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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

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

Defendants.
_____/

PLAINTIFF'S RESPONSE TO SUPPLEMENTAL BRIEF FILED BY GAWKER DEFENDANTS RE: MOTION IN LIMINE NO. 3 TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO BUBBA CLEM SETTLEMENT

Mr. Bollea responds to Gawker Defendants' opposition to excluding evidence of Mr. Bollea's settlement with Bubba Clem as follows:

Gawker Defendants' position regarding Terry Bollea's ("Mr. Bollea") settlement with Bubba Clem amounts to nothing more than speculation that would require this Court to conclude, contrary to law, that Mr. Bollea and Mr. Clem entered into a contrary upon the advice of counsel to commit a crime. This proposition is absurd. The fact that Mr. Bollea reached a settlement with Mr. Clem does not support the rank speculation that Mr. Bollea and Mr. Clem are conspiring to perjure themselves at the trial to advance Mr. Bollea's case. That claim is offensive, and demonstrates exactly why Florida law does not permit the admission of offers to compromise into evidence to prove liability. The settlement communications and agreement should be excluded.

First, **Florida law prohibits Gawker Defendants from using the release of Mr. Clem to make a bias argument**. Fla. Stat. 768.041(3) is categorical: "The fact of such a release or

covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury." There are no exceptions in the statute. *Saleeby v. Rocky Elson Construction, Inc.*, 3 So.3d 1078 (2009), a recent Florida Supreme Court case, is controlling. The Court rejects Gawker Defendants' argument that there are bias, prejudice, or impeachment exceptions to Section 768.041(3).

In Gawker Defendants' initial opposition, they analogized to "Mary Carter" agreements, where a defendant purports to remain in the case after secretly settling. However, *Saleeby* makes clear that while the Florida Supreme Court did rule that any existing Mary Carter agreements had to be disclosed to juries despite the language of Section 768.041(3), that doctrine would not be extended to any other releases of settling parties, and was based on the fact that the Florida Supreme Court actually outlawed Mary Carter agreements in Florida for public policy reasons. *Dosdourian v. Carsten*, 624 So.2d 241 (1993).

The vice of a Mary Carter agreement is not some speculation that a settling defendant might go too far in "helping" the plaintiff, but that the jury actually thinks there is no settlement and the defendant is still in the case and fighting the claim, when in fact the defendant is secretly helping the plaintiff:

> Unique to the scheme of Mary Carter agreements, settling defendants retain their influence upon the outcome of the lawsuit from which they settled: so-called settling defendants continue "defending" their case. Defendants who have allegedly settled remain parties throughout the negligence suit, even through trial. As a consequence, these defendants remain able to participate in jury selection. They present witnesses and cross-examine the witnesses of the plaintiff by leading questions. They argue to the trial court the merits and demerits of motions and evidentiary objections. Most significantly, the party status of settling defendants permits them to have their counsel argue points of influence before the jury.
> *Id.* at 243.

Mr. Bollea's agreement with Mr. Clem, however, is not a Mary Carter agreement. Bubba Clem has been dismissed. His counsel will not be sitting at the defense counsel table, cross-examining witnesses, selecting jurors, or making arguments. The type of prejudice that led the Florida courts to hold that Fla. Stat. § 768.041(3) does not apply to Mary Carter settlements has no application here.

Indeed, the alleged prejudice that Gawker Defendants complain about—the speculation that a settling defendant might be thankful that he or she was let out of the case and might try to "help" the plaintiff by delivering false testimony—is at least potentially present whenever a release is signed and a party is dismissed. If this argument were sufficient to defeat the provisions of Section 768.041(3), the statute would have no effect whatsoever. The Florida legislature weighed the possibility that juries could be deprived of information about a release that could be useful in evaluating the credibility of testimony, and struck the balance in favor of the exclusion of this evidence.

Gawker Defendants highlight the agreement of Mr. Clem to cooperate with Mr. Bollea, but that obligation extends only to cooperation consistent with the requirements of the law. Such terms are common in settlement agreements and do not and cannot require a party to lie under oath. Florida law requires contracts to be construed in a manner consistent with a lawful purpose. *Diversified Enterprises, Inc. v. West*, 141 So.2d 27, 30 (Fla. 2d DCA 1962). Mr. Clem will be under oath at trial, and he will be required to give truthful testimony to all questions that he is required to answer. If a truthful answer is unfavorable to Mr. Bollea, nothing in the settlement permits Mr. Bollea to take any action against Mr. Clem for giving it, and if Mr. Clem were to lie under oath in a misguided attempt to "assist" Mr. Bollea, he would be liable for the serious legal consequences of doing so.

Second, the testimony that Gawker Defendants are centered on—Mr. Clem's testimony that Mr. Bollea did not know that he was being recorded—has been repeatedly corroborated by both testimony and physical evidence. The camera in the Clems' residence was hidden. Every witness with knowledge of the encounter—Mr. Bollea, Mr. Clem, and Ms. Clem—all **testified** that Mr. Bollea did not know he was being recorded. The sex videos do not contain any indication of Mr. Bollea being aware of the presence of a camera. A comment is heard at the end of one of the videos that further confirms Mr. Bollea did not know he was being recorded. Other witnesses told law enforcement that Mr. Bollea did not know he was being recorded. Even the alleged statement made by Mr. Bollea to law enforcement that Gawker Defendants have repeatedly pointed out—wherein Mr. Bollea supposedly asked Bubba Clem about cameras and Mr. Clem confirmed to Mr. Bollea that he was not being filmed—is **consistent** with the conclusion that Mr. Bollea **did not know** he was being recorded.

Third, the admissibility of the discussions between Gawker Defendants themselves and Mr. Bollea in the wake of the publication of the Sex Video do not bear on this issue. There is no rule of law that says that just because one set of communications which could be characterized as settlement communications comes into evidence, another, totally unrelated release must be admitted into evidence. The two sets of communications raise different issues, and the prohibition contained in Section 768.041(3) is broader than the exclusion of offers to compromise to prove liability.

For those reasons and those stated in the moving papers, Plaintiff's Motion *in Limine* Number 3 should be granted and the Bubba Clem settlement excluded.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 12th day of February, 2016 to the following:

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