Filing # 29022879 E-Filed 06/26/2015 09:00:00 PM

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; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_________________________________/

THE PUBLISHER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 6 TO EXCLUDE EVIDENCE RELATING TO ADDITIONAL VIDEOS

PRELIMINARY STATEMENT

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby oppose the Motion *in Limine* No. 6 of plaintiff Terry Bollea, professionally known as "Hulk Hogan" ("Pl.'s MIL"), which seeks to preclude the Publisher Defendants from introducing evidence or argument related to additional videos depicting him having sexual relations with Heather Clem, one of which he believed included footage of him making "several racial slurs."

Hogan's motion should be denied for the reasons set forth in the Publisher Defendants' Motion *in Limine* on Evidence Relating to Plaintiff's Admission that He Believed the Sex Tape(s) Showed Him Making Statements that Have Been Marked as Confidential ("Defs.' MIL"). As explained in that motion, prior to filing suit, Hogan was highly concerned about the possibility that a sex tape depicted him making "several racial slurs." Indeed, one business day before filing suit, Hogan sent Bubba The Love Sponge Clem a text message expressing precisely that concern:

ELECTRONICALLY FILED 6/26/2015 9:00:00 PM: KEN BURKE, CLERK OF THE CIRCUIT COURT, PINELLAS COUNTY

> We know there's more than one tape out there and a [*sic*] ***one that has several racial slurs*** were [*sic*] told. I have a PPV [pay-per-view] and I am not waiting for anymore [*sic*] surprises because we know there is a lot more coming . . . .

See id. at Ex. 12 (BOLLEA 002658) (text messages); *id.* at ¶¶ 18-19 (explaining the bases for its admission). That admission is directly relevant to Hogan's core damages claim – that the *publication* of the video excerpts caused him distress. The Publisher Defendants should be permitted to challenge this unsubstantiated claim by using his own text message, which shows that he was distressed not by the depiction of him engaged in sexual activity, but by the possibility that someone might release a sex tape(s) depicting him making "several racial slurs."

In addition, the Publisher Defendants should be permitted to use the "timeline and transcript documents" (which Hogan calls "summaries" in his own motion). Those written accounts of the contents of sex tapes include references to the very racial slurs about which Hogan was concerned, and provide evidence of why Hogan had such well-founded concerns. *See id.* at Ex. 4 (Dep. Ex. 112) (timeline), Ex. 19 (BOLLEA 1213-14) (transcript); *id.* at ¶¶ 20-25 (explaining bases for their admission).

In addition to the grounds articulated in their previously filed motion *in limine*, the Publisher Defendants now address Hogan's specific arguments seeking to hide this evidence from the jury.

ARGUMENT

I. <u>The Text Message, Timeline and Transcript Are All Admissible.</u>

Hogan's contention that all materials suggesting that a sex tape depicted him making racial slurs are inadmissible, including his own text message expressing his concerns about such a tape, is simply wrong. First, although Hogan complains that none of this evidence speaks to the issue of whether he "knew he was being recorded or consented to be recorded," there are

other "material issues in this case." Pl.'s MIL at ¶¶ 13, 15-16. Whether Hogan was, in fact, significantly aggrieved by the posting of the video excerpts – or by something else – is obviously a material issue. As explained above, the evidence Hogan seeks to exclude goes directly to that issue, and is admissible on that basis alone. *See, e.g.*, *Judd v. Rodman*, 105 F.3d 1339, 1343 (11th Cir. 1997) (evidence of plaintiff's employment as a nude dancer, while potentially prejudicial, was nonetheless admissible where plaintiff was claiming emotional distress and that employment tended to suggest that she was not substantially aggrieved by the conduct at issue); *see also York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 957-98 (10th Cir. 1996) (approving the admission of substantial evidence concerning alternate causes of plaintiff's emotional distress, and noting that "it would be inequitable to allow the plaintiff to introduce selected evidence on the matter but to disallow defendants to present evidence supporting their theories of causation").

Second, Hogan is wrong in contending that, because the evidence at issue concerns his use of racially offensive language, it is automatically unduly prejudicial. The cases Hogan relies on for that proposition state only that evidence that a party or witness uttered racial slurs is inadmissible when irrelevant. *See MCI Express, Inc. v. Ford Motor Co.*, 832 So. 2d 795, 800 (Fla. 3d DCA 2002) (cited in Pl.'s MIL at ¶ 19) (stating that a party's past use of racial slurs *is* admissible if "the probative value outweighs any prejudice that may result from having the jury hear them," but holding that use of such slurs in that case was inadmissible because it was "completely irrelevant"); *Simmons v. Baptist Hospital of Miami, Inc.*, 454 So. 2d 681, 682 (Fla. 3d DCA 1984) (cited in Pl.'s MIL at ¶ 19) (evidence that expert witness had blamed his failure to pass Florida medical exam on "brown skinned people" should have been excluded because it was of only "marginal[] relevance"); *State v. Gaiter*, 616 So. 2d 1132, 1132-33 (Fla. 3d DCA 1993) (cited in Pl.'s MIL at ¶ 19) (affirming redaction of racial slurs, where there probative value did

not outweigh the potential for prejudice). Here, the evidence speaks directly to a central issue in the case. Under well-established Florida law – including the law cited by Hogan – that evidence is admissible.

Third, Hogan's various attacks on the reliability of the evidence he seeks to exclude – calling some of the relevant materials "unauthentic hearsay," Pl.'s MIL at ¶ 10 – are a distraction. Several of the documents in question are *not* "unauthentic hearsay." For example, Hogan seeks to preclude an email exchange between A.J. Daulerio (a defendant in the case) and Tony Burton (who first contacted Daulerio about a Hogan sex tape) addressing the possible existence of an additional sex tape with "racist comments by Hogan." Ex. 1 (AJD 005_C); *see* Pl.'s MIL at ¶ ¶ 10, 17 (addressing DBA 0065-0068 and AJD 005_C). Burton, who wrote the email, authenticated it at his deposition, and Daulerio, who received the email, can testify about it at trial. Likewise, the "timeline" document was authenticated by its sender, Richard Peirce, who testified about it at his deposition, and who will also testify at trial.

In addition, the Publisher Defendants do not intend to use those or other documents (like the transcript document) for the truth of the matter asserted. The Publisher Defendants do not need to establish that Hogan made any racial slurs. Rather, all of these documents show that people were discussing the slurs and provide possible sources for how Hogan was "told" a sex tape included "several racial slurs." In any event, the only reason that Hogan's statements in the timeline and transcript documents are "unauthentic hearsay" is that the Publisher Defendants have not been permitted to lay a foundation. At trial, they should be permitted to ask foundational questions. *See, e.g.*, Defs.' MIL at ¶¶ 21 n.5, 24.

And, Hogan's text message to Clem expressing his concern about the "racial slurs" has been authenticated (by Hogan, who produced the text message) and is not hearsay. *See* Defs.'

MIL at Ex. 12 (BOLLEA 002658) (text messages). That text message speaks directly to Hogan's actual concern when he filed suit, and is admissible as both an admission of a party opponent and to show his then state of mind. *See* Fla. Stat. § 90.803(3), (18) (setting forth the relevant hearsay exceptions); *see also* Defs.' MIL at ¶¶ 18 & n.4.

Hogan's motion protests that, in the relevant text message, he was only "refer[ring] to the **media** reports about the alleged recordings." Pl.'s MIL at 10 n.1 (emphasis in original). Even if that is true, it would not undermine the probative value of the text message as evidence of what was actually concerning to Hogan at the time. But, there is substantial evidence from which a jury could conclude that this statement (written by Hogan's lawyers) is ***not*** true. For instance, when asked at his deposition where he learned the information he conveyed to Clem – *i.e.*, that there was "more than one tape out there," that one of the tapes "has several racial slurs," and that there was "a lot more coming" – Hogan did ***not*** cite media reports. Instead, he testified as follows:

> Q. . . .What did you mean [in this text] by, we know there is a lot more coming?
>
> A. That's privileged.
>
> Q. How so?
>
> A. I heard there was a lot more coming from my attorneys.
>
> . . .
>
> Q. How many tapes did you know as of October 12, 2012, were out there?
>
> A. Well, that's privileged also.
>
> Q. And how come?
>
> A. Because my attorneys to me that –
>
> MR. HARDER: Whoa. That's all you need to go.

. . .

Q. . . . If you would look back at that same text we were looking at, how did you know that one of the tapes had several [redacted] slurs?

A. That's privileged.

Q. You learned that from counsel?

A. Yes.

. . .

Q. Did you learn information about [redacted] slurs from anyone at TMZ?

A. No, just from counsel.

Ex. 2 at 764:20 – 769:2. Hogan's testimony that he learned this information from his attorney, David Houston, is consistent with the fact that Houston, at that time, was in discussions with Keith Davidson (the supposed extortionist) about multiple tapes, *see* Defs.' MIL at ¶¶ at 8-11, and provides a much more plausible explanation for the text messages ("***We know*** there's more than one tape out there . . . . ***[W]e know*** there is a lot more coming . . .") (emphasis added). Indeed, Hogan's motion seems to make this very point elsewhere, as it complains that "[t]he extortionist likely is the source of the rumor as part of a coordinated effort to scare [Hogan] into paying the extortion money." Pl.'s MIL at ¶ 20.

There are other reasons why a jury might not believe Hogan's latest explanation of his text message exchange with Bubba Clem. On October 15, 2012, later in that same thread of messages, Hogan texted the following to Mr. Clem: "Why are there 3 tapes out there"? Ex. 3 (BOLLEA 002659). That fact – that there are three sex tapes featuring Hogan and Mrs. Clem – has never been publicly reported. In addition, the media reports about the existence of additional sex tapes containing racial slurs were not published until ***after*** Hogan's October 12, 2012 text message. *See* Defs.' MIL at Ex. 16 (Philly.com article, dated October 18, 2012, reporting that

"[a] source says he saw footage on one of the surreptitious recordings of Hogan . . . using the N-word and making other derogatory remarks about black people"); Ex. 4 (Defs.' Trial Exs. 522-23) (additional news reports following up on the Philly.com report).[1] Again, a jury could look at this evidence, conclude that Hogan had at that point received credible information about the existence of an additional sex tape depicting him using racist language, and conclude from that and other associated conduct that that is what was actually aggrieving him when he filed the lawsuits.

Hogan is additionally incorrect in denigrating the potential probative value of what he calls "the 'summaries'" of the sex tape content (and what the Publisher Defendants have been calling the "timeline and transcript documents") by saying that they "were prepared by an extortionist trying to steal money from [Hogan] in exchange for an agreement not to release the alleged recordings." Pl.'s MIL at ¶ 9. The timeline document, which was produced by a third party in response to ***Hogan*'s** subpoena, was attached to an email dated ***March 12, 2012***. *See* Defs.' MIL at Ex. 4 (Dep. Ex. 112). Davidson, the supposed extortionist, did not enter the picture until ***October 10, 2012***. *See id.* at ¶ 8, Ex. 10 (Dep. Ex. 249). And, the reason that Davidson provided the transcript document to Houston was to authenticate what was on the tapes he sought to sell to Hogan, knowing the videos would be watched to verify the transcripts. *See* Defs.' MIL at Ex. 21 (agreement signed by Hogan, Houston, and Davidson that includes the transcript). Indeed, Davidson allowed Houston to watch the tapes to verify their contents and the

[1] It is true that, in April 2012, a website called The Dirty alluded to the possibility of racial slurs when it posted still images from a Hogan sex tape. Defs.' MIL at Ex. 6 (Dep. Ex. 63) ("Terry, do you remember what you said about black people in this sex tape?"). But, Hogan testified at his deposition that he did not see that post. *See* Ex. 2 (Hogan Dep. Tr.) at 495:13 (testifying that he did not "see stills on The Dirty"). And, prior to October 12, 2012, no publication had reported that there was other sex tapes involving Hogan and Heather Clem, in addition to the one Gawker had reported about, nor that any of those tapes contained footage of Hogan using racial slurs.

accuracy of what was in the transcripts (although Houston claimed at his deposition that he did not actually watch the three tapes that Davidson showed him). *See, e.g.*, Ex. 5 (Houston Dep. Tr. 206:1-21, 215:23 – 217:18).

At any rate, as explained in the Publisher Defendants' motion *in limine*, both the timeline and transcript documents are admissible (a) as admissions by Hogan, (b) to establish Hogan's or Clem's state of mind, and (c) to establish that rumors of such a tape were circulating and that Hogan was subject to threats relating to those rumors. Defs.' MIL at ¶¶ 19-24. Those documents can also be used to refresh the recollections of Hogan, Bubba Clem, or Heather Clem as to whether the events depicted in the documents occurred. *Id.* at ¶ 25.

In short, there are numerous grounds on which the evidence Hogan seeks to exclude is admissible, and Hogan's continuing efforts to bury his true concern about the sex tape(s) should be resisted.

II. Hogan's Efforts To Exclude The Potential Fruits Of The FOIA Lawsuit Are Premature And Unfounded.

Hogan is also incorrect in asserting that any materials Gawker obtains from the federal government relating to its investigation into the sex tape(s) from its Freedom of Information Act ("FOIA") lawsuit would necessarily be inadmissible for use at trial. Although Hogan complains that the FOIA lawsuit pending in federal court is somehow inappropriate, *see* Pl.'s MIL at ¶ 6, this Court expressly authorized Gawker to pursue materials relating to any FBI investigation connected to the sex tape(s) via a FOIA request, ordering Hogan and his lawyers to sign authorizations permitting the government to release material in response to such a request. *See* Defs.' MIL at n.3. The pending FOIA lawsuit followed the government's denial of that request. *See* 5 U.S.C. § 552(a)(4)(B) (describing the relevant FOIA procedures). And, the government denied the request and the subsequent administrative appeal only after Hogan's lawyer sent

multiple letters imploring the government to refuse to disclose the very records for which this Court ordered him and his client to sign releases, citing the very same grounds that this Court required him to waive. *See, e.g.*, Ex. 6 (correspondence to FBI from C. Harder).

At any rate, it is premature to say whether any materials ultimately provided by the government would be admissible. It is simply too soon to tell what records will be produced in response to the federal court action. However, it appears from documents provided in discovery in this case, and from its statements at a recent hearing in the FOIA case, that the federal government possesses highly relevant materials, and those materials could further corroborate that there were multiple sex tapes (as indicated already in a letter sent to Hogan's lawyer by the U.S. Attorney's office), at least one tape shows Hogan making racial slurs, and Davidson threatened to leak a tape with Hogan making such slurs. *See* Defs.' MIL at n.3 & Ex. 19. Should the FOIA lawsuit result in the production of such materials, the question of admissibility can be addressed then.

CONCLUSION

For the foregoing reasons, the Publisher Defendants respectfully request that Plaintiff's Motion *in Limine* No. 6 be denied.

Dated: June 26, 2015

Respectfully submitted,

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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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