

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally  
known as HULK HOGAN,

Case No. 12012447 CI-011

Plaintiff,

vs.

GAWKER MEDIA, LLC aka GAWKER  
MEDIA; NICK DENTON; A.J.  
DAULERIO,

Defendants.

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**TERRY BOLLEA'S MOTION IN LIMINE NO. 24 TO EXCLUDE  
ARGUMENT OR EVIDENCE OF ILLEGALLY RECORDED AUDIO OF  
TERRY BOLLEA AND ANY EVIDENCE DERIVED THEREFROM**

Plaintiff Terry Bollea, professionally known as Hulk Hogan ("Mr. Bollea"), moves in limine under Fla. Stat. §§ 90.104, 90.403 and 934.06, for an order prohibiting Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, "Gawker Defendants") from introducing any evidence of any illegally recorded audio of Mr. Bollea, or evidence derived therefrom, except for evidence of or derived from the article and video posted on Gawker.com on October 4, 2012, which is the subject of this lawsuit.<sup>1</sup> The grounds upon which this motion is based and reasons it should be granted are as follows:

**Introduction**

The preponderance of the evidence<sup>2</sup> in this case establishes that Mr. Bollea was secretly recorded naked, engaged in consensual sexual activity, and having private conversations in a

<sup>1</sup> Mr. Bollea expressly reserves all objections to the admissibility of such evidence on other grounds.

<sup>2</sup> See, § 90.105(1), Fla. Stat.; *Dufour v. State*, 69 So.3d 235, 252 (Fla. 2011); *Tucker v. State*, 884 So.2d 168 (Fla. 2d DCA 2004).

private bedroom, without his knowledge and consent, in violation of Florida's Secured Communications Act (the "Act"). See § 934.03, *Fla. Stat.* Section 934.06, Florida Statutes, provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court ... if the disclosure of that information would be a violation of this chapter." The admission of evidence of or derived from other surreptitious audio recordings of Mr. Bollea which do not form the basis of Mr. Bollea's claims for relief in this case would be a violation of the Act. Thus, with the exception of the content of Mr. Bollea's communications disclosed on Gawker.com in the October 4, 2012 post, the secretly recorded audio of Mr. Bollea, and evidence derived therefrom, is inadmissible at trial and should be excluded.

As set forth in detail in Mr. Bollea's Omnibus Opposition (filed January 12, 2016), discovery established that Mr. Bollea did not know that his oral communications were being recorded in the Clems' bedroom. Rather, Mr. Bollea's conversations were intercepted by means of a hidden recording device in violation of the Act.

At some point in time, the surreptitiously recorded material was stolen, and a video recording was delivered to Gawker. Gawker then posted a "highlight reel" of the video they received, which included audio of Mr. Bollea's surreptitiously recorded conversations in a private bedroom.

Mr. Bollea sought the assistance of the FBI, and his complaint led to an investigation, and eventually a sting operation, which was recorded by the FBI.

Given the legislative intent of the Act, and the broad protections the Act affords victims of interception, the content of any of the other surreptitiously recorded audio of Mr. Bollea, as

well as transcripts and recordings derived from such audio, and evidence associated with the FBI investigation and sting operation, should be excluded under § 934.06, Fla. Stat. The FBI investigation and sting operation emanated from the surreptitiously recording of Mr. Bollea in a private bedroom. But for the illegal recording of Mr. Bollea, the FBI investigation never would have occurred. Thus, the FBI investigation constitutes “fruit of the poisonous tree,” which cannot be admitted under § 934.06, Fla. Stat.

### **Overview of the Act**

The Act prohibits the intentional “interception” of an “oral communication.” § 934.03(1)(a), Fla. Stat. The Act also prohibits the intentional disclosure or use of the “contents” of any oral communication by someone knowing or having reason to know that the information was obtained through the interception of an oral communication. § 934.03(1)(c)-(d), Fla. Stat.

An “oral communication” is any oral communication uttered by a person exhibiting “an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting...” § 934.02(2), Fla. Stat. “Intercept” means the “aural or other acquisition of the contents of any... oral communication through the use of any electronic, mechanical or other device.” § 934.02(3), Fla. Stat. “Contents,” when used with respect to oral communication, “includes any information concerning the substance, purport, or meaning of that communication.” § 934.02(7), Fla. Stat.

### **The Preponderance of the Evidence Establishes That Mr. Bollea Was Secretly & Illegally Recorded**

Mr. Bollea has consistently maintained, and testified under oath, that he did not know he was being recorded in the Clems’ bedroom. Bubba Clem and Heather Clem have both, under

oath,<sup>3</sup> confirmed this to be the case. Other third-party witnesses have corroborated that Mr. Bollea did not know he was being recorded. (*See Omnibus Opposition.*) The illegally recorded video itself, recently viewed by the Court and counsel for the parties, also makes it abundantly clear that Mr. Bollea was secretly recorded (based upon the setting, the nature and substance of the conversations, Mr. Bollea’s conduct, and the number of people present).

The device which was used to secretly record images of Mr. Bollea naked engaged in sexual activity, and to intercept Mr. Bollea’s private conversations in a private bedroom, was concealed above cabinets, and behind a plant, in the Clems’ Bedroom. (Rice Depo. p. 25:10–25:18) This camera was disguised as a motion detector, and there was nothing on it that would indicate that it was recording. (Clem Depo. Exhibit 51, pp. 196:24-197:13) (Rice Depo. p. 27:1-27:11) The following photo illustrates an example of what the camera in the Clems’ bedroom looked like (although the location was different at the time of the recording):



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<sup>3</sup> Bubba Clem initially claimed that Mr. Bollea knew about the recording, but explained under oath at his deposition that he was lying at that time to “cover his a\*\*.” (*See, Omnibus Opposition*)

Mr. Bollea was intentionally recorded. The secret recording device concealed in the Clems' bedroom only recorded if a DVD was placed in the recorder, and a button was pushed to "record." (Rice Depo. pp. 27:22-28:6) ("It would not do anything automatically. It actually required a user to – a human being to go and push the record button. This could not be set for timer record; this could not be set to automate, in any way.")

**Surreptitious Audio of Mr. Bollea and Evidence  
Derived Therefrom Other Than the Recording At the Center of This Action is Inadmissible**

Section 934.06, Fla. Stat., prohibits the introduction into evidence of the contents of intercepted audio, as well as evidence derived therefrom, when doing so would be a violation of the Act. The underlying intent of the Act is to protect the privacy of oral communications, and to protect the integrity of court proceedings. *State v. Walls*, 356 So.2d 294, 296 (Fla. 1978). "The Legislature chose to prohibit unauthorized interception and use of the contents of such interception in evidence in court and administrative proceedings." *Id.* The exclusionary rule embodied in Section 934.06, Fla. Stat., applies to civil and criminal cases. *Horn v. State*, 298 So.2d 194, 201 (Fla. 1st DCA 1974) The purpose of Chapter 934 is also to protect the victims of illegal intercepts.

*McDade v. State*, 154 So.3d 292 (Fla. 2014), demonstrates the broad scope of the Act. In *McDade*, Florida's Supreme Court concluded that even a recording of the solicitation and confirmation of child sexual abuse surreptitiously made by the child victim in the accused's bedroom was inadmissible under §934.06, Fla. Stat. 154 So.3d at 293. In *McDade*, a sixteen year-old girl who had been sexually assaulted since she was ten, secretly recorded her stepfather confirming the sexual abuse in his bedroom. The Second District Court of Appeal ruled that the recording should have been admitted in the stepfather's criminal trial, but the Florida Supreme Court reversed, recognizing its prior decision in *State v. Walls*, which held that a surreptitious

recording made by the alleged victim of extortionary threats in the victim's home was also inadmissible.

In *McDade*, the Supreme Court noted the importance of the location of the subject conversations, the visibility of the recording device and the content of the recordings, when deciding whether the victim had a reasonable expectation of privacy.<sup>4</sup> Here, the conversations between Mr. Bollea and the Clems occurred in a private bedroom,<sup>5</sup> as was the case in *McDade*. The recording device was concealed, as was the case in *McDade*. The content of the recordings (which this Court and counsel have now reviewed) confirms that Mr. Bollea did not know he was being recorded; while the subject matter of the conversations also makes it clear that Mr. Bollea believed his conversations were private.<sup>6</sup> Moreover, Bubba Clem and Heather Clem both testified that Mr. Bollea was surreptitiously recorded.

Under similar factual circumstances, numerous other courts have excluded evidence of intercepted oral communications under §934.06, Fla. Stat. *Perdue v. State*, 78 So.3d 712 (Fla. 1st DCA 2012); *Horn v. State*, 298 So.2d 194 (Fla. 1st DCA 1974); *State v. Tsavaris*, 382 So.2d 56 (Fla. 2d DCA 1980). In the cases in which courts concluded that intercepted communications were admissible, the recording device was obvious, the locations were such that an expectation of privacy was not reasonable, or the recording was made unintentionally. *State v. Inciarrano*,

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<sup>4</sup> The speaker must have an actual subjective expectation of privacy in his conversation, and society must be prepared to recognize the expectation as reasonable under the circumstances. *Stevenson v. State*, 667 So.2d 410, 412 (Fla. 1st DCA 1996) (citing *State v. Smith*, 641 So.2d 849, 852 (Fla. 1994)). “Where both elements are present, the statute has been violated whether the intercepted communication is private in nature or not.” *Id.* (citing *LaPorte v. State*, 512 So.2d 984 (Fla. 2d DCA 1987), review denied, 519 So.2d 987 (Fla. 1988)).

<sup>5</sup> A significant factor used in deciding the reasonableness of the expectation of privacy is the location: “conversations occurring inside an enclosed area or in a secluded area are more likely to be protected under Section 934.02(2).” *Stevenson*, 667 So.2d at 412.

<sup>6</sup> This fact is cemented by Bubba Clem's “retirement” comment – which clearly establishes Mr. Bollea didn't know he was being recorded.

473 So.2d 1272 (Fla. 1985); *Stevenson v. State*, 667 So.2d 410 (Fla. 1st DCA 1996); *Belle v. State*, 177 So.3d 285 (Fla. 2d DCA 2015). None of those circumstances are present here.

Importantly, Section 934.06 provides that the “contents” of an intercepted conversation should not be received in evidence. As set forth above, section 934.02(7) defines “contents” to include “any information concerning the substance, purport, or meaning of that communication.” *See also, Tsavaris*, 382 So.2d at 66. Applied here, this precedent means that the substance of Mr. Bollea’s intercepted conversations, other than those specifically disclosed on Gawker.com which are at the center of this case, cannot be used or disclosed to the jury.

Section 934.06 also prohibits the admission of the “fruit of the poisonous tree” into evidence at trial. *Horning-Keating v. State*, 777 So.2d 438, 448 (Fla. 5th DCA 2001). The exclusionary law applies to other evidence emanating from the content and substance of Mr. Bollea’s surreptitiously recorded conversations. *Id.*; *see also, Bagley v. State*, 397 So.2d 1036 (Fla. 5th DCA 1981); *Smith v. State*, 438 So.2d 10 (Fla. 2d DCA 1983). Practically, this means that the FBI investigation should also be excluded as fruit of the poisonous tree.

In *Horning-Keating*, the Court held that recordings made in violation of Article I, Sections 12 and 23 of the Florida Constitution and Section 934.03 and 934.06, Florida Statutes, could not be used to frame questions posed at deposition. Thus, it was held to be reversible error for the trial court to compel answers to deposition questions derived from an intercepted recording.

The clearest definition of “evidence derived from,” as applied to the facts presented here, is found in *State v. Williamson*, 701 So.2d 1243 (Fla. 5th DCA 1997); which held that “suppression of the recordings of subsequent authorized conversations is required only if the contents of the improperly recorded conversation was the basis for authorizing such subsequent

recordings and not merely one of the several factors that bolstered the complainant's credibility." In *Williamson*, law enforcement wiretaps subsequent to a conversation that was illegally recorded were deemed admissible because they would have been authorized by law enforcement regardless of whether the illegal recording was made. Here, however, Mr. Bollea's surreptitiously recorded conversations were, in and of themselves, the basis for the FBI investigation and subsequent authorized recordings. Unlike *Williamson*, the illegal recordings of Mr. Bollea were used to commit the extortion; and absent the recordings, the resulting law enforcement investigation never would have occurred.

In the criminal context, law enforcement investigations based upon illegal recordings are routinely excluded as "fruit of the poisonous tree." Where the exploitation of illegally recorded conversations, and not independent lawful investigation or fortuitous discovery, leads to investigations and resulting evidence, the entire investigation and any evidence derived therefrom is tainted and must be excluded. *Smith v. State*, 438 So.2d 10, 13 (Fla. 2d DCA 1983)

Considering the protections afforded to criminal defendants under § 934.06, Mr. Bollea, who is the **victim** of an illegal recording, and also the **victim** of an extortion attempt using the very same illegally recorded material, should not be afforded less protection because he sought the assistance of the FBI. The intent of the Act is to protect the privacy of the victims of interception. This should necessarily include prohibiting the disclosure and use of collateral evidence associated with a law enforcement investigation.

Accordingly, with the exception of Mr. Bollea's conversations actually disclosed on Gawker.com, the content of Mr. Bollea's intercepted conversations, and evidence derived therefrom, including the entire FBI investigation file, should not be admitted for any purpose at trial.



WHEREFORE, Terry Bollea requests that, with the exception of the content of the oral communications actually disclosed on Gawker.com on October 4, 2012 which are at the center of this case, the Court exclude any argument and evidence based on the content of Terry Bollea's other intercepted oral communications, as well as the evidence derived therefrom, including the entirety of the FBI's investigation, and grant such other and further relief as the Court deems just and appropriate.

*/s/ Kenneth G. Turkel*

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 1st day of February, 2016 to the following:

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