

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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

**DEFENDANTS' MOTION *IN LIMINE* NO. 1:
EVIDENCE CONCERNING THE FBI INVESTIGATION**

Defendants hereby move *in limine* to be permitted to introduce evidence and elicit testimony concerning the FBI investigation into the alleged extortion of Plaintiff Terry Bollea. Prior to the previously-scheduled trial in this matter, Plaintiff moved *in limine* to exclude evidence or argument related to the FBI's criminal investigation. The Court granted that motion, but did so without prejudice based on its understanding that the federal government had not yet produced records in connection with Gawker's pending FOIA lawsuit and its recognition that the issue would be revisited after the government's records were produced. *See* Ex. 1 (July 1, 2015 Hrg. Tr.) at 241:12 – 247:19. Now that the FBI and the Executive Office of the United States Attorneys have produced records, and in accordance with Paragraph 22 of the Second Pretrial Order, Defendants now move for the admissibility of evidence and testimony concerning the FBI investigation, insofar as it relates to Bollea's liability and damages claims and the credibility of Bollea and other key witnesses.¹

¹ Defendants are also filing separate motions *in limine* addressing the admissibility of evidence concerning Bollea's racial statements on one of the sex tapes and the admissibility of certain, limited portions of DVDs produced by the FBI. This motion does not address evidence related to either of those topics.

BACKGROUND

One day before filing this lawsuit, Bollea's attorney David Houston told the media that he and his client planned to meet with the FBI in an effort "to track down the sex tape leaker" for allegedly "distributing the illegal footage to the media." Timeline Appendix to Defs.' Mot. *in Limine* No. 2, Tab for October 14, 2012. The following morning, just hours before filing civil claims against Bubba Clem, Heather Clem, and Defendants, Houston and Bollea met with the FBI to initiate an investigation. That investigation centered on an alleged extortion involving three sex tapes. *See id.* at Tab for October 15, 2012. The FBI's investigation lasted for several months and culminated in a sting operation that took place on December 14, 2012, during the early stages of this litigation.

Since the prior hearing on motions *in limine*, the FBI and Executive Office of the United States Attorneys have produced hundreds of records related to the investigation. Among other records, the FBI released:

- Handwritten notes and typed FBI Form 302 memoranda memorializing interviews with Bollea, Houston, and Bubba Clem (designated in defendants' Second Supplemental Exhibit List as Exs. 754-73);
- Recordings and transcripts of telephone conversations between Houston and Keith Davidson, the alleged extortionist who was one of the targets of the FBI's investigation (designated in defendants' Second Supplemental Exhibit List as Exs. 740-44; 747-51);
- Audio recordings and a transcript of the December 14, 2012 sting operation involving a meeting between Bollea, Houston, and Davidson (designated in defendants' Second Supplemental Exhibit List as Exs. 745-46; 753);

- Various documents and communications provided to the FBI by Houston, Bollea, and Clem (designated in defendants' Second Supplemental Exhibit List as Exs. 774-77, 782-83, 785-87); and
- FBI records documenting other information and evidence it obtained during the course of its investigation.

These records show that during the course of the FBI's investigation, Bollea, Houston, and Bubba Clem made numerous statements to federal officials and provided the FBI with many documents bearing on this case. Those statements and information were given to the FBI immediately before Bollea filed suit against Defendants and in the early months of this litigation. The federal government's records therefore reveal unique, contemporaneous evidence about what Bollea and key witnesses knew and said about material issues relating to the creation, existence, and dissemination of the sex tapes.

At trial, Defendants intend to introduce some of this evidence and question Bollea, Houston, and Clem about it. In addition, they plan to call as a witness FBI Special Agent Jason Shearn, who led the investigation into the alleged extortion and conducted the interviews documented in the notes and FBI Form 302 memoranda.

ARGUMENT

The evidence obtained from the federal government about the FBI's investigation and the existence of that investigation bear on central issues in this case involving liability, damages, and witness credibility. Defendants plan to use that evidence and elicit testimony relating to the investigation for the following purposes:

1. Evidence from the FBI Investigation Addresses Bollea's Expectation of Privacy.

Whether Bollea had a reasonable expectation of privacy is a critical issue in this case. In

Bollea's deposition, he testified that he did not know that the Clems had security cameras in their house and had absolutely no reason to suspect that he was being filmed. *See, e.g.*, Ex. 2 (T. Bollea Dep.) at 258:5-12. But, he told the FBI the exact opposite, and said that he knew that Bubba Clem "has surveillance cameras all over his residence." Ex. 3 (Defs.' Trial Ex. 757) (FBI Form 302 of Bollea's Oct. 15, 2012 interview with FBI). In light of that knowledge, Bollea told the FBI that, before having sex with Heather Clem, he asked Mr. Clem whether he would be filming Bollea during that sexual encounter. *Id.*; *see also* Ex. 4 (excerpts from Defs.' Trial Ex. 753) at GAWKER-869 (transcript of sting audio in which Bollea states that, prior to the recorded sexual encounter, he "was just standing at the end of the bed and saying you aren't recording this are you?"). These statements are admissible as admissions of a party-opponent. *See, e.g.*, Fla. Stat. § 90.803(18)(a).

For his part, Mr. Clem told FBI agents that Bollea knew about his cameras and knew he was being filmed during his sexual encounters with Heather Clem. *See* Ex. 5 (Defs.' Trial Ex. 771) (FBI Form 302 of Bubba Clem's Nov. 9, 2012 interview with FBI). In fact, Mr. Clem told FBI agents that the camera in his bedroom was "obvious" to everyone. *Id.*

Bollea and Clem's statements about Plaintiff's knowledge of the camera and filming are central to Bollea's claims for intrusion, invasion of privacy and wiretap violations, all of which center on his alleged expectation of privacy. *See, e.g., Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009) ("All evidence tending to prove or disprove a material fact is admissible, unless precluded by law.").

2. Evidence from the FBI Investigation Addresses Bollea's Claims of Emotional Distress. Bollea has claimed that he suffered emotional distress from the Gawker posting and that Defendants intentionally inflicted that distress. But, the records of the FBI's meetings with

Houston and Bollea do not show that Bollea complained about the distress he suffered from Gawker's posting. Indeed, because Bollea had spoken extensively to the media about the Gawker posting, the FBI felt compelled to ask Bollea "whether the whole situation is some type of publicity stunt." Ex. 3 (Defs.' Trial Ex. 757).

Likewise, Houston testified that when he and Bollea watched the DVDs with Davidson in connection with the sting operation, Bollea became very upset when he saw the first short snippet of the footage of himself with Ms. Clem to the point that Bollea could not bear to watch any more of the footage. Ex. 6 (D. Houston Dep.) at 210:2-19. Houston further testified that because of his concern about Bollea's distress upon seeing the footage, Houston "didn't want to sit over there chuckling as to the passages in the various DVDs" because he was sensitive to his client's emotions and "thought that to be rather poor taste." *Id.* at 211:5-25. But, the audio of the sting operation reveals something very different.

The audio establishes that Bollea actually watched portions of all three tapes and did not become emotional upon watching any of the segments containing sexual content. *See* Ex. 7 (Defs.' Trial Ex. 745) at 2:54:28 – 3:09:25 (Part 1) (Sting Audio). In addition, as the tapes play, Houston does not seem concerned about Bollea's feelings. Instead, he is heard making comments about Ms. Clem's body and physical appearance, as if the men were engaged in locker room banter. *See id.*; Ex. 4 (excerpts from Defs.' Trial Ex. 753) at GAWKER-896 (transcript of sting audio). Accordingly, the audio of the sting operation and the transcript of that audio – which Bollea personally reviewed and verified the accuracy of – is critical evidence with respect to Bollea's claims of emotional distress.

3. Evidence from the FBI Investigation Addresses Bollea's Claim for Commercial Misappropriation Damages. Bollea intends to tell the jury that the brief video excerpts posted

by Gawker were worth more than \$30 million dollars. Gawker, however, paid nothing for the tape it received. And, the FBI records show that the tapes were worth far less than Bollea now claims. In fact, Bollea himself told the FBI that he stood “to make several million dollars” from the commercial distribution of the tape, a fraction of what he now claims in this suit. Ex. 3 (Defs.’ Trial Ex. 757) (FBI Form 302 of Bollea’s Oct. 15, 2012 interview with FBI). The FBI’s evidence shows the tapes were worth far less than that. For instance, the most anyone actually paid for access to any of the sex tapes was \$10,000, which was paid by the celebrity website TMZ, which reports regularly on Bollea and on whose programs Bollea repeatedly appeared to discuss the sex tapes. *See* Ex. 8 (Defs.’ Trial Ex. 768) at GAWKER-412. Meanwhile, Davidson – who sought to enter a real transaction selling the sex tapes – agreed to accept \$300,000 for all three tapes. *See, e.g.*, Ex. 9 (excerpts from Defs.’ Trial Ex. 749) at GAWKER-1615-16 (excerpts from FBI transcript of recording of telephone call between Houston and Davidson). All of this evidence goes directly to the “reasonable value of a publicly released sex tape featuring Hulk Hogan,” which is the damages that Bollea seeks through his misappropriation claim. Ex. 10 (Plaintiff’s Fourth Supplemental Response to Interr. No. 12 ¶ 1)

4. Evidence from the FBI Investigation Bears on the Credibility of Bollea and Houston. Not only did Bollea’s testimony in this case differ from what he told the FBI about his knowledge of the cameras in the Clems’ house and his suspicion of being filmed while engaged in sexual relations with Ms. Clem, but his testimony in connection with a number of other facts is demonstrably false in light of the material produced by the FBI. For example, the FBI records documenting Bollea’s interactions with Davidson demonstrate that his testimony that he had never heard of Davidson was false. *See* Ex. 2 (T. Bollea Dep.) at 580:22-24 (testimony from Bollea that he had no recollection of someone named “Keith Davidson”). The same is true for

records indicating that Bollea watched and listened to portions of all three sex tapes during his meeting with Houston and Davidson on December 14, 2012. After all, Bollea testified in this case that he had not watched *any* of those recordings at that time – in fact, Bollea testified that he did not even know if more than one of his sexual encounters with Heather Clem was recorded. *Compare* Ex. 4 (excerpts from Defs.’ Trial Ex. 753) at GAWKER-894 –899 (excerpts from FBI transcript of Dec. 14, 2012 meeting), *with* Ex. 2 (Bollea Dep.) at 291:12-14; 802:15-19.

The FBI’s records also can be used to impeach Houston. For example, Houston testified in this case that he could not identify Heather Clem while viewing the sex tapes during the sting operation. *See* Ex. 6 (D. Houston Dep.) at 211:5-25. But, as noted above, FBI records reveal that Houston did indeed recognize Heather Clem at the time. *See* Ex. 7 (Defs.’ Trial Ex. 745) at 3:11:11 – 3:11:30 (Part 1) (Sting Audio). Likewise, Houston has testified that he did not know whether the full set of sex tapes contained three separate encounters between Bollea and Ms. Clem, or whether they constituted three copies of the same encounter. *See* Ex. 6 (D. Houston Dep.) at 212:16-20. Yet, the FBI records demonstrate that Houston learned from Davidson that each DVD contained a separate encounter between Bollea and Ms. Clem, and that Houston watched portions of all three sex tapes. *See, e.g.,* Ex. 11 (excerpts from Defs. Trial Ex. 747) (excerpts from transcript of October 22, 2012 recorded telephone call between Houston and Davidson, in which Davidson states that “[t]hey are three . . . separate events . . . from beginning to end and the files on the DVDs are dated”).

Like Bollea’s statements revealed in the FBI records, Houston’s statements to the FBI and Davidson are admissions of a party-opponent. Those statements were made in the course of his work as an attorney acting on Bollea’s behalf. *See Brooks v. Shore*, 760 So. 2d 1093, 1094 (Fla. 3d DCA 2000). It is black-letter law that statements of a party’s agent are admissible

against the party himself. *See* Fla. Stat. § 90.803(18)(d). Thus, like Bollea’s own statements, Houston’s statements in the FBI records are admissible evidence. *See St. Paul Fire & Marine Ins. Co. v. Welsh*, 501 So. 2d 54, 57 (Fla. 4th DCA 1987) (letters written by defendant’s attorney were properly admitted into evidence as admissions of a party-opponent’s agent).

In addition, Bollea and Houston’s statements to the FBI and contained in the consensual recordings made in connection with the FBI’s investigation reflect classic impeachment evidence. *See Morowitz v. Vistaview Apartments, Ltd.*, 613 So. 2d 493, 495 (Fla. 3d DCA 1993) (holding that trial court erred in not admitting evidence to impeach witness where that evidence “clearly contradicted” the witness’s testimony regarding a fact at issue). Indeed, opposing Defendants’ fraud on the court motion, Plaintiff conceded that these and other statements in the FBI records are properly used for impeachment purposes. *See* Ex. 12 (Jan. 13, 2016 Hrg. Tr.) at 76:10-13 (“You have numerous statements at numerous times. It happens. You reconcile them at trial or you impeach a witness. That’s what we do.”); *see also id.* at 78:16-25 (“Florida law clearly provides an inconsistency, nondisclosure, poor recollection, dissemblance and even a lie is insufficient to support dismissal and in many cases may be well managed and best resolved by bringing the issue to the jury’s – to the jury’s attention through cross-examination.”); Pl’s Omnibus Opposition to Defendants’ Mots. at 17-18 (same).

All of this evidence casts grave doubt on the credibility of Bollea and Houston. The jury should be able to review this evidence and assess their credibility for itself.

5. Evidence from the FBI Investigation Bears on the Credibility of the Clems.

Similarly, the FBI materials cast doubt on the credibility of both Bubba and Heather Clem concerning Bollea’s expectation of privacy in his encounters. Bubba Clem testified in his deposition that Bollea did not know about the cameras in his house and that Bollea did not know

he was being filmed with Heather Clem. But, as explained above, he told the FBI the opposite. *See* Ex. 13 (B. Clem Dep.) at 467:6-8; *supra* at 4. Likewise, Heather Clem testified in this case that she did not know she was being filmed, only learned of the recording afterwards, and did not know how to use the camera in the bedroom. *See* Ex. 14 (H. Clem Dep.) at 20:19 – 22:1. Yet, documents produced by the FBI indicate that she knew she was being filmed at the time, because she and her husband discussed the recording. *See* Ex. 15 (excerpts from Defs.’ Trial Ex. 170) at BOLLEA 001214 (transcript prepared by Davidson). In addition, Mr. Clem told the FBI that Heather Clem knew how to use the camera system, was the person who filmed the sexual encounter, and burned the tape of herself and Bollea to a DVD. *See* Ex. 5 (Defs.’ Ex. 771).

In short, the FBI records contain evidence suggesting that all persons involved in the encounter and its recordings have given conflicting testimony and sworn statements about the events surrounding the sexual encounters between Ms. Clem and Bollea and the filming of those encounters. Defendants should be permitted to use this evidence to impeach the Clems. *See* Fla. Stat. § 90.608; *see also* *Lawson v. State*, 651 So. 2d 713, 715 (Fla. 2d DCA 1995) (“If the evidence is relevant to independently prove a material fact or issue, or if it goes to discredit a witness by pointing out bias, corruption, or lack of competency, it will be allowed.”).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their motion *in limine* and enter an order allowing them to use evidence and elicit testimony concerning the FBI’s criminal investigation.

February 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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