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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,

Plaintiff,

Case No. 12012447CI-011

vs.

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

Defendants.
_____________________________________/

PLAINTIFF TERRY BOLLEA'S OMNIBUS OPPOSITION TO DEFENDANTS' MULTIPLE MOTIONS *IN LIMINE* TO ADMIT EVIDENCE THAT EXISTS PURELY AS A RESULT OF A VIOLATION OF FLORIDA LAW (STYLED "Defendants' Motion *In Limine* No. 1: Evidence Concerning The FBI Investigation"; "Defendants' Motion *In Limine* No. 2: Evidence Concerning Plaintiff's Use of Racial Slurs on a Sex Tape"; and "Defendants' Motion *In Limine* No. 3: Relevant Excerpts from DVDs Produced by the FBI")

Mr. Bollea opposes Gawker Defendants' motions in limine numbered 1, 2 and 3, as follows:

I. INTRODUCTION

Instead of litigating the merits of the salient issues in this case, Gawker Defendants are once again asking this Court to ignore Florida law so that they can use the fruits of the crimes committed against Mr. Bollea to smear his character before the jury with irrelevant materials, all of which exist purely as a result of the surreptitious recording of Mr. Bollea in violation of Florida's Constitution and statutory law.[1] Specifically, Gawker Defendants seek to introduce:

[1] In response to all three Motions, Mr. Bollea incorporates by reference Plaintiff's Confidential Opposition to Gawker Defendant's Motion to Permit Presentation of Offensive Language at Trial, filed June 26, 2015, and Plaintiff's Omnibus Response in Opposition to Gawker Media, LLC, Nick Denton and A.J. Daulerio's Disguised Motion for Rehearing, filed January 12, 2016; both of which are incorporated herein by reference.

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- Evidence and testimony regarding an FBI investigation into an extortion attempt of Mr. Bollea, concerning DVDs and audio of Mr. Bollea recorded without his knowledge in violation of Fla. Stat. § 934.03 [Motion in Limine No. 1];[2]
- Evidence of offensive language used in a private conversation, recorded without Mr. Bollea's knowledge in violation of Fla. Stat. § 934.03 [Motion in Limine No. 2]; and
- Excerpts from three surreptitiously recorded sexual encounters, recorded without Mr. Bollea's knowledge in violation of Fla. Stat. § 934.03 [Motion in Limine No. 3].

These topics have been litigated multiple times previously in this lawsuit and the Court has been clear: under Florida law, this material is inadmissible. In fact, admitting it into evidence would be unlawful. § 934.06, Fla. Stat.

Florida law does not permit the admission of highly prejudicial offensive language under the circumstances here, and Gawker Defendants effort to manufacture a convoluted theory of "relevance" is unpersuasive. Such language relating to race **only** can come in to evidence when it is **central** to the case. The distinction between "some potential theory of relevance" and "central to the case" is straightforward. The central issue in this case is whether Gawker Defendants invaded Mr. Bollea's privacy by posting on the website Gawker.com a secretly recorded video of him naked and engaged in consensual sexual activity, or whether Gawker Defendants' actions are protected by the First Amendment. The video that Gawker Defendants posted online did not contain any of that offensive language that Gawker Defendants seek to introduce, and the full 30 minute video that Gawker Defendants originally received also did not contain any such language. The language is not central to the case, not by any stretch. Gawker Defendants outright misrepresent the holdings of several cases in their motions, again

[2] Indeed, the investigation itself would never have taken place had the violation of Fla. Stat. 934.03 not occurred. Thus, evidence or testimony regarding investigation, and all records thereof, are fruit of the poisonous tree. *See* Fla. Stat. § 934.06 (excluding any evidence "derived" from illegal recordings of conversations).

underscoring that Gawker Defendants' Motion in Limine is an act of pure desperation—they try anything and everything to inject race into the case, in the hopes of destroying Mr. Bollea and nullifying the jury. Their actions are improper.

With regard to evidence of the FBI investigation into an extortion attempt, this evidence was derived from an illegal recording of Mr. Bollea in violation of Fla. Stat. § 934.03. Any evidence derived from material illegally recorded under Section 934.03 is required to be excluded under Fla. Stat. § 934.06.

II. THERE IS NO BASIS FOR RECONSIDERATION OF THE COURT'S ORDERS EXCLUDING THE ADMISSION OF EVIDENCE OF OFFENSIVE LANGUAGE.

Gawker Defendants have repeatedly attempted to introduce evidence of offensive language in this case, and this Court has repeatedly ruled that such evidence is inadmissible. Gawker Defendants' motions for reconsideration of those orders should not be granted because Gawker Defendants have not made a specific showing of new facts or changed circumstances. To the contrary, the facts establish that the evidence Gawker Defendants seek to admit must be excluder under § 934.06. A motion for reconsideration is not a vehicle for correcting a **party's** errors in its earlier filings. *Holloway v. State*, 792 So.2d 588, 588 (Fla. 5th DCA 2001) (where motion to set bail had erroneously stated that no bail had yet been set, motion for reconsideration that asked the trial court to reconsider based on the corrected facts was properly denied). Further, a motion for reconsideration cannot simply reargue the previous motion, but must show a **change in circumstance** that justifies revisiting the Court's ruling. *Hunter v. Dennies Contracting Co.*, 693 So.2d 615, 616 (Fla. App. 2d DCA 1997) (motion to dissolve injunction which did not show changed circumstances was properly denied even though evidence had been insufficient to grant injunction in first instance). Where a motion for reconsideration relies on an affidavit presenting purportedly "new" facts, and those facts could have been presented before

the Court's initial ruling, the Court should deny the motion. *Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc.*, 381 So.2d 1164, 1167 (Fla. 5th DCA 1980) (appellate court declines to consider content of affidavit submitted with motion for reconsideration where party failed to offer affidavit in opposition to initial motion).

Gawker Defendants have not shown any new facts which make Mr. Bollea's illegally recorded conversations on other videos relevant or admissible in this case. Gawker Defendants' argument is simply that they have concocted new, attenuated **theories** of supposed relevance based on the very **same** unchanged facts. "I thought of a new argument that I should have argued before" is not a basis for reconsideration.

Further, even if the new theories are considered, this Court's rulings excluding Mr. Bollea's illegally recorded conversations in a private bedroom were correct on the merits. Florida law is clear that evidence of offensive language of the type at issue here **is precisely the sort of inflammatory, prejudicial evidence that should be excluded in the Court's discretion**, even when that language happens to be relevant to a material issue in the case (which is **not** the case here). The prejudicial effect of such evidence is so clear that its admission during a trial has been held to be **reversible error**. *MCI Express, Inc. v. Ford Motor Co.*, 832 So.2d 795, 801-02 (Fla. 3d DCA 2002) (holding that the trial court committed **reversible error** when it did not exclude testimony that executive of plaintiff used derogatory language about Cubans); *Simmons v. Baptist Hosp. of Miami, Inc.,* 454 So.2d 681, 682 (Fla. 3d DCA 1984) (*same*, holding: "We think these **unfair character assassinations** could have done **nothing but inflame the jury against these witnesses**, who were so **essential to the plaintiff's case**, and in so doing, **denied the plaintiff the substance of a fair trial** below.") (Emphasis added); *accord State v.*

Gaiter, 616 So.2d 1132, 1133 (Fla. 3d DCA 1993) (trial court redacted racial slurs even though probative).

Because the facts and law do not support their position, Gawker Defendants again resort to misrepresenting the law to this Court on this issue. They claim that so long as such evidence is "relevant," it is admissible. *Motion in Limine* No. 2 at 2. That position is belied by the cases cited by Gawker Defendants. *Lay v. Kremer*, 411 So.2d 1347, 1349 (Fla. 1st DCA 1982), involved the admission of a racial slur that was central to the case—plaintiff sued for assault and battery after being attacked by defendant, and used the racial slur, during an argument over a reserved parking space. The slur in *Lay* actually constituted part of the tort (assault) which the plaintiff pleaded. This factual scenario is completely different than the case at bar.

Jones v. State, 748 So.2d 1012, 1023 (Fla. 1999), held that a brief and spontaneous reference by a witness to the defendant's use of a racial slur was harmless **error** when there was overwhelming evidence of guilt; *Jones* did **not**, however, hold that the evidence should have been admitted, as Gawker Defendants wrongly imply.

Phillips v. State, 476 So.2d 194, 196 (Fla. 1985), held that an objection to the admission of racial slurs was waived because the defendant failed to raise it in the trial court. Obviously, the opposite is the case here.

Clinton v. State, 970 So. 2d 412, 413-14 (Fla. 4th DCA 2007), cited by Gawker Defendants, also involved a waived objection, as well as a situation where the evidence was central to the case (the defendant was convicted of aggravated battery after stabbing the victim while stating "I'm going to kill you [racial slur]", a statement which established the defendant's criminal intent, an element of the crime).

Wimberly v. State, 41 So. 3d 298, 303 (Fla. 4th DCA 2010), is yet another case cited by Gawker Defendants where the defendant failed to object to racially offensive language introduced at trial and thus waived the issue. The court ruled the waiver was decisive, and specifically stated that it "disapprove[d]" of the introduction of the racially offensive matter by the prosecution. *Id.*

Robinson v. State, 574 So.2d 108, 113 (Fla. 1991), does not involve racially offensive language comparable to this case at all. The defendant wanted his statement to the police as to why he shot the victim a second time ("How do you tell someone I accidentally shot a white woman?") excluded, and the Court held this statement was properly admitted because it evidenced that the shooting was deliberate.

Bullard v. State, 521 So.2d 223, 226 (Fla. 5th DCA 1988), did not even involve a party using racially offensive language at all. Rather, a murder defendant proffered evidence that the **decedent** used racially offensive language, and the trial court declined to admit the evidence. Obviously, admitting that evidence could not possibly prejudice the jury against a **party** to the case, and the issue in *Bullard* is completely distinguishable.

Gawker Defendants next argue that they supposedly will take steps to mitigate any unfair prejudice to Mr. Bollea if the offensive language is admitted. However, this puts the cart before the horse. Before Gawker Defendants can even introduce such evidence, they must show that it is central to the case, and they have not done so. Only if the evidence were central to the case, and thus admissible, would this Court then need to decide what steps would need to be taken to mitigate unfair prejudice.

Gawker Defendants' arguments for why the evidence of offensive language is relevant are pure contrivances, the result of lawyers brainstorming, grasping for any possible mechanism they can find to inflame the jury with offensive language. To briefly respond to those theories:

1. Mr. Bollea's emotional distress claim is based on the distress that Terry Bollea suffered because Gawker Defendants posted an illegally recorded video of him naked and engaged in consensual private sexual activity on the Internet for millions of people to see. The recently fabricated argument that Mr. Bollea also suffered emotional distress from the factually unsupported speculation that he feared that offensive language might be revealed on other videos, which Gawker Defendants did not have, bears no relevance to this issue. The supposed presence of a second emotionally distressing event in one's life does not preclude obtaining a damages award based on the first event.[3]

2. The "transaction" proposed in the extortion investigation was a **fake** transaction designed to facilitate a sting and arrest. Therefore, it is not evidence as to what the "real value" of the video was, or that the "only" source of that value was the alleged presence of offensive language. Gawker Defendants' argument is akin to concluding that an undercover vice officer, pretending to be a prostitute, actually was willing to charge a

[3] Gawker Defendants cite cases permitting the introduction of evidence of alternate causes of a plaintiff's injury, but they are not making an "alternate cause" argument. They are making an argument that Mr. Bollea may have suffered **additional** distress regarding the offensive language, but there is no either-or here. The jury is entitled to conclude that Mr. Bollea suffered the distress that any reasonable person would suffer upon seeing surreptitious footage of themselves naked and engaged in sex on the Internet for millions of people to see. This determination does not depend on whether anything else was causing Mr. Bollea distress at the time.

certain amount for a sexual act because she negotiated a fake transaction with a john to facilitate his arrest.

3. Mr. Bollea objects to (and has himself moved to exclude) any evidence being admitted regarding the FBI investigation of an extortion attempt. However, if such evidence is admitted over Mr. Bollea's objection and Gawker Defendants are concerned that it might appear that Gawker Defendants were investigated by the FBI and were guilty of a crime, that should be handled directly with a curative instruction to the jury (telling the jury not to infer anything about Gawker Defendants from the fact that there was an FBI investigation), rather than used as an excuse to smear Mr. Bollea by injecting offensive language into the trial.

4. With respect to impeachment, the "central to the case" standard would still need to be met. Gawker Defendants have not identified any issues where the alleged impeachment was central to the case, and would need to satisfy that stringent standard before attempting to impeach any witness with this inflammatory and prejudicial material. Moreover, illegally recorded audio and any evidence derived therefrom cannot be used for impeachment. *Atkins v. State*, 930 So.2d 678 (Fla. 4th DCA 2006).

III. THE FBI EXTORTION INVESTIGATION SHOULD BE EXCLUDED AS THE "FRUIT OF THE POISONOUS TREE" UNDER FLA. STAT. § 930.06.

Section 934.03(1)(c)-(d), Fla. Stat., prohibits the use or disclosure of the "contents" of oral communications when one knows or has reason to know that such information was obtained through surreptitious recording. "Contents" is defined as "any information concerning the

substance, purport, or meaning of that communication." § 934.02(7), Fla. Stat. The Act's clear prohibition against the disclosure or use of secretly recorded audio is based upon Florida's public policy that the privacy of oral communications must be protected. *State v. Walls*, 356 So.2d 294, 296 (Fla. 1978). This policy is also embodied in Article 1, Section 12 of Florida's Constitution, which provides that the rights of people against the unreasonable interception of private communications by any means "shall not be violated." **Stated simply, Florida does not allow its citizens to be secretly recorded, and will not tolerate people using or disclosing illegal recordings against them**. This policy is so strong that Courts are statutorily prohibited from receiving the contents of and any evidence derived from a secretly recorded conversation into evidence in any legal proceeding or trial, if doing so would also violate the Act. § 934.06, Fla. Stat. This statutory exclusion is "absolute." *Jackson v. State*, 636 So.2d 1372, 1374 (Fla. 2d DCA 1974). 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.*

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 victim of extortionary threats in the victim's home was 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.[4] Here, the conversations between Mr. Bollea and the Clems occurred in a private bedroom,[5] 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. The subject matter of the conversations also makes clear that Mr. Bollea believed his conversations were private.[6] Moreover, Bubba Clem and Heather Clem both have testified under oath 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*,

[4] 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)).

[5] 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.

[6] 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.

Section 934.06 further prohibits the admission of the "fruit of the poisonous tree." *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). This means that the FBI investigation should also be excluded as fruit of the poisonous tree.

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 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 purpose of the Act is to protect the privacy of the victims of interception. This necessarily includes prohibiting the disclosure and use of collateral evidence associated with a law enforcement investigation.[7]

IV. CONCLUSION

For the foregoing reasons, Gawker Defendants' motions in limine nos. 1, 2, and 3 should be denied.

Respectfully submitted,

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- and -

[7] Mr. Bollea requests that the Court strike from the court file all records which contain or disclose any of the contents of, or any evidence of or derived from, Mr. Bollea's surreptitiously recorded conversations. As outlined in Mr. Bollea's Emergency Motion to Strike and Remove All Materials from the Record that Disclose or Are Derived from Illegally Recorded Video, filed February 9, 2016 and incorporated by reference, such information cannot be disclosed or used for **any** purpose and Florida law bars the admission of such evidence. As such, the admission and record of such evidence in the Court file is prohibited.

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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 12th day of February, 2016 to the following:

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