

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12012447CI-011

HEATHER CLEM, *et al.*,

Defendants.

_____ /

**PUBLISHER DEFENDANTS'
PROPOSED JURY INSTRUCTIONS**

Trial: July 6, 2015

Presiding Judge:

**Pamela A.M. Campbell
Circuit Judge**

**INDEX OF PUBLISHER DEFENDANTS’
PROPOSED JURY INSTRUCTIONS**

Proposed Instruction	Title	Authority
1	OATH OF JURORS BEFORE VOIR DIRE	Fla. Std. Jury Instr. [Civ.] 101.1
2	OATH OF JURORS AFTER VOIR DIRE	Fla. Std. Jury Instr. [Civ.] 101.2
3	OATH OF WITNESS	Fla. Std. Jury Instr. [Civ.] 101.3
4	DESCRIPTION OF THE CASE (PRIOR TO VOIR DIRE)	Fla. Std. Jury Instr. [Civ.] 201.1 (modified)
5	OVERVIEW OF CLAIMS AND DEFENSES	Fla. Std. Jury Instr. [Civ.] 410.2 (modified)
6	OVERVIEW OF PRIVACY CLAIMS AND DEFENSES	<i>Allstate Ins. Co. v. Ginsberg</i> , 863 So. 2d 156, 162 (Fla. 2003); <i>Spilfogel v. Fox Broad. Co.</i> , 433 F. App’x 724, 726 (11th Cir. 2011) (per curiam) ; <i>Cape Publ’ns, Inc. v. Hitchner</i> , 549 So. 2d 1374, 1377 (Fla. 1989) (citing Restatement (Second) of Torts § 652D (1977)); <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011); <i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196 (Fla. 2d DCA 2014); <i>Tyne v. Time</i>

Proposed Instruction	Title	Authority
6 (cont'd)	OVERVIEW OF PRIVACY CLAIMS AND DEFENSES (cont'd)	<i>Warner Entm't Co.</i> , 901 So. 2d 802, 808-10 (Fla. 2005); <i>Loft v. Fuller</i> , 408 So. 2d 619, 622-23 (Fla. 4th DCA 1981); <i>Almeida v. Amazon.com, Inc.</i> , 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); <i>Fuentes v. Mega Media Holdings, Inc.</i> , 721 F. Supp. 2d 1255 (S.D. Fla. 2010); <i>Lane v. MRA Holdings, LLC</i> , 242 F. Supp. 2d 1205 (M.D. Fla. 2002)
7	OVERVIEW OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM AND DEFENSES	<i>Dependable Life Ins. Co. v. Harris</i> , 510 So. 2d 985, 986 (Fla. 5th DCA 1987); <i>Eastern Airlines, Inc. v. King</i> , 557 So. 2d 575, 575 (Fla. 1990); Fla. Std. Jury Instr. [Civ.] 410.4, 410.5 and 410.6, as modified; <i>Winter Haven Hosp., Inc. v. Liles</i> , 148 So. 3d 507, 515 (Fla. 2d DCA 2014); <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)
8	OVERVIEW OF CLAIM UNDER FLORIDA WIRETAP ACT AND DEFENSES	Florida Statutes §§ 934.02(2)-(3), 934.03(1)(c)-(d); 934.10; 934.10(2)(c); <i>Brillinger v.</i>

Proposed Instruction	Title	Authority
8 (cont'd)	OVERVIEW OF CLAIM UNDER FLORIDA WIRETAP ACT AND DEFENSES (cont'd)	<i>City of Lake Worth</i> , 978 So. 2d 265, 268 (Fla. 4th DCA 2008); <i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001); <i>Boehner v. McDermott</i> , 484 F.3d 573 (D.C. Cir. 2007); <i>Jean v. Mass. State Police</i> , 492 F.3d 24 (1st Cir. 2007)
9	DISREGARD STRICKEN MATTER	Fla. Std. Jury Instr. [Civ.] 301.9 (as modified)
10	SUMMARY OF CLAIM	Fla. Std. Jury Instr. [Civ.] 410.2 (modified); Plaintiff's Opposition to Mot. for Summary Judgment at 3
11	PUBLICATION OF PRIVATE FACTS COUNT: ISSUES ON CLAIM	<i>Cape Publ'ns, Inc. v. Hitchner</i> , 549 So. 2d 1374 (Fla. 1989); <i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196, 1201-02 (Fla. 2d DCA 2014); <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254, 285-86 (1964); <i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46, 56 (1988)

Proposed Instruction	Title	Authority
12	PUBLICATION OF PRIVATE FACTS COUNT: HIGHLY OFFENSIVE TO A REASONABLE PERSON	<i>Cape Publ'ns, Inc. v. Bridges</i> , 423 So. 2d 426 (Fla. 5th DCA 1982); <i>Harms v. Miami Daily News, Inc.</i> , 127 So. 2d 715 (Fla. 3d DCA 1961); Restatement (Second) of Torts § 652D comment c (1977)
13	PUBLICATION OF PRIVATE FACTS COUNT: PRIOR PUBLICATION	<i>Doe v. Sarasota-Bradenton Florida Television Co.</i> , 436 So. 2d 328 (Fla. 2d DCA 1983); <i>Williams v. N. Y. Times, Inc.</i> , 462 So. 2d 38 (Fla. 1st DCA 1984)
14	PUBLICATION OF PRIVATE FACTS COUNT: MATTER OF PUBLIC CONCERN	<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964); <i>Speiser v. Randall</i> , 78 S. Ct. 1332, 1339 (1958); <i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46, 57 (1988); <i>Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989); <i>Gonzales v. City of Belle Glade</i> , 287 So. 2d 669 (Fla. 1973); <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011); <i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196, (Fla. 2d DCA 2014); Fla. Std. Jury Instr. [Civ.] 503.1;

Proposed Instruction	Title	Authority
14 (<i>cont'd</i>)	PUBLICATION OF PRIVATE FACTS COUNT: MATTER OF PUBLIC CONCERN (<i>cont'd</i>)	<i>Slomowitz v. Walker</i> , 429 So. 2d 797, 799-800 (Fla. 4th DCA 1983)
15	PUBLICATION OF PRIVATE FACTS COUNT: BURDEN OF PROOF ON CLAIM	Fla. Std. Jury Instr. [Civ.] 410.8 (modified); <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964); <i>Speiser v. Randall</i> , 78 S. Ct. 1332, 1339 (1958); <i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46, 57 (1988); <i>Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989); <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011); <i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196 (Fla. 2d DCA 2014); Fla. Std. Jury Instr. [Civ.] 503.1
16	INTRUSION UPON SECLUSION COUNT: ISSUES ON CLAIM	<i>Allstate Ins. Co. v. Ginsberg</i> , 863 So. 2d 156 (Fla. 2003); <i>Spilfogel v. Fox Broad. Co.</i> , 433 F. App'x 724, 726 (11th Cir. 2011) (per curiam); <i>Oppenheim v. I.C. Sys., Inc.</i> , 695 F. Supp. 2d 1303 (M.D. Fla 2010)

Proposed Instruction	Title	Authority
17	INTRUSION UPON SECLUSION COUNT: BURDEN OF PROOF ON CONSTITUTIONAL ELEMENTS OF CLAIM	<i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196 (Fla. 2d DCA 2014); <i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496, 510 (1991); <i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. 657 (1989); <i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968); <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964); <i>Speiser v. Randall</i> , 78 S. Ct. 1332, 1339 (1958); <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)
18	INTRUSION UPON SECLUSION COUNT: BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM	Fla. Std. Jury Instr. [Civ.] 410.8 (modified)
19	VIOLATION OF COMMON LAW MISAPPROPRIATION OF THE RIGHT OF PUBLICITY COUNT: ISSUES ON CLAIM	<i>Tyne v. Time Warner Entm't Co.</i> , 901 So. 2d 802, 808-10 (Fla. 2005); <i>Loft v. Fuller</i> , 408 So. 2d 619, 622-23 (Fla. 4th DCA 1981); <i>Almeida v. Amazon.com, Inc.</i> , 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); <i>Fuentes v. Mega Media Holdings, Inc.</i> , 721 F. Supp. 2d 1255 (S.D. Fla.

Proposed Instruction	Title	Authority
19 (<i>cont'd</i>)	VIOLATION OF COMMON LAW MISAPPROPRIATION OF THE RIGHT OF PUBLICITY COUNT: ISSUES ON CLAIM (<i>cont'd</i>)	2010); <i>Lane v. MRA Holdings, LLC</i> , 242 F. Supp. 2d 1205 (M.D. Fla. 2002); <i>Epic Metals Corp. v. CONDEC, Inc.</i> , 867 F. Supp. 1009 (M.D. Fla. 1994)
20	VIOLATION OF COMMON LAW MISAPPROPRIATION OF THE RIGHT OF PUBLICITY COUNT: COMMERCIAL PURPOSE	<i>Tyne v. Time Warner Entm't Co.</i> , 901 So. 2d 802, 808-10 (Fla. 2005); <i>Loft v. Fuller</i> , 408 So. 2d 619, 622-23 (Fla. 4th DCA 1981); <i>Almeida v. Amazon.com, Inc.</i> , 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); <i>Fuentes v. Mega Media Holdings, Inc.</i> , 721 F. Supp. 2d 1255 (S.D. Fla. 2010); <i>Lane v. MRA Holdings, LLC</i> , 242 F. Supp. 2d 1205 (M.D. Fla. 2002)
21	VIOLATION OF COMMON LAW MISAPPROPRIATION OF THE RIGHT OF PUBLICITY COUNT: BURDEN OF PROOF ON CONSTITUTIONAL ELEMENTS OF CLAIM	<i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196 (Fla. 2d DCA 2014); <i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496, 510 (1991); <i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. 657 (1989); <i>St. Amant v. Thompson</i> , 390 U.S. 727

Proposed Instruction	Title	Authority
21 (<i>cont'd</i>)	VIOLATION OF COMMON LAW MISAPPROPRIATION OF THE RIGHT OF PUBLICITY COUNT: BURDEN OF PROOF ON CONSTITUTIONAL ELEMENTS OF CLAIM (<i>cont'd</i>)	(1968); <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964); <i>Speiser v. Randall</i> , 78 S. Ct. 1332, 1339 (1958)
22	VIOLATION OF COMMON LAW MISAPPROPRIATION OF THE RIGHT OF PUBLICITY COUNT: BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM	Fla. Std. Jury Instr. [Civ.] 410.8 (modified)
23	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: ISSUES ON CLAIM	Fla. Std. Jury Instr. [Civ.] 410.7
24	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: EXTREME AND OUTRAGEOUS CONDUCT	Fla. Std. Jury Instr. [Civ.] 410.4
25	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: SEVERE EMOTIONAL DISTRESS	Fla. Std. Jury Instr. [Civ.] 410.5; <i>Chase v. Nova Se. Univ., Inc.</i> , 2012 WL 1936082 (S.D. Fla. May 29, 2012); <i>City of Hollywood v. Hogan</i> , 986 So. 2d 634, 649 (Fla. 4th DCA 2008); <i>Ruhlmann v. Ulster Cnty.</i>

Proposed Instruction	Title	Authority
25 (<i>cont'd</i>)	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: SEVERE EMOTIONAL DISTRESS (<i>cont'd</i>)	<i>Dep't of Soc. Servs.</i> , 194 F.R.D. 445, 451 (N.D.N.Y. 2000); <i>Lane v. Pfizer, Inc.</i> , 2007 WL 221959, at *1 (N.D. Okla. Jan. 25, 2007)
26	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: LEGAL CAUSE	Fla. Std. Jury Instr. [Civ.] 410
27	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: BURDEN OF PROOF ON CONSTITUTIONAL ELEMENTS OF CLAIM	<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011); <i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196 (Fla. 2d DCA 2014); <i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496, 510 (1991); <i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. 657 (1989); <i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968); <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964); <i>Speiser v. Randall</i> , 78 S. Ct. 1332, 1339 (1958)
28	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT: BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM	Fla. Std. Jury Instr. [Civ.] 410.8 (modified)

Proposed Instruction	Title	Authority
29	VIOLATION OF FLORIDA WIRETAP ACT: ISSUES ON CLAIM	Fla. Stat. § 934.10(1); <i>Cohen Bros., LLC v. ME Corp., S.A.</i> , 872 So. 2d 321, 324 (Fla. 3d DCA 2004) (per curiam)
30	VIOLATION OF FLORIDA WIRETAP ACT: ORAL COMMUNICATION	Fla. Stat. § 934.02(2)
31	VIOLATION OF FLORIDA WIRETAP ACT: INTERCEPTION	Fla. Stat. § 934.02(3)
32	VIOLATION OF FLORIDA WIRETAP ACT: ELECTRONIC, MECHANICAL, OR OTHER DEVICE	Fla. Stat. § 934.02(4)
33	VIOLATION OF FLORIDA WIRETAP ACT: PRIVILEGE TO ACT	<i>Brillinger v. City of Lake Worth</i> , 978 So. 2d 265, 268 (Fla. 4th DCA 2008); <i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001); <i>Boehner v. McDermott</i> , 484 F.3d 573 (D.C. Cir. 2007); <i>Jean v. Mass. State Police</i> , 492 F.3d 24 (1st Cir. 2007); Fla. Stat. § 934.10(2)(c); GOOD FAITH, BLACK'S LAW DICTIONARY (10th ed. 2014)

Proposed Instruction	Title	Authority
34	VIOLATION OF FLORIDA WIRETAP ACT: BURDEN OF PROOF ON CONSTITUTIONAL ELEMENTS OF CLAIM	<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001); <i>Gawker Media, LLC v. Bollea</i> , 129 So. 3d 1196 (Fla. 2d DCA 2014); <i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496, 510 (1991); <i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. █ (1989); <i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968); <i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964); <i>Speiser v. Randall</i> , 78 S. Ct. 1332, 1339 (1958)
35	VIOLATION OF FLORIDA WIRETAP ACT: BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM	Fla. Std. Jury Instr. [Civ.] 410.8 (modified)
36	DAMAGES: INTRODUCTION	Florida Standard Jury Instruction 501.1 (modified)
37	DAMAGES: ELEMENTS	<i>Doe v. Beasley Broad. Grp., Inc.</i> , 105 So. 3d 1, 3 (Fla. 2d DCA 2012); <i>Cason v. Baskin</i> , 30 So. 2d 635, 640 (Fla. 1947); 19A Fla. Jur. 2d Defamation and Privacy § 232; 32 Fla. Jur. 2d Interference § 19; <i>Chase</i>

Proposed Instruction	Title	Authority
37 (cont'd)	DAMAGES: ELEMENTS (cont'd)	<p><i>v. Nova Se. Univ., Inc.</i>, 2012 WL 1936082, at *3-4 (S.D. Fla. May. 29, 2012); <i>City of Hollywood v. Hogan</i>, 986 So. 2d 634, 649 (Fla. 4th DCA 2008); <i>Ruhlmann v. Ulster Cnty. Dep't of Soc. Servs.</i>, 194 F.R.D. 445, 451 (N.D.N.Y. 2000); <i>Lane v. Pfizer, Inc.</i>, 2007 WL 221959, at *1 (N.D. Okla. Jan. 25, 2007); Restatement (Second) of Torts § 46 (1965); Fla. Stat. § 934.10; <i>Jackson v. Grupo Indus. Hotelero, S.A.</i>, 2009 WL 8634834, at *1 n.1 (S.D. Fla. Apr. 29, 2009); Fla. Stat. § 540.08(2); <i>Weinstein Design Grp., Inc. v. Fielder</i>, 884 So. 2d 990, 1001-03 (Fla. 4th DCA2004); Fla. Stat. § 934.10</p>
38	DAMAGES: NO AWARD OF PREJUDGMENT INTEREST	<p><i>Argonaut Ins. Co. v. May Plumbing Co.</i>, 474 So. 2d 212 (Fla. 1985); <i>Machado v. Foreign Trade, Inc.</i>, 478 So. 2d 405 (Fla. 3d DCA 1985)</p>

Proposed Instruction	Title	Authority
39	FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD	Proposed Florida Standard Jury Instruction 301.11
40	PUNITIVE DAMAGES — BIFURCATED PROCEDURE	Fla. Std. Jury Instr. [Civ.] 503.1 (modified)
41	PUNITIVE DAMAGES — NON-BIFURCATED PROCEDURE	Fla. Std. Jury Instr. [Civ.] 503.2 (modified)
42	MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES	Fla. Std. Jury Instr. [Civ.] 601.4

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 1

OATH OF JURORS BEFORE VOIR DIRE

(To Replace Plaintiff's Proposed Instruction No. 1)

Do you solemnly swear or affirm that you will answer truthfully all questions asked of you as prospective jurors so help you God?

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 2

OATH OF JURORS AFTER VOIR DIRE

Do you solemnly swear or affirm that you will well and truly try this case between the Plaintiff and the Defendants, and a true verdict render according to the law and evidence so help you God?

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 3

OATH OF A WITNESS

Do you solemnly swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 4

DESCRIPTION OF THE CASE (PRIOR TO VOIR DIRE)

(To Replace Plaintiff's Proposed Instruction No. 1)

Welcome. The clerk will now administer your oath.

Now that you have been sworn, I'd like to give you an idea about what we are here to do.

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies, where the claims of one or more of these parties have been brought to court to be resolved. It is called "a trial of a lawsuit."

I will now describe the claims and defenses in this case. Plaintiff Terry Gene Bollea, known as Hulk Hogan, has asserted five claims against Defendants Gawker Media, the publisher of the on-line news and entertainment website gawker.com, Nick Denton, the company's CEO, and A.J. Daulerio, the former editor of the gawker.com website. I will call these three parties the Defendants.¹

The Plaintiff's claims arise out of a web posting by A.J. Daulerio and published by Gawker in October 2012. The web

¹ Plaintiff has told the Court that he and Heather Clem have reached or likely will reach a settlement, and that he will dismiss his claims against her as part of that settlement. If Ms. Clem remains a defendant in this action for trial, defendants reserve the right to be called the "Publisher Defendants" to distinguish themselves from Ms. Clem.

posting dealt with a sexual encounter between Plaintiff and Heather Clem. At the time, Heather Clem was married to Plaintiff's best friend, Bubba The Love Sponge Clem. The posting consisted of a report and commentary written by Mr. Daulerio, which was accompanied by 110 seconds of excerpts from a video tape of Plaintiff, Mrs. Clem, and Mr. Clem. Plaintiff has sued the Defendants alleging that they 1) invaded his privacy by publishing private facts by posting the video excerpts; 2) intruded upon Plaintiff's seclusion by physically or electronically invading a place where he had an expectation of privacy; 3) violated Plaintiff's right of publicity by publishing the video excerpts for a commercial purpose; 4) acted outrageously and caused Plaintiff severe emotional distress by publishing the video excerpts; and 5) violated the Florida Wiretap law by disseminating the video excerpts.

All of Plaintiff's claims relate to the publication of the video excerpts; he does not seek damages or claim harm from the publication of the report and commentary.

The Defendants deny these claims and contend that the video excerpts and the accompanying report and commentary related to matters of public concern and therefore their posting is protected under the First Amendment. In addition, they assert the following defenses:

1. Plaintiff's name and likeness were not used for a commercial purpose.

2. The Defendants were not responsible for any physical or electronic intrusion because they did not record Plaintiff in the Clems' bedroom.

3. Plaintiff did not suffer severe distress from the publication of the video excerpts.

4. As for the wiretap claim, Defendants had a good faith belief that the dissemination of the video excerpts was lawful and legally protected under the First Amendment.

The principal witnesses who will testify in this case are:

- Terry Gene Bollea, professionally known as "Hulk Hogan"
- Heather Cole, formerly known as Heather Clem
- Bubba The Love Sponge Clem
- Nick Denton
- A.J. Daulerio
- Scott Kidder
- Andrew Gorenstein
- Erin Pettigrew
- Michael Kuntz
- Emma Carmichael
- John Cook
- Tom Plunkett
- Richard Peirce
- Jules Wortman

- David Houston
- Elizabeth Rosenthal-Traub
- A representative of a company called MindGeek
- David Rice
- Iv Simaku
- Peter Horan
- Mike Foley²
- Jeff Anderson²
- Leslie John²
- Shanti Shunn²

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

² The Publisher Defendants have filed motions to exclude the testimony of plaintiff's four designated experts, Mike Foley, Jeff Anderson, Leslie John, and Shanti Shunn, but have listed them here because those motions have not yet been adjudicated.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 5

OVERVIEW OF CLAIMS AND DEFENSES

(To Replace Plaintiff's Proposed Instruction No. 6)

The claims and defenses in this case are as follows.

Plaintiff Terry Gene Bollea, known as Hulk Hogan, has asserted five claims against Defendants Gawker Media, the publisher of the on-line news and entertainment website gawker.com, Nick Denton, the company's CEO, and A.J. Daulerio, the former editor of the gawker.com website. I will call these three parties the Defendants.³

The Plaintiff's claims arise out of a web posting by A.J. Daulerio and published by Gawker in October 2012. The web posting dealt with a sexual encounter between Plaintiff and Heather Clem. At the time, Heather Clem was married to Plaintiff's best friend, Bubba The Love Sponge Clem. The posting consisted of a report and commentary written by Mr. Daulerio, which was accompanied by 110 seconds of excerpts from a video tape of Plaintiff, Mrs. Clem, and Mr. Clem. Plaintiff has sued the Defendants alleging that they 1) invaded his privacy by publishing private facts by posting the video excerpts; 2) intruded upon

³ Plaintiff has told the Court that he and Heather Clem have reached or likely will reach a settlement, and that he will dismiss his claims against her as part of that settlement. If Ms. Clem remains a defendant in this action for trial, defendants reserve the right to be called the "Publisher Defendants" to distinguish themselves from Ms. Clem.

Plaintiff's seclusion by physically or electronically invading a place where he had an expectation of privacy; 3) violated Plaintiff's right of publicity by publishing the video excerpts for a commercial purpose; 4) acted outrageously and caused Plaintiff severe emotional distress by publishing the video excerpts; and 5) violated the Florida Wiretap law by disseminating the video excerpts.

All of Plaintiff's claims relate to the posting of the video excerpts; he does not seek damages or claim harm from the publication of the report and commentary.

The Defendants deny these claims and contend that the video excerpts and the accompanying report and commentary related to matters of public concern and therefore their posting is protected under the First Amendment. In addition, they assert the following defenses:

1. Plaintiff's name and likeness were not used for a commercial purpose.

2. The Defendants were not responsible for any physical or electronic intrusion because they did not record Plaintiff in the Clems' bedroom.

3. Plaintiff has not suffered severe distress from the publication of the video excerpts.

4. As for the wiretap claim, Defendants had a good faith belief that the dissemination of the video excerpts was lawful and legally protected under the First Amendment.

For some of the elements, the parties must prove their respective claims and affirmative defenses by the greater weight of

the evidence. For others, you must find by clear and convincing evidence. I will explain those standards now.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 6

OVERVIEW OF PRIVACY CLAIMS AND DEFENSES

(To Replace Plaintiff's Proposed Instruction Nos. 8 & 11)

Plaintiff is asserting five legal claims against the Defendants. Each of these claims is a separate and independent claim which you will decide in this case. Each claim arises solely from the publication of the video excerpts. It is important to remember that Plaintiff is not asserting any claims in relation to, or saying he was harmed, by the accompanying report and commentary. I will now explain the five claims to you. I will also explain the Defendants' arguments for why they should not be liable for publishing the video excerpts.

First, a claim for invasion of privacy based on publication of private facts consists of a defendant publishing truthful private information about a plaintiff that a reasonable person would find highly offensive and that does not relate to a matter of public concern.

The First Amendment of the United States Constitution protects publications that relate to a matter of public concern.

The Defendants contend they cannot be liable for publication of a private fact because the video excerpts related to matters of public concern.

A matter of public concern is one that can be fairly considered as relating to any matter of political, social, or other concern to the community or that is a subject of general interest and concern to

the public. A matter of public concern includes things that are the subject of ongoing public discussion. The arguably inappropriate or controversial character of a publication is irrelevant to whether it deals with a matter of public concern. The First Amendment gives publishers wide latitude and protects the publication of facts that might otherwise be considered controversial, offensive, or private so long as those facts relate to a matter of public concern. To determine whether the video excerpts are related to a matter of public concern, you are to look at the content of the posting that included the video excerpts and the larger context surrounding its publication. That context includes both the report and commentary written by Mr. Daulerio that accompanied the video excerpts and other evidence of the public discussion of the subject addressed in the video excerpts that preceded their publication.

Second, a claim for invasion of privacy based on intrusion consists of a defendant's wrongful intrusion into a private space through physical or electronic means in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. The intrusion must be into a place in which there is a reasonable expectation of privacy. The act of publishing recorded material, even if recorded illegally, does not constitute a wrongful intrusion.

The Defendants contend they cannot be liable to Plaintiff because they did not intrude physically or electronically in a private space and had no role in recording the video excerpts. Likewise, if

the video excerpts related to a matter of public concern, defendants cannot be liable for intrusion.

Third, a claim for misappropriation of the right of publicity consists of a defendant's unauthorized use of a plaintiff's name or likeness for a commercial purpose.

The Defendants contend that Plaintiff's claim for misappropriation of the right of publicity fails because they did not use Plaintiff's name or likeness for a commercial purpose. The Defendants also maintain that the publication of the video excerpts related to a matter of public concern.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 7

OVERVIEW OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM AND DEFENSES

(To Replace Plaintiff's Proposed Instruction Nos. 9 & 11)

Plaintiff's fourth claim is that the Defendants' publication of the video excerpts amounts to the intentional infliction of emotional distress. A defendant who engages in extreme and outrageous conduct, and intentionally or knowingly causes severe emotional distress to a plaintiff, is subject to liability for such emotional distress, unless the publication at issue relates to a matter of public concern.

Extreme and outrageous conduct is behavior, which, under the circumstances, goes well beyond all possible bounds of decency and is regarded as shocking, atrocious, and utterly intolerable in a civilized community.

Emotional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it.

The Defendants contend that they cannot be liable for intentional infliction of emotional distress because the video excerpts related to a matter of public concern. They also maintain that their conduct in publishing the video excerpts was not extreme or outrageous, that they did not intend to or knowingly cause severe emotional distress to the Plaintiff and that Plaintiff did not, in fact, suffer severe emotional distress.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 8

**OVERVIEW OF CLAIM UNDER
FLORIDA WIRETAP ACT AND DEFENSES**

(To Replace Plaintiff's Proposed Instruction Nos. 10 & 11)

Plaintiff's fifth claim involves Florida's Wiretap Act, which creates a civil claim against a defendant who discloses or uses a plaintiff's intercepted oral communications, when the defendant knows or has reason to know that the plaintiff's oral communications were recorded without the plaintiff's knowledge or consent.

Plaintiff claims that the Defendants violated Florida's Wiretap Act by posting online on Gawker.com the video excerpts which contain Plaintiff's oral communications, which he contends were recorded without his knowledge or consent.

The Defendants maintain that they cannot be liable under the Wiretap Act because they had no role in the recording of the video excerpts and because the video excerpts related to a matter of public concern. In addition, the Defendants contend that they had a good faith belief that their publication of the video excerpts was lawful.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 9

DISREGARD STRICKEN MATTER

Certain testimony or other evidence may be ordered stricken from the record and you will be instructed to disregard this evidence. Do not consider any testimony or other evidence that gets stricken or excluded. Do not speculate about what a witness might have said or what an exhibit might have shown.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 10

SUMMARY OF CLAIMS

(To Replace Plaintiff's Proposed Instruction No. 23⁴)

As I explained at the outset of the trial, Plaintiff has sued the Defendants on five claims. The claims in this case are as follows. Plaintiff claims the Defendants (1) invaded his privacy by publishing private facts; (2) intruded upon his seclusion; (3) misappropriated his right of publicity; (4) acted extremely and outrageously and caused Plaintiff severe emotional distress; and (5) violated the Florida Wiretap Act.

All of these claims arise from the publication of the video excerpts. Plaintiff does not seek damages or claim harm from the publication of the report and commentary accompanying the video excerpts.

I will now define some of the terms you will use in deciding this case.

⁴ Plaintiff's Proposed Instruction No. 23 is listed as "Summary of Claims" in the index to his Proposed Instructions, but titled "Burden of Proof" on the page with the actual instruction. For clarity's sake, the Publisher Defendants have titled this instruction "Summary of Claims," which accurately describes the substance of the proposed instruction.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 11

PUBLICATION OF PRIVATE FACTS COUNT: ISSUES ON CLAIM

(To Replace Plaintiff's Proposed Instruction No. 26)

The issues for you to decide on Plaintiff's claim for publication of private facts are:

1. whether the Defendants, in posting the video excerpts, disclosed to the public, or caused to be disclosed to the public, private facts about Plaintiff;

2. whether the posting of the video excerpts would be highly offensive to a reasonable person;

3. whether the posting of the video excerpts related to a matter of public concern;

4. whether the Defendants, in publishing the video excerpts, knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts; and

5. whether the Plaintiff suffered damage as a result of the publication of the video excerpts.

If the Plaintiff cannot prove any one of these elements, the jury must find for the Defendants on Plaintiff's claim for publication of private facts.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 12

**PUBLICATION OF PRIVATE FACTS COUNT:
HIGHLY OFFENSIVE TO A REASONABLE PERSON**

(To Replace Plaintiff's Proposed Instruction No. 26)

A disclosure of private facts or matters is highly offensive to a reasonable person if a person of reasonable sensibilities would find the disclosure highly offensive. Hypersensitive individuals are not the standard against which to measure whether a disclosure is highly offensive to a reasonable person. In determining whether a disclosure would be highly offensive to a reasonable person, the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the disclosure is highly offensive.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 13

**PUBLICATION OF PRIVATE FACTS COUNT:
PRIOR PUBLICATION**

(To Replace Plaintiff's Proposed Instruction No. 26)

Facts or matters that have been previously made known to the public are considered "public" facts and cannot form the basis for a claim for the public disclosure of private facts.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 14

**PUBLICATION OF PRIVATE FACTS COUNT:
MATTER OF PUBLIC CONCERN**

(To Replace Plaintiff's Proposed Instruction Nos. 26 & 31)

As I explained a moment ago, the plaintiff must prove that the publication of the video excerpts did not relate to a matter of public concern. The First Amendment of the United States Constitution protects all publications that relate to matters of public concern.

A matter of public concern is one that can be fairly considered as relating to any matter of political, social, or other concern to the community or that is a subject of general interest and concern to the public. A matter of public concern includes things that are the subject of ongoing public discussion. The arguably inappropriate or controversial character of a publication is irrelevant to whether it deals with a matter of public concern. The First Amendment gives publishers wide latitude and protects the publication of facts that might otherwise be considered controversial, offensive, or private so long as those facts relate to a matter of public concern. To determine whether the video excerpts are related to a matter of public concern, you are to look at the content of the posting that included the video excerpts and the larger context surrounding its publication. That context includes both the report and commentary written by Mr. Daulerio that accompanied the video excerpts and other evidence of the public discussion of the subject addressed in the video excerpts that preceded their publication.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 15

**PUBLICATION OF PRIVATE FACTS COUNT:
BURDEN OF PROOF ON CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 26, 30, & 31)

Plaintiff must prove that the publication of the video excerpts did not relate to a matter of public concern by clear and convincing evidence. Plaintiff also must prove by clear and convincing evidence that, in publishing the video excerpts, the Defendants knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts.

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. As I have already instructed you, “greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case. “Clear and convincing” has been defined as evidence making the truth of the facts asserted “highly probable.”

If Plaintiff has not proven by clear and convincing evidence that the publication of the video excerpts did not relate to a matter of public concern, your verdict should be for the Defendants. Your verdict also should be for the Defendants if the Plaintiff has not proven by clear and convincing evidence that, in publishing the video excerpts, the Defendants knew that they were publishing

material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts.

For the remaining elements of the claim for invasion of privacy by publication of private facts, if the greater weight of the evidence does not support Plaintiff's claim, your verdict should be for the Defendants.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 16

**INTRUSION UPON SECLUSION COUNT:
ISSUES ON CLAIM**

(To Replace Plaintiff's Proposed Instruction No. 25)

For Plaintiff's claim for intrusion on seclusion, you will need to decide whether the Defendants themselves intentionally intruded into a place where the Plaintiff had a reasonable expectation of privacy through physical or electronic means. If the Plaintiff cannot prove any one of these elements, the jury must find for the Defendants.

The act of publishing recorded material does not constitute physical or electronic intrusion.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 17

**INTRUSION UPON SECLUSION COUNT:
BURDEN OF PROOF ON CONSTITUTIONAL
ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 25, 30, & 31)

Defendants can only be liable on Plaintiff's claim of intrusion upon seclusion if you find, by clear and convincing evidence, that the publication of the video excerpts did not relate to a matter of public concern.

In addition, Defendants can only be liable on Plaintiff's claim of intrusion upon seclusion if you find, by clear and convincing evidence, that, in publishing the video excerpts, the Defendants knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts.

If you find that either of these elements are not supported by clear and convincing evidence, you should enter a verdict for Defendants on the claim of intrusion upon seclusion.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 18

**INTRUSION UPON SECLUSION COUNT:
BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 25 & 30)

If the greater weight of the evidence on each of the remaining elements of the claim for intrusion of seclusion does not support Plaintiff's claim, your verdict should be for the Defendants.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 19

**VIOLATION OF COMMON LAW MISAPPROPRIATION
OF THE RIGHT OF PUBLICITY COUNT:
ISSUES ON CLAIM**

(To Replace Plaintiff's Proposed Instruction No. 27)

For Plaintiff's claim for misappropriation of the right of publicity, you will need to decide:

1. whether the Defendants published the video excerpts without Plaintiff's consent; and
2. whether, in so doing, exploited Plaintiff's name or image for a commercial purpose.

If the Plaintiff cannot prove either of these elements, the jury must find for the Defendants.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 20

**VIOLATION OF COMMON LAW MISAPPROPRIATION
OF THE RIGHT OF PUBLICITY COUNT:
COMMERCIAL PURPOSE**

(To Replace Plaintiff's Proposed Instruction No. 27)

I will explain the term “commercial purpose” to you now.

Using another’s name or image for a commercial purpose means using the name or image to directly promote a distinct product or service.

The mere use of another’s name or image by a for-profit business in connection with the publication of a report or commentary is not a commercial purpose. Further, generating profits from the publication or use of another’s name or image in connection with a report or commentary is not a commercial purpose. Neither selling advertisements nor generating revenue nor profiting from the publication or use of another’s name or image in connection with a report or commentary is a commercial purpose. In other words, the name or image must have been used to promote a product or service that is separate and apart from the publication itself.

If the Defendants did not use plaintiff’s name and likeness for a commercial purpose, you must enter a verdict of no liability to the Defendants.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 21

**VIOLATION OF COMMON LAW MISAPPROPRIATION
OF THE RIGHT OF PUBLICITY COUNT:
BURDEN OF PROOF ON CONSTITUTIONAL
ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 27, 30, & 31)

Defendants can only be liable on Plaintiff's claim for misappropriation of the right of publicity if you find, by clear and convincing evidence, that the publication of the video excerpts did not relate to a matter of public concern.

In addition, Defendants can only be liable on Plaintiff's claim for misappropriation of the right of publicity if you find, by clear and convincing evidence, that, in publishing the video excerpts, the Defendants knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts.

If you find that either of these elements are not supported by clear and convincing evidence, you should enter a verdict for Defendants on the claim for misappropriation of the right of publicity.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 22

**VIOLATION OF COMMON LAW MISAPPROPRIATION
OF THE RIGHT OF PUBLICITY COUNT:
BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 27 & 30)

If the greater weight of the evidence on each of the remaining elements of the Plaintiff's claim for misappropriation of the right of publicity does not support that claim, your verdict should be for the Defendants.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 23

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT:
ISSUES ON CLAIM**

(To Replace Plaintiff's Proposed Instruction 28)

For Plaintiff's claim for intentional infliction of emotional distress, you will need to decide:

1. whether the Defendants engaged in extreme and outrageous conduct in publishing the video excerpts;
2. whether in doing so, the Defendants acted with the intent to cause severe emotional distress or with knowledge of the high probability of causing severe emotional distress;
3. whether Plaintiff in fact suffered severe emotional distress; and, if so
4. whether that extreme and outrageous conduct was a legal cause of severe emotional distress to Plaintiff.

If the Plaintiff cannot prove any one of these elements, the jury must find for the Defendants.

I will define some of these terms for you now:

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 24

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT:
EXTREME AND OUTRAGEOUS CONDUCT**

(To Replace Plaintiff's Proposed Instruction No. 28)

Extreme and outrageous conduct is behavior, which, under the circumstances, goes beyond all possible bounds of decency and is regarded as shocking, atrocious, and utterly intolerable in a civilized community.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 25

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT:
SEVERE EMOTIONAL DISTRESS**

(To Replace Plaintiff's Proposed Instruction No. 28)

Emotional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it. Lesser forms of emotional distress that equate to ordinary, commonplace, simple, or usual, emotional distress, are not severe forms of emotional distress. In this case, Plaintiff has stated that he only suffered garden variety or general emotional distress. Under the law, garden variety emotional distress refers to emotional distress that is "ordinary or commonplace."

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 26

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT:
LEGAL CAUSE**

(To Replace Plaintiff's Proposed Instruction No. 28)

Extreme and outrageous conduct is a legal cause of severe emotional distress if it directly and in natural and continuous sequence produces or contributes substantially to producing such severe emotional distress, so that it can reasonably be said that, but for the extreme and outrageous conduct, the severe emotional distress would not have occurred.

Extreme and outrageous conduct may also be a legal cause of severe emotional distress even though it operates in combination with the act of another occurring after the extreme and outrageous conduct occurs if the resulting severe emotional distress was a reasonably foreseeable consequence of the extreme and outrageous conduct and the extreme and outrageous conduct contributes substantially to producing it.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 27

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT:
BURDEN OF PROOF ON CONSTITUTIONAL
ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 28, 30, & 31)

Defendants can only be liable on Plaintiff's claim for intentional infliction of emotional distress if you find, by clear and convincing evidence, that the publication of the video excerpts did not relate to a matter of public concern.

In addition, Defendants can only be liable on Plaintiff's claim for intentional infliction of emotional distress if you find, by clear and convincing evidence, that, in publishing the video excerpts, the Defendants knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts.

If you find that either of these elements are not supported by clear and convincing evidence, you should enter a verdict for Defendants on the claim of intentional infliction of emotional distress.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 28

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS COUNT:
BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 28 & 30)

If the greater weight of the evidence on each of the remaining elements of the intentional infliction of emotional distress claim does not support Plaintiff's claim, your verdict should be for the Defendants.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 29

**VIOLATION OF FLORIDA WIRETAP ACT:
ISSUES ON CLAIM**

(To Replace Plaintiff's Proposed Instruction No. 29)

For Plaintiff's claim for violation of Florida's Wiretap Act, you will need to decide:

1. whether Plaintiff's oral communications with Heather Clem, within the posted video excerpts, were recorded without Plaintiff's knowledge or consent;
2. whether the Defendants intentionally disclosed Plaintiff's oral communications in any manner;
3. whether the Defendants knew or had reason to know Plaintiff's oral communications with Heather Clem were recorded without his knowledge or consent;
4. whether Plaintiff had a reasonable expectation of privacy in his oral communications with Heather Clem, which were contained within the video excerpts; and
5. whether Plaintiff suffered harm as a result of Defendants' disclosure of Plaintiff's oral communications.

If the Plaintiff cannot prove any one of these elements, the jury must find for the Defendants.

I will define some terms for you now.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 30

**VIOLATION OF FLORIDA WIRETAP ACT:
ORAL COMMUNICATION**

(To Replace Plaintiff's Proposed Instruction No. 29)

Oral communication means any oral communication uttered by a person who has a reasonable expectation that the communication is not subject to interception where that person is in a situation or circumstance where that expectation would be justified.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 31

**VIOLATION OF FLORIDA WIRETAP ACT:
INTERCEPTION**

(To Replace Plaintiff's Proposed Instruction No. 29)

Interception means acquiring the contents of any oral communication through the use of any electronic, mechanical, or other device.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 32

**VIOLATION OF FLORIDA WIRETAP ACT:
ELECTRONIC, MECHANICAL, OR OTHER DEVICE**

(To Replace Plaintiff's Proposed Instruction No. 29)

An electronic, mechanical, or other device means any device or apparatus which can be used to intercept an oral communication.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 33

**VIOLATION OF FLORIDA WIRETAP ACT:
PRIVILEGE TO ACT**

(To Replace Plaintiff's Proposed Instruction No. 29)

To determine whether the Defendants have a defense to Plaintiff's claim under the Florida Wiretap Act, the issue for you to decide is whether, the Defendants had a good faith belief that the publication of the video excerpts was lawful or that it related to a matter of public concern.

This defense is separate from the question of whether the video excerpts related to a matter of public concern. Here, the question is whether Defendants had a good faith belief that it did. "Good faith" means "honesty in belief or purpose."

If you decide the Defendants had such a good faith belief that the publication of the video excerpts was lawful or related to a matter of public concern, it would constitute a complete defense to Plaintiff's claim for violation of the Florida Wiretap Act, and you must enter a verdict of no liability for the Defendants.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 34

**VIOLATION OF FLORIDA WIRETAP ACT:
BURDEN OF PROOF ON CONSTITUTIONAL
ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 29, 30, & 31)

Defendants can only be liable on Plaintiff's claim of violation of the Florida Wiretap Act if you find, by clear and convincing evidence, that the publication of the video excerpts did not relate to a matter of public concern.

In addition, Defendants can only be liable on Plaintiff's claim of violation of the Florida Wiretap Act if you find, by clear and convincing evidence, that, in publishing the video excerpts, the Defendants knew that they were publishing material that did not relate to a matter of public concern, or entertained serious doubts about whether the material related to a matter of public concern, but published the video excerpts despite those doubts.

If you find that either of these elements are not supported by clear and convincing evidence, you should enter a verdict for Defendants on the claim under the Florida Wiretap Act.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 35

**VIOLATION OF FLORIDA WIRETAP ACT:
BURDEN OF PROOF ON REMAINING ELEMENTS OF CLAIM**

(To Replace Plaintiff's Proposed Instruction Nos. 29 & 30)

If the greater weight of the evidence on each of the remaining elements of the claim for violation of Florida's Wiretap Act does not support Plaintiff's claim, your verdict should be for the Defendants.

However, if the greater weight of the evidence supports Plaintiff's claim, then you shall consider the defense raised by the Defendants.

If the greater weight of the evidence supports the defense, your verdict should be for the Defendants.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 36

**DAMAGES:
INTRODUCTION**

(To Replace Plaintiff's Proposed Instruction No. 32)

If you find for the Defendants, you will not consider the matter of damages.

But, if you find for Plaintiff, you should award Plaintiff an amount of money that the greater weight of the evidence shows will fairly and adequately compensate him for such damage. You should only award damages for injury that the greater weight of the evidence shows was caused by the publication of the video excerpts.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 37

DAMAGES: ELEMENTS

(To Replace Plaintiff's Proposed Instruction No. 33)

If you find for Plaintiff, you shall consider the following elements of damage:

1. On the claims for invasion of privacy by publication of private facts, intrusion on seclusion, and intentional infliction of emotional distress *only*, you may award an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Plaintiff for his garden variety or general distress caused by the publication of the video. This is distress that is “ordinary or commonplace.” There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any award should be fair and just in light of the evidence. This is the only damage you can award for these claims.

2. On the claim for misappropriation of the right of publicity, you may award an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Plaintiff for any economic loss or injury he sustained because of the publication of the video excerpts, including a reasonable royalty for the use of his name or likeness. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Plaintiff is not entitled to any of the profits he alleges the Defendants made nor is he entitled to share in the profits of the

Defendants. Any award should be fair and just in light of the evidence.

3. On the claim under the Florida Wiretap Act, you may award an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Plaintiff for actual damage he suffered as a result of the publication of the interception of the oral communications with Heather Clem contained in the video excerpts or the sum of one thousand dollars (\$1,000), whichever is higher. Those are the only damages you can award on this claim.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 38

**DAMAGES:
NO AWARD OF PREJUDGMENT INTEREST**

Should you find Plaintiff is entitled to damages, in determining the amount to award Plaintiff, you must not add interest to the damages. By law, interest may only be recovered in certain cases. This is not such a case.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 39

FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

A party has a duty to preserve potentially relevant evidence whenever litigation is reasonably foreseeable. If you find that Plaintiff lost, destroyed, altered, concealed, or otherwise caused [INSERT LIST OF DOCUMENTS BASED ON TESTIMONY AND EVIDENCE ADDUCED AT TRIAL] to be unavailable, while it was within his possession, custody, or control when litigation was reasonably foreseeable; and the [INSERT LIST OF DOCUMENTS BASED ON TESTIMONY AND EVIDENCE ADDUCED AT TRIAL] would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to Plaintiff. You may consider this, together with the other evidence, in determining the issues of the case.

Given _____

Given as Modified _____

Denied _____

Withdrawn _____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 40

PUNITIVE DAMAGES — BIFURCATED PROCEDURE

(To Replace Plaintiff's Proposed Instruction No. 35)

First stage of bifurcated punitive damages procedure:

There is an additional claim in this case that you must decide. If you find for Plaintiff and against the Defendants, you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to one or more of the Defendants and as a deterrent to others.

The trial of the punitive damages issue is divided into two parts. In this first part, you will decide whether the conduct of the Defendants is such that punitive damages are warranted. If you decide that punitive damages are warranted, we will proceed to the second part of that issue during which the parties may present additional evidence and argument on the issue of punitive damages. I will then give you additional instructions, after which you will decide whether, in your discretion, punitive damages will be assessed and, if so, the amount.

Plaintiff claims that punitive damages should be awarded against the Defendants for their conduct in posting the video excerpts at issue in this case. Punitive damages are warranted against the Defendants if you find by clear and convincing evidence that the Defendants were guilty of intentional misconduct, which was a substantial cause of damage to Plaintiff. Under those circumstances you may, in your discretion, award punitive damages

against the Defendants. If clear and convincing evidence does not show such conduct by the Defendants, punitive damages are not warranted against the Defendants.

“Intentional misconduct” means that the Defendants had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to Plaintiff and, despite that knowledge, they intentionally pursued that course of conduct, resulting in injury or damage.

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. As I have already instructed you, “greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

Second stage of bifurcated punitive damage procedure:

Opening instruction, second stage:

Members of the jury, I am now going to tell you about the rules of law that apply to determining whether punitive damages should be assessed and, if so, in what amount. When I finish with these instructions, the parties will present additional evidence. You should consider this additional evidence along with the evidence already presented, and you should decide any disputed factual issues by the greater weight of the evidence. “Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

Punitive damages — determination of amount:

You are to decide the amount of punitive damages, if any, to be assessed as punishment against the Defendants and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:

1. the nature, extent and degree of misconduct and the related circumstances, including the following:

A. whether the wrongful conduct was motivated solely by unreasonable financial gain;

B. whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the Defendants;

C. whether, at the time of damage, the Defendants had a specific intent to harm Plaintiff and the conduct of the Defendants did in fact harm Plaintiff, [and]

2. the financial resources of Defendants; and

3. [Identify any other circumstance that the jury may consider in determining the amount of punitive damages.]

However, you may not award an amount that would financially destroy Defendants.

You may in your discretion decline to assess punitive damages. You may assess punitive damages against one defendant and not the others or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.

Closing instruction, second stage:

Members of the jury, you have now heard and received all of the evidence on the issue of punitive damages. Your verdict on the issues raised by the punitive damages claim of Plaintiff against the Defendants must be based on the evidence that has been received during the trial of the first phase of this case and on the evidence that has been received in these proceedings and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice or sympathy for or against any party.

Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given a form of verdict, which I shall now read to you:

[Reading of Verdict Form]

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign the verdict. You may now retire to consider your verdict.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 41

PUNITIVE DAMAGES — NON-BIFURCATED PROCEDURE

(To Replace Plaintiff's Proposed Instruction No. 36)

Punitive damages generally:

There is an additional claim in this case that you must decide. If you find for Plaintiff and against the Defendants, you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to one or more of the Defendants and as a deterrent to others.

Punitive damages for acts of an individual defendant:

Plaintiff claims that punitive damages should be awarded against the Defendants for their conduct in posting the video excerpts at issue in this case. Punitive damages are warranted against the Defendants if you find by clear and convincing evidence that the Defendants were guilty of intentional misconduct, which was a substantial cause of damage to Plaintiff. Under those circumstances you may, in your discretion, award punitive damages against the Defendants. If clear and convincing evidence does not show such conduct by the Defendants, punitive damages are not warranted against the Defendants.

“Intentional misconduct” means that the Defendants had actual knowledge of the wrongfulness of the conduct and that there was a high probability that injury or damage to (claimant) and, despite that knowledge, they intentionally pursued that course of conduct, resulting in injury or damage.

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. As I have already instructed you, “greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

Closing punitive damage instruction:

If you decide that punitive damages are warranted against one or more of the Defendants then you must decide the amount of punitive damages, if any, to be assessed as punishment against the Defendants and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:

1. the nature, extent and degree of misconduct and the related circumstances, including the following:
 - A. whether the wrongful conduct was motivated solely by unreasonable financial gain;
 - B. whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the Defendants;
 - C. whether, at the time of damage, the Defendants had a specific intent to harm Plaintiff and the conduct of the Defendants did in fact harm Plaintiff, [and]
2. the financial resources of Defendants;
3. [identify any other circumstance that the jury may consider in determining the amount of punitive damages.]

However, you may not award an amount that would financially destroy defendants.

You may in your discretion decline to assess punitive damages. You may assess punitive damages against one defendant and not the others or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 42

**MULTIPLE CLAIMS, NUMEROUS PARTIES,
CONSOLIDATED CASES**

In your deliberations, you will consider and decide five distinct claims. They include 1) Publication of Private Facts; 2) Intrusion Upon Seclusion; 3) Misappropriation of the Right of Publicity; 4) Intentional Infliction of Emotional Distress; and 5) violation of the Florida Wiretap Act. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

Given_____

Given as Modified_____

Denied_____

Withdrawn_____