

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

TERRY GENE BOLLEA, professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12-012447-CI-011

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

Defendants.

_____ /

HEARING BEFORE THE HONORABLE PAMELA A.M. CAMPBELL

DATE: May 29, 2015

TIME: 1:30 p.m. to 4:27 p.m.

PLACE: Pinellas County Courthouse
545 First Avenue North
Courtroom C
St. Petersburg, Florida

BEFORE: Valerie A. Hance, RPR
Notary Public, State of
Florida at Large

Pages 1 to 131

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25 Terry Gene Bollea

I N D E X

PLAINTIFF'S MOTION FOR LEAVE TO ADD A CLAIM
FOR PUNITIVE DAMAGES

Argument for the Plaintiff (By Mr. Turkel)	Page 5
Argument for the Defendants (By Mr. Berlin)	Page 36
Argument for the Defendants (By Mr. Davis)	Page 60
Argument for the Plaintiff (By Mr. Turkel)	Page 63

I N D E X (CONTINUED)

PLAINTIFF'S MOTION TO STRIKE IRRELEVANT AND
PREJUDICIAL HEARSAY FROM GAWKER DEFENDANTS'
STATEMENT OF UNDISPUTED MATERIAL FACTS IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Argument for the Plaintiff (By Mr. Harder) Page 74

Argument for the Defendants (By Mr. Berlin) Page 75

Argument for the Plaintiff (By Mr. Harder) Page 78

RULING BY THE COURT Page 79

DISCUSSION OF 2ND DCA'S ORDER

Argument for the Plaintiff (By Mr. Turkel) Page 80

Argument for the Plaintiff (By Mr. Harder) Page 82

Argument for the Defendants (By Mr. Berlin) Page 83

RULING BY THE COURT Page 107

DISCUSSION ON DISCOVERY OBJECTIONS

Argument for the Defendants (By Mr. Berlin) Page 113

ORE TENUS MOTION FOR PROTECTIVE ORDER FOR THE
DEFENDANT (By Mr. Berlin) Page 122

RULING BY THE COURT Page 124

DISCUSSION ON BIFURCATION

Argument for the Defendant (By Mr. Berlin) Page 126

REPORTER'S CERTIFICATE Page 131

E X H I B I T S
(None marked.)

P R O C E E D I N G S

(Court called to order at 1:30 p.m.)

THE COURT: All right. So I think at this point in time, are we finished with all of the issues on the motion for summary -- defendant's motion for summary judgment?

And so, next, do you want to -- let's just move to the plaintiff's motion for punitive damages. Does that make sense?

MR. TURKEL: Thank you, Judge. I was going to suggest that was probably the place to go.

Judge, may I approach?

THE COURT: Yes.

MR. TURKEL: This is a sort of a demonstrative table we put together. Everything that's in the packet is a -- in the record as record evidence. And we thought it would be valuable as we discussed what we think is one of the more prominent cases before the Court as you navigate through all these issues.

Judge, this is an odd procedural context in which to argue a motion for leave to amend. As the Court knows, we had this filed and teed up and wanted to have it heard sometime earlier. There was an exchange before the Court in which the defense

1 said they wouldn't be ready to have it heard, I
2 think, on the 11th or 12th. And there was sort of a
3 tradeoff involved that we would hear it today. And
4 they stated they were going to file their summary
5 judgment motion as to punitive damages
6 contemporaneous with their response to our motion
7 for leave to amend for punitive damages.

8 What is somewhat odd about that is the claim
9 for punitive damages wasn't pending, yet they kind
10 of merged their arguments on the merits and on the
11 basis for an amendment, as I'm sure the Court knows
12 from the papers.

13 There is an issue as to the timeliness of it
14 because of the way it was filed. I'm not sure it
15 comported with 1.510. But that being said, Judge, I
16 was always curious, when we struck that deal that
17 day, and I told you to remember the date, because I
18 knew they were going to object to all the discovery
19 which has obviously been teed up for later today.

20 THE COURT: If we get to it.

21 MR. TURKEL: If we get to it. That's obviously
22 a concern.

23 But I was just curious as to how they were
24 going to do this. So what they've essentially done
25 is their opposition to our position for leave is

1 basically their motion for summary judgment. I
2 think they've kind of confused the standards a
3 little bit in that, but I'm going to sort of handle
4 the merits of our motion for leave. And, Judge, you
5 know, if I somehow or another drift in a little bit
6 to the merits of their summary judgment, I think
7 it's all the way they've presented ends up kind of
8 merged into one big discussion about punitive
9 damages.

10 But, Judge, I don't -- I hate saying things
11 like I'm going to be brief or I'm going to reduce
12 this to the simple issues, because every lawyer says
13 that and two hours later you're scratching your head
14 as to why if it was so simple we're here two hours.

15 But in all of these binders and all of these
16 materials and all of this record evidence that's
17 been presented to you, I think the one value you get
18 from a day -- "you" being all of us, the parties,
19 the counsel, the Court -- is it does help crystalize
20 issues. It helps us focus on what we think is going
21 to be important for trial.

22 And I think that agreement was just dealt with
23 as it related to substantive summary judgment. And
24 I think it carries right over into the punitives. I
25 think we're basically talking about the same things.

1 And, Judge, at the onset -- and I know the
2 Court knows this, but I'm going to say it so it's
3 very clear to everybody. You're really not here to
4 judge the case today. You're not here to weigh
5 credibility, and you're not here to determine
6 whether the basis we alleged for punitive damages
7 100 percent is going to result in award. You're
8 here to do what I'm sure you've done any number of
9 times throughout your career, which is to determine,
10 under the applicable rule, whether we have made and
11 set forth to the Court a reasonable basis based upon
12 a proffer that provides a reasonable showing.

13 Where I think there is quite a bit of
14 disagreement both on that and the substantive merit
15 of punitive damages claim is on the theories that
16 Gawker has chosen to assert to both avoid liability
17 or trying to avoid liability and trying to avoid an
18 amendment to allow punitive damages.

19 And as best as I can tell, Your Honor, it goes
20 something like this. They premised their defense
21 largely on this contention that there was some
22 newsworthy value posting a criminal,
23 surreptitiously-taken private video in a private
24 room that our client indisputably, at this point in
25 the case, after much discovery, knew nothing about.

1 And based on that newsworthiness contention, have,
2 as it relates to punitive damages, added the element
3 that they had a good faith belief it was newsworthy,
4 then they're exculpated for liability for punitive
5 damages.

6 Presumably why they're saying it's
7 newsworthy -- and I think, Mr. Berlin, it was Slide
8 No. 2. By the way, this table is my PowerPoint.
9 It's not on a computer. It's just a table. But
10 they -- I think what he said was "content and
11 context." And then there was all these reasons that
12 had been argued and all these papers -- they must
13 have spent 15 pages saying it was newsworthy because
14 Terry Bollea at one point in time discussed his sex
15 life on a talk radio show, and it was newsworthy
16 because of this or that.

17 As Mr. Harder argued, there is a huge question
18 of fact in this case as to what they're contending
19 the newsworthiness was or is, is what they're
20 really -- what they really real time have said under
21 oath is. In other words, they cite all these cases
22 and change it in their words, but you read the
23 articles, none of them are in there.

24 And we start, I think, Judge, with the idea
25 that, one, they didn't write about that, the

1 controversy behind Terry Bollea's sex life. What
2 they did do in this article was basically give a
3 play-by-play, a vulgar play-by-play of a sex video.

4 And what becomes an issue for punitive damages,
5 at the time they did that, what did they know? What
6 did they know? Why did they do it?

7 And I'm not going to go through what we put in
8 our brief, because we laundry listed about 15
9 points, 20 points that shows -- and I'll just be
10 very general.

11 They knew it was surreptitiously recorded.
12 They knew our client objected to its dissemination
13 because he had gone on public TV, and they knew it,
14 they were aware of it. They recklessly and with
15 willful disregard have chosen and chosen at the time
16 to publish it knowing and not caring that it could
17 hurt him.

18 And that's their words, Judge. It's not mine.

19 And we surround those sort of specific
20 intentions with their history, because -- and I know
21 they've objected and they said it's irrelevant what
22 they've said about other nude videos. But the fact
23 remains, Judge, that they don't have any policies on
24 purpose so they're not pigeonholed down in a lawsuit
25 as to what they do when they get a

1 criminally-obtained sex tape video.

2 And so you look at what they have been willing
3 to say about the topic area when faced with other
4 things, like Erin Andrews or Eric Dane, and they've
5 condemned it. They've condemned, Your Honor, the
6 practice of publishing this kind of stuff, until it
7 gets to Terry Bollea's case, at which point now
8 they've wrapped themselves in the flag and say it's
9 newsworthy and of course you can do it.

10 Now, I'm making -- probably -- I'm probably
11 understating the degree of their comments, but they
12 are all in our papers. There's about four pages of
13 them. We don't care, we don't care if they consent
14 to it, we don't care if it was surreptitiously taken
15 or how it was got.

16 Nick Denton, unabashedly, almost bragging about
17 the fact that it would mortify him if it happened to
18 him, but he doesn't care because he's just there to
19 transmit information. And he doesn't care if the
20 information violates the criminal statute. He
21 doesn't care if the information is harmful. He
22 doesn't care if, you know, the subject of it had no
23 knowledge of it and was protesting the fact that it
24 even existed, because to them, it's about driving
25 traffic.

1 And it's not for you -- and I don't mean this
2 in a way that you don't have the power to do
3 anything, you know. But it's not for you today to
4 say we're right. It's for you to say we can put
5 that before a jury who could listen to it,
6 reasonably conclude that that is something that
7 deserves to be punished.

8 Where I take issue with Gawker's response to
9 our proffer is this idea that because they've gone
10 public with all these statements condemning other
11 media outlets for publishing this exact type of
12 information, and then they say that that doesn't
13 matter because, Judge -- and I'm going to walk you
14 through Toffolini (sic).

15 And I'm going to try not to be up here for
16 hours, because I do agree with Mr. Harder. This
17 stuff has been briefed extensively and I know you
18 read it, but the fact is that the -- the idea that
19 they've, I guess, you know, thrown out there that
20 this is somehow or another protected because it's
21 newsworthy is always going to be a fact question.
22 And that's going to be something whether it's
23 punitives or whether it's the substance of it.

24 And we've provided you cases, Judge. And
25 specifically, you know, the Toffolini case actually

1 went to a jury on punitive damages. They contend
2 that that -- the failure to grant summary judgment
3 on that was -- was -- I mean, was reversed by the
4 11th Circuit in Toffolini II.

5 But that's not what the 11th Circuit did. They
6 basically let it go to the jury. They got whacked
7 with a \$19 million punitive award. Then the 11th
8 Circuit looked at the evidence deduced at trial and
9 corrected it after the trial, which happens in many
10 trials.

11 But, Judge, the fact remains that their
12 objection to us using all the statements they have
13 made, all the times they have condemned the very
14 practice they engaged in in this case, is defeated
15 by the fact that when we asked them specifically,
16 "What did you do to make sure that what you were
17 doing was legal and it was newsworthy?"

18 And that shows up in Toffolini, because out of
19 all people in the world, Larry Flynt apologized for
20 his company's behavior. They had evidence in that
21 case that they had gone to their in-house lawyers, I
22 think three times, and they disclosed the substance
23 of those communications to show their good faith
24 belief. In other words, yes, we published it, but
25 we talked to our in-house lawyers and they said A,

1 B, and C.

2 The reason why you see a proffer with all these
3 statements from other cases is, when we asked
4 A.J. Daulerio in this case, "What did your lawyers
5 tell you?" he was instructed not to answer under the
6 attorney-client privilege.

7 The very evidence, in other words, that the
8 11th Circuit relied on ultimately to reverse the
9 jury's verdict, not summary judgment, they didn't
10 provide us in this case. And so we have to resort
11 to these other things they've said.

12 Because if you're going to come before a Court
13 and say, listen, mea culpa, if we had known it was
14 going to be illegal and bad and not newsworthy, we
15 wouldn't have done it, but we went through the right
16 steps; we have a policy, we talked to our lawyers.
17 And we don't get that here, so we have to rely on
18 what they've told the rest of the world about other
19 cases.

20 And if you read that, Judge, you can't come to
21 really any reasonable conclusion but that there is a
22 reasonable basis they did this knowingly with a
23 willful disregard for the rights of Terry Bollea.
24 And, really, "willful disregard," I think,
25 understates it. A brash, open disregard for his

1 rights.

2 On page 7 of our papers, we cite Emma
3 Carmichael's testimony. She was the managing editor
4 at the time the Bollea video was received, edited,
5 and posted. And she testified that Gawker has the
6 right to publish secret videos, sex and full frontal
7 nudity, even if the subjects did not know they were
8 being photographed or filmed.

9 They extended this to even saying, I think,
10 that it's appropriate for a news organization to
11 publish nude images of female employees secretly
12 recorded by their employers in showers and
13 restrooms. Carmichael also believes the news
14 organizations are justified publishing revenge porn
15 in photos.

16 Now, this is completely antithetical to the
17 numerous statements that they've made publicly about
18 this very practice. And so what does that tell us?
19 It tells us that when it came to Terry Bollea,
20 things that they had said were wrong, that other
21 media outlets shouldn't do, they knowingly did it,
22 they just did it. They chose to do it for whatever
23 reason.

24 And I think as it relates to this issue of
25 whether it's for you to judge, you know, as the

1 Court, solely, whether it be again, you know, the
2 proffer on punitive -- because if you take their
3 arguments, what they're saying is it doesn't matter
4 what we can prove and allege, it's not punitive. Or
5 what we can allege and prove.

6 Judge, we cited -- actually, in Toffolini, if I
7 can approach, they cite the Vigil (sic) case. It's
8 a Ninth Circuit case. And it may be string-cited
9 somewhere in our papers. I brought a copy in case
10 it didn't make it into any of the binders.

11 So the Vigil case, Judge, at page 9 and going
12 forward discusses in detail -- I'm sorry. Did I
13 give you two copies?

14 THE COURT: Maybe yours.

15 MR. TURKEL: Oh, what, is there something
16 wrong?

17 THE COURT: No. I don't know. No, it's -- I
18 have an extra one, so --

19 MR. TURKEL: If you look at page 9 of the Vigil
20 case, they start discussing, the Ninth Circuit, this
21 precise issue of whether a judge, you know, is
22 required, as Mr. Berlin had argued, to resolve all
23 these factual distinctions and somehow always rule
24 in a matter of law in these cases, because,
25 inherently, that's what they're saying on punitive

1 damages too.

2 And this was cited in Toffolini, Your Honor.
3 And I find it somewhat interesting that Toffolini
4 didn't occupy more of their time. I think it
5 probably is more of a punitive damages case. But
6 the Court's stated in the Vigil case that we cannot
7 agree that the First Amendment requires that the
8 question must be conferred to one of law to be
9 decided by the judge. Courts have not yet gone so
10 far in other areas of law involving First Amendment
11 problems such as liable and obscenity. And it goes
12 on to talk about community mores, et cetera.

13 And so, Judge, in our proffer -- and, Judge, if
14 I could, just to give you a cite to the papers, on
15 page 11 of, I think, our response to summary
16 judgment, we discuss newsworthiness. And it says
17 the issue of newsworthiness itself implicates issues
18 of facts that a jury must decide, including whether
19 Gawker defendants' publication of the video was a
20 morbid and sensational prying into private lives for
21 its own sake and whether a reasonable member of the
22 public with decent standards would say they have no
23 concern and common decency. And we cite a First
24 District case there and a Michigan case.

25 So this idea that you have to resolve it one

1 way or the other as an issue of law isn't borne out
2 by the cases, and Toffolini doesn't bear it out.

3 So in our proffer, what we're asking you to do
4 is let us amend, put the issue of punitives before a
5 jury, and let a jury decide whether they're
6 offended, and whether they believe that Gawker
7 knowingly published this in reckless and willful
8 disregard of Mr. Bollea's rights.

9 And, Judge, you know, interestingly, I mean,
10 the whole exercise that we go through in Florida
11 heightens the standard, as they argue in their
12 brief, but it doesn't heighten the legal standard.
13 In other words, all we still have to do, despite the
14 fact that it's a First Amendment case, is provide
15 you a reasonable showing, a reasonable basis based
16 upon a reasonable showing to our proffer.

17 And I think, in my years of practice, I'm not
18 sure I've ever seen this much evidence provided to a
19 Court to say that that question should go before a
20 jury.

21 Judge, as to a precise jury fact, because -- or
22 question, just one of the many that exist in these
23 binders, in that packet I gave you, they discuss
24 this issue of public concern today and
25 newsworthiness in very general terms in the sense

1 that they've compared it, as Mr. Harder argued, to
2 cases that really have nothing to do with what
3 happened here.

4 The Toffolini case is interesting because, you
5 know -- and just coincidentally, to rest, Nancy
6 Benoit who was herself a professional wrestler and
7 the wife of Chris Benoit who tragically killed his
8 family and committed suicide. And Hustler -- wasn't
9 Penthouse. But Hustler decides to publish these old
10 photographs of her and somehow or another justified
11 by talking about, quote, Her life now that she's
12 died.

13 But it didn't work. As Mr. Harder said and the
14 cases bear out, Toffolini I, they granted summary
15 judgment to the plaintiff saying that wasn't
16 newsworthy, you were just using the article to
17 publish the pictures.

18 And so we look at not what they argue in their
19 briefs. I don't necessarily like to use words like
20 "half-truth" and "spin." Okay? I think what
21 they're trying to do is take the general and put it
22 in front of you and ignore specific fact issues.
23 Whether that's a half-truth, advocacy, or spin, I
24 don't really know, but they can't change what their
25 client said under oath.

1 So if you go to Tab 3 of the Toffolini packet I
2 gave you, Judge, and you see the Nancy Benoit
3 article there on the front. And if you page back,
4 then you see the Hulk article, the Terry Bollea,
5 "Even for a minute watching Hulk Hogan having sex is
6 not NSFW or whatever." In paging through that, you
7 get the two excerpts of Mr. Daulerio, the person who
8 wrote the article, the person who evaluated this
9 whole thing. You'll see that it should come right
10 after the last page of the Gawker article. We're
11 still in Tab 3.

12 THE COURT: The first page of my Tab 3 is the
13 second deposition from Mr. Daulerio.

14 MR. TURKEL: Oh, it may be missing. Does it
15 start on page -- is it highlighted at lines 9
16 through 12?

17 THE COURT: Yes.

18 MR. TURKEL: Okay. That's the answer
19 Mr. Harder read to you earlier, which was the
20 question at line 4.

21 "And so what you wanted to do is run the NSFW
22 footage? That was the whole point of the story,
23 correct?

24 "Objection. You can go ahead and answer.

25 "Okay. No, the whole point of the story was

1 to, A, prove its existence; and, B, for me to
2 commentate on what I witnessed of the tape."

3 Which led into just he might as well just --
4 said, "I just wanted to put the tape up and do a
5 play by play."

6 What he did not say there was, No, no, no, we
7 thought Hulk Hogan's sex life was an issue of public
8 concern because he had gone on Howard Stern or on
9 the Bubba the Love Sponge show and had talked about
10 his sex life; and because of that, we felt the
11 public needed to know about this case.

12 Everything they argue is completely thrown into
13 question for a jury by their own client's testimony.
14 And this is the guy who wrote it.

15 And I'll turn the page, because this wasn't
16 before you earlier, but it's in the proffer.

17 "Question: Was the news hook here, with
18 respect to this story, the Hulk Hogan sex tape
19 story, was the true news hook that Hogan was taped
20 having sex with his best friend's wife?"

21 His answer, "I wouldn't say that was
22 particularly the true news hook.

23 "What was the news hook?"

24 Now, Judge, sometimes when we read depositions, the
25 questions are leading. You couldn't ask a more

1 general question, a softball for this kind of thing,
2 everything they're trying to argue before you today
3 that says there is no adequate proffer, no question
4 of fact.

5 "The news hook was essentially what is stated
6 in the headline itself, which was my own personal
7 commentary about the Hulk Hogan sex tape that was in
8 existence and me watching."

9 There is your question of fact for punitives.
10 There is your question of fact for everything. And
11 it doesn't matter how many cases they throw before
12 you to talk about newsworthiness, because their own
13 client has said, "I put it up because I wanted to
14 put it up so I could tell everybody what it said."

15 And then we get this disgustingly vulgar, you
16 know, play by play, that it's even hard to listen to
17 Mr. Harder read, that Nick Denton, I think under
18 oath, and I'm pretty sure it's in his depo, said.
19 When we asked him, "What did you think of the
20 narrative?" I think he used the words, "It was
21 sweet." I think that was the testimony he gave us.

22 So, Judge, we're entitled to amend this
23 complaint and to put that before a jury. And they
24 can determine whether Gawker's excuses and
25 justifications, as they've argued today, versus what

1 they said under oath, bear any muster, have any
2 validity.

3 Because I can tell you this, I don't care what
4 they argue in opening statement. When Mr. Daulerio
5 takes the stand, or whether we put him on by
6 deposition if he doesn't show up, the jury is going
7 to hear this, real time what we asked him, tell us
8 the newsworthiness, what was the news hook?

9 Now, he could have answered that question
10 anything. He could have said, Well, at Gawker, we
11 believe that you have to have full information about
12 issues of public concern and, well, Mr. Hogan had
13 made his sex life an issue of public concern and,
14 therefore, we felt it was critical, as a news media
15 organization, to tell the world what the sex tape
16 was about; and we felt it was even more critical to
17 attach it so they could see it and that was our good
18 faith belief that what we were doing was right.

19 But that's not what he said. There is our
20 question. One of many, but a very prominent one. A
21 very prominent one because it goes to the Court
22 everything they've argued here today.

23 So, Judge, between that, the Vigil case
24 language, what we see here is, their contention,
25 their proffer is insufficient, is really just a

1 redundant sort of regurgitation of why they don't
2 think our case has merit, which is we think it's
3 content -- I believe they said "context and
4 content."

5 Well, you can read the content of the article.
6 I mean, Mr. Harder read some of it. It is, as I
7 said like three times, a despicably vulgar
8 play by play of a sex tape.

9 You want the context? A.J. Daulerio gave it to
10 you. Or at least he gave us a question of fact on
11 it that doesn't get resolved today.

12 It goes to the jury and we say, Jury, you want
13 the content? Here is the article. You want the
14 context? We ask Mr. Daulerio. Here's what he said,
15 here's what he didn't say. That's why we try cases.

16 They can try and figure out how they want to
17 justify or deal with this bad answer, but it's not
18 for any of us to weigh credibility today,
19 particularly on the proffer, which is really just
20 got to be a reasonable basis upon which a reasonable
21 jury could conclude that there is punishment to be
22 meted out.

23 So, Judge, if you looked at the Toffolini
24 table -- and I'm probably going to wrap up somewhere
25 around here, because we still really are at the

1 motion for leave to amend stage, although I do kind
2 of think that all this stuff ends up kind of mucked
3 up together.

4 And if you look, what we tried to do is show
5 the Court in this -- the facts that -- the facts in
6 our case are even more egregious than those that
7 allowed the judge to send the Benoit case,
8 Toffolini -- the personal rep is Toffolini. She was
9 deceased at the time -- to the jury and to the jury
10 on a punitive damages claim.

11 So you see that Benoit posed voluntarily nude
12 for a photographer 20 years before her death. She
13 told the photographer to destroy it, so you do have
14 this element that I don't consent to the tape being
15 in existence.

16 In our case, Judge, after two and a half years,
17 there is not a fact in this file, in this record
18 that shows that Terry Bollea had any idea he was
19 being taped. They've asked everybody. We've asked
20 everybody.

21 So the 11th Circuit takes that simple fact and
22 states in Toffolini I that the fact of Benoit's
23 nudity in and of itself is newsworthy is not in and
24 of itself newsworthy.

25 And we cite this language. And you see a

1 similar language in Michaels I.

2 "Even public figures, like actresses, may be
3 entitled to keep private some intimate details such
4 as sexual relations. The line to be drawn when
5 publicity ceases to be the giving of information to
6 which the public is entitled, and becomes a morbid
7 and sensational prying into private lives for its
8 own sake, with which if a reasonable member of the
9 public, with decent standards, would say that he had
10 no concern."

11 You don't have to look any further than the
12 title of the article that Gawker wrote to see that
13 it's morbid and sensational. It's meant to get
14 people to watch something that they are not supposed
15 to see. That's how they did it. That's how they
16 want to get people to the site.

17 And so we have, in our case, a surreptitiously,
18 arguably criminal, sex tape versus what they had in
19 Toffolini, which got to the jury on punitive
20 damages, which were, presumably, destroyed pictures,
21 just nude pictures that were stills.

22 Hustler deviated from his normal custom by
23 deciding to contact its attorneys before the
24 photographs were purchased from the photographer.

25 Now, as I said, one distinction is, in

1 Toffolini, they discussed what the attorneys said
2 and it gave them a reasonable belief they were
3 proceeding on a good faith basis. Okay? And the
4 Court relied on that. Here, we couldn't get the
5 answer.

6 Implicates, in some degree, 90.510, the sword
7 and shield rule, which you can't hide behind the
8 privilege and at the same time make contentions like
9 you did this in good faith and you believed it was
10 newsworthy at the time. You can't have it both
11 ways. That's that rule of evidence that tells us,
12 you know, you can't use the privilege as a sword and
13 a shield.

14 In Toffolini I, they did have a story there.
15 And if you read that story in that article, "Content
16 and Context," it's a lot more of a presumable -- a
17 lot more of a threshold news story than the story
18 that Gawker wrote, which, again, I'll continue to
19 refer to as the vulgar play by play. And we cite
20 there on the second page of the summary that
21 language from Daulerio's depo.

22 And so the 11th Circuit when reviewing the
23 story is, "The question before us is whether a brief
24 biographical piece can ratchet otherwise protected
25 personal photographs into the newsworthiness

1 exception. The heart of this article was the
2 publication of nude photographs, not the
3 corresponding biography."

4 Now, that may have been inference in that case,
5 but it's a fact in this case, because Daulerio told
6 us that's why he put it up there.

7 And then they say, "These photographs are
8 not incidental. They are" -- rather, "They are
9 incidental. The photographs" -- that's Daulerio's
10 testimony. "Every private fact disclosed in an
11 otherwise truthful newsworthy publication must have
12 some substantial relevance to a matter of legitimate
13 public interest."

14 Judge, at the end of the day, if their actual
15 witnesses said what Mr. Berlin has argued, which is,
16 whether you like it or not, whether you find it
17 distasteful or not, Hulk Hogan's sex life is a
18 matter of public concern and that's why the article
19 was written. They had witnesses saying that. And
20 there was no controverted testimony. No question of
21 fact is one thing. They don't say that though.

22 I don't want to beat a dead horse, but
23 Mr. Daulerio says the complete opposite, and I think
24 it defeats everything that they've argued.

25 They sent cease-and-desist letters in the

1 Hustler case, the Toffolini case, just like
2 Mr. Houston did in this case. Hustler's counsel
3 drafted a response noting George's right of
4 publicity. Well -- and, parenthetically, it was a
5 right of publicity case. But insisting no
6 permission was necessary because the photos were
7 being used to illustrate a serious news article.

8 Does that sound familiar?

9 That was summary judgment for the plaintiff in
10 that case, in Toffolini I.

11 Notwithstanding this firm conviction, Hustler
12 made every reasonable effort to stop any further
13 dissemination of the pieces.

14 Juxtapose that against this case. Judge,
15 right, wrong, or indifferent, when you enjoin them,
16 they put something on the internet saying the judge
17 told us to take this down, we're not going to do it.

18 That's not -- and this was Larry Flynt, by the
19 way, being contrite. Okay? This was a guy who
20 wrapped himself in the First Amendment more than any
21 pornographer in the history of our country. This
22 was Falwell. He was contrite. That's how they got
23 out of punitives in this case. They basically went
24 to the appellate court and said, hey, look, we did
25 everything we could; we thought it was newsworthy.

1 At the very least, we had good faith basis and you
2 should -- you should reverse the punitive award.
3 But that was after. Not at this stage. Not at the
4 pleadings stage.

5 And, interestingly, in this case, we sent them
6 a cease and desist and they said they didn't find it
7 persuasive and so they didn't cease and desist.
8 They refused to take the video down for six months
9 and didn't even provide a link to the video. Denton
10 justified that Gawker didn't take the video down
11 after receiving Mr. Bollea's cease and desist
12 because it wasn't persuasive.

13 And then Gawker admitted that it took no steps
14 to confirm Mr. Bollea consented to the public
15 dissemination of the video before posting it, nor
16 did Mr. Bollea consent to being recorded.

17 When a person is involuntarily involved in a
18 newsworthy incident, Toffolini I said, "Not all
19 aspects of the person's life, not everything the
20 person says or does is thereby rendered newsworthy."
21 That is the core of the Michaels I holding too.

22 The point is, Judge, that just because he has
23 lived in the public eye for 38 years, just because
24 at some point in his life some shock jock has asked
25 him about his sex life, that doesn't mean, when he's

1 committing a private act in a private bedroom, that
2 he has no idea it's being recorded, that it's fair
3 game. That isn't the First Amendment. That's
4 punishable. It was punishable in Toffolini.

5 Now, in Toffolini, the issue was there that was
6 literally no controverting evidence deduced at
7 trial. I can tell you right now we have
8 controverting evidence, because I just read it to
9 you. But even with the lack of controverting
10 evidence, the issue went to the jury in Toffolini.

11 But one thing you don't have to do in federal
12 court is you don't have to amend. You don't have
13 the 768.72 exercise, so you don't have that
14 safeguard. But they didn't dismiss that claim
15 before it went to the jury.

16 The Court found there it was very clearly an
17 honest mistake. We were operating under the idea
18 that what we were doing was perfectly legal. That
19 was quoting Hustler's response. Flynt testified
20 that Hustler would not have run the photographs if
21 it thought that it needed permission.

22 Now, we can talk about the Chapter 934 claim
23 all we want, but at the end of the day, it prohibits
24 you from disseminating something you know was taken
25 in violation. I can't go out and illegally record

1 somebody and then hand it to you and say, Hey, Judge
2 go put that on the internet for me, you're
3 exculpated from liability.

4 They're saying they had a good faith belief.
5 They were told numerous times he didn't consent to
6 it.

7 So you look at that and you say Toffolini
8 reversed a punitive award because Larry Flynt
9 was contrite and they put evidence in the record
10 that they had gone through the right steps trying to
11 assure they weren't doing the wrong thing. That's
12 not what Gawker did.

13 Judge, we cited it and it's all over our motion
14 for leave. Unabashed, adamant about the fact that
15 they don't care, that they don't care. And that is
16 the kind of conduct we should be allowed to a
17 jury -- argue to a jury in this community that it
18 should be punished.

19 And, Judge, whether the facts mete it out or
20 not, that's why we do it. You know, that's why we
21 go to the jury. If you don't do it and I don't do
22 it and Mr. Berlin doesn't do it, Mr. Harder doesn't
23 do it, you take six people, you put it in the box,
24 you let them hear it, and then they can determine
25 whether it was good faith or they can determine

1 whether they knew or they can determine whether when
2 Daulerio said I only put it up there, put a sex tape
3 up there, so I could write a commentary on it, that
4 was newsworthy.

5 "There was substantial consistent and
6 uncontroverted testimony" -- this is the
7 Toffolini II court -- "from numerous Hustler
8 employees showing that they honestly and reasonably,
9 albeit mistakenly, believed at the time that the
10 photographs fit under the newsworthy exception."

11 We've cited it, Judge. It is in our motion.
12 We have four pages of unapologetic adherence to this
13 idea that they didn't care. They've all said they
14 didn't care. They didn't care about him, they
15 didn't care about the truth, they didn't care about
16 where they got the tape from. Their job, because
17 they're Gawker, I imagine, is that they're the ones
18 that put this out there.

19 It's a jury issue. It's a jury issue. We
20 should be allowed to amend this complaint and assert
21 that claim.

22 And I would say this, Judge -- other than just
23 conferring briefly with my co-counsel, I have one
24 more point to make, which is this: If you take
25 Gawker's theory and agree with their theory as

1 they've asserted in their papers, then all someone
2 has to do, when they're faced with this type of a
3 claim, is say this, "You can't really hold us
4 liable. We thought it was okay."

5 Go ahead and ignore all the objective facts,
6 their complete history, their procedures, how they
7 reacted to others, if we say it's okay, it's okay.
8 By the way, when you ask our lawyers, we're not
9 going to let you know whether they told us it was
10 okay, like they did in Hustler.

11 And so, Judge, you know, at the end of the day,
12 regardless of whether they agree with what we say
13 are disputed facts and they disagree with our
14 version of those disputed facts, we've gone well,
15 far beyond what Florida law requires to allege a
16 claim for punitive damages.

17 One thing I will say they pointed out in their
18 papers is it's a clear and convincing standard. But
19 I don't have to prove to you today by clear --
20 that's for them. I have to show you that there is
21 enough that they could find clear and convincing.

22 That's why we distinguished Toffolini, because
23 it is the closest case we have. And so the reason
24 why they reversed the Toffolini punitive award,
25 those facts don't exist in our case. We have all

1 the facts that didn't and -- yeah, right, this is
2 what we just said, but I -- who was that, Mr. Vogt?
3 Thank you.

4 Judge, he had gave the clear -- weighing any
5 evidentiary standard is not what you do on summary
6 judgment for punitives or substance or on the motion
7 for leave to amend, because that requires you to
8 weigh the evidence, and you're not allowed to do
9 that.

10 And I hate when I say "you're not allowed to,"
11 because you are the judge, but the law doesn't let
12 you weigh it. You're not here to say, yes, you
13 proved by a clear and convincing or, no, you didn't.

14 And he just handed me a Fourth District case
15 from '96 that says it, but I know the Court knows
16 that because that's not what summary judgment is for
17 or punitive damage amendment.

18 So, Judge, I guess I've made -- you know, it's
19 all kind of messed up in one big issue, but we
20 should be allowed leave to amend. We've
21 interlineated the complaint. We have plenty of law
22 that says it doesn't require technical amendments,
23 doesn't require new answer, affirmative defenses.
24 We have the ability to add that claim. And, you
25 know, we should let the jury decide.

1 So absent any questions, Judge, that's all I
2 have.

3 THE COURT: Thank you, Mr. Turkel.

4 Mr. Berlin, do you want to blend your argument
5 between responding to the motion for leave to amend
6 and also your motion for summary judgment?

7 MR. BERLIN: Sure thing, Your Honor. I think
8 that might --

9 THE COURT: Thank you.

10 MR. BERLIN: -- streamline things a little bit.
11 Did you want your cap back?

12 MR. TURKEL: You can have my cap or you can
13 give it back.

14 MR. BERLIN: Don't say I didn't give you
15 anything.

16 MR. TURKEL: Thank you.

17 MR. BERLIN: All right. Well, pardon me,
18 Your Honor. Let me try and address both motions
19 together, because I think it might actually make
20 this make a little more sense.

21 The law on this is pretty clear in Florida, and
22 I know Your Honor is aware of it. And the key thing
23 that punitive damages statute requires is it
24 requires to prove punitive damages. Ultimately,
25 they have to show clear and convincing evidence of

1 either intentional or gross negligence conduct. And
2 in both instances, there is a knowledge component
3 and you need to know what you were doing was
4 unlawful, right? So that's the -- that's the key
5 issue.

6 Now, before I get to how that applies to
7 punitive damages, I want to just respond briefly to
8 a couple of the things that Mr. Turkel said about
9 newsworthiness and consent, in two respects.

10 One is, I spoke at length this morning about
11 how consent is irrelevant to newsworthiness, but I
12 wanted to point out that you don't have to take my
13 word for it. The case that they've attached, which
14 is Toffoloni II -- this is found at page -- this is
15 the Tab 2 of their own submission -- says that if
16 the images had been newsworthy, LFP would not have
17 needed permission to publish them. And it makes
18 that clear as, again, a point that I made a bunch
19 this morning. I'm not going to reiterate it, but I
20 just wanted to note it that it was in their papers.

21 Second, they relied on a case -- Mr. Turkel
22 referred to it as "Vigil." It's actually "Virgil."
23 It's an unnamed plaintiff in that case. And for the
24 proposition that summary judgment could not be
25 granted in cases involving newsworthiness. It's an

1 early Ninth Circuit case. Goes back to 1975. The
2 case was remanded because they didn't like the
3 standard that had been applied by the trial court.
4 And then it went back to the trial court in 1976.

5 I only have one copy of this, but I'm happy to
6 hand it up, Your Honor. The Court granted summary
7 judgment on newsworthiness finding the timeliness
8 motion for summary judgment must be granted and
9 saying, "In conclusion, it is this Court's judgment
10 that the disclosure of these private facts is
11 privileged as newsworthy under the First Amendment.
12 Summary judgment granted."

13 If you'd like, I can hand that up.

14 THE COURT: I have it.

15 MR. BERLIN: You have the district court case?

16 THE COURT: I've got the Ninth Circuit case.

17 MR. BERLIN: Yeah, this is -- this is the year
18 later that --

19 THE COURT: Oh, okay.

20 MR. BERLIN: If I may, I'll just give you my
21 copy.

22 I'm sorry I don't have another one.

23 THE COURT: Mr. Turkel, do you want to see this
24 copy -- see this?

25 MR. TURKEL: If you're not going to read it

1 now, Judge, I'll take a look at it.

2 THE COURT: Well, you can take a look at it
3 while he's talking and then you can --

4 MR. TURKEL: Then I'll bring it back to you.

5 THE COURT: -- bring it back to me.

6 MR. TURKEL: And I'll ask for permission to
7 approach and all that stuff.

8 THE COURT: Oh, that's okay. No.

9 MR. BERLIN: I have no problem sharing that
10 with my colleague. I just wanted to make the
11 general point that it's a summary judgment issue and
12 I just want to move on, because there was a lot of
13 discussion in the presentation on punitive damages
14 that newsworthiness is a fact question. I think
15 since I spoke about that at length this morning, I
16 won't belabor the point.

17 So the second thing that I want to say is that,
18 on the two motions -- so the first motion is a
19 motion for leave. And the issue on the motion for
20 leave is did they make a proffer of sufficient
21 evidence that if it actually turned into being
22 evidence would be enough to establish punitive
23 damages.

24 But the second motion is a motion for summary
25 judgment. Yes, it's true that it's odd to be moving

1 for summary judgment on a claim that hasn't yet been
2 admitted in the case, but this was what we tried to
3 do because they waited until the very end to bring
4 the first motion and we wanted to streamline. All
5 right? So we've tried to do that.

6 But on the second motion, they can't just make
7 a proffer. They actually need to have evidence,
8 right, number one. And number two, that that
9 evidence has to be -- and what we would have to do,
10 as the movant, was to show, which we've shown, that
11 there is evidence that this was -- there was no
12 actual knowledge or conscious disregard that this
13 conduct was unlawful because all of the evidence
14 shows that that's what the defendants believe.

15 And it's not just that it's testimony. I want
16 to talk about this one snippet of Mr. Daulerio's in
17 a minute because there is more to the story. But
18 it's not just that the testimony is undisputed.
19 It's unrebutted. There is not anything in the
20 defendants' papers or anything other than this one
21 sentence of Mr. Daulerio that we've heard that in
22 any way undercuts their belief as to the
23 newsworthiness of this story.

24 We have a bunch of testimony that you believed
25 other things might be newsworthy in some instances,

1 might not be newsworthy in other instances. But if
2 that's decided and we all agree, based on content
3 and context, that doesn't really help us, right? It
4 doesn't tell us what these people believed about
5 this story.

6 Now, what we have here is we don't just have
7 the testimony of Mr. Daulerio, right? We have lots
8 of testimony. And Mr. Turkel basically said in his
9 presentation that if -- I want to make sure I get
10 this right -- if the witnesses said what I said this
11 morning, that would be a different story and that
12 there would be no punitives claim. And he pointed
13 to the one sentence of Mr. Daulerio, but I want to
14 give you the actual record evidence, okay, because
15 the record evidence is different than that.

16 Daulerio says he thought it was newsworthy.
17 That's his quoting. And then -- and then this is
18 also in his testimony. He thought that the video
19 excerpts, quote, would give a little more insight
20 into the stuff that was already in the public record
21 and also show some inconsistencies in what Hulk had
22 stated publicly and what there was as visual
23 evidence. Right? This is not just limited to I
24 wanted to write about it and commentate on it.

25 And even if it was admitted to, I just wanted

1 to write about it, commentate on it, that's --
2 that's the whole point. In the context of something
3 that is otherwise a subject of public discussion, he
4 is free to write about it and commentate about it
5 even if they decide or somebody else were to decide
6 that the commentary is crude or vulgar or whatever.
7 That's not the test. The test is was it a matter of
8 public concern. And he believed that.

9 So then we go on. We say -- Daulerio went on
10 to say -- in addition to the quote that they've
11 cited, he says, "Look, the newsworthiness at that
12 point was both the existence of the tape verifying
13 its existence and" -- so that we have the "and."
14 But we have the first part about the existence and
15 verifying its existence and then my own personal
16 commentary about celebrity sex tapes and the one in
17 particular involving Hulk Hogan. He's explaining
18 this is how -- this is the context that I'm writing
19 in. Right? And this is his testimony. This isn't
20 a question of, you know, what is he saying or, you
21 know, do you believe it. This is a question of here
22 is what he says. All right.

23 And then Gawker CEO, Nick Denton, who
24 testified, by the way, that he had never -- he had
25 not watched the video and that he had not read the

1 story; he just knew about it, the topic, generally,
2 but he believed in the story's newsworthiness and he
3 believed that the video excerpts were an essential
4 part of the whole story. And you heard them refer
5 to Emma Carmichael, who was the managing editor at
6 the time.

7 The stuff that's referenced at page 7 of their
8 brief that Mr. Turkel read is not testimony. That's
9 not evidence. It's their characterization of what
10 she said. Here is what she actually said. This is
11 her testimony.

12 She said that the story was probably published
13 because it concerned, quote, "a public figure," end
14 quote. Contextual stories related to this incident
15 were already out in the public. Again, there is the
16 context point, just like I made to you this morning.
17 And then she went on to explain that as a result,
18 quote, she was very comfortable with the way we
19 framed the story and the context we gave the story.
20 Her words, very much mirroring my words.

21 Scott Kidder, Gawker's COO, testified at length
22 on behalf of the company. He says Gawker, quote,
23 "felt that the video, along with the narrative, was
24 extremely newsworthy and that was the primary
25 motivation in publishing it." He explained, quote,

1 "The video, when taken with the post, looked at a
2 well-known American celebrity who had put himself
3 out there by appearing in television shows showing
4 himself as a 1950s-style father, had written at
5 length in a book about his marriage, contemplating
6 suicide, cheating on his wife. The video had been
7 rumored online, but there was no evidence that it
8 truly existed.

9 "In addition to that, A.J.'s narrative" -- A.J.
10 is Daulerio -- "A.J.'s narrative described how
11 celebrity sex at the end of the day is rather boring
12 and pedestrian."

13 He's again putting this into the context and he
14 is saying, just like I was this morning, this puts
15 into a context what's going on.

16 Now, it may be that he was wrong. And it may
17 be that the fact that he was out there for 38 years
18 talking about himself, portraying himself as a
19 1950s-style father on reality television show,
20 writing "My Life Outside of the Ring," the book that
21 he wrote, isn't enough to make this newsworthy.

22 But these people are actually believing, and
23 this is their sworn testimony, that that's why they
24 thought it was.

25 Then we have the same thing that we have in

1 Toffoloni, where they get a demand letter. In
2 Toffoloni, they say stop publishing those pictures.
3 Here they say take down the video. And just like in
4 Toffolini, when the cease and desist letter came,
5 Gawker's then counsel explained that Gawker believed
6 in the newsworthiness of the video. That's a quote
7 from their response. And they went on to explain,
8 "The existence of the content of the video were
9 widely reported prior to Gawker's publication.
10 Indeed, various news outlets have already identified
11 the woman in the video and her husband, and the
12 video depicts Mr. Bollea having sex with a married
13 woman in the woman's home. The one-minute clip
14 shows very little sexual activity and is clearly
15 newsworthy given the public interest in Mr. Bollea's
16 marriage, divorce, and extramarital activities."

17 The letter went on to explain, quote, "The
18 video is not being used for a" -- and this is an
19 internal quote -- "commercial purpose as the law
20 defines it. It is true and it is newsworthy."

21 So here we have all of these people in real
22 time talking about what they believe.

23 Now, Mr. Turkel said they -- that -- here is
24 what Mr. Daulerio said. And he was given the
25 opportunity to say something different. And as I

1 just explained, he did, in fact, say something
2 different.

3 But let's assume for a minute that all he said
4 was that one line on -- at the beginning of Tab 3,
5 right? So he says, "Here's what he said, and the
6 jury is entitled to consider not just what he said,
7 but what he didn't say."

8 With respect, Your Honor, what he didn't say is
9 not evidence. That's not evidence. We are here on
10 a motion that requires, whether it's for leave to
11 amend or whether it's for summary judgment, to
12 overcoming summary judgment, it requires evidence.
13 And what he didn't say is not evidence. What he did
14 say, which I've just read at some length and
15 accompanied by his colleagues, is uniform testimony
16 that these people believed, rightly or wrongly, for
17 better or for worse, that this was in fact
18 newsworthy and that they were lawfully entitled to
19 publish it.

20 And that is the beginning and the end of the
21 story, right? So we have that uniform record. And
22 in the Toffoloni case -- I think there is some
23 confusion that it's Toffolini, it's Toffoloni, but
24 it's actually Toffoloni.

25 In Toffoloni, we have a situation where the

1 Court says one last thing, right, which has not been
2 discussed by Mr. Turkel, but I'll mention. And that
3 is this:

4 In Toffolini, there is just the history of this
5 was the trial judge granted a motion to dismiss on
6 the issue of newsworthiness. It went up to the
7 11th Circuit the first time. And the 11th Circuit
8 says, no, this particular thing is not newsworthy;
9 and the reason it's not newsworthy is there is
10 really no connection between a story about this
11 woman's murder and 20-year-old photographs that have
12 nothing to do with that murder. All right? That
13 there is no nexus. All right. And that's what
14 we've talked about this morning. And it sends it
15 back.

16 Well, under those circumstances, realizing once
17 again that this is an issue of law, the trial court
18 says, okay, if it's not newsworthy, then I'm going
19 to grant summary judgment in favor of the plaintiff,
20 again recognizing this is an issue probably
21 concerning summary judgment. And then it goes to
22 trial, right?

23 And then the judge -- and then the Court in
24 Toffoloni says two things that are very important
25 here. One is, it says -- it doesn't say this was a

1 fact question. It says, "As a legal matter, no
2 reasonable jury could on this evidence -- with this
3 evidence find that this was supportive of punitive
4 damages or of the level of conduct that is required,
5 which is -- that was under Georgia law, but it's a
6 very similar standard to Florida law.

7 And the point of this is that they're making a
8 legal determination. Although they were not given
9 the opportunity between the grant of summary
10 judgment and trial, they basically are telling the
11 trial judge, When you said this was a jury question,
12 you were wrong. It's not a jury question. No
13 reasonable jury could find that. If no reasonable
14 jury can find that there is -- on this record that
15 there is no -- that there is evidence of punitive
16 damages, we don't need a jury to look at the
17 question. We already know that. That's a --
18 they're making a legal determination that this
19 evidence is of insufficient -- it's an insufficient
20 quantum of evidence to satisfy the demanding
21 standard for getting punitive damages. That's what
22 they're saying. And the notion that this is somehow
23 saying, oh, well, we have to wait until after trial
24 to do that, right, that's not what the law requires.
25 If it's not a jury question, it's not a jury

1 question and we know that now and we have a record.
2 Summary judgment is at the end of discovery. We're
3 not just at the point where they're earlier in the
4 case trying to amend their complaint for purposes of
5 alleged punitive damages as an allegation based on a
6 proffer. We're at the end where we have summary
7 judgment and evidence that's required to show that.

8 The second thing that the Toffoloni court
9 says -- and this is also important. Remember that
10 in my narrative of the four decisions, the first one
11 was that the district judge said, hey, I think this
12 is newsworthy. Turns out the district judge was
13 also wrong, right?

14 But the 11th Circuit, in ruling on this issue
15 of punitive damages, said, look, if even a federal
16 district judge thought this was newsworthy in some
17 way -- it turns out we decided he was wrong, but if
18 that judge thought that, then certainly we can't
19 expect more out of Larry Flynt and his colleagues
20 than we expect out of the federal judge. And if he
21 thought this was newsworthy, that supports the
22 reasonableness of the belief that those people in
23 Hustler had.

24 And here, we have very similar situation where
25 there has been a disagreement about whether this

1 thing is newsworthy, but we have an indication from
2 the federal judge, we have an indication from three
3 DCA judges that they thought, at least based on some
4 preliminary look at this, that this was newsworthy.
5 And if they think that, based even on a preliminary
6 look -- and they probably looked harder at it even
7 at the temporary injunction stage necessarily than
8 journalists do, because they're not lawyers.

9 They look at this and they say this is
10 newsworthy, that supports the belief that, you know,
11 you don't get to just come to the jury and say,
12 well, all these people testified about this, all
13 these people said they thought it was newsworthy,
14 but you're -- we want you to disbelieve that because
15 that belief was patently unreasonable.

16 It's not patently unreasonable if four other
17 judges decided that. And I realize Your Honor could
18 have a different conclusion, but if you just -- if
19 you can get to a point where that issue is
20 sufficiently unsettled, that multiple judges are
21 finding that it is newsworthy, then that cannot be
22 enough to support and be clear and convincing
23 evidence that these people knew it was unlawful and
24 did it anyway.

25 And with that, I think I will sit down. Let me

1 just, if I may, actually, say one last thing, which
2 I've highlighted in our paper, so I won't belabor
3 the point.

4 There are a number of cases in Florida dealing
5 with invasion of privacy from the publication of
6 unauthorized photographs, including unauthorized
7 photographs that involve nudity. And we've cited
8 them in our papers. And every single one of them
9 says where the publisher believes what they were
10 doing was lawful -- sometimes it's not a newsworthy
11 thing, but it's a private figure who has to give
12 consent. Sometimes it's about consent. But
13 wherever they think it's lawful, that is decided as
14 a legal matter that it can be -- it is not
15 sufficient for summary judgment.

16 And the only case that's different than that is
17 where it's clear -- and there was clear testimony on
18 this that the plaintiff brought in -- that was clear
19 that the publisher knew and admitted that we knew we
20 did not have the rights to this photograph and we
21 used it anyway.

22 And was there was that knowledge, that
23 satisfied the test for actual knowledge or conscious
24 disregard or indifference. And where you have that
25 actual knowledge, it said fine.

1 But in every other one of these cases -- there
2 is Genesis vs. Goss, there is Weinstein versus the
3 baseball player Cecil Fielder, there is the Coton
4 case -- that's with one T, C-o-t-o-n. All of those
5 cases. And then the Coton case, it was a case where
6 a woman's picture was used on the cover of a
7 pornographic movie without her authorization. And
8 they said, well, jeez, we thought it was lawful
9 because we thought we got it from a place where it
10 was in the public domain. Turned out that was
11 completely wrong and they needed permission, but
12 they thought it was lawful and the Court said no
13 punitive damages.

14 And so those cases like Toffoloni all support
15 our argument that whereas, here, there is
16 insufficient belief and that we have a lot of
17 evidence and that evidence is not only undisputed
18 but it is unrebutted, there is no basis for allowing
19 punitive damages to go forward. And even if there
20 were somehow a reason for maybe allowing it to be
21 amended early in the case, now that we're at the
22 summary judgment stage, more is required and we
23 simply don't have it.

24 Unless Your Honor has any questions, I will sit
25 down.

1 I guess I should just do one last thing as a
2 housekeeping matter. Some of these -- there are
3 things in this exhibit that Mr. Turkel handed up
4 that are not part of the record. And I know that
5 Your Honor made a comment when we were leaving from
6 this morning. I agree with you, you should not be
7 considering things that are not part of the record.
8 And I just want to clarify for, if in case there is
9 any confusion, that all of the things that I
10 referred to this morning and asked about and talked
11 about are parts of the record. And if there is any
12 question about where they are, then I will be able
13 to point you to them.

14 THE COURT: They all were until you said, "Have
15 you reviewed the video?"

16 MR. BERLIN: The video is part of the record,
17 Your Honor.

18 THE COURT: Not part of the record of any of
19 these notebooks that I received.

20 MR. BERLIN: It was attached. It was three
21 DVDs that came with one of the notebooks. And it is
22 Exhibit 92 to our summary judgment motion.

23 THE COURT: And that's on the -- that's all the
24 exhibits about -- from Ms. -- Ms. Fugate's --

25 MR. BERLIN: Yes, it's Exhibit 92 --

1 THE COURT: -- affidavit?

2 MR. BERLIN: It's Exhibit 92 to Ms. Fugate's
3 affidavit.

4 THE COURT: I think those are just images.
5 Those are still images, not a video. Or not on what
6 I saw. There is no -- there is not the minute and
7 42 seconds of the video on that CD that I received.

8 MR. BERLIN: It's -- there was definitely -- it
9 was Exhibit 92. It's on the third of the three
10 disks. So I just want to make --

11 THE COURT: Okay. Well, in looking at them, I
12 do not see that video, just so you know. I see
13 still images, I see the different -- Howard Stern,
14 all those other different shows, the --

15 MR. BERLIN: Bubba the Love Sponge --

16 THE COURT: Yes.

17 MR. BERLIN: -- and Howard Stern, yes.
18 Understood.

19 THE COURT: The radio, all those different
20 ones, But I don't see the video image in there.

21 MR. BERLIN: It's there as Exhibit 92, Your
22 Honor, and I appreciate the opportunity to clarify
23 that.

24 THE COURT: Okay. Thank you. Well, we're --

25 MR. BERLIN: Thank you, Judge.

1 THE COURT: Thank you.

2 MR. DAVIS: Your Honor --

3 THE COURT: One minute, Mr. --

4 MR. DAVIS: If I could, we'd like to tender.

5 If you're just telling us that what's there is an
6 image and is not the actual 101 seconds, we would be
7 glad to tender the video -- excerpt video right
8 here.

9 THE COURT: So everybody sees it.

10 MR. BERLIN: Do you have another copy of the
11 disk?

12 MR. TURKEL: Objection.

13 MR. BERLIN: This is a copy of the disk. Let
14 me hand it to you.

15 MR. TURKEL: I understand that. We have copies
16 of it. I just don't know whether -- bigger picture,
17 Judge, it makes sense for me if they didn't get it
18 in within the 20 days to not object.

19 THE COURT: They're saying that they did in the
20 three CDs. I'm saying that on the CD that I
21 received, I see still images, I don't see a -- the
22 minute and 40 some seconds of the actual video.

23 MR. TURKEL: Right.

24 THE COURT: So, Mr. Turkel, then, are you
25 having an objection to me looking at it because the

1 one that the Court received or the -- and maybe it's
2 just our antiquated electronic communications of a
3 computer equipment that we have that the legislature
4 gives us no money for, but --

5 MR. TURKEL: I don't want to create --

6 THE COURT: A new record?

7 MR. TURKEL: There is two issues, Judge. I've
8 been up for the second on some of these things that
9 have happened in this case and I do not want to be
10 in a position where I am having to deal with things
11 like invited error. Okay?

12 I don't know what they sent you. I can
13 certainly look at the video as something that is
14 part of this case. Obviously, we all know that.
15 But the problem is, I don't know what they sent you,
16 Judge. I don't know what it says. I know what they
17 served with their copy to me, and so I think I
18 probably would have to object because it didn't get
19 in within the 20 days.

20 THE COURT: And what they served with their
21 copy to you, did you see, was that Exhibit -- what
22 was it -- 92?

23 MR. DAVIS: 92.

24 MR. BERLIN: 92.

25 THE COURT: Was that the

1 minute-and-40-some-second video?

2 MR. TURKEL: I would not have watched any
3 version of it that came with this, because --

4 THE COURT: Why don't we take a break. If you
5 all have computers, you can look. Here is my
6 version. Let me put a little sticker on it. We'll
7 take a break, you can look at my version. Maybe
8 your computers show it differently.

9 MR. BERLIN: Do you want to just do that at the
10 next break and let us finish their argument on the
11 punitives or would you like -- happy to do it in any
12 way they'd like.

13 THE COURT: Weren't you done?

14 MR. BERLIN: Well, I thought maybe -- what I
15 actually wanted to offer was, this is a question
16 that's sort of an unusual question of Florida law.
17 And I thought since I had Mr. Davis here just to see
18 if he had anything that he might want to add.

19 MR. TURKEL: Judge, I'll make it easy.

20 MR. HARDER: Ken.

21 MR. TURKEL: Well, maybe I won't make it easy.
22 Hold on.

23 Judge, let's do this, okay? I have no problem
24 as long as what they're giving you is an authentic
25 copy of what they served me, which we can deal with

1 later. Mr. -- Seth, here, one of them was telling
2 me that it is. Was it, Seth? Sorry. People call
3 Shane Vogt, "Vot."

4 THE COURT: It's that southern pronunciation.

5 MR. TURKEL: Right. You know, it's -- I mean,
6 I lived in Louisiana for a little bit, so --

7 But getting back on path here, here is what I
8 want them to say. All right? That at no point in
9 time, if any part of this particular hearing goes
10 up, are they going to contend you considering this,
11 even though they're the proponents of it, inside the
12 20-day period is somehow an error.

13 THE COURT: Here's what -- so there is no -- no
14 problem going up, I want you all to take the one
15 that's mine. I put on here "the Court's CD." This
16 is the one that was given to me with all the
17 binders. This is the one that contains -- it's DVD
18 No. 3. It contains Exhibit 92. You all can take
19 this, look at it, make sure everybody is in
20 agreement, and then I can just try looking at it on
21 a different computer if that's the issue.

22 MR. TURKEL: That's fine.

23 THE COURT: Okay? So then that creates no
24 problem.

25 MR. BERLIN: I'll put that right here until we

1 break.

2 MR. TURKEL: Great.

3 MR. BERLIN: Thank you, Your Honor.

4 THE COURT: Thank you. Okay.

5 MR. BERLIN: I appreciate the opportunity to
6 clear up the confusion.

7 I did want to -- just because this punitive
8 damages issue is both generally and specific to how
9 it plays out on these motions both for summary
10 judgment and for leave to amend, is a unique
11 creature of Florida state law, I just wanted to see
12 if Mr. Davis, who is here with me, had anything he
13 wanted to add, because he may -- you know, I think
14 I've covered it, but if he has -- just if he wants
15 to say something brief, I'm happy to just make sure
16 I didn't leave anything out.

17 THE COURT: Is that going to be double teaming,
18 Mr. Turkel?

19 MR. TURKEL: I hope not.

20 MR. BERLIN: I hope that that's not.

21 MR. TURKEL: It's a small city. I don't --
22 I'm not from Washington, D.C., Judge. Okay?

23 THE COURT: It's also not my city.

24 MR. TURKEL: Small Pinellas County law school.

25 MR. BERLIN: You have the advantage here.

1 You're from Florida. You know this stuff. I'm
2 learning it as we go.

3 MR. TURKEL: Okay. Well, I get the option.
4 I'll use Mr. Vogt on that then.

5 THE COURT: Mr. Davis.

6 MR. DAVIS: Thank you, Mr. Turkel.

7 I appreciate that, Judge.

8 As you know, I'm not a First Amendment lawyer
9 or a Third Amendment lawyer, but I have done a lot
10 of tort work.

11 THE COURT: And health law.

12 MR. DAVIS: And health law. And punitive
13 damages comes up very rarely, but in the tort area,
14 when it does, I have yet to see -- and here is the
15 dilemma we've already addressed -- leave to amend.
16 I've yet to ever see a plaintiff who doesn't want to
17 take a shotgun on a causes of action to get in front
18 of a jury. They want to see what's going to stick
19 on all those theories. And here we are again, a
20 month away from trial, when they want to amend to
21 add a significant claim for punitive damages.

22 On the flip, where we -- the defendants are
23 here on a summary judgment saying let's use a rifle,
24 not a shotgun, and let's get to right to the heart
25 of what this case is about and not all this

1 extraneous stuff. And so that's what we're
2 continuing to see here. And I'm -- as Mr. Berlin
3 has said, we have guidance from the courts, the
4 federal court, Judge Whittemore, and 2nd DCA on
5 these issues of the First Amendment.

6 So I'm not going to go into that, because
7 that's not what I'm good about. But the punitive
8 damage issue, we still use the White standard, the
9 White vs. DuPont standard. The character of
10 negligence necessary to sustain a conviction of
11 manslaughter it what must be shown. Manslaughter,
12 Your Honor. And that's the whole point here.

13 Again, the law is clear, to obtain punitive
14 damages, they must present clear and convincing
15 evidence.

16 Well, they're trying to shotgun it and we're
17 trying to rifle it and our position is, based on
18 everything you've heard from both sides, they don't
19 have sufficient evidence. That's our position. And
20 today is the time that you have to make that
21 decision.

22 Then when you look at what they are talking
23 about, the plaintiffs, that four of the five points
24 that they're making talk about, my terms again,
25 things that I'm familiar with, prior bad acts of the

1 defendant.

2 Prior bad acts generally don't go in unless
3 they're used to show a habit or something like that
4 in our arena. And prior bad acts, you know, disdain
5 for privacy is what they say Gawker has, under
6 circumstances about no policies and procedures and
7 things. Repeatedly published things that violated
8 basic societal norms.

9 Now, there is a standard in this case for us to
10 consider.

11 And then last one, you know, Gawker's business
12 model.

13 None of those factors that they're using as the
14 basis for their motion for -- to add leave to amend
15 to add punitive damages is relevant to this case,
16 because it -- dissimilar acts, independent from acts
17 upon which the liability is attempting to be
18 premised in this case, cannot serve as the basis of
19 a motion for punitive damages, because the
20 dissimilar acts aren't the basis. They have to come
21 forward with clear and convincing evidence. And
22 then you flip it from leave and flip it into summary
23 judgment. They haven't established that.

24 And that's all I would like to say.

25 THE COURT: Thank you, very much.

1 MR. DAVIS: Thank you.

2 THE COURT: Mr. Turkel, would you like to
3 respond to Mr. Berlin and to Mr. Davis's --

4 MR. TURKEL: I'll tell you, it's -- I want that
5 extra time. It always backfires at the end. It's
6 like the guy who goes on the roller coaster and goes
7 through the exit line and then joins you after you
8 get off the ride and says, "Wow, that was a scary
9 ride."

10 I don't know if Mr. Davis has much of an idea
11 what we were, quote, continuing to do here, but I'll
12 defer to the fact that he just made an argument that
13 talked about negligent standards for summary
14 judgment -- I mean, for punitive damages in Florida.
15 Because nothing to do with the First Amendment cases
16 we've cited have set forth a different standard.

17 We've talked about that standard. I think out
18 of all the things, there's probably not much
19 disagreement on what it takes to get -- because
20 Toffolini tells us what it takes to get there, and
21 it has nothing to do with the negligence standard.

22 Prior bad acts, Judge, are inadmissible to
23 prove liability. 404(b) has a laundry list. As
24 Professor Eleazer taught me of reasons that you can
25 admit prior bad acts or prior statements evidencing

1 bad acts; modus operandi pattern, notice. In this
2 case, good faith.

3 And it's interesting because, you know, you
4 have this idea out there, these First Amendment
5 cases, that you're supposed to do certain things
6 when you're trying to make sure that what you're
7 doing isn't going to end up being subject to
8 punitive damages.

9 And we asked -- if you look at Tab 7. And I'm
10 not going to read all the excerpts, Judge. But we
11 asked Daulerio, "Did you talk to your editor in
12 chief? Did you talk to Mr. Denton?" And we have
13 the excerpts there. He didn't do any of that.

14 Judge, you know, it's not an issue. I think
15 that -- I certainly respect anybody who wants to
16 disagree. That's what we're paid to do. But when
17 Mr. Berlin gets up and argues about Daulerio's other
18 testimony, that's why we have cross-examination.
19 You're not here to determine when he was telling the
20 truth or when he was lying or which of his answers
21 came before the break or after. That's a -- you
22 know, the engine of cross-examination is here to let
23 a jury find out what they want to believe and not
24 believe of Mr. Daulerio.

25 It's interesting, Judge, because one of the --

1 I lost that little -- that little blurb I wanted to
2 talk about here.

3 The issue of good faith -- wait. There it is
4 right here.

5 On page 8 of our response to their motion for
6 summary judgment on punitives, we cite all the cases
7 that say state of mind is almost always a question
8 for the trier of fact.

9 And what they believed at the time that they
10 published it is the critical -- the critical
11 inquiry. And what the cases say -- and I think
12 Toffolini, the district court case in Toffolini,
13 that was the one where they discussed it. I want to
14 read you that language that I just tagged over here.

15 In Toffolini, the district court says as
16 follows, Judge: "Here, LFP" -- this is after the
17 first remand where they were told what -- that they
18 had to go back and review these newsworthiness
19 issues.

20 So in that opinion, the district court
21 addressed the issue of punitive damages in the
22 context of summary judgment. And the Court stated
23 as follows at page 16: "Here, LFP" -- that's Larry
24 Flynt Publishing, I think -- "said it acted
25 innocently because it believed that the nude

1 photographs were subject to the newsworthiness
2 exception. However, what LFP believed at the time
3 of publication is a question for the jury.
4 Accordingly, LFP is not entitled to summary
5 judgment."

6 Does that sound familiar, Judge? The whole
7 idea of their argument is they're allowed to come
8 back years after they did this and say, Well, Judge,
9 at the time, here's what we thought.

10 We're allowed to test that before a jury
11 because it's a state-of-mind issue. And if you were
12 to take their argument to its even logical extreme,
13 it would negate, for instance, in a criminal case,
14 somebody discussing their intent to commit a crime
15 at the time, because two years later they said, "Oh,
16 I didn't mean to. I didn't know the house was
17 occupied when I broke in. I didn't intend to hurt
18 that person."

19 That's why his state of mind goes to the jury,
20 Judge.

21 We're not here for you to tell us who is right.
22 It's a summary judgment standard. Therefore, all
23 the record evidence and all reasonable inferences to
24 be taken therefrom go our way.

25 Moreover, if there is a question of fact, or as

1 the Court has been saying since Snyder vs. Cheezum,
2 the mere possibility of a scintilla of a question of
3 fact, then summary judgment's inappropriate.

4 We just disagree on what their people say. And
5 we think, you know, under 404(b) -- they filed no
6 objections, I think, you know, under 404(b).

7 But the bottom line is, those are prior
8 inconsistent statements. They're going to be
9 relevant, they're going to be relevant to how they
10 treated the general topic of celebrity nudity in the
11 past. And they'll come in under a myriad of reasons
12 you can admit that type of evidence.

13 Moreover -- Judge, this is the last point I'm
14 going to make.

15 They keep talking about the article and why it
16 was newsworthy. And then I come back to what
17 Mr. Berlin started this morning with content and
18 context. If you read the article -- so we're
19 testing their state of mind and their good faith
20 belief as to why it was newsworthy. None of the
21 reasons they say it's newsworthy; i.e., the tape was
22 already out there, Hulk Hogan had gone on these talk
23 shows, he had said this on Howard Stern, he had said
24 this on Bubba the Love Sponge show, aren't even in
25 the article.

1 We look at the article, we don't see I'm
2 writing this article because Hulk Hogan, you know,
3 showed up on the Bubba the Love Sponge show and said
4 no tape existed or whatever they're contending.

5 And those are just fact issues. You know,
6 that's the jury's job to look at. So, Judge, you
7 know, the bottom line is this, Toffolini is about
8 the closest we've got, and the Court there did a lot
9 of things and gave us a lot of guidance. And one of
10 the things the guidance is on is if punitive damages
11 go to the jury on this type of evidence. It went
12 there on less evidence.

13 And then if after the trial, Judge, everything
14 they're saying is true and in these binders and
15 boxes of stuff you have, you find uncontroverted
16 evidence like they're saying, it's a different
17 story. But the record before you now has
18 controverted evidence and questions of fact.

19 Lastly, Judge, I read that Vigil case --
20 Virgil. My bad. All the district court did was
21 take the new standard that I read to you and applied
22 it to the facts of that case. And they even said,
23 in some cases this goes to the jury, but not in this
24 case.

25 I wasn't saying that you never grant summary

1 judgment in these cases. It's clear there are cases
2 out there where they do. What I was saying was
3 opposing what Mr. Berlin seemed to be saying all
4 day, which is you always grant summary judgment in
5 these cases, which is clearly not the case. That's
6 the reason I cited the Virgil case.

7 So last thing, Judge -- and I just want to read
8 this into the record. They keep talking about the
9 district court's opinion or the DCA opinion.

10 On page 23 of our opposition papers, we cited a
11 Second District case from 2004 which the Second
12 District provided as follows with regard to
13 inconclusive effect of the injunctive relief.

14 "The issuance or denial of a preliminary
15 injunction is the paradigmatic circumstance where a
16 determination is made by a court without the benefit
17 of a full hearing on the issues. Because a decision
18 based on less than full hearing, such as the
19 issuance or denial of a preliminary injunction, is
20 by its very nature provisional, it would be
21 nonsensical to give a binding effect on the
22 subsequent pleadings in the same case. This is
23 true, of course, even where the tentative
24 determination of a trial court has been the subject
25 of interlocutory appellate review."

1 I don't know how many times we have to say
2 this. The record wasn't developed. They had none
3 of this evidence. They went as far as to speculate
4 that Mr. Bollea knew about this tape and was in on
5 it, and it's uncontroverted even by Gawker that he
6 didn't. So I just want to put that to rest because
7 they keep bringing it up, and it's just not what the
8 law says.

9 Judge, absent any questions, I'm done. Thank
10 you.

11 THE COURT: Thank you.

12 All right. So next it looks -- why don't we
13 take a break at this point. You all can look at
14 that DVD. Somebody has a computer that they can
15 play it on. Anybody have a laptop that that would
16 play on?

17 MR. BERLIN: There is one over here,
18 Your Honor. There is a laptop -- our laptop is
19 already set up for a PowerPoint. We'll just take it
20 off the PowerPoint.

21 THE COURT: Oh, yeah, okay.

22 MR. BERLIN: Unless Your Honor --

23 THE COURT: No, I think we'll -- we'll --

24 MR. BERLIN: -- you'd like to see it extra
25 large.

1 THE COURT: No, thank you. We'll take a break
2 on that aspect of it. You all can port up that
3 technical potential argument with 2nd DCA. Let's
4 resolve that issue. And then we'll move on to some
5 of the other motions.

6 Okay. So let's take a break for ten minutes.
7 Thanks.

8 THE BAILIFF: All rise. Court is recess until
9 the call of the Court.

10 THE COURT: Ten minutes.

11 (Recess taken.)

12 (Court called to order at 2:55 p.m.)

13 THE COURT: Thanks, you-all. Is everybody
14 here?

15 MR. TURKEL: We're missing Mr. Bollea, but --

16 MR. HOUSTON: He'll catch up.

17 THE COURT: Okay. Thank you. Well, he says we
18 can start. Okay. So we'll -- you can all be
19 seated. Thank you.

20 MR. BERLIN: I have an answer on this if you
21 would like the answer.

22 THE COURT: Yes.

23 MR. BERLIN: Both sides have reviewed this and
24 determined that the video is in here as Exhibit 92.

25 THE COURT: Okay. Thank you. Then we'll just

1 look at it at --

2 MR. HARDER: It plays on Mr. Berlin's laptop.

3 MR. DAVIS: And also, Your Honor, there is a
4 video. We had to adjust the machine to make sure
5 the video worked too.

6 THE COURT: Okay.

7 MR. DAVIS: Just so you know that.

8 THE COURT: Thank you.

9 MR. DAVIS: Yes, ma'am.

10 MR. BERLIN: This was the case that Mr. Turkel
11 took back and --

12 THE COURT: Thank you.

13 MR. BERLIN: That should clean us up from the
14 last session.

15 THE COURT: All right.

16 Do you want to start on these different motions
17 to determine confidentiality of court records? I
18 mean, I don't know that we need to spend much time
19 on any of them.

20 Anybody object to the other side's motion to
21 determine confidentiality of court records? Do you
22 object to his, does he object to yours? See what
23 I'm saying?

24 MR. BERLIN: We talked about that at the break,
25 Your Honor, and the answer is that there were

1 certain -- I expressed to Mr. Harder there were some
2 things that surprised me that they were designated
3 confidential, but we both admitted that we had not
4 actually, given the volume of things for today,
5 necessarily focused on that as much as we probably
6 should have and it probably makes sense to put them
7 at the end. And if we can make some progress on
8 them, but otherwise try to get through whatever else
9 was on the agenda today.

10 THE COURT: Well, just so you know, I think
11 they're all pretty short, so I don't anticipate
12 spending much time on any of those.

13 MR. BERLIN: Good.

14 THE COURT: Okay. So -- all right. Then --

15 MR. BERLIN: It may be the kind of thing -- I'm
16 sorry to interrupt, Your Honor. It may be the kind
17 of thing that we can, you know, talk about.

18 He gave me a couple of examples that surprised
19 me, but we -- I can't say that we've studied every
20 last one of them, and it may not make -- may make
21 more sense to try and come up with any -- a shorter
22 list of what things are actually there is a
23 disagreement about, which there may be just a very
24 small number, and then bring those to Your Honor's
25 attention.

1 THE COURT: I'm just concerned we're running
2 out of time, but all things could change by the
3 2nd DCA.

4 Why don't we move to that issue next. Or you
5 want to go to plaintiff's motion to strike the
6 hearsay from Gawker's statement of undisputed
7 material facts and the supplement -- support -- and
8 the support of motion for summary judgment? Do you
9 want to go to that?

10 MR. HARDER: That would be fine, sure.

11 THE COURT: Okay.

12 MR. HARDER: I actually didn't prepare much of
13 an argument for Your Honor. I'm willing to just
14 submit all the papers.

15 THE COURT: Well, I saw the redlined version
16 that plaintiff's had presented as to what
17 those things -- those aspects that you wanted
18 deleted. Do you have any other argument to that?

19 MR. HARDER: To be honest with you, I didn't
20 even see it, so I don't. It's kind of standard
21 procedure in our world that when we see
22 objectionable evidence, we call it out and let the
23 judge decide whether the evidence is objectionable
24 or not objectionable and whether the objection
25 should be sustained or not. So I'm willing to just

1 submit on that, Your Honor.

2 THE COURT: Well, it was noticed for hearing,
3 so I'll give Mr. Berlin an opportunity to respond.

4 MR. BERLIN: Your Honor, I'll say very briefly,
5 I think most of what I would say is in our papers,
6 but let me just hit a couple of points very quickly.

7 We basically made three points. One is that
8 it's -- the objections were untimely. They came on
9 the same day that our reply brief was due. I don't
10 think I need to belabor that. That's set forth in
11 our papers.

12 The second is that there are relevance
13 objections. And I think that that's largely
14 addressed by the arguments that we've had here today
15 about what goes into the public concern analysis
16 including the context. And we believe that given
17 that that's what the evidence is that the Courts
18 look at, that the evidence that we've submitted is
19 relevant.

20 And, finally, there is a hearsay objection.
21 And the hearsay objection, Your Honor, we are -- and
22 I think I alluded to this this morning, so I'll be
23 quite brief about it.

24 We are not offering this evidence for the truth
25 of the matter asserted. We take no position on

1 whether the things that Linda Bollea said in her
2 book about the plaintiff are true or false. We take
3 no position about the things that he said are true
4 or false. Our point was simply that they were a
5 matter of public discussion. And so we're just
6 offering them for the fact that they were published,
7 not for what they say. And that's not hearsay.

8 They also argued that they're not
9 authenticated, but the news reports are
10 self-authenticating under the Florida Rules of
11 Evidence.

12 The main point I want to make, Your Honor -- I
13 alluded to this this morning, but let me make it one
14 last time -- is this. If you were to use the
15 redlined version of the -- our statement of
16 undisputed material facts and you were to excise the
17 handful of statements that they objected to and had
18 crossed out, it would not make any difference to the
19 result that we have advocated for here today, right?

20 When we put that thing together, we were trying
21 to explain -- without making Your Honor go through
22 volumes and volumes of materials, we were trying to
23 say here is the exhibit, and we were trying to pull
24 out what we thought was salient for the Court to
25 know, even if one were to disagree about that. If

1 you took that, their version of it -- and I'm not
2 saying that's proper. I think that the evidence is
3 properly before you. But even if you were to grant
4 all of their evidentiary, their motion to strike and
5 to limit it to that version which they attached as
6 Exhibit A to their motion, it would be something
7 that we would still have. Remember that sheet this
8 morning of the nine undisputed facts? Right?
9 That's not going to change those nine overall facts,
10 because it's still going to be true that the things
11 were being discussed, and it's still going to be
12 true that the sex tape was being discussed, and that
13 doesn't change even if some of those things are
14 stricken.

15 So in that instance, I would -- I don't know
16 that that's necessarily the answer to whether the
17 motion to strike should be granted or not, but I did
18 want to highlight that, because even if it's
19 granted, I'm not sure that it makes a difference to
20 the overall outcome.

21 And that's all I have on this subject.

22 THE COURT: Well, that was my thought.
23 Thinking as to the practical aspect of it, since
24 I've already reviewed it for their motion, I don't
25 know what practical effect it has if I strike it.

1 If it comes about from some other context and
2 considering it as a confidential record or if it
3 comes about later on because of the defense thinks,
4 oh, because I've reviewed it for the motion for
5 summary judgment, that I'm agreeing that it's
6 admissible to the jury. Totally separate issues.
7 So I'm not sure of the practical effect of me
8 granting the motion to strike. I mean, I --

9 MR. BERLIN: And that's sort of my point,
10 Your Honor --

11 THE COURT: Right.

12 MR. BERLIN: -- which I don't know that it
13 makes a big difference. And even if you -- even if
14 you were, you know -- if you were, you know, giving
15 opinion where you said I will rely on the following,
16 you know, 20 things in reaching whatever conclusion
17 I reach; you know, if thing 19 were one of the
18 things they objected to, probably things 1 through
19 18 and 20 are sufficient to support the point you're
20 making and it probably doesn't matter. But that's
21 sort of the point that I was making, I think.

22 THE COURT: Okay. Mr. Harder, do you see it
23 differently than I do? I don't --

24 MR. HARDER: Well, I mean, we find all of the
25 evidence or so-called evidence that we objected to

1 to be problematic for the reasons that we stated.

2 And, obviously, I'm not going to go through each one
3 point by point. We're flagging it for the Court so
4 that the Court can determine. Because if the Court
5 is going to, for example, rule in favor of summary
6 judgment based upon faulty evidence, that would be
7 improper. That's really the point of that document.

8 And also, as far as relevance, we believe
9 strongly that if there is an alleged article from
10 the National Enquirer, for example, citing to
11 something that Mr. Bollea's ex-wife supposedly said
12 and citing all kinds of unnamed insiders, there is
13 massive amounts of, first, hearsay problems, as well
14 as relevance problems because we failed to see the
15 connection between that sort of article and how it
16 correlates to a sex tape of Heather Clem has nothing
17 do with what that article is talking about. So
18 that's just an example.

19 THE COURT: So here's what I'm going to do.
20 I'm going to deny the motion to strike, but I'm
21 going to note them as your objections, so I'll
22 consider them really more objections to some of the
23 information that the defendants were relying on in
24 the motion for summary judgment.

25 MR. HARDER: Thank you.

1 THE COURT: Thank you. Okay. So there is one
2 ruling.

3 All right. So the only things I have left
4 are -- let's go through -- discussing the 2nd DCA's
5 order that they had given striking the trial
6 calendar and the trial order and plaintiff's
7 response to that. We have that. These other
8 determining of confidential records. And then,
9 otherwise, we're going right to the objections on
10 the financial disclosure, right?

11 MR. BERLIN: That's right.

12 MR. TURKEL: Yes.

13 THE COURT: Which would you like to do first?

14 MR. TURKEL: Judge, let's maybe take up the DCA
15 issue.

16 THE COURT: Yes.

17 MR. TURKEL: We sent you a letter.

18 THE COURT: Yes.

19 MR. TURKEL: We don't really -- we indicated
20 what we're willing to do to keep the trial date.
21 What we were really concerned about was they sent a
22 mandate out. And the mandate says an opinion is
23 forthcoming. They haven't sent the opinion.

24 So we can assume from what they did that their
25 problem is Kinja staying in the case, that the way

1 we severed it and so forth, but being severed out of
2 it, I should say.

3 I think our letter made it pretty clear what
4 we're willing to do, and we're willing to do that.
5 We just didn't want to go first without talking to
6 you.

7 It's kind of weird because they don't really
8 say much in the blurb that they gave us, and they
9 say the opinion's forthcoming. And we check the
10 docket every day and there is no opinion.

11 THE COURT: I checked yesterday.

12 MR. TURKEL: Yes, Mr. Vogt just checked,
13 actually, on our last break.

14 And so we're willing to proceed as we set forth
15 in our letter, which is to dismiss Kinja and keep
16 the trial date. And I think that's a fair
17 assumption.

18 I did see, actually, a Fourth District case --
19 I didn't bring it today -- that said -- bizarre how
20 this happens. But it came out like a week after we
21 got that mandate that says you can make, you know --
22 what is it -- logical assumptions as to what
23 generated the mandate, if they don't tell you.

24 But it seems pretty obvious that what the
25 problem is going to be is this issue that Kinja was

1 severed. So we'll dismiss them out, we'll keep the
2 trial date. I think we have to do an order
3 resetting the trial, just to make the record clean.
4 But that's all that we can really -- just so it's
5 clear, I think.

6 THE COURT: But do you agree that we should
7 wait until this order comes out?

8 MR. TURKEL: I think if everybody is good
9 leaving the trial date on the way it is --

10 MR. HARDER: Our concern, Your Honor, is that
11 everyone has been preparing for a July 6th trial.
12 So as long as we wait until -- I guess it could give
13 me either two of two ways, where you don't fill up
14 your docket for July 6th and for those two weeks and
15 then we see what the court of appeal's opinion is.
16 And if it's what we suspect it is, which is that the
17 court of appeal doesn't want Kinja back in the case
18 and be on separate tracks, it should be on the same
19 track, then at that point in time we can just
20 dismiss out Kinja and keep the July 6 trial date.

21 The other way to do it is we dismiss Kinja now,
22 but my concern is, if we dismiss them now and then
23 the court of appeal opinion is something different
24 from what we assume it is, then where are we at that
25 point.

1 MR. TURKEL: Our big concern is we just keep
2 our trial weeks and proceed towards that. I mean,
3 again, we're ready to remedy what could be the
4 obvious sort of thing.

5 THE COURT: Mr. Berlin, do you have any
6 comments?

7 MR. BERLIN: Your Honor, I'm a little -- let
8 me -- let me express what I think is our answer and
9 which is this, which is that some of what I just
10 heard seems -- it's unclear to me what to make of
11 that. And I don't mean to -- I'm not trying to be
12 difficult. It seems like there is a part that says
13 we'd like to dismiss Kinja, but we don't want to
14 dismiss Kinja if it means that the court of appeals
15 says something different and we don't need to
16 dismiss Kinja.

17 And I guess I would respect that. I would not
18 be unhappy if Kinja were dismissed. I've been
19 arguing for two and a half years that it should be
20 dismissed, both here and in the DCA, so that seems
21 like a good result for me and I'd be happy to see
22 that happen.

23 I was sort of expecting, in the wake of the
24 letter from the plaintiff's counsel to you, that
25 they were going to do that. And I haven't seen

1 that. And I now understand that maybe they'd also
2 like to see what the DCA opinion, when it comes,
3 says. They've issued the order. I don't think it's
4 the mandate. I think it's just an order that will
5 issue an opinion.

6 But I -- what I'd like to do, if it's all
7 right, now hearing that, which I didn't really grasp
8 from the letter -- I know we just had a break, but
9 what I think might make sense is either now or if
10 you want to do other stuff, at the next break, I
11 should confer with my client and my colleagues just
12 to make sure that I'm on -- I don't want to speak
13 for the client about what its position is without
14 knowing, because I now have additional information
15 which I didn't really have about what the
16 plaintiff's position is.

17 I don't want to give you a -- I want to give
18 you a good answer, but I'd also like to give you the
19 answer that is properly speaking on behalf of our
20 client.

21 THE COURT: Well, I think that if the issue
22 is Mr. Harder is concerned that I was going to set
23 other things, I always have other things, so --

24 MR. BERLIN: Right. We're not the only thing
25 on your docket, of course.

1 THE COURT: No. No. So -- but we have a
2 really great team of other judges here, so this case
3 goes, and my other work goes to somebody that's --
4 their cases have settled out. Next week, I have no
5 jury trials, all mine have settled. I'll be taking
6 one of one of the -- some of the others that my
7 colleagues happen to have extras. So there is
8 always -- and I currently still have, I think, three
9 or four other trials set for the same docket. So
10 I'm not concerned about that from that standpoint.

11 That being said, this trial continues to go,
12 this is the trial I'm doing. I wouldn't pass this
13 trial off to my other colleagues because there is
14 too much time that we have in all of these different
15 issues and --

16 MR. BERLIN: Because you like them.

17 THE COURT: Yeah, I do like them.

18 MR. BERLIN: I'm sorry.

19 THE COURT: That's right.

20 So I'm fine for keeping it on this schedule. I
21 don't want to run afoul, though, of the appellate
22 court in saying, oh, she kept it on for trial when
23 we told her to take it off. So, you know, that's
24 another concern.

25 But the -- we have these other -- we have

1 plenty of other work that we're doing between now
2 and then headed towards that goal, so I don't see
3 any reason for, at this point, necessarily taking it
4 off based on whatever opinion comes out that totally
5 may change the game, the 5th, depending on what you
6 want to do, what you want to do, and then we get
7 to -- have to wait.

8 MR. BERLIN: I should probably confer before
9 giving you an answer.

10 THE COURT: Yes.

11 MR. BERLIN: Because, again, I got a different
12 piece of information I didn't really fully have from
13 Mr. Harder.

14 THE COURT: Well, why don't we just take a few
15 minutes break and you just let me know when you're
16 ready.

17 MR. BERLIN: Thank you, Your Honor. We'll do
18 so.

19 (Recess taken.)

20 (Court called to order at 3:28 p.m.)

21 THE COURT: Here is what I want to do. I just
22 watched the video, Exhibit 92.

23 Thanks. You can all be seated.

24 But what I see as Exhibit 92 is not what I'm
25 seeing in all the written material here. So how

1 about put this on somebody's laptop and play it so
2 everybody gets to see and so we see that
3 Exhibit 92 -- because this Exhibit 92 that I just
4 saw is not consistent with all the written material.
5 Okay?

6 Anybody have any objections to that?

7 MR. BERLIN: Happy to do it, Your Honor.

8 THE COURT: Mr. Harder, any objections?

9 MR. HARDER: No.

10 THE COURT: Okay. Great.

11 MS. DIETRICK: Over here?

12 THE COURT: I don't care where. I want
13 everybody to see it. So wherever it's going to be.

14 Sorry, Mr. Bollea.

15 So here, somebody come and take this. And
16 we're going to flick it to 92 so that everybody sees
17 exactly the same thing, because I -- it's just not
18 consistent with the --

19 MR. BERLIN: Or if you would like, we can bring
20 the computer up to the bench and then --

21 THE COURT: Okay. That's fine.

22 MR. BERLIN: -- somebody from each side rather
23 than --

24 THE COURT: That's fine, but I want somebody
25 from both sides up here.

1 MR. BERLIN: Fair enough.

2 MR. HARDER: My only concern, Your Honor, is
3 the confidentiality aspect of it, because --

4 THE COURT: Come up here. You're going to come
5 up here, a person from each side.

6 MR. HARDER: We're happy to have you --

7 THE COURT: No, I'm saying --

8 MR. HARDER: I'm sorry?

9 THE COURT: We're going to do the video up
10 here.

11 MR. HARDER: Right.

12 THE COURT: You're going to show me the video
13 up here.

14 MR. HARDER: That's fine.

15 THE COURT: You're going to be up here,
16 Mr. Berlin or whoever --

17 MR. HARDER: That's fine.

18 THE COURT: -- from each side so that we can --

19 MR. HARDER: I just don't ever want to hear an
20 argument that we showed it in open court and so,
21 therefore, we've --

22 THE COURT: I see.

23 MR. HARDER: -- waived all our confidentiality,
24 because that's not what we're doing here.

25 THE COURT: Okay. Perfect. Thank you.

1 I just want every -- each -- I just want
2 everybody on the same page.

3 MR. SAFIER: But the screen is --

4 THE COURT: Yes, but it has subtitles to it.

5 Okay. But I want everybody -- you hold it back
6 so that both sides can see it.

7 MR. BERLIN: They had looked at it. So that's
8 fine.

9 MR. SAFIER: Okay. Ready?

10 MR. HARDER: Start from the beginning.

11 THE COURT: Is that the beginning?

12 (Video played for the Court.)

13 MR. HARDER: Wait, this is really dark. Really
14 dark.

15 MR. HOUSTON: Well, if you step back --

16 MR. BERLIN: We can turn up the screen.

17 MR. SAFIER: Yeah. That better?

18 (Video ended.)

19 THE COURT: Okay. So let's go back on the
20 record.

21 Now, Mr. Harder, is this the video that you
22 believe the same video that was shown on Gawker?

23 MR. HARDER: Honestly, Your Honor, it's
24 similar. I'd have to compare them to be, you know,
25 absolutely certain, but it's similar.

1 THE COURT: Mr. Berlin, obviously you believe
2 it is?

3 MR. BERLIN: That's correct, Your Honor.

4 THE COURT: All right. Thank you.

5 MR. BERLIN: We've made that representation.

6 THE COURT: Okay. Thank you.

7 MR. HOUSTON: Thank you.

8 MR. BERLIN: Your Honor, here is the case file.

9 THE COURT: Oh, okay. What happened to it?

10 Now, we took that little break for an
11 opportunity to discuss the DCA case. So what are we
12 doing from there? Was anyone able to resolve
13 anything or come up with any suggestions?

14 MR. BERLIN: Well, Your Honor, you may ask for
15 the defendant, Gawker defendants' position on the
16 subject, and I guess I would say three things.

17 One is perhaps to say the obvious, that we
18 think that summary judgment should be granted and
19 there should be no trial date necessary, but I feel
20 compelled to say that.

21 The second thing is, I think two things, if
22 we're -- if that is not going to be the case, there
23 are two things that I think need to happen.

24 Bless you, Your Honor.

25 One is that before -- as I read the two- or

1 three-sentence order from the DCA, it seems like if
2 we were going to try and move forward now, that two
3 things would need to happen. One is that Kinja
4 would need to be dismissed. And I understood the
5 plaintiff's letter. I was sort of surprised and a
6 little confused, which as I admitted before the
7 break, I thought that their letter indicated that a
8 dismissal of Kinja, which would be an adjudication
9 on the merits, would be forthcoming so that Kinja
10 would be out of the case.

11 I think I overanalyzed the DCA order to say
12 that since the parties all have to go to trial
13 together, if Kinja was not out, we would have to
14 resolve the jurisdictional question about Kinja
15 first and that would have to be conclusively
16 resolved, they'd have to answer before we could have
17 a trial date set.

18 They're saying they want go in a different
19 direction, but there is a little bit of -- and I
20 don't mean this in a pejorative way, but there's a
21 little bit of wanting to have cake and eat it too,
22 because they sort of say, well, we want Kinja to
23 be -- we would dismiss Kinja, but we sort of want to
24 see what the DCA is going to say.

25 They were lamenting at the break that the DCA

1 has not yet given us an opinion and we don't really
2 know what they're going to say. And I have been
3 told both by Mr. Davis and Mr. Thomas beforehand,
4 and then Mr. Turkel confirmed that this is the first
5 time in their experience with the DCA ever that they
6 have seen it issue an order like this prior to
7 issuing an opinion. So nobody really knows what to
8 make of it and we're going on uncharted territory.

9 But the first thing that seems to happen that
10 needs -- seems to need to happen is that Kinja needs
11 to be dismissed in a way that they're conclusively
12 out of the case. And my understanding from the
13 plaintiff's counsel is that they're prepared to
14 actually do that as early as Monday.

15 The second thing that I think needs to happen
16 is since the -- since the order that Your Honor
17 issued was quashed, you would need to issue a new
18 order. And the question that I have in this
19 question is whether or not you can do that now while
20 the DCA hasn't yet issued its opinion.

21 I don't know the answer to that question off
22 the top of my head. I asked Mr. Davis and he said
23 he was not sure. I think that the -- the short
24 version of this is Your Honor told us in the fall,
25 you know, we're going to go to trial in July, and we

1 took that seriously. We tried to do all sorts of
2 things to streamline that. Combined these punitive
3 damages motions and the like. And to move the case
4 forward to -- we worked -- I think it's fair to say
5 that everybody on our team, and I think this is true
6 on plaintiff's side, has worked incredibly hard to
7 meet that objective.

8 And so where we are on that is, you know, we're
9 a little bit in limbo because we, on the one hand,
10 you know, are gearing up to go. On the other hand,
11 we're in this sort of limbo where we're being told
12 by the plaintiff I would dismiss Kinja, but I
13 haven't yet done it. Now they're saying they will.

14 And then there's the second piece of limbo,
15 which is can the DCA -- can Your Honor reset an
16 order while the question of setting a trial order is
17 before the Court.

18 And as I say, I don't know the answer to that.
19 And I think it's important to -- you know, given the
20 procedural history, to make sure that what we're
21 doing is done properly, so I don't know the answer
22 to that second piece.

23 And, you know, that's really where we are. And
24 I think it sort of comes after dismissing Kinja,
25 because, obviously, one thing that I think is clear

1 from even the brief order the DCA issued is we
2 cannot set -- there can be no setting of the trial
3 date for -- you know, for this case until Kinja is
4 either out of the case or has answered. Right. I
5 mean, I think that's the point of the order was.
6 And that --

7 So I think we're a little bit in this limbo,
8 then, so it's -- I realize that's a little bit of a
9 vague answer. I'm not trying to be vague, but I'm
10 trying to be candid with where we're coming from.

11 I would like to see if there is a way to do
12 that, but I obviously, you know -- I've been waiting
13 for Kinja to be dismissed for a long time and I
14 would like to first see that happen, and then we
15 would like to try and find out the answer to the
16 question about whether there is some way to do this
17 now and keep that date. And if there is not, I
18 mean, our view about this case all along -- I've
19 said this many times, so I'm sorry for repeating
20 myself, our view about this case.

21 We think we have strong legal defenses, we've
22 argued them at a couple of key junctures, at the
23 motion to dismiss, at the motion for summary
24 judgment stage, but if those things are -- and we've
25 focused on those things on issues that we think are

1 not disputed issues of fact. We also think we have
2 very good factual elements. And if we're not
3 getting to be dismissed on legal grounds, we'd like
4 to be dismissed -- we'd like to end this based on a
5 factual ground. So we would like to do it in an
6 orderly fashion but also bring this thing to a head
7 so it can be adjudicated in that way that it needs
8 to be. So I'm not sure how best to do that, but
9 that's really the concern that we have which is we
10 can't do it until Kinja is out. And we couldn't do
11 it today unless Kinja was dismissed. Also do it --
12 but then the question is could you do it now.

13 Then I think, also, you know, we do have an
14 overlay -- and this maybe bleeds into the next
15 topic, but we have an overlay of, you know, we
16 already have a -- there were a lot of deadlines that
17 were set in this order that were now quashed that,
18 if we were going to try and reinstate, run pretty
19 close together and, you know, we're now -- no matter
20 where we set, there was no -- there was no
21 consideration of punitive damages, discovery of
22 punitive damages depositions.

23 And, you know, at some point, you know, you're
24 put in a schedule for motions in limine, and I think
25 this process of briefing summary judgment has, in

1 fact, revealed that maybe there are a few more that
2 we hadn't anticipated that will be before Your Honor
3 on a fairly quick timetable. So one of the things I
4 think we've got to do for reissuing the order is try
5 and figure out how that stuff is going to get in
6 there. But that's, you know, after the question for
7 figuring out whether essentially it's authorized
8 given that the DCA still has this question and it's
9 a big mystery, which is we don't know what they're
10 going to say.

11 I would have thought that this issue was a
12 fairly simple one, and if they had added a couple
13 more sentences to their order, they might have made
14 themselves clearer. But they obviously decided they
15 had more to say on it than could be done quickly,
16 and so we're waiting.

17 So that's really where we are. And I hope
18 that -- I hope that that answer is helpful. And if
19 there is any questions about what I just said, I'm
20 happy to try and answer them.

21 THE COURT: Is anybody's appellate counsel
22 here? No? Yours is not?

23 MR. BERLIN: No.

24 THE COURT: You're appellate counsel?

25 MR. TURKEL: I mean, I've argued appeals,

1 Judge, but -- let's say I've argued against
2 appellate specialists and won appeals, so I'm not
3 really sure.

4 THE COURT: I guess --

5 MR. BERLIN: I argued one appeal in Florida
6 against Mr. Turkel, so that's all I know I can tell
7 you.

8 THE COURT: I guess my question would be this:
9 If -- I thought I had it right here -- if plaintiff
10 dismisses Kinja, is it a proper procedure then for
11 one of the parties to ask the appellate court for
12 leave to just go -- you've been dismissed, now let's
13 go forward with the trial? You know, like sort of
14 like an advisory opinion.

15 MR. TURKEL: Judge --

16 THE COURT: I don't know.

17 MR. TURKEL: -- here is what I -- here's what
18 I'm trying to avoid, we're trying to avoid. All
19 right? We never -- you know, we sent you a letter
20 in response to this opinion. And the reason why is
21 Mr. Harder and myself were concerned that when you
22 got that opinion, we were going to lose our date or
23 you were going to take it off the calendar. I said
24 I don't think she will, but let's send the letter
25 anyway. And that was the point.

1 The rest of it, from that point, I mean, we
2 didn't say the dismissal was imminent, but we are
3 going to dismiss Kinja if that's the way we keep our
4 trial date. We're not trying to have our cake and
5 eat it too. The bottom line is, we're willing to
6 dismiss it. We wouldn't have put it in a letter to
7 you if we weren't willing to dismiss Kinja.

8 What I'm worried about is this. And this is
9 the part that maybe generated the eight or nine
10 interlocutory appeals we've had to deal with in this
11 case.

12 We tried -- maybe it's five or six. Whatever
13 it is, it's more than I'm used to dealing with in a
14 case.

15 We tried to sit here and say, listen, if we're
16 all onboard and we've all been working hard to go
17 try this case in a month, we'll dismiss Kinja, we'll
18 give Judge Campbell a new order, and we'll take the
19 deadlines up from that date, we got a month left,
20 and let's finish it up. Okay?

21 What I don't want to happen is what tends to
22 happen in this case. We do that and the next thing
23 you know they file a notice of appeal that you
24 didn't have jurisdiction to enter that order.
25 Right? That's what I don't want to happen.

1 And that's why when I hear a ten-minute speech
2 on what seems to be a two-minute issue, I worry
3 about it. And that is, we're going to do this and
4 dismiss Kinja, and they're going to be, oh, great,
5 Kinja is out, now let's appeal the order that said
6 for the judge resetting the trial without Kinja in.
7 And I don't want that to happen. I don't want it to
8 happen to you and I don't want it to happen to us.

9 Now, are you allowed to do it? You have a
10 vested jurisdiction. You've been presiding over the
11 case consistently. They didn't contend that you
12 didn't have jurisdiction to hear summary judgment
13 motions today, so I don't know why you wouldn't be
14 able to enter an order that resets this trial with
15 the pending deadlines without Kinja in it. That
16 seems to be what the DCA is saying in their short
17 and unclear opinion.

18 I don't know why it matters unless somebody
19 intends to complain and we don't intend to complain.
20 So I don't know what they're really saying. Okay?
21 I don't know. I have no idea, frankly, what they're
22 saying. We're willing to do what we said, which is
23 dismiss Kinja and send you a new order.

24 We have cases, Judge, that say technical
25 defects in setting a trial, for instance, situations

1 where it gets amended on a missing word and account
2 seven days before trial. Can give you exceptions
3 for Rule 1.44 -- what is it -- 440.

4 And so, you know, this to me would fall into
5 that category. It's not like everybody isn't on
6 notice of a trial and hasn't been adhering to
7 deadlines which were set some time ago. I just
8 don't want to see this turn into one of these deals
9 where we do it, we send you the order, the next
10 thing, you know, it's up on appeal.

11 Now, if they're going say they're not going to
12 do that. I don't see why we can't proceed that way.

13 I don't know. Mr. Harder, I think I said
14 everything we've talked about.

15 THE COURT: Well, I think, though, from
16 Mr. Berlin's perspective -- certainly you're free to
17 speak for yourself, but I think from his perspective
18 you're saying, well, you're saying you're going to
19 dismiss it, but when is that going to be?

20 MR. HARDER: No.

21 THE COURT: So --

22 MR. HARDER: We're willing to dismiss Kinja
23 right now.

24 THE COURT: Oh.

25 MR. HARDER: But we just don't want what

1 Mr. Turkel just described.

2 THE COURT: I understand. Okay.

3 Because I sort of agreed with Mr. Berlin that I
4 was saying, well, we're going to dismiss it, but --

5 MR. TURKEL: We wanted to get to today and talk
6 to you --

7 THE COURT: Sure.

8 MR. TURKEL: -- about it before we did it.

9 THE COURT: Okay.

10 MR. TURKEL: Because we had everybody at the
11 party and we could all discuss what we're going to
12 do with it.

13 THE COURT: Right.

14 MR. TURKEL: I just don't want to send you that
15 order setting it for trial without Kinja in there --

16 THE COURT: Right.

17 MR. TURKEL: -- and all of a sudden we get
18 appealed, or you get appealed. We're all talking
19 about resolving this.

20 THE COURT: So Mr. Berlin, I'm hearing they're
21 ready to dismiss Kinja.

22 MR. BERLIN: That's excellent news, Your Honor.

23 THE COURT: And they're not waiting on the
24 order from the 2nd DCA.

25 And so are you -- I guess what they're asking

1 then is, does that mean you are agreeing to we'll
2 just reenter a new order for July on the remaining
3 defendants?

4 MR. BERLIN: And the answer is -- and I wasn't
5 trying -- I'm not trying to be difficult on this
6 question. The answer is, I think that it's
7 important -- and we've said this all the way
8 through -- to try and do this in a procedurally
9 proper way. And I don't know whether Your Honor can
10 do that, because it's this odd situation.

11 I agree with Mr. Turkel that the Court, you
12 know, order did not divest this Court of
13 jurisdiction to do things like declare summary
14 judgment. But the thing that it has before it is
15 the question of setting a trial order. And so when
16 it has that before it -- and, again, I'm not a
17 Florida appellate specialist. I'm asking the
18 question.

19 THE COURT: I think Mr. Davis may have the
20 answer for you outside, so why don't we take a brief
21 break and go and you can go and confer with
22 Mr. Davis.

23 (Recess taken.)

24 THE COURT: Do you need more time?

25 MR. HOUSTON: No, Your Honor.

1 MR. TURKEL: I don't think so. Don't know what
2 they're going to say, but -- they have more people
3 than us, therefore, more ammunition, more resources.

4 THE COURT: Well, Mr. Davis is out there busy
5 weighing it on his phone. I could see him.

6 MR. TURKEL: He's got the weight of
7 a gigantic grumbot. I mean --

8 THE COURT: Right.

9 MR. HARDER: Maybe I'll just walk out.

10 MR. BERLIN: You making a weight comment about
11 me, Ken?

12 MR. TURKEL: Huge.

13 MR. BERLIN: First he's well seasoned, then
14 he's -- really?

15 MR. TURKEL: What have you got?

16 MR. BERLIN: You're going to teach him to get
17 involved in this case. He's going to run for the
18 hills.

19 THE COURT: And the last attorney that -- last
20 hearing I was involved with with Mr. Davis, that was
21 really interesting.

22 MR. DAVIS: That really was interesting.

23 MR. BERLIN: Your Honor, the answer to the
24 question, Mr. Davis was able to get his appellate --
25 board certified appellate specialist on the phone.

1 And the question that I raised was actually seemed
2 like a reasonable -- was an instinctively reasonable
3 question. And what his appellate specialist said --
4 and he can amplify this if there is any questions
5 about it -- is essentially your instincts were spot
6 on, which is that the appellate specialist said that
7 while the matter is still before the DCA, because
8 they still have their opinion to issue and the
9 mandate to issue, that you may not have jurisdiction
10 to reset a -- to reenter a trial order, and proposed
11 that what we might do is have you -- have, you know,
12 probably the plaintiff, but, you know, to go to the
13 court of appeals with the motion and explain that
14 they dismissed Kinja and to ask them to do -- I'm
15 not sure exactly what the relief would be, but to
16 give some relief that would allow Your Honor to then
17 reissue the --

18 THE COURT: Trial order.

19 MR. BERLIN: -- the trial order with all the
20 dates that are in there. And that's what they're --
21 the appellate gurus are apparently saying.

22 Did I get that about right?

23 MR. DAVIS: Yes, ma'am.

24 THE COURT: Thank you.

25 MR. TURKEL: Judge, I've also spoken to an

1 appellate guru. His name is David Caldevilla. He
2 is not of record in this case, but he is board
3 certified also.

4 He told me, because the writ's interlocutory,
5 you have jurisdiction to do everything you want to
6 do in this case except enter a final judgment.
7 Haha.

8 MR. BERLIN: Let me --

9 MR. TURKEL: How's that feel?

10 MR. BERLIN: Let me see if I can sort out what
11 I understand to be potentially the disconnect
12 between the two. And I don't know what the -- is it
13 David?

14 MR. TURKEL: I don't -- he's not to be -- he's
15 just a guy I talked to, but, yeah, he's a board
16 certified guy.

17 I don't -- it's not going to matter because
18 there's no case law in front of us. There's nothing
19 to give Judge Campbell except two lawyers who aren't
20 in the courtroom. But here is what I suggest,
21 Judge, okay, because --

22 THE COURT: Bring my three folks here behind
23 me?

24 MR. TURKEL: Well, I don't know. I mean, you
25 know, the easy thing would be to say, Seth, just

1 waive your rights to appeal the order she enters.
2 Then we're all well and good and we're going to
3 trial in a month. But I doubt I'm going to get that
4 concession, right?

5 MR. BERLIN: I don't think you can waive
6 subject matter jurisdiction. The Court either has
7 it or it doesn't have it.

8 MR. TURKEL: Well, then everything you did
9 today, Judge, seems to me to not matter. Why are we
10 even here today? Your jurisdiction seems to be in
11 question. Well, I'm sorry, I just -- you know,
12 maybe we're trying to get to a result here. We're
13 not trying to talk about the process.

14 MR. BERLIN: I'm trying to find a way -- look,
15 I'm trying to -- I was trying to come up with
16 something constructive.

17 I think that the difference between normal writ
18 petition, which is interlocutory and doesn't
19 transfer jurisdiction to the court of appeals and
20 this proceeding, is that when the Court issued its
21 order saying we grant the writ petitions, part of
22 granting a writ petition, as I understand, and I
23 learned about this in the prior writ petition that
24 we had which was dismissed, was that they accept
25 jurisdiction. Once they've issued an order saying

1 we grant the writ petition, they've basically taken
2 jurisdiction over not the whole case, but the issue
3 that is before them, which is the setting of a trial
4 order.

5 THE COURT: Well, here's what I'm going to do.

6 MR. BERLIN: And that's why Mr. Davis's person
7 is telling us that.

8 THE COURT: Here's what I'm doing. I'm going
9 to give you some rulings. You all are then going to
10 do some orders on those. And then we are going to
11 deal with the remaining motions that I think that we
12 have. You all will each have an opportunity to go
13 back to your appellate folks and decide what you
14 want to decide, and then we'll move forward from
15 there. And maybe Monday the appellate court will --

16 MR. TURKEL: Hold our spot on the calendar,
17 Judge. We'll figure something out. That's all we
18 could ask for.

19 THE COURT: I'm not changing my trial orders at
20 this point for July, so it's good.

21 All right. So defendant Gawker's motion for
22 summary judgment is going to be denied.

23 And plaintiff's motion for leave to add a claim
24 for punitives, Court finds there's a reasonable
25 basis to present to a jury, so that would be

1 granted.

2 And the defendants' motion for summary judgment
3 on the plaintiff's proposed claim for punitives is
4 denied.

5 All right. Let's spend a few minutes -- well,
6 do you all want an opportunity to go back and look
7 at these confidential court records? I mean, I know
8 you've been doing other things, but -- I can give
9 you my -- my basic view of all of them is to grant
10 them. I recognize the -- both sides have put
11 forward what they want to put forward, but I also
12 recognize that they both contain confidential
13 aspects in them.

14 So unless there is some -- unless I'm hearing
15 some objection to one of the other's motions, my
16 inclination is to grant both plaintiff's and
17 defendants'.

18 MR. BERLIN: I think our concern, Your Honor,
19 was when we went to prepare the part of the
20 statement of undisputed material facts that was
21 confidential -- we had two. One is a
22 nonconfidential one, which was the bulk of it, and
23 then there is a much shorter version that's
24 confidential.

25 There were a number of facts that were in that

1 motion that were -- struck us as unusually --
2 unusually -- unusual for being designated as
3 confidential. And that's why we were concerned
4 about that particular issue, because while, you
5 know, there is some legitimate reason to treat
6 something as confidential, then fine, you treat --
7 we have some concerns, like we did when we were here
8 a couple of months ago or a month ago on the trial
9 exhibits.

10 THE COURT: Do you have it to pull up?

11 MR. BERLIN: Yeah, I do.

12 THE COURT: Or a specific example?

13 MR. BERLIN: Yes, Your Honor.

14 At any rate, I guess I can speak about this in
15 the court, because it's otherwise empty without
16 that, but -- so, for example, Your Honor, the first
17 one that was confidential was something that the
18 plaintiff has designated from his deposition
19 testimony. The first item says "2000, Hogan
20 announced to Jay Leno on the Tonight Show that he
21 was, quote, going to run to seek the office of the
22 President of the United States. We -- struck us as
23 quite odd, something that was aired on national
24 television to be confidential.

25 THE COURT: Can you tell me, was that one in

1 the -- I don't think that was in Mr. Harder's
2 affidavit and all the attachments to that.

3 MR. BERLIN: No, that's actually in ours.
4 That's in our -- in other words, that's in our
5 motion. We designated it as confidential because we
6 had to, but --

7 THE COURT: I see. Okay.

8 MR. BERLIN: -- we sort of scratched our heads
9 on why would that be confidential.

10 He said -- on the next paragraph of our
11 confidential statement of undisputed material facts
12 says, "He testified that his public persona includes
13 training, savior and prayers, and eat your vitamins,
14 being a person of faith, being a family man, and
15 being wholesome.

16 I mean, these are things that he said many
17 times publicly. We were sort of scratching our head
18 why is that confidential.

19 Another one on the next two down, until shortly
20 before this lawsuit begin, Bubba the Love was
21 Hogan's best friend. And there's testimony about
22 that that's been designated as confidential.

23 The next line is, "He was the best man at
24 Bubba Clem's wedding." That was publicly reported
25 and there was media at the wedding. Like it --

1 these are things that we don't -- they're not, you
2 know, usually consequential, but we were sort of
3 scratching our heads about why these things would be
4 designated confidential that are now part of a
5 record on which the Court is making decisions
6 about -- about, you know, something as significant
7 as summary judgment would be -- would be
8 confidential.

9 And those are just some examples. I can go on.
10 But that's sort of why we filed the motion and
11 raised the question in the motion about whether the
12 stuff was properly designated as confidential.

13 And, you know, again, Your Honor, maybe the
14 thing to do -- because I did mention this to
15 Mr. Harder today. He said that he hadn't really
16 focused on it that carefully. And to be honest, I
17 have focused on it a little bit, not line by line.
18 It might make sense for us to try and narrow the
19 issues and then bring them back to you next time
20 we're here.

21 THE COURT: We're just running out of time.

22 MR. DAVIS: We're talking --

23 THE COURT: We're just running out of time to
24 bring it back to another hearing. We're going to
25 have days of hearings, and I only have a day and a

1 half left.

2 MR. BERLIN: In other words, it may be the kind
3 of thing that we could -- it may be the kind of
4 thing that we could eliminate all, but -- you know,
5 we'll maybe not go over all of them, but we're
6 eliminating all but a few of them. And it's a much
7 narrower subject. Make more sense to talk about the
8 other issues that we have than that.

9 THE COURT: Okay. That's fine.

10 MR. BERLIN: Does that work?

11 THE COURT: Does that work for you, Mr. Harder?

12 MR. HARDER: I didn't hear the sentence -- the
13 last sentence you just said, but I just think we
14 should work together on this.

15 THE COURT: You all are going to get together
16 and --

17 MR. HARDER: We should work together on it,
18 because --

19 THE COURT: You're going to get together on it
20 and --

21 MR. HARDER: -- we've been focused on the main
22 stuff and not this.

23 THE COURT: And then you can come back later on
24 and we'll --

25 MR. BERLIN: We may be able to work it all out,

1 because I don't think there is something that's
2 that -- we're not that far apart on this.

3 But would that mean then you next want to take
4 up the discovery objections?

5 THE COURT: Yes.

6 MR. BERLIN: On the discovery -- Your Honor, as
7 you may remember when we were here last in April, in
8 an effort to streamline things, I came up with a
9 suggestion that we would deal with the -- we'd get
10 the financial work discovery requests and we would
11 send out our objections. In the wake of that court
12 conference, we were served with 334 discovery
13 requests.

14 I have to say, I asked both Mr. Davis and
15 Mr. Thomas about this, and they both said that this
16 is unheard of. It seemed rather striking to me and
17 certainly not the kind of thing that if you were
18 trying to streamline things and get to a fair
19 evaluation of what each of the three publisher
20 defendants was worth you would need to do.

21 And what we tried to do in our objections was
22 to go through and say, look, we understand under
23 Florida law that if punitive damages are authorized
24 to be sought, that we are -- that we are going to
25 have to give over certain information that basically

1 speaks to our financial worth. It's not limited to
2 just, hey, here's an interrogatory, tell us what
3 you're worth. They're entitled to get some
4 documents to test it.

5 But we're in a situation here where the volume
6 of what's being asked and the volume of the number
7 of requests asking it and which are duplicative of
8 one another really is imposing an undue burden. And
9 it's a little frustrating, Your Honor, because we
10 proposed a procedure that we thought was designed to
11 streamline things rather than to wait until today
12 when this was ordered and let the discovery be
13 served and then we have to answer. And that we're a
14 little frustrated that that was met with such
15 voluminous discovery.

16 What we tried to do was to come up with a list
17 of things that we thought really fairly viewed and
18 answered these questions and probably then some.
19 And that appears in our objections starting at the
20 top of page 4. And it lists documents relating to
21 the publisher defendant's actual and estimated net
22 worth. It includes documents used in responding to
23 interrogatories, bank statements for the -- you
24 know, the end of each year, going back to the 2011
25 and the current one. Brokerage and investment

1 statements, same way, each year and then most recent
2 one. Financial statements including -- and we've
3 already given over a lot of financial statements of
4 Gawker, but they wanted an updated one, so we were
5 going to update them and give financial statements
6 provided the other two defendants have them.
7 Accounts receivables, cash receipt journals,
8 documents reflecting liabilities, debts, mortgages,
9 other obligations on the idea that if you -- part of
10 your net worth is determined by things that you
11 owed, that's deducing the net worth and they're
12 entitled to know that as well.

13 We give the defendant's ownership interest in
14 Gawker, whether Gawker has been sold to, merged
15 with, or consolidated with any other entity.

16 THE COURT: Can we just go through the list and
17 everybody make argument and I just make the ruling
18 on one by one?

19 MR. BERLIN: Yeah. I was going to say these
20 were the things that we were going to give, so --

21 THE COURT: Right.

22 MR. BERLIN: -- I don't know that there is, you
23 know, a dispute about those because we're going to
24 give those. And we have given federal tax returns
25 and so forth, and trusts. And then we're going to

1 do interrogatories that the publisher defendant
2 swear to the authenticity of the documents, that
3 they have identified the amount of financial worth,
4 that they identified material assets and
5 liabilities, and whether the publisher defendant's
6 maintain their right to bring any action or --
7 about, you know, recovering any debts. Somebody
8 owes you money, that's part of the net worth, and we
9 were going to give that information as well.

10 And we did this based on looking at Florida law
11 on the subject. And there is a series of cases that
12 deal with the scope of financial worth discovery.
13 And all of the other ones were just substantially
14 more narrow. One of them involved nine
15 interrogatories and one request for production. One
16 of them involved three interrogatories. One of them
17 involved a request for a three-year period for
18 income tax returns, personal or business profit and
19 loss statements and balance sheets. And that was
20 it.

21 There has to be a reasonable limit on this,
22 Your Honor, and this just isn't it. And we think
23 the proposal we've outlined here is reasonable.
24 It's a little larger than what we had anticipated we
25 would be doing when we were here in April. And I

1 know I said I would do this, if we needed to, by
2 Tuesday. I'd ask for a few more days into the next
3 week to get it done. But I think this is a
4 reasonable proposal, and I think that it should be
5 adopted by the Court rather than having to go
6 through and serving individual objections to what is
7 essentially 330 documents of a discovery request,
8 which is really, at this point in the case, busy
9 work.

10 I mean, I want to try and cut to the chase.
11 We're going to try and move this forward. That's
12 what I want to do. I think that's where I am on
13 this.

14 And so I'm not sure what the -- the technical
15 relief is if it's a motion for protective order or
16 if there are objections that you then rule on, but,
17 either way, we would ask for appropriate relief that
18 memorializes that.

19 And I guess I could let the plaintiff speak to
20 that. And then if -- you know, just reserve a
21 moment for rebuttal if there is anything that I feel
22 like I need to address. I tried to be brief on this
23 subject, so --

24 THE COURT: Thank you.

25 MR. BERLIN: Thanks.

1 THE COURT: This is your time, Mr. Vogt.

2 MR. VOGT: This is my time. I get to tell --

3 THE COURT: So, Mr. Vogt, tell me first why you
4 don't agree with, yeah, Mr. Berlin's proposal.

5 MR. VOGT: Well, first and foremost, he's wrong
6 on the laws that pertain to discovery in terms of
7 punitive damages cases.

8 If I can approach, Your Honor.

9 THE COURT: Did you give them a copy?

10 MR. VOGT: Yes, ma'am.

11 THE COURT: Okay.

12 MR. VOGT: And this is the Dokes v. Kennedy
13 case. It actually was a follow-up to the Donahue
14 case which is cited in the Tennant case that the
15 Gawker defendants are relying on to object to this
16 discovery.

17 And it says, "Broad latitude regarding
18 discovery and punitive damages claims has been
19 allowed by this Court." That was the Donahue case
20 and Tennant case.

21 Several areas of inquiry are permissible;
22 income, cash flow, expenses, anticipated income,
23 expensed diminutions in income, anticipated
24 casualties affecting the assessment of punitive
25 damages.

1 To that list, Judge, then I'm also adding
2 briefs about bank accounts, depositories, present
3 and recent ownership of property and its value, of
4 any interests in various business arrangements.

5 Interestingly, Your Honor, in this case, the
6 Court didn't find a problem with them using standard
7 family law interrogatories, which are incredibly
8 broad, much more broad than what we've served in
9 this case. And the Court said that that was
10 absolutely fine.

11 The reason they did that, Your Honor, was
12 because in the Donahue case -- may I approach?

13 And this actually dismisses with the notion
14 that what we've asked for here is busywork. And
15 there is a long quote on the second page of this
16 case, Your Honor. It says that -- discussed about
17 possibly just providing sworn statements to someone
18 and cut off any further aggressive inquiry into the
19 true financial capacity to respond to the issue of
20 punitive damages.

21 And the Court disagreed with that. You get
22 that aggressive ability to pursue financial
23 information. They said -- they recognized that
24 people have a tendency to overinflate or
25 underinflate their assets and their net worth, even

1 under oath. And they said, "It is the height of
2 naivete to suggest that a sworn statement of one's
3 net worth must be accepted as the final word on that
4 important subject. The search for a forgotten or
5 hidden assets is of the essence of the discovery
6 process. The whereabouts of assets disclosed by a
7 recent income tax return or shown in a recent
8 financial statement furnished in another situation
9 when the current litigation was not envisioned is a
10 very definitely appropriate inquiry as is the
11 bona fides of the recent disposition of assets."

12 This is where --

13 THE COURT: But they're giving you some of the
14 backup.

15 MR. VOGT: Pardon me?

16 THE COURT: They're giving you, though, the
17 backup. They're giving you the bank statements, the
18 broker investment account statements. They're
19 giving you more than just their view of what their
20 company is worth.

21 MR. VOGT: Correct, they have selectively
22 picked and chosen what they wanted to give. Our
23 requests really don't ask for anything outside the
24 scope of these cases, Your Honor.

25 THE COURT: Here is my concern.

1 MR. VOGT: And I'll be happy to go into them.

2 THE COURT: We may be set for a July trial.

3 MR. VOGT: Correct.

4 THE COURT: I appreciate the fact that they
5 were just getting a ruling a few minutes ago on
6 punitive damages. I appreciate the fact that the
7 defense is really trying to streamline the process
8 to get you everything that -- that at least they can
9 in an expedited basis, so -- because prior to just a
10 week or ten days ago, we were all going to trial on
11 July and I still had a standing trial order out
12 there.

13 MR. VOGT: And we understand that, Your Honor.

14 THE COURT: And so, I guess, for that reason, I
15 think it's a good compromise for now.

16 And so tell me why it wouldn't be or what
17 additional things that you think you want to get on
18 this expedited schedule that the defense has agreed
19 to.

20 MR. VOGT: And our response is, it basically
21 ties in with your concerns that there is not much
22 time left. So these requests necessarily had to be
23 very broad, because if we get responses, we're not
24 going to get a second chance to come back and ask
25 for more information.

1 So if the Court's inclined to grant this, this
2 request by the defense to initially limit the
3 inquiries to the issues that are set forth in this
4 letter, what we would ask is that that not be the
5 final order, but we have the ability to come back.
6 And if we see things in bank statements or financial
7 statements and we didn't get the documents or
8 information from those, that we -- there is proper
9 follow-up on, that we have the ability to do that.

10 THE COURT: All right. Thank you. I'm sorry.
11 This was your main presentation. I cut it short.

12 MR. VOGT: That's okay, Your Honor.

13 THE COURT: Mr. Berlin, would you agree with
14 that?

15 MR. BERLIN: I'm not sure what I'm agreeing to.

16 THE COURT: So here -- I think here -- I think
17 you've made an ore tenus motion for protective order
18 to limit it just to your response to these things on
19 this expedited basis that you've agreed to provide.

20 So Mr. Vogt has then said, well, would they
21 then -- if I was going to grant your ore tenus
22 motion for protective order just on these things,
23 would they have an additional -- after they've had
24 the opportunity to go through all of this, would
25 they have an additional opportunity later on to

1 further inquire.

2 MR. BERLIN: Your Honor, if I could say just
3 two things. One is that the cases that they have
4 presented, I actually think are consistent with what
5 I've just said. In the Donahue case, the
6 defendants -- involving 16 interrogatories, the
7 defendant answered six and objected to the other
8 ten. We're not talking about 334 requests.

9 And in the other one, it lists bank accounts,
10 depositories. We've giving this stuff. What we're
11 objecting to is if you get our bank accounts, you
12 don't need every deposit slip for every -- you know,
13 be just a bunch of paper. The bank has no incentive
14 to misstate what the deposit is. It's on the bank
15 account, so -- and the amounts that are there
16 reflect what's what.

17 So I think that -- I think it's consistent with
18 what I was saying. I generally think that if for
19 some reason -- I mean, remember that the discovery
20 that we're talking about here, Your Honor, is
21 answering one question: What are you worth, right?

22 And, realistically, if we give over all that
23 stuff, it would be very difficult to imagine that
24 they would not be able to formulate a reasonable
25 answer to that question. Right?

1 They've also now asked for depositions of each
2 of the people on that subject and we've scheduled
3 them for the end of June. And, you know, the
4 combination, while that would seem very unlikely.
5 But if for some reason they came and said we can't
6 answer the question what are you worth without some
7 additional piece of information, and we object to
8 that information, and they want to come back to
9 Your Honor, I have no objection to that. I think
10 that's -- that that's what you're here for --

11 THE COURT: Right.

12 MR. BERLIN: -- to resolve that dispute, so --

13 THE COURT: All right. Thank you.

14 So I'm granting defense's ore tenus motion for
15 protective order to limit the discovery to those
16 things that the defense has agreed to provide in the
17 May 22nd, 2015, letter to Mr. Harder. And that the
18 defense is going to provide this information -- was
19 it by next Thursday, the 4th? Is that what you
20 wanted?

21 MR. BERLIN: I think we had originally proposed
22 the 2nd. And if I could look at --

23 THE COURT: 3rd?

24 MR. BERLIN: If I could look at Ms. Smith and
25 find out.

1 MS. SMITH: I think, yes.

2 MR. TURKEL: When we cut the deal to do all
3 this today, I thought it was the 2nd.

4 THE COURT: But then I think that the defense
5 asked for a few days.

6 MR. BERLIN: I'm asking -- basically, this is
7 more than we thought it was going to be, and if I
8 had a couple extra days. If we can do Thursday or
9 Friday of next week, it's still before the
10 depositions. If I can get it done sooner, I will.

11 THE COURT: 5:00 on the 4th, is that good?

12 MS. SMITH: We'll make it.

13 THE COURT: Okay.

14 MR. BERLIN: Ms. Smith is bearing the burden of
15 that production, so --

16 THE COURT: I'm sorry.

17 MR. BERLIN: Yes, I'm sorry as well. I
18 apologize.

19 THE COURT: So -- all right. So by 5:00
20 Thursday. That's June 4th. All right? And with
21 the --

22 MR. BERLIN: 5:00 p.m. on the 4th, yes.

23 THE COURT: And if there is a problem after the
24 plaintiff has had the opportunity to review all of
25 that, there is more information and you guys can't

1 work it out, you're welcome to come back.

2 MR. BERLIN: Your Honor, I have one other
3 question about the punitive damages since Your Honor
4 has ordered that that go forward.

5 THE COURT: Yes.

6 MR. BERLIN: My understanding, again, this is
7 not -- I'm not an expert at this, so perhaps
8 Mr. Davis can speak to this if I get this wrong, but
9 my understanding is that under a case called
10 W.R. Grace, that when that -- when punitive damages
11 are issued, that it is the practice in Florida to
12 bifurcate the issue of net worth presentation to the
13 jury. And I would ask that we do that in this case.

14 THE COURT: So the first part of the trial is
15 going to go forward. The jury will make their
16 decision on the underlying complaint. And then at
17 that point in time, based on the verdict of the
18 jury, then they'll present the additional
19 information. The same jury will make additional
20 decision.

21 Do you agree with that, Mr. Turkel?

22 MR. TURKEL: I don't know that it's mandatory
23 to do it that way. Usually they file a motion to
24 bifurcate and you vet out whether it has to happen.

25 You know, it's, to me, something that we'll

1 probably handle pretrial if that's the way -- I
2 haven't given it much thought. I've done it both
3 ways. You know, I've done it where it was
4 bifurcated, I've done it where it was all together.

5 THE COURT: I've generally seen it with the
6 same jury. Yeah.

7 MR. TURKEL: I've always seen the same jury do
8 it, yeah.

9 MR. BERLIN: Oh, I was asking for the same
10 jury, but just the --

11 THE COURT: Right.

12 MR. BERLIN: -- the information that they --

13 THE COURT: That's how I've seen it.

14 MR. BERLIN: I just thought it would be helpful
15 as we're -- you know, if, in fact, we can work this
16 out with the DCA so we can go forward, it would be
17 helpful to know that as we plan for --

18 MR. TURKEL: I suggest we discuss it. And then
19 if there is disagreement, you know, it's something
20 we can deal with at pretrial, so --

21 THE COURT: That's fine.

22 MR. BERLIN: But you're otherwise amenable to
23 that, Your Honor?

24 THE COURT: Probably.

25 MR. BERLIN: Okay. Fair enough.

1 THE COURT: Probably, but I'll allow the
2 plaintiff --

3 MR. BERLIN: I'm not asking you to rule. I was
4 just --

5 THE COURT: Oh, good.

6 MR. BERLIN: -- asking if you didn't object to
7 that.

8 THE COURT: Well, I'll -- that's how I've
9 generally seen it, but I'll allow the plaintiffs an
10 opportunity to figure it out, what they want to do
11 too.

12 MR. BERLIN: And would it be okay just to raise
13 that at the pretrial or would you like us to --

14 THE COURT: Certainly.

15 MR. BERLIN: -- file a formal motion?

16 THE COURT: Well, usually, those kinds of
17 discussions are typically held at pretrial.

18 MR. BERLIN: Okay. But without the formal
19 motion is what I was trying to ask, if you needed
20 one.

21 THE COURT: I've typically seen it with a
22 motion.

23 MR. BERLIN: All right.

24 THE COURT: They usually come about in almost
25 every nursing home case. Good case law in nursing

1 home cases. Nursing home and tobacco. Okay?

2 MR. DAVIS: Only with certain plaintiffs' law
3 firms.

4 THE COURT: That's the majority of what I see.

5 Okay. So the next thing that I have, the next
6 time that I have that we're all going to be together
7 is June 29th for a half a day, and then July 1 for a
8 full day, and then the trial.

9 So, hopefully, for any of these other issues,
10 have you all reserved any time on Judge Case's
11 calendar?

12 MR. BERLIN: I don't think so, Your Honor, but
13 I think we're sort of past discovery, so --

14 THE COURT: Okay.

15 MR. BERLIN: We did confer and decided that he
16 did not need to attend the net worth depositions
17 because they should be fairly straightforward and,
18 you know, not controversial. It's just questions
19 about money. But -- and then we'll have to confer,
20 obviously, with each other about what to do with the
21 DCA order, and we'll do that.

22 THE COURT: All right. Great. Anything else
23 that we can do today?

24 MR. TURKEL: It's been a long day.

25 MR. BERLIN: Thank you very much.

1 THE COURT: It's not even 4:30.

2 MR. TURKEL: Do you want us to prepare the
3 orders?

4 THE COURT: I'd love you to, please.

5 MR. TURKEL: We'll do that.

6 THE COURT: All right. And I did want to
7 introduce, too, John Vito Grieco. Is interning with
8 me from Stetson, so I told him to come and watch the
9 good lawyering today, so he has.

10 MR. BERLIN: Your Honor, thank you very much
11 for the time.

12 THE COURT: Thank you all very much.

13 (Proceedings concluded at 4:27 p.m.)
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1 REPORTER'S CERTIFICATE

2
3 STATE OF FLORIDA4 COUNTY OF HILLSBOROUGH
56 I, Valerie A. Hance, Registered Professional
7 Reporter, certify that I was authorized to and did
8 stenographically report the foregoing proceedings and
that the transcript is a true and complete record of my
stenographic notes.9
10 I further certify that I am not a relative,
11 employee, attorney, or counsel of any of the parties,
12 nor am I a relative or employee of any of the parties'
attorney or counsel connected with the action, nor am I
financially interested in the outcome of the foregoing
action.13
14 Dated this 1st day of June, 2015, IN THE CITY
OF TAMPA, COUNTY OF HILLSBOROUGH, STATE OF FLORIDA.
15
1617 _____
Valerie A. Hance, RPR
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