

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.

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 TERRY BOLLEA'S
OPPOSITION TO HEATHER COLE'S (SUED AS HEATHER CLEM)
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Heather Clem (now known as Heather Cole) has moved for summary judgment, claiming there is no triable issue of fact as to whether she was involved in the creation of a secretly-recorded video of Mr. Bollea and Heather Clem, taken without Mr. Bollea's knowledge in Heather Clem's private bedroom (the "Secret Recording"). Ms. Clem claims she had nothing to do with it. However, there are significant pieces of evidence that show that Ms. Clem, in fact, did know about the Secret Recording at the time of its creation and was involved in its production.

1. Bubba Clem gave extensive testimony that Ms. Clem both knew about the Secret Recording at the time it was made, and knew that Mr. Clem had burned a DVD copy of the Secret Recording (the copy which apparently was stolen and sent to Gawker).

2. Ms. Clem herself admitted that she knew Bubba Clem had burned a CD of the Secret Recording, because he showed it to her.

3. Ms. Clem was a resident in the Clems' house and had to have been aware of the surveillance camera that Bubba Clem had installed in the bedroom. Thus, it is reasonable to infer that she knew her sexual encounter with Mr. Bollea had been recorded.

4. Ms. Clem stated in her answers to written discovery that the Secret Recording was created for the Clems' "personal private use," which indicates that she knew about the recording, why it was made, and that she benefitted from it (her and her husband's "personal private use").

5. Terry Bollea testified that both Heather and Bubba Clem pressured and goaded him into having the sexual encounter with Heather, which gives rise to an inference that Heather knew that the sex would be recorded.

Thus, Ms. Clem fails to establish that the facts are undisputed on the key question of whether she was involved in the creation of the Secret Recording. The factual issues are in dispute, and must be resolved by the jury.

Ms. Clem also joins the Gawker Defendants' Motion for Summary Judgment without explanation. The arguments made by the Gawker Defendants, however, do not apply to her. While Mr. Bollea vigorously disputes the Gawker Defendants' arguments in favor of summary judgment, nonetheless they are premised on the Gawker Defendants having no involvement in the original recording of Mr. Bollea and Ms. Clem in 2007. Ms. Clem cannot claim a First Amendment privilege, particularly where there are triable issues of fact as to her participation in

secretly recording Mr. Bollea, conduct that is totally unprotected by the First Amendment and instead is a serious crime as well as being tortious.

Accordingly, Ms. Clem's motion for summary judgment should be denied and the claims against her should proceed to trial.

II. STATEMENT OF FACTS

The facts of this case are set out in extensive detail in Mr. Bollea's Opposition to the Gawker Defendants' Motion for Summary Judgment, filed concurrently herewith. Mr. Bollea incorporates those facts herein, and cites herein only those facts that concern the Motion for Summary Judgment filed by Heather Clem.

Mr. Bollea was a social acquaintance of Ms. Clem and was a close friend of her husband, Bubba Clem. Bubba Clem Tr. (Ex. 1)¹ 56:1–4; Heather Cole Tr. (Ex. 4_C) 9:23–10:7. During the course of Mr. Bollea's friendship with Mr. Clem, **both** Bubba and Heather Clem pressured and goaded Mr. Bollea into having a sexual encounter with Ms. Clem. Bollea Tr. (Ex. 5_C) 273:17–22 (“she started asking me to have sex with her on the phone”); *id.* at 274:5–10 (there were at least 20 conversations; “they [the Clems] kept bringing it up”); *id.* at 277:13–17 (“Bubba made me think that Heather was initiating it”); Bubba Clem Tr. (Ex. 3_C) 314:14–315:6. Mr. Bollea was reluctant to have sex with Ms. Clem. Bubba Clem Tr. (Ex. 3_C) 315:9–10 (“Q. Was he reluctant to have sex with Heather? A. I think so.”); Bubba Clem Tr. (Ex. 1) at 319:12–13 (Mr. Bollea having sex with Ms. Clem “was absolutely, unequivocally not his idea, period.”).

In 2007, after Mr. Bollea had separated from his now ex-wife Linda, and when he was at a low point in his life (Bubba Clem Tr. (Ex. 3_C) 325:14–326:1), the Clems again asked him to

¹ Exhibits 1 and 2 are attached to the Affidavit of Charles J. Harder, Esq. Confidential exhibits 3_C through 5_C are attached to the Confidential Supplemental Affidavit of Charles J. Harder, Esq.

have sex with Heather, and this time Mr. Bollea went along with it. Bollea Tr. (Ex. 5_C) 279:20–280:9 (“After . . . the marriage was dysfunctional . . . and . . . I was under the understanding that my marriage was over. Q. . . . [D]id you come to Bubba and ask if the offer still stood? A. No. Q. How did it come up again? A. Somehow or another, I was just really depressed. . . . And I went over to his house, and Heather pursued me while I was there. And I just let my guard down.”). Mr. Bollea and Ms. Clem thereafter engaged in sexual relations in a private bedroom in Ms. Clem’s house.

Unbeknownst to Mr. Bollea, there was a surveillance camera located in the bedroom, disguised as a small motion detector, painted the same color as the wall, and placed high up where the wall meets the ceiling. Bubba Clem Tr. (Ex. 1) 195:24–196:19. Heather Clem was a resident of the house and knew its existence and placement. Heather Cole Tr. (Ex. 4_C) 65:8–24. It is reasonable to infer that she knew her sexual encounter with Mr. Bollea was being recorded, and her responses to discovery confirm her knowledge and involvement. Defendant Heather Clem/Cole’s Notice of Serving Answers to Plaintiff Terry Gene Bollea’s First Set of Interrogatories (Ex. 2), No. 8.

Mr. Bollea was surreptitiously recorded, and did not know about the Secret Recording until almost five years later. A copy of the Secret Recording eventually was anonymously sent to Gawker, which edited and produced a one minute and 41 second “highlight reel” (in the words of Gawker.com’s Editor in Chief, A.J. Daulerio, who produced the video with his staff) containing explicit footage of Mr. Bollea fully naked, aroused, and engaging in multiple positions of sexual intercourse. Gawker published the highlight reel on the Gawker.com website.

There is extensive evidence that Ms. Clem **knew** about the Secret Recording at the time it was created, and about the fact that Bubba had burned the recording onto a disk (which apparently is what was sent to Gawker anonymously). Bubba Clem testified:

Q. Did you think that she knew she was being recorded?

A. I would assume that she did. I would say the only person who didn't know would be Terry.

Bubba Clem Tr. (Ex. 3_C) 327:21–24. Mr. Clem further testified:

Q.... But at this point, Heather knew about the tape, right?

A. . . . she knew about the tape.

Bubba Clem Tr. (Ex. 3_C) 412:8–11; *see also* Bubba Clem Tr. (Ex. 3_C) Tr. 459:1–3 (“I know that there were three people that were on that tape, two of which knew about it [Bubba and Heather Clem], one of which didn't [Terry Bollea].”).

According to Bubba Clem's testimony, he burned a DVD of the recording of the sexual encounter, which was originally captured on a digital video recorder hooked up to the surveillance system. Bubba Clem Tr. (Ex. 1) 328:14–329:19. Bubba burned the DVD and testified that Heather Clem was aware of that fact within 14 days of the sexual encounter. Bubba Clem Tr. (Ex. 1) 329:22–330:19. Ms. Clem admitted that at some point after her encounter with Mr. Bollea, she was shown footage of the encounter by Bubba Clem burned on a CD-ROM. Heather Cole Tr. (Ex. 4_C) 17:15–23, 25:15–18. Mr. Clem never told Mr. Bollea about the recording. Bubba Clem Tr. (Ex. 1) 332:05–333:02.

In this lawsuit, Ms. Clem served responses to written discovery that confirm she knew the purpose of the Secret Recording (which gives rise to the reasonable inference that she knew about the recording itself at the time it was made). Defendant Heather Clem/Cole's Notice of

Serving Answers to Plaintiff Terry Gene Bollea’s First Set of Interrogatories (Ex. 2), No. 8 provides:

“Q. STATE ALL FACTS regarding the purpose for the creation and storage of the VIDEO, including YOUR purpose, and BUBBA CLEM’s purpose, for creating and storing it”

“A. There was no intent to sell or license the video. It was **created and intended for personal private use.**” (Emphasis added.)

Ms. Clem testified that she supposedly had no knowledge that her sexual encounter with Mr. Bollea was being recorded. Heather Cole Tr. (Ex. 4_C) 18:14–20, 20:19–24. The jury will have to evaluate the evidence, including her inconsistent admissions, and Bubba Clem’s testimony that she was aware of the recording, and decide whether to believe her, or the contrary evidence, as to “what she knew and when she knew it.”

III. ARGUMENT

A. Standard for Summary Judgment

Under Florida law, summary judgment is proper **only** if, based upon examination of admissible evidence, no genuine issue of fact exists and the movant is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510; *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000).

A “material fact,” for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case. *Continental Concrete, Inc. v. Lakes at La Paz III Ltd*, 758 So.2d 1214, 1217 (Fla. 4th DCA 2000). “The burden to conclusively prove the nonexistence of a material fact is on the moving party.” *Id.*

The Court must take all facts that the opposing party states as true, and must draw all reasonable inferences in his favor. *Bradford v. Bernstein*, 510 So.2d 1204, 1206 (Fla. 2d DCA 1987). Accordingly, with respect to any evidence where multiple inferences may be drawn, the inference most favorable to Mr. Bollea’s position **must** be drawn for purposes of this motion. *Star Lakes Estate Ass’n, Inc. v. Auerbach*, 656 So.2d 271, 274 (Fla. 3d DCA 1995) (motion for summary judgment must overcome “all” reasonable inferences drawn in favor of the opposing party).

The Court may not try or weigh facts on a motion for summary judgment. *Bradford*, 510 So.2d at 1206. “If the record reflects the existence of any genuine issue of material fact, **or the possibility of an issue**, or if the record raises **even the slightest doubt that an issue might exist**, summary judgment is improper.” *Christian v. Overstreet Paving Co.*, 679 So.2d 839, 840 (Fla. 2d DCA 1996) (emphasis added).

“On a motion for summary judgment, unless and until material facts at issue presented to the trial court are so crystallized, conclusive, and compelling as to leave nothing for the court’s determination but questions of law, those facts, as well as any defenses, must be submitted to the jury for its resolution.” *Dreggors v. Wausau Insurance Co.*, 995 So.2d 547, 550 (Fla. 5th DCA 2008).

B. There are triable issues of fact as to whether Ms. Clem knew about the production and distribution of the Sex Video.

Bubba Clem’s testimony creates an unambiguous triable issue of fact as to whether Ms. Clem knew about the creation of the sex video, and Bubba Clem’s decision to burn it onto a DVD (the first step in the distribution chain that eventually led to its being received by Gawker). Bubba Clem Tr. (Ex. 1) 328:14–329:19, 329:22–330:19.

Additionally, Mr. Bollea is entitled to favorable inferences that Ms. Clem was involved in the production and/or distribution of the Sex Video: (1) Ms. Clem was a co-participant in the scheme to goad and cajole Mr. Bollea into having sex with Ms. Clem in the Clems' bedroom, which gives rise to the inference that she wanted to produce the recording; (2) Ms. Clem was aware of the surveillance system installed at her residence and would have known that by having sex in that bedroom, her activities could or would be recorded; (3) Ms. Clem admitted in written discovery that the Sex Video was created for the Clems' "personal private use," which gives rise to the inference that she knew about the Sex Video at the time of its recording, and benefitted from it.

Based on these disputed facts, Ms. Clem is not legally entitled to summary judgment; the jury should be allowed to hear and resolve the conflicts in the evidence.

C. Gawker Defendants' arguments in favor of summary judgment, even if credited, would not entitle Ms. Clem to summary judgment given the triable issues of fact concerning her involvement in the production and distribution of the secretly-recorded footage.

Ms. Clem purports to join in the Gawker Defendants' arguments in favor of summary judgment. While Mr. Bollea strongly believes that the Gawker Defendants' arguments in support of their motion for summary judgment are baseless (and therefore Heather Clem cannot be awarded summary judgment on those grounds either), Ms. Clem nonetheless stands in a completely different situation from the Gawker Defendants, and would not be entitled to a summary judgment even if their motion was granted.

The Gawker Defendants' defenses are predicated on their having had no role in the original recording of the secretly-recorded footage. Because Mr. Bollea seeks to hold them liable for **publishing and disseminating** the highlight reel they made from the Secret Recording, rather than recording it in the first instance, the issue as to the Gawker Defendants is whether the

footage that was published was a matter of public concern. The public concern test, however, has **no** application to anyone who was involved in the original Secret Recording. Illegally recording someone in a private place is not protected by the First Amendment, regardless of whether the contents recorded are matters of public concern. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (in order to claim a privilege to publish illegally intercepted communications on matters of public concern, defendant must “not [be] involved in the initial illegality”). Thus, Ms. Clem cannot avail herself of the Gawker Defendants’ arguments in favor of summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment filed by Heather Clem should be denied, and the case against her should proceed to trial.

Respectfully submitted,

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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 11th day of May, 2015 to the following:

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