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. 1: IN FAVOR OF ALL DEFENDANTS 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 on all of Plaintiff's claims. Based on the evidence brought out during Plaintiff's case-in-chief, a directed verdict should be entered in favor of Defendants on every claim because the publication related to a matter of public concern, and because Plaintiff put forward no evidence that Defendants knew or believed that the publication did not relate to a matter of public concern.

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).

ARGUMENT

I. The Court Should Enter a Directed Verdict in Favor of Defendants on All of Plaintiff's Claims Because the Publication Relates to a Matter of Public Concern.

In his Opposition to Defendants' Motion for Summary Judgment in this case ("SJ Opp."), Plaintiff conceded that he cannot prevail on any of his claims as a matter of law if the publication at issue addressed a matter of public concern or was "newsworthy." *See* SJ Opp. at 27. In brief, this is so because:

(1) Plaintiff must prove, as an element of his claim for publication of private facts, that the publication did not relate to a matter of public concern, *see Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989);

(2) the First Amendment provides a complete bar to liability on Plaintiff's claims of intrusion upon seclusion, misappropriation, and intentional infliction of emotional distress so long as the publication at issue relates to a matter of public concern, *see Snyder v. Phelps*, 562 U.S. 443 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); and

(3) under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), truthful information, lawfully obtained, about a matter of public concern cannot give rise to liability under the Wiretap Act or any privacy theory.

In light of the evidence adduced at trial, there can be no doubt that the Video related to a matter of public concern. First, the Second District Court of Appeal has already so held with respect to the very publication at issue, concluding that *both* the written "report" *and* "the related video excerpts address matters of public concern." *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1201 (Fla. 2d DCA 2014); *see also id.* at 1202 ("the written report and video excerpts are linked to a matter of public concern"); *id.* at 1203 (same).

And that conclusion is independently correct under well-established legal principles. As discussed in greater detail in Defendants' Motion for Summary Judgment and its supporting documents – which Defendants incorporate by reference here – there are four aspects of the public concern test in particular that compel a directed verdict for Defendants.

First, at its core, the public concern doctrine recognizes that things that the general public is talking about are constitutionally protected topics of discussion. The U.S. Supreme Court has emphasized that what constitutes a matter of public concern must be construed broadly to include any "subject of general interest," lest "courts themselves . . . become inadvertent censors." *Snyder*, 562 U.S. at 452-53. Thus, although the question of whether something is a matter of public concern is frequently also referred to as "newsworthiness," it is not "limited to 'news'" in the traditional sense, but "extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment." *Restatement (Second) of Torts* § 652D cmt. j.

Second, the mere fact that a publication contains arguably inappropriate content does not remove it from the realm of legitimate public interest. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1202 (Fla. 2d DCA 2014); *see also Snyder*, 562 at 453, 458 (citation omitted)..

Third, topics become matters of public concern when they are the subject of widespread public interest, even if they are otherwise normally the kinds of things that are kept private. Courts have routinely applied the public concern doctrine to protect public disclosure of things that might in different circumstances be private, including, for example: video footage of the "intimate, private medical" treatment of a highway accident victim, *see Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998); the sexual orientation of a private citizen who fortuitously saved President Ford's life, *see Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665

(Cal. Ct. App. 1984); the identity of a rape victim, *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); and disclosure to Phil Donahue's national television audience of the details of rape and incest, *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex. Comm'n App. 1993). Applying these same principles, courts have regularly found that images of sex or nudity, when connected to an ongoing public discussion or controversy, involve matters of public concern even though they involve conduct generally considered to be private. *See, e.g.*, *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*") (gossip outlet's report about celebrity sex tape that included excerpts from tape); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309 (C.D. Cal. Mar. 19, 1997) (*Penthouse* magazine article about sex life of celebrities accompanied by sexually explicit photos of them); *Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (even though videotape of alleged rape was "highly personal and intimate in nature," use of excerpts in news broadcast addressed matter of public concern and was protected by First Amendment as a matter of law); *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994) (video footage of molestation of young men by private figure priest).

Fourth, the public concern analysis asks whether the *topic* involves a matter of public concern and whether the challenged aspect(s) of the publication are related to that topic. It does not contemplate an evaluation of whether each detail or each image is necessary or appropriate, or whether a different person might have handled the story differently, and for good reason. A litany of First Amendment cases makes clear that judges may not take out their red pen to edit individual passages or images from speech about a topic of public concern, nor may they permit jurors to do so. In *Michaels II*, the court made exactly that point in rejecting the plaintiff's argument that there was a fact question as to whether it was necessary for the defendant's report

to inform viewers where they could watch the full Pamela Anderson Lee/Brett Michaels sex tape:

> Lee contends that because Paramount could have prepared a story on the newsworthy dissemination of the Tape without describing where and when it would be shown, there exists a genuine issue of fact as to whether Paramount exceeded the scope of the newsworthiness privilege by advertising the Tape. *The problem with this contention is that it requires the Court to sit as a 'superior editor' over Paramount's decisions on how to present the story.*

1998 WL 882848, at *6 (emphasis added); *see also Anderson*, 499 F.3d at 1236 (endorsing "aggregate" approach to public concern analysis, "rather than itemizing what in the news report would qualify [as a matter of public concern] and what could remain private") (citation omitted); *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1221 (10th Cir. 2007) ("courts have not defined the tort of public disclosure of private facts in a way that would obligate a publisher to parse out" and publish only "concededly public interest information.").

For example, in *Lee*, 1997 WL 33384309, at *4-5, the court concluded that "the sex life of Tommy Lee and Pamela Anderson Lee is . . . a legitimate subject for an article," and that sexually explicit pictures of the couple accompanying an article in *Penthouse* magazine were "newsworthy." The Court based its holding in significant part on the public discussion of their sex life, including plaintiffs' own statements on *Howard Stern* and in other media outlets extensively addressing the "frequency of their sexual encounters and some of [their] sexual proclivities," just as Plaintiff did here. *Id.* at *5; *see also id.* (reciting that, in another published interview, "Ms. Lee disclosed that her name is tattooed on her husband's penis; that she and her husband were constantly having sex in her trailer on the set of the movie 'Barb Wire'; [and] that she and her husband took Polaroid photographs of themselves having sex"). Based on the public discussion of their sex lives and the images at issue, the Court concluded that both the *Penthouse* article and the accompanying images were newsworthy, emphasizing that "the intimate nature of

the photographs . . . is simply not relevant for determining newsworthiness." *Id.* Similarly, in *Michaels II*, 1998 WL 882848, at *8-10 & n.4, the court held that the publication of sex tape excerpts was protected based both on their connection to a newsworthy report about the controversy over the sex tape and on prior media reports addressing the sexualization of plaintiff's image.

Applying this analysis of the public concern test to the facts adduced during Plaintiff's case-in-chief, viewed in the light most favorable to Plaintiff, no reasonable jury could return a verdict for Plaintiff on any of his claims against any of the Defendants. The evidence shows that Plaintiff openly made an issue of his sex life, including boasting about his penis size, *see* Trial Tr. 1554:23-1555:24, his performance in the bedroom, *see id.* 1623:7-1624:8, his daughter's virginity, *see id.* 1640:13-1641:1, and even his sexual performance on the tape at issue, *see id.* 1561:15-24. Moreover, Plaintiff does not dispute that he lacked privacy in any of those matters, but he contends that the lifestyle at issue was "Hulk Hogan's," a fictional "character," not "Terry Bollea," and so when he is "in character" he is free to talk about anything and even to lie with impunity – to the point of going on Howard Stern and TMZ to supposedly comment as "Hulk Hogan" on "Terry Bollea's" performance on the sex tape. *See, e.g., id.* 1561:15-1562:17. Plaintiff's self-perception of this artificial, dual reality is not one that is recognized by the First Amendment, and so the Court should direct a verdict for Defendants.

II. The Court Should Enter a Directed Verdict in Favor of Defendants on all of Plaintiff's Claims Because Plaintiff Failed to Adduce any Evidence that Defendants Knew or Believed the Publication *Did Not* Relate to a Matter of Public Concern.

As discussed in more detail in 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 – which Defendants incorporate by reference here – to prevail on any of his

claims, the First Amendment requires Plaintiff to establish, by clear and convincing evidence, 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").

Every Gawker witness presented by Plaintiff testified unambiguously that they believed the video excerpts, in the context of Mr. Daulerio's commentary, was newsworthy. *See, e.g.*, Trial Tr. 1888:14-16 (testimony of Mr. Daulerio that he "thought it was newsworthy and it was something that was worth discussing and putting up on the site"). Plaintiff offered no evidence to the contrary, let alone clear and convincing evidence. This alone requires entry of a directed verdict for Defendants on each of Plaintiff's claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully request entry of a directed verdict in their favor as to all of Plaintiff's claims.

March 11, 2016

Respectfully submitted,

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I HEREBY CERTIFY that on this 11th_ 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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