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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.
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THE PUBLISHER DEFENDANTS' REPLY IN SUPPORT OF *DAUBERT* MOTION TO EXCLUDE THE EXPERT TESTIMONY OF LESLIE JOHN

The opposition of plaintiff Terry Bollea, professionally known as "Hulk Hogan," ("Opp.") to the Publisher Defendants' motion to exclude the expert testimony of Leslie John ("Mot.") does nothing to overcome the multiple problems that independently render John's proposed testimony inadmissible.

First, Hogan is simply incorrect in asserting that "golden rule" arguments are only impermissible when used in closing argument. *See* Opp. at 6. The case he relies on for that proposition, *Tieso v. Metropolitan Dade County*, 426 So. 2d 1156, 1157 (Fla. 3d DCA 1983), did not reject a plaintiff's challenge to the jury's verdict because the "golden rule" argument was made "during *voir dire*," as Hogan mistakenly suggests. Opp. at 6. Rather, the court rejected plaintiff's argument because "the challenged comments . . . were not impermissible golden rule statements."[1] *Tieso*, 426 So. 2d at 1157. The prohibition on "golden rule" arguments is general

[1] The other case cited in the Opposition, *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258, 263 (Fla. 1st DCA 1989), simply holds that asking jurors what they would have done as "reasonable people" under the circumstances is not a "golden rule" argument when directed to determining the applicable standard of care. The holding in *Cummins* says nothing about whether a party can indirectly ask jurors to place themselves in the plaintiff's position when

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and applies at any stage in a case: "An argument that jurors should put themselves in the plaintiff's place, commonly known as the golden rule argument, is impermissible and constitutes reversible error." *Klein v. Herring*, 347 So. 2d 681, 682 (Fla. 3d DCA 1977); *see also Clark v. State*, 553 So. 2d 240, 242 (Fla. 3d DCA 1989) (witness's demonstration of shooting during direct examination would have been a violation of the "golden rule" prohibition had the witness been permitted to aim at the jury, as he originally attempted to do, but was not such a violation because the witness was directed by prosecution and trial court not to involve the jury in the demonstration).

Here, Hogan concedes that John's "survey asked respondents to ***imagine themselves in the same situation as Terry Bollea***." Mot. Ex. 4 at 22:9-12 (L. John Dep.) (emphasis added); *see also*, *e.g.*, Mot. ¶ 13 (quoting extensively from John's survey). If John is allowed to testify about that survey and Hogan is then permitted to ask the jury to award damages based on her survey, he would necessarily be asking the jury either (a) to defer to the assessments of John's survey respondents regarding how much ***they*** would want if what happened to Hogan happened to them, or (b) to award damages based on the jurors' agreement with John's survey respondents about how much ***they*** would want if what happened to Hogan happened to them. Neither is permissible. *See, e.g.*, *Coral Gables Hosp., Inc. v. Zabala*, 520 So. 2d 653, 653 (Fla. 3d DCA 1988) (even indirect "golden rule" arguments are forbidden).

Second, Hogan cannot escape the fact that John's survey was simply an elaborate mock jury exercise. Hogan admits that John's survey asked respondents for their "valuation of the privacy violation." Opp. at 6. In her survey, John expressly asked participants to state a dollar amount that would make them feel "***adequately and fairly compensated*** for the situation." Mot.

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assessing damages, let alone anything about whether a party can generate survey results based on golden-rule questions, and then ask the jury to defer to those survey results.

Ex. 3 at 18 (emphasis added). That question is precisely the same question jurors will be asked to answer at trial. Indeed, Hogan's proposed jury instructions mirror John's survey question, telling jurors that in determining damages they should make an award that will "***fairly and adequately compensate*** plaintiff." Pl.'s Proposed Instructions Nos. 32, 33 (emphasis added).

And, while the Opposition argues that John "did not ask" her survey participants "to decide the various jury questions in this matter, such as whether the publication of the Sex Video invaded [Hogan's] privacy," Opp. at 2-3, John's survey posed that exact question, asking participants to assess "***the extent to which, if at all, the situation represented a privacy invasion***." Mot. Ex. 3 at 4 (emphasis added). Again, as the Opposition acknowledges, this is precisely the question the jury will be asked to weigh at trial. *See* Opp. at 2-3; *see also* Pl.'s Proposed Verdict Form at 3 (asking jurors to decide if the posted video was "of a private nature"); Pl.'s Proposed Jury Instruction No. 26 (explaining same for tort of "invasion of privacy for publication of private facts").

John herself testified at her deposition that the purpose of her survey was to "validate[] the amount of money that Terry Bollea thinks is fair and reasonable compensation." Mot. Ex. 4 at 44:3-15 (L. John Dep.). While such validation may assist Hogan's legal counsel in making strategic calculations about how much to ask the jury to award in damages, it cannot assist a jury in making up its own mind about how much to award, which ultimately must be based on its independent assessment of the evidence about Hogan's damages.[2] At bottom, John's survey was

[2] Hogan attempts to minimize the importance of *Hildwin v. State*, 951 So. 2d 784, 792 (Fla. 2006), in which the Florida Supreme Court held that opinions based on mock jury results were inadmissible even under the more generous *Frye* standard that then controlled. In assessing the significance of *Hildwin*, it is important to note that it dealt with circumstances in which mock jury results were much more likely to be probative than those present here. In that case, a criminal defendant in a post-conviction proceeding offered mock jury results to the court – *not* the jury – in an attempt to show that newly discovered DNA evidence would have made a

a mock jury exercise. *See* Mot. Ex. 4 at 22:23 – 23:2 (John explaining that "the point" of her survey was "to describe the situation in a as reasonably similar as possible way [*sic*], to that that Terry Bollea faced, and then to ask people what is a fair compensation value"). It is inadmissible.

Third, Hogan fails to meaningfully address the argument that John's opinion is irrelevant because her survey respondents were not asked to assess the extent of ***Hogan's*** actual emotional distress, incorrectly insisting that issue goes to the weight, not admissibility, of John's testimony. Opp. at 3, 7. Hogan's own description of John's survey underscores how serious this relevance problem is. In attempting to defend John's survey from the charge that it is no different than a mock jury exercise, Hogan states that "the survey asked ***hypothetical questions*** about privacy invasions and ***did not even mention 'Hulk Hogan'***" *Id.* at 3 (emphasis added); *see also id.* at 6 (same). "Hypothetical questions about privacy invasions" have nothing to do with the damages ***Hogan actually suffered***, which is the only thing for which he can be compensated. *See* Mot. ¶ 22.

Hogan's suggestion that it is for the jury to decide whether John's survey measured the right thing is simply incorrect. The law is clear that it is "[t]he judge's role. . . 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." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999) (emphasis added); *see also, e.g.,*

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difference had it been available at his original trial. *Id.* In other words, unlike here, that was a situation in which the question of what a jury *would* do with this evidence was directly relevant to the issue before the court (*i.e.*, whether the newly discovered evidence could have led to an acquittal). In this case, on the other hand, information about how some other group of people viewed the evidence is not relevant to any issue being decided. Nonetheless, even in *Hildwin*, the Court held that the expert opinion based on mock jury results was inadmissible, which would make John's opinion obviously inadmissible here.

Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 862 F. Supp. 2d 1322, 1330-33 (S.D. Fla. 2012) (excluding expert testimony because it analyzed "the wrong problem"); *Stano v. State*, 473 So. 2d 1282, 1285-86 (Fla. 1985) (excluding testimony because it was not relevant to any issue in the case).

Fourth, Hogan does not dispute that John's survey failed to distinguish between compensation for the original "secret" filming of the sex tape and compensation for the subsequent publication of excerpts from it, which is the only thing for which damages can be awarded against the Publisher Defendants. Instead, Hogan asserts that the jury can assess for itself "to what extent Mr. Bollea's damages are attributable to the filming rather than the publication of the Sex Video." Opp. at 3. Of course, that is true and is a reason that John's survey is inadmissible. It does nothing to help the jury answer that question. If anything, her failure to separate the "compensation" attributable to each act makes her testimony unreliable and irrelevant. *See* Mot. ¶¶ 26-33. Indeed, John's opinion will affirmatively impede the jury's ability to allocate compensation for these separate torts between different alleged tortfeasors because she did not ask her survey respondents to distinguish between the initial recording and the subsequent publication, and there is nothing in her analysis that would aid a jury in redistributing her damages figures between the two alleged privacy violations. Her proposed testimony is inadmissible for that reason.

Finally, Hogan simply waives his hands and asserts that concerns about whether John's survey results were tainted by the survey respondents' desire to punish the defendants, or about whether "the factual predicate of the survey that 7 million people watched the Sex Video" is accurate, are for a jury to address. Opp. at 7. As set forth in the Publisher Defendants' opening motion, those issues go to the heart of the reliability of John's methodology and present an issue

that only the Court can meaningfully address – what factors are appropriate to consider in assessing compensatory damages and ensuring that the jury understands the difference between compensatory and punitive damages. Mot. at ¶¶ 34-47.

Reliability is a threshold issue that the Court must decide before allowing expert testimony to go to the jury. *See* Fla. Stat. § 90.702 (providing, *inter alia*, that expert opinion is admissible if, but only if, it is "the product of reliable principles and methods," and the "witness has applied the principles and methods reliably to the facts of the case"). Hogan's suggestion that this Court abdicate that responsibility is inconsistent with this Court's fundamental "gatekeeper" role. *See, e.g.*, *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (*Daubert* standard requires that courts "act as 'gatekeepers' to ensure that speculative, unreliable expert testimony does not reach the jury").

CONCLUSION

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

Respectfully submitted,

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