Hulk Hogan
21 originally sued Bubba Clem over the disclosure of the
22 sex tape?

23 A. I believe I read about that, yes.

24 Q. Did you read about that in connection with
25 your work on the case or when you were following it --

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1 MR. HARDER: Incomplete hypothetical.

2 THE WITNESS: I don't know.

3 BY MR. SULLIVAN:

4 Q. Would that raise questions in your mind if
5 the plaintiff settled quickly and cheaply with the one
6 person who was clearly responsible for the taping?

7 MR. HARDER: I'm going to object to the form
8 of the question, vague and ambiguous, incomplete
9 hypothetical.

10 THE WITNESS: I would like it repeated.

11 (The reporter read the pending question.)

12 THE WITNESS: I would have to say I would
13 have to consider -- I would have to think about
14 this.

15 BY MR. SULLIVAN:

16 Q. As a former newsman, when considering how
17 this tape came to get out publicly, did you consider
18 that the disclosure of a sex tape depicting an aging
19 wrestler having sex with an attractive younger woman
20 may be good for his image in certain circles?

21 MR. HARDER: I'm going to object to the form
22 of the question. I think it's argumentative,
23 incomplete hypothetical.

24 THE WITNESS: I don't know.

25 BY MR. SULLIVAN:

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1 A. I can't remember.

2 Q. -- before your retention?

3 MR. HARDER: Don't answer until I've had a
4 chance to object. And I'm going to object to the
5 form of the question.

6 THE WITNESS: I can't remember.

7 BY MR. SULLIVAN:

8 Q. Okay. Are you aware that Hulk Hogan settled
9 his suit against Bubba in less than two weeks?

10 A. I don't think I was.

11 Q. Are you aware that Hulk Hogan settled his
12 case against Bubba for a rather modest sum?

13 MR. HARDER: I'm going to object to the
14 characterization of the terms of the settlement.

15 Just specifically there is a lot of terms in that
16 contract, and the sum was one of some terms.

17 MR. SULLIVAN: Okay. I'll take his answer.

18 THE WITNESS: I don't know.

19 BY MR. SULLIVAN:

20 Q. If you were made -- if you assume that --
21 assume these facts for your assessment of this, assume
22 that Hulk Hogan did sue Bubba and settled in two weeks
23 and that the settlement was for a very modest sum of
24 money. Okay? Would that affect your analysis of this
25 case?

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1 Q. Okay. If you will look now over on to
2 page -- well, I guess we're still on page 2. You'll
3 see there you pose a question, question 1, and you say,
4 "Did Gawker's publication of the Hulk Hogan sex video
5 serve any valid ethical journalistic purpose?"

6 Do you see that?

7 A. Yes.

8 Q. Then your conclusion follows and it says,
9 "Based on my experience, background, knowledge,
10 training, education and more than 40-year career in
11 journalism, I conclude with a reasonable degree of
12 certainty that Gawker's publication of the sex video
13 itself did not serve any valid ethical journalistic
14 purpose."

15 Do you see that?

16 A. I do.

17 Q. I take it from this conclusion that you do
18 not object to the article discussing the sex tape that
19 was posted by Gawker.

20 MR. HARDER: Objection, argumentative,
21 objection to form of the question.

22 THE WITNESS: I thought it was graphic and
23 not journalism and, given the description, that it
24 was not newsworthy. And I felt it was unethical.

25 BY MR. SULLIVAN:

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1 Q. But in your opinion, I take it from the way
2 your opinion is crafted, the publication of the article
3 itself served some journalistic purpose, correct?

4 MR. HARDER: Objection, asked and answered,
5 misstates prior testimony.

6 THE WITNESS: It's not journalism.

7 BY MR. SULLIVAN:

8 Q. Well, tell me this. Explain to me why when
9 you set out your opinion you said, I conclude with a
10 reasonable degree of certainty that Gawker's
11 publication of the sex video itself did not serve any
12 valid ethical journalistic purpose.

13 A. I believe strongly that it did not.

14 Q. Okay. Why didn't you say that Gawker's post
15 which would have included the textual material and the
16 video?

17 MR. HARDER: Argumentative, objection to form
18 of the question.

19 THE WITNESS: I found them both disgusting.

20 BY MR. SULLIVAN:

21 Q. All right. Let me ask you this. Would you
22 agree that the article itself, the post without the
23 video, was protected by the First Amendment?

24 MR. HARDER: I'm going to object. It calls
25 for a legal conclusion. I'm going to instruct you

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1 have any intention of testifying about, namely the
2 article that accompanied the Hulk Hogan sex tape
3 video. And it's my understanding just from having
4 looked at two very quick cases that were just sent
5 to me a few minutes ago from my local counsel that
6 there is the potential of waiving either a
7 privilege or some other protection that this
8 witness would have or that the plaintiff would
9 have if we allow questions to be asked of him that
10 go beyond the scope of what he's been retained to
11 do. And obviously we have no intention of waiving
12 any privileges, waiving any protections. And so
13 we intend to preserve everything so that we would
14 preserve the right to object to admissibility of
15 this testimony that I'm referring to that will be
16 happening in the future, because I tend to agree
17 with Michael Sullivan that I think that we should
18 press on, but I do want it to be clear in the
19 record that we are not waiving any privileges, not
20 waiving any protections, and if these protections
21 and privileges do exist, then they can be used by
22 the plaintiff's side to omit this testimony from
23 trial or otherwise to be used.

24 MS. FUGATE: I just wanted to add that the
25 legal point, I think it's clear that all

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1 not to answer on the basis that it calls for a
2 legal conclusion.

3 BY MR. SULLIVAN:

4 Q. In your view, as a journalist who practiced
5 journalism for years, do you believe that the post
6 itself, the textual material, should have been
7 enjoined?

8 MR. HARDER: I'm going to object. It calls
9 for a legal conclusion, and I'm going to instruct
10 you not to answer on that basis.

11 There -- also, there's a beeping. Can
12 someone silence their phone?

13 (Discussion off the record.)

14 (Recess taken from 12:54 p.m. to 1:32 p.m.)

15 (Discussion off the record.)

16 MR. HARDER: So we just took a lunch break
17 and we agreed that there was some transcription
18 while we were here in the room and I asked that it
19 be deleted from the record because I had no idea
20 that we were on the record and we were just having
21 a casual conversation.

22 The situation that we're facing here is that
23 questions are being asked of the witness that go
24 beyond his expert report and beyond what he has
25 been retained to testify about and he does not

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1 objections are preserved. They are not waived by
2 this. So we agree with plaintiff's counsel on
3 that. We think it's proper to move forward
4 because we don't think it's proper to instruct a
5 witness not to answer. So that's why we agree
6 that all of those are preserved, all of those
7 objections.

8 And, please, if you could make that for
9 Charles a continuing objection throughout so that
10 there's not an issue.

11 MR. HARDER: Right. It will be a continuing
12 objection.

13 Now, at a certain point, if I feel that
14 you're going so far afield that I'm still going to
15 preserve what I believe is my right to say you
16 can't ask him certain questions because that's
17 just way too far afield, but I guess we'll come to
18 that if we come to that.

19 MR. SULLIVAN: Right.

20 MR. HARDER: Okay. But in the meantime --

21 MR. SULLIVAN: Then the last thing I'll just
22 add, which is what I said when we were talking
23 before which has now been taken off the record is
24 the simple point that I said to Mr. Harder and
25 Professor Foley, which is I am not here attempting

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1 to seek his legal opinion which I don't think
2 would be proper, because we all know and agree
3 that he is not a lawyer and has not been asked to
4 render a legal opinion. I have asked for his
5 opinion as a journalist and my questions are
6 directed to him solely in that capacity. And I
7 note that in his report that has been tendered to
8 us that he has spoken about First Amendment rights
9 and issues of that nature, and that's the context
10 in which I seek to examine him.

11 MR. HARDER: I understand that. And just to
12 clarify my objection from before we took a lunch
13 break, you were asking him about First Amendment
14 issues as to the narrative. And because his
15 report does not speak to the narrative and because
16 he's not been retained to speak to the narrative,
17 I felt that, A, that went beyond the scope; and,
18 B, it seems to call for a legal conclusion as to
19 how he believes the First Amendment applies or
20 does not apply to a particular specific issue.

21 And then second, you were asking him about
22 whether an injunction should or should not have
23 been issued as to the narrative and, again, I
24 believe that that calls for a legal conclusion and
25 is an improper question to ask of an expert. Even

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1 graphicness of it is unethical, not newsworthy,
2 and not journalism.

3 BY MR. SULLIVAN:

4 Q. But taking that for granted, do you believe
5 it's protected by the First Amendment?

6 A. I honestly --

7 MR. HARDER: Wait.

8 THE WITNESS: I'm sorry.

9 MR. HARDER: Asked and answered. Same
10 objections.

11 Go ahead.

12 THE WITNESS: I don't know. I really have to
13 think about it.

14 BY MR. SULLIVAN:

15 Q. All right. And following up where we were
16 when we left off, do you believe that the post
17 itself -- as a journalist, now, do you believe that the
18 post should have been enjoined?

19 A. I don't know what enjoined means.

20 MR. HARDER: Okay. Again, I need to get in
21 my objections.

22 THE WITNESS: I'm sorry.

23 MR. HARDER: Same objections as before.

24 BY MR. SULLIVAN:

25 Q. Mr. Harder can clarify if he wishes, but what

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1 though he's a journalist, he's not a judge.

2 MR. SULLIVAN: Right. And I don't want his
3 legal views, but I take your point. I understand
4 what you're saying.

5 MR. HARDER: I don't see how you can ask him
6 that question and not seek his legal views
7 regarding whether an injunction should have or
8 should not have been issued. I think it's just
9 kind of contradictory in that sense.

10 MR. SULLIVAN: All right. Let's go back I
11 think to where we were.

12 MR. HARDER: Okay.

13 BY MR. SULLIVAN:

14 Q. Let me ask you -- Professor Foley, let me ask
15 you a preliminary question.

16 Did you review the Gawker post, the article
17 itself?

18 A. I read it.

19 Q. And in your view as a journalist, do you
20 believe that that post is protected under the First
21 Amendment?

22 MR. HARDER: Again, all the same prior
23 objections that we were talking about.

24 MR. SULLIVAN: Right.

25 THE WITNESS: I think like the video, the

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1 I'm referring to in terms of enjoined is an order
2 issued by a court that restrains publication. All
3 right? Or orders the journalist to take down material
4 that has already been published. That's the context in
5 which I'm speaking.

6 MR. HARDER: Again, same objections as
7 before. Calls for a legal conclusion. It goes
8 beyond the scope of what he's been asked to
9 testify about, beyond the scope of his expert
10 report. And I also think it's vague and
11 ambiguous.

12 But you can answer if you can.

13 THE WITNESS: I'll repeat what I said before.
14 You had a two-part question. You said should it
15 have been not published, should the court have
16 said that it should not be published, prior
17 restraint?

18 BY MR. SULLIVAN:

19 Q. Right.

20 A. I don't know that I would disagree with that.
21 I don't think that there is a prior restraint.

22 As to the other question, I believe it's a
23 legal question. I'm not qualified.

24 Q. Okay. Let's look back now at your report.
25 See the part there that's the conclusion?

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1 A. Yes.

2 Q. And at the bottom of 2 and the top of 3 --

3 MR. HARDER: Can we just pause one second?

4 Could I just note real quickly for the record, I
5 just looked at the transcript and it just seemed
6 to me like I heard words that didn't show up on
7 the screen and I'm just not sure if there's a
8 clear record. That's all I want to say. It could
9 be a LiveNote issue. I don't know.

10 BY MR. SULLIVAN:

11 Q. Professor Foley, looking back at the bottom
12 of 2, which is where we were, and continuing over on to
13 the top of 3, you see the statement there, "I conclude
14 with a reasonable degree of certainty that Gawker's
15 publication of the sex video itself did not serve any
16 valid ethical journalistic purpose"? Do you see that?

17 A. You just read the last half of it, yes.

18 Q. Yes, sir.

19 My question for you is, what type of
20 certainty are you referring to there?

21 A. My years of experience, my education, the
22 other qualifications that are listed.

23 Q. Okay. Let me see if I can put a finer point
24 on it. Are you testifying to a reasonable degree of
25 journalism ethics certainty?

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1 Q. Fair enough.

2 Let me put a finer point on it. To your
3 knowledge, would journalists from the National Enquirer
4 agree with that assessment?

5 MR. HARDER: Calls for speculation.

6 THE WITNESS: I don't know.

7 BY MR. SULLIVAN:

8 Q. To your knowledge, would journalists from the
9 Hollywood Reporter agree with that assessment?

10 MR. HARDER: Calls for speculation.

11 THE WITNESS: I don't know.

12 BY MR. SULLIVAN:

13 Q. To your knowledge, would reporters from TMZ,
14 the online publication, agree with that assessment?

15 MR. HARDER: Same objection.

16 THE WITNESS: I don't know.

17 BY MR. SULLIVAN:

18 Q. If you would look, sir, at page 3 again,
19 you'll see a heading in kind of the top third of the
20 page that says "News Values."

21 Do you see that?

22 A. I do.

23 Q. Okay. And then it says, "It is news that a
24 sex video involving a famous professional" -- "Is it
25 news that a sex video involving a famous professional

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1 A. I'm lost.

2 Q. When experts come in -- a person has a field.
3 Okay? So you get an expert. He'll come in and he'll
4 say, I testify to a reasonable degree of engineering
5 certainty; I'm an electrical engineer. You go, okay.
6 Now we know what we're dealing with. You bring a
7 fellow and he says, I testify to a reasonable degree of
8 medical certainty. Now we know what we're dealing
9 with.

10 What I want to know from you is, what type of
11 reasonable degree of certainty? Are we talking
12 journalism? Are we talking journalism ethics? What
13 are we talking, what kind of certainty?

14 MR. HARDER: Okay.

15 THE WITNESS: We're talking journalism. We
16 are talking journalism ethics.

17 BY MR. SULLIVAN:

18 Q. So both?

19 A. I believe so.

20 Q. All right. In your opinion, would all
21 journalists agree with your assessment there?

22 MR. HARDER: Calls for speculation.

23 THE WITNESS: I would be hard pressed to say
24 that all journalists would agree with anything.

25 BY MR. SULLIVAN:

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1 wrestler exists? Probably. He is a celebrity, after
2 all. Is it news that the ex-wife of the wrestler's
3 friend also is on the tape? Yes."

4 Now, my question for you just as to that last
5 sentence, the thing about the ex-wife, at the time of
6 these events when the sex tape was being created,
7 Ms. Clem was still the wife of Bubba Clem, wasn't she,
8 as you understand it?

9 A. I don't know.

10 Q. Would that factor into your assessment if she
11 was still married to Bubba at the time?

12 MR. HARDER: Vague and ambiguous.

13 THE WITNESS: No.

14 BY MR. SULLIVAN:

15 Q. It wouldn't factor into your assessment?

16 A. I don't believe so.

17 Q. Now, you indicate here -- picking up where we
18 left off, you'll see the next sentence, "Is it news
19 that the video was shot secretly and that the person or
20 person(s) responsible is/are unknown? Yes."

21 Do you see that?

22 A. I do.

23 Q. Okay. Now, it was your understanding that
24 the persons responsible are unknown. That was one of
25 the premises upon which you operated?

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1 MR. HARDER: Objection, vague and ambiguous
2 to persons responsible.

3 THE WITNESS: Yes.

4 BY MR. SULLIVAN:

5 Q. Okay. Are you aware that the video, the sex
6 tape, was shot in Bubba Clem's house?

7 A. Yes.

8 Q. In fact, it was shot in Bubba Clem's bedroom,
9 wasn't it?

10 A. I believe so.

11 Q. I'll just observe, Mr. Foley, you -- before
12 answering each question, you look over at Mr. Harder.
13 Can you tell me why that is?

14 A. I have developed a habit of answering before
15 he has a chance to object. I don't want to do that. I
16 just want to make sure I'm not missing anything.

17 Q. All right. Now -- so we were -- you
18 understand that it was shot in Bubba Clem's bedroom,
19 right?

20 A. I've been told, yes.

21 Q. Okay. And are you aware that Bubba Clem
22 apparently was present toward the beginning of the
23 sexual encounter?

24 A. I believe that was on the videotape.

25 Q. Yes, sir.

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1 As I recall at the start, there is a person
2 off camera who speaks to Mr. Hogan and Ms. Clem. Do
3 you remember that?

4 A. Yes.

5 Q. And was it your understanding that that
6 speaker is in fact Bubba Clem?

7 A. I don't know it, but I understand that.

8 Q. All right. Does that suggest to you that
9 Bubba may bear some responsibility for the actual
10 recording of that video?

11 A. For the recording of that video?

12 Q. Yes, sir.

13 A. Perhaps.

14 Q. Does that suggest to you that Bubba may have
15 some knowledge of the taping of that sexual encounter?

16 A. That I don't know.

17 Q. Okay. Let us look then back to your report.
18 If you would look, please, at the bottom of page 3,
19 you'll see a statement there, "Consider these excerpts
20 from the Society of Professional Journalists Code of
21 Ethics which in my experience and based on my expertise
22 is commonly accepted as authoritative on ethical issues
23 in the profession."

24 Do you see that?

25 A. I do.

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1 Q. Now, when you say commonly accepted, commonly
2 accepted by whom?

3 A. Journalists.

4 Q. And do you know if all journalists accept
5 these standards?

6 A. I do not know.

7 Q. Do you have any empirical data to back that
8 up that journalists accept it?

9 MR. HARDER: Objection to the term
10 "empirical."

11 THE WITNESS: I do not.

12 BY MR. SULLIVAN:

13 Q. Okay. Have you conducted, you yourself,
14 Professor Foley, conducted any kind of a scientific
15 poll?

16 A. I have not.

17 Q. To your knowledge, has the Society for
18 Professional Journalists conducted any kind of
19 scientific poll?

20 A. To my knowledge, I don't know.

21 MR. SULLIVAN: What I would like to do now is
22 mark as Defendant's Exhibit 160 a single-page
23 document that appears to be a copy of the Society
24 for Professional Journalists Code of Ethics.

25 And I will represent to you, Professor Foley,

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1 that that was taken out of that -- again, that
2 thing I showed you, the Exhibit 5, which was the
3 collection of materials that you provided to us --
4 or were provided to us on your behalf.

5 (Exhibit No. 160 marked for identification.)

6 BY MR. SULLIVAN:

7 Q. Have you had an opportunity to look over
8 Defendant's Exhibit 160?

9 A. I've read it.

10 Q. Do you recognize Exhibit 160?

11 A. Yes.

12 Q. Could you please identify it for the record?

13 A. It is the Society of Professional
14 Journalists, SPJ's Code of Ethics.

15 Q. Now, the Code of Ethics itself admits that
16 it's not a set of rules, correct?

17 MR. HARDER: Objection. The document speaks
18 for itself.

19 BY MR. SULLIVAN:

20 Q. Are you aware of that?

21 A. Does it say it here?

22 Q. It certainly does.

23 A. Where? I'm having trouble. The type is
24 small. I'm sorry.

25 Q. Sure. Look at the bottom of the page. See

| | |
|---|--|
| <p>Page 113</p> <p>1 there at the bottom, last paragraph, "The SPJ Code of 2 Ethics is a statement of abiding principles supported 3 by additional explanations and position papers (at 4 SPJ.org) that address changing journalistic practices." 5 Do you see that? 6 A. Yes. 7 Q. Now, following after that, it says, "It is 8 not a set of rules, rather a guide that encourages all 9 who engage in journalism to take responsibility for the 10 information they provide, regardless of medium." 11 Do you see that? 12 A. I do. 13 Q. Now, to your knowledge, was the Code of 14 Ethics ever intended to be binding on journalists? 15 MR. HARDER: I'm going to object, calls for 16 speculation. 17 MR. SULLIVAN: I'm asking him to his 18 knowledge. There is no speculation involved. You 19 either know to your knowledge or you don't. 20 THE WITNESS: I do not. 21 BY MR. SULLIVAN: 22 Q. You do not, correct? 23 A. Correct. 24 Q. What happens to a journalist if he or she 25 refused to follow this Code of Ethics?</p> | <p>Page 115</p> <p>1 have the force of law? 2 MR. HARDER: Vague and ambiguous. 3 THE WITNESS: No. 4 BY MR. SULLIVAN: 5 Q. Right. In fact, the Code of Ethics on its 6 face disclaims that, doesn't it? 7 MR. HARDER: I'm going to object. The 8 document speaks for itself. 9 THE WITNESS: Yes. 10 BY MR. SULLIVAN: 11 Q. If you would look at the bottom of the page 12 continuing on where we read before, you see it says, 13 last sentence, "It is not nor can it under the First 14 Amendment" -- 15 MR. HARDER: You didn't read it right. 16 MR. SULLIVAN: Pardon me. 17 BY MR. SULLIVAN: 18 Q. "It is not, nor can it be under the First 19 Amendment, legally enforceable." 20 Do you see that? 21 A. I do. 22 Q. And do you, sir -- as a journalist, do you 23 agree with that? 24 MR. HARDER: I'm going to object. The 25 document speaks for itself.</p> |
| <p>Page 114</p> <p>1 MR. HARDER: I'm going to object. It's vague 2 and ambiguous, incomplete hypothetical, calls for 3 speculation. 4 THE WITNESS: I think it would depend on what 5 the journalist, in quotes, did. 6 BY MR. SULLIVAN: 7 Q. Didn't follow the code. In my question, 8 assume they didn't follow the code, any of these 9 prescriptions here, didn't follow them. 10 MR. HARDER: Same objections. 11 THE WITNESS: It would depend on the 12 incident, the story. 13 BY MR. SULLIVAN: 14 Q. Is the Code of Ethics enforceable? 15 MR. HARDER: Same objections. 16 THE WITNESS: I believe any -- this Code of 17 Ethics is not -- as you say, it's not rules. It 18 is meant as guidelines for journalists. 19 BY MR. SULLIVAN: 20 Q. And the Code of Ethics, if there are 21 violations, I take it the Society of Professional 22 Journalists does not convene a hearing and bring 23 journalists up on charges, correct? 24 A. I've not ever heard of that, no. 25 Q. Among journalists, does the Code of Ethics</p> | <p>Page 116</p> <p>1 THE WITNESS: I agree. 2 BY MR. SULLIVAN: 3 Q. Professor Foley, would you agree that 4 journalism encompasses a broad and diverse swath of 5 publications? 6 MR. HARDER: Object to the form of the 7 question. 8 THE WITNESS: Yes. 9 BY MR. SULLIVAN: 10 Q. Journalism would include fact-based reporting 11 about government, politics, and current affairs, 12 correct? 13 A. I'm not really sure what you mean by 14 fact-based reporting. 15 Q. Well, I'll give you a very concrete example. 16 When you told me about the work you did when you 17 first -- or early on in your career when you covered 18 local government here in these parts, is that 19 fact-based reporting? 20 A. It was my intention. 21 Q. You went to council meetings. You looked and 22 listened to what was done there, and then you did your 23 level best to convey that to your readers, correct? 24 A. Correct. 25 Q. And you weren't holding forth on matters of</p> |

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1 opinion. You were doing your level best to do accurate
2 fact-based reporting, correct?

3 A. Yes.

4 Q. Okay. And you considered that to be
5 journalism, correct?

6 A. Certainly part of it.

7 Q. Now, would journalism also include editorials
8 expressing opinions and views on the significant issues
9 of our times?

10 MR. HARDER: Vague and ambiguous.

11 THE WITNESS: It's certainly part of the
12 journalistic enterprise.

13 BY MR. SULLIVAN:

14 Q. You told us -- and to give you a concrete
15 example there, you told us about an instance where when
16 you had moved up into the management and into the
17 editorial side, right, you had some hand with these
18 kind of opinion pieces and editorials that the paper
19 ran, correct?

20 A. No. I said I was --

21 MR. HARDER: Compound, vague, ambiguous.

22 THE WITNESS: I did not say that. I said I
23 was in charge of everything except advertisements
24 and editorials.

25 BY MR. SULLIVAN:

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1 BY MR. SULLIVAN:

2 Q. I'll give you a concrete example on that one.
3 I take it, given our age, all right, you would consider
4 the works of Hunter S. Thompson -- are you familiar
5 with Hunter S. Thompson?

6 A. I am, sir.

7 Q. Okay. And you'll recall, I think, that he
8 would publish some rather biting commentaries on the
9 culture of this country or certain parts of this
10 country at that time. Do you recall that?

11 A. I do.

12 Q. Okay. Would you consider those works to be
13 journalistic works?

14 A. He was part of what is termed in the industry
15 as the new journalism.

16 Q. Okay. Now, would the Society for
17 Professional Journalists Code of Ethics apply to those
18 kind of works, his so-called new journalism?

19 A. I don't know why not.

20 Q. Okay. Did you ever attend a session at the
21 society where these kind of issues were discussed?

22 A. I can't recall.

23 Q. So in your judgment, things like be fair,
24 would that apply to Hunter S. Thompson?

25 A. The new journalism was one of opinions, what

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1 Q. Then I misspoke or misunderstood.

2 I believe in your career at the
3 St. Petersburg Times, there were times where you
4 actually wrote opinion pieces, didn't you?

5 A. I didn't -- I wrote editorials for two weeks
6 at the Evening Independent when a person was on
7 vacation.

8 How do you define editorials?

9 Q. Opinion pieces in the paper that take a
10 stance on the issues of the day, whether it be a zoning
11 change in the community or whether it be who's running
12 for president and what the key issues are.

13 A. By that definition, I did not -- except for
14 that two-week stint at the Evening Independent, I did
15 not write editorials.

16 Q. But for the folks at your paper who did write
17 editorials, did you consider that to be journalistic?

18 A. Yes.

19 Q. And journalism, I take it, would also include
20 cultural commentaries, even those published with a
21 rather jaundiced eye, correct?

22 MR. HARDER: Vague, objection to the form of
23 the question.

24 THE WITNESS: What do you mean by jaundiced
25 eye?

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1 opinions would go into work, yes, and that he wrote
2 from a point of view of what he saw, what he felt. And
3 he was after what all journalists are after, which is
4 truth.

5 Q. What about if we go back to the editorial
6 writers, does the Society for Professional Journalists
7 Code of Ethics apply to people who are writing
8 editorials for the opinion page of the paper?

9 A. Editorials are based on facts. As far as
10 that goes, yes.

11 Q. What about this business about being fair,
12 does an editorial have to be fair? It's the opinion of
13 the publisher, isn't it?

14 MR. HARDER: Vague and ambiguous, the term
15 "fair."

16 BY MR. SULLIVAN:

17 Q. Well, I'm using -- just so you know, I'm
18 using fair as it appears here in the Code of Ethics.
19 Do you understand that?

20 A. Yes.

21 Q. So do editorials have to be fair?

22 A. Good ones, yes.

23 Q. What about balanced, giving competing views?

24 A. Yes, good ones. A good argument in an
25 editorial as an argument for a particular side will

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1 talk about the other side if it's to be effective.

2 Q. And did the St. Petersburg Times observe that
3 in its editorials?

4 A. I can't speak for every editorial that
5 appeared in the St. Petersburg Times, but to be
6 effective, an editorial must be fair.

7 Q. So is it your understanding that if the
8 editorial board of the paper decided to take a
9 position, for example, on let's say the growth of the
10 neo Nazi movement in some part of Florida, would they
11 then say, well, you know -- would it be one of these,
12 well, on the one hand, on the other hand kind of
13 presentations?

14 MR. HARDER: I'm going to object. It's an
15 incomplete hypothetical and it's argumentative.

16 THE WITNESS: I doubt it would go into
17 detail.

18 BY MR. SULLIVAN:

19 Q. Now, if you would look back to page 4 of your
20 report, you'll see -- skipping down to kind of the
21 middle of the page, you have a sentence there that
22 says -- the paragraph starts, respect for privacy.

23 Do you see that paragraph?

24 A. Uh-huh. (Indicates affirmatively.)

25 Q. Okay. The sentence that I'm interested in is

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1 the second sentence, and it says, "It is customary in
2 the industry not to publish grisly images of car
3 accidents, for example, unless it is absolutely
4 necessary to the telling of the story."

5 Do you see that?

6 A. I do.

7 Q. Why would it ever be necessary to include a
8 grisly image of a car accident?

9 A. I'm not sure I can come up with an example
10 right here.

11 Q. Can you -- as you sit here, can you think of
12 a situation where it would be deemed necessary?

13 MR. HARDER: Asked and answered.

14 THE WITNESS: I can't come up with a good one
15 unless it maybe involved a prominent figure or was
16 the cause of assassination or something along
17 those lines.

18 MR. SULLIVAN: I'll ask the court reporter to
19 mark as Defendant's Exhibit 161 a multi-page
20 exhibit bearing ID numbers Gawker document 24635
21 through 36. And I'll ask that you take a moment
22 and look that over.

23 (Exhibit No. 161 marked for identification.)

24 MR. HARDER: 161?

25 MR. SULLIVAN: Yes, sir.

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1 BY MR. SULLIVAN:

2 Q. Professor Foley, have you had an opportunity
3 to look over Defendant's Exhibit 161?

4 A. I have.

5 Q. Do you recognize Exhibit 161?

6 A. Do I remember it, recognize it?

7 Q. No. I mean, as you look at it, do you see
8 there that it appears to come from the St. Petersburg
9 Times?

10 A. Yes.

11 Q. And it bears a date of June 11, 1988. Do you
12 see that?

13 A. I do.

14 Q. At this point in time, you were serving as an
15 editor?

16 A. Yes.

17 Q. And you would have been the -- you would have
18 been the managing editor at this point?

19 A. Probably.

20 Q. Now, you see that this particular photo -- to
21 give you the context, I have the blowup so that you can
22 read it. Then if you want to see how it fits in the
23 paper and what page it appeared on and all that, I've
24 given you the second page, but it's a little hard to
25 read because it's so small.

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1 But what we have before us, the first page of
2 Exhibit 161 is the whole of the article. Would you
3 agree?

4 A. It's a caption, yes.

5 Q. Now, you see there it depicts a victim on a
6 stretcher, strapped on a stretcher. Do you see that?

7 A. Yes.

8 MR. HARDER: Objection to the term "victim."

9 MR. SULLIVAN: Well, he's the --

10 BY MR. SULLIVAN:

11 Q. Is it your understanding that that is one of
12 the individuals hurt in the accident?

13 A. It appears so.

14 Q. Now, why did you publish -- I don't mean you
15 personally, but why did the newspaper publish this
16 photo?

17 A. It's news.

18 Q. Do you think that this was newsworthy, this
19 photograph?

20 A. I do.

21 Q. Okay. You see if you look at the text of the
22 publication, the brief little article there, under the
23 photograph, it indicates that two people received
24 relatively minor injuries after the van in which they
25 were riding lost control Friday evening on a

rain-slickened U.S. 19 in Hudson and flipped several times by the side of the road according to Pasco Emergency Medical Services.

Do you see that?

Q. Now, you viewed this as newsworthy even though the passengers only had minor injuries?

A. Given the photo, that might make it more

Q. All right. Do you know whether it would have been the practice of the St. Petersburg Times at that point to get the consent of the person depicted there on that stretcher?

A. The consent for what?

Q. To publish the photograph of him or her. I think it's a him actually. You can't tell. To get the person's permission to publish their photograph having been injured lying on the side of the road there in

A. Well, it's a public place. It is involving public paramedics. It occurred as rather miraculous. And he was involved in an accident.

Q. That's about the size of it?

flown to Bayfront Medical Center. Delgato's children, Matthew three and Leslie seven, and niece Rebecca Decker 11, were treated and released."

Okay? And then you have the photo that appears above that. Do you see that?

A. I'll take your word for it.

Q. Now, can you make out the date at the top of

A. Saturday, July 20th, 1991.

Now, at that point in time, would you have been the executive editor of the paper?

Q. Now, my question for you on this exhibit is the same as the last one. Why did the paper, the St. Petersburg Times, publish this story?

A. That was a question?

Q. Yes, sir. Why did the newspaper publish this

A. It's not a story, first of all. It's a photo and a caption. Is that what you're asking me, about the photo and caption?

A. It's not a story. For the same reason as the other one, it was something that happened, an accident.

MR. SULLIVAN: Okay. Let me ask the court reporter to mark as Defendant's Exhibit 162 a single-page document that bears identification number Gawker 24663 and ask if you can take a moment and look that over.

(Exhibit No. 162 marked for identification.)

THE WITNESS: What am I looking at?

BY MR. SULLIVAN:

Q. Professor, if you could look at kind of right in the center of the page, there is a piece that says, three hospitalized in Pasco crash. There is a photograph of what looks like an emergency type worker and a person on a stretcher. And then there's text beneath that. If you can, read that over.

Q. Can you read the text?

Q. I'm happy to read it for you. I'll ask the others assembled to try to correct me if I misread. But here's what the text says.

"Pasco Deputy Darcy Scarpati comforts Matthew Delgato after a collision Friday on U.S. 19 in Hudson. Police say Donald and Peggy Castleman pulled in front of Denise Delgato's car. The three of Spring Hill were

Q. Was it deemed newsworthy?

A. Obviously it was.

Q. When you say obviously, was the photo newsworthy?

Q. And why publish the photo of an injured child, which we know from your caption is Matthew Delgato, age three? Why publish that young boy, age three, a photo of him?

A. He was the victim of the accident. He was injured in the accident.

Q. Now, would it have been the practice of the St. Petersburg Times to obtain the consent of that boy's parents to publish his photo on the pages of your

A. I don't believe so.

Q. And why is that?

A. As I answered before, it was an accident. It was news. It took place and involved city streets, city personnel. It's news.

Q. And you say city streets because it took place in public?

A. That's part of it.

Q. Now, Professor, if you would look on page 4, the paragraph after the one we just looked at, you'll

see it says, "The Tampa Bay Times, for example, published stories about the beheadings and burning alive of hostages by terrorists. It did not publish links to the videos. Gawker did."

Do you see that?

Q. Now, why do you point out that Gawker did publish those things?

A. I think it's part of a pattern of sensationalism and graphicness, if that's a word.

Q. All right. Was it illegal for Gawker to publish the links to the videos of the beheadings?

MR. HARDER: I'm going to object, calls for a legal conclusion.

THE WITNESS: I don't know.

BY MR. SULLIVAN:

Q. Was it unethical for Gawker to publish the links to the videos of the beheadings?

A. I wouldn't do it.

Q. Would it be fair to say that Gawker made a different news judgment?

Q. Are you aware of any other news entities that made the same judgment as Gawker?

MR. HARDER: I'm just going to object to the

extent it's compound because there were five different beheading videos and one burning video.

THE WITNESS: I don't know.

BY MR. SULLIVAN:

Q. Okay. Professor Foley, are you aware that Fox News broadcast on its air a still image from the video of the pilot being burned alive? They did that

A. I do recall that, yes.

Q. It was a still, correct?

A. I believe so, to my recollection.

Q. Are you aware that Fox News chose to put the video of that pilot being burned alive on its website?

A. I'll take your word for it.

Q. Assuming that that was indeed done, in your judgment, was that unethical?

A. I wouldn't do it.

Q. But did it violate journalistic ethics?

A. It's distasteful. It's disgusting. I think

Q. As you understand it, did it violate the code, the SPJ Code of Ethics?

MR. HARDER: Take a look at the Code of

THE WITNESS: I think it does.

BY MR. SULLIVAN:

Q. All right. And why is that?

A. I think the first tenet under minimize harm, journalists should balance the public's need for information against potential harm or discomfort. Pursuit of the news -- it's the harm or discomfort.

Q. The harm or discomfort to whom?

Q. And you're aware that the family in this instance was that pilot who lived in the Mideast,

A. I don't know.

Q. Let me ask you this. Do you have any idea why Fox News chose to do that, to publish the link to

MR. HARDER: Calls for speculation.

THE WITNESS: I don't know.

BY MR. SULLIVAN:

Q. Were you aware that at least the proffered explanation by Fox News was that they did it so that people in this country could see the true horror of the enemy that we're up against?

MR. HARDER: Lacks foundation.

BY MR. SULLIVAN:

Q. Were you aware of that?

A. I was not, but -- no, I was not.

Q. As you understand these matters, did Fox News have the right under the First Amendment to make that decision to publish that link?

MR. HARDER: Calls for a legal conclusion.

MR. SULLIVAN: Just so we're clear, I don't want your legal view. I want your understanding of the First Amendment as a journalist who practiced in this area for decades.

MR. HARDER: Again, I don't think that you can distinguish it that way.

MR. SULLIVAN: That's all I'm interested in.

THE WITNESS: I'm not a lawyer.

BY MR. SULLIVAN:

Q. I don't -- I understand that. I'll stipulate to it. You as a journalist, is it your understanding that Fox News had the right under our First Amendment to make that decision to publish the link?

MR. HARDER: Calls for a legal conclusion.

THE WITNESS: In my view?

BY MR. SULLIVAN:

Q. All right. If you would look, please, at page 4 -- we're going to go to the bottom of 4 over

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1 onto the top of 5. And you see a passage there that
2 says, "In newsrooms across the country, editors employ
3 something called the "Cheerios test." They consider
4 graphic photos and descriptions, even graphic language,
5 using a simple standard. How would it play to readers
6 eating breakfast? Yes, this standard varies from
7 publication to publication and from editor to editor,
8 but at its heart is basic humanity. Don't abuse the
9 First Amendment to hurt anyone unnecessarily."

10 Do you see that?

11 A. I do.

12 Q. Now, the so-called Cheerios test was an
13 offspring of the morning daily newspaper, correct?

14 A. Probably. I don't know the -- where it
15 really came from.

16 Q. But the notion -- the notion being that folks
17 wouldn't want to find something on the front page of
18 their morning paper that might be upsetting or
19 disturbing, correct?

20 A. Yes. But I think that would pertain to an
21 afternoon newspaper or an evening newscast.

22 Q. All right. That's fair.

23 Also, you wouldn't want to have something
24 that would be upsetting on the front page of your paper
25 if you sent your eight-year-old daughter out on your

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1 Cheerios test?

2 MR. HARDER: Vague and ambiguous as to all
3 magazines.

4 THE WITNESS: There are so many magazines, so
5 many publications.

6 BY MR. SULLIVAN:

7 Q. Right.

8 A. I would imagine there are niche publications
9 that pay no attention to the Cheerios test.

10 Q. Let's put a finer point on it yet again.

11 To your knowledge, does Playboy magazine
12 follow the Cheerios test?

13 A. No.

14 Q. To your knowledge, does Sports Illustrated
15 follow the Cheerios test?

16 A. That could probably be debated.

17 Q. To your knowledge, does the editor of the
18 Sports Illustrated swimsuit edition follow the Cheerios
19 test?

20 A. That has been debated.

21 Q. What's the answer?

22 MR. HARDER: Calls for speculation.

23 THE WITNESS: I think in his way, if it's a
24 him -- or I don't know. I think in his way, yeah.

25 BY MR. SULLIVAN:

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1 front porch to pick up the paper, right? You wouldn't
2 want something that was upsetting to a person that
3 might come upon this unawares, correct?

4 A. That's certainly part of it.

5 Q. Does every paper follow the same Cheerios
6 test?

7 A. Well, as the report says, the standard varies
8 from publication to publication and from editor to
9 editor.

10 Q. Does the Rural Weekly in Nebraska follow the
11 same Cheerios test as the Philadelphia Enquirer?

12 MR. HARDER: Calls for speculation. It's an
13 incomplete hypothetical.

14 THE WITNESS: I have no idea.

15 BY MR. SULLIVAN:

16 Q. Do -- let me ask you this. Do magazines
17 follow the Cheerios test?

18 MR. HARDER: Calls for speculation.

19 THE WITNESS: I have no evidence one way or
20 the other. I imagine -- I'm not even going to
21 imagine.

22 BY MR. SULLIVAN:

23 Q. Since Mr. Harder objected that it calls for
24 speculation, let me put a finer point on it.

25 To your knowledge, do magazines follow the

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1 Q. Does your old paper, the St. Petersburg
2 Times, follow the same Cheerios test that it did when
3 you served as executive editor of that paper?

4 A. I don't know.

5 MR. HARDER: Calls for speculation.

6 THE WITNESS: I'm sorry. I don't know.

7 BY MR. SULLIVAN:

8 Q. Can you make an assessment based on -- you
9 indicated that you continue to read the St. Petersburg
10 Times, correct?

11 A. Yes.

12 Q. Can you make an assessment based on having
13 read that coverage for how many decades now, four?

14 A. Probably five.

15 Q. Okay. In your view, have times changed? Do
16 you see things there now that you wouldn't have seen
17 when you were the executive editor?

18 A. I'm not sure.

19 Q. Okay. Do you see things there now that you
20 wouldn't have seen when you first entered into this
21 business, when you first became a reporter?

22 A. Very broad question. I'm sure lots of things
23 are different. It's a different world from 1970.

24 Q. Let me ask you this. How -- how does the
25 Cheerios test have relevance in the current world of

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1 online publications?

2 A. The Cheerios test is a metaphor, obviously,
3 in my view for taste. And it is -- it is -- as the
4 Code of Ethics states, it's part of the balancing act
5 of the public's need for information against harm or
6 discomfort.

7 Q. All right. Let me ask you this. With an
8 online publication, we don't have the problem of my
9 eight-year-old daughter going out on the front porch
10 and picking up a paper and seeing some half-naked
11 person, right?

12 MR. HARDER: I object. You think
13 eight-year-olds don't go online?

14 THE WITNESS: I think the Internet is -- you
15 have that problem almost infinitely more than
16 ever.

17 BY MR. SULLIVAN:

18 Q. But when you go to a site, you know what
19 you're getting, don't you?

20 MR. HARDER: Objection, vague and ambiguous,
21 argumentative.

22 THE WITNESS: Not always.

23 BY MR. SULLIVAN:

24 Q. Okay. Well, let's take the post that's at
25 issue here, the Gawker Hulk Hogan post. You had to

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1 A. Yes. I couldn't testify as to if that's just
2 a recent phenomenon or not.

3 Q. Okay. But you know of what I speak, right?

4 A. I do.

5 Q. And I take it the news stations that choose
6 to operate in that fashion, one would assume that as
7 journalists, having given people the heads up, warning,
8 they can avert their eyes, they can change the channel,
9 or they can sit there and watch it, right?

10 A. I would have to assume what they think.

11 Q. Okay. Do you think that them behaving in
12 that fashion by saying to their viewers, warning, we're
13 about to show something that could be viewed as
14 disturbing, do you think they have satisfied their
15 ethical duties to their viewers?

16 MR. HARDER: Incomplete hypothetical and
17 vague.

18 THE WITNESS: I think that's a case-by-case
19 situation.

20 BY MR. SULLIVAN:

21 Q. But case by case, I take it from that answer
22 that you would agree with me that there may be
23 instances where they have satisfied their ethical
24 obligations to their viewers.

25 MR. HARDER: I'm going to object. It's an

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1 click on it, didn't you?

2 MR. HARDER: Objection. Objection, vague.

3 THE WITNESS: That doesn't make it
4 anything -- that doesn't make it newsworthy. That
5 doesn't make it journalism. That doesn't make it
6 ethical.

7 BY MR. SULLIVAN:

8 Q. No. But it doesn't surprise you. It doesn't
9 jump out at you and surprise you. You have to take an
10 affirmative act. You have to decide to click it, don't
11 you?

12 MR. HARDER: Argumentative, vague.

13 THE WITNESS: You do have to click it.

14 BY MR. SULLIVAN:

15 Q. Right. You didn't come across the Hulk Hogan
16 video by accident, did you?

17 A. I don't think so.

18 Q. Okay. Professor Foley, have you noticed that
19 in recent years, more TV broadcasters provide warnings?
20 They announce to their viewers, we're about to show you
21 some video; we're about to show you something that you
22 may find very disturbing. And then they proceed to
23 show you a video of some young fellow getting beaten by
24 the cops or some such thing, right? Have you seen that
25 yourself?

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1 incomplete hypothetical that's not even a
2 hypothetical. It's vague and ambiguous and it's
3 argumentative.

4 THE WITNESS: The word "may" opens up all
5 sorts of possibilities.

6 BY MR. SULLIVAN:

7 Q. Well, let's put it in concrete terms. Do you
8 think they've satisfied -- can you conceive of a
9 situation where by posting a warning before they showed
10 the material to their viewers they've satisfied their
11 ethical obligations?

12 A. Again, I think it would depend on the
13 circumstances, as so much of journalism does.

14 MR. HARDER: Michael, we've been going over
15 an hour, if we can break.

16 MR. SULLIVAN: By all means, sure.

17 (Recess taken from 2:37 p.m. to 2:51 p.m.)

18 MR. SULLIVAN: I'll ask the court reporter to
19 mark as Defendant's Exhibit 163 a multi-page
20 document that bears Gawker ID numbers 24711
21 through 24715.

22 (Exhibit No. 163 marked for identification.)

23 BY MR. SULLIVAN:

24 Q. Now, the story -- just to give you a heads
25 up, the story that I was interested in appears at the

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1 very bottom of the page. It's entitled, "For Now Clubs
2 Dancing Around New Law." And then, so that if you want
3 to read it, there's text that is larger that appears --
4 that's why you've got so many pages for a short
5 article.

6 Have you had the opportunity to look over
7 Defendant's Exhibit 163?

8 A. I have.

9 Q. And we're focused on the article that
10 appeared on the front page of the St. Petersburg Times.
11 It's down at the bottom of the page entitled, "For Now
12 Clubs Dancing Around New Law."

13 Do you see that?

14 A. I do.

15 Q. Then under the heading, there is a photograph
16 and it appears to be -- it looks like it's a couple
17 women and a gentleman in some kind of establishment. I
18 take it from the article this is about the lap dancers
19 and what have you that was going on in Tampa at the
20 time.

21 Is that a fair assessment? Is that your
22 understanding?

23 A. It's part of what it's about, yes.

24 Q. In your opinion, does the publication of that
25 photo on the front page pass the Cheerios test?

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1 A. I think so.

2 Q. Based on your knowledge of the paper's
3 readership, are there readers that would find that
4 photo upsetting?

5 A. In the newspaper business, you should realize
6 that there are some readers who find some things
7 upsetting.

8 Q. So would it be fair to say there would be
9 readers that would find that to be in rather poor taste
10 to put a photo like that on the front page of the
11 paper?

12 A. I couldn't say for sure, but it wouldn't
13 surprise me.

14 Q. Okay. Why -- why was it necessary to report
15 this story? Why was it necessary to publish that photo
16 on the front page?

17 A. I can't speak to the people who made the
18 decision. This was in December of 1999, after I had
19 left the paper. I would have to speculate.

20 Q. Do you -- based on your experience in
21 journalism, do you have a view of why they would run
22 that on the front page?

23 A. It's controversy. It's interesting. It's --
24 the lap dance -- as one of my writers once put it,
25 the lap dance is to Tampa what Rice-A-Roni is to

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1 San Francisco.

2 MR. SULLIVAN: Let's mark as Defendant's
3 Exhibit 164 a multi-page document, and it bears
4 Gawker ID numbers 24711 through -- sorry. That's
5 not correct. Strike that. It bears ID numbers
6 24707 through 24710.

7 (Exhibit No. 164 marked for identification.)

8 BY MR. SULLIVAN:

9 Q. I'll ask if you can take a moment and look
10 that over. If you could, look at the article that
11 says, final hearing on lap dancing creates a buzz.

12 Professor, have you had an opportunity to
13 look over Defendant's Exhibit 164?

14 A. I have.

15 Q. And you'll see that this article that I've
16 pointed to you appears on the front page of the
17 St. Petersburg Times.

18 A. Yes.

19 Q. And you'll see that, again, as with our last
20 example, it's from December of 1999. So that would be
21 after you left the paper; is that correct?

22 A. That is correct.

23 Q. Now, if you would look, please, at the second
24 page of the exhibit. And I will tell you this is
25 rather hard to read, but I will attempt to read the

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1 paragraph that's about three or four graphs down on the
2 left column. You'll see there's a photograph of some
3 people. It's the column to the left of that. And the
4 passage that starts, "The City has produced an explicit
5 videotape from police undercover arrests. The tape
6 shocked a gathering of local clergy Monday as well as
7 council members who received private viewings Tuesday
8 and Wednesday."

9 Then the next graph says, "The tape shows
10 repeated close-ups of female genitalia and appears to
11 show women engaging in oral sex on stage. Nude dancers
12 wrap their legs around customers' heads. In one case,
13 a radio-controlled truck with a sex toy attached to the
14 front is directed between a performer's legs. The tape
15 will be played at the meeting this afternoon."

16 Do you see that?

17 A. I don't. I'm taking your word for it.

18 Q. Okay. It's pretty small print.

19 A. I've had several eye surgeries.

20 Q. Okay. Fair enough.

21 Assuming that it's the text -- that I read
22 the text accurately, does that violate the Cheerios
23 test publishing that kind of fairly graphic description
24 of what was on that page?

25 A. I would have to admit, that's pretty close to

Q. But you wouldn't -- you had left the news side of the paper by that point?

A. I left the paper by then.

Q. To your knowledge, did you ever hear whether the paper received any complaints from readers?

A. I have no idea.

Q. If you would look, sir, at the next page of the document or -- so that you can see it in slightly larger version, if you would look at the last page, 24710, now, you see there a photograph that had appeared in the original version on that page we were just reading from. It appeared next to that. And it says, "Two dancers in a Tampa adult entertainment club are shown in this undercover video taken by the Tampa Police Department. An explicit videotape from undercover police operations will be shown at today's

And then the photo, if you can examine that, appears to depict what looks like two women who are nude embracing and kissing.

Do you see that?

Q. Now, does the publication of that photograph in the newspaper, the St. Petersburg Times, does that

violate the Cheerios test?

A. Pretty close.

Q. And would you say based on your experience in the news business that there are readers in this community who would prefer not to see that over their morning breakfast?

MR. HARDER: Calls for speculation.

THE WITNESS: Could you read the question

(The reporter read the pending question.)

THE WITNESS: Probably.

BY MR. SULLIVAN:

Q. Why -- I realize you weren't there at the time, but why would it be necessary to publish a photo like that to tell this story to your readers?

A. I don't know.

Q. Can you -- based on your experience in the news business, can you -- do you have a view on why they would have done that?

MR. HARDER: Asked and answered.

THE WITNESS: I don't know.

BY MR. SULLIVAN:

Q. Okay. Let me ask you this. Would it concern you that these two women who are depicted in that still were filmed surreptitiously?

MR. HARDER: Incomplete hypothetical.

THE WITNESS: Beginning of that sentence --

BY MR. SULLIVAN:

Q. Would it concern you that the two women depicted in that picture -- it's a still from a videotape -- were filmed surreptitiously?

MR. HARDER: It lacks foundation and it's an incomplete hypothetical.

THE WITNESS: Surreptitiously filmed, yes.

In a public place makes a big difference. Public performances in a public place with people around, that takes -- that makes it less concerning.

BY MR. SULLIVAN:

Q. Okay. But you see there in the caption that it was part of an undercover video.

Q. Do you know if these two women gave the paper consent to publish this photograph?

A. I have no idea.

Q. Would it concern you? In your judgment, would consent be an issue?

A. I think in this case, nobody's identifiable.

I think it would be much less concerning.

Q. Okay. In your view, was this a violation --

the publication of this photograph of these two women, was that a violation of these women's privacy rights?

MR. HARDER: I'm just going to object. It calls for a legal conclusion, incomplete

THE WITNESS: I don't know that these women haven't given up their rights of privacy by dancing naked in front of a bunch of people.

BY MR. SULLIVAN:

Q. All right. Professor Foley, if you could look, please, at the -- at your report, page 5. At the bottom of that page and continuing on over into the middle of the next page, you will -- if you want to take a moment and just look at that.

A. Which -- begins what?

Q. Yes, sir. It's at the bottom of page 5, last year a Tampa businessman.

A. Yes. Okay.

Q. Essentially, would you agree with me that on the bottom of page 5 and continuing on over through the middle of page 6, you provide us with essentially three examples of instances where someone surreptitiously taped women in various states of undress? Would that be fair -- oh, pardon me -- women and in one instance underage girls.

MR. HARDER: Compound.

THE WITNESS: Yes.

BY MR. SULLIVAN:

Q. And then you make the point that the instances themselves were newsworthy, correct?

Q. And you make the further point that those media entities, in this case the Tampa Bay Times and the Los Angeles Times, did not publish any of the video material, right?

A. That's correct.

Q. And then on the Johns Hopkins instance, you make the point that no news outlets of which you're aware published any of that footage, right?

Q. To your knowledge, did Gawker post any of that video footage that you're talking about there in those three paragraphs?

Q. Now, if you look over on page 7, you have at the top of the page a heading that says, Privacy

Do you see that?

Q. And you say, "Based on my examination of

just showing that that's part of a pattern.

Q. So they published pictures of folks in some state of undress and that means they intend to harm folks; is that what you're telling us?

MR. HARDER: Ambiguous, objection to the form of the question.

THE WITNESS: I think they did harm Hulk

BY MR. SULLIVAN:

Q. Yeah. But -- I take your point on that.

What I don't understand, what I'm having difficulty with is what in the world it has to do with publishing photos of Kate Middleton.

A. It's a pattern of nudity, invasion of privacy, disregard for human dignity, as was the case in the Hulk Hogan video.

Q. And you feel that that meant that they intended to harm Mr. Hogan?

A. They did harm him.

MR. HARDER: Asked and answered.

THE WITNESS: They did harm Mr. Hogan.

BY MR. SULLIVAN:

Q. Is it relevant -- the topless photos of Kate Middleton, is that relevant to whether they invaded his privacy in the first place in your view?

Gawker's practices in this matter as well as others, Gawker violated the privacy of Terry Bollea (Hulk Hogan), which is unfair and meant to cause harm rather

Do you see that?

Q. And then following that statement, you have Gawker Media (at Gawker.com or one of its affiliated publications, Deadspin). And then you provide us with four examples.

Do you see that?

Q. First example out of the box is you point out that Gawker published topless photos of Kate Middleton, wife of the future king of England.

Do you see that?

Q. How did the fact that Gawker published topless photos of Kate Middleton, wife of the future king of England, indicate to you that Gawker meant to cause harm to Hulk Hogan?

A. It's just part of a pattern.

Q. And how does that show you that they meant to harm Hulk Hogan in particular?

A. I think they're two separate things. I'm

A. Is it relevant to whether they invaded Hulk Hogan's privacy?

A. Again, as I said, this is a pattern of invading people's privacy without regard for their feelings. There's no balancing of the public's need for information against potential harm or discomfort.

Q. Look then at the last of the little starred examples. Do you see asterisks there?

Q. Do you see the one that says, posted cell phone photos of what was claimed to be Brett Favre's penis? Do you see that?

Q. How did the fact that Gawker posted cell phone photos of what was claimed to be Brett Favre's penis indicate to you that Gawker meant to harm Hulk

MR. HARDER: Asked and answered.

THE WITNESS: It's a pattern of publishing nudity without regard for privacy. It's not newsworthy. It's not ethical. And it's not

BY MR. SULLIVAN:

Q. In your judgment?

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1 A. In my judgment.

2 Q. And I take it would agree that there are
3 journalists who would disagree with you, correct?

4 MR. HARDER: Objection to the term
5 "journalists."

6 THE WITNESS: Journalists I don't think would
7 disagree with me.

8 BY MR. SULLIVAN:

9 Q. And you base that on what?

10 A. I believe journalists are ethical and they
11 look for newsworthy items and they commit journalism.

12 Q. Okay. Why did you pick these examples, the
13 four that appear on this page 7?

14 A. I thought they were illustrative of my point.

15 Q. Where did you find them?

16 A. In the batch of information that I viewed
17 about Gawker and --

18 Q. Did you find them through your own research?

19 A. Some of it.

20 Q. Where did you find others of it?

21 A. Some of it was provided by Mr. Harder's
22 staff.

23 Q. All right. Before we move off of Brett
24 Favre, is the privacy calculus different when you are
25 dealing with a celebrity or a well-known sports figure?

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1 question.

2 Q. Well, it sounded to me like what you've been
3 telling us is there is some kind of balancing,
4 assessment, some kind of application of judgment in
5 these instances, right?

6 A. Okay. Yes.

7 Q. Okay. One of the things that you take into
8 account is that the person is a celebrity.

9 A. Take into account? It's more interesting
10 when people know who we're talking about. Brett Favre
11 was a football star. And now this famous athlete -- or
12 actually part of this famous athlete is exposed.

13 Q. All right.

14 MR. HARDER: Are you finished with your
15 answer?

16 THE WITNESS: I was going -- I was going to
17 say that you can invade anybody's privacy. And in
18 the case of Hulk Hogan, his privacy was invaded
19 without his knowledge and where he had -- the idea
20 that he was alone -- or with someone else in what
21 he assumed was the privacy of his own home and yet
22 the video was published.

23 BY MR. SULLIVAN:

24 Q. Well, it wasn't his own home, was it?

25 A. Excuse me. In the home of a friend.

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1 MR. HARDER: Vague and ambiguous, incomplete
2 hypothetical.

3 THE WITNESS: I would like to hear that
4 again, the beginning of it.

5 BY MR. SULLIVAN:

6 Q. Certainly.

7 We were talking about Brett Favre. Is the
8 privacy calculus different when you're talking about a
9 celebrity or a well-known sports figure?

10 MR. HARDER: Same objections.

11 THE WITNESS: I don't know what privacy
12 calculus means.

13 BY MR. SULLIVAN:

14 Q. You're trying to do this balancing. You're
15 taking into account newsworthiness and you're taking
16 into account privacy concerns and you're trying to make
17 the judgment as to whether it is fair to publish that
18 particular thing, whatever it is, all those factors
19 taken into account as you've explained to us.

20 Is one of the things you take into account
21 whether the person is a celebrity?

22 A. That's different than the other question.

23 Q. Pardon?

24 A. I take into account -- I'm sorry to be
25 thick-headed, but I'm not sure I understand the

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1 Q. Right. He was in the bedroom of his best
2 friend's -- his best friend's bedroom having sex with
3 his best friend's wife, right?

4 A. Uh-huh. (Indicates affirmatively.)

5 Q. Does that factor into the mix when you're
6 making your assessment of privacy?

7 A. Where he was, no. The fact that there was a
8 video of him naked having sex in a private bedroom in a
9 private home and that was posted on the Internet for
10 anyone to see, it's not newsworthy. It's not
11 journalism. It's not ethical.

12 Q. Let me ask you this. Before we finish with
13 Brett Favre, does it matter to you that Brett Favre
14 allegedly took a photograph of his own penis? There is
15 no surreptitiousness in this reporting. He took his
16 own penis and he texted it to someone. Are you aware
17 of that?

18 A. I was.

19 Q. Do you find that offensive?

20 MR. HARDER: Objection, incomplete
21 hypothetical.

22 THE WITNESS: I think it's weird. I think
23 it's offensive to the person who got the text.

24 BY MR. SULLIVAN:

25 Q. Do you think it's newsworthy?

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1 A. I do. He is a famous athlete and he is
2 famous for being a football player and now he does
3 something that is really weird.

4 MR. HARDER: I'm just going to object to the
5 word "it" in his question. It's vague.

6 BY MR. SULLIVAN:

7 Q. Did you understand my question?

8 A. Well, when you're referring to a penis and
9 use the word "it," I understand it can be ambiguous. I
10 think you were referring to the incident.

11 Q. Yes, sir. And you answered with that
12 understanding I take it.

13 A. Yes.

14 Q. Professor, if you look now on page 8, you'll
15 see down at the very bottom of that page, the last
16 paragraph says, "There are three absolute requirements
17 for good reporting: The story must be accurate, it
18 must be complete, and it must be fair."

19 Do you see that?

20 A. I do.

21 Q. Where do those three absolute requirements
22 derive from?

23 A. That's based on my years of experience. I
24 would guess I probably have read that somewhere on
25 occasion. It's part of my lesson plan in class. It's

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1 A. I do.

2 Q. Now, how extensive was your review?

3 A. I read an awful lot of Gawker stuff.

4 Q. And approximately how many posts did you
5 review?

6 A. Dozens, hundreds.

7 Q. What is your -- as you sit here today with
8 us, what's your best estimation?

9 A. Certainly dozens. Probably over a hundred.

10 Q. All right. How much time --

11 A. Let's change it to possibly instead of
12 probably.

13 Q. Possibly over a hundred, okay. That's fair.

14 How much time did you spend reviewing those
15 posts?

16 A. Hours. I don't know. I've done an awful lot
17 of research. Of that 50 hours, maybe half.

18 Q. Now, is that reading Gawker posts or reading
19 stuff including Gawker posts?

20 A. Stuff including Gawker posts.

21 Q. So the piece of that that's reading Gawker
22 posts, what's your best estimate of how much time you
23 spent doing that?

24 A. Well, I am truly guessing.

25 Q. I don't want you to guess, but I do want your

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1 what I teach my kids.

2 Q. Who enforces that absolute requirement?

3 A. Journalists.

4 Q. In what way?

5 A. They endeavor to make their stories fair and
6 accurate and complete.

7 Q. But if the absolute requirement is not met,
8 what penalty is imposed?

9 MR. HARDER: Vague, incomplete hypothetical.

10 THE WITNESS: Lack of credibility, lack of
11 fairness, lack of human -- what's the word I'm
12 looking for? There's no penalty in terms of a
13 wrist slap or something like that. It's just not
14 journalism.

15 BY MR. SULLIVAN:

16 Q. In your judgment?

17 A. In my judgment.

18 Q. If you would look, sir, over on page 9,
19 there's a paragraph right before the heading
20 Inadvertent Journalism. And it says, "Based on my
21 extensive review of Gawker's work, it is not Gawker's
22 institutional intention to adhere to the fundamental
23 principles of journalism. In fact, Gawker, its founder
24 and its editors have said publicly that they do not."

25 Do you see that?

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1 best estimate.

2 A. My best estimate would be a guess.

3 MR. HARDER: You can give a range if it helps
4 you.

5 THE WITNESS: Okay. Between 15 and 20.

6 BY MR. SULLIVAN:

7 Q. Hours?

8 A. Yeah.

9 Q. Okay. All right. If you could look, sir,
10 on -- if you could look at the bottom of page 10,
11 you'll see there it looks like -- just so you get
12 context, if you look above that, you refer to a March
13 2013 interview with Tommy Craggs, executive editor of
14 Gawker.

15 A. Yes.

16 Q. And then the paragraph I was pointing you to
17 initially looks like that is a quote from him. Do you
18 see that?

19 A. I do.

20 Q. And kind of midway into it, there's a
21 sentence that says, "Ethics has nothing to do with the
22 truth of things, only with the proper etiquette for
23 obtaining it so as to piss off the fewest number of
24 people possible. That works fine for lots of news
25 outlets. We don't have to worry about niceties."

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1 Do you see that?

2 A. I do.

3 Q. The part of that where he says ethics has
4 nothing to do with the truth of things, do you agree
5 with that?

6 MR. HARDER: Incomplete hypothetical, vague
7 and ambiguous.

8 THE WITNESS: No.

9 BY MR. SULLIVAN:

10 Q. Why not?

11 A. There's another quote in this report where
12 one of the editors, or whatever their titles are, talks
13 about how rumors are a great way -- printing rumors is
14 a great way to get to the truth, which I found
15 ridiculous, absolutely ridiculous. And I think that
16 that's a lot of what is referred to here, same thing.

17 Q. You don't agree with that?

18 A. I do not agree with that.

19 Q. But focus back on this. Ethics has nothing
20 to do with the truth of things. What does ethics have
21 to do with -- I publish a fact, a simple fact. I say
22 the mayor is a crook. He stole \$50,000 from the city
23 council's transportation fund. That's my statement.
24 It's true or it's not, isn't it?

25 MR. HARDER: Incomplete hypothetical, vague

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1 A. I do.

2 Q. "This is evidenced by its focus on traffic,
3 click-bait journalism."

4 Do you see that?

5 A. I do.

6 Q. What is the significance of that observation
7 for purposes of reaching your expert opinion?

8 A. I don't understand the question.

9 Q. You know that Gawker's motivated primarily or
10 entirely by money, right?

11 A. It appears so.

12 Q. For purposes of your assessment and rendering
13 of your expert opinion, does that matter?

14 A. I believe it does. I think that's why Gawker
15 publishes nude photographs. I believe it publishes
16 rumors and half truths without regard for their
17 veracity. I think that there is total disregard for
18 privacy. I think that's why we're here, that they
19 published the Hulk Hogan video to drive traffic even
20 though it was not newsworthy and not journalistic and
21 not ethical.

22 Q. Let me ask you this. When you were serving
23 in a managerial capacity at the St. Petersburg Times,
24 was it a for-profit entity?

25 A. Yes.

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1 and ambiguous.

2 THE WITNESS: I would need the circumstances.

3 Where did you get it?

4 BY MR. SULLIVAN:

5 Q. Got it from the assistant mayor.

6 A. Who's the assistant mayor?

7 Q. The assistant mayor.

8 A. Do we trust the assistant mayor?

9 Q. What if it -- but if it's true -- let's say
10 we don't trust the guy. The guy's a bum. He's an
11 alcoholic. But it turns out he got that right. What
12 does ethics have to do with the truth of that
13 statement?

14 A. Ethics is part --

15 MR. HARDER: Argumentative, vague and
16 ambiguous, incomplete hypothetical.

17 Pause and let me squeeze it in.

18 THE WITNESS: I'm sorry. I apologize.

19 It's part of the reporting process. That's
20 part of the reporting process.

21 BY MR. SULLIVAN:

22 Q. Let me ask you this. On page 11, you say
23 under the heading Money is the Motive, "Gawker is
24 motivated primarily, or entirely, by money."

25 Do you see that?

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1 Q. It wasn't some kind of charitable foundation
2 I take it, was it?

3 A. That was not our intent.

4 Q. All right. So does -- the fact that Gawker
5 is a for-profit publisher, does that affect the scope
6 of its First Amendment rights?

7 MR. HARDER: Objection, vague and ambiguous,
8 calls for a legal conclusion, incomplete
9 hypothetical, argumentative.

10 THE WITNESS: Can you repeat it?

11 (The reporter read the pending question.)

12 THE WITNESS: The fact that it's for profit
13 does not, but the fact that -- the way they make
14 their profit does.

15 BY MR. SULLIVAN:

16 Q. All right. If you would look, please, on
17 page 12, the next page, you'll see at the top of the
18 page you refer to so-called NSFW material. Do you see
19 that?

20 A. I do.

21 Q. And you explain that that means -- those four
22 initials mean not safe for work, right?

23 A. Yes.

24 Q. And not safe for work typically means that
25 it's depicting nudity or some other such content,

A. I don't know that typically would apply, but it means that they do. There's a lot of it.

Q. All right. Professor Foley, how many NSFW stories did you review?

Q. And how much time did you spend reviewing

A. I have no idea.

Q. Can you give us an estimate of how much time you spent reviewing those materials?

A. If you're going through Gawker material, it's hard not to go through those. I know they're mixed in

Q. So does that help you assess how many hours we're talking about?

A. It makes it harder. I can't do it. I just

Q. Let's say we put you in charge of the Internet. All right? Make you Internet czar. Would you banish NSFW stories from the Internet?

MR. HARDER: I'm going to object. It's an incomplete hypothetical. It's compound in that it refers to every single NSFW-tagged article ever put onto the Internet. It's vague.

THE WITNESS: I would go back to the preceding answer and say I would put them out of business because I would not want to unnecessarily harm people and embarrass them.

BY MR. SULLIVAN:

Q. What if these are folks that, like Brett Favre, took pictures of their own penis?

MR. HARDER: Incomplete hypothetical, vague and ambiguous. Objection to the form of the

THE WITNESS: I was an editor for 22 years -- or I was an editor for 15 -- more than 15 -- about 13 of my years -- however many years I was an editor, I've never published a picture of a man's penis. I know that's redundant to say man's

BY MR. SULLIVAN:

Q. Let me ask you this. Would you banish all photos or posts that display photos of women with bare

MR. HARDER: Same objections as before.

THE WITNESS: Same answer essentially.

BY MR. SULLIVAN:

Q. Would you banish all photos or posts that

THE WITNESS: Would I ban them?
BY MR. SULLIVAN:

A. I don't have any idea.

Q. All right. Let's narrow our question a bit. If I were to make you the editor of Gawker, would you banish NSFW stories from Gawker's publications?

MR. HARDER: Argumentative, incomplete hypothetical, vague and ambiguous, compound in that NSFW refers to numerous, numerous amounts of stories and content.

THE WITNESS: I can't imagine being editor of Gawker. I can't imagine.

BY MR. SULLIVAN:

Q. Well, give it a shot. Give it a try. In your role as an expert, we put you in charge. You're the man in charge now.

A. I would probably put Gawker out of business.

Q. All right. And why would you do that?

A. I would follow some form of ethical guidelines so as not to harm my fellow man.

Q. Would you banish all posts that display photos of men's penises?

MR. HARDER: Again, compound, incomplete hypothetical, but go ahead.

contain photos of women with bare buttocks?

MR. HARDER: Same objections as before. Just to specify the objections, it's incomplete hypothetical, vague and ambiguous. I object to the form of the question. And it's compound in that the question is asking about every single photo of a person's bare buttocks or breast or penis, depending on the question asked, just for

THE WITNESS: Roughly the same answer.
BY MR. SULLIVAN:

Q. Okay. If you look at page 12 of your report, you see there's a heading Rumors.

Q. And you say, "Gawker publishes rumors and uses anonymous sources without any attempt to verify

Do you see that?

Q. What does that have to do with this case?

A. It goes back to directly the source of the -- not the source, but whoever gave this to Gawker was an anonymous source. So that's the direct connection.

Q. Why does that matter?

A. Because we don't have any idea where he got

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1 it and how he got it, anything about it.
 2 Q. Why does that matter? Do you dispute that
 3 that videotape is actually the videotape of Hulk Hogan
 4 and Heather Clem having sex in Bubba's bedroom?
 5 MR. HARDER: Argumentative.
 6 MR. SULLIVAN: It's not an argument. I'm
 7 just asking him a question.
 8 MR. HARDER: It's a compound question. You
 9 asked him two questions.
 10 THE WITNESS: Do I dispute that it was Hulk
 11 Hogan and Heather Clem? I do not.
 12 BY MR. SULLIVAN:
 13 Q. All right. And the fact that it was
 14 anonymous, why would that matter in whether it's an
 15 invasion of his privacy?
 16 A. Motives. What is the motive of this person?
 17 That could easily taint everything about it.
 18 Q. How so? The claim isn't that it's untrue.
 19 A. The claim is that it's --
 20 MR. HARDER: I'm just going to object. It's
 21 vague and ambiguous. I object to the form of the
 22 question. It's argumentative also.
 23 THE WITNESS: I would like to know before --
 24 you're asking whether -- if the question implies
 25 whether I would publish the video, I would not.

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1 So I think that the fact that there's an anonymous
 2 source just adds to the unethicalness of the whole
 3 incident.
 4 BY MR. SULLIVAN:
 5 Q. When you worked at the St. Petersburg Times,
 6 did you ever publish stories based on anonymous
 7 sources?
 8 A. We did. And we did it -- it was my rule, my
 9 hard and fast rule, that we would publish no anonymous
 10 sources on any local news stories unless I was told who
 11 the source was. I would then make the judgment whether
 12 it was a valid source. I would also make the judgment
 13 whether it was the only way we could get the
 14 information. I would also judge whether the
 15 information was important enough to publish it with an
 16 anonymous source. However, we did run wire stories
 17 from the Washington Post, the Associated Press, the New
 18 York Times that did have anonymous sources in them,
 19 because that is the way many governments -- that's the
 20 way Washington works is anonymous sources. You don't
 21 get anything in Washington without an anonymous source.
 22 It's part and parcel of the fabric of how our country
 23 is governed.
 24 Q. So if it was a local story, you wanted to
 25 know who the anonymous source was?

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1 A. I demanded to know.
 2 Q. But if it was the Associated Press, you'd
 3 just take it on faith?
 4 MR. HARDER: Objection, argumentative,
 5 incomplete hypothetical, vague and ambiguous.
 6 THE WITNESS: We often did. But we sourced
 7 the story as coming from the Washington Post, the
 8 New York Times, the Associated Press.
 9 BY MR. SULLIVAN:
 10 Q. All right.
 11 MR. HARDER: When it's a convenient time,
 12 we've been going for roughly another hour.
 13 MR. SULLIVAN: Let me see. If you want to
 14 take a break now, I'm trying to kind of see if we
 15 can wrap up.
 16 MR. HARDER: Just take like five?
 17 MR. SULLIVAN: Yes.
 18 MR. HARDER: Okay. That will give you a
 19 chance to kind of gather things up.
 20 (Recess taken from 3:39 p.m. to 3:48 p.m.)
 21 MR. SULLIVAN: I ask the court reporter to
 22 mark as Defendant's Exhibit 165 a multi-page
 23 document titled Documents Relied Upon by Professor
 24 Mike Foley.
 25 (Exhibit No. 165 marked for identification.)

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1 BY MR. SULLIVAN:
 2 Q. Do you recognize Exhibit 165?
 3 A. The exhibit, I don't -- what do you mean by
 4 recognize? Do I see it? Yes.
 5 Q. When did you prepare Exhibit 165?
 6 A. I didn't. The Harder firm did.
 7 Q. Looking at this exhibit, can you tell the
 8 order -- strike that.
 9 You'll see here it indicates that you read
 10 the DCA opinion.
 11 A. A long time ago when I first was hired.
 12 Q. It indicates that you read the deposition of
 13 Nick Denton. Do you see that?
 14 A. Yes.
 15 Q. And A.J. Daulerio?
 16 A. Yes.
 17 Q. When did you read those?
 18 A. I read them at the beginning of the case and
 19 I reread them within the last month.
 20 Q. When you say the beginning of the case, what
 21 is your best recollection of when that was?
 22 A. Four to six months ago.
 23 Q. Did you review the deposition of Hulk Hogan?
 24 A. I did not.
 25 Q. Why not?

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- 1 A. I didn't have it.
 2 Q. Did you ask for it?
 3 A. I didn't -- to be honest, I didn't know it
 4 had been taken.
 5 Q. Did you learn at some point that it had been
 6 taken?
 7 A. Yesterday maybe.
 8 Q. All right. Did you review the deposition of
 9 Bubba Clem?
 10 A. I did not.
 11 Q. And did you know that the deposition of Bubba
 12 Clem had been taken?
 13 A. I was certain it had, yes.
 14 Q. And did you ask to review that deposition?
 15 A. I did not.
 16 Q. Do you think that would be helpful to your
 17 analysis and your services as an expert?
 18 A. Yes.
 19 Q. Do you intend to review that deposition?
 20 A. Yes.
 21 Q. When do you intend to do that?
 22 A. When I have time.
 23 Q. Did you -- not having read Hulk Hogan's
 24 deposition, did you interview Hulk Hogan?
 25 A. I did not.

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- 1 Q. Did you request an interview?
 2 A. I did. And that is being set up.
 3 Q. And when is that to take place?
 4 A. That hasn't been set up yet.
 5 Q. What about Bubba Clem, did you interview
 6 Bubba Clem?
 7 A. I did not.
 8 Q. Did you request an interview of Bubba Clem?
 9 A. No.
 10 Q. Do you intend to interview Bubba Clem?
 11 A. I'd like to read his transcript first.
 12 Q. And after you do these things, will you
 13 prepare and issue a supplemental report?
 14 A. Perhaps.
 15 Q. And do you intend -- strike that.
 16 Did you review the deposition of Heather
 17 Clem?
 18 A. I did not.
 19 Q. Do you intend to review her deposition?
 20 A. I will consider it.
 21 Q. Have you asked for a copy of that deposition?
 22 A. I will.
 23 Q. No. I said have you. Have you already asked
 24 for it?
 25 A. No.

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- 1 Q. All right. Now, the section there that says
 2 documents produced on the first page, it has a number
 3 of document numbers, both Gawker numbers and Bollea
 4 numbers and what have you.
 5 Who selected the documents set forth in that
 6 category?
 7 A. Mr. Harder's staff.
 8 Q. Okay. The next grouping we come to is the
 9 one not produced. And that's the one I showed you
 10 earlier this morning, the one that -- this collection
 11 of material here. And I believe you explained to me
 12 that those are items that you gathered yourself through
 13 your own research efforts?
 14 MR. HARDER: Misstates prior testimony.
 15 BY MR. SULLIVAN:
 16 Q. That's not my intent. I misunderstood.
 17 These materials here, who assembled those?
 18 A. Some from the law firm, some of them my own.
 19 Q. So it's a mix?
 20 A. Yes. That didn't include those. I did not
 21 assemble those.
 22 Q. No, no, no. I'm saying this one that's
 23 titled Exhibit 5.
 24 A. Okay.
 25 Q. Professor Foley, would you agree that the

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- 1 protections of the First Amendment are not limited to
 2 journalists who abide by conventional codes of
 3 journalistic ethics?
 4 MR. HARDER: I'm going to object to the form
 5 of the question. It calls for a legal conclusion,
 6 vague and ambiguous, incomplete hypothetical.
 7 THE WITNESS: I think it depends on the
 8 methods employed by -- did you refer to them as
 9 journalists? I think that it would depend on the
 10 situation.
 11 BY MR. SULLIVAN:
 12 Q. You mentioned that you -- at the University
 13 of Florida, in teaching your class, you talk about some
 14 legal principles to some extent, right?
 15 A. (Indicates affirmatively.)
 16 Q. You mentioned that you have a textbook that
 17 talks about some cases, significant cases in the
 18 development of First Amendment law, correct?
 19 A. For a beginning reporter, yes, they need to
 20 be aware of it.
 21 Q. In that text and in your teachings to those
 22 students, do you talk about the U.S. Supreme Court's
 23 case, its decision wherein the protections of the First
 24 Amendment were extended to Hustler magazine when it
 25 published a parody of a Campari ad depicting Jerry

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1 Falwell having sex in an outhouse with his mother?

2 A. I show that ad. I do.

3 Q. Do you?

4 And you're aware that the Supreme Court said
5 that was protected by our First Amendment?

6 A. I am.

7 Q. Do you discuss the court's decision whereby
8 it extended the protections of the First Amendment to
9 the Westboro Baptist Church when they protested the
10 funeral of a Marine killed in combat claiming that
11 homosexuality was the cause of all of society's ills?

12 A. I do not use that.

13 Q. You don't address that case?

14 A. No.

15 Q. Are you familiar with that case?

16 A. Vaguely.

17 MR. SULLIVAN: I ask the court reporter to
18 mark as Defendant's Exhibit 166 a multi-page
19 document bearing ID numbers Gawker 24653 through
20 24654.

21 (Exhibit No. 166 marked for identification.)

22 BY MR. SULLIVAN:

23 Q. Have you had an opportunity to look over
24 Defendant's Exhibit 166?

25 A. I did.

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1 opinions and views and letters to the editor and what
2 have you, right?

3 A. Yes.

4 Q. Now, if you would look, sir, at -- on the
5 left-hand column, you'll see there are some quotes that
6 you indicate are things that readers said to you, to
7 the paper, right?

8 A. To the paper.

9 Q. Yes, sir.

10 And then you continue on down a few graphs
11 and you'll see the graph that starts, "It was
12 accompanied by a story about the stir the cover was
13 causing nationwide and the reactions of various
14 magazine sellers. Some stores refused to carry it.
15 Others ordered extra copies."

16 Do you see that?

17 A. Yes.

18 Q. Then you continue, "But everyone, just
19 everyone" -- in italics -- "was talking about it. And
20 that is precisely why we published the photo and the
21 story."

22 Do you see that?

23 A. I do.

24 Q. Okay. Now, the fact that all these folks
25 were talking about it, did that make the matter

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1 Q. Do you recognize Exhibit 166?

2 A. I do.

3 Q. You'll see it appears to be a July 21, 1991,
4 piece that appeared in the St. Petersburg Times,
5 correct?

6 A. Correct.

7 Q. And that piece being authored by you,
8 correct?

9 A. Yes.

10 Q. Entitled "Demi Moore Cover Photo had People
11 Talking."

12 Do you see that?

13 A. Correct.

14 Q. Now, you at the time were the executive
15 editor of the St. Petersburg Times, correct?

16 A. Yes.

17 Q. And would you describe this as an editorial?
18 What would you characterize this as?

19 A. Kind of a letter from the editor explaining
20 what -- what, why, and how we did something.

21 Q. And it ran on -- if you look at the last page
22 of the exhibit, it ran on the opinion page of the
23 paper.

24 A. It ran on the opposite editorial page.

25 Q. Okay. The page devoted to expressions of

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1 newsworthy?

2 MR. HARDER: Objection, incomplete
3 hypothetical.

4 THE WITNESS: That was part of it.

5 BY MR. SULLIVAN:

6 Q. Okay. Did that -- that amount of public
7 attention, did that indicate to you that it was a
8 matter of public concern?

9 MR. HARDER: Objection, calls for a legal
10 conclusion, incomplete hypothetical, vague,
11 ambiguous.

12 THE WITNESS: I'm not sure that I know what
13 public concern is.

14 BY MR. SULLIVAN:

15 Q. If you're more comfortable with newsworthy,
16 we'll use that. Are you more comfortable with
17 newsworthy?

18 A. It helps, yes.

19 Q. And so you indicated this was a matter that
20 was newsworthy in your judgment?

21 A. Yes.

22 Q. Okay. Now, when we looked at -- look at the
23 next paragraph, the middle of that paragraph, you say,
24 "We didn't do it to make people angry or to corrupt
25 their morals or their children. We didn't do it

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1 because we were trying to attract attention." It's
2 interesting and people were talking about it is the
3 short version of our reasoning."

4 Do you see that?

5 A. I do.

6 Q. Is that true?

7 A. Yes.

8 Q. And was that the paper's reasoning at the
9 time?

10 A. That was part of it.

11 Q. Were you intending to be honest in this piece
12 that you wrote?

13 A. Absolutely.

14 Q. Now, you look below that, the next graph,
15 "Though some readers obviously disagreed, we didn't
16 think the photo was prurient or offensive."

17 Do you see that?

18 A. I do.

19 Q. Now, how does that work? Some readers were
20 offended, right?

21 A. Yes.

22 Q. But the paper decides, right?

23 A. Yes.

24 Q. Okay. Now, would you agree with me that this
25 could be perceived as arrogant?

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1 Q. You said, "I had seen it on several TV news
2 shows, for example."

3 So how did that factor into your decision,
4 the fact --

5 A. It was news.

6 Q. So because it was already out there, the
7 St. Petersburg Times felt it was okay to run it in its
8 own pages, correct?

9 MR. HARDER: Objection, argumentative,
10 incomplete hypothetical, asked and answered.

11 THE WITNESS: That was not the only reason.

12 BY MR. SULLIVAN:

13 Q. What was the reason?

14 A. It was news. It was truly a cultural
15 phenomenon. People -- everybody was talking about it
16 and we decided to do a story about the local part of
17 it, what was happening here.

18 Q. And then you say in the next paragraph, "No,
19 we don't let other media sources set our standards, but
20 the photo was widely distributed from a variety of
21 outlets and that was factored into the decision."

22 Do you see that?

23 A. I do.

24 Q. Is that a true statement?

25 A. It was and is.

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1 MR. HARDER: Objection, vague.

2 THE WITNESS: No.

3 BY MR. SULLIVAN:

4 Q. Do you agree that this could be perceived as
5 showing contempt for community -- for the community?

6 A. No.

7 Q. Why not?

8 A. It was news. It was a cultural phenomenon.

9 Q. According to whom?

10 A. Me, Sandra Thompson, the editor of the
11 section, and quite a few other editors agreed.

12 Q. All right. Let me ask you this. If you
13 would look now -- go to the other side of the column.
14 Okay. Go to the right column and you'll see the
15 picture of Ms. Moore. If you go down further down from
16 that, you'll see where it says, "Getting back to the
17 naked Demi Moore, I should point out that" --

18 A. I'm sorry. I got it.

19 Q. I'm sorry. Did you find it?

20 A. I got it.

21 Q. "Getting back to the naked Demi Moore, I
22 should point out that the cover had achieved no small
23 notoriety well before it appeared in our paper."

24 Do you see that?

25 A. I do.

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1 Q. And lastly, down at the very bottom, it
2 was -- you see where it says, "It was provocative. It
3 did get people talking and perhaps thinking. And, hey,
4 that's not a bad thing."

5 Do you see that?

6 A. Yes.

7 Q. In your judgment, is that the bottom line?

8 MR. HARDER: Objection, vague and ambiguous,
9 argumentative, incomplete hypothetical.

10 THE WITNESS: What do you mean by bottom
11 line?

12 BY MR. SULLIVAN:

13 Q. Well, I realize it is the bottom line of your
14 piece. But at the end of the day, is that kind of what
15 it all distills down to, in all seriousness, that it
16 was a provocative thing, as you put it to me earlier,
17 it was a cultural phenomenon, folks were talking about
18 it, and it stimulated people to think?

19 MR. HARDER: Objection, incomplete
20 hypothetical. It's compound and it's vague and
21 ambiguous.

22 THE WITNESS: It met many of the criteria for
23 a news story. It featured a prominent person, a
24 celebrity. It featured a controversial
25 somewhat -- I don't -- by controversial, I don't

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1 mean -- I guess it was controversial by means of
2 talking about it. It was widespread. So it
3 had -- it not only filled the national scene, but
4 it also filled the local scene. It had a
5 provocative flair about it. I won't deny that.
6 But it was tasteful, I believe. It was shot by
7 one of the world's greatest photographers.
8 Ms. Moore posed for it. So we didn't sneak up on
9 her in the shower. So there was no question of
10 privacy.

BY MR. SULLIVAN:

11 Q. All right.

12 A. It was journalism.

13 Q. Okay. Now, tell me this. When you said that
14 it's tasteful, it wasn't -- did you say obscene or
15 pornographic?

16 A. I didn't say either one of those things.

17 Q. What did you say before tasteful? You said
18 it was tasteful.

19 A. I thought it was tasteful.

20 Q. That is in your judgment, right?

21 A. And the judgment of many of the editors of
22 the paper and in the judgment of the editors of Vanity
23 Fair and in Ms. Demi Moore's judgment.

24 Q. But in the judgment of some of your readers,
25

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1 Q. You see this document bears ID number
2 Gawker 24669?

3 A. Yes.

4 Q. Have you ever seen this document before?

5 A. It was in that stack of things I believe that
6 your -- you guys sent over.

7 Q. And you'll see this appears to be a page from
8 the St. Petersburg Times published on May 22nd, 1990,
9 correct?

10 A. Correct.

11 Q. At the time, you would have been the
12 executive editor of the paper?

13 A. I believe so.

14 Q. And what is The Floridian? You see up there
15 at the top?

16 A. The Floridian was the feature section,
17 Section D of the paper. In the days prior to the
18 current newspaper economic turndown, we published a
19 full feature section every day, not just on Sundays.

20 Q. You'll see the heading I pointed your
21 attention to, Celebrity Update, on the right column?

22 A. I do.

23 Q. What was the purpose of the celebrity update?

24 A. I can't read any of it. I'm sorry. So I
25 don't know, but I think it was a celebrity update,

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1 as you point out at the very outset of your piece, some
2 of those folks in this community thought it was in,
3 quote, poor taste, right?

4 A. Yes.

5 Q. Some of those folks in this community thought
6 it was, quote, repugnantly vulgar, closed quote, right?

7 A. That's correct.

8 Q. Some of those folks that it was rubbish,
9 closed quote, right?

10 A. That's true.

11 Q. But you decide?

12 A. I did decide. And that's why I wrote the
13 column to explain the reasoning behind what we did.

14 MR. SULLIVAN: All right. I'll ask the court
15 reporter to mark as Defendant's Exhibit 167 the
16 last exhibit of the day.

17 (Exhibit No. 167 marked for identification.)

BY MR. SULLIVAN:

18 Q. And, Professor Foley, the part that I'm
19 interested in is the portion -- pardon me -- the very
20 right column. See where it says, Celebrity Update?

21 A. Yes.

22 Q. Have you had an opportunity to look over
23 Defendant's Exhibit 167?

24 A. Yes.
25

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1 prominent people in the entertainment world and what
2 they are up to.

3 Q. You'll see there is a photograph of Diana
4 Ross and it talks about some upcoming celebrity roast
5 or something like that. You see a photograph of
6 Ling-Ling, the panda, at the time.

7 Do you see that?

8 A. I do.

9 Q. And then we have a section called "They Said
10 It." And the very bottom of that -- I realize this is
11 tiny, tiny print. So I'll read that for you. It says,
12 "John says my boobs are so proud, they're like a
13 shelf" -- and that's in quotes -- "Bo Derrick quoting
14 her husband, filmmaker John Derrick, in Punch
15 magazine."

16 Can you see that?

17 A. No, I can't see it. But I'll take your word
18 for it.

19 Q. Tell me this. Why did the St. Petersburg
20 Times publish that?

21 A. It was funny. It's -- it involves two very
22 well-known celebrities.

23 Q. I take it it's not breaking news, is it?

24 A. I don't know that much of that is breaking
25 news. It's celebrities.

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1 Q. But in this instance, clearly we know on the
 2 face of it because it indicates it was already
 3 published in Punch magazine.
 4 A. I'll take your word for it.
 5 Q. And was that -- did you deem that newsworthy?
 6 A. The feature section is feature stories and
 7 feature items, interesting tidbits often about
 8 celebrities, fashion, cooking, advice columns, things
 9 that people just like to read. It's fun, comics.
 10 Q. Would you agree that some readers may be
 11 offended by that?
 12 A. As I've said before --
 13 MR. HARDER: Objection to the word "that."
 14 Are you talking about everything he just
 15 mentioned, or are you talking about the boobs
 16 reference?
 17 MR. SULLIVAN: The quote we just read.
 18 MR. HARDER: Okay. Because his answer was
 19 about cooking and advice and all that.
 20 MR. SULLIVAN: All right.
 21 THE WITNESS: As I've said before, some
 22 readers are offended by something all the time,
 23 some. We had a quarter of a million, maybe
 24 300,000 readers on a given day -- excuse me --
 25 circulation of a quarter of million, 300,000

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1 that -- two and a half times that actually read
 2 the paper that day.
 3 BY MR. SULLIVAN:
 4 Q. Because folks shared it?
 5 A. Uh-huh. (Indicates affirmatively.)
 6 MR. SULLIVAN: Professor Foley, I have no
 7 further questions of you at this time. Thank you.
 8 THE WITNESS: Thank you.
 9 MR. HARDER: Thank you.
 10 (Deposition concluded at 4:16 p.m.)
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1 CERTIFICATE OF OATH
 2
 3 STATE OF FLORIDA
 4 COUNTY OF HILLSBOROUGH
 5
 6 I, the undersigned authority, certify that MICHAEL
 7 F. FOLEY personally appeared before me and was duly
 8 sworn.
 9
 10 WITNESS my hand and official seal this 27th day of
 11 March, 2015.
 12
 13
 14
 15
 16 Susan C. Riesdorph, RPR, CRR, CLSP
 17 Notary Public - State of Florida
 18 My Commission Expires: 6/10/17
 19 Commission No.: FF 023522
 20
 21
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1 REPORTER'S CERTIFICATE
 2
 3 STATE OF FLORIDA :
 4 COUNTY OF HILLSBOROUGH :
 5
 6
 7 I, Susan C. Riesdorph, RPR, CRR certify that I
 8 was authorized to and did stenographically report the
 9 deposition of MICHAEL F. FOLEY; that a review of the
 10 transcript was requested and that the transcript is a
 11 true and complete record of my stenographic notes.
 12
 13 I further certify that I am not a relative,
 14 employee, attorney, or counsel of any of the parties,
 15 nor am I a relative or employee of any of the parties'
 16 attorney or counsel connected with the action, nor am I
 17 financially interested in the outcome of the foregoing
 18 action.
 19 Dated this 27th day of March, 2015, IN THE CITY
 20 OF TAMPA, COUNTY OF HILLSBOROUGH, STATE OF FLORIDA.
 21
 22
 23
 24
 25 Susan C. Riesdorph, RPR, CRR, CLSP

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1 PLEASE ATTACH TO THE DEPOSITION OF MICHAEL F. FOLEY
2 TAKEN ON MARCH 20, 2015 IN THE CASE OF BOLLEA V GAWKER

3 PAGE LINE CORRECTION AND REASON THEREFOR

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I HAVE READ THE FOREGOING PAGES AND, EXCEPT FOR ANY
CORRECTIONS OR AMENDMENTS INDICATED ABOVE, I HEREBY
SUBSCRIBE TO THE ACCURACY OF THIS TRANSCRIPT.

MICHAEL F. FOLEY DATE

WITNESS TO SIGNATURE DATE