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CONFIDENTIAL

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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

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

Defendants.
_____/

PLAINTIFF'S *CONFIDENTIAL* OPPOSITION TO GAWKER DEFENDANTS' MOTION TO PERMIT PRESENTATION OF OFFENSIVE LANGUAGE AT TRIAL (STYLED "The Publisher Defendants' Motion *in Limine* on Evidence Relating to Plaintiff's Admission that He Believed the Sex Tape(s) Showed Him Making Statements That Have Been Marked as Confidential")

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (together, the "Gawker Defendants") contend that they should be permitted to inject the extremely prejudicial and inflammatory issue of race into a trial which they concede is only about privacy and newsworthiness. Their clear intent is to seek to destroy Plaintiff's character and reputation using alleged "evidence" that is completely irrelevant to this case.

Gawker Defendants' pretext for introducing this totally improper "evidence" is their argument that Plaintiff filed and has prosecuted this incredibly expensive and time-consuming lawsuit over the past two-and-one-half years supposedly for reasons **other than** the vindication

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of his rights. Their position is wrong, nonsensical, lacks any factual support, is irrelevant and is offensive. Gawker Defendants' contention is essentially that Plaintiff filed this **public** lawsuit, in a high profile case, as an elaborate ruse to **keep private** alleged other video that is not even at issue in this lawsuit, and that Gawker Defendants do not even possess. Gawker Defendants' basic premise in their motion makes no sense whatsoever, and lacks any factual support, and is completely incorrect. On the contrary, and as Gawker Defendants are well aware, Plaintiff sought the assistance of the F.B.I. to investigate and prosecute an attempt to extort him with the secret footage of him naked and having sex. The alleged "other video" has never been a legitimate issue in this case, and Plaintiff certainly has never tried to make it an issue. Just the opposite: Gawker Defendants have repeatedly tried to make the alleged "other video" an issue—for the purpose of further invading Plaintiff's privacy and seeking to assassinate his character. Plaintiff has consistently opposed these efforts. Thus, the premise of the Gawker Defendants' motion—that Plaintiff filed this **public** lawsuit supposedly for the ulterior purpose of keeping the alleged "other video" **private**—notwithstanding the fact that the alleged "other video" is not even at issue, and Plaintiff certainly has never tried to make it one—defies logic, lacks support, and is false.

Moreover, as discussed below, Plaintiff's actual or alleged motive for filing this lawsuit is completely irrelevant. If Gawker Defendants violated his rights, then he is entitled to redress, regardless of what his motive was in bringing suit. Even if his motive was relevant, Plaintiff's motive for bringing this lawsuit was, in fact, to seek legal redress for Gawker Defendants' wrongful conduct against him, and there is no evidence whatsoever to suggest otherwise.

The only motive potentially germane to Gawker Defendants' motion *in limine* is their own motive in seeking to inject offensive racial language into the jury trial. Gawker Defendants'

motive obviously is to unfairly prejudice the jury against the Plaintiff. Gawker Defendants have publicly stated to the press in recent weeks that they are facing the prospect of being economically destroyed by a jury verdict.[1] Gawker Defendants therefore are now resorting to jury nullification by seeking to brand Plaintiff as a "racist" to the jury and the general public. Such improper tactics have no place in jurisprudence—which seeks justice above all else. Gawker Defendants seek to turn the court system on its head, and use it as a means to destroy Plaintiff and deny him a fair trial on his legitimate claims.

It also is noteworthy that Gawker Defendants are **not** arguing that this alleged "evidence" is relevant to establish Plaintiff's consent or knowledge of being recorded, or any other potentially legitimate issue in the case. Rather, the motion is frivolous, and possibly even warrants sanctions given the patent absurdity of its central premise, as well as its total lack of factual support.[2]

A. Motive is Completely Irrelevant to Plaintiff's Claims

Plaintiff has well-supported claims against Gawker Defendants—so much so that, on May 29, 2015, this Court found that there is a reasonable factual and legal basis to support the imposition of punitive damages against Gawker Defendants. Mr. Denton and Heather Dietrick (Gawker's President and in-house counsel who attended the May 20, 2015 hearing) recently acknowledged the viability of Plaintiff's claims, and the very real possibility that he could prevail at trial.[3]

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[1] See **Exhibit A**.

[2] It should be noted that this is not the first time this Court has been asked to rule on this issue. Gawker Defendants have repeatedly asked both the Special Discovery Magistrate and this Court to rule that they could take discovery on the alleged statements by Plaintiff and utilize any such evidence at trial, and both Special Discovery Magistrate Case and this Court have repeatedly ruled against the Gawker Defendants because this issue is irrelevant.

[3] See **Exhibit B**.

Against this backdrop, the argument that Plaintiff had some nefarious ulterior motive for filing and prosecuting this case rings hollow. As Mr. Denton and Ms. Dietrick recognized in their recent interviews, the central issues the jury will decide in this case are whether the secretly recorded footage of Plaintiff naked and engaged in sexual intercourse posted on gawker.com was an invasion of his privacy, and whether the posting was "newsworthy." Plaintiff's alleged "motivation" for filing this suit is completely irrelevant to the issues our jury must decide. *Corey v. Clear Channel Outdoor, Inc.*, 683 S.E.2d 27, 33 (Ga. App. 2009) (holding that it is within the trial courts' discretion to grant a motion *in limine* excluding evidence of plaintiff's motive in filing suit); *Long John Silvers, Inc. v. Nickelson*, 2013 U.S. Dist. LEXIS 31455 (W.D. Kty. Mar. 6, 2013) (holding that ulterior motives are irrelevant).

None of the elements of the claims Plaintiff must prove, or the defenses that have been raised, involve Plaintiff's subjective intent when he filed this case. Gawker Defendants should not be permitted to prejudice, mislead and confuse the jury with their factually and legally unsupported conjecture about Plaintiff's motives.

The cases Gawker Defendants cite in their motion demonstrate why the "evidence" they want to use is irrelevant in this case. There are very limited circumstances where the use of offensive terms is admissible: they must be directly material to the issues in the case or the testimony being offered. *Jones v. State*, 748 So.2d 1012, 1023 (Fla. 1999). The examples cited by Gawker Defendants of when such language has been determined to be "directly material" are almost all **criminal cases**[4] in which the defendants made racial slurs that were germane to critical issues being tried. Two of the cases involved racial slurs used by defendants that were

[4] The sole civil case Gawker Defendants cite, *Lay v. Kremer*, 411 So.2d 1347 (Fla. 1st DCA 1982), specifically held that the racial slur at issue was relevant to the defendants' intent, an essential element in the assault and punitive damages claim at issue.

relevant to discrediting their alibis and to explain the context of incriminating statements. *Jones*, 748 So.2d at 1022-1023; *Phillips v. State*, 476 So.2d 194, 196 (Fla. 1985). In *Robinson v. State*, 574 So.2d 108 (Fla. 1991), the defendant's reference to the victim of his sexual assault and homicide as a "white woman" was directly relevant to his defense based on an accidental shooting—because his victim (a "white woman") was raped and then shot twice in the head. The final two cases cited, *Clinton v. State,* 970 So.2d 412 (Fla. 4th DCA 2007) and *Lay v. Kremer*, specifically acknowledge that the racial slurs at issue in those cases were relevant to the issues of premeditation and intent.

Here, Plaintiff's intent or motive in prosecuting this lawsuit is not relevant to his claims or any of Gawker Defendants' defenses. In fact, Gawker Defendants provide **no** explanation as to why Plaintiff's intent is relevant. Instead, Gawker Defendants appear to be asserting an **unpled** abuse of process type argument as the basis for this inadmissible and highly prejudicial evidence. However, even in properly pled abuse of process cases (which is not the case here), an ulterior motive in filing a lawsuit is not relevant. *Peckins v. Kaye*, 443 So.2d 1025, 1026-27 (Fla. 2d DCA 1983); *Thomson McKinnon Secur., Inc. v. Light*, 534 So.2d 757, 760 (Fla. 3d DCA 1988) ("There is no abuse of process when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior motive.").

For the same reason, Gawker Defendants' argument based upon the "state of mind" exception to the hearsay rule is without merit. For that exception to apply, the state of mind of the party must be relevant to the lawsuit. *Combs v. State*, 133 So.3d 564, 567 (Fla. 2d DCA 2014) (holding for state of mind exception to apply, party's state of mind "must be relevant to the issues in the case"); *Rutledge v. State*, 1 So.3d 1122, 1129 (Fla. 1st DCA 2009) ("The 'state of mind' exception allows admission only if 'the declarant's state of mind is at issue.'"). Here,

Plaintiff's "state of mind" related to the filing and prosecution of this lawsuit is not at issue, and has no relevance to any of his causes of action, nor any defenses.

Moreover, this exception applies only to statements of a declarant's **then existing** state of mind, if offered to prove or explain the declarant's subsequent conduct or the declarant's state of mind when the statement was made. Fla. Stat. § 90.803(3). The "statements" Gawker Defendants seek to introduce are **not** statements of Plaintiff's **then existing** state of mind. They have absolutely nothing to do with his state of mind—let alone his state of mind concerning any intent, motive or mental feeling relevant to this case. For example, in *Van Zant v. State*, 372 So.2d 502, 504 (Fla. 1st DCA 1979), it was held to be reversible error to admit the victim's statements under the state of mind hearsay exception because the statements did not relate to the victim's state of mind on the date she made the statement, nor refer to any plan or intention the victim had.

While Plaintiff categorically denies Gawker Defendants' claim that he filed suit for a different or additional reason than the vindication of his privacy rights, even if Gawker Defendants' contention were true, Plaintiff is still entitled to redress because his claims are well founded and he suffered damage from Gawker Defendants' conduct, regardless of any ulterior motives for filing suit. Ultimately, the jury will decide the claims and defenses that are pled in this case—none of which are based upon Plaintiff's motivations for bringing suit.

Finally, there is no legitimate basis for Gawker Defendants using this alleged evidence either as impeachment or to refresh witnesses' recollections, because there are no issues in the case (and therefore there should be no testimony or evidence) turning on whether Plaintiff used

offensive language. This case involves only **one** video posted on gawker.com.[5] That video, and for that matter the entire 30 minute video from which it was derived, contain **none** of the offensive language Gawker Defendants seek to introduce. The issue of whether Gawker Defendants invaded Plaintiff's privacy by posting this video is not affected in any way by alleged additional videos or language contained therein. Likewise, whether Gawker Defendants had the right to post the sex video is not affected in any way by the alleged "other video" or language that may be contained therein. Whether Plaintiff was damaged, and the amount of his damages, is not affected one way or the other by this issue.

Gawker Defendants cannot use impeachment or refreshing recollection as a guise to put irrelevant and improper character assassination evidence before the jury. The other video and any related argument or evidence are wholly irrelevant.

The importance of the context of the "evidence" and argument Gawker Defendants want to use to taint the jury and assassinate Plaintiff's character cannot be overstated. An extortionist (who will not testify at trial) prepared purported written summaries of alleged video to try to steal money from Plaintiff. Websites made unverified comments about its alleged existence and contents. None of the authors of these purported summaries or stories will testify at trial. The "evidence" cited in Gawker Defendants' motion is hearsay upon hearsay, lacking any foundation, and providing no opportunity for cross-examination. *See* Fla. Stat. §§ 90.802., 90.604, 90.401-403, 90.609, and 90.952.

Equally important is the fact that the additional video currently in the F.B.I.'s possession is also illegally recorded footage of Plaintiff. However, this illegally recorded footage has **not**

[5] In fact, even if Gawker Defendants had copies of other video, they still would not be admissible for this very reason. The video at issue at trial is the one video posted on gawker.com.

been publicly disclosed—and Plaintiff has a privacy right to ensure that it never is. This is the very reason why Florida's Security of Communications Act exists.

Gawker Defendants (not Plaintiff) have now secured an order directing the F.B.I. to deliver the video footage in its possession to the Court for review. Because Gawker Defendants maintain that the relevancy of the video is based on the alleged use of offensive language, this Court should rule that such evidence is irrelevant and inadmissible at trial.

B. Any Minimal Probative Value of Offensive Language is Far Outweighed by Its Substantial Prejudice.

Florida law is absolutely clear that evidence of offensive language of the type at issue here is **precisely the sort of inflammatory, prejudicial evidence that should be excluded in the Court's discretion**, even when that language is relevant to a material issue in the case (which is **not** the case here). The prejudicial effect of such evidence is so clear that its admission during a trial has been held to be **reversible error**. *MCI Express, Inc. v. Ford Motor Co.*, 832 So.2d 795, 801-02 (Fla. 3d DCA 2002) (holding that the trial court committed **reversible error** when it did not exclude testimony that executive of plaintiff used derogatory language about Cubans); *Simmons v. Baptist Hosp. of Miami, Inc.,* 454 So.2d 681, 682 (Fla. 3d DCA 1984) (*same*, holding: "We think these **unfair character assassinations** could have done **nothing but inflame the jury against these witnesses**, who were so **essential to the plaintiff's case**, and in so doing, **denied the plaintiff the substance of a fair trial** below.") (Emphasis added); *accord*

State v. Gaiter, 616 So.2d 1132, 1133 (Fla. 3d DCA 1993) (trial court redacted racial slurs even though probative).[6]

Even in *Jones v. State*, 748 So.2d 1012, 1023 (Fla. 1999), cited by Gawker Defendants, the Florida Supreme Court expressly stated that this sort of evidence should generally be **excluded** from trials: "Although we strongly caution prosecutors against eliciting testimony involving racial slurs unless **absolutely necessary**, we understand that there are limited circumstances where the use of such offensive terms may be directly material to the issues in the case or to the testimony being offered. In this case, although we agree that it was necessary to tell the jury of Jones' initial explanation concerning the source of the scratch marks, we question whether it was necessary for Detective Parker to mention that a racial slur was used by Jones. In circumstances such as this, we strongly suggest that prosecutors **err on the side of caution by omitting these statements** and that **trial courts consider the danger that the prejudicial effect of such evidence will substantially outweigh any probative value**." *Id.* (emphasis added). The Court **only** found the error harmless because "we do not find that there was any

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[6] Gawker Defendants argue that these cases leave open the possibility that offensive language of the type at issue here could be admissible where directly relevant. However, that simply is not the case here, for the reasons stated herein. Moreover, the admonition in *MCI Express*, which Gawker Defendants quote in their papers, is **directly** applicable here: *MCI Express* held that the admission of an actual **recording** of a party using offensive language, *i.e.*, actual evidence that a slur was uttered was **reversible error** in part because the other side "exploited" the recording to "exacerbate" the prejudicial effect. *See Moving Papers* at 14 n.7. Gawker Defendants clearly are attempting to do the same thing to Plaintiff here, as evidenced by their repetition of the words "several racial slurs" in their motion. *Phillips v. State*, 476 So.2d 194, 196 (Fla. 1985), and *Clinton v. State*, 970 So.2d 412, 414 (Fla. Fla. 4th DCA 2007), cited by Gawker Defendants, merely hold that the defendant failed to object to the admission of evidence of racially offensive language and therefore waived the issue. In *Clinton*, the racial slur was clearly admissible anyway because it showed the defendant's motive for committing a premeditated murder. Meanwhile, *Robinson v. State*, 574 So.2d 108, 113 (Fla. 1991), cited by Gawker Defendants, does not involve offensive language at all, but merely held that the defendant's statement about shooting a white woman twice in the head was admissible to refute his defense of an accidental shooting.

attempt to inject race as an issue in the trial, or an impermissible appeal to bias and prejudice." *Id.* The contrast between what happened in *Jones* and what Gawker Defendants attempt to do here is manifest.[7]

Gawker Defendants have not identified any theory that would make the alleged offensive language directly relevant to a **central** issue in this case such that the clear prejudicial effect of such alleged evidence would be far outweighed by its probative value. At best, Gawker Defendants' theories of relevance are wholly collateral, not going to whether Plaintiff's privacy was invaded or whether Gawker Defendants have a legitimate defense. Gawker Defendants' unsupported assertion that Plaintiff's damages are somehow diminished by his supposed ulterior motive for filing suit is nonsensical: Plaintiff either has damages, or he does not.

C. Conclusion

Gawker Defendants should not be permitted to use their misguided "theory" about Plaintiff's supposed ulterior motives as a pretext to assassinate Plaintiff's character and prejudice the jury against him. Gawker Defendants cannot establish that the "evidence" they want to use is competent or relevant, let alone that it meets the heightened threshold required when a party attempts to admit evidence of highly offensive language of this type. Gawker Defendants' motion should be denied in its entirety, and their attorneys and all of their witnesses should be specifically instructed that they must not raise any of these issues in their testimony or arguments at trial at any time.

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[7] *Jones* cites with approval two cases, which hold that racially offensive language should be **excluded** from evidence. *Jones*, 748 So.2d at 1022 (citing *Robinson v. State*, 520 So.2d 1, 6-8 (Fla. 1988) and *McBride v. State*, 338 So.2d 567, 568-69 (Fla. 1st DCA 1976)).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 26th day of June, 2015 to the following:

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