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 TERRY GENE BOLLEA'S OPPOSITION TO GAWKER MEDIA, LLC'S MOTION TO COMPEL PRODUCTION OF COMMUNICATIONS RELATED TO SETTLEMENT OF CLAIMS WITH BUBBA CLEM

I. INTRODUCTION

Bubba Clem was a former defendant in this action and the owner of the residence where Mr. Bollea was surreptitiously recorded without his knowledge and consent engaging in private sexual activity. The recording was later posted on the Internet by Gawker Media, LLC and its affiliated co-defendants, and Mr. Bollea sued for invasion of privacy and related claims. Mr. Bollea settled his claim against Bubba Clem.

As part of its extremely broad discovery and overly-aggressive requests, Gawker sought discovery of all the communications between Mr. Bollea and Bubba Clem regarding their settlement. Mr. Bollea has produced a copy of the settlement agreement (subject to his

objections, including the objection that the terms of the agreement are **inadmissible**). Gawker has not established, however, that the settlement **negotiations** between Mr. Bollea and Bubba Clem are discoverable. Florida law provides that offers to compromise are generally not admissible in civil actions, and Gawker has not identified any **admissible** evidence that its requests are likely to lead to. Accordingly, the motion should be denied.

II. THE SETTLEMENT COMMUNICATIONS ARE NOT DISCOVERABLE.

Under Florida law, offers to compromise are not admissible to prove liability for a claim. Fla. Stat. § 90.408. This rule applies to statements made in settlement negotiations. *Rubrecht v. Cone Distributing, Inc.*, 95 So.3d 950, 955 (Fla. 5th DCA 2012) ("Under section 90.408, in addition to evidence of an offer to settle, evidence of statements made during settlement negotiations is inadmissible to prove liability or the absence liability or the value of a claim."). There are two reasons for this rule: (1) statements made in an attempt to settle are not always reliable, because parties will make concessions and say things they do not necessarily agree with, in order to get the dispute resolved; and (2) maintaining a rule of confidentiality furthers the public policy favoring the settlement of disputes and pending lawsuits by allowing parties to speak freely without fear that their statements will be used against them. Law Revision Council Note to Fla. Stat. § 90.408 (1976); *Rubrecht*, 95 So.3d at 956 ("The purpose of the statute is to allow counsel to communicate freely in an effort to settle litigation without the risk that any statement made will be used against his clients.").[1]

[1] Gawker misrepresents *Harris v. Grunow*, 71 So.3d 186, 189 (Fla. 3d DCA 2011), as saying the sole purpose of the statute is to prevent juror prejudice. Not so. The case identifies another important purpose of Section 90.408, namely, to promote the public policy of encouraging settlement. *Id.* ("[T]he purpose of the prohibitions against the admission of evidence of settlement is promotion of Florida's public policy to encourage settlement [and to prevent juror prejudice].").

The offer to compromise rule extends to the use of statements made in negotiations to settle a different claim, as long as the two claims are related. In *Rubrecht*, 95 So.3d at 955-56, an automobile accident case, the court excluded evidence of a settlement of a claim arising out of a prior accident even though the issue of how the damages would be apportioned between the two accidents was still in play. In *Charles V. Pitts Real Estate, Inc. v. Hater*, 602 So.2d 961, 963 (Fla. 2d DCA 1992), the court excluded evidence of a settlement of a related claim where Court found it to be "quite analogous to a settlement with a codefendant."[2]

Thus, the settlement negotiations between Mr. Bollea and Bubba Clem are inadmissible in this case, and thus, absent a showing by Gawker that the settlement negotiations are likely to lead to the discovery of some **other** evidence that will be admissible (and Gawker has made no such showing), the settlement negotiations are not discoverable. While Florida courts have not ruled directly on the existence of a privilege not to disclose settlement communications in discovery, other courts have ruled that the privilege emanates from the rule excluding offers to compromise from being used to prove liability, and held that **settlement communications are generally non-discoverable** by third parties. In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981-83 (6th Cir. 2003), the court held that under Fed. R. Evid. 408 (which Gawker admits is similar to Section 90.408), the **existence** of a settlement or settlement talks may be discoverable, but the **settlement communications themselves are privileged**. In

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[2] *Bankers Trust Co. v. Basciano*, 960 So.2d 773, 779-80 (Fla. 5th DCA 2007), cited by Gawker, permits settlement communications to be admitted for the purpose of showing that a party to the settlement was acting in a representative capacity. **Gawker is not seeking to obtain the communications relating to the Bubba Clem settlement for any analogous purpose**. *Basciano* is also distinguishable because in *Basciano*, there was no compromise at all, because there was no dispute about the amount of the obligation. In contrast, here, Bubba Clem and Bollea settled a claim and compromised regarding the terms of the settlement. Similarly, *Wolowitz v. Thoroughbred Motors, Inc.*, 765 So.2d 920, 925 (Fla. 2d DCA 2000), holds that settlement communications are admissible to show the existence and terms of an oral contract, which, again, is entirely different from the justification asserted by Gawker for this discovery.

Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418, 423 (D.N.J. 2009), the court held that: "Parties seeking to discover [settlement] communications must make a **heightened, more particularized showing of relevance**.... [D]iscovery which can only lead to inadmissible evidence is prohibited...." (internal quotation omitted; emphasis added). In *Gaull v. Wyeth Laboratories, Inc.*, 687 F. Supp. 77, 82-83 (S.D.N.Y. 1988), the court **denied** a motion to compel production of settlement agreement with third party because the relevance of the document was tangential, when weighed against the important public policy of encouraging settlement communications.

Nieman v. Naseer, 47 So.3d 954, 954-55 (Fla. 4th DCA 2010), cited by Gawker, does not hold that settlement communications are generally discoverable. It rejected a **lawyer-client** privilege claim and a claim that a settlement agreement was nondiscoverable due to a confidentiality clause contained in it. Mr. Bollea is not arguing that his lawyer's communications with Bubba Clem's lawyers are protected by the lawyer-client privilege, or that the mere fact that the settlement with Bubba Clem contained a confidentiality clause, it is not discoverable. Nothing in *Nieman* holds that settlement communications that will not be admissible at trial are discoverable. On the contrary, as explained above, if the communication is inadmissible at trial—as is the case here with the settlement communications between counsel for Mr. Bollea and Bubba Clem—the communication is not discoverable.[3]

[3] Gawker points to three cases that declined to recognize a broad settlement privilege. However, Mr. Bollea is not contending that settlement communications can never be discoverable. In some cases, either the protections of Section 90.408 will not apply (and thus the communications will be admissible and discoverable) or the settlement communications may lead to the discovery of other evidence that will be admissible at trial. However, in this case, Gawker is seeking documents that will both be inadmissible and are unlikely to lead to the discovery of any admissible evidence. Whether or not it is characterized as a formal "settlement privilege," such documents are not discoverable and the cases cited by Gawker are not to the contrary.

III. MR. BOLLEA'S PRODUCTION OF HIS SETTLEMENT AGREEMENT WITH BUBBA CLEM IS SUFFICIENT TO PERMIT GAWKER TO MAKE THE ARGUMENTS IT WISHES TO MAKE.

Gawker argues that it needs the settlement communications to make **bias arguments** and to **challenge inconsistencies** in Bubba Clem's description of how the Sex Tape came to be recorded. However, Mr. Bollea has produced the settlement agreement with Bubba Clem, and Gawker can make those arguments (if they are even cognizable) from the face of the settlement agreement. Any allegation of bias on the part of Bubba Clem would be based on the **actual terms** of the settlement that he entered into with Mr. Bollea. Gawker has those terms. Discussions, negotiations, and offers to compromise are irrelevant.

Gawker contends that Bubba Clem's statements before the settlement with Mr. Bollea were inconsistent with his statements after the settlement. Mr. Bollea does not necessarily disagree—Bubba Clem appears to have made inconsistent statements. The day after he was sued for secretly taping Mr. Bollea in violation of the law, Bubba Clem appears to have stated on his morning radio show and lied about Mr. Bollea supposedly knowing that he was being taped and potentially being involved in its distribution. As part of the settlement agreement, Bubba Clem agreed to set the record straight and make a public apology to Mr. Bollea for his statements, and told the truth to the public by stating that Mr. Bollea, in fact, had no knowledge whatsoever that he was taped, and had no knowledge or involvement whatsoever in any aspect of the distribution of the sex tape.

The production of the settlement agreement is sufficient to allow Gawker to make the argument that Bubba Clem made inconsistent statements before and after the settlement agreement. The argument does not depend at all on the content of the negotiations between

Bubba Clem and Mr. Bollea. Similarly, Gawker will be able to cross-examine Bubba Clem based on the fact that the settlement was entered into, and ask him about any inconsistencies in his statements. The **negotiations** of the settlement have nothing to do with that argument. In *Charles V. Pitts Real Estate, Inc. v. Hater*, 602 So.2d 961, 963 (Fla. 2d DCA 1992), the court rejected the argument that settlement negotiations needed to be admitted into evidence to show that the settlement "colored" the settling party's testimony, where the settling party had made inconsistent statements before and after the settlement. Settlement negotiations generally are not admissible for the purpose of impeaching a witness. *Rubrecht*, 95 So.3d at 955-56; *Saleeby v. Rocky Elson Construction*, 3 So.3d 1078, 1081-82 (Fla. 2009) (holding that trial court erred in admitting evidence of settlement of previous lawsuit for impeachment purposes).[4]

IV. CONCLUSION

For the foregoing reasons, Gawker's motion should be denied.

DATED: January 9, 2014

/s/ Charles J. Harder
Charles J. Harder, Esquire
PHV No. 102333
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800

[4] Because Florida law rejects the use of settlement negotiations for the purpose of impeachment, the federal cases cited by Gawker which permit discovery of such negotiations for impeachment purposes are inapplicable. In any event, Gawker has not actually shown that there will be any impeachment material in the settlement negotiations that it does not already have due to Bollea's production of the settlement agreement with Bubba Clem. If Gawker is attempting to impeach Bubba Clem, that argument will not be based on anything in the settlement negotiations; it will be an argument based on his changing his story after the settlement was signed. The negotiations between Bollea's and Bubba Clem's respective lawyers have nothing to do with that argument. *Tanner v. Johnston*, 2013 WL 121158 at *5 (D. Utah. Jan. 8, 2013); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 687 (D. Kan. 2004); and *Tribune Co. v. Purcigliotti*, 1996 WL 337277 at *3 (S.D.N.Y. Jun. 19, 1996), cited by Gawker, all concerned discovery of the settlement agreement itself so that the party could show bias; this is consistent with the scope of Bollea's position that the settlement **agreement** may have been discoverable but the settlement **negotiations** were not.

Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601
charder@hmafirm.com

-and-

Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Christina K. Ramirez, Esq.
Florida Bar No. 954497
BAJO CUVA COHEN & TURKEL, P.A.
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: cramirez@bajocuva.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service mail this 9th day of January, 2014 to the following:

Barry A. Cohen, Esquire
Michael W. Gaines, Esquire
Barry Cohen, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1000
Tampa, Florida 33602
bcohen@tampalawfirm.com
mgaines@tampalawfirm.com
jrosario@tampalawfirm.com
Counsel for Heather Clem

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

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

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

/s/ Kenneth G. Turkel
Attorney