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.
_____/

THE PUBLISHER DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE PLAINTIFF FROM INTRODUCING EVIDENCE RELATED TO OTHER GAWKER ARTICLES

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby move *in limine* to preclude Plaintiff Terry Gene Bollea, professionally known as Hulk Hogan, from introducing evidence related to Gawker's publication of other articles, including about content of a sexually explicit nature or content that he contends evinces a lack of regard for privacy. This Court should exclude the introduction of any such articles because they are irrelevant to the central claims in this lawsuit. In addition, Hogan intends to use them in a manner that would be confusing for the jury and is highly prejudicial to the Publisher Defendants' ability to defend themselves in this action.

BACKGROUND

Throughout this litigation, Hogan has sought to rely on other Gawker articles that reference sexual activity or contain nudity, or that he contends show a lack of regard for privacy. He did so in connection with his opposition to the Publisher Defendants' Motion for Summary Judgment, and in connection with the parties' motions concerning punitive damages. In particular, Hogan pointed to articles on various Gawker websites that involved naked pictures or

sex tapes. For example, in past filings, he has cited and discussed postings about photos of Katherine Middleton topless, footage of ESPN commentator Erin Andrews taken through a hotel peep hole, and video of Eric Dane and his wife, Rebecca Gayheart, naked in a hot tub with a third person. In those filings, Hogan has argued that this "evidence" demonstrates that the Publisher Defendants had "actual knowledge of the wrongfulness of their conduct and the high probability that injury or damage to Mr. Bollea would result" such that liability should be imposed and punitive damages should be awarded. *See, e.g.*, Pl.'s Opp. to Mot. for Summ. Judgment at 12-13; Pl.'s Mot. for Leave to Add Claim for Punitive Damages at 4-5.

On June 8, 2015, Hogan submitted an Exhibit List for trial, which included these same articles and other postings on various Gawker websites involving sexual activity, naked photos, or sex tapes of different people in different contexts. *See, e.g.*, Ex. 1 (listing examples from Plaintiff's Exhibit List, including Exhibits 6, 7, 24, 25, 27, 28, 66, 195, 196, 249, 250, 251, 255, 256, 257, 258-267). For instance, Hogan has identified the following postings as exhibits he would like to introduce as evidence at trial:

- *Brett Favre's Cellphone Seduction of Jenn Sterger (Update)*, Pl.'s Ex. 6;
- *Some Horrible Sociopath Hung a Used Condom From a F Train Handrail*, Pl.'s Ex. 24;
- *Bathroom Sex Pandemic Reaches The Damp Floor of Indiana Sports Bar*, Pl.'s Ex. 27;
- *How Gene Simmons' Sex Tape Is the Fairytale Romance of Our Time*, Pl.'s Ex. 195;
- *Ex-Deputy Mayor of London Posted Dick Pics on Facebook (NSFW)*, Pl.'s Ex. 250;
- *Former Disney Star Sends Nude Pics to Girl, Girl Puts Them on Tumblr*, Pl.'s Ex. 255;
- *Teen Rocker Snapchats His Boner, Girl Uploads It For the World*, Pl.'s Ex. 257; and
- *Roy Jones Jr's Sexting Technique is Very On-Brand [NSFW]*, Pl.'s Ex. 264.

ARGUMENT

This Court should preclude Hogan from offering into evidence any Gawker article or posting other than the October 4, 2012 posting about the Hogan sex tape and Video Excerpts (hereinafter, the "Hogan Post"), including, but not limited to the articles regarding Katherine Middleton, Erin Andrews, Eric Dane, and Rebecca Gayheart, and/or from relying on any article or posting other than the one the Hogan Post.

I. HOGAN SHOULD BE PRECLUDED FROM RELYING ON ANY GAWKER ARTICLE OR POSTING OTHER THAN THE HOGAN POST BECAUSE THEY ARE NOT RELEVANT TO THIS LITIGATION.

This Court should preclude Hogan from relying on articles and postings other than the Hogan Post because no other article or posting is probative of any issue in this litigation.

First, other material published on Gawker's websites is not relevant to any of the substantive arguments on Hogan's claims. That material has no bearing on whether the Publisher Defendants invaded Hogan's privacy, misappropriated his image, or caused him emotional distress.

In the past, Hogan has argued that other Gawker stories with sexually explicit content are somehow relevant to the question of whether the Video Excerpts are newsworthy. This is simply a sideshow. Other postings have no bearing on whether ***this posting*** is newsworthy. Moreover, Florida law does not permit Hogan to "prove" that the Publisher Defendants committed an actionable invasion of privacy by pointing to other allegedly invasive publications. *See* Fla. Stat. § 90.404(1)-(2) (evidence of other alleged bad acts is inadmissible to show propensity or character); *Thigpen v. UPS, Inc.*, 990 So. 2d 639, 647 (Fla. 4th DCA 2008) (testimony regarding prior instances in which defendant had unjustly terminated employees was not admissible in wrongful termination suit); *Bulkmatic Transp. Co. v. Taylor*, 860 So. 2d 436, 447 (Fla. 1st DCA 2003) (under Section 90.404, evidence of prior of alleged bad acts is not admissible to prove that

a defendant acted similarly in this case). Accordingly, even if other articles unrelated to Hogan or the Video Excerpts contain sexually explicit content, they are irrelevant to the substantive issues at trial.

Second, other Gawker publications are irrelevant to the question of punitive damages. The United States Supreme Court has made clear that defendants should only be punished for "conduct directed toward" the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420 (2003). It explained that "due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *Id.* at 423; *see also Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 859 (Fla. 3d DCA 2007) (in case involving design defects causing SUVs to roll over, evidence of other rollovers not relevant to punitive damages).

Here, the publication of articles about unrelated third parties are obviously not directed toward Hogan. They involve different facts, different people, different circumstances, and different beliefs about whether publishing such articles were lawful. Consideration of these other alleged acts is improper.

For both of the above reasons, this Court should preclude Hogan from relying on any articles or postings other than the Hogan Post at trial.

II. OTHER ARTICLES SHOULD BE EXCLUDED AS PREJUDICIAL AND CONFUSING

Moreover, even if the articles and postings with sexual content or nudity were somehow relevant as collateral bad acts to a material fact at issue in the proceeding, the Court should exclude them as prejudicial and confusing. A court may exclude the evidence of collateral bad acts if its probative value is outweighed by its prejudicial effect or likelihood to mislead and confuse the jury. Charles W. Ehrhardt, 1 FLA. PRAC., EVIDENCE § 404.9 (2014 ed.). Section

90.403 of the Florida Evidence Code provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Fla. Stat. § 90.403.

Trial courts must balance the probative value of the collateral bad evidence against its potential for unfair prejudice. *See Zack v. State*, 753 So. 2d 9, 16 (Fla. 2000). Florida courts have excluded collateral bad act evidence as unduly prejudicial where the evidence, if relevant, served only to inflame the jury. *See, e.g.*, *Henry v. State*, 574 So. 2d 73, 75 (Fla. 1991) (evidence of subsequent murder inadmissible pursuant to Fla. Stat. § 90.403 and stating: "[I]t was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. . . . Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury…."); *Thigpen*, 990 So. 2d at 647-48 (evidence that different supervisors at different facility within the same company falsified records to create pretext for another employee's discharge "inflamed the passions of the jurors and affected their verdict," and warranted new trial of wrongful termination suit).

Similarly, Florida courts have excluded evidence of collateral acts where the presentation of the evidence was so extensive as to become a central feature of the trial thereby diverting the jury's attention from the alleged offense at issue in the proceeding. *See, e.g.*, *Steverson v. State*, 695 So. 2d 687, 690 (Fla. 1997) (error to admit "virtually every detail" of accused's shooting of police officer prior to accused's arrest for charged offense because evidence of the shooting was unduly prejudicial as it became the feature of the trial distracting the jury from the case at hand). Where collateral act evidence is so extensive that it becomes "a feature of the trial," the evidence

also becomes an impermissible attack on character, warranting exclusion of the evidence. *Bush v. State*, 690 So. 2d 670, 673 (Fla. 1st DCA 1997); *Sutherland v. State*, 849 So. 2d 1107, 1109 (Fla. 4th DCA 2003).

Here, there is no question that even if these *were* instances in which Gawker published non-newsworthy information that was invasive of privacy – *which Gawker in no way concedes* – those instances would be highly prejudicial to Gawker. For instance, it would allow Hogan to misleadingly portray Gawker as a website that produces explicit content, rather than a news website that on occasion has explicit – but still newsworthy – content. This would be highly prejudicial to Gawker's ability to defend itself in this litigation and should, therefore, be excluded.

This evidence would also confuse the jury. The question to be decided is whether the Publisher Defendants invaded *Hogan's* privacy and caused *Hogan* emotional distress. The introduction of articles about *other people* in *other situations* will confuse the jury about the issues it must decide.

CONCLUSION

For the foregoing reasons, the Publisher Defendants respectfully request that this Court enter an order precluding Hogan from offering into evidence any Gawker article or posting other than the Hogan Post.

June 12, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June 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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