

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

HEATHER CLEM, *et al.*,

Defendants.

**THE PUBLISHER DEFENDANTS' MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF CEASE AND DESIST COMMUNICATIONS
AND INCORPORATED MEMORANDUM OF LAW**

Defendants Gawker Media, LLC (“Gawker”), Nick Denton and A.J. Daulerio (collectively, the “Publisher Defendants”) hereby move the Court for the entry of an order excluding testimony and evidence relating to cease and desist communications between the Publisher Defendants and third parties involving publications that are not at issue in this case.

1. Based on the Exhibit List filed by plaintiff Terry Gene Bollea, professionally known as “Hulk Hogan,” on June 8, 2015, it appears that Hogan intends to offer into evidence documents that constitute, refer or relate to cease and desist communications between the Publisher Defendants and third parties involving publications that are not at issue in this case. *See, e.g.*, Pl.’s Exs. 20, 144, 247. For example, Hogan seeks to introduce an email threatening legal action if the website deadspin.com did not “cease and desist” from publishing a web post in May 2010. Pl.’s Ex. 144.

2. The cease and desist communications, which relate to publications that are not at issue, are not admissible under well-established evidentiary principles. They simply are not relevant to any issue in this case. *See Fla. Stat. § 90.401.* Beyond this fundamental bar, the

admission of the cease and desist communications would violate multiple rules of evidence, including Fla. Stat. § 90.408, which prohibits evidence of settlement negotiations, and Fla. Stat. § 90.404, which prohibits admission of evidence relating to alleged prior bad acts to prove bad character or propensity. In addition, any allegation of potential relevancy that might be advanced by Hogan is far outweighed by the potential prejudice to the Publisher Defendants and likely confusion to the jury. The admission of the cease and desist communications thus would violate Fla. Stat. § 90.403.

WHEREFORE, the Publisher Defendants respectfully request that this Court enter an order precluding the admission of documents and testimony that constitute, refer or relate to cease and desist communications between the Publisher Defendants and third parties involving publications that are not at issue in this case.

MEMORANDUM OF LAW

Hogan's Exhibit List includes documents that relate to cease and desist communications involving publications that are not at issue in this litigation. *See, e.g.*, Pl.'s Exs. 20, 144, 247 (documents relating to "cease and desist" demand involving a May 2010 post on the website deadspin.com). Those documents – which involve both communications with third parties and internal communications among employees of Gawker – have nothing to do with any issue in *this case*. *See Nationwide Mut. Fire Ins. Co. v. Hess*, 814 So. 2d 1240, 1242 (Fla. 5th DCA 2002) (concluding that interrogatory seeking information about party's handling of prior, unrelated claims was improper and not relevant to question of its good or bad faith in its consideration of the claim at issue in the instant case). The cease and desist communications are simply not relevant to any material facts. They are thus inadmissible.

Even if evidence and testimony relating to the cease and desist communications were somehow relevant, it should be excluded. Relevant 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. Unfair prejudice “means an undue tendency to suggest (a) decision on an improper basis, commonly, though not necessarily, an emotional one.” Fed. R. Evid. 403 advisory committee’s note.¹ To allow the jury to consider cease and desist communications involving publications and claims that are not at issue in this case would serve no purpose but to prejudice the Publisher Defendants in the eyes of the jury and would confuse jurors about what is at issue in this case. Here, the evidence is irrelevant and any potential claim of relevance is far outweighed by its prejudicial and confusing nature. Thus, evidence and testimony concerning the cease and desist communications should not be admitted under Fla. Stat. § 90.403.

In addition, evidence of other alleged wrongs is inadmissible when that evidence is proffered to prove bad character or propensity under Fla. Stat. § 90.404. To the extent that Hogan seeks to introduce evidence and testimony about the cease and desist communications to shed light on the Publisher Defendants’ views on privacy or their state of mind with regard to the Hogan post, that testimony and evidence would be offered to impute bad characteristics to the Publisher Defendants and to demonstrate their propensity to act in a certain way. That use is flatly prohibited by Florida law.

Where evidence regarding prior alleged bad acts is not relevant or essential to prove a material fact, it is not admissible under Fla. Stat. § 90.404. *Smith v. Hooligan’s Pub & Oyster Bar, Ltd.*, 753 So. 2d 596, 600 (Fla. 3d DCA 2000). Moreover, evidence of prior bad acts is

¹ Florida’s interpretation of this rule mirrors that of the federal courts. *Westley v. State*, 416 So. 2d 18, 19 (Fla. 1st DCA 1982).

inadmissible to prove similar conduct, a propensity to act a certain way, or a defendant's character. 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 § 90.404, evidence of prior of alleged bad acts is not admissible to prove that a defendant acted similarly in this case).

Even if collateral bad act evidence is offered for a valid purpose relevant to a material fact at issue in the proceeding, a court may still exclude the evidence if its probative value is outweighed by its prejudicial effect. Charles W. Ehrhardt, 1 FLA. PRAC., EVIDENCE § 404.9 (2014 ed.). The Court must balance the probative value of the collateral bad act evidence against its potential for unfair prejudice. *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 § 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 collateral bad act evidence where a party's presentation of the evidence became a central feature of the trial thereby diverting the jury's attention from the offense at issue. *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 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).

Finally, the cease and desist communications reflect settlement negotiations, which are inadmissible under Fla. Stat. § 90.408. *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009). Here, the cease and desist communications relate directly to a settlement offer and response. For example, one of plaintiff's proposed exhibits is an email stating that legal action will be taken if the website deadspin.com does not "cease and desist" from publishing a post. *See* Pl.'s Ex. 144. That communication, internal communications about the "cease and desist" demand, and the response reflect settlement communications that are plainly inadmissible. Indeed, admission of such evidence may irreparably bias a jury. *Saleeby*, 3 So. 3d at 1085.

CONCLUSION

For the foregoing reasons, pursuant to Florida Statutes §§ 90.401, 90.403, 90.404 and 90.408, the Publisher Defendants respectfully request that this Court grant the motion in limine and enter an order precluding the admission of documents and testimony that constitute, refer or relate to cease and desist communications between the Publisher Defendants and third parties involving publications that are not at issue in this case.

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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