

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' OPPOSITION TO PLAINTIFF'S OBJECTION AND
MOTION TO EXCLUDE DEPOSITION TESTIMONY OF MINDGEEK
CORPORATE REPRESENTATIVE AND EXHIBITS AT TRIAL**

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio hereby oppose the motion of Plaintiff Terry Bollea, professionally known as Hulk Hogan, to exclude from trial the deposition testimony of Brett Goldenberg, and any exhibits to be introduced through such testimony. In July 2015, the Court rejected Plaintiff's prior attempt to prevent any witness from MindGeek testifying at trial, and the Court specifically allowed Defendants to obtain testimony about a narrowly defined set of issues. Try as he might, Plaintiff has failed to manufacture an issue that would justify reaching a different result today.

BACKGROUND

At trial, Plaintiff is planning to call Shanti Shunn, an e-commerce consultant, as an expert witness in an attempt to support his damages claim that he is entitled to recover, for each person who purportedly viewed the video excerpts posted by Defendants, the "standard price to access and view" a complete celebrity sex tape on the Internet. Ex. 1 to Defs.' Shunn *Daubert* Motion at 5. To support this damages theory, Mr. Shunn will testify as to two key points: (1) the video excerpts were purportedly "viewed" a total of 4.46 million times; and (2) VividCeleb.com, a

membership website specializing in celebrity sex videos, charges a fee of \$4.95 for a four-day pass to view celebrity sex tapes on that site. Despite seeking to offer testimony on these points, Mr. Shunn acknowledged in his deposition he had no experience in the pornography industry and did not know whether Vivid makes celebrity sex tapes available for viewing for free on a website called PornHub, a website that Mr. Shunn nonetheless repeatedly mentioned in his expert report. *See, e.g.*, Ex. 1 (S. Shunn Dep. Tr.) at 236:1-9 (testifying that he did not know whether Vivid distributes content for free through PornHub).

To respond to Mr. Shunn's proposed testimony and to address a topic raised by his expert opinion about which he turned out to know very little, Defendants listed on their June 8, 2015 Witness List a corporate representative from MindGeek, a company that owns the PornHub website. The sole purpose for the testimony was to establish that (1) people can watch celebrity sex tapes for free on PornHub, (2) Vivid posts celebrity sex tapes on PornHub and makes them available to be viewed for free, and (3) millions of people watch those celebrity sex tapes without paying anything. On June 12, 2015, Plaintiff filed a motion *in limine* to exclude the MindGeek witness from trial. The Court denied that motion at the July 1, 2015 pretrial hearing. *See* Ex. 2 (July 1, 2015 Hrg. Tr.) at 253:21–256:3.

By agreement of the parties, Mr. Goldenberg's deposition was scheduled for February 18, 2016. Because Mr. Goldenberg is a citizen of Canada, the parties arranged to conduct the deposition by videoconference. On February 10, 2016, Defendants filed and served their deposition notice, which listed four discrete topics. *See* Ex. 3 (Notice of Videotaped Deposition) at 1-2, 8. Each of those topics involved whether people can watch celebrity sex videos for free on the PornHub website. *See id.* at 8. In particular, the Notice stated that the deposition would focus on whether people can watch the Kim Kardashian sex tape on PornHub for free, whether

Vivid consents to the posting of that video on PornHub, and how many times the video had been viewed on PornHub. Each of these topics related directly to information Plaintiff's expert did not know and were directly tied to this Court's rationale in denying Plaintiff's prior motion to exclude a witness from MindGeek.

On February 11, 2016, Plaintiff cross-noticed the deposition of Mr. Goldenberg, asserting that the deposition "is being taken pursuant to Plaintiff's Subpoena directed to MindGeek dated February 11, 2016." *See* Ex. A to Motion to Exclude at 2. Plaintiff's subpoena, in turn, listed ten additional topics for questioning, which were largely outside the subject areas for which Mr. Goldenberg was selected as MindGeek's corporate representative, and which have nothing to do with the specific purpose for which this Court allowed this deposition. *Id.* at 8. On February 18, 2016, the day of the deposition, Plaintiff provided eight exhibits that he planned to use at the deposition, many of which had not previously been produced in discovery or identified in Plaintiff's trial exhibits.

The deposition took place as scheduled later that day. Mr. Goldenberg was represented by both in-house and outside counsel for MindGeek. *See* Ex. 4 (Goldenberg Dep. Tr.) at 1. Defendants questioned Mr. Goldenberg only on the topics listed in their notice. In response to Defendants' direct examination, Mr. Goldenberg confirmed that users can "watch pornography for free at PornHub," including the "Kim Kardashian Sex Tape With Ray J" video, that VividCeleb had posted the Kim Kardashian video on PornHub, and that the page with that video had been viewed over 105 million times. *Id.* at 8:22–9:15; 14:16–18:4. Plaintiff then proceeded to cross-examine the witness outside the scope of Defendants' direct examination and on topics with respect to which Mr. Goldenberg had no personal knowledge, which drew objections from MindGeek's counsel. Defendants counsel also objected to certain questions, principally on

grounds of relevance, the questioning being outside the scope of the direct examination, and Plaintiff's failure to comply with an earlier order entered by Judge Case about producing documents in advance of depositions. Plaintiff now moves for the complete exclusion of Mr. Goldenberg's testimony and related exhibits from trial. That motion is not well founded.

ARGUMENT

I. The Court should not exclude the very testimony it authorized Defendants to obtain.

At the pretrial hearing on July 1, 2015, the Court heard argument on Plaintiff's Motion *in Limine* No. 20, which asked the Court to "prohibit[] Defendants from introducing any testimony, evidence, or argument, during any portion of the trial, related to their recently listed witness MindGeek (corporate representative)," characterizing the use of a witness as "ambush litigation." *Id.* at 1, 3. Defendants explained that a witness from MindGeek was necessary because Mr. Shunn did not have knowledge about the pornography industry or that Vivid posts celebrity sex tapes on PornHub, where they can be watched for free. As Defendants explained at that hearing, they sought testimony on a narrow, clearly-defined issue: "that [anyone] can watch celebrity sex tapes for free that are posted by Vivid onto [MindGeek's] website." Ex. 2 (July 1, 2015 Hrg. Tr.) at 255:6-11. Such testimony would directly respond to the point made in Mr. Shunn's expert report "that people need to pay \$4.95 to watch celebrity sex tapes on Vivid." *Id.* at 254:11-16. The Court heard argument on this issue and ruled that if Mr. Shunn testifies on that point, "then [MindGeek] comes in," and the Court denied Plaintiff's motion to exclude accordingly. *Id.* at 256:1-3.

Subsequently, MindGeek identified Mr. Goldenberg as the person with knowledge about the topics identified by Defendants, and he voluntarily appeared for his deposition. Defendants questioned him on the precise issues that led the Court to deny Plaintiff's Motion *in Limine* No.

20 more than six months ago. *See* Ex. 5 (Defs.’ Proposed Designations for Goldenberg); Ex. 4 (Goldenberg Dep. Tr.).

Plaintiff does not (and cannot) argue that he was unable to cross-examine Mr. Goldenberg on the issues identified by Defendants or authorized by the Court: whether anyone can watch celebrity sex tapes on PornHub for free. Rather, Plaintiff argues that the testimony should be excluded because Mr. Goldenberg would not opine on *other* subjects that were outside the scope of his knowledge and were far afield from the ones on which the Court based its ruling to allow the deposition in the first place. In short, Plaintiff asks the Court to exclude Mr. Goldenberg’s testimony because Plaintiff was unsuccessful in his own attempt to obtain discovery on other topics from Mr. Goldenberg. The Court should reject this argument and reach the same conclusion it did in July 2015: if the jury is allowed to hear Mr. Shunn’s testimony as to how *much* (\$4.95) it can cost users to watch a celebrity sex tape on one website, the jury must be permitted to hear Mr. Goldenberg’s testimony as to how *little* (\$0.00) it can cost to watch exactly the same videos on another website.

II. Plaintiff was not denied the opportunity to cross-examine Mr. Goldenberg about the limited topics addressed by his testimony on direct examination.

At bottom, Plaintiff complains that he was not able to question Mr. Goldenberg as to issues outside of the scope of Defendants’ direct examination, outside the limited scope of Mr. Goldenberg’s corporate designation, and beyond Mr. Goldenberg’s personal knowledge. *See, e.g.*, Ex. 4 (Goldenberg Dep. Tr.) at 29:11-24 (asking the witness to speculate as to whether “Vivid Celebs” generates revenue from online advertisements); 36:25–38:12 (asking the witness questions about a blog for a website called YouPorn, and witness responding “I’m not involved with it at all”). Plaintiff characterizes this as being “deprived of the opportunity . . . to elicit testimony on issues relevant to this case,” but that ignores the fact that he was able to cross-

examine Mr. Goldberg about the limited topics addressed in his testimony on direct examination. Motion at 3.

If Plaintiff had wanted to take discovery on other topics, he has had years to identify and depose witnesses on those issues. Here, Plaintiff's Motion mentions that (1) VividCeleb "uses Pornhub to advertise" its celebrity tapes; (2) YouPorn had a blog post that mentioned Hulk Hogan; and (3) Pornhub's "terms and conditions" restrict "content that involves invasions of privacy, infringement of the right of publicity, and violation of copyright" and require the people featured in the video to have consented. *Id.* at 2. Those matters do not bear on the damages theory that Plaintiff seeks to present through Mr. Shunn or the reason this Court authorized the testimony from MindGeek. And, just as importantly, none of them bears on Mr. Goldenberg's testimony that VividCeleb posted the Kim Kardashian sex tape on Pornhub, that posting has received over 105 million views, and the video can be watched for free.

Plaintiff has known for many months the limited scope of the testimony Defendants sought from a MindGeek designee, and Mr. Goldenberg offered such testimony as expected at his deposition. If Plaintiff wanted "testimony on [other] issues relevant to this case," he has had ample opportunity to secure it for years. Motion at 3. For example, Plaintiff has been aware of Vivid Celeb since first receiving an offer letter from the company's owner in March 2012, and he has known about YouPorn since Defendants produced the document in question long ago in discovery. Yet, he made no effort to secure any testimony from witnesses with actual knowledge on those topics, such as a corporate representative of Vivid or YouPorn. Plaintiff cannot argue now that he has been prejudiced by not being able to elicit such testimony from Mr. Goldenberg.

III. Plaintiff's complaints are misplaced as to objections raised during the deposition.

Plaintiff argues at length about “improper speaking objections” raised during the deposition, but the record makes clear no such objections or instructions came from Defendants.¹ Motion at 3. To the extent that MindGeek’s counsel objected, and instructed Mr. Goldenberg not to answer, those statements were made with regard to questions that were (a) outside the scope of the direct examination; (b) outside the scope of Mr. Goldenberg’s knowledge; (c) outside the scope of the issues for which the Court approved the deposition at the July 2015 hearing; and/or (d) focused on exhibits that violated Judge Case’s June 2014 order (see below). No such objections in any way deprived Plaintiff of the opportunity to cross examine the witness on the subject matter of the direct examination. That hardly warrants exclusion of the testimony.

IV. Plaintiff's questioning during the deposition violated a standing order in this case, and therefore plaintiff was not prejudiced by Mr. Goldenberg's responses.

Plaintiff’s motion further fails because many of the questions he put to Mr. Goldenberg were in violation of a standing order in this matter. In June 2014, Judge Case issued a report and recommendation – which became an order when it was not objected to by either party – providing that “for all future depositions, all counsel [are] ordered to produce to counsel for the plaintiff and defendants, no later than five (5) days in advance of such deposition, any documents that have not previously been produced and that will be used as deposition exhibits, unless mutually agreed by counsel for plaintiff and defendants in advance or otherwise authorized by the Special Discovery Magistrate.” Ex. 6 (Order) at 1. Yet at Mr. Goldenberg’s deposition, Plaintiff repeatedly questioned him about documents that were not provided to Defendants with

¹ Defendants objected at 21:6-7; 21:18-19; 22:23-24; 23:16-17; 24:1-7; 24:12-20; 26:13-14; 26:24-25; 28:15-16; 29:6-7; 29:14-15; 30:8-9; 30:21-22; 31:9-10; 32:10-12; 32:21-33; 33:14-15; 35:1-2; 35:24-25; 36:5-6; 36:19-20; 37:4-9; 38:8-9; 38:16-17; 39:1-2; 39:20-21; 40:3-4; 40:20-21; 41:13-14; 41:23-24; 42:12-13; 42:24-25; 43:9-10; 43:20-21; 44:6-7; 44:16-18; 45:1-2; 45:12-13; 45:23-24; 46:5-6; 46:13-15; 47:5-6; 47:16-17; 49:13-14; 49:19-20.

the requisite five days' notice – without defendants' consent or permission from Judge Case or this Court. In fact, the documents were not produced to Defendants *until the day of the deposition*. Defendants properly memorialized their objection to this conduct. *See, e.g.*, Ex. 4 (Goldenberg Dep. Tr.) at 24:1-20. Incredibly, Plaintiff now argues that he was “essentially . . . denied the right to depose and cross-examine MindGeek at all” because he was not provided with answers to *some* of the questions that he asked in violation of that order. Motion at 3. Florida courts have made clear that “the exclusion of a witness' testimony is a drastic remedy which should be utilized only under the most compelling circumstances.” *Vega v. CSCS Int'l, N.V.*, 795 So. 2d 164, 167 (Fla. 3d DCA 2001); *Louisville Scrap Material Co., Inc. v. Petroleum Packers, Inc.*, 566 So. 2d 277, 278 (Fla. 2d DCA 1990). The circumstances here – where plaintiff asked numerous improper questions and still received answers to many of them – certainly do not justify such a “drastic remedy.”

V. Plaintiff did not have the authority to unilaterally expand the scope of the deposition.

Finally, it bears noting that Mr. Goldenberg voluntarily agreed to be deposed on the topics listed in Defendants' notice. As Mr. Goldenberg testified, he is a citizen of Canada, and his company, MindGeek Canada, has no offices in Florida. Ex. 4 (Goldenberg Dep. Tr.) at 18:7-12. Mr. Goldenberg was therefore beyond the reach of a subpoena issued by this Court. Yet Plaintiff asserts that he “Cross-Noticed the MindGeek corporate representative deposition on additional topics, some of which went beyond the scope of the limited notice served by Gawker Defendants,” and that he “provided a copy of his Cross-Notice to counsel for MindGeek via e-mail on February 11, 2016, along with a request that any objections to the additional topics be raised immediately.” Motion at 2-3. According to the reply email that Plaintiff attached to his Motion as Exhibit B, however, MindGeek's outside counsel cautioned that he would need

authorization from MindGeek to accept service on its behalf. *See* Ex. B to Motion at 1 (Feb. 11, 2016 email from J. Fischer to S. Vogt). Plaintiff has not represented to the Court that he was told service was accepted, and therefore the Court has no reason to believe that Plaintiff's "cross-notice" had any effect or that the topics noticed therein were ever properly before the witness.

CONCLUSION

Plaintiff has failed to offer any meaningful basis for the Court to revisit its July 2015 ruling that Defendants could secure testimony from MindGeek that celebrity sex tapes can be viewed for free at PornHub in light of the expert testimony proffered by Plaintiff's expert that a person would need to pay at least \$4.95 to watch those tapes. Moreover, nothing about Mr. Goldenberg's deposition presents the compelling circumstances to warrant the drastic remedy of excluding his testimony. Plaintiff's motion should, accordingly, be denied.

February 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th 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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