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.: 12012447-CI-011

vs.

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

Defendants.
_____/

DEFENDANTS' BENCH MEMORANDUM REGARDING THE BURDEN OF PROOF AND THE ELEMENT OF FAULT REQUIRED TO ESTABLISH THAT SPEECH IS NOT ABOUT A MATTER OF PUBLIC CONCERN

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding a plaintiff's burden of proof and the element of fault that are necessary to establish facts that are required by the First Amendment.

In this case, the First Amendment precludes liability for any of Plaintiff's causes of action if the publication at issue relates to a matter of public concern. *See, e.g.*, *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (claim for invasion of privacy/publication of private facts requires that the speech at issue not involve a matter of public concern); *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (claims for intrusion upon seclusion and intentional infliction of emotional distress cannot be based on speech involving a matter of public concern); *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34, 36 (Fla. 1955) (unauthorized use of a plaintiff's name or likeness in connection with the dissemination of news or other matters of public interest cannot give rise to liability); *Cape Publ'ns v. Bridges, Inc.*, 423 So. 2d 426, 427 (Fla. 5th DCA 1982) (same); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (no liability under

publication prong of wiretap act for publication of illegally recorded information where, as here, information involves a "matter of public concern" and publisher played no role in illegal recording). Plaintiff's own proposed jury instructions, though defective in other ways, acknowledge that the prohibition on liability for speech relating to a matter of public concern comes from the First Amendment and is fully dispositive of each of his claims. *See, e.g.*, Pl.'s Proposed Jury Instructions No. 31.

Accordingly, Plaintiff must prove as a constitutional element of his claims that the publication at issue did not relate to a matter of public concern. *See, e.g.*, *Hitchner*, 549 So. 2d at 1377. To satisfy that burden, the First Amendment imposes both a procedural and substantive requirement. Specifically, it requires that Plaintiff establish that the publication at issue is not related to a matter of public concern by *clear and convincing evidence.* And substantively, it requires Plaintiff to establish, also by clear and convincing evidence, that Defendants acted with *fault* by publishing material that they knew or subjectively believed was of no concern to the public. Finally, this same requirement applies to the question of whether Defendants' conduct warrants punitive damages – the jury may not make such a finding unless Plaintiff shows, by clear and convincing evidence, that Defendants knew or had a subjective awareness that they were publishing material that did not relate to a matter of public concern.

I. THE FIRST AMENDMENT IMPOSES BOTH PROCEDURAL AND SUBSTANTIVE SAFEGUARDS TO LIMIT THE CHILLING EFFECT OF TORT THEORIES THAT CHALLENGE SPEECH AND EXPRESSION.

Both the United States and Florida Supreme Courts have made clear the First Amendment limits tort liability, including by imposing substantive and procedural safeguards to guard against the risk that constitutional rights may be mistakenly infringed by jury verdicts. As the United States Supreme Court has summarized the point:

> We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held some procedures – a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on – to be constitutionally required in proceedings that may penalize protected speech.

Waters v. Churchill, 511 U.S. 661, 669 (1994). The reason these substantive and procedural safeguards are required is "to provide sufficient breathing room for protected speech." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

For example, the United States Supreme Court has repeatedly noted that false statements of fact do not, "in and of themselves," have any meaningful constitutional value. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). However, the line between truth and falsity is often not self-evident, and reasonable jurors and judges will often disagree about what is true, false, or even just an opinion. Thus, tort liability for allegedly false speech inevitably creates a risk that truthful speech may be sanctioned as well, thus inhibiting people from engaging in any speech. As a result, "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value." *Id.* Therefore, because "[f]reedoms of expression require breathing space," public figures who assert any tort theory grounded upon allegedly false speech must also prove, by clear and convincing evidence, that the publisher knew the statement was false or had serious doubts about its truth. *Id.* (internal marks and citation omitted); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

As discussed in more detail below, both the United States and Florida Supreme Courts, and even the Florida Legislature, have recognized that these principles are not unique to the defamation context and have applied them to a wide variety of legal theories implicating First Amendment and other fundamental constitutional rights. *See, e.g.*, *BE & K Constr. Co. v. NLRB*,

536 U.S. 516, 531 (2002); *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 967-68 (Fla. 1991). The U.S. Supreme Court has also noted that "the propriety of a proposed procedure [safeguard] must turn on the particular context in which the question arises – on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." *Waters*, 511 U.S. at 669.

Here, the context of this case presents a far more pronounced potential chilling effect on free expression rights than defamation cases do. The tort theories asserted here are grounded on the publication of indisputably *truthful* speech about a *public figure*, which is presumptively entitled to the highest degree of First Amendment protection. Thus, while it is well-settled that knowingly false, defamatory speech can be actionable, the Supreme Court has expressly left open the question "whether truthful publications may ***ever*** be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (emphasis added).

Yet, Plaintiff's construction of the tort theories he seeks to apply would essentially make publishers strictly liable for publishing any accurate information that a jury determines might not be a matter of public concern. Thus, under Plaintiff's view of the law, even if a publisher honestly believes it is contributing to the discussion over a public issue, it could be liable for $100 million in damages if a jury were to conclude there was a 50.1% probability that the publisher in fact made a mistake about that.

The resulting chilling effect on the publication of truthful speech of constitutional value is obvious. For this reason, many courts and commentators have questioned whether, for instance, the publication of private facts tort can survive First Amendment scrutiny at all. *See, e.g.*, *Restatement (Second) of Torts* § 652D (noting that "[i]t has not been established with

certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution" and that the Supreme Court's jurisprudence "leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern."). At a minimum, the current state of constitutional law requires Plaintiff to surmount at least the same substantive and procedural safeguards applied to claims involving allegedly false speech.

Therefore, the First Amendment requires that Plaintiff (1) establish that the publication at issue is not a matter of public concern by *clear and convincing evidence*, and (2) establish, also by clear and convincing evidence, that Defendants *knew or acted with reckless disregard* as to whether the publication was of no concern to the public. This Memorandum discusses both of these requisite safeguards more fully below.

II. A PLAINTIFF MUST ESTABLISH THAT SPEECH WAS NOT A MATTER OF PUBLIC CONCERN BY CLEAR AND CONVINCING EVIDENCE.

Courts have repeatedly emphasized that the preponderance of the evidence standard that normally defines a plaintiff's burden of proof in civil litigation carries too great a risk that free expression rights, as well as other fundamental constitutional rights, will be infringed by juries. As a result, in multiple contexts the law now imposes on plaintiffs the burden of establishing any constitutionally-required elements of a claim by ***clear and convincing*** evidence. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (in defamation cases actual malice must be proved by clear and convincing evidence); *Nodar v. Galbreath*, 462 So. 2d 803, 806 (Fla. 1984) (same). This principle was first articulated in the context of defamation cases, and then extended by the United States and Florida Supreme Courts to many other circumstances in which the Constitution imposes substantive requirements on state laws.

For example, in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, the Court upheld a state-law statute proscribing fraudulent solicitation of charitable funds in part because the statutory burden of proof was clear and convincing evidence. 538 U.S. at 620. Pointing to its defamation precedents, the Court emphasized that "[e]xacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech." *Id.* The Court has also extended the clear-and-convincing standard beyond the First Amendment context to cases implicating other fundamental liberty interests as well. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 427 (1979) (requiring the State to meet a heightened clear-and-convincing standard for civil involuntary commitment because a defendant with liberty at stake "should not be asked to share equally with society the risk of error"); *Santosky v. Kramer,* 455 U.S. 745, 755-56 (1982) (requiring the State to bear a heightened burden of at least clear and convincing evidence in parental termination proceedings, which the Court recognized involved a parent's fundamental liberty interest in the care, custody, and management of their child). *See also Hill v. Humphrey*, 662 F.3d 1335, 1377 n.21 (11th Cir. 2011) ("Several Supreme Court cases establish that states may not require the individual putative holder of a substantive constitutional right to bear a significant majority of the risk of an erroneous determination of a fact that implicates the right.").[1]

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[1] The United States Supreme Court has also made clear that other heightened procedural safeguards originally developed in defamation cases also apply to all actions implicating First Amendment rights. For example, in *Bose Corp. v. Consumers Union of U.S., Inc.*, the Court held that appellate courts must exercise independent review of a jury's factual finding of actual malice in defamation cases. 466 U.S. 485, 499 (1984). Subsequently, the Court extended that principle to appellate review of all findings of fact necessary to determine whether speech is entitled to First Amendment protection, in any context. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995); *see also Booth v. Pasco Cty., Fla.*, 757 F.3d 1198, 1209 (11th Cir. 2014) ("Ordinarily, we review district court fact findings only for clear error, but First Amendment issues are not ordinary. Where the First Amendment Free Speech Clause is

The Florida Supreme Court has construed this case law "consistently [to hold] that the constitution requires substantial burdens of proof where state action may deprive individuals of basic rights." *Real Prop.*, 588 So. 2d at 967-68. Most relevant here, "[i]n noncriminal contexts, this Court has held that constitutionally protected individual rights may not be impinged with a showing of less than clear and convincing evidence." *Id.* (citing cases). Consistent with this requirement, Florida courts have applied the clear and convincing standard to a variety of constitutionally-required elements of claims involving freedom of the press and other constitutional rights. *See, e.g.*, *Snyder v. Brd. of Cty. Comm'rs of Brevard Cty.*, 595 So. 2d 65, 81 n.70 (Fla. 5th DCA 1991) (citing half a dozen examples of claims implicating constitutional rights in which Florida courts apply a clear and convincing standard) (quashed on other grounds); *Zorc v. Jordan*, 765 So. 2d 768, 771 (Fla. 4th DCA 2000) (applying the "clear and convincing" standard to all constitutionally required elements of false speech tort claims, not just to the "actual malice" element); *Gregory v. Miami-Dade Cty.*, 2015 WL 3442008, at *3 (S.D. Fla. May 28, 2015) (the First Amendment's reporter's privilege imposes "a 'heavy burden' and the standard must be met by clear and convincing evidence"); *McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39, 47 (N.D. Fla. 1998) (same).

Since this case is clearly a "noncriminal" one in which Plaintiff challenges "constitutionally protected individual rights," *Real Prop.*, 588 So. 2d at 967-68, he may only prevail if he establishes the constitutionally-required elements of his claim by clear and convincing evidence. Therefore, Plaintiff must establish by clear and convincing evidence that the challenged publication does not relate to a matter of public concern.

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involved our review of the district court's findings of constitutional facts, as distinguished from ordinary historical facts, is *de novo.*") (internal marks and citation omitted).

III. PLAINTIFF MUST ALSO ESTABLISH THAT DEFENDANTS KNEW OR SUBJECTIVELY BELIEVED THAT THE PUBLISHED MATERIAL DID NOT RELATE TO MATTERS OF PUBLIC CONCERN.

In addition to procedural safeguards, First Amendment law imposes additional substantive burdens on a party that seeks to sanction a defendant's speech or activity protected by the First Amendment. The most common substantive requirement is that a merely mistaken belief that one's speech or related activity was lawful is insufficient to support liability. Rather, the First Amendment requires that a defendant act with deliberate or reckless *scienter*. Indeed, throughout this case, Plaintiff has conceded that he must prove state of mind. *See, e.g.*, Pl.'s Opp. to Defs' Mot. in Limine No. 4 at 2 ("intent is an element of Mr. Bollea's claims"); Pl.'s Opp. to Defs' Mot. in Limine No. 5 at pp. 1-2 ("intent, knowledge of the wrongfulness of the conduct at issue" relevant to prove Mr. Bollea's tort claims); Pl.'s Collected Position Statements on Disputed Evidentiary Issues at 6-7 (evidence of intent "crucial" to plaintiff's claims).

The United States Supreme Court first articulated the scienter requirement mandated by the First Amendment in the defamation context, and then subsequently extended it more broadly. Beginning with *New York Times Co. v. Sullivan*, the Supreme Court held that public figures suing for defamation may not recover merely for factual errors. 376 U.S. at 271-73. Rather, public figures must prove, by clear and convincing evidence, that the publisher acted with "actual malice," a legal term of art meaning the publisher knew a statement was false or acted with reckless disregard for the truth. *Id.* at 279-80; *Nodar*, So. 2d at 806. Importantly, in this context "reckless disregard" does not mean recklessness in the ordinary sense of extreme negligence. Rather, like knowledge of falsity, it is a purely *subjective* standard, requiring clear and convincing proof that the defendant was subjectively aware of the publication's probable falsity, and actually entertained serious doubts about its truth but published anyway. *Fla. Bar v.*

Ray, 797 So. 2d 556, 558 (Fla. 2001); *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50, 51-52 (Fla. 4th DCA 1976).

In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court extended that principle to the tort of intentional infliction of emotional distress, one of Plaintiff's claims here. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993), the Court extended essentially the same standard to the First Amendment right of petition. *Professional Real Estate Investors* held that parties may not be sued for exercising their right to petition the government, including filing lawsuits, unless the plaintiff proves that the petitioning activity was both objectively baseless and *subjectively* a sham – meaning that the defendant intended to engage in baseless petitioning solely to harm a competitor.

The Court looked to its defamation precedents for that scienter requirement because it serves the same purpose regardless of whether the issue is the right to petition or the right to speak. Even though, like false speech, baseless petitions "may advance no First Amendment interests of their own," a requirement that they also be "subjectively motivated by an unlawful purpose" is necessary to provide "breathing space" for lawful petitioning activity. *BE & K Constr. Co.*, 536 U.S. at 531. The Court has even applied the same rationale to speech by attorneys, even though as officers of the court they have less freedom to speak about pending cases. Thus, attorneys may not be disciplined for extra-judicial speech about pending cases absent clear and convincing evidence that an attorney "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1065 (1991) (internal marks and citation omitted).

Unlike most of the Supreme Court cases discussed above, Plaintiff's claims challenge indisputably truthful speech, which, as previously discussed, is entitled to far more "breathing space" than allegedly false or fraudulent speech and objectively baseless petitions. The Florida Supreme Court has never addressed what scienter requirement constitutionally should apply to lawsuits like this one, which challenges the truthful publication of facts that are alleged to be private or offensive or to have been gathered through intrusive or illegal means. Notably, however, the Florida Supreme Court recently observed that privacy torts which depend upon a jury's determination of what is "highly offensive to a reasonable person" apply the kind of "subjective standard that 'fails to draw reasonably clear lines between lawful and unlawful conduct' [which] may impermissibly restrict free speech under the First Amendment." *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1110 (Fla. 2008) (citation omitted). As a result, the Court declined to recognize the tort of false light invasion of privacy at all. *Id.* at 1113-14. The publication of private facts tort Plaintiff advances in this case applies the same problematic "highly offensive" standard, while Plaintiff's intrusion upon seclusion and intentional infliction of emotional distress claims apply the similarly problematic "outrageousness" standard. *See Phelps*, 562 U.S. at 458 (expressing constitutional concerns about "outrageousness" as a legal standard in speech cases, describing it as "a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression'") (citation omitted).

Moreover, many other jurisdictions have directly addressed the *scienter* question and held that liability in a private facts case cannot be imposed absent proof that the publisher at least recklessly disregarded the non-public nature of the facts disclosed and published them anyway.

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."); *see also Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 882 (9th Cir. 1988) ("in Oregon there is no common-law tort liability for truthful presentation of private facts unless the defendant's conduct in obtaining or publishing the information is wrongful in some other respect").

While the precise formulation of the constitutional scienter requirement these jurisdictions impose may vary somewhat, it is well-settled that "reckless disregard" in the First Amendment context is a *subjective* standard. In this context, that means that a plaintiff must prove, by clear and convincing evidence, that a publisher knew that the challenged material was not a matter of public concern, or actually entertained serious doubts about whether it was.

In short, for Plaintiff to impose liability on Defendants for their truthful speech about a concededly public figure in a matter 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.

IV. PUNITIVE DAMAGES CANNOT BE BASED ON GROSS NEGLIGENCE.

Finally, these same First Amendment considerations mandate that the jury cannot award Plaintiff punitive damages upon a showing merely of "gross negligence" on Defendants' part. Instead, the speech at issue cannot be punished without a showing of intent or knowing *scienter* as to whether it related to a matter of public concern. Indeed, it would make no sense at all if the state-of-mind requirement necessary to impose punitive damages were lower than the state-of-mind requirement necessary to find liability. In the analogous defamation context, the Florida Supreme Court's Standard Jury Instructions make clear that punitive damages may not be awarded absent a showing of *scienter*:

> If the statement was on a matter of public concern, the standard of liability for punitive damages is both the First Amendment actual malice standard, *Dun & Bradstreet* [*v. Greenmoss Builders*, 472 U.S. 749 (1985),] and express malice as defined by Florida law. . . . If the statement was not on a matter of public concern, punitive damages are controlled by Florida's express malice standard alone.

In re Standard Jury Instructions (Civil Cases 89-1), 575 So. 2d 194, 202 cmt. 10 (Fla. 1991); *see also id.* at 195 (jury charges on punitive damages may be given "where appropriate under Florida law *and not forbidden by the U.S. Constitution*.") (emphasis added). That same requirement likewise applies here, in a case arising out of truthful speech.

In contrast, applying the gross negligence standard would permit the jury to punish speech upon a finding that Defendants "were guilty of . . . gross negligence, which was a substantial cause of loss, injury or damage to plaintiff." Pl.'s Proposed Jury Instructions Nos. 35, 36. This instruction errs in two ways. First, the First Amendment does not permit speech about a public figure to be punished based on "gross negligence." Second, the First Amendment requires Plaintiff to establish that the Defendants acted with fault by publishing material that they

knew or believed *was of no concern to the public*. Whether Defendants *should have known* that Plaintiff *would be injured* by the publication, under some sort of "gross negligence" theory, is not the appropriate question. The First Amendment does not permit truthful speech to be punished simply because it was published with an understanding that the subject-matter of the speech might not care for it unless there is *also* a showing that the publishers believed the speech was not protected by the First Amendment. *See Toffoloni v. LFP Publ'g Grp.*, 483 F. App'x 561 (11th Cir. 2012) (even though publication of nude photographs of deceased model in *Hustler* magazine was actionable, award of punitive damages was vacated because defendants subjectively believed photographs were newsworthy).

For the foregoing reasons, Plaintiff's proposed jury instructions violated Florida law to the extent that they would permit the jury (a) to impose liability without a finding that each defendant had actual knowledge or subjective awareness that the publication did not relate to a matter of public concern, (b) to do so without clear and convincing evidence, and (c) to impose punitive damages based on proof of "gross negligence," rather than both proof of intentional conduct and knowledge or actual subjective awareness that the publication did not relate to a matter of public concern.

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Respectfully submitted,

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