

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALVA JOHNSON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

Case No. 8:19-cv-00475-T-02SPF

DONALD J. TRUMP,
in his individual capacity and
DONALD J. TRUMP FOR
PRESIDENT, INC.,

Defendants.

_____ /

MOTION TO REOPEN DISCOVERY FOR LIMITED PURPOSE

Plaintiff Alva Johnson, through counsel, respectfully requests that the Court open discovery for the limited purpose of allowing her to obtain the original unaltered video file that purportedly evidences the incident in which Defendant Donald J. Trump kissed her at a campaign event in 2016. A forensic expert analysis indicates that the video provided to the Court and produced to Ms. Johnson is not the original recording, but is instead a clip from a longer video file. Accordingly, Ms. Johnson requests that the Court reopen discovery for the limited purpose of permitting Ms. Johnson to obtain the original video and test its authenticity, and that the Court stay all other deadlines. Counsel for Ms. Johnson have conferred with counsel for defendants President Trump and Donald J. Trump for President, Inc. (“Defendants”) and Defendants have indicated that they will oppose the relief sought herein.

I. Introduction

Defendants produced an eight and a half hour video to Ms. Johnson on Friday July 5, 2019. Her deposition was scheduled for the following Monday morning. Within that lengthy video is a 15-second segment that shows President Trump in an RV with Ms. Johnson. Ms. Johnson maintains

that the video shows President Trump looking her over, grabbing her by the shoulders, and kissing her while she tried to move her head and her mouth away from him. Defendant maintains that the video shows Ms. Johnson kissing President Trump. Prior to production of the 15-second video, the video was spliced into over eight hours of other video. As such, that initially-produced eight-hour spliced-together video has no metadata that would identify the source of the 15-second segment or would show whether and when the segment was altered. The only metadata available is for the longer video. That metadata indicates that compilation video was created no later than June 12, 2019, almost a month before it was finally produced to Ms. Johnson on the eve of her deposition.

On July 10, 2019, Defendants filed the 15-second segment as a separate video with the Court and finally served it as a separate video on Ms. Johnson. Dkts. 74-75. The next day, during a telephonic hearing, the Court indicated that the video did not appear to support Ms. Johnson's battery allegations, and directed Ms. Johnson and her counsel to share the video with disinterested third parties and reassess whether to proceed with their battery claim. Ms. Johnson takes that admonition seriously. In order to make a careful decision of how to proceed—under threat of sanctions from the defendants—Ms. Johnson requested and received a two-week extension of time to file her amended complaint. *See* Dkts. 80-81. In addition, she made a few simple requests of Defendants to assist her in this important decision. Most critically, she wanted the original video with its metadata (so she could ensure that the video was not altered in any way) and she wanted to know when Defendants received that video (so she could understand why Defendants waited until the eve of her deposition to produce it). Defendants refused to comply with these requests.

Because she could get no information from defendants—other than their repeated assertion that the 15 second segment was the original unaltered video—Ms. Johnson retained a forensic expert to examine the video. That forensic examination has raised some serious questions regarding the provenance, authenticity, and completeness of that video. Specifically, the metadata of the

version produced on July 10, 2019 indicates that the 15-second file is an extract from a longer file, and that the extract was created on February 25, 2019—the date this lawsuit was filed.

While Ms. Johnson is mindful of the Court’s admonitions, she also believes she is entitled to a full and fair record surrounding the video recording that caused the Court to believe it may be in her best interests to not pursue the battery claim. Her requests are modest, but important. For the reasons set forth herein, she respectfully asks the Court to reopen discovery to allow her to conduct discovery necessary to determine when the video was altered, to try to authenticate the video, and to access the original unaltered video. She also asks the Court to suspend the deadline for her to file an amended complaint until she has had an opportunity to pursue and complete this limited discovery.

II. Background

On the afternoon of July 5, 2019, three days before Ms. Johnson’s deposition, Defendants served her with a flash drive containing a document identified as DJTFPI_00000493.mp4. Declaration of Hassan A. Zavareei (“Zavareei Decl.”) ¶ 2. That document contains approximately eight hours and thirty-eight minutes of video footage. *Id.* The document contains spliced-together video of media coverage of the Trump Campaign rally that occurred on August 24, 2016, in Tampa, Florida, from a number of media sources, including ABC Arizona, Fox 10 Phoenix, Channel 90, APC 7 Suncoast News, several YouTube channels, and others. Buried deep in the compilation, at 07:39:44 (i.e., over seven hours into the compilation) is a brief video, taken on a cell phone, showing President Trump kissing Ms. Johnson. *Id.* ¶ 3. The metadata on that eight-plus hour video indicated that it was created no later than June 12, 2019.

On July 8, 2019 (the day of Ms. Johnson’s deposition), counsel for Ms. Johnson contacted counsel for Defendants to ask for each individual video contained in the compilation in their unaltered form, including their metadata. Zavareei Decl. ¶¶ 4-5, Ex. 1. Her counsel also asked defense counsel when they obtained the video and why defense counsel “waited until the eve of Ms.

Johnson's deposition to produce it," since the metadata showed that they had the video "at least as early as June 13, 2019." *Id.* While defense counsel responded to the email, he did not provide an unaltered copy of the video or explain why it was not produced earlier. *Id.* ¶ 5, Ex 1.

Instead, Defendants filed a copy of the 15-second segment with the Court on July 10, 2019, and also posted a copy of the video publicly on Defendants' counsel's website (<http://www.HarderLLP.com/JohnsonVideo>). *See* Dkts. 74-75. The video filed with the Court is a standalone version of the video of the August 24, 2016 kissing incident, rather than the eight-hour compilation served on Ms. Johnson. In connection with the filing, Defendants for the first time served a copy of the standalone 15-second video to Ms. Johnson's counsel. Zavareei Decl. ¶ 6, Ex. 2.

On July 11, 2019, the parties appeared telephonically before the Court to discuss Ms. Johnson's motion for entry of order governing the production of Electronic Sources of Information (ESI). The Court discussed the contents of the video with the parties and cautioned counsel for Ms. Johnson to carefully review the video prior to filing an amended complaint:

I would humbly suggest that you have somebody objective, from a distance, view that tape and tell "team plaintiff" whether, number one, that's a battery before you re-allege your complaint. Okay? Number two, conclude whether that was sexually predatory conduct, which you seem to have repeated multiple times in your complaint, you know, whether that conduct – and, you know, you can't sue him for the 19 other incidents. You can only sue him for what he did in the trailer. Whether that conduct was not only sexually predatory but forcible kissing, wanton, willful.

This is going to – you're at an inflection point. I just want to tell you that. Okay? And if you need more time to review that, of course, I'll give you whatever time you want. But have some people who aren't connected and invested in this emotionally look at that and tell you if that's a battery. Because you're ready to put your signature on an amended complaint, and your opponent is – let's just put it this way. The tape didn't – we were all a little bit surprised here in chambers to see that tape based on what you represented.

Tr. at 7:23-8:18 (July 11, 2019).

The Court indicated that Ms. Johnson could take more time to file her amended complaint, and Ms. Johnson entered into a stipulation with Defendants that stayed discovery and extended the deadline to file the amended complaint by two weeks—to July 29, 2018. Dkts. 80-81.

In order to make the difficult decision urged on her by the Court, Ms. Johnson felt that she needed certain basic information regarding the video and its provenance. Accordingly, on July 15, 2019, counsel for Ms. Johnson again requested that Defendants respond to a handful of narrow inquiries about that video:

- First, please send us the original unaltered Video. This means without any edits and containing the full metadata.
- Second, please tell us when you first received the Video.
- Third, please tell us from whom you obtained the Video.
- Fourth, please explain why you waited until July 5, 2019 to produce the Video.
- Fifth, please provide any other video and photographs taken from the same device as the Video captured on the same day.
- Sixth, please identify who spliced the video in with over eight hours of other footage and explain why you produced the Video in this manner.
- Finally, if you have any other photographs or videos depicting any portion of the interaction between Mr. Trump and Ms. Johnson, please produce them.

Zavareei Decl. Ex. 3.

Defendants responded on July 18, 2019, refusing to provide the requested information. Counsel stated only that “the full-speed version of the video submitted to the Court and served on your office on Wednesday, July 10, is the same video that was produced during discovery.” *Id.* ¶ 8, Ex. 4. According to counsel, the video filed with the Court in connection with Defendants’ July 10, 2019 filing “was the full-length, unedited video taken by Brian Hayes on August 24, 2016, in the campaign RV.” *Id.*

Thus, on July 19, 2019, Ms. Johnson asked Defendants if they would agree to reopen discovery for limited purposes and sent narrow draft discovery requests to Defendants: three (3)

interrogatories and two (2) requests for production (“RFPs”). Defendants responded on July 20, 2019, again asserting that Ms. Johnson was already in possession of the “entire unedited video recording . . . in its original, unaltered format.” *Id.* Ex. 5. Defendants would not agree to reopen discovery. *Id.* ¶ 10, Ex. 6.

Afterwards, counsel for the parties spoke on the phone on July 22, 2019. Defense counsel asked Ms. Johnson’s counsel if they would narrow the requests. *Id.* ¶ 11. Ms. Johnson’s counsel sent a narrowed request shortly afterwards. *Id.* ¶ 12, Ex. 7. In response, defense counsel declined to respond to the narrowed requests, and reiterated that Defendants had “already produced the full, unaltered video . . . and filed it with the Court.” *Id.* ¶ 12, Ex. 7.

Because defense counsel refused to provide any further information about the video, Ms. Johnson’s counsel retained Matt Danner, a forensic expert, to examine the video. Mr. Danner is a Senior Forensics Specialist with CS DISCO, Inc., in Austin, Texas. Mr. Danner examined the video and found that there were two separate time stamps on the video. The first set of timestamps “indicates that the video was originally created with an Apple iPhone 6 with iOS v9.3.4 and was created on August 24, 2016 at 13:35:41.” Declaration of Matt Danner (“Danner Decl.”) ¶ 12. The second set of timestamps have a “Create Date” and “Modify Date” of February 25, 2019. *Id.* ¶¶ 14-15. That is the date that the complaint in this lawsuit was filed. Dkt. 1. According to Mr. Danner, this second set of timestamps “indicate that additional activity occurred with this video on February 25, 2019 that updated these internal metadata timestamps.” *Id.* ¶ 17. As he explains in his declaration, the existence of these divergent dates indicates that the underlying video was filmed on August 24, 2016, but that the video provided to Ms. Johnson is a clip or portion of that underlying video that was created on the day this lawsuit was filed: “Specifically, the difference between the [February 25, 2019 timestamps] and the creation timestamp [of August 24, 2016] is consistent with this video being a clip or portion of another video.” *Id.* ¶¶ 18; *see also id.* ¶ 23 (“The timestamps

indicate that the video clip was created on February 25, 2019 while the parent video was created on August 24, 2016.”).

Immediately after receiving the declaration and speaking with the expert, Ms. Johnson’s counsel sent the declaration to defense counsel and asked them to produce the full unedited video:

I have attached a declaration from a forensic expert we retained to examine the Brian Hayes video. As you will see, it appears that the video is a snippet of a longer video. Can you please produce the full unedited video? If you don’t have it and cannot get it from Mr. Hayes, please let us know. If that is the case we will need to ask the Court to reopen discovery for the limited purpose of obtaining the original video. Hopefully that won’t be necessary. Also, if you have reason to believe our expert’s conclusions are incorrect, please let us know.

Zavareei Decl. ¶ 14, Ex. 8. Ms. Johnson’s counsel followed up the afternoon of July 25, 2019, to inquire whether Defendants’ counsel were available to discuss the issue. *Id.* ¶ 15, Ex. 9. Defendants’ counsel have not responded to either email.

III. Argument

Ms. Johnson and her lawyers take the Court’s advice and admonitions of July 11, 2019 very seriously. Ms. Johnson is considering her options with regard to the battery claim and any amended complaint. But to make an informed decision about whether and how to move forward, Ms. Johnson requires complete and fulsome information about the belatedly-produced video of the interaction between her and President Trump. Ms. Johnson has attempted to avoid motions practice by seeking the information informally, but Defendants have not agreed to produce it.

While counsel for Defendants have represented that the video produced to Ms. Johnson and the Court was not edited, her expert’s analysis shows otherwise. Under ordinary circumstances, Ms. Johnson would be entitled to seek information about the circumstances under which a video of a disputed incident was produced, edited (meaning, at minimum, stripped of metadata and spliced into a longer video, and possibly cropped from a different longer video), and produced following a substantial delay. The same should be true here. At a minimum, Ms. Johnson is entitled to discovery

of the underlying video (if, as her expert's analysis indicates, the produced video is a clip of a longer video) to review what substance, if anything, was cropped out. Ms. Johnson is not seeking these materials for purposes of delay, harassment, or obstruction, or for any other improper purpose, but rather to assist her in determining next steps in the litigation in light of the Court's comments.

For these reasons, Ms. Johnson respectfully requests that the Court open discovery for the limited purpose of permitting Ms. Johnson to conduct narrow discovery relating to the video—specifically its origin, whether it was edited (and if so, how, by whom, and why), and any substance that may have been removed or cropped out. That should include limited third-party discovery if necessary. To protect the resources of both parties and the Court, Ms. Johnson requests that the Court stay all other deadlines (including the deadlines set forth in Dkts. 80-81) until this issue has been resolved. Ms. Johnson requests that the Court set a telephonic status conference for 30 days following resolution of this Motion to assess case status and enter new deadlines as needed.

IV. Conclusion

For the foregoing reasons, Ms. Johnson requests that the Court (1) reopen discovery for the limited purpose of permitting Ms. Johnson to obtain the original video and test its authenticity; (2) stay all other deadlines; and (3) set a telephonic status conference for 30 days from the date of the Court's Order.

Dated: July 26, 2019

Respectfully Submitted,

/s/ Hassan A. Zavareei
Hassan A. Zavareei (*pro hac vice*)
Katherine M. Aizpuru (*pro hac vice*)
TYCKO & ZAVAREEI LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
Telephone: 202-973-0900
Facsimile: 202-973-0950
hzavareei@tzlegal.com

kaizpuru@tzlegal.com

Janet Varnell (Fla. Bar No. 71072)
Brian W. Warwick, (Fla. Bar No. 0605573)
VARNELL & WARWICK, PA
P.O. Box 1870
Lady Lake, FL 32158-1870
P: 352-753-8600
F: 352-503-3301
jvarnell@varnellandwarwick.com
bwarwick@varnellandwarwick.com

F. Paul Bland (*pro hac vice*)
Karla Gilbride (*pro hac vice*)
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600

Jennifer Bennett (*pro hac vice*)
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8150

Counsel for Plaintiff