Filing # 41582047 E-Filed 05/16/2016 07:37:20 PM

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Case No. 12012447 CI-011

Plaintiff,

vs.

GAWKER MEDIA, LLC
aka GAWKER MEDIA, NICK DENTON,
and A.J. DAULERIO,

Defendants.
_______________________________________/

PLAINTIFF'S COMBINED OPPOSITION TO
MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR REMITTITUR AND
TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Plaintiff, Terry Bollea known professionally as Hulk Hogan ("Mr. Bollea"), responds to the Motion for New Trial or, in the Alternative, for Remittitur, and Motion for Judgment Notwithstanding the Verdict, filed by Defendants, Gawker Media, LLC ("Gawker"), Nick Denton ("Denton") and A.J. Daulerio ("Daulerio") (collectively "Gawker Defendants"), as follows:

I. INTRODUCTION

On March 18, 2016, two important questions were answered in a Pinellas County courtroom: Does privacy still exist in the Internet era? If so, how much does it take to adequately compensate the victim of a privacy violation that is unprecedented in its egregiousness and scope? After carefully weighing the facts and applying the law, a jury drew a well-needed line across the threshold of a bedroom door to mark the boundary that protects one of the few remaining private places from indefensible intrusion by unscrupulous shock-journalists. That jury recognized there is set a reasonable and justifiable limit on what the public

ELECTRONICALLY FILED 05/16/2016 07:37:19 PM: KEN BURKE, CLERK OF THE CIRCUIT COURT, PINELLAS COUNTY

has the right to **see and hear**, not what it has a right to know. That jury also appropriately recognized that a reasonable member of the public, with decent standards, has no **legitimate** interest in watching two consenting adults naked and engaged in sexual activity in a private bedroom without their permission. Stated simply, the jury rejected Gawker Defendants' assertion that the law permits the Internet to be abused by exploitative, unprincipled business people masquerading as journalists so they can pander to shameless voyeurs and deviants.

Given the precious few slivers of privacy that celebrities such as Mr. Bollea still possess, as well as the immediacy and enormity of the harm that results when privacy rights are violated on the world-stage the Internet provides, the jury rightfully found that Gawker Defendants should pay a heavy price for crossing the line. Mr. Bollea's privacy was maliciously violated. And the violation in this case was more publicly widespread than any other ever suffered by any person who has asked a jury to compensate him for losses incurred when the most intimate aspect of his life was, against his will, laid bare for the entire world to see.

The severity of the privacy violation in this case exceeds any other. Over seven million people watched Mr. Bollea naked and engaged in sexual intercourse. In his profession, Mr. Bollea doesn't have the option of avoiding the public eye. Every time he walks out of his house, he is immediately recognized. And every time he looks into the eyes of a fan, whether man, woman or child, he is broadsided with the realization that they may be one of those seven million people. No one has suffered the worldwide public shame, humiliation, anguish and severe emotional distress of the magnitude that Mr. Bollea has suffered as a result of Gawker Defendants' willful and malicious invasion of his privacy.

The trial in this case exposed for the first time the severity of the harm that is caused when unchecked bloggers—drunk on the incredible power they wield from behind the safety of a

computer, and confident that their twisted and perverted interpretation of the First Amendment will protect their depraved money-making schemes—decide that privacy really doesn't exist at all any more. With that as their premise, it is nothing for such pseudo-journalists to conclude that they can show the world secret recordings made of famous people having sex, even though those famous people have not consented to the invasion and even though the public is not supposed to see such private, intimate activities. It is not surprising that Denton (who disdains privacy and owned a pornography website), Daulerio ("The Worldwide Leader in Dong Shots"), and Gawker (which only "inadvertently commits journalism"), lack the decency and respect for privacy to appreciate or care that exposing someone naked and engaged in sexual activity on the Internet will, in fact, cause significant harm and emotional distress. Conversely, the jury (whom Gawker Defendants themselves implored to draw upon their common sense and life experiences) fully understood and fairly and adequately compensated Mr. Bollea for the substantial harm that Gawker Defendants caused. The jury also refused to allow Gawker Defendants to unjustly enrich themselves with the substantial benefits they received by posting an illegally recorded, pornographic video of Mr. Bollea on their website.

When viewed in the context of the totality of the unique facts of this case, the damages the jury awarded here are reasonable and appropriate. Unrefuted expert testimony established Gawker Defendants' malicious actions caused Mr. Bollea $55 million in economic damages. And as for emotional distress, who could reasonably question the appropriateness of a payment of $10.00 in exchange for the harm caused by allowing just **one** person to see Mr. Bollea naked and engaged in sexual activity without his consent? Mr. Bollea endured that shame and humiliation at least **7 million** times.

The jury's verdict in this case is supported by overwhelming evidence. That evidence, which the Court saw first-hand, heard and also independently evaluated, established that Gawker Defendants intentionally published explicit footage of Mr. Bollea naked and engaged in sexual activity in a private bedroom knowing full well that he had been secretly recorded. Gawker Defendants knew this footage had no news value. But they didn't care. Their overriding intention was to harm Mr. Bollea by pandering to shameless, voyeuristic tendencies of viewers so they could drive traffic to their websites and make more money. Gawker Defendants chose to continue to publish the video even after Mr. Bollea begged them to take it down. As a result, millions were able to watch footage that they were never supposed to see, which caused a gross and massive invasion of Mr. Bollea's privacy.

Clear and convincing evidence confirmed that this case was about Gawker Defendants' lust for power and profit, not the freedom of the press. That Denton and Daulerio loathed privacy and celebrity was conclusively established, Gawker Defendants' financial motivation was equally clear. To virally market their brand and website, they used the illegally recorded footage of Mr. Bollea and made it available to the public free of charge. And they used the First Amendment as a pretext for publishing "pornography" by labelling it "news." Their scheme worked. They exponentially increased revenues and the values of their properties.

Clear and convincing evidence also established that Gawker Defendants acted with a specific intent to harm Mr. Bollea, and to cause him severe emotional distress. Their reprehensible conduct fully supports all of the compensatory damages and the relatively modest punitive damages the jury awarded.

Assuming *arguendo* that Gawker Defendants are not estopped from challenging the verdict,[1] there is still no basis for ordering a new trial or reducing the damages award. Competent, substantial evidence supports the verdict. The verdict was not the product of passion or prejudice. Rather, as this Court observed first-hand, the jurors were composed, stoic, engaged, and calm throughout the entire trial. They took copious notes, asked intelligent questions, and followed the instructions they received. Controlling law requires consideration of the community standards of decency and mores that Gawker Defendants consciously ignored. The jury properly heard about the principles of legitimate journalism that relate to whether the explicit images and audio on an illegally recorded sex tape are a matter of legitimate public concern. Appropriately, they took into account the extreme and outrageous nature of Gawker Defendants' actions, their lack of credibility, and their unrepentant rejection of the notion that there exists any modicum of personal privacy.

After rightfully concluding that the Gawker Defendants' publication was not a matter of legitimate public concern, the jury properly awarded damages that were fully supported by extensive, unrefuted evidence. Those damages show the jury recognized that Gawker Defendants unlawfully used the secretly recorded footage of Mr. Bollea to draw millions of people to their websites. That traffic was worth tens of millions of dollars to Gawker and Denton. While Gawker prospered, Mr. Bollea suffered severe emotional distress.

The jury was in the best position to see and weigh the credibility of the witnesses and measure the emotional harm inflicted when Mr. Bollea's most private and intimate conduct was exposed to the world against his will. It is entirely proper that the uniquely outrageous conduct

---

[1] Mr. Bollea filed his Motion to Strike Gawker Defendants' Motion for New Trial or, Alternatively, for Remittitur on May 2, 2016. That motion explained that all of Gawker Defendants' post-trial motions as to liability and compensatory damages should be denied summarily.

and immense suffering at issue in this case resulted in a significant compensatory damages award.

Finally, and contrary to Gawker Defendants' argument, the punitive damages awarded in this case were not "grossly excessive." Indeed, under the circumstances, the awards were modest. At Gawker Defendants' urging, the jury awarded as punitive damages between 9 and 14 percent of the compensatory award against Gawker and Denton. It awarded only $100,000 against Daulerio. In doing so, the jury followed its instructions and took into account the wealth of the respective defendants. The circumstances in this case do not resemble the facts in other decisions that involve truly "excessive" punitive damage awards. In those cases, the punitive damages are typically, at least, as much as the compensatory damages, and often a multiple of them. Gawker Defendants were punished appropriately for their reprehensible conduct.

II. GOVERNING LEGAL STANDARD FOR MOTION FOR NEW TRIAL

A. Motion for New Trial

"The power of a trial court to grant a new trial should be exercised cautiously and only after careful consideration of all the evidence in the aspect most favorable to the party in whose favor the verdict was rendered." *Florida Power Corp. v. Smith*, 202 So.2d 872, 878 (Fla. 2nd DCA 1967), *citing Wolkowsky v. Goodkind*, 14 So.2d 398 (Fla.1943) and *Ely v. Atlantic Coast Line R. Co.,* 138 So.2d 521 (Fla. 2nd DCA 1962). The role of the trial judge in ruling on a motion for new trial is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict. *Brown v. Estate of Stuckey*, 749 So.2d 490, 495 (Fla.1999). Clearly, it is a jury function to evaluate the credibility of any given witness. *Squibb and Sons, Inc., v. Farnes*, 697 So.2d 825, 826 (Fla. 1997).

The trial judge should only intervene and grant a new trial when the manifest weight of the evidence is contrary to the verdict. *Van v. Schmidt*, 122 So.3d 243, 254 (Fla. 2013). Florida's Second District Court of Appeal has consistently stated that "[f]or a verdict to be against the manifest weight of the evidence, so as to warrant a new trial, the evidence must be clear, obvious, and indisputable; where there is conflicting evidence, the weight to be given that evidence is within the province of the jury." *Smith v. Llamas*, 109 So.3d 1185, 1187 (Fla. 2d DCA 2013) *citing Harlan Bakeries, Inc. v. Snow,* 884 So.2d 336, 340 (Fla. 2d DCA 2004). Where conflicting evidence has been presented, a trial court may not act as a "seventh juror with veto power" by deciding that the verdict was against the manifest weight of the evidence and granting a new trial on that basis. *Id. citing McNair v. Davis,* 518 So.2d 416, 418 (Fla. 2d DCA 1988); *Farnes*, 697 So.2d at 826.

Similarly, in considering a post-trial motion for judgment notwithstanding the verdict, the Second District Court of Appeal recently held that "unless the evidence as a whole, with all reasonable deductions to be drawn therefrom, points to one possible conclusion, the trial judge is not warranted in withdrawing the case from the jury or setting aside the jury's determination of conflicting evidence and substituting therefor his own evaluation of the evidence." *San Marco Realty, Inc. v. Dopierala*, 14 So.3d 1108, 1109 (Fla. 2d DCA 2009) (reversing trial court's grant of motion for judgment notwithstanding the verdict); compare, *Tenny v. Allen*, 858 So.2d 1192, 1195 (Fla. 5th DCA 2003) ("A motion for new trial should not be granted unless no reasonable jury could have reached the verdict rendered.")

B. Motions for Judgment Notwithstanding the Verdict

A court is generally required to apply the same legal standard to a motion for judgment notwithstanding the verdict ("J.N.O.V.") in accordance with a prior motion for directed verdict

as it applies when an ordinary motion for directed verdict is involved. *Ticor Title Guarantee Co. v. Harbin*, 674 So.2d 781, 782 (1st DCA 1996). Presented with such a motion, the court must view all of the evidence in a light most favorable to the non-movant, and, in the face of evidence which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made. *Id.* Only where there is no evidence upon which a jury could properly rely should a motion to set aside a verdict and entry of a J.N.O.V. in accordance with a prior motion for directed verdict be granted. *Id. citing Collins v. School Board of Broward County*, 471 So.2d 560 (Fla. 4th DCA 1985). Granting a directed verdict on a party's motion for J.N.O.V. "…is improper if there is *any* evidence to support a possible verdict for the non-movant." *Id. (citing Pritchett v. Jacksonville Auction, Inc.*, 449 So.2d 364 (Fla. 1st DCA 1984).

C. Remittitur

A remittitur should not be awarded when the jury's verdict is reasonable based on the evidence that was presented. As explained by Florida's Second District:

> In tort cases damages are to be determined by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.

Aills v. Boemi, 41 So.3d 1022 (Fla. 2d DCA 2010) *citing Bould v. Touchette*, 349 So.2d 1181, 1184-85 (Fla. 1977). When (as here) the defendant does not assist the jury in establishing a range for a verdict, it is more difficult for the defendant to later suggest that a verdict below the plaintiffs' request is somehow a verdict which exceeds the maximum limit of the reasonable range. *Id. citing Hawk v. Seaboard Sys. R.R., Inc.*, 547 So.2d 669, 674 (Fla. 2d DCA 1989) (Altenbernd, concurring).

When reviewing the sufficiency of the evidence supporting a jury's damage award, the court's inquiry is limited to determining whether reasonable jurors could have concluded as this jury did based upon the evidence presented, with reasonable inferences in favor of the non-moving party. *Palm Beach Atlantic College v. First United Fund*, 928 F.2d 1538, 1542-43 (11th Cir. 1991). A jury has wide latitude in determining the amount of damages. Moreover, punitive damage awards are "peculiarly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression or outrage found by the jury from the evidence." *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 171 So. 214, 221-22 (1936). *Rety v. Green,* 546 So.2d 410, 418 (Fla. 3d DCA, 1989).

> Even though the jury's role as fact finder is protected by the 7th Amendment to the U.S. Constitution, the trial judge has the duty to enter a post-trial order of remittitur or new trial "when the record affirmatively shows the jury's verdict to be excessive [i.e., against the manifest weight of the evidence] or when the judge makes [supportable] findings concluding that the jury was influenced by something outside the record." *Rety* at 418; *Arab Termite & Pest Control, Inc. v. Jenkins,* 409 So.2d 1039, 1041, 1042 (Fla.1982). *See also*, *Laskey v. Smith,* 239 So.2d 13, 14 (Fla.1970), A court should not declare a jury verdict excessive simply because it is higher than the amount the court itself considers appropriate. Brown v. R. J . Reynolds Tobacco Co., 2015 WL 3796256, *2 (M.D. Fla. June 18, 2015); Simon v. Sherson Lehman, 895 F.2d 1304, 1310 (11th Cir. 1999) (new trial should only be ordered where verdict is so excessive as to shock conscience of the court). Florida law closely follows federal law in preferring a jury determination. *Arab Termite*, 409 So.2d at 1041.

D. Gawker Defendants Grossly Misstate the Standard of Review.

Under the "constitutional facts" doctrine, the facts that support a conclusion that speech is unprotected under the First Amendment are independently reviewed on appeal (and, by extension, on post-trial motions). But this doctrine is limited to the facts that support the jury's conclusion that the expression at issue is unprotected under the public concern test. "In determining whether [a] constitutional standard has been satisfied, the reviewing court must

consider the factual record in full." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (emphasis added); *see* Connor v. State, 803 So.2d 598, 607 (Fla. 2001) (independent review standard applies to factual issues "that ultimately determine constitutional rights"). "The independent review function is not equivalent to a 'de novo' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 n. 31 (1986).

In *Booth v. Pasco County*, 757 F.3d 1198, 1210 (11th Cir. 2014), the Eleventh Circuit distinguished between the review of "constitutional facts" and the remainder of the factual issues in the case. "Constitutional facts are the ultimate fact[s] upon which the resolution of the constitutional question depends, as distinguished from preliminary factual issues…. Although we review findings of 'constitutional fact' de novo, we review other subsidiary findings of historical fact for clear error, and we defer to the jury's credibility determinations unless they are clearly erroneous."

In their post-trial motions, Gawker Defendants try to vastly expand the constitutional facts doctrine beyond its limits in an attempt to invade the jury's exclusive province to make factual determinations on numerous other issues. As to all issues in the case other than whether the one minute forty-one second video of Mr. Bollea posted on Gawker.com (the "Gawker Video") was a matter of public concern, the verdict may be overturned only if there is no evidence on which the jury could rely and find for the plaintiff. *See Irven v. Dep't of Health & Rehabilitative Servs.*, 790 So. 2d 403, 406 n.2 (Fla. 2001). Additionally, any jury determinations regarding witness credibility are entitled to deference and may not be independently reviewed,

even if they relate to the constitutional issue of whether the Gawker Video was a matter of public concern. *Bose*, 466 U.S. at 499-500; *Booth*, 757 F.3d at 1210.

III. GAWKER DEFENDANTS J.N.O.V. SHOULD BE DENIED

Gawker Defendants' Motion for J.N.O.V. should be denied because it is not supported by the facts or law. *First*, there is no basis to overturn the jury's verdict, which solidly rests on overwhelming evidence and binding precedent. Public concern was an issue of fact properly submitted to the jury in the first instance. The jury's common sense conclusion that the actual footage on an illegally recorded sex video is not a matter of legitimate public concern is supported by competent, substantial evidence and consistent with the law. The First Amendment does not protect the publication of material that consists of nothing more than a morbid and sensational prying into the private life of another for its own sake.

Second, Gawker Defendants erroneously argue that actual malice was a necessary element of Mr. Bollea's claims. Actual malice must only be proven in defamation claims asserted by public figures. It has never been required in privacy torts. Regardless, Mr. Bollea proved clearly and convincingly that Gawker Defendants acted with actual malice. The jury's factual findings on this issue is correct.

Third, Bubba Clem's refusal to testify is a red herring. Mr. Clem's invocation of his Fifth Amendment privilege rendered him "unavailable." Gawker Defendants chose not to offer his deposition testimony. That choice had consequences for which only Gawker Defendants are accountable.

Fourth, clear and convincing evidence established that Mr. Bollea had a reasonable expectation of privacy, suffered severe emotional distress, and is entitled to recover all of the

economic damages awarded by the jury. The law fully supports all of the causes of action Mr. Bollea proved and the categories of damages the jury awarded as a result.

Fifth, clear and convincing evidence also established that Gawker Defendants' conduct was extreme and outrageous, warranted punitive damages, and that Denton is personally liable. The jury's factual decisions on these issues must be given great deference and are fully supported in the record.

A. The Overwhelming Weight of the Evidence Supports the Jury's Finding that the Sex Video Was Not a Matter of Public Concern.

In support of their Motion for J.N.O.V., Gawker Defendants simply repeat their directed verdict arguments, all previously rejected by this Court, that the Gawker Video was a matter of legitimate public concern. In doing so, they misstate both the legal standard and the unrefuted facts of this case.

1. The issue of whether a publication is a matter of public concern is a jury question in the first instance.

Gawker Defendants erroneously contend that public concern is a pure question of law. In this case, public concern was a question of fact that was properly submitted to the jury, which this Court should now independently review under the constitutional facts doctrine. *See e.g.*, *Judge v. Saltz Plastic Surgery, P.C.*, 367 P.3d 1006, 1013 (Utah 2016) (if court concludes that reasonable minds could differ concerning the newsworthiness of the information, then the issue is a jury question); *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 564 (Cal. Ct. App. 1988) (newsworthiness "is a question to be answered by the jury"); *Virgil v. Sports Illustrated*, 424 F.Supp. 1286, 1290 (S. D. Cal. 1976); *Capra v. Thoroughbred Racing Ass'n of North America, Inc.*, 787 F.2d 463, 464 (9th Cir. 1986); *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

The Eleventh Circuit has already adopted the same test for "public concern" applied in *Judge*. *Toffoloni v. LFP Publ'g. Group*, 572 F.3d 1201, 1211 (11th Cir. 2009). This test depends in part on the fact-based determination of the "community's customs and conventions" recognized in Section 652D of the Restatement (Second) of Torts:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Toffoloni, 572 F.3d 1201, 1211; *Judge*, 367 P.3d at 1012. "The Restatement expounds that the limitations… are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure." *Id.*

Snyder v. Phelps, 562 U.S. 443, 453-54 (2011), cited by Gawker Defendants, illustrates the proper procedure, which was followed in this case. In *Snyder*, there was first a jury verdict for the plaintiffs, which was followed by an independent judicial review of the public concern issue.

2. A video containing explicit, unblocked and unblurred footage of a private sexual encounter is not a matter of public concern.

The jury's determination that the illegally recorded Gawker Video was not a matter of legitimate public concern is supported by competent, substantial, clear and convincing evidence, and firmly in accord with controlling "public concern" precedent. Several courts have recognized that broadcasts of sexual activity, and specifically private celebrity sex tapes or nude photos, are not a matter of legitimate public concern. *See City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (broadcast of sexual activity such as police officer masturbating is not a matter of public concern); *Toffoloni*, 572 F.3d 1201, 1212 (11th Cir. 2009) (private nude photos of celebrity were not newsworthy). Indeed, while the United States Supreme Court has noted that

journalists may be entitled to publish some illegal recordings (*see Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001)), a majority of the justices in the same case declined to give celebrity sex tapes constitutional protection as matters of public concern. *Id.* at 540. (Breyer, J., concurring) (stating that a case involving the broadcast of a celebrity sex tape constitutes a "truly private matter" not protected by the First Amendment); *Id.* at 541 (Rehnquist, C.J., dissenting) (taking position that disseminating the contents of illegal recordings is not protected by the First Amendment). The Supreme Court expressly declined to extend constitutional protection for disclosure of the contents of illegal recordings of "domestic gossip or other information of purely private concern."

Toffoloni strongly supports the jury's verdict. In that case, the Eleventh Circuit rejected a First Amendment defense asserted by *Hustler* when it published private nude photos of a celebrity. The court reasoned that if the defense were accepted, the defendant "would be free to publish any nude photographs of almost anyone without permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.'" 572 F.3d 1201, 1212 (11th Cir. 2009). Standing alone, nude photos "impart no information to the reading public… and serve no legitimate purpose of disseminating news [while] needlessly exposing aspects of the plaintiff's private life to the public." *Id.* at 1209. The same holds true even when an incidental article accompanies such photos. *Id.*

Michaels v. Internet Entertainment Group, Inc., 5 F.Supp. 2d 823 (C.D. Cal. 1998) similarly holds that the publication of a sex tape of actress Pamela Anderson and rock star Bret Michaels was not protected by the First Amendment because "the visual and aural details of their sexual relations" were "facts which are ordinarily considered private even for celebrities." 5 F.Supp. 2d at 840.

Just last February, the Utah Supreme Court applied the widely recognized *Toffoloni* test to a case involving a physician's distribution to the media of nude "before and after" photos of his cosmetic surgery patient. *Judge*, 367 P.3d at 1008 (Utah 2016). In *Judge*, the Utah Supreme Court reversed a summary judgment in favor of the defendant: "In determining whether there is legitimate public concern, one must take into account whether there is a logical nexus between the information and a matter of legitimate public interest, the degree of intrusiveness, and the community's customs and conventions." *Id.* at 1012. "Information is not considered to be of legitimate public concern when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." *Id.* at 1012-13 (internal quotation omitted).

Importantly, as was the case in *Toffoloni* and as is the case in this lawsuit, the photos at issue in *Judge* were accompanied by a news report. However, that fact alone does not automatically render the photos newsworthy. "Reasonable minds could differ" on whether the plaintiffs' voluntary appearance on television to inform the public about her breast augmentation gave rise to legitimate public interest in viewing explicit photos of her surgery. *Id.* at 1013. "[T]he dispute as to whether there was legitimate public interest in the photographs based on [plaintiff's] participation in the broadcast on whether the inclusion of the photographs was gratuitous or overly intrusive "was a fact issue for the jury to decide." *Id.*

Under these controlling authorities and as a matter of law, the Gawker Video was not a matter of legitimate public concern. This conclusion is confirmed by the overwhelming, clear and convincing evidence established at trial.

3. Clear and convincing evidence established that the Gawker Video was not a matter of public concern.

Gawker Defendants' own testimony established clearly and convincingly that every after-the-fact reason that Gawker Defendants invented in an attempt to portray the video as "newsworthy" was pretextual and did not afford First Amendment protection. Daulerio admitted that no matter of legitimate public concern justified posting the Gawker Video. (RT 2785-86; 2790-92) In fact, Daulerio refuted every *pretrial* reason the federal court[2] and the Second District Court of Appeal[3] mention when suggesting the Gawker Video could be "newsworthy." Daulerio admitted that Gawker Defendants' posting had **nothing** to do with Mr. Bollea's wrestling career, his autobiography, his wife's autobiography, his statements about his sex life on shock jock shows, his "reality" show, his affair with Heather Clem, his penis and sexual positions, and even the existence of the tape or Mr. Bollea's supposedly hypocritical statements. (RT 2785-86; 2790-92). Florida's Second District and the federal district court did not have the benefit of Daulerio's testimony when deciding whether temporary injunctive relief was appropriate in this case, and so the rulings denying that relief were not and could not be, at that stage, based on all of the evidence.

Instead, at trial, Daulerio conceded that the **only** reason he posted the Gawker Video was the morbid and sensational desire to publish the footage so that the public could watch Mr. Bollea naked and engaged in sexual activity and hear his private conversations. (RT 2793, 2784-86) Daulerio admitted that his accompanying narrative was a play-by-play of the illegal footage, nothing more. (RT 2784) Not surprisingly, the tactic of manufacturing stories support images so the images can be posted came directly from Denton. (Plf's Ex. 59; RT 3018-19)

---

[2] *Bollea v. Gawker Media, LLC*, 2012 WL 5509624 at *3 (M.D. Fla. Nov. 14, 2012).

[3] *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1201 (Fla. 2d DCA 2014).

Gawker Defendants are ignoring these undisputed facts, and instead erroneously argue that general propositions of law and certain isolated pieces of evidence justify their claim that the explicit content of the Gawker Video was a matter of public concern. That argument fails.

This case is unlike any other published opinion as far as the intent of the "journalist" is concerned. Gawker Defendants **argued** that numerous topics of public interest justified posting the pornographic Gawker Video. Denton conceded that this was merely his view in "retrospect." (RT 2994:1-6) However, the **facts** conclusively demonstrated that those arguments had nothing to do with why Gawker Defendants posted the video footage. Gawker Defendants admitted that the only reason they posted the Gawker Video and Daulerio's incidental narrative was to expose to the public Mr. Bollea naked and engaged in sexual activity to public. This admission is dispositive.

Although in most cases, "reliance must rest upon the judgment of those who decide what to publish or broadcast," that reliance necessarily gives way when the publication is a "flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists." *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328, 331 (Fla. 2d DCA 1983). This case involved a flagrant breach of privacy through an obvious exploitation of public curiosity where no legitimate public interest exists. Moreover, even if deference to Gawker Defendants' editorial discretion is required, Daulerio and Denton conceded that the explicit content of the Gawker Video was an exploitation of public curiosity without any **legitimate** justification for publishing.

Factually and legally, Gawker Defendants' contention that Daulerio's damning admissions are not relevant to the public concern test is wrong. Florida's Second DCA primarily uses a subjective standard. *Doe*, 436 So.2d 328, 331 (Fla. 2d DCA 1983); *Gawker Media, LLC*

v. Bollea, 129 So.3d 1196, 1201 (Fla. 2d DCA 2014). In *Doe*, the standard was stated as follows:

> The judgment of what is newsworthy must remain primarily a function of the publisher. However, in cases where essentially private persons are the subject of publicity because of their involuntary connection with events of widespread interest, this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers. The right of the public to know is clearly one of the primary values protected by the First Amendment and its "… guarantees are not for the benefit of the press so much as for the benefit of all of us."

436 So.2d 328, 331 (Fla. 2d DCA 1983) (quoting *Time, Inc. v. Hill*, 385 U.S. 374 at 39). *Chappel v. Montgomery County Fire Protection District*, 131 F.3d 564 (6th Cir. 1997), cited by Gawker Defendants, is in accord. The *Chappel* court did not hold that evidence of the speaker's intent is not relevant, only that it does not "dispositively determine" the issue of public concern. *Id.,* at 574.[4]

Whether viewed subjectively or objectively, the facts conclusively established that the Gawker Video is clearly an exploitation of public curiosity and a morbid and sensational prying into Mr. Bollea's private life for its own sake. Objectively, the Gawker Video imparted no information of legitimate news value to the public. *Toffoloni*, 572 F.3d 1201, 1209 (11th Cir. 2009). Subjectively, Daulerio excited about his "exclusive," admittedly posted it to appeal to "shameless voyeurs and deviants" because he wanted to show and tell them about what he saw.

Daulerio's incidental, graphic narrative (a "play-by-play" of the sex tape) and admissions on the stand affirmed that he subjectively believed what is outwardly obvious from the content and context of the publication itself: Gawker Defendants published the Gawker Video to pander

---

[4] Importantly, Gawker Defendants' argument that Daulerio's statements are irrelevant conflicts headlong with their arguments that they should be relieved from liability because they did not know that they were publishing material that was not a matter of public concern. Obviously, when Daulerio described the audience for the Gawker Video as "shameless voyeurs and deviants," speaking on behalf of Gawker, he clearly knew.

to prurient interests to make money and to publicly humiliate Mr. Bollea. It was evidence proving to everyone, including the jury, that Gawker Defendants had no intention to and did not report any "news."

4. Gawker Defendants present a grossly inaccurate version of the public concern test.

Given Daulerio's dispositive testimony and his statements in the narrative, Gawker Defendants resort to grossly mischaracterizing the public concern test. In addition to denying the jury's vital role in determining the issue, Gawker Defendants recast the "public concern" test as permitting anything to be published as long as it merely "relates" to the "subject matter" of some issue of public interest. Under such a test, even excerpts of the most obviously unprotected speech, such as secretly recorded child pornography, are protected by the First Amendment, as long as enough "shameless voyeurs and deviants" are interested in watching it. That is not the law.

Not surprisingly, Gawker Defendants want to remove the "**legitimate**" element from the public concern test. This approach is not supported by the law, and was explicitly rejected in *Judge*. In that case, the defendant plastic surgeon argued that the nude before-and-after photos at issue related to a journalist's informational story about cosmetic surgery and were therefore a matter of public concern. The Court rejected this overly broad definition: "[T]he dispute as to whether there was legitimate public interest in the photographs based on Ms. Judge's participation in the broadcast or whether the inclusion of those photographs was **gratuitous** or **overly intrusive** made summary judgment inappropriate in this case." 367 P.3d 1006, 1013. (Emphasis added). *Michaels* recognized the same limitation (*i.e.,* that even though Brett Michaels and Pamela Anderson having sex was of public interest, "the visual and aural details of

their sexual relations… are considered private even for celebrities). 5 F.Supp.2d at 840. *Toffoloni* is also in accord.

Gawker Defendants' argument would mean that there could never be any such thing as "gratuitous or overly intrusive," so long as the publisher can fashion an argument, however flawed, that the subject matter relates to some issue of public interest. This flies in the face of *Judge*, *Michaels*, *Toffoloni* and *Doe* (which recognizes that "obvious exploitation of public curiosity where no legitimate public interest exists" is not constitutionally protected). It also contradicts Denton's own recognition at trial that gratuitous images of nudity and sex are **not** protected. (RT 3068-69)

In *Toffoloni,* the Eleventh Circuit likewise rejected the argument that attaching a biographical article to private photographs will somehow "ratchet otherwise protected, personal photographs into the newsworthiness exception." 572 F.3d at 1209. *See also Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 484 ("[W]hen a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy…."); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.")

Gawker Defendants' effort to buttress their argument with isolated language in certain cases discussing the public concern test, taken out of context, is unavailing. Gawker Defendants cite *Michaels v. Internet Entertainment Group, Inc.*, 1998 WL 882848 at *6 (C.D. Cal. Sep. 11, 1998) ("*Michaels II*"). However, *Michaels II* involves a claim that is completely different from the one at issue here, that *Hard Copy* violated Michaels and Pamela Anderson's right to publicity

by including in a news report on their sex tape a mention of the commercial websites where the tape could be viewed. *Id.* ("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.") While the *Michaels II* court holds that the Hard Copy story was also not actionable as an invasion of privacy, it **did not** repeat or rely on the "superior editor" argument. I Instead it scrutinized the report and held that because no explicit sex was shown, there was no violation of Michaels' and Anderson's privacy. *Id.* at *10 ("The video images presented in the Hard Copy broadcast--while highly suggestive--were brief and revealed little in the way of nudity or explicit sexual acts.").

In this case, Daulerio purposely included explicit images of Mr. Bollea's penis, and footage of oral sex and various different sexual positions in his post. (RT 2786; 1881) Daulerio conceded that he did this to show his viewers these specific images, even though they were not necessary. (RT 2786; 1884) Denton conceded that the Gawker Video is "pornographic." (RT 3035) Daulerio characterized the footage as "Super NSFW," while characterizing it in his narrative as something viewers "are not supposed to see." (RT 1891; Plf's Ex. 4)

Gawker Defendants' reliance on *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007), is also misplaced. *Anderson* explicitly rejects their subject-matter argument. Instead, *Anderson* stated that "[t]o properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest." *Id.* at 1236. The *Anderson* court said exactly

what *Toffoloni* said and Mr. Bollea is saying—that each fact in a story, even a legitimate news story reporting actual news, must have some substantial relevance to a matter of legitimate public interest. Even though the general subject area of the romantic lives of celebrities may be a matter of public concern, the explicit visual and aural footage of Mr. Bollea on the Gawker Video is still a violation of his privacy. Unlike the video content in *Anderson*, which was a matter of public concern because it established the guilt of a dangerous rapist, the explicit content of the Gawker Video here does not have "substantial relevance" to any **legitimate** public interest.

The discussion in *Lee v. Penthouse International, Ltd.*, 1997 WL 33384309 (C.D. Cal. Mar. 19, 1997) quoted by Gawker Defendants is equally inapt. That case involves an exemption to a right of publicity claim recognized in California for "use of a name, photograph or likeness in connection with any news." *Id.* at *4 (quoting Cal. Civ. Code § 3344(d)). The "subject matter" test is written into the California statute. There is no similar statutory language in Florida restricting the claims in this case. And while *Lee* involved a public disclosure of private facts claim, that claim was not resolved on "public concern" grounds at all. Rather, the claim was rejected because the nude photographs of the plaintiff had already been published by other publishers. 1997 WL 33384309 at *6. In this case, Daulerio admitted that the footage Gawker Defendants posted had never been publicly disclosed before. (RT 2783-84)

Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1221 (10th Cir. 2007), also relied on by Gawker Defendants, involved a report of police misconduct that identified undercover officers. That court noted the extensive public interest that is served by airing complaints of police misconduct, and held that there was no special "undercover officer" doctrine that would shield identification of officers if the report was otherwise one of public concern. In *dictum*, the court

suggested another reason the claim was non-actionable was that courts should not parse stories for private and non-private details, but the facts in *Alvarado* do not remotely resemble the facts of this case. Reporting police misconduct is not analogous to trafficking a pornographic video to expose a celebrity's sex life. Moreover, Daulerio admitted that he could have run his narrative piece without posting the images of Mr. Bollea's nudity and sexual activity in a private bedroom. (RT 2786)

The jury's verdict on public concern is well supported by the facts and law and withstands constitutional facts review. Gawker Defendants' public concern argument has and continues to fail. They did not and cannot establish that the public had any **legitimate** interest in seeing the footage of Mr. Bollea naked and engaged in sexual activty that they posted online and that they then invited "shameless voyeurs and deviants" to watch.

5. The remaining authorities cited by Gawker Defendants are distinguishable.

Gawker Defendants bootstrap their arguments to a number of other cases and authorities that hold the public concern test to be applicable to other, dissimilar situations. None of them justify Gawker Defendants' brazen invasion of Mr. Bollea's privacy.

Gawker Defendants selectively quote the *Restatement (Second) of Torts* for the proposition that the public concern test "extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment." Presumably, they intend to justify Daulerio's publication of the footage because he was "amused" by it, and thought his readers would be as well. (RT 1888) But Gawker Defendants neglect to mention that the same *Restatement* recites the language used in the jury instructions in this case: "[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for

its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." *Restatement (Second) of Torts* § 652D cmt. H.

Gawker Defendants misplace reliance on several other incomparable cases in which the matters of public concern were obvious and not analogous to a private sex tape. *See, Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 669-70 (Cal. App. 1984) (newspaper report of sexual orientation of man who saved President's life was not actionable both because he had not kept his sexual orientation private and because it was reported not for morbid or sensationalistic reasons but to dispel the stereotype of gays as effeminate and timid); *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex. App. 1993) (woman revealed on television that her husband had raped their daughter and fathered their grandchild; because she was telling her own life's story, there was no claim for invasion of privacy by her family members); *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So.2d 328, 330-31 (Fla. 2d DCA 1983) (disclosure of rape victim's identity); *Loft v. Fuller*, 408 So. 2d 619, 620 (Fla. 4th DCA 1981) (book that contained references to a ghost of a pilot who died in a plane crash reappearing to other airline pilots was not actionable because it did not invade any privacy interest of the pilot's relatives who brought suit).[5]

B. There Is No Requirement of Actual Malice in an Invasion of Privacy Case.

Gawker Defendants erroneously argue that the law requires a showing of actual malice in order for a plaintiff a privacy tort when public figures are involved. This requirement is only imposed in defamation cases, not privacy cases.

---

[5] *The Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989), holds that a rape victim's identity, obtained from the government, may be published. The *B.J.F.* court expressly rejected the appellant's argument seeking a rule of absolute protection for any truthful information published by a journalist. *Id.* at 541. *Walker v. Fla. Department of Law Enforcement*, 845 So. 2d 339, 340 (Fla. 3d DCA 2003), holds that the plaintiff could sue for damages for the release of sealed criminal records, but simply brought the wrong form of action.

If plaintiffs were required to show that defendants in privacy cases acted with reckless disregard to privacy, it would be mentioned in *Hitchner*, or *Snyder*, or *Bartnicki*, or *Toffoloni*, or any of the other leading privacy cases relied on by both sides. It is not. And Gawker Defendants fail to site to a single case saying that it is.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), cited by Gawker Defendants, did not hold that all intentional infliction of emotional distress cases brought by public figures must pass a reckless disregard test. Rather, that case applies the standard to claims that attempted to circumvent a defamation claim. *Id.* at 57 ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.") (Emphasis added). Further, the *Falwell* case involved a claim by Rev. Jerry Falwell that his feelings were hurt by an allegedly defamatory parody advertisement that ran in *Hustler* magazine. It did not involve a secretly recorded video tape showing him naked and engaged in sexual activty. *See, e.g., Blatty v. New York Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986) (reckless disregard standard applies to any claim alleging an "injurious falsehood").

The other cases cited by Gawker Defendants are also off the mark. In *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 379 (Colo. 1997), the court simply imposed reckless disregard as one of the elements in recognizing the public disclosure tort in Colorado, and says nothing about this being a First Amendment requirement. The case of *Purzel Video GmbH v. St. Pierre*, 10 F. Supp. 3d 1158, 1167 (D. Colo. 2014) simply follows *Borquez*, and also never says the reckless disregard element is a First Amendment requirement. The case of *Zinda v. Louisiana Pacific*

Corp., 440 N.W.2d 548, 555 (Wis. 1989) involves a Wisconsin public disclosure of private facts statute that, like Colorado, specifically imposes a reckless disregard requirement.

In *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984, 988 (Idaho 1974), the court applied the "reckless disregard" standard to a truthful report about a public arrest record by a media defendant. Similarly, *Roshto v. Hebert*, 439 So.2d 428, 432 (La. 1983) involved the publication of a person's criminal record. These cases are easily distinguished because a defendant's First Amendment interests are much stronger when reporting on the content of public records, which are incomparable to a surreptitiously recorded sex video.

Even if a reckless disregard standard were required, Mr. Bollea clearly and convincingly proved malicious intent. The jury made several findings that Gawker Defendants recklessly disregarded Mr. Bollea's privacy rights and acted with actual malice. *See Verdict Form*, Questions 14, 16, 17. Again, overwhelming, clear and convincing evidence supported these findings, which are entitled to great deference. RT 1815:7-15; RT 1888:21-1889:1; RT 1889:4-7; RT 2051:1-5; RT 2051:19-2052:6; RT 2780:5-8; RT 2792:23-2793:4; RT 2793:14-17; RT 2877:12-15; RT 3036:24-3037:3; RT 3037:4-7.

C. Bubba Clem's invocation of the Fifth Amendment did not require dismissal of the case.

Gawker Defendants' argument regarding Bubba Clem's invocation of the Fifth Amendment is based on the false premise that a plausible claim can be made that Mr. Bollea knew that he was being recorded. No credible evidence supports this argument.

Mr. Bollea, of course, testified that he did not know he was being recorded. Heather Clem confirmed this was true. The recording was made by a hidden camera that was disguised to look like a motion detector. Mr. Bollea and Heather Clem never acknowledge the presence of

the camera at any point during the recording. The content of the conversations on the recording also prove it was surreptitious.

The argument that Mr. Bollea knew he was being recorded ignores this evidence and defies common sense. If, for example, Mr. Bollea knew about the recording, why use a hidden, distant camera that generated relatively grainy footage rather than a visible camera that could produce a better recording?

Further, the irrelevant and prejudicial evidence of offensive language that Gawker Defendants tried so hard to interject into this case strongly corroborates that Mr. Bollea did not know he was being recorded. If he knew he was being recorded, why would he ever make such comments? Further, why would Mr. Clem have made his "retirement" comment? Gawker Defendants have no good answers for these questions.

Gawker Defendants' claim of error also fails because they could have presented Mr. Clem's deposition testimony at trial, but chose not to. His invocation of the Fifth Amendment rendered him "unavailable." *Henyard v. State*, 992 So.2d 120, n. 3 (Fla. 2008); *Roussonicolos v. State*, 59 So.3d 238 (Fla. 4th DCA 2011). They still chose not to do so. Instead, they elected to make a grandstanding proffer before the cameras so they could invite supposed error and complain about an unfair trial after the verdict.

The Court's decision to prevent Gawker Defendants from calling Mr. Clem for the sole purpose of invoking his Fifth Amendment privilege before the jury was entirely appropriate. Florida case law supports this decision. *Faver v. State*, 393 So.2d 49 (Fla. 4th DCA 1981); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *Bowles v. U.S.*, 493 F.2d 536 (D.C. Cir. 1970); *Ins. Co. of State of Pa. v. Guzman's Estate*, 421 So.2d 597 (Fla. 4th DCA 1982) And the polestar of the federal cases cited by Gawker Defendants (all of which involve a

negative inference Gawker Defendants did not request) is trustworthiness. (*Coquina Invs. V. TD Bank, N.A.*, 760 F.3d 1300 (11th Cir. 2014) Given Gawker Defendants' own representation to this Court that Mr. Clem was "pathologically untrustworthy," the Court's decision on this issue was proper. (RT 2816)

In truth, Gawker Defendants are not really complaining about the exclusion of a witness who was going to give testimony crucial to its defense. Their true claim is that the witness's invocation of his constitutional rights prevented them from presenting a factual theory to the jury that was so implausible that it likely would have been excluded under Florida Statute § 90.403 anyway, and could not have ever been proven even if Mr. Clem had been compelled to testify.

Regardless, the unpersuasive case law cited by Gawker Defendants does not require dismissal of Mr. Bollea's claims. Both *Trulock v. Lee*, 66 Fed. Appx. 472, 475-76 (4th Cir. 2003), and *Restis v. American Coalition Against Nuclear Iran, Inc.*, 2015 WL 1344479 at *9 (S.D.N.Y. Mar. 23, 2015), involve the state secrets privilege, which permits courts to dismiss cases where airing the facts would constitute a threat to national security. *See Totten v. United States*, 92 U.S. 105 (1875) (holding spy could not maintain action for breach of contract made by President Lincoln to employ his services; case could not be tried without revealing classified information about the secret services). In that specialized and highly unique context, the extraordinary remedy of dismissal is permitted because of the extraordinary threat that judicial fact-finding can pose if state secrets have to be revealed. Gawker Defendants do not cite a single case applying this rule to a case where a witness invoked a Fifth Amendment privilege.

Finally, even if the Court were to entertain Gawker Defendants' absurd claims that they were deprived of the chance to show that, contrary to the evidence and all common sense, Mr. Bollea knew about the recording, this is a predicament of Gawker Defendants' own making.

Mr. Clem was and is a third party witness. There is always a possibility in any case where a party is relying on third party testimony that the witness will become unavailable. Even after Gawker Defendants obtained Mr. Clem's inconsistent statement made to the FBI (in August 2015), they had six months to take his deposition. Instead of protecting their interests, they made the tactical decision to risk his unavailability so they could ambush Mr. Clem at trial. That choice has consequences for which only Gawker Defendants are accountable.

D. Gawker Defendants' Argument that Mr. Bollea had no Reasonable Expectation of Privacy with Respect to a Private Sex Act in a Private Bedroom lacks merit.

Gawker Defendants argue that judgment must be entered in their favor on Mr. Bollea's claims for intrusion, publication of private facts, and violation of the Wiretap Act because there was "no evidence" Mr. Bollea had a reasonable expectation of privacy. JNOV Mot. at 14. This bad faith argument continues to ignore the evidence and common sense.

Mr. Bollea was in a private bedroom. Gawker Defendants falsely suggest that Mr. Clem was in the room the entire time, but he was not (even Daulerio's post notes that he told Mr. Bollea and Mrs. Clem to "do [their] thing" and left them to their "privacy"). No one else was in the room. The unrefutted evidence established that Mr. Bollea did not think he was being recorded.

Gawker Defendants' argument essentially is that a man who has sex with a woman in a home the woman shares with someone else—even a roommate—has no reasonable expectation of privacy, and anyone can record the activity. Gawker Defendants try to bolster this absurd suggestion with irrelevant references to "adultery," the baseless assertion that Mr. Clem was present during the sexual encounter, and descriptions of Mr. Clem's radio character. But

ultimately, Gawker Defendants are arguing that two people have no privacy even with respect to sex acts if they are in any dwelling other than their own home.

Gawker Defendants' position is refuted not only by common sense but also by the case law. In *Lewis v. LeGrow*, 670 N.W.2d 675, 685 (Mich. App. 2003), the defendant had sex with three different women in his bedroom and videotaped them. The court held that the women had a reasonable expectation of privacy in his bedroom: "Here, there is no question that defendant's bedroom meets the required definition of a 'private place' as one from which the general public is excluded. Likewise, plaintiffs did not claim, nor could they, that they were safe from defendant's observation while engaging in consensual sex with him. Indeed, defendant's observation of plaintiffs during their intimate sexual activities was neither casual nor hostile, nor was his observation secret…. Nevertheless, a bedroom in a private home in which a couple engages in intimate relations fulfills the definition of a 'private place'… because reasonable people expect to be 'to be safe from casual or hostile intrusion,' within a bedroom." *Id.*

It seems axiomatic that "when a person knowingly undresses and engages in sexual relations with another person, he or she should be able to do so with the reasonable expectation that his or her actions are limited to that particular time and place and that his or her naked body and/or sexual acts will not be memorialized and/or repeatedly viewed at any time by the other person present or by anyone else with whom that person decides to share the recordings…." *People v. Piznarski*, 977 N.Y.S. 104, 112 (A.D. 2013) (holding that surreptitious recording of sexual activity violates the victim's reasonable expectation of privacy).

Gawker Defendants' only citation to authority in support of their argument is a concurring opinion by a single Florida Supreme Court justice whose analysis was rejected by the majority opinion in the case. In *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985), the court held

that the defendant had no reasonable expectation of privacy when he went to the victim's office to murder him. The court's holding involved an office, not a bedroom, and was expressly limited to situations in which the party went to a place with the intention of harming the victim. *Id.* at 1275-76 ("One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises."). Mr. Bollea was not a trespasser in an office. Further, Gawker Defendants rely on the concurrence of Justice Overton who felt that there should be no expectation of privacy at all, so long as the defendant was in someone else's home or office. Of course, Justice Overton was not addressing the unique facts of this case, or any case involving a surreptitious sex tape. In any event, his position was not adopted by any other member of the Court and is not controlling or persuasive authority.

E. Gawker Defendants' Sundry Arguments for Dismissing the Remaining Claims Should Be Rejected.

Gawker Defendants' reiteration of the series of arguments they have made without success numerous times before should be rejected again. Nothing warrants reversal of the Court's prior decisions.

First, Gawker Defendants argue that intrusion upon seclusion requires a physical invasion. That is incorrect. The case law allows for the tort if Mr. Bollea's privacy was electronically intruded, and the jury reasonably concluded that the publication of an explicit, clandestinely-recorded sex video on the Internet satisfies the factual elements of this claim. *See Zirena v. Capital One Bank (USA) NA*, No. 11-24158-CIV, [redacted] WL [redacted]89 at *2 (S.D. Fla. Feb. 2 2012) (defining intrusion tort as "physically *or electronically* intruding into one's private quarters" and holding that harassing phone calls were actionable) (emphasis in original). The

tort vindicates the "right of a private person to be free from public gaze." *Allstate Insurance Co. v. Ginsburg*, 863 So.2d 156, 162 (Fla. 2003). The out-of-state cases cited by Gawker Defendants are not consistent with Florida law on this point, and the jury was properly instructed.

Second, Gawker Defendants' argument that the "commercial" element of the right-to-publicity cause of action was not met is without merit. According to Gawker Defendants, their use of Mr. Bollea's name and image was not "commercial" because his name and image supposedly were not used to promote a specific product or service. That assertion is disproven by abundant, unrefutted evidence (including Gawker Defendants' own expert, Peter Horan) that the Gawker Video was used to virally market Gawker and its websites, as well as evidence that Gawker Defendants' strategy was to use the Gawker Video itself to drive substantial web traffic to Gawker. Through those efforts, Gawker reaped huge financial revenue and value from the millions of people who flocked to Gawker's web environment to watch the video.

Gawker Defendants attack a straw man when they suggest Mr. Bollea is saying that any news story that generates a profit or generates readers is commercial. In this case, the extensive evidence of the specific actions of Gawker Defendants in their use of the Gawker Video itself to generate traffic and promote their brand and websites fully supports the jury's finding that the usage was for a "commercial or advertising purpose."

The case of *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So.2d 802 (Fla. 2005) does not hold otherwise. *Tyne* holds that depicting individuals' names and likenesses in a motion picture drama is not actionable because that does not constitute the direct promotion of a good or service. However, in *Tyne*, there was a **legitimate** noncommercial purpose of the motion picture (*i.e.,* to tell a story involving the plaintiffs). By contrast, here the overwhelming evidence conclusively showed that the nefarious purpose of publishing the Gawker Video was to drive

traffic to Gawker's websites, promote its brand, and generate revenues and profits, and not (as Gawker Defendants claim) to report legitimate news about Mr. Bollea.

Additionally, the use of names and likenesses on the Internet raises issues that the Court did not confront in *Tyne*. Internet blogs such as Gawker do not sell subscriptions, do not sell single copies, and do not sell admission tickets. Their revenue comes from the traffic that is generated by and from their content. Thus, in addition to publishing news reports as any journalistic outlet would, Gawker publishes content, such as the Gawker Video and the page that contained the Gawker Video, as well as the other pages on their other sites linked to the Gawker Video page, for the purpose of furthering its business model, generating traffic, and generating revenue through that traffic. All of Gawker's posts, and especially the Gawker Video, are vehicles for commercial marketing or promotion of Gawker Media generally on the Internet and through social media. And it was a way to bring users into the Gawker universe where they could then become available to Gawker's advertisers and generate more revenue and profits for Gawker.

The use of the "Hulk Hogan" name and Mr. Bollea's likeness, in this context, was certainly in connection with the advertisement or promotion of a service. It promoted Gawker, and it did so successfully, bringing millions of people on board. *Tyne* is distinguishable and does not bar the publicity claim here.

Gawker Defendants also argue that the right-of-publicity tort is a content-based regulation that is subject to strict scrutiny under the First Amendment. This argument is contrary to controlling United States Supreme Court authority. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977) (right of publicity judgment against journalists who broadcast plaintiff's human cannonball act was not precluded by the First Amendment).

F. The Economic Damages Award was Fully Supported By Substantial Evidence.

Gawker Defendants again rehash arguments that this Court already rejected numerous times when they argue that the damages awarded by the jury are not available in this action. Damages premised upon unjust enrichment are appropriate in cases such as this, and are permitted under Florida law. *See Garcia v. Kashi Co.*, 2014 WL 4392163 (S.D. Fla. Sep. 5, 2014) (holding plaintiffs stated a claim for unjust enrichment based on false advertisements); *Berry v. Budget Rent-a-Car Systems, Inc.*, 497 F. Supp. 2d 1361 (S.D. Fla. 2007); *Aceta Corp. v. Therapeutics MD, Inc.*, 953 F.Supp.2d 1269 (S.D. Fla. 2013); *Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 485 B.R. 460 (S.D. Fla. 2013); *Banks v. Lardin*, 938 So.2d 571 (Fla. 4th DCA 2006).

In *Benchmark Mgmt. Co. v. Ceebraid Signal Corp.*, 292 Fed. Appx. 784 (11th Cir. 2008), an unjust enrichment remedy was permitted when the defendant usurped confidential information and used it to seek a profitable distribution contract. And in *Montage Group, Ltd. v. Athle-Tech Computer Systems, Inc.*, 889 So.2d 180 (Fla. 2d DCA 2004), an order by Judge Case disgorging profits was upheld (though the amount awarded was reduced).

Restitution for the reasonable value of services rendered also is an available damage category under Florida law. *Aldebot v. Story*, 534 So.2d 1216 (Fla. 3d DCA 1988) (care provider for decedent was entitled to reasonable value of services rendered); *Ocean Communications, Inc. v. Bubeck*, 956 So.2d 1222 (Fla. 4th DCA 2007) (restitution also is an available remedy).

These measures of damages were all reasonable and legally appropriate to fully and fairly compensate Mr. Bollea for the harm caused by Gawker Defendants' conduct. The fundamental principle of the law of damages is that a person injured by the wrongful act of another should receive fair and just compensation commensurate with the loss sustained. *Hanna v. Martin*, 49

So.2d 585, 587 (Fla. 1950). In a tort action, the plaintiff may recover compensation for the actual loss or injury, as well as for damages that are the natural, proximate, probable or direct consequence of defendants' wrongful acts. *Clausell v. Buckney*, 475 So.2d 1023, 1025 (Fla. 1st DCA 1985); *Douglass Fertilizers v. McClung Landscaping*, 459 So.2d 335, 336 (Fla. 5th DCA 1984).

The case of *Doe v. Beasley Broadcast Group, Inc.*, 105 So.3d 1 (Fla. 2d DCA 2012), cited by Gawker Defendants, contains no language limiting damages, and any such limitation would be contrary to the weight of Florida authority. The case of *Cason v. Baskin*, 20 So.2d 243, 254 (Fla. 1944), which is over 70 years old, is distinguishable. There, a portion of a book improperly used the plaintiff's name, and that was held not sufficient to entitle the plaintiff to disgorgement.[6] By contrast, the Gawker Video is not a Gawker-penned literary work with an objectionable section; Mr. Bollea has the right to control the commercial use of any footage of him naked and engaging in sexual activity. The decision in *Jackson v. Grupo Industrial Hotelero, S.A.*, 2009 WL 8634834, at *8 (S.D. Fla. Apr. 29, 2009), cited by Gawker Defendants, supports Mr. Bollea's position. It holds that a right-to-publicity plaintiff is entitled to "the actual value of what has been appropriated," which in this case would be the value of the Gawker Video to Gawker Defendants. In *Design Group, Inc. v. Fielder*, 884 So. 2d 990 (Fla. 4th DCA 2004), cited by Gawker Defendants, the plaintiff did not even appeal the damages award awarding a reasonable royalty; the defense appealed, and unsuccessfully argued that it was excessive. *Fielder* does not bar Mr. Bollea's damages theories. The case of *Stockwire Research Grp., Inc. v. Lebed*, 577 F. Supp. 2d 1262, 1269 (S.D. Fla. 2008), cited by Gawker Defendants, is a copyright case and does not discuss the causes of action Mr. Bollea presented here. Finally,

---

[6] Here, Mr. Bollea did not seek disgorgement. He sought the value of the benefit (*i.e.*, the increased value of gawker.com) Gawker Defendants unlawfully obtained.

Coton v. Televised Visual X-Ography, Inc., 740 F. Supp. 2d 1299, 1311, 1313 (M.D. Fla. 2010), simply prohibits double recoveries in damages awards. Mr. Bollea did not receive any double-recovery, as his emotional distress and two distinct measures of economic damages measures did not overlap.

Finally, Gawker Defendants argue that the jury could not award damages based on the amount that a celebrity sex tape would sell for, because this was an improper award of "gross receipts." This contention misstates Mr. Bollea's theory of damages and is unfounded. Nothing in the record indicates the jury awarded "gross receipts." There were no gross receipts from the sale of a "Hulk Hogan sex tape" because Gawker Defendants distributed it to all seven million people who wished to see it for free. The jury awarded Mr. Bollea the value of what was taken from him (*i.e.,* the "minimum amount" the millions of people who watched the video would have to pay to watch any celebrity sex tape: $4.95). (RT 2367:9-23) That is a measure of economic damages, not "gross receipts," which Gawker Defendants offered **no** evidence to refute.

G. Evidence supported the jury's finding that Mr. Bollea suffered severe emotional distress.

Gawker Defendants' arguments against the emotional distress award are also meritless. First, they repeat their contention, previously rejected in this case, that because Mr. Bollea claimed "garden variety" emotional distress, such distress could not be sufficiently "severe" to allow an award of intentional infliction of emotional distress. This argument misconstrues the "garden variety" doctrine, which holds that a plaintiff can obtain damages based on the sort of emotional distress that anyone would suffer in a particular situation without seeking medical or psychiatric treatment. *See, e.g., Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D. Cal. 2012) (permitting plaintiff to invoke garden variety emotional distress doctrine despite the fact that

plaintiff pleaded a claim for intentional infliction of emotional distress which required "severe" emotional distress).

The facts of this case—the publication, against Plaintiff's will, of a surreptitious recording of him naked and engaged in sexual activity in a private bedroom—would cause any typical plaintiff severe emotional distress. In other words, the "garden variety" emotional distress in this horrific situation **is** severe. Gawker Defendants cite no authority for the proposition that every emotional distress claim that goes without psychiatric treatment is garden variety and not severe.[7]

Mr. Bollea conclusively proved, and the jury found, severe emotional distress. He lost sleep, lost his appetite, cried in public, became afraid of public mockery and afraid to communicate with his fans. Mr. Bollea was emotionally devastated as a result of what Gawker Defendants did. It was up to the jurors who observed Mr. Bollea on the witness stand and carefully weighed the evidence to make the determination whether he suffered "severe" emotional distress. They determined that he did.

Amazingly, Gawker Defendants also suggest that they did not cause Mr. Bollea's emotional distress in the first place because Mr. Bollea did not personally watch the video Gawker posted or because he had other reasons to be distressed. Mr. Bollea's testimony that he did not personally view the Gawker Video does not mean he suffered no emotional distress. He

---

[7] The cases cited by Gawker Defendants do not address this issue. *Chase v. Nova Southeastern University, Inc.*, 2012 WL 1936082 at *5 (S.D. Fla. May 29, 2012), specifically noted that the plaintiff did not plead any claim for IIED, and the Court did not address at all whether such a claim would have been barred had it been pleaded. *Wheeler v. City of Orlando*, 2007 WL 4247889 at *3 (M.D. Fla. Nov. 30, 2007), rejects a claim of psychotherapist-patient privilege by an IIED plaintiff; again, *Wheeler* does not say that plaintiffs cannot assert garden variety claims in IIED cases. *Mixon v. K Mart Corp.*, 1994 WL 462449 at *3 (M.D. Fla. Aug. 2, 1994), involved a claim where there was no evidence at all of emotional distress; Mr. Bollea presented such evidence. Finally, *Murdock v. L.A. Fitness Int'l, LLC*, 2012 WL 5331224, *4 & n. 8 (D. Minn. Oct. 29, 2012), dismissed the claim on the basis that there was no "outrageous" conduct; the discussion of garden variety emotional distress was dicta.

suffered from the knowledge that millions of people watched him naked and engaged in sexual activity on the Internet; people who immediately recognized him every time he left his home. That harm was caused by Gawker Defendants. Nor does the fact that Mr. Bollea suffered some distress from other events, such as his marriage breaking up or the fact that Mr. Clem had secretly recorded him, prove that he did not also suffer severe distress from the publication of the Gawker Video. The jury was instructed on this very issue, and then decided the facts and applied the law appropriately. Gawker Defendants attempt to escape responsibility for what **they** caused by blaming others is shameless and inconsistent with the law.

H. Gawker Defendants' Conduct Was "Extreme And Outrageous."

Gawker Defendants argue their conduct was not extreme and outrageous. The jury correctly found that it was. The overwhelming, unrefuted evidence proved that Gawker Defendants intentionally and maliciously published illegally recorded, explicit footage that no other journalistic outlet had published before, even though news outlets had reported the story of Mr. Bollea's encounters with Heather Clem and the secret taping. The evidence also clearly and convincingly proved that Gawker Defendants knew that the footage was secretly recorded with a hidden camera, that Mr. Bollea maintained that he was filmed without his knowledge, and that Gawker Defendants had the capability of blocking or blurring the images to protect Mr. Bollea's privacy while still reporting that the footage was authentic, but chose not to do so. And the evidence conclusively proved that Gawker Defendants knew the publication of the footage would cause emotional distress to Mr. Bollea but did not care.

The jury was justified in concluding that the conduct in this case was extreme and outrageous. A number of cases have held that similar conduct satisfies this element of the tort. In *In re Grossman*, 538 B.R. 34, 45 (E.D. Cal. 2015), the court held that a husband's publication

of a private sex video depicting his wife on a pornographic website was non-dischargeable in bankruptcy, because it constituted an actionable intentional infliction of emotional distress. In *Dana v. Oak Park Marina, Inc.*, 660 N.Y.S.2d 906, 910 (A.D. 1997), the court held that a complaint that alleged that a marina installed cameras in the women's restroom and secretly recorded women there without their consent had stated a cause of action for intentional infliction of emotional distress.

Gawker Defendants' argument that the publication of the Gawker Video could not be extreme and outrageous because it was published alongside Daulerio's narrative is a non sequitur—even if written descriptions of sexual activity are protected, that does not mean that video recordings of the same activity are also protected. *Michaels v. Internet Entertainment Group*, 5 F. Supp. 823, 840 (C.D. Cal. 1998) ("The fact recorded on the Tape, however, is not that Lee and Michaels were romantically involved, but rather the visual and aural details of their sexual relations, facts which are ordinarily considered private even for celebrities.").[8]

The remaining cases cited by Gawker Defendants do not come close to supporting their assertion that their conduct was not extreme and outrageous. The case of *Cape Publications, Inc. v. Bridges*, 423 So.2d 426, 428 (Fla. 5th DCA 1982), involved a kidnapping victim photographed escaping her captor covered by a dish towel. The defendant took more explicit photographs but did not publish them, the photograph depicted a significant news event, and her breasts and genitals were covered and not visible in the photograph. In contrast, Gawker Defendants

---

[8] Gawker Defendants cite the later decision in *Michaels v. Internet Entertainment Group, Inc.*, 1998 WL 882848 (C.D. Cal. Sep. 11, 1998), in which the same court declined to enjoin a television show from broadcasting images from the Pamela Anderson-Bret Michaels sex tape, but the Court specifically indicated that the images (which ran on commercial television) were censored and did not contain nudity or sexual acts. *Id.* at *10 ("The video images presented in the Hard Copy broadcast-while highly suggestive-were brief and revealed little in the way of nudity or explicit sexual acts."). In contrast, Gawker Defendants here admitted they could have published blocked and blurred footage but deliberately sought to include explicit footage of Mr. Bollea naked and having sex, because this would drive traffic to the website.

deliberately included footage of Mr. Bollea naked, with his genitals exposed, and engaged in sexual activity (and they graphically mock him in internal communications while doing so) because they wanted to inflict harm upon him and bring traffic to their websites.

Gawker Defendants also cite *Moore v. Wendy's International, Inc.*, 1994 WL 874973 (M.D. Fla. Aug. 25, 1994), in which sexual harassment allegations were held to not meet the extreme and outrageous requirement as a matter of law. Even if that case was correctly decided, the facts of the unpublished decision in *Moore* do not resemble the facts here.

I. Gawker Defendants' Conduct Meets the "Intentional or Reckless" Standard.

The jury made numerous factual findings that Gawker Defendants' conduct was intentional or reckless. *See Verdict Form*, Questions 14, 16, 17. These findings are fully supported by overwhelming evidence. Gawker Defendants cannot justify any reason to ignore them.

Gawker Defendants knew the footage was secretly recorded, that Mr. Bollea maintained he was secretly recorded, and that publishing the footage would cause Mr. Bollea emotional distress. Gawker Defendants callously mocked Mr. Bollea, both in their internal messages and in Daulerio's published narrative. Gawker Defendants' witnesses specifically testified that they did not care about any of these facts—*i.e.,* they consciously disregarded the risk of harming and intended to harm Mr. Bollea. Additionally, the jury was justified by the reality that one who intentionally publishes the sort of material that Gawker Defendants published knows that it will cause emotional distress to someone in Mr. Bollea's position.

Gawker Defendants make two unavailing arguments in response to the unrefuted mountain of evidence at trial. First, they argue there was testimony in the record that Gawker Defendants did not set out to harm Mr. Bollea. The jury rightfully rejected this self-serving,

unsupported testimony devoid of any credibility. Second, Gawker Defendants cite two cases that they contend to be exemplary of the sort of conduct that would give rise to an IIED claim. But one of the two cases, *Williams v. City of Minneola*, 575 So. 2d 683, 686, 690 (Fla. 5th DCA 1991), supports Mr. Bollea's claim. In *Williams*, the defendants videotaped the autopsy of a fourteen year old boy, and then passed the video around for viewings (including by at least one person who did not work for the city) which occurred in a party atmosphere. This sort of conduct is at least analogous to what Gawker Defendants did here, not only publishing the Gawker Video for the world to see but mocking Mr. Bollea while they did it. *Williams* held that the plaintiffs stated a cause of action for infliction of emotional distress.[9]

J. Gawker Defendants did not act in "Good Faith."

Gawker Defendants argue two bases suggesting that they acted in "good faith": (1) Daulerio's self-serving testimony; and (2) the decisions by the federal court and the Second District Court of Appeal denying temporary injunctions. Neither basis has any merit.

First, as discussed *supra* with respect to Gawker Defendants' intent, the jury had every right to reject Gawker Defendants' self-serving testimony in light of the overwhelming evidence. There was also evidence that Gawker Defendants were aware of journalistic standards, applied them in other cases (such as in their criticism of Tumblr.com and sites that published revenge porn), but did not apply those standards to themselves when they would interfere with Gawker Defendants' desire to generate traffic and revenue by publishing "exclusive" sexual content. In light of that evidence, the jury could, and did, reject Gawker Defendants' self-serving testimony regarding their intent.

---

[9] The other case cited by Gawker Defendants, *Nims v. Harrison*, 768 So. 2d 1198, 1200-01 (Fla. 1st DCA 2000), involves threats to rape and kill the plaintiff and is not relevant to this matter.

Second, the two pretrial rulings Gawker Defendants rely on were made in the context of motions for a temporary injunction, which were treated as seeking a prior restraint and analyzed the issues without a full evidentiary record. As the Second District Court of Appeal itself ruled, decisions made in that context are not binding on the remainder of the case. *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1204 (Fla. 2d DCA 2014).

Whether or not Mr. Bollea was entitled to a preliminary injunction has no bearing on whether Gawker Defendants' actions were tortious. Accordingly, the fact that courts early on ruled that Gawker Defendants could not be temporarily enjoined because Mr. Bollea had not at that juncture satisfied the exceedingly heavily burden of justifying a prior restraint, does not mean that those courts found that Gawker Defendants had a reasonable belief that their actions were not tortious.

More importantly, an examination of these opinions juxtaposed against Daulerio's testimony proves that this argument is meritless. As set forth above, Daulerio testified that the each of the reasons why the federal district court and Florida's Second DCA believed his post **may** be newsworthy were in fact **not** the reason that he posted the Gawker Video. Rather, he posted the video for its own sake, to appeal to the prurient interests of viewers as "shameless voyeurs and deviants."

Equally important, although Gawker Defendants claim to have spoken to their counsel before posting the video, they refused to testify about the substance of the conversations. (RT 2771) Accordingly, *Toffoloni II*, where the defendants adduced competent evidence in support of an advice of counsel defense, is distinguishable.

K. The verdict against Mr. Denton is supported by evidence he approved, authorized, and ratified the publication of the Sex Video.

The evidence of Denton's involvement in the publication of the Gawker Video is ample, and the jury's finding that he was liable for its publication is well-supported. Denton spoke with Daulerio and approved the "Hulk Hogan sex tape" story **before** it was published. RT 2019:14-17 (Denton); RT 2039:25-2040:21 (Denton); RT 2983:6-2985:4 (Denton). Daulerio followed Denton's rules with respect to what was appropriate to publish at Gawker. RT 2766:9-2767:14 (Daulerio). Additionally, Denton ratified the publication and made the decision to leave it up on the Gawker website, determining that the personal appeal from Mr. Bollea's counsel asking him to take it down was not "persuasive." RT 1920:2-1923:9 (Houston); RT 1929:7-9 (Houston); RT 2054:18-2055:4 (Denton); RT 3037:10-16 (Denton); Plf's Exs. 49 & 268.

Once again, Gawker Defendants are simply inviting this Court to sit as a seventh juror and overrule the jury's consideration of the evidence in this case. Gawker Defendants make much of the claim that although Denton approved the post, he did not actually view the Gawker Video before publication. However, given his position, that conduct in and of itself warrants liability. Moreover, the evidence showed that Denton discussed the issue of publication with Daulerio before Daulerio posted the video on the Gawker website, knew exactly what was on it, and approved the post. Denton also ratified the decision, and then refused to take the video down. Denton even testified **after** viewing the video that he would post it again. (RT 3035-36) There is no basis for overturning the jury's finding on this issue.[10]

[10] Gawker Defendants also recast the same argument as an intent argument, arguing that Denton did not have a culpable state of mind because he supposedly did not watch the Gawker Video before publication. However, the jury heard extensive evidence regarding Denton's attitudes both about privacy, the publication of sexual content generally, and the publication of this Gawker Video in particular. There was more than sufficient evidence to support the jury's finding that Denton had a culpable state of mind.

L. Mr. Bollea Proved the Requisite Mental State for Punitive Damages.

Gawker Defendants repeat their "intent" arguments to urge that Mr. Bollea did not establish the requisite mental state for punitive damages. The jury found that Mr. Bollea had proven his entitlement to punitive damages by clear and convincing evidence. *Verdict Form*, Question 16. This finding is well supported by the evidence.

Overwhelming evidence clearly and convincingly established that Gawker Defendants knew that they were engaging in wrongful conduct—indeed, Daulerio's article itself stated explicitly that his readers were not supposed to see the footage and that the Gawker Video would appeal to "shameless voyeurs and deviants." Gawker Defendants criticized others for publishing revenge porn, and called such acts virtually identical to the conduct they engaged in here, "wrong" and an "invasion of privacy." (Plf's Exs. 67, 70, 71 and 73) Their own conduct guidelines forbade the conduct they engaged in. (Plf's Ex. 233)

Gawker Defendants knew that their actions would cause emotional distress to Mr. Bollea. They consciously decided that risk was of no concern to them, and that taking Mr. Bollea down and pursuing traffic for the Gawker websites were all-important.

The evidence of Gawker Defendants' culpability was extensive, from the publication itself, to the statements in Daulerio's narrative, to the shameless manner in which they disregarded people's privacy, to Denton's and Daulerio's denigration of privacy, to their refusal to take the Gawker Video down even after it was clear that it was surreptitiously recorded. This is a classic case for punitive damages—defendants who did not care if they ruined the plaintiff's life, and wanted to attack him because of his celebrity, knowing all the while that they would make a lot of money doing it.

The cases cited by Gawker Defendants do not support their argument. *Toffoloni v. LFP Publishing Group, LLC*, 483 F. App'x 561 (11th Cir. 2012), rejected a punitive damages award because there was a strong showing of evidence by the defendants that they were contrite and would have never published the nude photographs at issue had they known they were not protected by the First Amendment. That is completely inapposite to what happened here. Further, the *Toffoloni* defendants revealed their numerous consultations with counsel, and the plaintiff in *Toffoloni* presented no evidence to contradict these claims. In sharp contrast, Mr. Bollea adduced extensive evidence that Gawker Defendants knew exactly what they were doing, understood that the public was not supposed to see the Gawker Video, that they had contempt for privacy rights, and that they would do the same thing all over again. Unlike the defendants in *Toffoloni*, Gawker Defendants refused to disclose the advice they supposedly received from their lawyers.

The case of *Genesis Publications, Inc. v. Goss*, 437 So.2d 169, 170-71 (Fla. 3d DCA 1983), cited by Gawker Defendants, is also distinguishable. In *Genesis*, the defendant relied on its advertising agency when it included nude photographs in advertisements; the advertising agency was supposed to obtain the necessary clearances and failed to do so. Here, Gawker Defendants presented no evidence that they relied in good faith on the judgment or actions of any other party in determining whether to publish.

Gawker Defendants selectively cite to portions of the record in which their witnesses give self-serving, uncorroborated and contradictory testimony that they believed the Gawker Video to be newsworthy. The jury did not credit these statements, and it acted properly in doing so. There was extensive evidence in the record that Gawker Defendants knew the Gawker Video was **not** newsworthy. Daulerio's narrative, for instance, stated that we were not supposed to see

the video and that it appealed to "shameless voyeurs and deviants." Daulerio also admitted that there was no legitimate news value in publishing.

Gawker Defendants assert that Mr. Bollea cannot simultaneously argue that they had an overly narrow view of the right to privacy while at the same time arguing that they knew their conduct was wrong. This oversimplifies the evidentiary record, which in fact shows that Gawker Defendants were quite aware of journalistic standards regarding privacy and knew what they were doing was wrong. Further, even in their statements denigrating privacy, they openly admitted that they were transgressing the standards of serious journalism, an enterprise that Gawker Defendants had contempt for. Thus, it is entirely consistent to say that Gawker Defendants were aware of privacy rights and journalistic standards, but decided to consciously ignore them and to actively transgress them when it benefitted their enterprise to do so because they could generate traffic with "exclusive" sexual content. And the evidence established they did so knowing that their actions would harm people, including, in this case, Mr. Bollea. They did not care and consciously disregarded the risk of hurting people like Mr. Bollea when they had the "exclusive."

Gawker Defendants also rely on self-serving testimony by Daulerio that he suspected the video was a publicity stunt. Again, the jury obviously disbelieved that testimony and was clearly within its rights to do so. The Gawker Video itself shows, and Daulerio acknowledged, that it was recorded by a hidden camera. And the reaction by Mr. Bollea and his lawyers to its distribution made clear that this was no publicity stunt. In any event, Daulerio's testimony is a stunning abdication of the professional responsibilities of any legitimate journalist. If Daulerio truly believed that this might have been a publicity stunt, why go along with the stunt and publish the Gawker Video with a snarky commentary about the size of Mr. Bollea's penis? Had

Daulerio really believed this was a publicity stunt, the bigger story would have been that of a celebrity who released an assertedly surreptitiously recorded sex video for publicity while denying he had anything to do with the release. Significantly, Daulerio's narrative makes no mention of such a claim. Daulerio is supposedly an experienced journalist who has reported on a number of celebrity-related stories. His actions speak louder than his words. He did not act as if he thought Mr. Bollea was complicit in the release of the Gawker Video or that the release of the video was a publicity stunt, because he knew that was not the case. The jury was authorized to reject Daulerio's far-fetched testimony. And it did.

IV. THE MOTION FOR A NEW TRIAL SHOULD BE DENIED.

None of the arguments offered by Gawker Defendants in support of their new-trial motion succeed. They are factually unsupported and lack legal merit.

A. The Verdict Was Not Against the Weight of the Evidence.

Gawker Defendants incorporate by reference their J.N.O.V. arguments here, arguing that Mr. Bollea supposedly failed to prove his claims. Those arguments fail for the reasons discussed above.

B. The Verdict Was Not the Product of Passion or Prejudice.

Gawker Defendants misconstrue the standard for a new trial on this ground. If the evidence fairly supports the verdict, it is not the product of "passion or prejudice" simply because the jury awards large damages. "A large damage award, by itself, is not necessarily indicative of excessiveness or impropriety…." *Zambrano v. Devanesan*, 484 So.2d 603, 607 (Fla. 4th DCA 1986). "Although a jury may award a greater sum than the trial court deems appropriate, the court may not interfere unless the sum is so large that it indicates the jury must have been under the influence of passion, prejudice, or gross mistake…. If evidence supports an

award of damages, the award may not be disturbed." *Pierard v. Aerospatiale Helicopter Corp.*, 689 So.2d 1099, 1101 (Fla. 3d DCA 1997) (reversing new trial ordered after jury awarded $6.7 million in pain and suffering damages for pain and indignities suffered by plaintiff as a result of non-functioning bladder; economic damages awarded were less than $2 million). The record supports the damages here.

Here, the jury was presented with a unique case. Gawker Defendants published a surreptitiously recorded sex tape that they knew was not newsworthy to inflict harm and make money generating traffic to their websites by pandering to "shameless voyeurs and deviants." Gawker Defendants did so knowing, and not caring, that their actions would inflict emotional distress on Mr. Bollea. The jury heard the testimony, carefully weighed how Mr. Bollea reacted to knowing millions of people had observed him naked and engaged in sexual activity, and how he felt knowing he had been mocked by his fans who had adored him and having his life turned upside down. The evidence supported a large emotional distress award to fairly and adequately compensate Mr. Bollea's for the substantial suffering he endured. The verdict is supported by the evidence.

Gawker Defendants argue that in factually dissimilar cases, emotional distress awards have been overturned, but those cases are distinguishable. This is a case like no other. Mr. Bollea's injuries are truly unique and resulted from a particularly gross and unprecedented, online affront to human dignity and privacy.

Gawker Defendants' other "passion or prejudice" arguments are similarly without merit:

(a) This Court carefully limited the evidence relating to other acts of Gawker Defendants (just as it carefully limited evidence relating to Mr. Bollea's comments about his sex life). Within those limits, the evidence presented by Mr. Bollea disclosed important facts about Gawker Defendants' opinions about privacy, their mental state and scienter, and the fact that their business model is designed to drive

traffic to the website by peddling sexual and invasive content. Indeed, Gawker Defendants are making all sorts of arguments regarding their mental state in these post-trial motions; they cannot make such arguments and then argue that their knowing denigration of people's privacy rights is irrelevant or prejudiced the jury.

(b) Gawker Defendants complain that they were depicted in closing argument as decadent pornographers who decide whose lives to ruin. Despite there being overwhelming evidence to support that depiction, the jury was properly instructed that arguments of counsel are not evidence. Notably, Gawker Defendants indefensibly characterized Mr. Bollea as a publicity hound and a showman who would do anything to stay in the public spotlight. The jury was entitled to evaluate all of these arguments in light of the evidence and did so appropriately.

(c) The $100,000 punitive damages award against Daulerio proves that the jury carefully followed instructions without any passion or prejudice. It awarded far more punitive damages against the defendants who had significant net worths, even though Daulerio was the central person at Gawker who published the Gawker Video. Similarly, the jurors' question about community service showed they were looking for a way to render a verdict that addressed the depravity of Daulerio's actions, but was faithful to the law. The fact that the answer to the question was "no" does not mean that the question was not a legitimate one for a juror to ask.

(d) The juror's question to Denton regarding his knowledge whether the Hulk Hogan sex tape was controversial was not improper (and at any rate, Gawker Defendants did not object to it and waived any claim that it was). Denton's personal culpability, and whether Gawker Defendants knew it was improper to publish the Gawker Video, were both key issues in the case. While not necessarily worded the way a lawyer might ask the question, the juror was clearly asking about Denton's scienter and bad faith. Both were relevant in this case.

(e) The juror's question about sex being part of Gawker Defendants' branding was also on point. It went to Gawker Defendants' motives for publishing the Gawker Video and their views about privacy. Gawker Defendants cite no authority for the proposition that asking a Gawker witness about Gawker's journalistic practices (commonplace in a case against a journalist when the First Amendment is raised as a defense) violates the First Amendment. In any event, Gawker Defendants also failed to object to this question. They waived any objection to it.

(f) The juror's question regarding Gawker Defendants' decision not to remove the Gawker Video was also proper. That action was evidence of Denton's ratification of the decision to publish. It was one basis for imposing liability on him personally. And in any case, Gawker Defendants again failed to object to this question and waived any objections to it.

(g) The jurors asked questions about whether the Gawker Video was posted to draw readers to Gawker websites, consistent with the testimony of other witnesses. Those questions were relevant to both the scienter issues and the "commercial" requirement under the right to publicity. Again, no First Amendment doctrine prohibits questions at trial that ask about First Amendment activity, even assuming that Gawker's attempts to draw traffic to its websites are protected expression. And again, Gawker Defendants failed to object to this question and waived their objections to it.

(h) Gawker Defendants also failed to object to the question about Emma Carmichael's relationship with Denton and Daulerio. In fact, they agreed that this very question addressed a potential ground of bias. Again, Gawker Defendants waived their argument concerning this question.

(i) Gawker Defendants refer nonspecifically to a number of discovery, evidentiary, and jury instruction issues. Gawker Defendants' failure to address any of these issues with specificity or explain why they justify a new trial waives them.

C. Mr. Bollea's Closing Argument was proper, and Gawker Defendants' failure to Object to It is a Waiver.

It is axiomatic that failing to object to an allegedly improper closing argument waives the objection. *LeRetilley v. Harris*, 354 So.2d 1213, 1214-15 (Fla. 4th DCA 1978); *Potashnick v. Tito*, 529 So.2d 764, 764 (Fla. 4th DCA 1988). Gawker Defendants failed to object to any of the assertedly improper arguments by Mr. Bollea's counsel. All of Gawker Defendants arguments are waived.

Assuming *arguendo* they weren't waived, the arguments are without merit. This Court previously overruled Gawker Defendants' objections to Mike Foley's testimony regarding ethical standards in journalism. Gawker Defendants' arguments that Professor Foley's testimony

should not have been mentioned in closing argument fail for the same reasons. *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Cal. App. 2001) (expert testimony regarding standards and practices of journalism admissible in privacy case where First Amendment defenses raised); *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (same).

Gawker Defendants argue that Professor Foley should not have been permitted to testify that Gawker Defendants should have contacted Mr. Bollea prior to publication. They analogize this case to defamation cases that hold there is no per se First Amendment requirement to contact the subject of a news article before publishing an article about the subject. Even in defamation cases, there **is** an obligation to check the facts of a story before running it to make sure it is not defamatory. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The jury here was entitled to consider the fact that Gawker Defendants did not take any steps to determine whether they were invading Mr. Bollea's privacy or whether the Gawker Video was really a matter of public concern. Professor Foley testified that one such step would have been to contact Mr. Bollea. There were others—such as additional reporting on where the video came from, who was shopping it, and the fact that Mr. Bollea had no involvement with those people. Gawker Defendants did none of these.

Gawker Defendants' contention that it was improper to argue that individuals have the right to decide what they want to make public also fails. The jury was properly instructed on the issue of public concern. Had the jury found that the Gawker Video was a matter of public concern, it would have been required to return a verdict for Gawker Defendants (and it would not have mattered whether Mr. Bollea wanted to keep the Gawker Video private). But other issues in the case did turn on whether Mr. Bollea wanted to make the Gawker Video public. For instance, as Gawker Defendants urge, Mr. Bollea had to prove he had a reasonable expectation of

privacy with respect to the content of the Gawker Video. Obviously, whether Mr. Bollea wanted to keep the video private was relevant to that issue.

Finally, Gawker Defendants' argument that there is no distinction between political expression and other forms of speech with respect to First Amendment protections is flat wrong in the context of privacy cases. It is true that with respect to government censorship of speech in a public forum, it does not matter whether the speech at issue is political expression, artistic expression, or legitimate news about celebrities. But it is different when a person's privacy is invaded, because the public concern test controls. That test does distinguish between: (a) expression on important political issues, which is always a matter of public concern, and (b) sex and nudity, which can in certain cases become a matter of public concern, but sometimes (as in this case) is not. It was proper for Mr. Bollea's counsel to make the distinction to the jury.

D. There Is No Basis for a Reduction in Or Vacation of the Damages Award on the Basis of Other Damages Awards Against "Media" Defendants.

Gawker Defendants' shotgun arguments for reducing or vacating the damages also fail. Gawker Defendants argue that because other large jury verdicts have been reversed, this one must also be excessive. That is not a legal or logical argument. No principle of law that holds that a jury may not award damages that are otherwise proven simply because in some other dissimilar case, involving a different set of facts, a large award was not proper.

Similarly, Gawker Defendants argue that the verdict must be excessive because it is supposedly the largest award ever against a "media defendant" for this kind of case. There is no First Amendment rule that holds a "media defendant" is immune from paying large damages when it causes a large amount of harm through conduct unprotected by the First Amendment. Gawker Defendants' argument to the contrary fails for at least two reasons: (1) it rests on the false premise that the "media" is entitled to a special privilege to engage in tortious conduct and

does not have to compensate its victims; and (2) it also rests on the premise that an admittedly "voyeuristic" and "deviant" enterprise like Gawker can reject decent standards of the community without regard for privacy and still claim virtual immunity to payment of compensatory damages as a member of the "media."

Notably, other than *Toffoloni*, none of the cases cited by Gawker Defendants involve factual scenarios that remotely resemble this one. *Gannett Co. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA 2006) (defamation claim based on story that implied plaintiff committed a serious crime); *Prozeralik v. Capital Cities Communications, Inc.*, 635 N.Y.S.2d 913 (A.D. 1995) (defamation claim based on allegation of connection to organized crime); *Guccione v. Hustler Magazine, Inc.*, 1981 WL 3516 (Ohio App. Oct. 8, 1981) (defamation and invasion of privacy claim based on parody appearing in *Hustler* magazine; action would likely now be barred by *Hustler Magazine, Inc. v. Falwell*); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984) (defamation based on falsely claiming that plaintiff appeared in nude scene in movie); *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982) (defamation based on fictional story that allegedly portrayed plaintiff). It is patently obvious, for instance, that the plaintiff in *Lerman* suffered an injury very different from Mr. Bollea's. It is surely unpleasant to be falsely identified as being nude in a movie, but that is not the same as having nude footage of a plaintiff naked and engaged in sexual activity to over **seven million people** on the Internet. Gawker Defendants' argument that Mr. Bollea should be limited to whatever damages Ms. Lerman got for her injuries makes no sense.

As for *Toffoloni*, there are obvious reasons why the damages here are far higher. First, the woman whose nude photos were run by *Hustler* in the *Toffoloni* case was deceased; the plaintiff was her estate, and the theory of liability articulated was based only on the right to

publicity that descended to her heirs. The plaintiff in *Toffoloni* could not, for instance, assert emotional distress damages—Ms. Benoit, the woman depicted in the photographs, died before *Hustler* published them and suffered no emotional distress. Second, as offensive as *Hustler*'s conduct was, there is a qualitative distinction between mere nude photographs and video depicting sexual activity. Third, Gawker Defendants' actions caused the Gawker Video to be seen by over seven million people; the *Toffoloni* opinion does not mention the circulation of *Hustler* in 2007, but it was likely lower. *See* Nathan Francis, "Larry Flynt: Hustler Magazine Won't Exist in a Year or Two," *The Inquisitor*, at http://www.inquisitr.com/1101162/larry-flynt-hustler-magazine-wont-exist-in-another-year-or-two/ (stating Hustler's current circulation is under 100,000).

Even if *Toffoloni* really set some sort on limitation on damages in identical cases, this case involves a far more egregious situation with far greater damages. The jury's award was entirely proper and not inconsistent with *Toffoloni*.

E. The Jury's Emotional Distress Award Is Supported By the Unrefuted Evidence.

Gawker Defendants' contention that there is a hard and fast dollar-amount limit to garden variety emotional distress damages misconstrues the doctrine. In fact, "garden variety" refers not to the severity of the emotional distress the plaintiff sustained, but rather to cases in which the proof of emotional distress does not include evidence of psychiatric or medical care as a result of the emotional distress. In a "garden variety" case, then, the plaintiff is limited to damages that would compensate for the type of emotional distress that a typical person would experience in the same circumstances. That does not mean that the damages must be nominal. Awards for garden-variety emotional distress can be significant where, as here, the circumstances warrant it.

In this case, the severity of the emotional distress that Mr. Bollea suffered is unparalleled and cannot be doubted. The nature of what Gawker Defendants did—exposing him to all the world naked and engaging in the most intimate of human activities—is certain to cause substantial and severe emotional distress. Mr. Bollea's own testimony confirmed this—he could not sleep, feared interactions with his fans who saw the sex tape, faced strains in his marriage, was sick, was humiliated, lost his appetite, cried, and even contemplated suicide.

The amount of emotional distress damages to compensate Mr. Bollea was for the jury to decide. Contrary to Gawker Defendants' arguments, there are no *per se* ceilings on garden-variety emotional distress damages. *See, e.g., Johnson v. Sawyer*, 760 F. Supp. 1216 (S.D. Tex. 1991) (awarding $5 million dollars in garden-variety emotional distress damages where IRS released private information about a taxpayer that destroyed his career); *Arnold v. Pfizer, Inc.*, 2015 WL 268967 (D. Or. Jan. 21) (rejecting argument that there is a cap on garden-variety emotional distress damages).

The case law cited by Gawker Defendants does not impose a strict limit on garden-variety emotional distress damages. For example, in *City of Hollywood v. Hogan*, 986 So.2d 634, 649 (Fla. 4th DCA 2008), the court noted that because of a congressionally-imposed $300,000 cap on all damages in age discrimination cases, the highest garden-variety emotional distress award should be $150,000. *Hogan*'s reasoning does not apply here. There is no cap on the compensatory damages at issue in this case.

In *Ernie Haire Ford, Inc. v. Atkinson*, 64 So. 3d 131, 132-33 (Fla. 2d DCA 2011), the court rejected a damages award for pain and suffering where there was no evidence that plaintiff had suffered **any** emotional distress at all. *Atkinson* does not apply here. Substantial unrefuted evidence establishes Mr. Bollea's emotional distress damages.

In *Stone v. GEICO General Ins. Co.*, 2009 WL 3720954 at *6 (M.D. Fla. Nov. 5, 2009), the court granted a motion for a remittitur when there was significant evidence that the plaintiff did not, in fact, suffer emotional distress at all. In that case, witnesses testified that the plaintiff's stress level actually went down and the plaintiff was able to take on additional work. That is not comparable to the facts of this case.[11]

The case of *Myers v. Cent. Fla. Investments, Inc.*, 2008 WL 4710898, *13-14 (M.D. Fla. Oct. 23, 2008), which Gawker Defendants claim caps damages at $100,000, says precisely the opposite: "Awards for emotional distress damages vary widely, and judgments for $100,000 or more have been upheld even where a plaintiff relies on her own testimony to establish emotional distress." *Id.* at 14.

Finally, the discussion of garden-variety emotional distress damages in *Epstein v. Kalvin-Miller International, Inc.*, 139 F. Supp. 2d 469 (S.D.N.Y. 2001), is dicta. *Epstein* is not controlling and did not involve garden-variety emotional distress. *Id.* at 481 ("However, plaintiff's emotional distress claim is not of the garden variety, because plaintiff's distress caused him to seek medical treatment.").

Gawker Defendants also argue that the emotional distress verdict is not in line with verdicts in other cases. Again, this is not surprising because this is not comparable to any other

---

[11] *Stone* lists a nine factor test for determining whether emotional distress damages are excessive: "(1) whether the plaintiff lost the esteem of her peers; (2) whether the plaintiff suffered physical injury as a consequence of her emotional distress; (3) whether the plaintiff received psychological counseling or other medical treatment; (4) whether the plaintiff suffered a loss of income; (5) the degree of emotional distress; (6) the context of the events surrounding the emotional distress; (7) the evidence tending to corroborate the plaintiff's testimony; (8) the nexus between the challenged conduct and the emotional distress; and (9) any mitigating circumstances." 2009 WL 3720954 at *6 Of those factors, **only** factors (3) and (4) militate against Mr. Bollea—the other factors all point to a large emotional distress award. The evidence showed Mr. Bollea was mocked by his fans, suffered physical symptoms relating to his emotional distress, and suffered severe distress. The context of the distress was a horrifying scenario in which footage of him naked and having sex in a private bedroom was released to the public. His testimony regarding his emotional distress was corroborated, including by the instance of his crying at the *Today* show taping. There is a nexus between Gawker Defendants' actions and his emotional distress, and there are no mitigating circumstances.

case. But Gawker Defendants go so far in support as to inaccurately describe the applicable standard as follows: "The Second District Court of Appeal has explained that 'comparison of verdicts is a recognized method of assessing whether a jury verdict is excessive or inadequate.' *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010)." *Motion for New Trial* at 13. *Aills* **actually** says: "The comparison of jury verdicts reached in similar cases provides **one method** of assessing '[w]hether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered.'… However, because no injury is exactly like another and different individuals may be adversely affected to a greater or lesser degree by similar injuries, **such comparisons must be made with caution**." *Aills*, 41 So.3d at 1028 (emphasis added). Gawker Defendants suggest *Aills* endorses verdict comparison as ***the*** way to determine if a verdict is excessive. In fact, *Aills* states that verdict comparison is only ***one*** factor, which should only be applied in respect to similar cases, and should be applied with caution.

The other cases cited by Gawker Defendants do not meet the controlling standard in *Aills* and thus cannot be used as comparatives. As Gawker Defendants admit, *Aills* was a medical malpractice case. The emotional harm suffered by the *Aills* plaintiff was not comparable to what Mr. Bollea suffered here. The other cases cited by Gawker Defendants are likewise not analogous. *Glabman v. De La Cruz*, 954 So. 2d 60 (Fla. 3d DCA 2007) (medical malpractice); *Kammer v. Hurley*, 765 So. 2d 975 (Fla. 4th DCA 2000) (same); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So.3d 331, 337-38 (Fla. 1st DCA 2012) (products liability action against tobacco company); *Philip Morris USA, Inc. v. Putney*, 117 So.3d 798, 803 (Fla. 4th DCA 2013) (same).

Gawker Defendants have not pointed to a truly comparable case. There are none. Over seven million people watched Mr. Bollea naked and engaged in sexual activity without his

consent, on an illegally recorded and distributed video. The jury's emotional distress verdict for this incredible, unique harm was not excessive.

F. The Economic Damages Award Is Not Excessive.

Mr. Bollea presented unrefuted expert testimony that established: (1) the minimum fee to watch a licensed celebrity sex tape online is $4.95 per viewer, and (2) Gawker derived at least $15 million in increased value from publishing the Gawker Video. Gawker Defendants' arguments about this evidence are simply a rehash of the arguments the Court previously rejected when it ruled on the defense's *Daubert* motions.

With respect to the $4.95 fee per viewer and the over seven million people who watched the Gawker Video, Gawker Defendants' arguments first go to weight, not admissibility. *Joiner v. General Electric Co.*, 78 F.3d 524, 530 (11th Cir. 1996) ("correctness of the expert's conclusions" is left for the jury to decide). Juries have a great deal of discretion in determining the amount of harm done by a privacy invasion. *Fairfield v. American Photocopy Equipment Co.*, 291 P.2d 194, 200 (Cal. App. 1955) (holding trial court erred in privacy case by excluding plaintiff's own testimony as to how the invasion damaged him); *accord Myers v. U.S. Camera Publishing Corp.*, 167 N.Y.S.2d 771, 774 (N.Y. City Ct. 1957) (holding, in a case involving unauthorized publication of nude photographs: "The measure of damages should be left to the sound discretion of the trier of the facts.") Regardless, this evidence was unrefuted.

Fairfield was applied in *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979 (S.D.N.Y. 1981), a case in which a pornographic magazine used plaintiff's nude and sexually themed photographs without her consent in advertisements to promote the magazine. The court cited *Fairfield* with approval to approve the trier of fact's discretion to award damages on multiple theories. It upheld damages for invasion of privacy on three different non-duplicative bases:

emotional distress, failure to pay compensation for the use of her photos, and damage to her career. *Id.* at 983-84.

Cases also hold that calculation of damages based on the number of viewers or readers is appropriate when a tortious act is transmitted by means of mass media. For example, in *Keohane v. Wilkerson*, 859 P.2d 291 (Colo. App. 1993), a defamation action based on a statement that a judge was accepting bribes, the Court held that the **number of people** who read the libel was **relevant to the amount** of damages awarded: "That a defamatory statement is made to one person will not preclude recovery of actual damages; the number of people hearing the defamatory statement is relevant to the amount, not the fact, of damages." *Id.* at 302 (emphasis added). The damages element of a public disclosure of private facts claim is analogous to a defamation claim in this respect—the more people who read, view, hear, or see either, the greater the damage to the plaintiff. *Fairfield*, 291 P.2d 194, 198-99 (damages issues of invasion of privacy claim are analogous to libel damages).

Similarly, in *Geragos v. Borer*, 2010 WL 60639 (Cal. App. Jan. 11, 2010), the court addressed the importance of considering the number of people who heard or read the material in calculating damages. *Geragos* involved a surreptitious videotaping of conversations between Michael Jackson and his lawyers. The plaintiffs obtained a quick injunction—which led to only a few people viewing the video. The court later reversed a substantial damage award because so few people saw the material. In reaching its decision, the court distinguished *Sommer v. Gabor*, 48 Cal. Rptr. 2d 235 (Cal. App. 1995), which upheld a $2 million damage award based on false statements in a periodical that the plaintiff was broke and destitute and had lost all the money she had made in show business. The court explained, "[t]he present case is distinguishable from *Sommer*. The defamatory statements in *Sommer* were published in periodicals that were

distributed to millions of people. Here, by contrast, almost no one viewed the silent videotape of plaintiffs and Michael Jackson." *Geragos*, 2010 WL 60639 at *9.

Given the wide latitude a jury is afforded in fashioning a damage award in privacy cases to fully and fairly compensate a plaintiff, analogizing Gawker Defendants' misconduct to a conversion of personal property is also appropriate. Under conversion law, Mr. Bollea would be entitled to an award of damages based on the special value of what was taken from him, even if that measure is over and above the fair market value. Florida's damages law in conversion cases is set out in *Christopher Advertising Group, Inc. v. R & B Holding Co.*, 883 So.2d 867, 871 (Fla. 3d DCA 2004): "As a general proposition, the owner of property which has been converted is entitled to fair value at the time and place of the conversion, with interest. *See Restatement (Second) of Torts* § 927 (1979). How to calculate fair value depends on the circumstances of the case. *See id.* §§ 911, 927. '[V]alue includes market value and value to the owner. A person tortiously deprived of property is entitled to damages based upon its special value to him if that is greater than its market value.' *Id.* § 927 cmt. c." The *Christopher Advertising Group* opinion extensively discusses Florida law and the Restatement providing for an award based on subjective valuation and the authority of juries to make plaintiffs whole when items such as heirlooms, antiques, personal records, manuscripts, and other items with special value are converted. *Id.,* 883 So.2d at 871-72.

Gawker Defendants' invasion of Mr. Bollea's privacy is analogous to the conversion of an item of great personal value. Gawker Defendants stole Mr. Bollea's privacy. They had no basis to force Mr. Bollea—who appeared against his will on a secretly recorded sex tape that was unlawfully published for millions to see—to enter into a compulsory license of the most intimate details of his life. It is appropriate to compensate Mr. Bollea for Gawker's invasion of his

privacy by using a damage model for the theft of something of great personal value. Compensating Mr. Bollea with the conversion model for damages gives the jury great latitude to determine the plaintiff's subjective personal value of what was taken. Under this approach, a minimum fee of $4.95 per view is entirely reasonable.

The case of *Intelsat Corp. v. Multivision TV LLC*, 2010 WL 5437261 (S.D. Fla. Dec. 27, 2010), demonstrates the application of Florida's conversion damages approach in a comparable situation. In *Intelsat*, the defendant stole 76 days' worth of unauthorized transmissions on the plaintiff's satellite bandwidth. Under Florida law, the plaintiff was entitled to receive as damages its full billing rate for those 76 days without regard to whether it would have been able to sell the bandwidth to anyone else. *Id.* at *6. *Intelsat* supports damages based on the number of people who watched the sex video multiplied by the prevailing price to view a celebrity sex video.

Gawker Defendants argue that Mr. Bollea's damages should be based on the number of people who would have paid to see the Gawker Video. That argument is baseless and asks the court re-write history. First, as *Intelsat* shows, a plaintiff seeking economic damages is not required to prove that every possible person would have purchased the material at issue. Second, Mr. Bollea's damages are not limited to the people who would have paid to view the Gawker Video. He is also entitled to damages to compensate him for people viewing the Gawker Video and invading his privacy who would not pay to see it. Gawker Defendants' argument is akin to arguing that a store is only injured by those shoplifters who stole merchandise that another customer would have actually purchased.

Mr. Bollea's damages theory is not speculative. It does not rest on the premise that every single person who watched the Gawker Video for free would have paid to see it. Rather,

Mr. Bollea is entitled to reasonable compensation from Gawker Defendants for every person who watched the video, just as a retail store would be entitled to market value compensation for every shoplifter, not just shoplifters who would have paid for the goods if they had to.

For all these reasons, it was proper for the jury to fix an economic damage award at least $4.95 per viewer. Significantly, despite retaining an expert on the value of celebrity sex tapes, Gawker Defendants chose to adduce **any** evidence of an alternative measure—the supposed reasonable royalty that they now say the jury was supposed to award. They cannot advocate for that alternative measure now, after failing to offer any evidence and long after the trial is over.

Gawker Defendants argue that Mr. Shunn's testimony as to the number of people who viewed the Gawker Video was inaccurate. But they had the full opportunity to cross-examine Mr. Shunn. They also had the opportunity to retain their own expert. They chose to rest on their arguments and evidence suggesting that Mr. Shunn's estimates were inaccurate because there could be some repeat viewers or multiple views.

However, the jury weighed the evidence and rejected Gawker Defendants' arguments. There is no reason to disturb the verdict. In fact, Gawker Defendants stipulated to the authenticity and admissibility of the web pages on which the view counters appeared. Mr. Shunn merely confirmed the accuracy of the view counters of the websites at issue.

Gawker Defendants' assertion that Mr. Shunn's testimony is hearsay because he relied on the view counters is wrong. The view counters were admitted. No hearsay objection was made at trial, and is therefore waived. And even if the hearsay objection were considered, it fails. Experts are entitled to rely upon facts not in evidence and otherwise inadmissible. Fla. Stat. § 90.704. This includes hearsay reasonably relied upon in the expert's field of expertise. *Dean Witter Reynolds, Inc. v. Cichon*, 692 So.2d 313, 315 (Fla. 5th DCA 1997).

The hearsay rule poses no obstacle to expert testimony premised on tests, records, data or opinions of another, where such information is of a type reasonably relied upon by experts in the field. *Barber v. State*, 576 So.2d 825, 832 (Fla. 1st DCA 1991). Expert testimony based on presentation of data to the expert outside of court and other than by his own perception must be permitted. *Id.* What Mr. Shunn did in this case is akin to a medical expert reviewing x-rays. Mr. Shunn applied his expert knowledge to data to conclude that the view counts of the Gawker Video were accurate.

The "reasonableness of experts' reliance on this data may be questioned on cross-examination." *Id.* (citing *Bender v. State*, 472 So.2d 1370, 1371-2 (Fla. 3d DCA 1985). Gawker Defendants did just that in this case. Their arguments were evaluated (and rejected) by the jury.

Experts are permitted to testify regarding hearsay, as Gawker admits, so long as the testimony's probative value is not substantially outweighed by the likelihood of unfair prejudice. Fla. Stat. § 90.704. "In order for relevant, probative evidence to be deemed unfairly prejudicial, it must go beyond the inherent prejudice associated with any relevant evidence." *State v. Gad*, 27 So.3d 768, 770 (Fla. 2d DCA 2010). There is no such unfair prejudice here. The only "prejudice" to Gawker Defendants is that they are justifiably being held accountable because their actions caused over four and a half million people to view the Gawker Video on websites other than Gawker.com.

Gawker Defendants' assertion that they should not be responsible for the posting of the Gawker Video on third party sites because that occurrence was not reasonably foreseeable to them is factually unsupported, and was never even made to the jury. It is waived. Even if it were considered, it would fail as there was extensive testimony that the Gawker Video was used to virally market Gawker. Daulerio knew other sites would capture the video. (RT 2789-90)

Gawker Defendants' argument against the other component of economic damages—the increase of value realized by Gawker Media as a result of the publication of the Gawker Video—is also unavailing. Jeff Anderson's testimony, upon which this argument is based, used the monthly unique user metric that Gawker Defendants themselves embraced.

Gawker Defendants argue that Mr. Anderson's testimony was unfounded because traffic to the Gawker sites supposedly stayed flat between October 2012 and April 2013. This argument was rejected by the jury based on the evidence presented. And the jury was free to believe and did believe Mr. Anderson's testimony that the Gawker Video had increased the value of Gawker.

Gawker Defendants disingenuously cite to a stipulation that the parties entered into regarding net worth for purposes of punitive damages to attack Mr. Anderson's opinions. As more specifically set forth in Mr. Bollea's May 2, 2016 Motion to Strike, that stipulation was limited solely to punitive damages and is irrelevant to any other argument.

Finally, Gawker Defendants contend Mr. Anderson's opinion testimony that unique page views were as valuable to Gawker as unique users was unfounded. Like all of Gawker Defendants' arguments against Mr. Anderson's testimony, this one was a jury issue. Gawker Defendants were entitled to argue and did argue to the jury that Mr. Anderson's testimony on this point was not credible. In turn, the jury was entitled to evaluate Mr. Anderson's credibility, did so, and chose to believe him. Gawker Defendants' argument that there is no discernible chain of reasoning behind Mr. Anderson's testimony is misguided. The chain is clear: Gawker Defendants generated traffic by posting the Gawker Video; their business model and market value is based on traffic; additional traffic is valuable; stories that drive large amounts of traffic are particularly valuable; and it is possible to derive the value of such traffic through a market

valuation method that looks at the sale prices of comparable Internet businesses. There is no part of that chain of reasoning that is unsupported.

G. There Is No Double Recovery.

Finally, Gawker Defendants' argument that the two theories of economic damages resulted in a double recovery by Mr. Bollea is mistaken. The two measure different things: the $4.95 per viewer measures damages that were suffered by Mr. Bollea when Gawker Defendants gave over seven million people something for free that was worth $4.95 in the marketplace. On top of that, the value of the traffic generated by the Gawker Video is a separate measure of the amount that Gawker Defendants were unjustly enriched when they profited by publishing footage that invaded Mr. Bollea's privacy. These measures of damages are separate and distinct. There is no double recovery.

H. The Punitive Damages Award Is Not Excessive.

Remarkably, even though the jury came back with a punitive damages award that was a small fraction of the compensatory damages award, Gawker Defendants still challenge that award as constitutionally excessive. It is not.

Gawker Defendants recite the correct test for the constitutionality of a punitive damage award, which depends on three factors: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003). From there, however, Gawker Defendants go on to grossly misapply this standard.

First, Gawker Defendants' conduct was egregiously reprehensible. They deliberately invaded Mr. Bollea's privacy in the starkest possible terms, putting his most intimate acts out on the Internet for over seven million people to see. And they did this to inflict harm on Mr. Bollea, pander to shameless voyeurs and deviants, and generate traffic for Gawker Media. They also did it knowing that it was a violation of basic human decency and journalistic standards. They knew the public was not "supposed to see" the footage; they knew the Gawker Video was surreptitiously recorded; they knew that Mr. Bollea stated that he was recorded without his consent; and they knew that publication of the video would cause Mr. Bollea emotional distress, but they did not care. This is exactly the sort of reprehensible conduct that justifies a significant punitive damages award.

Gawker Defendants' argument that their conduct was not reprehensible boils down to their insistence that they did not risk anyone's physical safety and did not defraud anyone. If this definition of reprehensibility were adopted as law, punitive damages would simply never be available in a privacy case, no matter how egregious the defendant's conduct. It is no surprise that Gawker Defendants favor such a rule, as they infamously do not care about the privacy of others. But their view is at odds with the law.

Gawker Defendants also repeat their scienter argument, addressed above, that they did not intend to do Mr. Bollea any harm. There is overwhelming, clear and convincing evidence supporting the jury's findings to the contrary.

Gawker Defendants next attempt to distance Denton from the posting of the Gawker Video. However, the evidence shows that Gawker Defendants' reprehensible conduct was at Denton's direction. Denton said Gawker Media did not care about privacy; endorsed the content

of Daulerio's narrative; and said that the letter from Mr. Bollea's counsel asking him personally to remove the Gawker Video was "not persuasive."

Gawker Defendants' arguments that the punitive damages award is disproportionate also fail. The punitive damages awarded were 13.6 percent, 9.1 percent, and 0.009 percent of the amount of compensatory damages attributed to each defendant, respectively. Gawker Defendants' attempt to make the punitive damages award appear bigger by adding the three awards and referring to it as a single $25 million award fails. There is no basis for doing this under the case law, as the award is not joint and several.

Gawker Defendants offer no authority for their assertion that a punitive damages award of 13.6 percent or less of compensatory damages is unconstitutional. Instead, they simply argue that because the jury awarded emotional distress damages, the punitive award was suspect. But the punitive damages awarded would still be no more than 30 percent of even the economic damages awarded. Even if the emotional distress damages are not considered, the punitive damages award still does not approach an unconstitutionally disproportionate level. This is dispositive. The *Campbell* line of cases strikes down punitive damages awards that generally equal or exceed compensatory damages, not awards like those in this case.

Further, Gawker Defendants' "comparable" cases analysis is of no value here. They treat the award in this case as a $25 million punitive damages award, and ignore the fact that there are separate awards of $15 million, $10 million, and $100,000. And the privacy cases they rely upon do not involve and are not in any way comparable to publication of a surreptitiously recorded video of a private sexual encounter on the Internet that over seven million people watched. *See Genesis Publications, Inc. v. Goss*, 437 So. 2d 169 (Fla. 3d DCA 1983) (publication of single nude photograph that plaintiff voluntarily posed for and expected to release

to the public); *Weinstein Design Group, Inc. v. Fielder*, 884 So. 2d 990 (Fla. 4th DCA 2004) (commercial misappropriation of baseball player's name); *Sun International Bahamas, Ltd. v. Wagner*, 758 So. 2d 1190 (Fla. 3d DCA 2000) (commercial misappropriation of photographs from modeling shoot); *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA 1982) (publication of photograph of plaintiff clad in a dishtowel which covered her private parts).

Finally, Gawker Defendants argue that the punitive damages awarded would "economically castigate" them. The evidence shows that the jury properly took this factor into account in rendering its verdict: while Gawker and Denton were assessed awards in the millions, only $100,000 was awarded against Daulerio.

The awards against Gawker and Denton are only a fraction of their net worth. Gawker Defendants argue that the compensatory damages award should be included when applying the economic castigation rule. That makes no sense. It would mean that a court could never impose any punitive damages award at all against a defendant when compensatory damages were awarded in excess of the defendant's net worth, no matter how reprehensible the conduct of the defendant. And there is no rule limiting compensatory damages based on ability to pay.

V. CONCLUSION

A dispassionate and dedicated jury carefully weighed the evidence presented at trial. They applied the law as instructed, and awarded fair and reasonable damages supported by that evidence. There is no factual or legal basis to overturn or reduce the fair and just compensatory damages and relatively modest punitive damages the jury awarded. The motions for a JNOV, remittitur, and new trial all lack merit and should be denied.

Dated: May 16, 2016.

Respectfully submitted,

/s/ Kenneth G. Turkel
Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Shane B. Vogt, Esq.
Florida Bar No. 0257620
BAJO | CUVA | COHEN | TURKEL
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: svogt@bajocuva.com

-and-

Charles J. Harder, Esq.
PHV No. 102333
HARDER MIRELL & ABRAMS LLP
132 South Rodeo Drive, Suite 301
Beverly Hills, CA 90212-2406
Tel: (424) 203-1600
Fax: (424) 203-1601
Email: charder@hmafirm.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 16th day of May, 2016 to the following:

Barry A. Cohen, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1950
Tampa, Florida 33602
bcohen@tampalawfirm.com
jhalle@tampalawfirm.com
mwalsh@tampalawfirm.com
Counsel for Heather Clem

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esquire
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com
abeene@tlolawfirm.com
Counsel for Gawker Defendants

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com
krosser@houstonatlaw.com

Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Alia L. Smith, Esquire
Michael D. Sullivan, Esquire
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW, Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
msullivan@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
Pro Hac Vice Counsel for Gawker Defendants

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hklaw.com

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amnestee@aol.com
asteele@rahdertlaw.com
ncampbell@rahdertlaw.com
Attorneys for Intervenor Times Publishing Company

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hklaw.com

Steven L. Brannock, Esquire
Celene H. Humphries, Esquire
Brannock & Humphries
1111 West Cass Street, Suite 200
Tampa, FL 33606

Attorneys for Intervenors, First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, Vox Media, Inc., WFLA-TV, Media General Operations, Inc., Cable News Network, Inc., Buzzfeed and The Associated Press.

sbrannock@bhappeals.com
chumphrics@bhappcals.com
eservice@bhappeals.com
Co-Counsel for Gawker Defendants

/s/ Kenneth G. Turkel
Attorney