

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' BENCH MEMORANDUM REGARDING THE "NOT OF PUBLIC CONCERN" ELEMENT OF THE PUBLICATION OF PRIVATE FACTS CLAIM

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding how the jury should properly be instructed regarding the elements of Plaintiff's claim for publication of private facts.

In Plaintiff's Proposed Jury Instructions Nos. 11 and 23, respectively, Bollea proposes to instruct the jury that the issue of whether the video excerpts related to a matter of public concern is a "defense[] raised by defendants," and that "[i]f plaintiff proves his claim[], then you will decide whether defendants proved by the greater weight of the evidence their affirmative defense[] of legitimate public concern." And, in his Proposed Jury Instruction No. 26, Bollea proposes that the jury be instructed that, for Defendants to be liable on this claim, Plaintiff need only show (a) publication of private facts that are (b) offensive to a reasonable person and that (c) caused Plaintiff damages, omitting the public-concern element entirely. That is plainly incorrect as a matter of well-settled Florida law.

The Florida Supreme Court has expressly held that a plaintiff must prove, as an *element* of a claim for publication of private facts, that the publication *did not* relate to a matter of public concern. In *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989), the Court

explained that for the tort of publication of private facts, “[t]he elements can be summarized as 1) the publication, 2) of private facts, 3) that are offensive, and 4) are not of public concern.” Subsequently, Florida courts have continued to identify that requirement as an element of a plaintiff’s claim. *See, e.g., Doe v. Univision Television Grp., Inc.*, 717 So. 2d 63, 64 (Fla. 3d DCA 1998) (“The elements can be summarized as 1) the publication, 2) of private facts, 3) that are offensive and 4) are not of public concern.”). Moreover, in *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. 3d DCA 1993), the Third District Court of Appeal emphasized that the plaintiff bears the burden of proof on that question, holding that summary judgment on a private facts claim was properly granted because “the plaintiff is also unable to prove that the matters broadcast are not of public concern.”

February 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 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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