**THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| MEANITH HUON, | ) | |
| Plaintiff, | ) | |
| | ) | CIVIL ACTION NO.: |
| -against- | ) | 1:11-CV-3054 |
| | ) | |
| GAWKER MEDIA et. al. | ) | |
| Defendants | ) | |
| | ) | |

**GAWKER DEFENDANT'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS EVERY COUNT OF PLAINTIFF'S FOURTH AMMENDED COMPLAINT PURSUANT TO 12(b)(6)**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

Throughout his response, Plaintiff conflates the statements made by the Gawker defendants with statements posted by others on the Jezebel.com website, and those made by the ATL defendants. Doing so muddles the issues before the court. Though none of the statements gives rise to liability, it is critical to distinguish among them as different defenses obtain. Simply put, between the provisions of section 230 of the Communications Decency Act, innocent construction, opinion, and fair report, nothing Plaintiff complains of is actionable. Throughout his response, Plaintiff goes out of his way to ascribe statements posted by others to the Gawker Defendants themselves, eliding the actual statements contained in the post. Section 230 of the CDA immunizes the Gawker Defendants for statements made by others. The Plaintiff claims that the simple act of linking to a post is defamatory; yet, such actions do not create liability. Finally, in terms of the Gawker post itself, Plaintiff has clearly narrowed his claims to two statements—one headline and one sentence concerning the impact of a bartender's testimony on the verdict in his case. This Reply will focus primarily on the issues relating to those two statements.

As to Plaintiff's allegations based on the rest of the Post, the Gawker Defendants have already enumerated their reasons for seeking dismissal, and provided the Court with a chart (Exhibit F of Defendant's Motion to Dismiss) outlining their arguments in response to each of the numerous and confusing allegations in Plaintiff's Fourth Amended Complaint. That chart explains in detail which defenses apply to each of the Complaint's allegations and puts those allegations side by side with the Post's language, source of the information, and defenses.

## I. THE FAIR REPORT PRIVILEGE BOTH APPLIES AND IMMUNIZES THE GAWKER DEFENDANTS

Plaintiff argues that Defendants' reporting on the lawsuit he filed against the ATL defendants, and the sexual assault charges that led to that suit went so far afield as to nullify the fair report privilege. This is simply not the case, and as a consequence, both his false light and defamation claims fail.

Plaintiff rests his arguments concerning the actual Gawker post on a single sentence: "*Huon's version was that it was a consensual encounter, and partly on the strength of a bartender's testimony that the woman had been drinking and asked where to go to have fun, the jury believed him.*" Plaintiff cites this sentence as evidence of malice (Plaintiff's brief at 6) and asserts that it is "*simply fabricated*" (Plaintiff's brief at 9) and that it is "*plain make believe*" (Plaintiff's brief at 9). Plaintiff finds this sentence so outrageous as to justify stripping the defendant of the shelter of the fair report privilege. This is odd. Particularly as the very phrase Plaintiff seems to loathe most—"the strength of a bartender's testimony"—contains an embedded link to an article about plaintiff's trial which discusses the evidence in detail and reports directly on the bartender's exculpatory testimony.[1] Thus, Defendants not only cite their source, but anyone wondering about the source could follow a link to it that is embedded right in the article.

Finally, Plaintiff attacks the headlines—one used by the ATL defendants and

[1] See, http://www.theintelligencer.com/local_news/article_5d91cadf-2f49-5f03-9bfa-bc70b9cd1b7e.html "Prosecutors argued that the victim had answered an advertisement on Craigslist for a promotional model but that Huon, using a false name, posed as a supervisor for the company and lured her to downtown St. Louis... A bartender testified that Huon and the victim drank martinis and wine, and asked her where they could go to have fun. Police arrested Huon at his apartment in Chicago, where detectives found the purse and shoes the woman had left behind in the car during her escape."

one briefly used by the Gawker defendants. Each, he alleges, are so outrageous and malicious as to strip the defendants of the cloak of the fair report privilege. This too is unavailing. Courts have long understood that headlines are by nature substantial abbreviations, and have thus taken a liberal approach to interpreting them, even in cases (unlike this one) in which they were actually inaccurate. Plaintiff asserts that he was "[*N]ot charged with "Rape" in 2008. He was charged with sexual assault*." (Plaintiff's Brief at 7 fn 17). This distinction is unavailing. Indeed, in a case in which the publication alleged a criminal felony rather than a simple civil violation, the Court in Harrison v. Chi. Sun-Times, Inc., 341 Ill. App. 3d 555, 572 (Ill. App. Ct. 1st Dist. 2003), tellingly held that:

> The headline had to succinctly convey that there was a finding of wrongful removal of a child under international child abduction law which imposes civil rather than criminal liabilities. Given the complexities of the ruling, the characterization of this violation as kidnapping is, as earlier stated, substantially the same in its gist or sting as wrongful removal under child abduction law. Considering the space limitations inherent in the front-page headline and leader, it is an accurate abridgement for the Sun-Times to characterize this finding as kidnapping.

Similarly, in Conterras v. Village of Woodridge, 1994 U.S. Dist. LEXIS 5969, at *4 (N.D. Ill. May 4, 1994), this same Court held that:

> Although the Press Release does not contain the exact language used by Life Printing in its article, the test under the fair report privilege is not exactness. Rather, the news account need only contain the same "gist or sting of the defamation" in the official report, here, the Press Release. Dolatowski v. Life Printing & Pub. Co., 197 Ill. App. 3d 23 (Ill. App. Ct. 1st Dist. 1990). See also O'Donnell v. Field Energy, 491 N.E.2d 1212, 1217 (Ill.1986) ("We believe that the privilege . . . is not defeated merely because there may be a misstatement or some discrepancies between the statements in the newspaper articles and the statements from the governmental and public proceedings upon which they are based."). Life Printing's article clearly meets this less exacting standard.[2]

[2] In terms of standards, it is worth noting that a court in this very jurisdiction adjudicating another dispute between a plaintiff in Illinois and defendants with a New York domicile observed, "the fair reporting privilege is meant to protect speakers, not provide a remedy

Was plaintiff charged with sexual assault? Yes. Was he acquitted? Yes. Did he then sue the ATL defendants for fifty million dollars? He did. That is the gist of the piece, and that is the gist of the truth. The fair report privilege applies.

Finally, Plaintiff raises one other argument against the headline: "*The Gawker story falls outside of this privilege because, inter alia, it... adds, incorrectly, that acquittal does not mean that he did not commit rape*" (Plaintiff's response at 7). As Plaintiff should know by now, a verdict of "not guilty" is not a verdict of "innocent." As set forth in more detail below, the standard of proof in a criminal case is the most exacting in our law requiring each and every element be proven "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358 (1970). Thus it is not only possible, but also a laudable fact of the system, that guilty people are acquitted in instances in which the lofty substantive and procedural standards for criminal conviction go unmet. Indeed, as even a cursory look at standards of proof reveals, someone could be found not guilty at a criminal trial and still be indefinitely involuntarily committed on the same evidence. Addington v. Texas, 441 U.S. 418 (1979). Similarly, it is entirely possible to be acquitted of a crime and still have one's sentence enhanced for the very same conduct one was acquitted of**.** U.S. v. Settles, 530 F.3d 920 (D.C Cir. 2008); United States v. Waltower, 643 F.3d 572 (7th Cir. 2011). In other words, contrary to Plaintiff's belief, acquittal does not mean innocent; it means not guilty, and just as there is a broad spectrum of possible truths and implications

---

to plaintiffs." Wilkow v. Forbes, 2000 US Dist LEXIS 6587 (N.D.Ill. May 12, 2000). Using that logic the Wilkow court actually applied the NY fair report privilege law codified in NY Civil Rights Law Sec. 74, which is even more forgiving than the Illinois statute. And while Defendants would be happy with the New York standard, under either one, every one of the Gawker defendants' statements is immunized under the fair report privilege.

between guilty and innocent, there is a great deal of room between "acquitted" and "guilty."

In order to encourage a robust debate and a strong free press, the fair report privilege is broad. The Illinois Supreme Court has held that "the fair report privilege overcomes allegations of either common law or actual malice." Solaia Tech., LLC v. Specialty Publ'g Co., 221 Ill. 2d 558, 587, (Ill. 2006); see also Restatement (2d) of Torts, § 611 cmt. a ("[T]he privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false."). Moreover, as specifically concerns both headlines at issue, a "flippant" or "'smart alecky' style of writing . . . to create reader interest" does not cause a publication to lose the fair report privilege. Sellers v. Time, Inc., 299 F. Supp. 582, 585 (E.D. Pa. 1969), aff'd 423 F.2d 887 (3d Cir. 1970) ("Even such a respected periodical as United States Law Week, sometimes adds 'color' to enliven an otherwise routine and dull account of a legal decision.").

Quite simply, there is nothing in the Defendants conduct that would support Plaintiff's argument. Contrary to Plaintiff's belief, "The fair report privilege" is not the "What plaintiff feels is fair privilege" and a news article about his litigiousness does not lose its immunity just because Plaintiff does not like it.

## II. PLAINTIFF MISUNDERSTANDS THE BROAD PROTECTION OF SECTION 230 OF THE CDA.

Based on the broad protections of section 230 of the CDA, courts in this very district have regularly dismissed cases of this sort at the pleading stage. See , Hadley v. Gatehouse Media Freeport Holdings, Inc., 2012 U.S. Dist. LEXIS 98674, at * 6-7 (N.D.

Ill. July 10, 2012); Collins v. Purdue Univ., 703 F. Supp. 2d 862 (N.D. Ill 2010). The Court should do so here.

As a close reading of Plaintiff's claims reveals, nearly all of Plaintiff's allegations against the Gawker Defendants (other than the ironic headline noting Mr. Huon's acquittal, and the statement about the bartender), rest on comments posted by other non-parties on Gawker's website. As discussed below, all of these statements (which constitute the vast majority of plaintiff's complaint) are immunized by 230 of the CDA.

In his response, Plaintiff spends a great deal of time cobbling together conjecture and fantasy in a vain attempt to avoid CDA immunity. He does this by constructing a theory of liability based on the notion that the Gawker Defendants themselves were responsible for, or possibly even posted the comments he complains of. He has no support for this assertion whatsoever, and indeed, when confronted with the requirements of a verified pleading, Mr. Huon pleads: "*In this case, Mr. Huon alleges that certain commenters **may** actually be Jezebel Defendants' employees, posting under an alias...".* (Fourth Amended Complaint Paragraph 110.) Leaving aside that this is untrue, taking this allegation in the light most favorable to the plaintiff only establishes that Mr. Huon believes these paranoid fantasies, not that they are actually true.

At root, Plaintiff utterly confuses comment moderation and content generation, and his theory that by posting a defamatory story the Gawker Defendants encouraged defamatory posts is unavailing. Despite Plaintiff's contention that "*Gawker's actions were intended to generate the unlawful and offensive content"* and his assertion that "*Gawker compares Nick Denton to the dark overlord Darth Vader running an evil empire"* none of these, even if true, would strip defendants of their CDA immunity.

Indeed, Courts across the country have looked at precisely the argument plaintiff makes here, and dismissed them on 12(b)(6) motions. In a decision that could have been written in response to Plaintiff's pleadings, the court observed:

> Plaintiff argues that the Website encourages and "exists solely for people to post 'dirt' about their neighbors without regard for truth." Doc. 52, p. 9. This argument fails both legally and factually. As a matter of law, and even if true, merely encouraging defamatory posts is not sufficient to defeat CDA immunity. See *Best Western Int'l, Inc. v. Furber, 2008 U.S. Dist. LEXIS 70552, 2008 WL 4182827, at * 10 (D. Ariz. Sept. 5, 2008)* ("impliedly suggest[ing] [*13] that visitors should make statements defaming [plaintiff] . . . is insufficient"); *Shiamili v Real Estate Group of N.Y., Inc., 17 N.Y.3d 281 (N.Y. 2011)* (concluding that implicit encouragement does not make a website an information content provider).

S.C. v. Dirty World, LLC, 2012 U.S. Dist. LEXIS 118297, at *12-13 (W.D. Mo. Mar. 12, 2012). Similarly, in Dimeo v. Max, 433 F. Supp. 2d 523, 530 (E.D. Pa. 2006), aff'd, 248 Fed. Appx. 280 (Third Cir. 2007**)** the Court brushed aside precisely the argument Plaintiff advances here, dismissing the complaint on FRCP 12(b)(6) grounds finding that:

> DiMeo falls back on the position that, because Max can select which posts to publish and edits their content, he exercises a degree of editorial control that rises to the "development of information." See Pl.'s Resp. to Def.'s Mot. to Dismiss & Pl.'s Mot. for Leave To Am. ("Pl.'s Resp."), at (unnumbered) 3. If "development of information" carried the liberal definition that DiMeo suggests, then § *230* would deter the very behavior that Congress sought to encourage. In other words, § *230(c)(1)* would not protect services that edited or removed offensive material. Yet, as noted earlier, one of Congress's goals in enacting § *230* was to promote this kind of self-regulation. Thus, "development of information" must mean "something more substantial than merely editing portions of [content] and selecting material for publication." *Batzel v. Smith, 351 F.3d 904 (9th Cir. 2003)*; see also *Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003)* (holding that § *230(c)(1)* bars "'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone, [**18] or alter content.") (quoting *Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997))*. [12] Because DiMeo alleges that Max did no more than select and edit posts, we cannot consider him to be the "provider" of the "content" that DiMeo finds to be offensive.

Finally, in another case from just last year, the Court in the Eastern District of Louisiana addressed an argument similar to that which Plaintiff advances here. That court also dismissed the complaint pursuant to FRCP 12(b)(6).

> Plaintiff argues that Angie's List is responsible, in part, for the "development of the content provided." Id. However, Plaintiff fails to provide, and the Court has been unable to locate, binding case law establishing that a website's use of a questionnaire renders it a "content provider" of information provided in response to same.

Courtney v. Vereb 2012 U.S. Dist. LEXIS 87286, at *14-15 (E.D. La. June 21, 2012).

As the seminal case Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998), and its epigones makes clear: "[l]awsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred" under the CDA.

Amplifying this general theme, the Seventh Circuit itself has issued a concise and damning refutation of Plaintiff's position. In a case that Plaintiff himself cites, Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008), Judge Easterbrook makes very clear what the Seventh Circuit believes the scope of section (2) of the CDA is. He observes:

> Congress could have written something like: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any *sexually oriented material* provided by another information content provider." That is not, however, what it enacted. Where the phrase "sexually oriented material" appears in our rephrasing, the actual statute has the word "information." That covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians' promises, and everything else that third parties may post on a web site; "information" is the stock in trade of online service providers.

(*Id.* at 667). The court in the Craigslist case goes on, in what could be a direct

admonishment of Plaintiff:

> Using the remarkably candid postings on craigslist, the Lawyers' Committee can identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination...It can assemble a list of names to send to the Attorney General for prosecution. But given § *230(c)(1)* it cannot sue the messenger.

Despite Plaintiff's farfetched allegations he cannot surmount the simple fact that comment moderation does not constitute content generation. His analysis of the CDA is flawed, and neither his allegations nor his complaints about the comments appended to the Gawker article can generate the liability he dreams of. And as fall the comments, so falls the vast majority of Plaintiff's suit.

## III. THE GAWKER ARTICLE IS PROTECTED OPINION

In Plaintiff's attempt to suggest that the Defendants' post is not protected opinion, he once again zeroes in on the question of his acquittal as it pertains to both the Gawker headline and the sentence in the Gawker piece that he complains of. Concerning the Gawker headline, Plaintiff argues:

> *Saying: "Just because a man is acquitted of rape does not mean he did not commit rape" is not only a statement of fact (he committed rape), it is a completely incorrect statement of what it means to be found not guilty."*

(Plaintiff's Response at 10).

Here, Plaintiff is entirely correct about his formulation, but entirely incorrect in his analysis. The two sentences he believes are interchangeable are in fact quite different. Guilt and innocence are not binary, and the bedrock understanding of the criminal justice system is that it is difficult if not impossible to determine ontological truth—hence, standards of proof. Being found "Not Guilty" is not by any stretch of the imagination a finding of "Innocent." Indeed, as discussed above, the standard of proof in a criminal

case is the most exacting in our law requiring each and every element be proven "beyond a reasonable doubt." *In re Winship*, 397 U.S. at 358. Thus it is perfectly possible for a criminal jury to deliver a not guilty verdict, while a civil jury judging the very same case on the lower evidentiary standard of "a preponderance of the evidence" finds a defendant liable for the very conduct he was acquitted of. (See, e.g., State of California v. Orenthal James Simpson, No. BA 097 211 (Los Angeles County, 1997)). In fact, in federal court, even when a defendant is acquitted of certain counts he can nonetheless be sentenced for the conduct in those counts. Settles, 530 F, 3d at 920); Waltower, 643 F.3d 572 (7th Cir. 2011). Thus, while Plaintiff properly presents the legal issue posed by the Gawker headline, the legal answer is the inverse of what he advances.

As for the sentence in the Gawker piece that Plaintiff objects to, he is similarly misguided. That sentence which appears throughout Plaintiff's submission (and appears to be the only specific language in the Gawker post that Plaintiff complains of directly) concerns the contribution of a bartender to the ultimate outcome of the criminal sexual assault case against Plaintiff. On this question, Plaintiff argues as follows:

> *The Gawker article states the alleged victim's version of events at length and then suggests that Gawker has firsthand knowledge that the jury relied on the bartender's testimony—but nowhere in the record of the proceedings is there any evidence that the jury relied on that testimony.*

(Plaintiff's Response at 12).

This argument too misapprehends the basics of criminal law. Jury deliberations are secret, so there is no record of their deliberations. Defendants hardly suggest firsthand knowledge of secret jury deliberations when they opine that obviously exculpatory testimony may have been partly responsible for the plaintiff's acquittal. This is classic opinion, grounded in the testimony, and is protected as such.

## IV. PLAINTIFF INVENTS A NONEXISTANT CAUSE OF ACTION

Plaintiff, without authority beyond his perceived aggrievement, asks this court to invent a novel cause of action: "cyberstalking" as a tort. The court should decline to do so. According to the Illinois statute he himself cites, cyberstalking is solely criminal, and there is no associated civil right of action. See 720 ILCS 5/12-7.5(b).

## V. PLAINTIFF MISSTATES THE REPUBLICATION RULE

Plaintiff's assertion that the republication rule applies to internet postings is simply incorrect, and both cases he cites for the proposition pre-date the explosion of the internet. Illinois has long since adopted the single publication rule, codified in 740 ILCS 165/1. Moreover, virtually every court that has considered the republication rule in the context of the internet has come to an entirely different conclusion than that which plaintiff asserts. Perhaps the most concise and widely adopted rationale was asserted in Firth v. State of New York, 706 N.Y.S.2d 835 (N.Y. Ct. Cl. 2000), aff'd, 731 N.Y.S.2d 244 (N.Y. App. Div. 2001), in which the court held:

> While the act of making the document available constitutes a publication, in the absence of some alteration or change in form its continued availability on the Internet does not constitute a republication…

Id. at 843. Hence the continued availability of the Post on Defendants' website "does not constitute a republication," as Plaintiff urges to the court.

## VI. PLAINTIFF FAILS TO ALLEGE SPECIAL DAMAGES

In their Motion to Dismiss, the Gawker Defendants pointed out that Plaintiff failed to allege special damages in support of his defamation *per quod* claim. In his response, Plaintiff suggests in a footnote that after the Gawker Post appeared, he was again charged with a sex related crime and was thus required to spend money on

attorney's fees. (Plaintiff's Response at 4). This vague sense of downstream causation, without more, cannot support Plaintiff's theory of special damages, and his unsupported theory that as a result of the Defendants' actions, he was the victim of a "copycat" sex crime complaint is simply untenable.

## VII. PLAINTIFF FAILS TO ARTICULATE A PLAUSIBLE LEGAL THEORY OF PERSONAL LIABILITY

Citing The Drink Group, Inc. v. Gulfstream Communications, Inc., et al., 7 F. Supp. 2d 1009 (N.D. Ill. 1998), Plaintiff engages in a fanciful attempt to pierce the corporate veil by alleging, without any support whatsoever, that Nick Denton and Gaby Darbyshire are "alter egos" of Gawker Media. However, in the very case Plaintiff cites, Drink Group, the court grants a motion to dismiss in favor of defendants finding: "Plaintiff's averments fall woefully short of the 'special showing' requirement in Dangler v. Imperial Mach. Co., 11 F.2d 945, 947 (7th Cir. 1926)," Drink Group, 7 F. Supp 2d at 1011, which "[d]espite the passage of years... is still the law of this Circuit and cited approvingly by subsequent courts," Id. at 1010. "[C]onclusory statements, standing alone, run afoul of Plaintiff's obligation to adumbrate a claim with some supporting facts." Id. at 1011.

There as here, there is no evidence or allegation beyond Plaintiff's fanciful imaginings. Indeed, a look at the other cases Plaintiff cites bolsters the notion that such an attempt must be undergirded by more than the mere desire to sue someone personally. Both *Fontana* and *Kohler*, which Plaintiff cites, involve genuinely sham companies that are held by 2-3 sole shareholders seeking to hide from liability by using companies marred by insolvency, commingling of funds, and in general corporate disrepair. Plaintiff's own assertions do not make the claim that Gawker is such a company.

## VIII. PLAINTIFF FAILS TO ALLEGE WHAT PRIVATE FACTS DEFENDANT IMPROPERLY DISCLOSED

Plaintiff asserts a cause of action for the public disclosure of private facts, but he does not plead with any specificity which private matters Defendants allegedly publicized. Instead he lumps this claim in with his other grievances without identifying any fact a reasonable person would believe was private which Defendant's tortiously disclosed. Plaintiff was a defendant in a criminal case. The Defendants reported on that case. Plaintiff publically brought a series of civil suits against officials in Madison County and against the ATL defendants--lawsuits in which he sought over a hundred and fifty million dollars in damages. Defendants reported on that as well. Plaintiff's conduct in these matters may have been embarrassing or shameful, but it was hardly private.

## IX. PLAINTIFF PRESENTS NO LEGAL ARGUMENT AS TO THE VIABILITY OF HIS EMOTIONAL DISTRESS CLAIM

Plaintiff's IIED claim fails because, among other reasons, the First Amendment protections that prevent his defamation claim apply equally to a claim for IIED. Indeed, The Supreme Court has recently said as much in Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.") (citing Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1998)). Beyond insisting that Defendants engage in "*extreme and outrageous conduct,*" (Plaintiff's response at 13), Plaintiff fails to present any argument supporting the sufficiency of his IIED pleadings.

## X. PLAINTIFF'S CONSPIRACY THEORY FAILS AS A MATTER OF LAW

For the first time in his response, Plaintiff elaborates on the specifics of his conspiracy theory, alleging that "there was a combination of two or more persons: Gawker Media and its entities, Nick Denton, Gabby Darbyshire, Irin Carmon." (Plaintiff's Response at 14). Having finally elaborated his theory, it is even more manifest that Plaintiff's conspiracy claim fails as a matter of law. In addition to the reasons stated in Defendants' Memorandum, Plaintiff's claim fails because he alleges a conspiracy only between individuals who are agents of the same principal, which is not valid under Illinois law. See Buckner v. Atlantic Plant Maintenance, Inc., 182 Ill. 2d 12, 24 (Ill. 1998) ("[B]ecause the acts of an agent are considered in law to be the acts of the principal, there can be no conspiracy between a principal and an agent."); Van Winkle v. Owens-Corning Fiberglass, 291 Ill. App. 3d 165, 173 (Ill. 4th Dist. 1997) ("[A] civil conspiracy cannot exist between a corporation's own officers or employees.").

## XI. BASED ON THE RECORD AS IT STANDS THE COURT CAN ASSESS INCREMENTAL HARM AND SUBSTANTIAL TRUTH

Toward the end of his response, Plaintiff incorrectly asserts both that the incremental harm defense does not lie in Illinois and that even if it (or the related defense of substantial truth) did, the case could not be decided on those grounds at this stage. Plaintiff is incorrect on both counts. As to the question of whether the doctrine of incremental harm exists, in Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir.1993), the Seventh Circuit invoked the incremental harm doctrine and upheld a summary judgment dismissal explaining:

> The rule of substantial truth is based on a recognition that falsehoods which do no incremental damage to the plaintiff's reputation do not injure the only interest that the law of defamation protects. A news report that contains a false statement is actionable "only when 'significantly greater opprobrium' results from the report

> containing the falsehood than would result from the report without the falsehood." Herron v. King Broadcasting Co., supra, 776 P.2d at 102. …Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are thus not actionable. The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide.

As to the question of whether this court can make a determination of the question at this stage of the proceedings, it is important to note that unlike the cases Plaintiff cites here, the court can take judicial notice of the official court documents and transcripts that have already been submitted. Thus, unlike the other cases Plaintiff cites in which substantial and unresolved questions of fact remained prior to discovery, here, everything relevant to the determination of substantial truth, opinion, and incremental harm are entirely laid out in the record before the court. Nothing more need be pled or discovered.

In terms of the "substantial truth" inquiry, all of Plaintiff's allegations reduce to a simple set of inquiries which can be easily answerer at this stage of the proceedings based solely on official court records the court can take judicial notice of:
Was plaintiff charged with sexual assault? Yes. Was he acquitted? Yes. Did he then sue the ATL defendants for fifty million dollars? He did. That is the gist of the piece, and that is the gist of the truth. There is no dispute about the facts, and in light of the precedents and the law, the article was substantially true. The Gawker Defendants' actions in publishing its eleven sentence item concerning Plaintiff's lawsuit against the ATL defendant's, are not only substantially true and thus immunized, not only protected opinion and thus protected, not only squarely within the bounds of the fair report privilege and thus immunized, but, at the end of the day, viewed in light of this Plaintiff's various arrests, trials, and tribulations, are incapable of any incremental damage to Plaintiff's reputation. This court both can and should dispense with Plaintiff's claims

## XII. THE COURT CAN AND SHOULD DISMISS THE CASE WITH PREDJUDICE

As the instant litigation amply demonstrates, there are few combinations more dangerous than a law license and a vendetta. Plaintiff, aggrieved by his arrest and prosecution for sex offenses, has gone about suing not only those involved in his prosecution, but also those who have written about it. This behavior follows a pattern. When he was terminated from his law firm, he sued the partners and the firm for defamation for a performance evaluation he did not like. The case was dismissed. Plaintiff appealed, and ultimately lost again. He filed collateral actions. These were turned aside. In all, he managed to tie-up his old law firm in nearly a decade of litigation. Here, after filing a seventy five million dollar suit against Madison County, its police, and prosecutors, he sued the ATL Defendants for defamation for reporting on his rape trial and then sued the Gawker Defendants for defamation (along with, initially, several hundred John Doe Defendants) for reporting on the lawsuit he filed against ATL. In all, Plaintiff has filed against over 500 defendants, seeking over a quarter of a billion dollars in damages. In short, Mr. Huon uses the law of defamation offensively—to silence those who report things about him he doesn't like. Rather than meritorious, Mr. Huon's litigation strategy is tactical, vexatious, and chilling—and designed as such.[3] The pattern demonstrates that his aim is to make writing about his actions as costly as possible, and his conduct in this litigation supports that notion. Thus far, he has filed four complaints

[3] This strategy also explains why, Plaintiff, who has touted his success as an attorney conflates important distinctions, and prefers bizarre (and inaccurate) conjecture to any serious legal rejoinder to the merits of Gawker Defendants' motion to dismiss.

and a plethora of motions. It has taken nearly two years and two hundred docket entries to get to a 12(b)(6) motion. It is high time to put a stop to Plaintiff's harassment.

As the forgoing memo and the chart attached to the Gawker Defendants' Motion as Exhibit F makes abundantly clear, the Gawker Defendants eleven sentence item concerning Mr. Huon's lawsuit against the ATL defendants was in no way defamatory, nor was it actionable. It is time for Mr. Huon's campaign to end. This court can and should dismiss each and every one of Plaintiff's claims with prejudice, and that is precisely the relief the Gawker Defendants now seek.

WHEREFORE, the Gawker Defendants respectfully request the Court dismiss all claims against them in Plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) with prejudice, and provide such further relief as is just.

Dated: New York, New York
April 9, 2013

Respectfully Submitted,

GAWKER MEDIA A/K/A
GAWKER.COM, JEZEBEL.COM,
NICK DENTON, IRIN CARMON
& GABY DARBYSHIRE,

By: ____/S/ David Feige_____
One of their attorneys

David Feige
Oren S. Giskan
GISKAN SOLOTAROFF ANDERSON
& STEWART LLP
11 Broadway, Suite 2150
New York, NY 10004
T: 212.847-8315
F: 646.520.3235
David@DavidFeige.com

**CERTIFICATE OF SERVICE**

Under penalties of law, I attest the following documents or items have been or are being electronically served on all counsel of record for all parties on April 9th, 2013

Dated: New York, New York
April 9, 2013

Respectfully Submitted,

By: ____/S/ David Feige_____
David Feige

David Feige
Oren S. Giskan
GISKAN SOLOTAROFF ANDERSON
& STEWART LLP
11 Broadway, Suite 2150
New York, NY 10004
T: 212.847-8315
F: 646.520.3235
David@DavidFeige.com