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.

HEATHER CLEM, *et al.*,

Defendants.
_____/

Case No.: 12012447-CI-011

PUBLISHER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 22 TO EXCLUDE ANY EVIDENCE OR ARGUMENT RELATED TO DEFENDANTS' COMMUNICATIONS WITH COUNSEL

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby oppose motion *in limine* No. 22 of plaintiff Terry Bollea, professionally known as "Hulk Hogan" ("Pl.'s MIL"), which seeks an order barring the Publisher Defendants "from introducing any evidence or argument, during any portion of the trial, referencing defendants' communications with counsel to support their 'good faith' defense." Pl.'s MIL at 1. This motion should be denied.

First, the motion is premature. The premise of the motion is that "the failure of a party to allow pre-trial discovery of confidential matters which that party intends to introduce at trial will preclude the introduction of that evidence." *S. Bell Tel. & Tel. Co. v. Kaminester*, 400 So. 2d 804, 806 (Fla. 3d DCA 1981) (quoting *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 186 (M.D. Fla. 1973)). Hogan seems to be anticipating that the Publisher Defendants might invoke an advice-of-counsel defense to his claim for punitive damages, which was first allowed on May 29, 2015, and first asserted on June 18, 2015. Given that the punitive damages claim was only recently asserted and an Amended Complaint was only recently filed,

the Publisher Defendants have not even had an opportunity to answer the Amended Complaint and newly added punitive damages claim, let alone invoke an advice-of-counsel defense. If the Publisher Defendants assert such a defense at any point, Hogan may be entitled to disclosure of relevant attorney-client communications. But given that at the time of the depositions in question no punitive damages claim had been asserted, the privilege was properly raised then and that invocation of the privilege has no bearing on whether an advice-of-counsel defense could be raised now that Hogan has belatedly added a claim for punitive damages. The fact that Hogan took two depositions where the privilege was invoked in the Fall of 2013, *see* Pl.'s MIL at ¶¶ 3-4, does not bar the Publisher Defendants from subsequently asserting an affirmative defense, or waiving the privilege, in response to a claim that was first asserted in the Spring of 2015. *Zarrella v. Pac. Life Ins. Co.*, 2011 WL 2447519, at *4-5 (S.D. Fla. June 15, 2011). If the Publisher Defendants decide to assert an advice-of-counsel defense, then at that point the question of whether and to what extent they are required to disclose attorney-client communications would become ripe for the parties and the Court to address.

Second, to the extent that Hogan seeks to exclude the mere fact that a communication with counsel occurred, that request is baseless. The Publisher Defendants never sought to block Hogan from discovering ***whether*** they sought legal advice. Indeed, defendant A.J. Daulerio and Gawker's corporate designee, Chief Operating Officer Scott Kidder, testified that the Publisher Defendants communicated with counsel prior to publishing the Hogan post. *See* Pl.'s MIL at ¶¶ 3-4. No pre-trial discovery of that fact was denied.

Testimony that an attorney-client communication took place is not privileged and does not implicate the privilege because it is the *content* of attorney-client communications, not the fact that communications took place, that is privileged. *Lee v. Progressive Express Ins. Co.*, 909

So. 2d 475, 476-77 (Fla. 4th DCA 2005) (plaintiff in bad-faith lawsuit against insurance company did not waive attorney-client privilege by testifying at his deposition that "the timing of his [settlement] demand, the amount of his demand, and rejection of Progressive's settlement offer were decided by his attorney" and that he had followed his attorney's advice); *Teachers Ins. Co. v. Loeb*, 75 So. 3d 355, 356-57 (Fla. 1st DCA 2011) (party's admission at deposition that he discussed an issue with his counsel was "insufficient to support a waiver of the privilege" as to that issue); *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. at 185 ("the client does not waive the privilege by testifying generally in the cause or testifying as to facts which were the subject of consultation with his attorney").

Accordingly, there is no basis for an order prohibiting any reference to the fact that the Publisher Defendants communicated with counsel before publishing. To the contrary, excluding such evidence would be tantamount to requiring witnesses to lie and would re-cast history to pretend that communications that took place never happened.

CONCLUSION

For the foregoing reasons, the Court should deny Hogan's motion *in limine* No. 22.

June 26, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th 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:

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