

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' POSITION STATEMENT NO. 1:
ADMISSIBILITY OF OTHER GAWKER PUBLICATIONS THAT
PLAINTIFF ALLEGES CONSTITUTED PRIVACY VIOLATIONS**

In June 2015, Defendants Gawker Media, LLC (“Gawker”), Nick Denton, and A.J. Daulerio, filed a motion *in limine* in which they sought to exclude evidence of, or testimony about, publications by Gawker unrelated to the one giving rise to this lawsuit. *See* Defs.’ Mot. *in Limine* to Preclude Plaintiff From Introducing Evidence Related To Other Gawker Articles (filed June 12, 2015). In that motion, Defendants sought to preclude Plaintiff Terry Bollea from using these other publications to argue to the jury that Gawker routinely violates the privacy of others. This Court heard argument on that motion on July 1, 2015, ultimately reserving on the motion. Ex. A (July 1, 2015 Hrg. Tr.) at 264:1 – 267:25. Pursuant to Paragraph 8 of the Second Pretrial Order (dated November 19, 2015), Defendants hereby submit their Position Statement regarding the admissibility of evidence of, and testimony about, other Gawker articles that Bollea contends violated privacy.

The exhibits that fall into this category, which include, for example, an article about the football player Brett Favre sending pictures of his penis to a woman who later accused him of

sexual harassment, and articles about couples being caught engaging in public sex acts, are inadmissible for at least the following reasons:

1. **Irrelevant, Prejudicial, and Confusing for the Jury:** This case is about whether the specific publication at issue in this lawsuit (a) invaded Bollea's privacy, (b) commercially misappropriated his right of publicity, (c) intentionally inflicted emotional distress on him, and/or (d) was published in violation of Florida's Wiretap Act. Gawker publications about other people, even ones that also involve depictions of sex or nudity, will not impart any useful information to the jury on those topics. Instead, they will simply cause confusion and prejudice, as they will encourage the jury to treat this case as a general referendum about Gawker, rather than a case about the specific publication giving rise to this lawsuit. Indeed, even were plaintiff permitted to submit evidence concerning Gawker's overall publishing practices (which he is not), because Gawker publishes more than 100,000 posts per year, allowing plaintiff to present the small handful he has selected will paint a distorted and unfair picture of Gawker.

2. **Prior "Bad Acts" Evidence:** The law does not permit Bollea to prove that Gawker's conduct in this case was actionable by pointing to other publications that he contends are similarly actionable. *See* Fla. Stat. § 90.404(1)-(2); *Thigpen v. UPS, Inc.*, 990 So. 2d 639, 647 (Fla. 4th DCA 2008). This applies equally to Bollea's claims for punitive damages, where other alleged bad acts cannot be used to establish entitlement to punitive damages without a prior showing of "substantial similarity" to the conduct complained of. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' *hypothetical claims against a defendant*") (emphasis added).

The use of these other alleged “bad acts” is particularly problematic in this case because of First Amendment considerations. This is not, for instance, a products liability case where the plaintiff wants to point to what are indisputably prior instances of the same product failing in the same way. Defendants’ position is that all the other publications that Bollea wants to admit were protected by the First Amendment, as was the publication he complains about in this lawsuit. That creates an additional problem, beyond the standard restrictions on admitting prior “bad acts” evidence. Without a mini-trial weighing the privacy considerations against the First Amendment for each of those other posts, which would be a huge distraction and waste of time, the jury will be left without information to accurately assess how each of those post’s ought to bear on its assessment of Gawker and the other defendants. If the jury is going to be asked to decide the liability and damages questions in this case based on presumptively constitutionally protected material, without requiring Bollea to demonstrate in each instance that it is not protected by the First Amendment, that will create an insurmountable infirmity in any verdict the jury ultimately might render against defendants.

CONCLUSION

Defendants respectfully request that this Court preclude Bollea from admitting into evidence, or seeking testimony about, other Gawker publications that he alleges constituted violations of privacy.

February 12, 2016

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Gregg D. Thomas

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

601 South Boulevard, P.O. Box 2602 (33601)

Tampa, FL 33606

Telephone: (813) 984-3060

Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael D. Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th 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:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

Attorneys for Plaintiff

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Attorney for Plaintiff

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hkllaw.com

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hkllaw.com

*Attorneys for Intervenors First Look Media,
Inc., WFTS-TV and WPTV-TV, Scripps Media,
Inc., WFTX-TV, Journal Broadcast Group, and
The Associated Press*

Charles J. Harder, Esq.
charder@HMAfirm.com
Jennifer McGrath, Esq.
jmcgrath@hmafirms.com
Harder Mirell & Abrams LLP
132 S. Rodeo Drive, Suite 301
Beverly Hills, CA 90212
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amneste@aol.com
asteel@rahdertlaw.com
ncampbell@rahdertlaw.com

Attorney for Intervenor Times Publ'g Co.

/s/ Gregg D. Thomas
Attorney