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' BENCH MEMORANDUM REGARDING LIMITATIONS ON ECONOMIC DAMAGES RECOVERABLE BY PLAINTIFF

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding the limitations on the economic damages available to Plaintiff. In Plaintiff's Proposed Jury Instruction No. 33, Plaintiff proposes that the jury be instructed generally, with respect to all of his causes of action, that he may recover "[a]n amount of money which the greater weight of the evidence shows will fairly and adequately compensate [him] for the total benefit that defendants received from posting the uncensored video of [him] naked and engaged in consensual sexual activity on the website Gawker.com," as well as "[a]n amount of money which the greater weight of the evidence shows will fairly and adequately compensate [him] as a reasonable fee for people viewing the video of him naked and engaged in consensual sexual activity."

That is incorrect. Florida law is clear that (a) Plaintiff may not recover economic damages for any of his causes of action except for his claim for commercial misappropriation of his right of publicity, and (b) his recovery for that claim is limited to his own economic losses, and does not include any "benefit" Defendants received from the use of his name or likeness, or

the fees that consumers theoretically would have paid to someone other than him to view the complete sex tape.

1. Bollea cannot recover economic damages on any claim but misappropriation.

As a threshold matter, Plaintiff may not recover economic damages on any of his claims but misappropriation:

Intrusion on Seclusion & Publication of Private Facts: It is black letter law that "an invasion of the right of privacy by a publication confers no right on the plaintiff to share in the proceeds of the publication." 19A Fla. Jur. 2d Defamation and Privacy § 232; *see also Doe v. Beasley Broad. Grp., Inc.*, 105 So. 3d 1, 2 (Fla. 2d DCA 2012) (holding that a plaintiff may recover damages for emotional distress on invasion of privacy claim); *Restatement (Second) of Torts* § 652H, cmt. a (1977) ("[O]ne who suffers an intrusion upon his solitude or seclusion . . . may recover damages for the deprivation of his seclusion.").

Intentional Infliction of Emotional Distress: A plaintiff suing for intentional infliction of emotional distress through outrageous conduct is limited to damages "for mental pain and anguish." 32 Fla. Jur. 2d Interference § 19; *see also Claycomb v. Eichles*, 399 So. 2d 1050, 1051 (Fla. 2d DCA 1981) (noting that jury would have been properly instructed had it been told it could award damages for "mental anguish" on intentional infliction of emotional distress claim). That is all the more true here, where, in limiting the discovery that Defendants could take, Plaintiff limited his claim to "garden variety" emotional distress.

Florida's Wiretap Act: The Wiretap Act provides only for statutory damages – specifically, "not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." Fla. Stat. § 934.10(1)(b).

2. Bollea's recovery on the misappropriation claim is limited to a "reasonable royalty" for the use of his name or likeness.

It is long settled in Florida that a misappropriation claim does not entitle a plaintiff to seek defendant's profits from the disputed publication. For instance, in *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944), the court affirmed a demurrer to a common law misappropriation claim that sought recovery of defendant's proceeds from sale of a book about the plaintiff. The Court held "that the publication of a book containing a biographical sketch of a person does not legally entitle[] such person to share whatever profit is realized from the sale of such book." *Id.* at 254; *see also Jackson v. Grupo Indus. Hotelero, S.A.*, 2009 WL 8634834, at *8 (S.D. Fla. Apr. 29, 2009) (finding that plaintiff could seek an award of defendant's profits on his federal copyright infringement claims, but not his Florida law misappropriation claims).

Instead, consistent with *Cason*, Florida law plainly restricts the recovery available for a misappropriation claim to "damages for *any loss or injury* sustained" by the plaintiff "by reason" of an unauthorized use of his name or likeness, "including an amount which would have been *a reasonable royalty*." Fla. Stat. § 540.08(2) (emphases added). In other words, the economic damages that Bollea can recover for his claim of misappropriation are limited to recovery of the loss of a licensing fee for the rights to his name and likeness.[1] Courts have followed this rule strictly, in cases involving both statutory and common law right of publicity claims. For example, in *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990 (Fla. 4th DCA 2004), the court indicated that there was no reason to disturb the jury's finding on compensatory damages

[1] As a technical matter, damages for harm to the plaintiff's reputation are also available for a claim for commercial misappropriation of the right of publicity, as they would constitute loss or injury to the plaintiff. However, Plaintiff has, consistently throughout this case, specifically disclaimed any right to such damages. *See* Ex. 1 (July 1, 2015 Hrg. Tr.) at 173:13-19 (Counsel for Plaintiff stating that "I think about two years ago we told Your Honor we were not seeking damages for harm to career, harm to reputation, any of that").

for misappropriation where the jury heard competing testimony on "*the royalty value* of [plaintiff]'s name for [defendant]'s uses." *Id.* at 1002 (emphasis added). And in *Jackson*, the court held that "[w]ith regard to the violation of his right of publicity, the Plaintiff is entitled to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been *a reasonable licensing fee* for the use made of Plaintiff's likeness." *Jackson*, 2009 WL 8634834, at *9 (emphasis added); *see also Stockwire Research Grp., Inc. v. Lebed*, 577 F. Supp. 2d 1262, 1269 (S.D. Fla. 2008) (finding that "recover[ing] monetary damages for Defendants'" common law misappropriation claim requires "conclusively demonstrat[ing] the manner in which [p]laintiff . . . was *personally* damaged") (emphasis added); *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1311, 1313 (M.D. Fla. 2010) (plaintiff was not entitled to damages for common law right of publicity claim because only available damages would be identical to the lost "licensing fee" recoverable on her statutory claim).

CONCLUSION

In short, Plaintiff may only recover economic damages for his claim for commercial misappropriation of his right of publicity and those damages are limited to injury he suffered, including the loss of a reasonable royalty rate, and do not extend to any benefit supposedly received by Defendants or anyone else.

February 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

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