

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 STATEMENTS
THAT DENTON, DAULERIO, AND CURRENT AND FORMER GAWKER
EMPLOYEES HAVE MADE ABOUT PRIVACY UNRELATED
TO PLAINTIFF OR THE PUBLICATION AT ISSUE**

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby move *in limine* to preclude plaintiff Terry Bollea, professionally known as "Hulk Hogan," from introducing evidence of statements made by Denton, Daulerio, and other current and former Gawker employees about privacy, including articles published on Gawker's various websites addressing questions of privacy. Specifically, Hogan seeks to introduce statements and articles about those individuals' views on privacy generally, about matters unrelated to the Video Excerpts, and about people other than Hogan.

This Court should exclude the introduction of these articles and any other statements or articles unrelated to the Video Excerpts or Hogan because they are irrelevant to the central claims in this lawsuit and, even if somehow relevant, their admission would be highly prejudicial and likely confuse the jury.

BACKGROUND

The Exhibit List that Hogan filed on June 8, 2015 includes numerous exhibits in which

Denton, Daulerio, and other current and former Gawker employees discuss privacy. These statements, which appear in interviews with other media and in articles posted on www.gawker.com and Gawker's other websites, express those individuals' views on privacy generally and about a wide range of people and matters. They do not relate to Hogan, the Gawker posting about Hogan, or the Video Excerpts. (For ease of reference, these articles and statements are referred to herein as the "Unrelated Privacy Statements.")

For example, Hogan's Exhibit List contains articles on the following topics:

- *Internet's Sleaziest Pornographer Calls It Quits: 'I'm Done with Looking at Little Kids Naked All Day,'* written by Adrian Chen, Pl.'s Ex. 67;
- *The Case for Making Revenge Porn a Federal Crime,* written by Michelle Dean, Pl.'s Ex. 69;
- *Tumblr Refuses to Take Down Illegal Public Restroom Photos,* written by Phoenix Tso, Pl.'s Ex. 70;
- *Ladies: 8,000 Creeps on Reddit Are Sharing the Nude Photos You Posted to Photobucket,* written by Max Read, Pl.'s Ex. 73; and
- *Pervy Flesh-Peddler Bill O'Reilly Plays Erin Andrews Peephole Video On-Air,* written by "The Cajun Boy", Pl.'s Ex. 74.

See also, e.g., Pl.'s Exs. 30, 31, 35, 46, 47, 60, 115, 170, 225.

In earlier stages of this litigation, Hogan has sought to use Unrelated Privacy Statements in various ways. For example, Hogan has pointed to certain Unrelated Privacy Statements by Nick Denton to argue that Denton is "depraved" and believes that people "don't give a f---" about privacy. Pl.'s Mot. For Leave To Add Claim For Punitive Damages at 2; Pl.'s Opp'n to Mot. for Summ. J. at 12. Hogan argues that these and other Statements show that "[i]f it were up to the Gawker Defendants, there would be no privacy in America" and that this supposed view somehow establishes liability for posting the Video Excerpts. E.g., Pl.'s Opp'n to Mot. for Summ. J. at 13.

Hogan also has argued that the Unrelated Privacy Statements show that the Publisher Defendants are hypocritical about privacy rights and that this purported hypocrisy entitles him to punitive damages. For instance, Hogan cited various Unrelated Privacy Statements in articles by Gawker writers who claim that posting nude photos of people in different contexts is “wrong” to argue that the Publisher Defendants knew that their decision to post the Video Excerpts was unlawful and not newsworthy and that their decision was hypocritical. *See* Pl.’s Motion For Leave To Add Claim For Punitive Damages at 2, 4-9. Even though these Unrelated Privacy Statements dealt with different people in different situations, Hogan claims that they provide evidence that the Publisher Defendants willfully invaded Hogan’s privacy.

ARGUMENT

This Court should order *in limine* that Hogan is precluded from offering into evidence the Unrelated Privacy Statements.

I. THE UNRELATED PRIVACY STATEMENTS ARE NOT RELEVANT

Statements by Denton, Daulerio, and other current and former Gawker employees about privacy that are not about Hogan, the Video Excerpts, or this case are irrelevant. They simply are not probative of any issue in this litigation.

First, under Florida law, evidence must be relevant to be admissible. *See* Fla. Stat. § 90.402 (“All relevant evidence is admissible, except as provided by law.”). Evidence is relevant if it tends to prove or disprove a fact that is material to the outcome of the action. Fla. Stat. § 90.401. If evidence proffered is not of consequence to an identifiable issue to be decided in the case, it is not relevant and may properly be excluded. Charles W. Ehrhardt, 1 FLA. PRAC., EVIDENCE § 401.1 & n.6 (2015 ed.). *See also, e.g., State v. Baird*, 572 So. 2d 904, 907 (Fla. 1990) (stating that “an out-of-court statement which is offered for a purpose other than proving the truth of its contents is admissible only when the purpose for which the statement is being

offered is a material issue in the case.”); *Porter v. State*, 715 So. 2d 1018, 1020 (Fla. 2d DCA 1998) (holding that in prosecution for resisting arrest and battery on police officer responding to domestic violence call, wife’s statement to officer “He’s trying to kill me” was not relevant and its admission was unduly prejudicial to the accused: “There was no need to reveal the wife’s statement because the deputies’ legal duty to be present was never called into question. Thus, the wife’s statement was not relevant to any material issue in the case. . . . Clearly, the admission of an out-of-court statement accusing the defendant of the collateral crime of attempted murder is prejudicial.”).

Here, the Unrelated Privacy Statements are not relevant to whether the Publisher Defendants invaded *Hogan’s* privacy rights. They express individuals’ views on privacy *generally*, concern posts dealing with a wide range of *other people* and *other matters*, and even address the decisions of *other publishers* to publish images and videos of *other people*. They do not relate to relate to Hogan, the Gawker posting about Hogan, or the Video Excerpts. Those are the only issues for trial and the only proper focus of evidence.

Second, the Unrelated Privacy Statements 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 Unrelated Privacy Statements made by Denton, Daulerio, and other current or former Gawker employees do not relate in any way to the quantum of harm actually suffered by Hogan. Nor do they evidence the Publisher Defendants' intent to harm Hogan. Indeed, any suggestion that their alleged hypocrisy somehow evidences that the Publishing Defendants knew that publishing the Article would cause Hogan harm is purely hypothetical.

For this reason, this Court should preclude Hogan from offering into evidence or relying on the Unrelated Privacy Statements.

II. ADMISSION OF THE UNRELATED PRIVACY STATEMENTS WOULD BE PREJUDICIAL AND CONFUSING

Even if the Unrelated Privacy Statements were somehow relevant, they should be excluded because their admission would be highly prejudicial and confusing for the jury.

Florida law provides that relevant evidence may be excluded 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. Here, there is no question that admission of the Unrelated Privacy Statements would be prejudicial to the Publisher Defendants in this litigation. Among other things, Hogan seeks to use these statements to call the Publisher Defendants “depraved” and “hypocrites” and to claim the statements demonstrate a “lack of ethics.” Pl.’s Mot. For Leave To Add Claim For Punitive Damages at 2, 17, 23; Pl.’s Opp’n to Mot. for Summ. J. at 11, 14. And, Hogan will point to the Unrelated Privacy Statements to scare the jury into thinking that “[i]f it were up to the Gawker Defendants, there would be no privacy in America” and “if it were up to Gawker, **all walls would become windows**, and no privacy would exist **anywhere**.” Pl.’s Opposition to Mot. for Summ. J. at 13 (emphasis in original).

This overblown rhetoric is particularly prejudicial to the Publisher Defendants because, as discussed above, the evidence is not relevant in any way to the question of what the Publisher Defendants did or intended to do in posting the Video Excerpts. It simply provides Hogan with a platform to make the Publisher Defendants look bad.

Hogan's effort to introduce the Unrelated Privacy Statements also will confuse the jury about what is actually at issue. The relevant questions for the jury are (1) whether the Publisher Defendants' invaded *Hogan's* privacy, and (2) if so, whether punitive damages should be imposed because of the Publisher Defendants' mindset towards *Hogan*. Evidence of Unrelated Privacy Statements has no bearing on either of those issues, and their introduction is likely to cause the jury to become confused.

CONCLUSION

For the foregoing reasons, the Publisher Defendants respectfully request that this Court enter an order precluding Hogan from offering evidence related to Unrelated Privacy Statements.

Dated: June 12, 2015

Respectfully submitted,

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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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