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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.
_____/

PLAINTIFF TERRY BOLLEA'S SUPPLEMENTAL OPPOSITION TO GAWKER DEFENDANTS' MOTION IN LIMINE TO EXCLUDE TESTIMONY OF KEVIN BLATT (STYLED "Publisher Defendants' Motion In Limine to Preclude Plaintiff From Calling Their Retained Expert Kevin D. Blatt as a Witness")

Mr. Bollea opposes Gawker Defendants' renewed effort to exclude the harmful testimony of their own expert, as follws:

Gawker Defendants' supplemental response supporting the Motion in *Limine* relating to Kevin Blatt repeats their prior incorrect argument: that there is a *per se* rule against calling an expert engaged by the other side. However, no such *per se* rule exists. To the contrary, Florida law provides that, as long as Mr. Bollea does not introduce evidence that Gawker Defendants originally retained Mr. Blatt as an expert during Mr. Bollea's case-in-chief, Mr. Bollea is entitled to introduce Mr. Blatt's testimony.

As stated in Mr. Bollea's initial opposition, a series of published Florida state appellate cases confirms that there is no prohibition on calling the other side's expert, so long as the prior employment is not discussed in the case in chief. *Bogosian v. State Farm Mutual Automobile Insurance Co.*, 817 So.2d 968, 973 (Fla. 3d DCA 2002); *Sun Charm Ranch, Inc. v. City of*

Orlando, 407 So.2d 938, 940 (Fla. 5th DCA 1981); *Jacksonville Transportation Authority v. ASC Associates*, 559 So.2d 330 (Fla. 1st DCA 1990).

Gawker Defendants cite to only one Florida state case, *Milburn v. State*, 742 So.2d 362, 364 (Fla. 2d DCA 1999), and grossly misrepresent its holding. *Milburn* is a criminal court case which held that it was error for a trial court to **permit the prosecutor to tell the jury that the defense had tried to hire the state's expert witness**, and states the governing rule as "the fact that the expert was originally retained by the adverse party is inadmissible to bolster the credibility of the expert". *Id.* (internal quotation omitted). Logically, there would be no need for this special rule about not mentioning the prior retention of the expert if the expert's testimony were inadmissible in the first place.[1] Thus, Mr. Bollea can use Mr. Blatt's testimony, and will not mention his original retention by Gawker Defendants.

The remainder of Gawker Defendants' argument is based entirely on non-binding authorities from federal courts and jurisdictions outside of Florida, which must be disregarded as contrary to Florida law. Those cases are irrelevant because precedents from the Florida District Courts of Appeal, cited above, control.

In addition to their lack of precedential value, these inapplicable, out-of-jurisdiction cases cited by Gawker Defendants still do not support Gawker Defendants' argument. *Saewitz v. Lexington Insurance Co.*, 2003 WL 25740731 (S.D. Fla. Oct 21, 2003), an unpublished case, holds that the possibility of prejudice from calling the other side's expert can be taken into account when weighing the probative value and prejudicial effect of evidence under Federal Rule

[1] Importantly, *Milburn* notes that courts are not even unanimous on the alleged prejudice of mentioning the expert's prior employment. *Milburn* cites *Broward County v. Cento*, 611 So.2d 1339, 1340 (Fla. 4th DCA 1993), which held that it was permissible to mention the prior engagement of an expert by the other side so long as the expert had been engaged to give trial testimony rather than merely as a consultant.

of Evidence 403 but that it was not conclusive. The court held that where a party had two other retained experts to testify regarding the same subject matter, the testimony of the other side's expert could be excluded as cumulative. *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408 (D. Minn. 1999) and *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458 (S.D.N.Y. 1995), also cited by Gawker Defendants, also exclude the testimony based on a Federal Rule of Evidence Rule 403 balancing test considering a variety of factors. The fact that Gawker Defendants retained an expert in a discrete field of expertise, whose testimony ultimately proved beneficial to Mr. Bollea, is not grounds to exclude his opinions under any of these factors. Likewise, Gawker Defendants' failure to vet their own expert does not preclude Mr. Bollea from using his opinions at trial.

Gawker Defendants next argue—unsupported by any authority—that the jury will be able to "tell" from the video excerpts that the Gawker Defendants actually hired Mr. Blatt. This is speculative and untrue. Mr. Bollea has not designated **any** testimony for admission in his case-in-chief where Mr. Blatt discusses his engagement by Gawker Defendants. Parties routinely depose their **own** out-of-state experts to avoid the cost and expense of calling them at trial. This is why Rule 1.390(b), Fla. R. Civ. P., expressly provides for the use of **any** expert's deposition at trial.

Gawker Defendants are simply guessing that some jurors might make the stretch from the fact that he was being questioned by a particular attorney (if the attorney's identify is even apparent from the video clips—which has not been demonstrated) that he must have been retained by Gawker Defendants. This is unsupported speculation. In fact, many third party witnesses, experts, and court appointed experts are questioned this way at deposition, and even an ostensibly friendly witness might be cross-examined if he or she gives hostile testimony on a particular subject. There is no reason to believe that any juror is going to make the quantum leap

necessary to conclude that Mr. Blatt was hired by Gawker Defendants, and certainly no law supports Gawker Defendants' speculations in this regard. On the contrary, as discussed above, Florida's appellate courts have ruled repeatedly that another side's expert testimony **can** be provided at trial.

Even if Mr. Blatt's expert opinions are excluded, Mr. Bollea is absolutely entitled to introduce his testimony on matters of fact. In addition to his expert role, Mr. Blatt is a third-party fact witness who has personal knowledge of salient facts regarding, among other things, the production, distribution and marketing of celebrity sex tapes, online marketing and e-commerce, and the operational aspects of pornographic websites. Importantly, Mr. Blatt authored one of the offer letters to Mr. Bollea, on behalf of Sex.com, establishing the significant value of the sex video at issue. The fact that Mr. Bollea's counsel questioned Mr. Blatt at his deposition concerning his personal knowledge of relevant facts does not in any way suggest that Mr. Blatt is any one party's "expert," nor does it support excluding his testimony on matters of fact.

Gawker Defendants' last resort is to argue for an "exceptional circumstances" standard which appears in some federal cases but is not a standard under any Florida state authorities—which control. In Florida, the rule is clear: a party may call the other side's expert, as long as the expert's prior employment is not identified in the case in chief. There is no basis for a categorical exclusion of Mr. Blatt's testimony, and no basis to exclude Mr. Blatt's testimony on other grounds.[2]

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[2] Gawker Defendants also intimate that they believe that some of Mr. Blatt's testimony is irrelevant or inadmissible on other grounds. While Mr. Bollea disagrees with these objections, they are not the proper subject of a motion in limine, as they would need to be dealt with one-by-one at trial before being presented to the jury, when ruling on objections to deposition designations.

For the foregoing reasons, along with those stated in Mr. Bollea's initial opposition papers, Gawker Defendants Motion in *Limine* regarding Kevin Blatt should be denied.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 12th day of February, 2016 to the following:

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