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.
_____/

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SANCTIONS ORDER PRECLUDING DEFENDANTS FROM USING EXHIBITS NOT DISCLOSED IN DISCOVERY AS EVIDENCE AND STRIKING DEPOSITION TESTIMONY BASED ON SUCH EXHIBITS

Plaintiff Terry Gene Bollea submits this Reply in support of his Motion for Sanctions Order precluding Defendants from using Exhibits[1] not disclosed in discovery as evidence, and striking deposition testimony based on such Exhibits.

As an initial matter, Defendants are wrong in assuming that Mr. Bollea only seeks the preclusion sanction as to Gawker Media, LLC ("Gawker"). *See* Opp. at n.1. Gawker, A.J. Daulerio, Nick Denton and Kinja KFT are all represented by the same counsel, Levine Sullivan Koch & Schulz, and therefore act together when it comes to litigation strategy and tactics.

[1] "Exhibits" shall refer to Deposition Exhibits 77–84, 100 and 103–06, which were marked at Mr. Bollea's deposition, but were never produced by Gawker despite the fact that they were responsive to document requests previously propounded to Gawker by Mr. Bollea.

Gawker cannot be allowed to avoid an evidentiary sanction precluding it from using certain evidence by claiming, at trial or otherwise, that a different defendant is presenting the same evidence that Gawker is precluded from using. Mr. Bollea thus seeks the requested order as to all Defendants represented by the law firm Levine Sullivan Koch & Schulz.

I. INTRODUCTION

Defendants call this "a remarkable motion." Opp. at 1. There is nothing remarkable about this motion, except that Mr. Bollea had to bring it. It is remarkable that Defendants willfully withheld responsive documents, asserting meritless objections they knew they would waive only a few days later, so that they could ambush Mr. Bollea with documents and video designed to make him extremely uncomfortable—including, for example, playing audio from a radio broadcast discussing where guests prefer to ejaculate, and showing a video of Mr. Bollea in the hospital, under the influence of medications, following major surgery. *See* Mot. at 6–8 (chart describing Exhibits at issue). Defendants' tactics fly in the face of "Florida's dedication to the prevention of surprise, trickery, bluff and legal gymnastics," and are remarkable for their gall. *Northup v. Acken*, 865 So. 2d 1267, 1270 (Fla. 2004) (internal quotations omitted). Because this kind of "[t]rial by ambush is distant history" in Florida (*id.* at 1271), and for the following additional reasons, the appropriate sanction for Defendants' behavior is preclusion:

First, Defendants do not dispute that the Exhibits were responsive to propounded discovery, Defendants intended to use them as evidence, Defendants willfully did not produce the Exhibits by the deadline for production, and Defendants introduced them as evidence at Mr. Bollea's deposition anyway.

Second, Defendants admit, as they must, that any work product protection ceases when a party intends to use the requested documents as evidence at trial. Opp. at ¶8. The Supreme

Court of Florida has held that "those documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery." *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 112 (Fla. 1970). In another Florida Supreme Court case, which Defendants themselves cite, the Court "reiterate[d] [its] dedication . . . to the principle that in Florida, when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, the video recording, document, exhibit, or other piece of evidence is fully discoverable and is not privileged work product." *Northup*, 865 So. 2d at 1270.

Third, though Mr. Bollea disputes that the documents at issue are, as Defendants put it, of "central relevance to the legal issues at hand," (Opp. at 1), Defendants' contention that they are belies any argument that the instant motion is somehow "exceedingly premature" (Opp. at ¶10). Defendants intend, and always intended, to use this evidence at trial. They cannot argue otherwise. *Northup*, 865 So. 2d at 1272 (holding that party is "expected to reveal [evidence] to the opposing party" as soon as it determines "in good faith" that it intends to use the evidence at trial).

Fourth, Defendants claim that Mr. Bollea's motion asks the Court to "disregard" Florida Supreme Court authority. *See* Opp. at 2. This is not true. In *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980), the Florida Supreme Court held, first, that a "party's failure to comply with such a discovery request will bar the information's use as evidence in the cause"—the exact relief requested here—and, second, that a trial court has "**discretion** to allow the discovery deposition before disclosure"—not that it is required to do so, as argued by Defendants. *Id.* at 708 (emphasis added).

Fifth, the Court has authority to enter sanctions for abusive litigation tactics, including

precluding Defendants from using the Exhibits as evidence, and striking the testimony regarding them. Obtaining an order compelling their production prior to the deposition is not required.

II. ARGUMENT

A. The Work Product Doctrine Does Not Protect Documents That A Party Intends To Use As Evidence

In *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 112 (Fla. 1970), the Florida Supreme Court unequivocally held that materials "which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery." The Florida Supreme Court has reiterated its *Surf Drugs* holding on at least two occasions: (1) In *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980), the Court held:

> [T]he contents of surveillance films and materials are subject to discovery in every instance where they are intended to be presented at trial either for substantive, corroborative, or impeachment purposes. **Any work product privilege that existed for the contents ceases once the materials or testimony are intended for trial use.** More simply, if the materials are only to aid counsel in trying the case, they are work product. But, if they will be used as evidence, the materials, including films, cease to be work product and become subject to an adversary's discovery.

(Emphasis added.) (2) In *Northup v. Acken*, 865 So. 2d 1267, 1270 (Fla. 2004), the Court held:

> We conclude and specifically announce today that **all materials reasonably expected or intended to be used at trial**, including documents intended solely for witness impeachment, **are subject to proper discovery requests** under *Surf Drugs*, *Dodson*, and a host of lower court decisions, and are not protected by the work product privilege.

(Emphasis added.) Lower courts have followed and applied this rule. *See, e.g.*, *Spencer v. Beverly*, 307 So.2d 461, 462 (Fla. 4th DCA 1975) (Downey, J., concurring) ("If matter is to be introduced into evidence, it is not privileged as work product."); *Corack v. Travelers Insurance Co.*, 347 So.2d 641, 642 (Fla. 4th DCA 1977) ("if a party possesses material he expects to use as evidence at trial, that material is subject to discovery"). The *Surf Drugs* holding is not, as

Defendants argue, "unremarkable." Opp. at n.5. It is the seminal work product case in Florida.

Given this well-established rule, Defendants' reliance on *Smith v. Florida Power & Light Co.*, 632 So. 2d 696 (Fla. 3d DCA 1994), is misguided. *Smith* does not involve documents intended to be used as evidence. It thus is inapposite to the situation here, and rather, *Surf Drugs* and its progeny control. It does not matter whether Defendants could once claim work product protection for the Exhibits; once Defendants "reasonably ascertain[ed] in good faith that the material may be used or disclosed at trial," any work product protection ceased to exist, and the Exhibits should have been "produced when requested." *Northup*, 865 So. 2d. at 1271–72.

Additionally, Defendants do not dispute that courts in Florida have found that an objection on grounds that documents are publicly available is insufficient to resist a discovery request. *See* Opp. at n.4 (listing string cite of cases outside Florida); *Cf. Pepperwood of Naples Condominium Ass'n, Inc. v. Nationwide Mutual Fire Insurance Co.*, 2011 WL 3841557 at *4 (M.D. Fla. Aug. 29, 2011) (rejecting objection based on documents being publicly available online). Defendants further concede that they intend to use the Exhibits for purposes other than impeachment. *See* Opp. at 1 (referring to Exhibits as being of "central relevance to the legal issues at hand").

Accordingly, Defendants' objections to producing the Exhibits were without merit, and they should have been produced by the deadline.

B. The Exhibits Were Required To Be Produced Prior To Mr. Bollea's Deposition

Defendants next contend that "[t]here is no obligation to produce 'work product' before a deposition." Opp. at ¶10. This simply is not correct. "*Dodson* and other decisions demand that evidence reasonably expected or intended for trial use be produced **when requested**."

Northup, 865 So. 2d. at 1271 (emphasis added). "We also explicitly hold that if attorney work product is expected or intended for use at trial, it is **subject to the rules of discovery**." *Id.* at 1272 (emphasis added). The rules of discovery require that documents be produced in response to requests for production 30 days after service (Fla. R. Civ. P. 1.350). Here, the deadline for production was March 4, and Defendants did not produce their responsive documents by their deadline—though they possessed those documents at that time. *See* 4/4/14 Harder Aff., Ex. A (meet and confer correspondence wherein counsel for Defendants states that "there is no reasonable argument that Gawker is precluded from asking these key witnesses questions about **documents we have gathered**" (emphasis added)).

It is not credible for Defendants to argue, on the one hand, that "counsel is unlikely to decide until much later in the process whether and to what extent they intend to use attorney work product materials at trial" (Opp. at ¶12), and on the other hand, that the Exhibits are of "central relevance to the legal issues at hand" (Opp. at 1). The Florida courts have made clear: "all materials **reasonably expected** or intended to be used at trial . . . are subject to proper discovery requests . . . ." *Northup*, 865 So. 2d at 1271 (emphasis added). Defendants "reasonably expected" to use materials they deemed to be of "central relevance" at trial, and, in fact, used them at Mr. Bollea's deposition. *Id.* Accordingly, the Exhibits were not protected by work product as of the deadline for their production, and should have been produced by that deadline—prior to Mr. Bollea's deposition.

Defendants are being misleading when they claim that *Dodson* is "dispositive" authority that Defendants had the right to question Mr. Bollea about their work product prior to its production. Opp. at ¶11. In *Dodson*, the Court held that a trial court has "**discretion** to allow the discovery deposition before disclosure"—not that it is required to do so. 390 So.2d at 708

(emphasis added). The *McClure v. Publix Super Markets, Inc.*, 124 So. 3d 998, 999 (Fla. 4th DCA 2013) case, cited by Defendants, reinforces this point. *Id.* (quoting *Dodson*, and holding that it is "*within the trial court's discretion*" to determine whether a party has the right to question the deponent before producing the work product materials) (emphasis in original). Here, the Court was not given the opportunity to exercise its discretion as to the timing of the disclosures, because Defendants never sought permission from the Court to withhold their otherwise discoverable documents prior to the deposition.

Independently, there was no basis for permitting Mr. Bollea's deposition before disclosure of the Exhibits. In *Dodson*, the case involved surveillance videotapes that were used to detect fraudulent personal injury claims. The court held that questioning the plaintiff before revealing the surveillance footage was permissible to serve this purpose. There is no similar rationale for permitting Gawker to ambush Mr. Bollea with material such as general discussions of sex on the radio or footage of him in a hospital. Mr. Bollea's central claim—that he suffered damages by Gawker's publication of footage of a surreptitious recording of Mr. Bollea involved in a sexual encounter—is not fraudulent and there is no reason why the Court should exercise the discretionary power that was recognized in *Dodson*.

Defendants bury their discussion of *Target Corp. v. Vogel*, 41 So.3d 962 (Fla. 4th DCA 2010), in a footnote, presumably because they know that its holding is squarely against them. As Mr. Bollea explained in his moving papers, the *Target* court affirmed an order compelling disclosure of photos and video of an accident scene **before** the plaintiff's deposition, and specifically rejected the defendant's work product objection. *Id.* at 963. The *Target* court expressly addressed *Dodson*, and found that, unlike in *Dodson*, the defendant in *Target* "did not make any showing as to how production of the photographs [prior to the plaintiff's deposition]

violates *Dodson's* policy of timing the disclosure of discovery to prevent fraudulent and overstated claims." *Id.* Nor do Defendants here. Defendants make **no showing** as to why they needed to question Mr. Bollea about the Exhibits prior to their production. Likely, Defendants delayed to (1) ambush and surprise Mr. Bollea, (2) trick him into making admissions or misstatements, and (3) harass and intimidate him so to gain inappropriate leverage in settlement discussions. None of the foregoing is a substantive reason for delay, nor are any akin to the reasons articulated in *Dodson*. Opp. at ¶11 (quoting *Dodson*, 390 So. 2d at 705).[2]

C. The Court Has Authority To Enter The Sanctions Order

The Court has authority to enter sanctions for abusive litigation tactics, including precluding Defendants from using the Exhibits as evidence, and striking the testimony regarding them. In *Dodson*, the Court held that a "party's failure to comply with such a discovery request will bar the information's use as evidence in the cause unless the trial court finds that the failure to disclose was not willful and either that no prejudice will result or that any existing prejudice may be overcome by allowing a continuance of discovery during a trial recess." 390 So. 2d at 708; *see also Williams v. Walt Disney World Co.*, 583 So. 2d 794 (Fla. 1st DCA 1991) (same). *Dodson* does not require an order compelling the materials' production as a precondition to preclusion, or that the materials be left off of an exhibit list.[3] If the failure to comply was willful and caused prejudice to the plaintiff, then the information cannot be used as evidence going forward. Further, the availability of a trial recess is inapplicable to the situation here, where the

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[2] *State Farm Fire & Cas. Co. v. H Rehab, Inc.*, 56 So. 3d 55 (Fla. 3d DCA 2011), and *State Farm Mut. Auto Ins. Co. v. H Rehab, Inc.*, 77 So. 3d 724 (Fla. 3d DCA 2011), simply follow *Dodson* in finding that a defendant can question a plaintiff prior to producing surveillance videos.

[3] Accordingly, *Horace Mann Ins. Co. v. Chase*, 51 So. 3d 640 (Fla. 1st DCA 2011), and *Stiles v. Bargeron*, 559 So. 2d 365 (Fla. 1st DCA 1990), which do not concern the situation presented in *Dodson*, are inapposite.

prejudice resulted at the time of deposition.

Here, Defendants willfully failed to comply with the discovery requests and withheld the Exhibits prior to Mr. Bollea's deposition. *See* 4/4/14 Harder Aff., Ex. A (meet and confer correspondence wherein counsel for Defendants states that "there is no reasonable argument that Gawker is precluded from asking these key witnesses questions about documents we have gathered"). Mr. Bollea was prejudiced by Defendants' conduct. Defendants intentionally withheld the Exhibits from him in discovery so that they could show them to him, for the first time, at his deposition while he testified. The Exhibits included, *inter alia*: (1) a video of Mr. Bollea going to the bathroom in the hospital while on medications following major surgery; (2) a conversation from a radio bit wherein "Hulk Hogan" is asked how large his penis is; and (3) a different conversation regarding where radio guests prefer to ejaculate when having intercourse. *See* Mot. at 6–8 (chart describing contents of Exhibits at issue). Given the nature and subject matter of the Exhibits, the resulting surprise on the part of Mr. Bollea was substantial. Further, Defendants' trickery worked. Mr. Bollea was distracted and extremely upset following the introduction of the Exhibits, and his resulting testimony reflects that he was upset. Preclusion is the appropriate sanction.

Defendants' argument that "plaintiff cannot credibly claim to have been surprised by questions about *his own* public statements and public appearances *he himself* made" (Opp. at ¶16 (emphasis in original)), runs counter to the case law on this topic. Courts routinely hold that a failure to produce evidence when requested, even evidence of a plaintiff's own conduct (*e.g.*, surveillance videos of the plaintiff), constitutes an unfair surprise to the plaintiff, thereby justifying the preclusion of that material as evidence in the case.

In sum, Defendants' trickery and gamesmanship cannot be countenanced. As the Florida

Supreme Court has held:

> A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics. We caution that **discovery was never intended to be used and should not be allowed as a tactic to harass, intimidate**, or cause litigation delay and excessive costs.

Dodson, 390 So. 2d at 707 (emphasis added). *See also Surf Drugs*, 236 So. 2d at 111 ("A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics."). Defendants used Mr. Bollea's deposition as a tactic to trick him into making harmful admissions or misstatements, and to harass and intimidate him. Such conduct should be sanctioned.[4]

III. CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that the Special Discovery Magistrate sanction Defendants and recommend that they be precluded from using the Exhibits as evidence, and strike all related deposition testimony.

DATED: May 8, 2014

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[4] Defendants' final footnote makes the completely extraneous and irrelevant argument that Mr. Bollea supposedly has "continued to blatantly violate the Court's April 23, 2014 Order," and attached their counsel's meet and confer letter on this topic. Defendants' continued attempts to smear Mr. Bollea in their court filings, rather than keeping to the issues at hand, are at once outrageous and tiresome. Mr. Bollea's counsel should not even be required to address these extraneous issues in connection with the instant motion, but because of Defendants' attack, Mr. Bollea is compelled to attach his response letter as Exhibit A to the 5/7/14 Affidavit of Charles J. Harder verifying that Mr. Bollea is diligently working to gather the documents ordered to be produced and will do so as soon as practicably possible.

-and-

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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 8th day of May, 2014 to the following:

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