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' COMBINED OPPOSITION TO PLAINTIFF'S "EMERGENCY" MOTION TO STRIKE AND REMOVE ALL MATERIAL FROM THE RECORD THAT DISCLOSE OR ARE DERIVED FROM ILLEGALLY RECORDED AUDIO AND PLAINTIFF'S MOTION TO MODIFY, SUPPLEMENT AND/OR AMEND ORDERS SEALING SURREPTITIOUS AUDIO AND EVIDENCE DERIVED THEREFROM

In his latest motions, Plaintiff Terry Gene Bollea, professionally known as Hulk Hogan, asks this Court to take an extraordinary step with wide-ranging ramifications. Specifically, Bollea's "Emergency" Motion to Strike and Remove All Materials from the Record that Disclose or Are Derived from Illegally Recorded Audio ("Motion to Strike") asks this Court literally to remove from the court file all motions, briefs, and exhibits that include or refer to materials obtained by Defendants from the FBI, including multiple motions that are the subject of a pending writ petition by the Media Intervenors seeking access to those materials. In his Motion to Modify, Supplement and/or Amend Orders Sealing Surreptitious Audio or Evidence Derived Therefrom ("Motion to Amend Sealing Orders"), Bollea asks this Court to amend its prior orders sealing various materials to recite additional grounds justifying this Court's decisions, despite the fact that the orders he would have this Court amend are the subject of the Media Intervenors' writ petition.

Both motions should be denied for any and all of the following reasons:

(1) The materials Bollea is asking this Court to strike are not excludable under the Florida Wiretap Act, let alone subject to striking or sealing on that basis;

(2) The remedy of "striking" only applies to pleadings, not motions, briefs, and evidentiary submissions;

(3) Bollea waived any right to these remedies by failing to raise the Wiretap Act issue when the motions and orders at issue were originally adjudicated and issued; and

(4) The Motion to Strike is a transparent attempt to undermine the appellate rights of the Media Intervenors and Defendants.

I. The Materials Bollea Seeks To "Strike" Or "Seal" Are Not Excludable Under The Florida Wiretap Act.

Both of Bollea's motions should be denied for the simple reason that they are based on a massive misreading of the Florida Wiretap Act. Each motion extends from the mistaken premise, originally advanced in Bollea's Motion *in Limine* No. 24, that all evidence consisting of, or "derived from," the sex tapes is suppressible under the Wiretap Act's exclusionary rule – except, of course, evidence that Bollea wants to present. In making that self-serving argument, Bollea advances an almost comically expansive conception of the "fruit of the poisonous tree" doctrine, under which any evidence relating to events that would not have happened "but for" the original, allegedly illegal, recordings must be suppressed (except that evidence he wishes to use).

As set forth in detail in Defendants' Opposition to Plaintiff's Motion *in Limine* No. 24, filed February 12, 2016, Bollea's argument on this score is simply wrong. Specifically:

(1) Bollea is not permitted, under either the Florida Wiretap Act or the "sword and shield" doctrine, to selectively invoke the exclusionary rule to keep out only the evidence that is harmful to him. *Id.* at 2-7.

(2) The Court has already ruled that whether Bollea had a reasonable expectation of privacy in the oral communications captured on the tapes, which is the predicate question for the application of the Wiretap Act, is a jury question. *Id.* at 7-10.

(3) In the Wiretap Act context, the "fruit of the poisonous tree" doctrine only bars the use of evidence derived from information learned exclusively from an illegal recording. It does not apply where what caused the evidence to be obtained is the *fact* that the allegedly illegal recording was made, which is how Bollea wrongly construes the doctrine. Accordingly, the doctrine does not apply to evidence voluntarily disclosed by Bollea and his attorney or to evidence lawfully acquired by the FBI as a result of information the agency learned from Bollea. *Id.* at 11-15.

(4) Bollea's belated appeal to the Wiretap Act is untimely under the statute's procedural provisions. *Id.* at 15-16.

Accordingly, Bollea's motions should be denied on the ground that he is not entitled to *any* relief under the Wiretap Act, let alone the additional relief he seeks here.

II. The Remedies Bollea Seeks Are Not Available As a Matter of Law.

Even if Bollea were correct about what is and is not excludable under the Wiretap Act, he would still not be entitled to the remedies he seeks.

A. Striking Only Applies To Pleadings.

Bollea's Motion to Strike should be denied for a very simple reason: Section 934.06 of the Wiretap Act addresses the exclusion of evidence from a trial. It does not authorize striking anything from the record, as is made clear from the fact that none of the Wiretap Act cases he cites struck anything from the record. Indeed, the very fact that all of those decisions remain public proves that the materials ultimately excluded remain open to public inspection in the court file. In fact, the publicly reported decisions Bollea cites describe the excluded evidence in detail.

By contrast, Florida Rule of Civil Procedure 1.140(f), which is the rule under which Bollea moves, only applies to "***pleadings***." Specifically, the Rule permits a party to move to strike allegations from a "pleading" where those allegations have no bearing on the issues in a case. *See* Fla. R. Civ. P. 1.140(f) ("[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any ***pleading*** at any time") (emphasis added); *see also Burns v. Equilease Corp.*, 357 So. 2d 786, 787 (Fla. 3d DCA 1978) ("A motion to strike a defense tests only the legal sufficiency of the defense. It is reversible error for a trial court to strike a defense where evidence may be presented to support it."). The Florida Rules of Civil Procedure set out only seven categories of filings that may be considered pleadings:

> (1) a complaint;
>
> (2) a petition and an answer to it;
>
> (3) an answer to a counterclaim denominated as such;
>
> (4) an answer to a crossclaim if the answer contains a crossclaim;
>
> (5) a third-party complaint if a person who was not an original party is summoned as a third-party defendant;
>
> (6) a third-party answer if a third-party complaint is served; and
>
> (7) a reply containing the avoidance, if an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it.

Fla. R. Civ. P. 1.100(a). To prevent any ambiguity on this issue, the Rules further make clear that "***[n]o other pleadings shall be allowed***." *Id.* (emphasis added).

Florida courts have followed that rule strictly and denied motions to strike on this basis. In *Motzer v. Tanner*, 561 So. 2d 1336, 1337 (Fla. 5th DCA 1990), the appellate court held that the trial court erred in granting a motion to strike a motion to dismiss, explaining that "[a]lthough

commonly employed, the use of the term 'pleading' to describe all of the various papers filed in an action is incorrect." The court further noted both that "[m]otions are not pleadings" under the Florida Rules of Civil Procedure and that "motions cannot be directed against other motions" generally. *Id.* at 1338 (citing Trawick, Florida Practice and Procedure, § 6-1, p. 65 & § 10-2, p. 154 (1989 ed.)). The court thus concluded that the "use of a motion to strike" was improper. *Id.* Likewise, in *Boswell v. Boswell*, 877 So. 2d 829, 830 (Fla. 4th DCA 2004), the Fourth District held that the trial court erred in striking a motion for temporary relief, finding "no legal basis" to strike such a motion. *See also Patsy v. Patsy*, 666 So. 2d 1045, 1046 (Fla. 4th DCA 1996) (citing *Motzer* for the proposition that "a motion is not a pleading within the meaning" of the parallel Rule authorizing motions to strike "sham" pleadings). *Holt v. Sheehan*, 122 So. 3d 970 (Fla. 2d DCA 2013), upon which Bollea relies, further illustrates the narrow scope of motions to strike. The court there ordered a circuit judge to replace an improper opinion on the docket – but did so only after stating that the rule on motions to strike scandalous matter from pleadings, would "[f]or obvious reasons" not apply to such a record. *Id.* at 974.[1]

So, too, here. Bollea's Motion to Strike is not directed towards any pleadings filed by Defendants. On the contrary, he asks this Court to strike from the "court file all of the filings . . . containing, referencing, or disclosing any material" related to the FBI investigation. Motion to

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[1] Bollea also cites *State v. Barber*, 2004 WL 3605656 (Fla. Cir. Ct. July 30, 2004), as support for his position. That decision, which is not binding precedent, provides no support for Bollea's motion for two reasons. First, in that case, material from the court's own sealed files (grand jury testimony) had been mistakenly put in the court file, and the court *sua sponte* ordered it removed. The decision never suggests that a court can selectively strike non-pleadings filed by parties to civil litigation. Even so, *Barber* has since been fully discredited. The decision was challenged all the way up to the United States Supreme Court, which, though it declined review, summarized its basis for doing so this way: "[t]he two orders, issued by a judge no longer in office, appear to have been isolated phenomena, not a regular or customary practice." *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns Cty.*, 544 U.S. 1301, 1306 (2005) (Kennedy, J., in chambers). Unsurprisingly, no court has cited *Barber* since that time for any proposition, let alone for the proposition that Bollea advances here.

Strike at 10. That request encompasses multiple motions filed in this case, including a motion Bollea himself filed – specifically, his motion seeking discovery into an alleged leak of the FBI materials.

B. Bollea Failed To Make These Arguments In A Timely Fashion.

Bollea's motions should be denied on the additional ground that they are untimely. Bollea seeks the following from this Court: (a) an order striking and removing from the court file a number of motions that have already been fully adjudicated in his favor, or (b) barring that, an order modifying this Court's prior orders sealing various filings so as to recite additional grounds for sealing the at-issue records. But Bollea did not raise the Wiretap Act issue when any of these motions – including the sealing motions – were being heard. Having failed to raise that issue at the time, he should not be permitted to obtain this additional relief now.

In his motions, Bollea tries to get around this obvious problem by asserting that, "[n]ow that the Gawker Defendants have obtained the federal government's investigation file, and the Court and counsel for the parties have reviewed the corrected and unredacted DVDs, the Court has the final predicate necessary to conclude that Mr. Bollea was secretly recorded in violation of Florida law." Motion to Amend Sealing Orders at 2. Putting aside that Bollea vigorously opposed allowing the parties to review the DVDs, that is both disingenuous and inaccurate.

First, Bollea has alleged since long before this case began that he was unknowingly recorded. And, from the time Gawker posted the video excerpts, Bollea has claimed publicly and in countless court filings that he did not know he was being filmed by the Clems. As for the DVDs themselves, Bollea and counsel have long known of their contents, including when Bollea's counsel viewed them last June after the initial set was produced to this Court. *See also* Defs.' Opp. to Pl.'s Mot. *in Limine* No. 24, Feb. 12, 2016 (reciting additional evidence regarding

same). That review, and Bollea's own knowledge of whether he knew of the cameras in the Clems' home or thought he might be filmed when engaging in sexual encounters in the Clems' bedroom, are in no way "new" information that could somehow justify his eleventh hour attempt to strike or seal records.

Second, Bollea's characterization of the the content of the DVDs themselves is not proof that Bollea was unaware that he might have been recorded by security cameras, as there is conflicting evidence on that point and the DVDs do not show what may have happened before or after the taping. Defs.' Opp. to Pl.'s Mot. *in Limine* No. 24 at 9. Even if Bollea was unaware of the cameras, as he claims, that would not resolve the question of whether he had a reasonable expectation of privacy for purposes of the Wiretap Act, because, as a general matter, a guest has no automatic expectation of privacy in someone's else's house. *Id.* (citing *State v. Inciaranno*, 473 So.2d 1272, 1276 (Fla. 1985) (Overton, J., concurring) ("I concur and write to emphasize that when an individual enters someone else's home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply.")).

The untimeliness concern applies especially to Bollea's Motion to Amend Sealing Orders. This Court's original sealing orders already cited Florida Rule of Judicial Administration 2.420(c)(9)(A)(vii), the same provision he relies upon now, as a basis for permitting the records to be sealed. *See, e.g.*, Ex. 1 (order). All Bollea is asking for here is for this Court to amend those orders to add a new justification under that same prong of the rule he already raised. That would be inappropriate under any circumstances, but it is especially so where, as here, the orders he seeks to have modified are subject to pending writ proceedings.

III. These Motions Were Brought For The Express Purpose Of Denying Defendants And The Media Intervenors Their Appellate Rights.

Finally, in evaluating Bollea's request for relief, it important to be clear-eyed about just what he is attempting to do. In his Motion to Strike, Bollea asserts, specifically with reference to efforts by the Media Intervenors to seek access to the sealed filings, that his motion should be granted "***because sealing those records within the court file is no longer a sufficient method to enforce Florida law and protect Mr. Bollea's undeniable Constitutional and statutory privacy rights***." Motion to Strike at 2 (emphasis added); *see also* Ex. 2 (Feb. 9, 2016 letter from K. Turkel to Court stating that, "[i]f these materials are stricken, it may render all or a majority of the issues raised in [the Media Intervenors'] appeal moot"). But, of course, the only reason why this Court's prior decision to seal those records might prove inadequate from his perspective is if the Court of Appeal were to reverse that order and unseal those records. That makes clear the true purpose of Bollea's motion. He believes the Court of Appeal will not rule in his favor, and so he wants to enlist this Court to cut the legs out from under the appellate court. And he asks this Court to do this by literally moving the subject records to someplace where he thinks that the appellate court will be unable reach them, thereby rendering the pending writ proceeding "moot." It goes without saying that this Court should not agree to be a party to that effort.

In fact, it may be that Bollea's intentions go beyond just the Media Intervenors' appeal. If this Court strikes the judicial records that Bollea is asking it to strike and the Media Intervenors then seek appellate review of that order, he presumably hopes that they will be unable to do so because he will argue that there would be no court record to submit to the appellate court. While we seriously doubt that the Court of Appeal would accept such a ruse, another appellate court has recognized that this is yet another reason why striking a motion would be improper: "A movant's right to appeal from an order denying a motion is worth little if

the denying judge can strike the motion from the record altogether. Approval of the [trial court's] action would establish a procedure that, if abused, could shield erroneous district court orders from review. We hold that [the rule] should not be construed as allowing this undesirable result." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).[2] Here, the mischief would be far greater, as an order expansively discarding vast portions of the file in this Court would erase the trial court record and, if the jury renders an adverse verdict, substantially complicate Defendants' ability to seek review of that judgment, including a number of significant decisions that preceded the upcoming trial.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion to Strike and his Motion to Amend Sealing Orders.

February 15, 2016

Respectfully submitted,

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[2] In addition, striking materials from the record would violate the First Amendment rights of the public for the same reasons that sealing them would. In fact, striking materials that have been the subject of intense litigation, as is the case here, would clearly be precluded by the First Amendment because it would prevent the public from exercising its constitutional right to challenge sealing orders and from obtaining meaningful relief granting access to court records.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th 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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