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. 12012447-CI-011

HEATHER CLEM, *et al.*,

Defendants.

THE PUBLISHER DEFENDANTS' REPLY IN SUPPORT OF THEIR *DAUBERT* MOTION TO EXCLUDE THE EXPERT TESTIMONY OF SHANTI SHUNN

The opposition of plaintiff Terry Bollea, professionally known as "Hulk Hogan," ("Opp.") to the Publisher Defendants' motion to exclude the expert testimony of Shanti Shunn ("Mot.") offers nothing more than smoke and mirrors, as it fails to address any of the multiple grounds that independently render Shunn's proposed testimony inadmissible.

First, Hogan mischaracterizes the hearsay problem with Shunn's proposed testimony about the "view counts" of third-party websites.[1] Hogan does not dispute that the "view counts" listed on the third-party websites that republished the Video Excerpts constitute hearsay. He admits that the sole purpose of Shunn's proposed testimony is to "verify the accuracy of the view counts." Opp. at 5. Hogan nonetheless insists that Shunn's testimony is admissible by invoking the familiar rule that an expert may, to a limited degree, rely on hearsay in formulating his opinion. *Id.* at 4 (citing Fla. Stat.§ 90.704). That rule is of no help to Hogan here. This is not a case where an expert's opinion on another matter has been informed by hearsay. Rather, Shunn

---

[1] Shunn has offered expert opinions on two separate subjects – the accuracy of the "view counts" found on web pages that republished the Video Excerpts, and the price of accessing celebrity sex tapes. The Publisher Defendants have moved to exclude both.

is directly opining on the accuracy of hearsay statements. The law is clear that expert testimony cannot be used solely for the purpose of laundering inadmissible evidence in that way. *See, e.g.*, *Linn v. Fossum*, 946 So. 2d 1032, 1037-38 (Fla. 2007) ("Florida courts have routinely recognized that an expert's testimony 'may not merely be used as a conduit for the introduction of otherwise inadmissible evidence.'" (citation omitted)); *Maklakiewicz v. Berton*, 652 So. 2d 1208, 1209 (Fla. 3d DCA 1995) (same); *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430, 431-32 (Fla. 2d DCA 1989) (same); *Smithson v. V.M.S. Realty, Inc.*, 536 So. 2d 260, 261-62 (Fla. 3d DCA 1988) (same).

Judge Altenbernd's opinion in *Riggins* explains why Hogan should not be permitted to use Shunn to replace the testimony of witnesses from the third-party websites about the accuracy of their view counts. In *Riggins*, after the trial court ruled that a laboratory report purporting to show plaintiff's blood-alcohol level at the time of his accident was inadmissible without the testimony of the medical examiner or lab technician that performed the test, the defendant engaged an expert to render an opinion about plaintiff's blood-alcohol level, which the expert arrived at by using his experience and expertise to review the inadmissible laboratory report. 545 So. 2d at 431. The court held that that was an impermissible use of expert testimony, explaining as follows:

> [S]ection 90.702, Florida Statutes, permits expert testimony to assist the jury in understanding 'a fact in issue.' The expert's opinions are not admissible unless the opinions 'can be applied to evidence at trial.' In this case, the expert was rendering an opinion on blood alcohol content and was relying exclusively upon information which is not evidence at trial. ***The expert opinion only helped the jury to understand the inadmissible document rather than the evidence at trial.***

Id. at 432 (emphasis added) (internal citation omitted); *see also Smithson*, 536 So. 2d at 262 ("Where the expert's actual opinion parallels that of the outside witnesses, then the outside witness should be produced to testify directly." (internal marks and citation omitted));

Maklakiewicz, 652 So. 2d at 1209 ("the presentation of the inadmissible evidence before the jury through the testimony of the . . . expert unfairly prejudiced the plaintiff and misled the jury by giving the inadmissible evidence the expert's imprimatur of approval and reliability"). So, too, here. Hogan should not be permitted to use Shunn as a conduit to get otherwise inadmissible evidence before the jury.

Second, Hogan's account of what Shunn allegedly did to "verify" the accuracy of the view counts ignores the fundamental problem with his analysis. Hogan misleadingly asserts that "Shunn . . . verified how the sites tagged the viewers within their source code." Opp. at 4. But, this assertion glosses over the flaw in Shunn's analysis – a flaw that Shunn himself admitted. Shunn testified that he only looked at publicly available source code. *See* Mot. at ¶¶ 13-14, 22-26, 28 (describing Shunn's testimony). He explained that the source code he reviewed does ***not*** establish whether the view counts are accurate or even what the view counts mean. *Id.* To determine that information, Shunn testified he would need to access the websites' "script" coding and back-end analytics. But, he admitted that he could not – and did not – take those steps. And, he admitted that without access to the "script" coding and back-end analytics, it was impossible for him to verify the accuracy of the publicly available view counts, or even to understand what the public view-count numbers mean. *Id.* Given this inability, Shunn's methodology cannot satisfy the *Daubert* test for reliability. After all, Shunn himself admitted that he was unable to do what he would have to do to accurately verify, or even meaningfully *decipher*, the view counts that are the subject matter of his proposed testimony. *Id.*; *see, e.g.*, *The Doctors Co. v. State, Dep't of Ins.*, 940 So. 2d 466, 470 (Fla. 1st DCA 2006) ("An expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data.").

Finally, as to Shunn's opinion regarding the membership fee for a membership-based website featuring celebrity sex tapes, Hogan has pointed to nothing to show the relevance or admissibility of that proposed testimony. Hogan's sole response to the Publisher Defendants' motion to exclude Shunn's testimony about the website's $4.95 membership fee is to point to "the discretion afforded to juries in invasion of privacy cases," as if the jury has unlimited discretion to award him any damages it wants to award, untethered by the record evidence or the law. Opp. at 7.[2] To support this bold claim, Hogan points to a series of cases from other states (California, Georgia, New York, and Colorado) and involving other kinds of claims, like defamation and conversion. *See* Opp. 7-9. Hogan is not asserting those claims, however, and the law in Florida is clear that Hogan cannot recover economic damages for two of his privacy claims (intrusion and publication of private facts). *See, e.g.*, *Cason v. Baskin*, 20 So. 2d 243, 254 (Fla. 1944).

The only claim for which he can recover economic damages is his claim for misappropriation, and the damage for that claim is limited to a reasonable royalty fee. *See* Mot. ¶ 34. Shunn's testimony, by his own admission, does not speak to that issue. *See id.*, ¶ 33. Even if $4.95 is the minimum amount a consumer would have to pay a membership-based website to access the catalogue of celebrity sex tapes offered by that website, that information says nothing about what royalty fee would be paid to Hogan or is paid to any other celebrity appearing in a sex tape.

Hogan's suggestion that a jury could use Shunn's $4.95 figure (which is paid to the website, not the celebrity appearing in a tape) to come up with some number for his damages is

[2] In his proposed jury instructions, Hogan states that his damages in this area are limited to "the market value" of the sex tape, Pl.'s Proposed Instructions No. 33, even though in his opposition he insists that he is entitled to compensation "over and above the fair market value" of the tape, Opp. at 9.

flawed for another reason: It is wholly speculative. There are no facts in the case that would permit Shunn to connect his membership-fee testimony to an actual damages figure, and Shunn admittedly has no knowledge of the pornography industry. It is a fundamental rule of our legal system, applicable across the board, that "[d]amages cannot be based on speculation, conjecture or guesswork." *Swindell v. Crowson*, 712 So. 2d 1162, 1164 (Fla. 2d DCA 1998).

In this case, Shunn's proposed testimony about membership fees is either irrelevant, because it says nothing about Hogan's damages, or speculative, because it is being used in the service of a damages theory for which there is no evidentiary support. Either way, it is inadmissible and should be excluded. This is not "an untimely and improper summary judgment argument," as Hogan contends. Opp. at 7. It is a well-accepted basis for excluding expert testimony, and the reason Shunn's testimony should be precluded. *See, e.g.*, *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999) (explaining that "[t]he judge's role is to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value").

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Publisher Defendants' opening motion, the Publisher Defendants respectfully request that this Court exclude the proposed testimony of Shunn.

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*
Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029

601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June 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:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Sarah Luppen, Esq.
sluppen@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

Gregg D. Thomas
Attorney