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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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' MOTION FOR A DIRECTED VERDICT NO. 3: IN FAVOR OF NICK DENTON AS TO ALL OF PLAINTIFF'S CLAIMS

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio hereby move for a directed verdict under Fla. R. Civ. P. 1.480 in favor of Denton on all of Plaintiff's claims because Plaintiff has not brought out any evidence that Denton personally participated in posting the publication at issue in this case.

STANDARD OF REVIEW

"Before granting a directed verdict, the trial court must view the evidence and testimony in the light most favorable to the nonmoving party. Having done that, if the court determines that no reasonable jury could render a verdict for the nonmoving party, a directed verdict is appropriate." *Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. 1st DCA 2004). When Defendants are "moving for a directed verdict, the plaintiff is entitled to all conflicts in the evidence or inconsistencies being resolved in his favor, together with all reasonable inferences logically deducible from the evidence viewed in a light most favorable to him." *Wilson v. Bailey-Lewis-Williams, Inc.*, 194 So. 2d 293, 294 (Fla. 3d DCA 1967).

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ARGUMENT

I. The Court Should Enter a Directed Verdict in Favor of Denton on All of Plaintiff's Claims Because Plaintiff Failed to Show Denton's Participation in the Publication.

At the time of the publication at issue in this case, Nick Denton was President and CEO of Gawker. *See* Trial Tr. 2019:8-13 (testimony of Mr. Denton). It is well settled that "officers or agents of corporations may be individually liable in tort if they commit or participate in a tort . . . ." *White v. Wal-Mart Stores, Inc.*, 918 So. 2d 357, 358 (Fla. 1st DCA [redacted]) (citations omitted and emphasis added). However, such liability must be based on "***personal*** (as opposed to technical or vicarious) fault" on the part of "the officer or agent." *Id.* Indeed, "an officer or agent may not be held personally liable simply because of his general administrative responsibility for performance of some function of his [or her] employment." *Id.*

Yet Plaintiff brought out no evidence during his case-in-chief to establish that Denton had any personal involvement in posting the allegedly tortious publication at issue in this case. To the contrary, the evidence showed unambiguously that Denton never watched any portion of the sex tape or reviewed the accompanying commentary before they were published, and was at most merely *aware* of Gawker's receiving a tape whose contents he never had any knowledge of before excerpts of it were published. *See, e.g.*, Trial Tr. 2040:22-25 (testimony of Mr. Denton that he has never viewed the sex tape in whole or part); *id.* 2042:8-17 (testimony of Mr. Denton that he did not read the commentary before its publication).

Nor can Plaintiff establish that Denton is vicariously liable through the doctrine of respondeat superior: as the U.S. Supreme Court has explained, setting aside special circumstances not present here, "it is the corporation, ***not its owner or officer***, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (emphasis added); *see also id.* ("A

corporate employee typically acts on behalf of the corporation, not its owner or officer."). Because Plaintiff has failed to adduce any evidence that Denton was personally responsible for the publication in any way, Denton cannot be found liable on any of Plaintiff's claims, and entry of a directed verdict in his favor is warranted. *See Della-Donna v. Nova Univ., Inc.*, 512 So. 2d 1051, 1056 (Fla. 4th DCA 1987) (affirming entry of judgment for defendant where "the record revealed no proof" that defendant "took part in the [allegedly] tortious publication or in procuring the publication").

II. The Court Should Enter a Directed Verdict in Favor of Denton on All of Plaintiff's Claims Because Plaintiff Failed to Show that Denton Had a Culpable State of Mind.

A. Liability

During his case-in-chief, Plaintiff adduced no evidence of a culpable state of mind on the part of Denton. Rather, the evidence brought out confirmed that Denton had *no* state of mind as to the publication at issue, because he did not participate in it in any way. *See, e.g.*, Trial Tr. 2040:22-25; *id.* 2042:8-17. Yet for Plaintiff to impose liability on Defendants for their truthful speech about a concededly public figure in a manner consistent with the First Amendment, he must show that 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 nevertheless published the video excerpts despite those doubts. *See, e.g.*, *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 379 (Colo. 1997) (requiring that "the defendant acted with reckless disregard of the private nature of the fact or facts disclosed"); *Purzel Video GmbH v. St. Pierre*, 10 F. Supp. 3d 1158, 1167 (D. Colo. 2014) (same); *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984, 988 (Idaho 1974) (reversing jury verdict for failure to require proof of knowing scienter or reckless disregard in a private facts case); *Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 555 (Wis. 1989) (requiring reckless disregard "as to whether there was a legitimate public

interest in the matter"); *Roshto v. Hebert*, 439 So. 2d 428, 432 (La. 1983) ("more than insensitivity or simple carelessness is required for the imposition of liability for damages when the publication is truthful, accurate and non-malicious"). Since Plaintiff failed to adduce evidence on Denton's state of mind, no reasonable jury could find Denton liable on any of Plaintiff's claims.

B. Punitive Damages

For these same reasons, Plaintiff cannot establish any entitlement to an award of punitive damages against Denton. As set forth in the Jury Instructions, to establish an entitlement to punitive damages, Plaintiff must show that Denton engaged in the conduct complained of with a state of mind consisting of "intentional misconduct." Jury Instruction No. 34. The evidence Plaintiff has put before the jury establishes – *at most* – that (a) Denton was dimly aware of a story in the pipeline involving a Hulk Hogan sex tape and (b) he admonished A.J. Daulerio to publish something that was not gratuitous and to do after speaking to counsel. That simply does not constitute the kind of "intentional misconduct" that can support a claim for punitive damages.

Under these circumstances, Plaintiff has failed to establish at all – let alone by clear and convincing evidence – that Denton published with "actual knowledge" that his conduct was unlawful or "conscious" disregard or indifference to Plaintiff's rights, as is required to establish a claim for punitive damages. Accordingly, no reasonable jury could find that Plaintiff is entitled to an award of punitive damages from Denton in this action.

CONCLUSION

For the foregoing reasons, Defendants respectfully request entry of a directed verdict in favor of Nick Denton as to all of Plaintiff's claims, or, barring that, as to Plaintiff's claim for punitive damages against him.

March 11, 2016

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of March, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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