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. 12012447-CI-011

HEATHER CLEM, *et al.*,

Defendants.
_____/

PUBLISHER DEFENDANTS' *DAUBERT* MOTION TO EXCLUDE THE EXPERT TESTIMONY OF MIKE FOLEY

Defendants Gawker Media, LLC ("Gawker"), Nick Denton and A.J. Daulerio (collectively, the "Publisher Defendants") hereby move to exclude the proposed expert testimony of Mike Foley, plaintiff's "journalism expert." Foley's testimony fails to satisfy the requirements for the admissibility of expert opinions set out in Fla. Stat. § 90.702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for two principal reasons. First, Foley's proposed testimony constitutes "pure opinion" testimony, unsupported by any discernible, let alone reliable, methodology, and is excludable on that ground alone. Second, Foley's opinions about the "newsworthiness" of the publication would be inadmissible, even if supported by a reliable methodology, because that is a legal issue and, thus, not a proper subject of expert testimony.

BACKGROUND

1. This case arises out of a post published on www.gawker.com on October 4, 2012 (the "Story"), which addressed an ongoing public controversy about a sex tape featuring plaintiff Terry Gene Bollea, professionally known as "Hulk Hogan" ("Hogan"). The post consisted of both a written article about the sex tape and the sex-tape controversy (the "Story"), and brief

excerpts from the tape (the "Excerpts"). The Story and the Excerpts are referred to collectively as the "Publication."

2. Hogan is asserting five claims against the Publisher Defendants arising out of the Publication. Those claims are for (a) invasion of privacy (publication of private facts), (b) intrusion upon seclusion, (c) common law misappropriation of the right of publicity, (d) intentional infliction of emotional distress, and (e) violation of Florida's Wiretap Act, Fla. Stat. § 934.10(2)(c). Am. Compl. ¶¶ 59-93, 100-108.

3. The central issue for each of those claims is whether the Publication addressed matters of public concern, and was, therefore, "newsworthy," as that term is used in the case law. If the Publication was "newsworthy" in that sense, there cannot be liability for the Publisher Defendants on any of the claims asserted against them.[1]

4. Plaintiff has proffered Foley as his sole expert on liability. Foley has taught journalism at the University of Florida since 2001, where he currently holds a non-tenure-track position as a "Master Lecturer." Ex. 1 at 42:12 – 43:19, 55:15 – 56:05 (Foley Dep.). Prior to that, Foley worked as a newspaper reporter and editor, primarily at the *St. Petersburg Times*, from 1970 until 1992, at which point he moved into a community-relations position with the paper. *Id.* at 18:23 – 35:17. Foley has not been a practicing journalist since 1992. *Id.* at 43:20 –

[1] *See, e.g.*, *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (claim for invasion of privacy/publication of private facts requires that the speech at issue not involve a matter of public concern); *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1220 (2011) (claims for intrusion upon seclusion and intentional infliction of emotional distress cannot be based on speech involving a matter of public concern); *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34, 36 (Fla. 1955) (unauthorized use of a plaintiff's name or likeness in connection with the dissemination of news or other matters of public interest cannot give rise to liability); *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427 (Fla. 5th DCA 1982) (same); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (no liability under publication prong of wiretap act for publication of illegally recorded information where, as here, information involves a "matter of public concern" and publisher played no role in illegal recording).

44:09, 59:02-04. When he was a practicing journalist, he worked exclusively in print (and, primarily, newspaper) journalism, with no experience with online or web-based publishing. *Id.* at 44:10 – 45:16.

5. According to Foley's expert report, his testimony answers two questions:

- "Did Gawker's publication of the Hulk Hogan sex video serve any valid, ethical, journalistic purpose?"
- "Did Gawker's publication of the sex video violate fundamental principles of journalism?"

Ex. 2 at 1 (Report).

6. Much of Foley's report is taken up with opining about articles and stories other than the Publication, as well as about statements made by Gawker employees about matters unrelated to this case. *See, e.g.*, *id.* at 7-10, 12-13 (addressing other posts allegedly published by Gawker, as well as statements attributed to Gawker employees that did not address the Publication). Foley does, however, express the following views specifically about the Publication in his report:

- "Is it news that a sex video involving a famous professional wrestler exists? Probably. He is a celebrity, after all. Is it news that the ex-wife of the wrestler's friend also is on the tape? Yes. Is it news that the video was shot secretly and that the person(s) responsible is (are) unknown? Yes. But is the video itself news? Absolutely not." *Id.* at 3.
- "Based on my experience, background, knowledge, training, education, and more than 40-year career in journalism, I conclude with a reasonable degree of certainty, that Gawker's publication of the sex video itself did not serve any valid, ethical journalistic purpose." *Id.* at 2-3.
- "Based on my 30 years in the journalism profession, posting this video shows a total disregard for privacy. It's insensitive. It shows contempt for the community and, from everything I have read, incredible arrogance." *Id.* at 5.
- "Based on my examination of Gawker's practices in this matter, as well as others, Gawker violated the privacy of Terry Bollea (Hulk Hogan), which is unfair and meant to cause him harm, rather than minimize it." *Id.* at 7.

- "Based on my experience, background, knowledge, training, education, and more than 40-year career in journalism, I conclude with a reasonable degree of certainty, that Gawker's posting of the Hulk Hogan sex video footage violated fundamental principles of journalism." *Id.* at 8.

- "Gawker posted the 1 minute and 41 seconds of sex footage because Gawker is in the business of publishing sex and calling it news." *Id.* at 14.

At his deposition, Foley repeatedly summarized the opinion to which he intends to testify at trial as follows: the Publication is "not journalism[,] . . . not newsworthy[, and] not ethical." Ex. 1 at 80:09-11 (Foley Dep.); *see also id.* at 96:17-24, 102:19 – 103:02, 137:24 – 138:06, 152:15-23, 156:01-11, 162:22 – 163:21 (same).

ARGUMENT

7. Fla. Stat. § 90.702, as recently amended to incorporate the *Daubert* standard, provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Under this standard, expert testimony is admissible if, but only if, "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-92 (11th Cir. 2005); *see also Wendel v. R.J. Reynolds Tobacco Co.*, 2014 WL 1396820, at *1 (Fla. Cir. Ct. Apr. 1, 2014) (same).

8. The *Daubert* standard requires that courts "act as 'gatekeepers' to ensure that speculative, unreliable expert testimony does not reach the jury." *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (citing *Daubert*, 509 U.S. at 597). In this case, Foley's proposed testimony should be excluded because it is not supported by a reliable methodology, and, even if it were, it would not assist the trier of fact because he is offering an opinion on a legal question.

A. Foley's Testimony Represents "Pure Opinion" Testimony, and Is Not Supported By Any Reliable Methodology.

9. As one Florida court recently explained, "[t]he Legislature's adoption of the *Daubert* standard reflected its intent to prohibit 'pure opinion testimony, as provided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007).'" *Giamo v. Fla. Autosport, Inc.*, 154 So. 3d 385, 388 (Fla. 1st DCA 2015) (quoting Ch. 13-107, § 1, Laws of Fla.). Under this new standard, "[s]ubjective belief," unsupported by any reliable methodology, is "henceforth inadmissible." *Perez v. Bell S. Telecomms., Inc.*, 138 So. 3d 492, 498-99 (Fla. 3d DCA 2014).

10. Foley's testimony is plainly inadmissible on this ground. As his expert report makes clear, Foley's proposed testimony consists of a series of unsubstantiated subjective judgments about Gawker's conduct, both as regards the Publication and more generally. *See, e.g.*, Ex. 2 at 5 (Report) (Gawker's conduct "shows contempt for the community and, from everything I have read, incredible arrogance"); *id.* at 11 ("Gawker is motivated primarily, or entirely, by money."); *id.* at 11 ("Gawker is a celebrity tattletale and a pornography website that masquerades as a 'news site' and panders to its readers."). When, for instance, Foley was asked at his deposition to identify the basis for his conclusion that "Gawker's publication of the sex video . . . did not serve any valid ethical journalistic purpose," he could only say that it was

based on his "years of experience, . . . education, [and] other qualifications." Ex. 1 at 105:11-22 (Foley Dep.).

11. Under Section 90.702 and the case law applying the *Daubert* standard, an expert must do more than simply espouse his personal beliefs. The expert must point to some identifiable and reliable methodology on which his opinion is based. *See, e.g.*, *Giamo*, 154 So. 3d at 388 (excluding expert testimony where proposed expert's "testimony provide[d] no insight into what principles or methods were used to reach his opinion, and [he] did not demonstrate that he applied any such principles or methods to the facts of th[e] case"); *In re Trasylol Prods. Liability Litig.*, 2010 WL 1489793, at *8 (S.D. Fla. Feb. 24, 2010) (expert testimony regarding whether defendant's conduct was "ethical" was inadmissible because it reflected the expert's "subjective beliefs and personal views" and did not rest on "knowledge" as required by the rule); *Parsi v. Daioleslam*, 852 F. Supp. 2d 82, 90 (D.D.C. 2012) (excluding testimony of journalism expert where his conclusions were "driven less by objective sources and more by his personal views").

12. At his deposition, Foley repeatedly made clear that the opinions summarized in his report are entirely *ad hoc* and do not rest on any systematic foundation. For instance, in his report, Foley stated unequivocally that "[i]t is customary in the industry **not** to publish grisly images of car accidents, for example, unless it is absolutely necessary to the telling of the story." Ex. 2 at 4 (Report) (emphasis in original). Yet, when confronted at his depositions with multiple instances in which *St. Petersburg Times*, often under his leadership, posted photographs of accidents scenes, Foley could say only that those examples reflected the judgment that the photos were "newsworthy," without supplying any principle that could explain why those examples fell on the correct side of the newsworthiness divide. *See* Ex. 1 at 122:18 – 128:05 (Foley Dep.). In

his report, Foley condemned Gawker for publishing links to videos showing hostages being beheaded and burned alive by terrorists, contrasting this with the conduct of the *Tampa Bay Times* and suggesting that Gawker's having linked to those videos was emblematic of its (in Foley's opinion) uniquely indefensible approach to journalism. Ex. 2 at 4 (Report). When confronted at his deposition with the fact that Fox News did the same thing, Foley stated simply that he "wouldn't do it," calling it a "close call," while conceding that both Gawker and Fox News had a First Amendment right to publish the link. Ex. 1 at 128:24-132:23 (Foley Dep.). In his report, Foley articulated what he called "the 'Cheerios Test,'" which he says requires publishers when considering use of "graphic photos and descriptions," to ask: "How would it play for readers eating breakfast?" Ex. 2 at 4-5 (Report). At his deposition, Foley could not say whether any specific publications actually follow the "Cheerios Test" or anything like it, let alone whether such a test would apply equally to all types of publications. Ex. 1 at 133:12-137:06 (Foley Dep.).

13. The closest Foley's report comes to relying on anything that even resembles a methodology, let alone a reliable one, is when he cites to the Society of Professional Journalists' Code of Ethics ("SPJ Code of Ethics") as reinforcing his conclusions. Ex. 2 at 3-4 (Report). But the SPJ Code of Ethics, on its face, disclaims any aspiration to be a set a rules, binding on all journalism, stating explicitly that: "The SPJ Code of Ethics is *voluntarily embraced* by thousands . . . and is intended not as a set of 'rules' but as a resource for ethical decision-making. It is not – nor can it be under the First Amendment – legally enforceable," Ex. 3 (Dep. Ex. 160), a point Foley acknowledged at his deposition. *See* Ex. 1 at 113:13 – 114:18 (Foley Dep.) (conceding that the SPJ Code of Ethics is not legally enforceable).

14. Nor, finally, can Foley rely on what he refers to as the "three absolute requirements for good reporting" – that "the story be . . . accurate, . . . complete[,] and . . . fair" – as the basis for his opinions. Ex. 2 at 8 (Report). When asked at his deposition about the source of these "three absolute requirements," Foley could say only that they are "based on [his] years of experience," that he "probably . . . read that somewhere on occasion," and that that is "what [he] teach[es]." Ex. 1 at 157:14 – 158:06 (Foley Dep.). Regardless of their origins, applying these ordinary ethical principles hardly constitutes a specialized methodology of a sort that would require an expert. A jury is more than capable of determining whether they apply to this case, and, if so, how. *See, e.g.*, *In re Rezulin Prods. Liability Litig.*, 309 F. Supp. 2d 531, 543 (S.D.N.Y. 2004) ("At their core, . . . the witnesses' opinions regarding ethical standards for reporting or analyzing clinical data or conducting clinical trials articulate nothing save for the principle that research sponsors should be honest. Even if charitably viewed as a 'standard,' the testimony nevertheless is 'so vague as to be unhelpful to a fact-finder.'").

15. Because Foley is offering nothing other than his own subjective and *ad hoc* opinions about Gawker's conduct, both as it relates to this case and more generally, his testimony is not admissible as expert testimony.

B. "Newsworthiness" Is a Legal Issue, Which Is Not a Proper Subject of Expert Testimony.

16. Even if Foley's proposed testimony *did* reflect a reliable methodology, it would be excludable on the alternative ground that he is offering expert testimony on a legal issue – *i.e.*, whether the Publication was "newsworthy." It is well established that "an expert should not be allowed to render an opinion which applies a legal standard to a set of facts." *Cnty. of Volusia v. Kemp*, 764 So. 2d 770, 773 (Fla. 5th DCA 2000); *see also Lee Cnty. v. Barnett Banks, Inc.*, 711 So. 2d 34, 34 (Fla. 2d DCA 1997) ("Expert testimony is not admissible concerning a question of

law."). Such testimony is *not* helpful to the fact finder, since "a legal conclusion [is] no better suited to expert opinion than to lay opinion." *Gurganus v. State*, 451 So. 2d 817, 821 (Fla. 1984). As the U.S. Court of Appeals for the Eleventh Circuit has explained, "[p]roffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *U.S. v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004). The specific danger of admitting such testimony is that "the jury may forego independent analysis of the facts and bow too readily to the opinion of [the] expert." *Smith v. Martin*, 707 So. 2d 924, 925 (Fla. 4th DCA 1998) (quoting *Angrand v. Key*, 657 So. 2d 1146, 1149 (Fla. 1995)).

17. That is precisely the case here. Although in his report Foley is careful not to couch his opinion specifically in terms of "newsworthiness" – opining instead that the video excerpts Gawker published were "[a]bsolutely not . . . news," and that the Publication "did not serve any valid, ethical journalistic purpose" and "violated fundamental principles of journalism," Ex. 2 at 2-3, 8 (Report) – his proposed testimony is plainly directed to that issue. This was made clear at Foley's deposition, when he repeatedly summarized his opinion as amounting to his view that the Publication was not "newsworthy." Ex. 1 at 80:09-11, 96:17-24, 102:19 – 103:02, 137:24 – 138:06, 152:15-23, 156:01-11, 162:22 – 163:21 (Foley Dep.). It was made even more clear by Hogan's opposition to the Publisher Defendants' motion for summary judgment, which repeatedly relies on Foley in attempting to argue that the Publication was not newsworthy as a matter of law, explicitly framing Foley's conclusions about journalistic standards as equivalent to conclusions about newsworthiness. *See, e.g.*, Opp. to Mot. for Summ. J. at 38 ("Professor Foley's affidavit regarding the standards in the journalism industry further

establish that Gawker's publication of pornographic footage was an invasion of privacy and not a matter of legitimate news judgment."); *see also id.* at 3, 11, 13-14, 19, 34 (same).[2]

18. The "newsworthiness" of the Publication is not a proper subject for expert testimony. *See, e.g.*, *Anderson v. Suiters*, 499 F.3d 1228, 1237-38 (10th Cir. 2007) (declining to consider expert testimony that publication "was unnewsworthy" because that testimony addressed an "ultimate question of law"); *Toffoloni v. LFP Publ'g Group, LLC*, 2010 WL 4877911, at *3 (N.D. Ga. Nov. 23, 2010) (same). Indeed, Foley's opinion is particularly unsuited for presentation as expert testimony because most of his analysis consists of what are, at best, closing-argument-style rhetorical maneuvers. *See, e.g.*, Ex. 2 at 14 (Report) ("Gawker posted the 1 minute and 41 seconds of sex footage because Gawker is in the business of publishing sex and calling it news."); *see also supra* at ¶ 10 (providing examples of similar rhetoric). Hogan is represented by able counsel, who are capable of arguing vigorously on his behalf. The law does not permit Hogan to lend those arguments any extra gravitas by presenting them out of the mouth of a purported expert.

19. Moreover, Foley's testimony presents an additional danger associated with permitting expert testimony on legal questions – "that the witness will apply a standard or definition which is different from that defined by the applicable law." 1 Fla. Prac., Evidence

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[2] In addition to representing an improper attempt to admit expert testimony on a legal issue, his testimony also focuses on the wrong thing under the law. The newsworthiness analysis turns on the content and subject matter of the Publication itself, viewed in the broader context in which it was published, and not on whether Gawker did or did not adhere to some professional standard of care. *See, e.g.*, *Loft v. Fuller*, 408 So. 2d 619, 620 (Fla. 4th DCA 1981) (relying on prior reports which "received extensive publicity by the news media" in concluding that book involved matter of public concern); *Lee v. Penthouse Int'l, Ltd.*, 1997 WL 33384309, at *5 (C.D. Cal. Mar. 19, 1997) (concluding that "the sex life of Tommy Lee and Pamela Anderson Lee is . . . a legitimate subject for an article," and sexually explicit pictures of the couple accompanying the article were "newsworthy," particularly in light of plaintiffs' own statements on *Howard Stern* and in other media outlets extensively discussing the "frequency of their sexual encounters and some of [their] sexual proclivities").

§ 703.1 (2014 ed.). For instance, as noted above, Foley states in his report that "[i]t is customary in the industry **not** to publish grisly images of car accidents, for example, unless it is absolutely necessary to the telling of the story. And when it is deemed necessary, the least-offensive material sufficient to tell the story is used." Ex. 2 at 4 (Report) (emphasis in original); *see also* Ex. 1 at 136:24 – 137:06 (Foley Dep.) (explaining that the "Cheerios test" he advocates "is a metaphor . . . in my view for taste"). That may or may not accurately reflect Foley's personal views,[3] but it has nothing to do with the newsworthiness standard as applied by courts. The case of *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998), frequently cited by Hogan in these proceedings, illustrates that the law is at odds with Foley's contention that upsetting imagery is only permissible when absolutely "necessary" to tell the story. In *Shulman*, the defendant aired video footage "showing . . . 'intimate private, medical'" treatment of a private figure who had been injured in an automobile accident that the court conceded "was not *necessary* to enable the public to understand the significance of the accident or the rescue.'" *Id.* at 483-84, 488. Nonetheless, the court held that the video footage addressed a matter of public concern, explaining:

> The standard, however, is not necessity. That the broadcast *could* have been edited to exclude some of [plaintiff's] words and images . . . is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.

Id. at 488.

20. The court's conclusion in *Shulman* is consistent with how courts, including courts in Florida, have applied the newsworthiness standard. That standard has not been used – and

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[3] *See supra* at ¶ 12 (describing testimony indicating that, under his direction, the *St. Petersburg Times* would publish photographs of accidents scenes).

cannot, consistent with the First Amendment, be used – to impose any particular conception of good taste on publishers, as Foley endeavors to do here. *See, e.g.*, *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426, 427-28 & n.3 (Fla. 5th DCA 1982) (publishing photo of plaintiff escaping her kidnapper wearing only a dish towel might "be considered by some to be in bad taste," but court's role is not to establish "canons of good taste for the press or public"); *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994) (affirming dismissal of privacy claim arising out of airing portions of videotapes depicting plaintiff, a Catholic priest, engaged in sexual acts, and observing, "[p]erhaps the use of the materials reflected the media's insensitivity, and no doubt [plaintiff] was embarrassed, but we are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern").

21. In short, because Foley is offering testimony on a legal question, and applying the wrong legal standard to that question, his expert testimony is inadmissible on this additional ground as well.

CONCLUSION

22. For each of the foregoing reason, the Publisher Defendants respectfully request that this Court exclude the testimony and report of Foley.

Respectfully submitted,

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I HEREBY CERTIFY that on this 18th day of May 2015, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing portal upon the following counsel of record:

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