

**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; GAWKER MEDIA, LLC
aka GAWKER MEDIA; GAWKER MEDIA
GROUP, INC. aka GAWKER MEDIA;
GAWKER ENTERTAINMENT, LLC;
GAWKER TECHNOLOGY, LLC; GAWKER
SALES, LLC; NICK DENTON; A.J.
DAULERIO; KATE BENNERT, and
BLOGWIRE HUNGARY SZELLEMI
ALKOTAST HASZNOSITO KFT aka
GAWKER MEDIA,

Defendants.

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**DEFENDANT, HEATHER COLE'S,
MOTION FOR PROTECTIVE ORDER**

Defendant, HEATHER COLE (fka Heather Clem), by and through her undersigned attorneys, hereby moves for the entry of a protective order with regard to the trial subpoena served upon her by GAWKER MEDIA, LLC ("GAWKER") in the above-styled matter and states:

1. The Complaint in this action purports to assert causes of action based on the release and publication of a videotape depicting Plaintiff and Ms. Cole engaging in consensual sexual

relations. Plaintiff alleges that the video was published on the Internet by one or more of the GAWKER Defendants. There are no factual allegations whatsoever concerning the alleged role of Ms. Cole in the dissemination or publication of the video and, in fact, she had absolutely nothing to do with the dissemination of the video. The only substantive allegation relating to Ms. Cole is that she can be identified on the video excerpt as having been a participant with the Plaintiff.

2. On June 24, 2015, GAWKER served Ms. Cole with a subpoena for trial beginning July 6, 2015 until excused by the Court or by counsel.

3. Ms. Cole has prior travel and vacation plans during the time scheduled for trial in this matter during which she will be beyond 100 miles from the site of the trial. These plans were made known to the other parties in this litigation well before service of the subpoena.

4. On January 26, 2015, Ms. Cole's video deposition was taken by counsel for GAWKER. At her deposition, Ms. Cole was questioned extensively by GAWKER counsel during a four hour period and during which GAWKER had virtually unrestricted access to Ms. Cole and was able to thoroughly explore all areas of inquiry (and many other irrelevant topics) and ask of Ms. Cole any conceivable questions pertaining to this case. GAWKER counsel was given extreme latitude in the scope and length of his examination during Ms. Cole's deposition for precisely this reason: that all parties knew that she would be unavailable to testify at trial and that the video deposition would suffice as her trial testimony. Ms. Cole answered all questions to the best of her ability and GAWKER was provided with ample opportunity to conduct direct examination, cross examination or impeachment as counsel saw fit. The simple fact was, and remains the same as it has since the outset of this litigation; to wit: that Ms. Cole had nothing whatsoever to do with the recording, transmission, distribution or publication of the video or of

any other material pertinent to this case. No party or witness has contradicted that fact nor made any accusations to the contrary against Ms. Cole during any deposition or discovery in this case. Therefore, GAWKER will not be prejudiced in any manner whatsoever by Ms. Cole not being physically present to testify, particularly when her testimony is already memorialized in her video deposition.

5. Rule 1.330(a)(3) Fla. R. Civ. P. specifically provide for the use of a deposition at trial or other proceeding under these circumstances, stating that:

the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

Rule 1.330(a)(3) Fla. R. Civ. P.

6. Importantly, Plaintiff, BOLLEA, has agreed that he will not seek to compel Ms. Cole's attendance at trial and will not object to this motion for protective order. Therefore, BOLLEA, the party who has brought this case and whose burden of proof it is, is satisfied that Ms. Cole's video deposition will be more than sufficient for trial and he will not seek to require her personal presence.

7. In addition to the fact that Ms. Cole will be beyond the 100-mile zone during the scheduled July 6, 2015 trial, Rule 1.330(3) also provides that there may be additional grounds that exist for the granting of a protective order based on exceptional circumstances and in the interests of justice. Rule 1.330(a)(3)(E). As the Court is well aware, the subject matter of this

case and the subject video depicts Ms. Cole involved in consensual, extremely personal acts of a sexual nature. The events depicted therein occurred some eight years ago. Ms. Cole has since obtained a divorce from her husband of the time, Todd Clem (formerly a party to this action), and has worked very hard to distance herself from the actions and associations of that time. Ms. Cole is the mother of a teenage daughter and is involved in a committed relationship with a gentleman who has no connection whatsoever with the events or allegations involved in this lawsuit.

8. As such, Ms. Cole has requested that she not be compelled to testify in person at the trial in this matter, which is likely to attract intense media coverage both locally and nationally. Plaintiff, Mr. Bollea, has agreed not to compel Ms. Cole to be present during trial and has agreed that her video deposition testimony can be used to present any necessary testimony from her. While GAWKER has not agreed, GAWKER cannot convincingly argue any prejudice to its case, having already obtained Ms. Cole's video testimony.

9. This case has already received extensive pretrial publicity in the print and television media, and on the internet.

10. This case continues to be of great interest to the media as demonstrated by the number of media reports concerning every aspect of this litigation and the number of media representatives following these proceedings.

11. Requiring Ms. Cole to appear at trial will result in repeated publication of her name and likeness by means of print media, internet, and/or television news, which in turn will result in this matter being brought to the forefront of the attention of Ms. Cole's teenaged daughter, her peers, her educators and many others, which is fundamentally unfair and unduly prejudicial to Ms. Cole and to her family. Additionally, requiring this additional testimony by Ms. Cole in

person at trial risks the publication of private confidential matters despite the designation of such materials as confidential and there is a very real and legitimate fear on the part of Ms. Cole of harassment of her and her family by media representatives or unstable fans or members of the public. This is a situation analogous to certain criminal trials in which witnesses who are scared and reluctant to testify for fear of personal and private information being disclosed to the public are provided with certain protections by the Court.

12. A trial court has the inherent power to control the conduct of the proceedings before it. *State v. McIntosh*, 340 So. 2d 904, 909 (Fla. 1976). This Court has both the right and the affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, and is obligated to take protective measures “even when they are not strictly and inescapably necessary” to insure that the parties can receive a fair trial. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966). The trial court also has broad judicial discretion in its determination of the facts it may consider in support of the use of a deposition in lieu of live testimony at trial. *See Colonnades, Inc. v. Vance Baldwin, Inc.* 318 So. 2d 515, 516 (Fla. 4th DCA 1975).

13. In this case, there is no benefit to GAWKER from requiring Ms. Cole’s presence at trial that would outweigh the reasons in support of the issuance of this protective order, since her complete and recent testimony is already fully memorialized and available for GAWKER’s use at trial.

14. Under the circumstances, it would be highly unfair to force Ms. Cole to cancel her travel plans and be forced to attend the trial of this matter. It would additionally be highly prejudicial to Ms. Cole and to her family to force her to appear for the other exceptional circumstances set forth herein.

15. In addition to the fact of her physical unavailability, it is respectfully suggested that there is no compelling reason why GAWKER cannot present the truthful sworn deposition testimony from Ms. Cole via her four-hour video deposition without forcing her to endure humiliating and embarrassing questions about a video that she has tried for many years to put behind her and in which she had nothing whatsoever to do with its dissemination or publication.

WHEREFORE, Defendant, Heather Cole, respectfully requests that this Court enter a protective order quashing the trial subpoena served by GAWKER and providing that her testimony in this case be presented via her video deposition.

Respectfully submitted,

Barry A. Cohen Legal Team, P.A.

/s/ Michael W. Gaines

BARRY A. COHEN

Florida Bar No.: 0096478

bcohen@tampalawfirm.com

MICHAEL W. GAINES

Florida Bar No. 775614

mgaines@tampalawfirm.com

201 East Kennedy Boulevard, Suite 1950

Tampa, Florida 33602

(813) 225-1655 (Telephone)

(813) 225-1921 (Facsimile)

Attorneys for Defendant, Heather Cole

bcohen@tampalawfirm.com

mgaines@tampalawfirm.com

mwalsh@tampalawfirm.com

jhalle@tampalawfirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June 2015, a true and correct copy of the foregoing was served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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

Attorneys for Plaintiff
kturkel@bajocuva.com
svogt@bajocuva.com
lisa.meriwether@bajocuva.com
teri.deleo@bajocuva.com

-and-

Charles J. Harder, Esq.
Matthew Blackett, Esq.
Sarah E. Luppen, Esq.
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
charder@hmafirm.com
mblackett@hmafirm.com
sluppen@hmafirm.com
dmirrell@hmafirm.com

-and-

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

Attorneys for Plaintiff
dhouston@houstonatlaw.com
krosser@houstonatlaw.com

Gregg D. Thomas, Esq.
Rachel E. Fugate, Esq.
Thomas & Locicero PL
601 South Boulevard
Tampa, FL 33606
Tel: (813) 984-3060 Fax: (813) 984-3070

Attorneys for Gawker, Defendants
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com

Kirk S. Davis, Esq.
Akerman LLP
401 E. Jackson Street, Suite 1700

Co-Counsel for Publisher Defendants
kirk.davis@akerman.com
shawn.goodwin@akerman.com

Tampa, Florida 33602
Tel: (813) 223-7333 Fax: (813) 223-2837

Seth D. Berlin, Esq.
Paul J. Safier, Esq.
Alia L. Smith, Esq.
Michael Sullivan, Esq.
Levine Sullivan Koch & Schulz, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Tel: (202) 508-1122 Fax: (202) 861-9888

Pro Hac Vice Counsel for Gawker Defendants
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
msullivan@lskslaw.com

-and-

Michael Berry, Esq.
Levine Sullivan Koch & Schulz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103

Pro Hac Vice Counsel for Gawker Defendants
mberry@lskslaw.com

/s/ Michael W. Gaines _____