

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, *et al.*,

Defendants.

PUBLISHER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants") hereby oppose plaintiff's "Motion to Strike Irrelevant and Prejudicial Hearsay from Gawker Defendants' Statement of Undisputed Material Facts ISO Motion for Summary Judgment" ("Motion to Strike" or "Mot."), stating as follows:

First, plaintiff's Motion to Strike, and the concurrently filed "Evidentiary Objections to Evidence Proffered by Defendants in Support of Motion for Summary Judgment" ("Evidentiary Objections" or "Objs.") upon which it is based, are untimely. Although plaintiff's opposition to the Publisher Defendants' motion for summary judgment was served two weeks earlier, he did not serve either his Motion to Strike or his Evidentiary Objections until the date on which the Publisher Defendants summary judgment reply brief was served. To the extent plaintiff intends to oppose the Publisher Defendants' summary judgment motion on the ground that it is based upon inadmissible evidence, *see, e.g.*, Objs. at 1, the time to make that argument was in his opposition. The rule plaintiff purports to be moving under, which permits a court to strike material "at any time," applies to "*pleadings.*" Fla. R. Civ. P. 1.140(f) (emphasis added) (cited at Mot. at 1). It has no application here. In any event, as explained below, plaintiff's objections make no difference to the outcome of the Publisher Defendants' summary judgment motion.

Second, plaintiff's objections to the *relevance* of these media materials reflect a misunderstanding of the public concern inquiry. As set forth in detail in the Publisher Defendants' summary judgment papers, the materials the Publisher Defendants have assembled are precisely what courts look to in making the public concern determination in this context. *See, e.g.*, Publisher Defendants' Summ. J. Mot. at 15-17; Publisher Defendants' Summ. J. Reply at 6, 8-12. Indeed, plaintiff himself "agrees" that "when evaluating First Amendment public concern arguments," the "courts must examine the **context** of the publication, as well as its content." Opp. to Pub. Def. Summ. J. Mot. at 43 n.16 (emphasis in original). Despite this, plaintiff seeks to strike prior reporting that connects the sex tape controversy to prior controversies in plaintiff's life concerning his marital fidelity and sex life, *see, e.g.*, Mot., Ex. A at ¶¶ 85, 92, 105-106, 109-110, including public discussion of his sex life on radio or television broadcasts in which plaintiff himself participated, *see, e.g., id.* at ¶¶ 56, 64-67.

But those are precisely the kinds of facts on which the Court of Appeal based its earlier ruling that both the written commentary about the sex tape and excerpts from it address matters of public concern. *See Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1201-02 & n.5 (Fla. 2d DCA 2014) (basing its public concern holding on the existence of a preexisting "public controversy" surrounding the sex tape and the extramarital affair depicted therein, and placing that controversy within the broader context of plaintiff's long history of publicly discussing his personal life, including other alleged affairs). In analyzing the public concern issue along these lines, the Court of Appeal's decision was firmly in accord with other cases involving the publication, over a celebrity plaintiff's objections, of images of sex or nudity. *See, e.g., Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at *8-10 & n.4 (C.D. Cal. Sept. 11, 1998) (gossip outlet's publication of excerpts from celebrity sex tape addressed matter of public concern based

on preexisting controversy relating to sex tape and prior media reports sexualizing plaintiff's public image); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309, at *5 (C.D. Cal. Mar. 19, 1997) (concluding that "the sex life of Tommy Lee and Pamela Anderson is . . . a legitimate subject for an article," and that the sexually explicit pictures of the couple accompanying the article were "newsworthy," based on extensive discussion and prior media coverage of plaintiffs' sex lives).

Despite this settled law, plaintiff contends that the Publisher Defendants have offered this evidence for an improper purpose. *See* Mot. at 3 (labeling Publisher Defendants' tactics "offensive, outrageous, unprofessional and improper"). But, given that courts consider both the "context" and "content" of a publication, as even plaintiff himself concedes, and given that the Court of Appeal considered precisely this kind of evidence in this very case, plaintiff's strong accusations – about both the Publisher Defendants and their counsel – are plainly an attempt to create a sideshow where neither the law, nor the facts, are on his side on the summary judgment motion itself. Indeed, even if plaintiff's motion were granted and his evidentiary objections sustained, then almost all of the Publisher Defendants' Statements of Undisputed Material Facts would remain unaltered, and the nine key facts that they demonstrate would remain undisputed.¹ Thus, plaintiff's objections have no bearing on the ultimate resolution of the Publisher Defendants' motion for summary judgment because that question is decided as a matter of law based on the context and content of the Publication, and the context still includes widespread public discussion of plaintiff's sex life and this tape, including by plaintiff himself.

¹ Indeed, plaintiff selectively objects to quotations from news reports and other documents he does not like. According to plaintiff, Kate Kennedy's allegations must be stricken, but his denials are properly considered. *Compare* Mot. Ex. A ¶¶ 46-47 with ¶¶ 48, 50. Even still, plaintiff lodges no objection to the Publisher Defendants' showing that the controversy and eventual lawsuit over "Ms. Kennedy's accusations and Hogan's denials received nationwide media coverage," including articles in AP Online, *St. Paul Pioneer Press*, *South Florida Sun-Sentinel*, *Chicago Tribune*, and *USA Today*.

Finally, plaintiff objects extensively on hearsay grounds, but he has no valid hearsay objections to the materials he would have this Court strike. Those materials consist almost entirely of news reports and other documents demonstrating that plaintiff's sex life and this sex tape were already the subject of widespread public discussion prior to the Publication at issue. *See* Mot., Ex. A at ¶¶ 39, 43, 45-47, 51, 54, 56, 64-67, 85, 92, 105-106, 108, 109, 110. As plaintiff himself acknowledges, the media and related materials that the Publisher Defendants have assembled in support of their summary judgment motion are not offered "to prove the truth of the matters asserted therein." Mot. at 3. Rather, as explained in detail in the Publisher Defendants' summary judgment papers, the materials are offered to show that plaintiff's personal life, and, in particular, his sex life and the sex tape that was the topic of the challenged Publication, were the subject of widespread media coverage and public discussion. *See, e.g.*, Pub. Def. Summ. J. Mot. at 1, 2-3, 5, 7, 9, 10, 13, 15-19. While plaintiff complains that the summaries of, and quotations from, these materials were too extensive and detailed, Mot. at 3, the Publisher Defendants are not aware of any rule under which evidence offered for a non-hearsay purpose becomes inadmissible hearsay based on how much of it is used. *See* Fla. Stat. 90.801 (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted").²

² Plaintiff also objects to significant portions of the evidence submitted by the Publisher Defendants on the basis that it is "not properly authenticated." But these news reports are self-authenticating. *See* Fla. Stat. 90.902(6); *see also, e.g., Wilensky v. Gooding*, 2003 WL 21361276 (Fla. Cir. Ct. Apr. 7, 2003) ("news article is self-authenticating under § 90.902(6)"). Moreover, the parties have stipulated to the authenticity of news reports, and are in the process of documenting that stipulation, making this objection extremely ill-suited here.

CONCLUSION

Because plaintiff has no valid objection to the materials he asks this Court to strike, his motion should be denied in its entirety.

Dated: May 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of May 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

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