

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

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC
aka GAWKER MEDIA; GAWKER MEDIA
GROUP, INC. aka GAWKER MEDIA;
GAWKER ENTERTAINMENT, LLC;
GAWKER TECHNOLOGY, LLC; GAWKER
SALES, LLC; NICK DENTON; A.J.
DAULERIO; KATE BENNERT, and
BLOGWIRE HUNGARY SZELLEMI
ALKOTAST HASZNOSITO KFT aka
GAWKER MEDIA,

Defendants.

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PLAINTIFF’S MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

The gravamen of this case is a claim for invasion of privacy by Plaintiff Terry Gene Bollea (professionally known as Hulk Hogan) against Defendants Gawker Media, LLC (and its affiliates) and Heather Clem based on the publication on the Internet of explicit excerpts (the “Sex Tape”) from a clandestine recording (the “Video”) of a sexual encounter between Terry Bollea and Heather Clem, recorded without Bollea’s knowledge. Gawker Media does not dispute that it published the Sex Tape along with a story detailing the explicit details of the remainder of the Video (the “Sex Narrative”); rather, Gawker Media asserts a First Amendment defense contending that it had a constitutional right to publish the Sex Tape and Sex Narrative because, according to Gawker Media, they concerned matters of public concern. If Gawker Media is not entitled to its First Amendment defense, then Terry Bollea will likely prevail on his

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invasion of privacy claims and will prove the damages that he has suffered from the publication of the Sex Tape and Sex Narrative. With respect to Terry Bollea's claim against Heather Clem, Terry Bollea will need to prove that he did not consent to the dissemination of the Video and that she bears legal responsibility for its creation and/or dissemination, as well as his damages.

This is a relatively simple and straightforward case. Gawker Media, however, realizing the possibility that it will be found liable and ordered to pay substantial damages, has undertaken a "scorched earth" litigation strategy. Specifically, Gawker Media is seeking extensive discovery into areas having nothing to do with either its First Amendment defense or Terry Bollea's tort claims or damages, including: (1) the details of Terry Bollea's sex life generally, including alleged extramarital encounters with women other than Heather Clem; (2) whether Terry Bollea made sex tapes for private purposes (i.e., not for dissemination to the public); (3) Terry Bollea's medical records; and (4) the records of Terry Bollea's divorce proceeding. In addition, Gawker Media seeks to depose Terry Bollea for at **least two days**, despite the fact that the issues in the case are straightforward and should not take anywhere near that much time to explore at Terry Bollea's deposition. Gawker Media also seeks to depose both Terry Bollea's current wife, and his ex-wife, regarding numerous salacious topics having nothing to do with the case. By seeking to engage in this irrelevant and excessive discovery, Gawker Media is attempting to compound and multiply the very invasion of Mr. Bollea's privacy that started this lawsuit in the first place. Moreover, such discovery will only serve to needlessly drive up the costs of litigation and frustrate and annoy Mr. Bollea, his current wife, and his ex-wife.

The Florida Rules of Civil Procedure authorize this Court to issue appropriate orders to limit the scope of discovery to preclude the discovery of irrelevant material as well as to protect legitimate privacy interests. Here, a protective order should issue to prevent widespread invasions of the privacy of Terry Bollea and those closest to him, and limit the litigation and

costs thereof to those issues that are relevant to the case.

II. STATEMENT OF FACTS

A. Inquiries Into the Private Sexual And Medical Affairs of Terry Bollea

Defendants have propounded extensive written discovery into Terry Bollea's private sexual and financial conduct. For instance, Gawker Media has asked Terry Bollea to identify all recordings of his sexual activity [Interrogatories 4 & 5], all writings and statements of Bollea discussing his sex life [Interrogatories 6 & 7], and all persons with whom he had sex [Interrogatory 8]. Defendant AJ Daulerio, aligned with Gawker Media and represented by the same counsel in this action, has asked for the identity of all of Terry Bollea's doctors [Interrogatory 2], presumably so that he can subpoena them all.

Gawker Media also has served intrusive document demands, including all documents concerning sex Terry Bollea had with anyone other than his wife between 2002 and 2006 [Demands 7, 21, and 22], all documents concerning even private sex tapes he might have made [Demands 12 and 13], all documents concerning health professionals or doctors Terry Bollea saw between 2006 and the present [Demand 30] and all documents related to his divorce proceeding [Demand 43].

The discovery referenced above is attached as **Exhibits A–C** to the accompanying Affidavit of Charles J. Harder (“Harder Affidavit” or “Harder Aff.”).

B. Length of Terry Bollea's Deposition

On July 12 and 16, 2013, attorneys for the Defendants, Gawker Media and Heather Clem, sent e-mails to Bollea's counsel indicating their desire that Terry Bollea be deposed for at least two days, and seeking dates for two days of depositions of Terry Bollea. Plaintiff's counsel has agreed to one full day of deposition and repeatedly objected to the requests for two days on grounds that it is unnecessary, unduly burdensome, excessive, and harassing.

C. Depositions of Linda and Jennifer Bollea

The parties have been engaging in negotiations over depositions for some period of time. Gawker Media and Heather Clem have indicated at various points during the discussion that they wish to take the depositions of Jennifer Bollea, and Linda Bollea, Terry Bollea's current wife and ex-wife, respectively. (At the time of Mr. Bollea's encounter with Heather Clem, Terry and Linda Bollea were separated; Mr. Bollea had already moved out of their home permanently; their divorce proceeding followed shortly thereafter.)

In Gawker Media's responses to the First Set of Interrogatories served by Terry Bollea, Gawker Media has indicated a desire to depose Jennifer and Linda regarding numerous extraneous issues. Both Jennifer and Linda, according to Gawker, have information regarding "Plaintiff's efforts to cultivate a public persona," as well as "the extent to which Plaintiff's actual conduct corresponded to the public persona Plaintiff attempted to cultivate, as well as public statements Plaintiff made about such conduct, including without limitation with respect to his marriage, his marital infidelities, his professional life, and his interactions with his family."

On August 13, 2013, Terry Bollea's counsel sent counsel for Gawker Media and Heather Clem a meet and confer letter regarding this motion. On August 16, 2013, counsel for Gawker Media responded to that letter. These letters are attached as **Exhibit D** to the Harder Affidavit.

III. ARGUMENT

A. Legal Standards for Protective Orders

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time

or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; [and/or] (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters. . .” Fla. R. Civ. Proc. 1.280(c).

In this case, Gawker Media is seeking to expand discovery in this case into numerous issues that have nothing to do with the merits of the case, but that would be invasive to Terry Bollea and people close to him. In these circumstances, a protective order is appropriate. Indeed, Mr. Bollea has already had his privacy severely invaded by the surreptitious taping of him fully naked in a private bedroom and engaged in consensual sexual relations, and the unlawful posting of that recording at Gawker.com where more than 4 million people have viewed it. He and his family should not be subjected to further invasions of their privacy through invasive discovery that goes beyond the scope of reasonable discovery.

Florida’s Constitution recognizes a right to privacy. Fla. Const. Art. 1 § 23. Protective orders are appropriate to preclude or limit discovery into areas of constitutionally protected privacy. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798, 801 (Fla. 3d DCA 1985) (quashing order granting discovery from blood bank of identities of donors, which could be used to determine whether donors had contracted STD’s and thus could indirectly disclose the sex lives of the donors). “The discovery rules. . . grant courts authority to control discovery in all aspects in order to prevent. . . undue invasion of privacy.” *Id.*

Medical records also are protected by the right to privacy. *Peisach v. Antuna*, 539 So.2d 544 (Fla. 3d DCA 1989) (reversing denial of motion for protective order seeking to prevent deposition of wife’s gynecologists in child support proceeding); *see also Leonard v. Leonard*, 673 So.2d 97 (Fla. 1st DCA 1996) (holding husband could not depose wife’s therapists in divorce and child custody proceeding).

A California case involving a television actress is highly persuasive on the issue of the scope of the plaintiff's right to sexual privacy in this sort of case. *Tylo v. Superior Court*, 64 Cal. Rptr. 2d 731 (Cal. App. 1997), involved an actress who sued a television producer for firing her from a role in a television show due to her pregnancy. At deposition, the defense counsel asked the actress about the state of her marriage at various points in time, purportedly to rebut her claims that she suffered emotional distress. The court held that just because the plaintiff claimed emotional distress did not mean that **any possible source** of emotional distress from her private life was discoverable. *Id.* at 736–37. The court further rejected the defendant's argument that the fact that Ms. Tylo gave interviews to the media about her personal life waived her right to privacy, or put the content of those interviews at issue in the case. *Id.* at 737.¹ Likewise, here, Gawker Media's efforts to claim that Mr. Bollea somehow waived certain rights because he brought this action for injunction or damages, or spoke about the case, is without merit.

In determining whether to permit discovery into private matters, the court must balance the relevance of the discovery to the action against the invasion of privacy that would result from allowing the discovery. *Rasmussen*, 467 So.2d at 803.

B. The Court Should Limit the Subject Matter of Discovery

Under the foregoing standards, Gawker Media is seeking discovery into numerous private matters of no or tangential relevance to the case, and the Court therefore should issue an appropriate protective order. First, Gawker Media should not be permitted to inquire into Terry Bollea's sex life except where it relates to the issues in the case, that is, the sexual encounter with

¹ *Tylo* distinguishes a case involving a request to seal public court records as involving competing First Amendment issues; however, there are no competing First Amendment issues when it comes to taking **discovery** in a case. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (affirming protective order against newspaper prohibiting publication of material obtained through discovery).

Heather Clem that was recorded. Whether or not Terry Bollea had extramarital affairs, with whom he slept, etc., is simply of no relevance to this action and is exactly the sort of private information that is manifestly protected by the Florida Constitution's right to privacy.

Similarly, unless Terry Bollea made a sex tape and disseminated it to the public (which he did not), whatever his proclivities might be with respect to the making of completely **private** sex tapes with women, if any exist, are not relevant and are clearly protected under his right to privacy.

Terry Bollea expects Gawker Media to argue that his alleged hypocrisy, and alleged failure to live up to his public pronouncements, is relevant to this case, and therefore Gawker Media can take discovery of these matters. However, this is not the case. Unlike, say, a case involving the unauthorized use of a person's name or likeness in an advertisement (where the plaintiff's unpopularity and inability to obtain commercial endorsements would be relevant to the damages claimed), the popularity of a sex tape does not depend on whether a celebrity is viewed positively or negatively. The mere fact that the celebrity is famous makes the sex tape valuable.

Terry Bollea believes that Gawker Media's real purpose in pursuing this evidence into alleged "hypocrisy" is a thinly veiled attempt to assassinate Terry Bollea's character and put **him** on trial, so as to divert from the real issues in the case that concern **Gawker Media's** conduct in posting the Sex Tape and Sex Narrative on the Internet. This Court should reject Gawker Media's attempt to divert from the issues, turn the case upside down, and put Terry Bollea's personal life on trial.

Moreover, Gawker Media presumably wants to make Mr. Bollea as uncomfortable and inconvenienced as possible through the discovery process, in hopes that the mere **process** of the litigation will cause him to back down or stop the case. Any such tactics would be highly improper and should not be countenanced.

This Court also should limit discovery of Terry Bollea’s medical records. Terry Bollea expects Gawker Media to argue that it should be able to take extensive discovery of his medical history because he has asserted that he suffered emotional distress as a result of the publication of the Sex Tape. However, Florida follows the rule of other jurisdictions that this sort of discovery is not permitted unless the plaintiff is making very specific allegations of emotional distress, i.e., that he had to go seek medical treatment, etc. However, in the “garden variety” emotional distress case, where the plaintiff is simply alleging that the very nature of the defendant’s conduct would cause any normal person mental anguish, and where the plaintiff is not intending to put on expert medical testimony as to his emotional state, no such discovery is required or permissible. *See Olges v. Dougherty*, 856 So.2d 6, 12 (Fla. 1st DCA 2003) (citing cases from other jurisdictions).

Here, Mr. Bollea is seeking “garden variety” emotional distress damages, and is **not** claiming that he was forced to seek medical treatment. Therefore, his medical records are irrelevant and outside the scope of discovery. Moreover, such discovery is yet another attempt by Gawker Media to divert the Court and jury from the real issues and instead turn the case into a “side show” and referendum on Mr. Bollea’s life, rather than Gawker Media’s illegal conduct of posting a surreptitious sex tape, knowing that Mr. Bollea did not know about or consent to the taping or documentation.

C. The Court Should Limit Terry Bollea’s Deposition to One Seven-Hour Day

Gawker Media and Heather Clem are seeking to depose Terry Bollea for at least two days. However, the issues in this case do not require anywhere near two days of deposition for Mr. Bollea. As noted above, the issues concern whether Gawker Media invaded Terry Bollea’s privacy, whether Gawker Media has a First Amendment defense for its actions and, if not, the extent of Terry Bollea’s damages. These aspects of the case do not require anywhere near two

days of examination of Mr. Bollea. Similarly, with respect to Heather Clem, the issue is whether she bears legal responsibility for the creation and dissemination of the tape. Again, nothing about that issue requires two days of testimony by Terry Bollea.

In correspondence, Gawker Media compared Terry Bollea's deposition to Gawker Media's corporate designee deposition (noticed for more than one day), but that deposition is different. Gawker Media's conduct, not Bollea's conduct, is at the center of this case, and discovery on the damages issue will require detailed information from Gawker Media regarding the financial windfall that it reaped by posting the Sex Tape. Finally, because Gawker Media is a business entity, its deposition may involve multiple human designees rather than just a single witness, as is the case with Bollea's deposition. Indeed, Gawker Media has designated at least eleven (11) of its employees as witnesses in this case.

D. The Court Should Preclude the Deposition of Bollea's Ex-Wife And Limit Examination of His Current Wife to Two Hours

Gawker Media has stated that it seeks to depose Terry Bollea's wife, Jennifer, and also his ex-wife, Linda. Neither of these women have any knowledge regarding the making or dissemination of the Video or Gawker Media's First Amendment defenses.

Linda Bollea is being deposed, by Gawker Media's own admission, to obtain salacious material regarding Terry Bollea's alleged extramarital affairs and personal life. Further, Linda and Terry were separated at the time the Sex Tape was recorded; Mr. Bollea had permanently moved out of their house; and divorce proceedings commenced shortly thereafter. Also, the two were long-divorced at the time Gawker Media released the Sex Tape to the public and Terry Bollea suffered damage. Second, any alleged extramarital affairs have no relevance whatsoever to any of the claims or legitimate defenses in this case. Third, the depositions are being sought to harass and annoy Jennifer Bollea, Linda Bollea, and Terry Bollea. Linda has no relevant

evidence regarding this case and there is no basis to drag her into this matter and require her deposition. Indeed, doing so will simply be an opportunity for one ex (or both) to unnecessarily re-hash their marital issues in this case, where those issues have no place, and will only serve to waste the parties' and Court's time and resources.

Jennifer Bollea also is being deposed to obtain salacious material. Gawker states in its interrogatory response that Jennifer has knowledge regarding the same salacious categories of facts as Linda. However, unlike Linda, at least Jennifer was married to Terry Bollea at the time the Sex Tape came out and therefore has some (very limited) relevant evidence on issue of the damages that Terry Bollea has suffered. Her deposition therefore should be limited to two hours and Gawker Media's counsel should be required to show cause, after those two hours, why additional time is warranted.²

IV. CONCLUSION

For the foregoing reasons, Plaintiff Terry Bollea respectfully requests that the Court issue a protective order as follows:

1. The following matters shall not be discoverable:
 - a. Bollea's alleged extramarital affairs and sex life with the sole exception of the recorded encounter at issue;
 - b. whether Terry Bollea made sex tapes for any purpose other than dissemination to the public;
 - c. Terry Bollea's medical records; and
 - d. any records or details relating to Bollea's divorce proceeding;
2. Terry Bollea's deposition shall be completed in one day and occur for no more

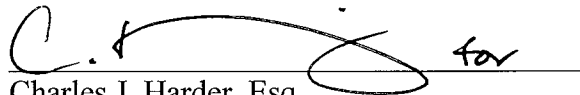
² If Linda's deposition is permitted to be taken at all, Terry Bollea requests that it be limited to two hours.

than seven hours;

3. Jennifer Bollea's deposition shall take place in one day for no more than two hours, absent an order from the Court; and

4. Linda Bollea shall not be deposed in this action.

DATED: August 23, 2013



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CERTIFICATE OF GOOD FAITH CONFERENCE

Plaintiff has made a good faith effort, via correspondence attached as **Exhibit D** to Charles Harder's Affidavit, to resolve this issue without court intervention. However, Defendants oppose the relief sought in this motion.

CERTIFICATE OF SERVICE

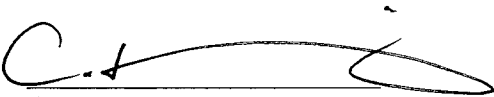
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email this 26th day of August, 2013 to the following:

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