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.
_____/

PUBLISHER DEFENDANTS' MOTION IN LIMINE TO EXCLUDE ALL EVIDENCE CONCERNING GAWKER MEDIA LLC'S REVENUES OR PROFITS DURING THE LIABILITY PHASE OF TRIAL AND INCORPORATED MEMORANDUM OF LAW

Defendants Gawker Media, LLC Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants") hereby respectfully move the Court for the entry of an order excluding any evidence Plaintiff may offer, during the first phase of the trial, that seeks to establish the revenues or profits of Defendant Gawker Media, LLC ("Gawker").

1. Plaintiff has indicated that he intends to offer into evidence documentary exhibits, lay witness testimony and expert witness testimony, through which he seeks to establish the financial "fair market value," revenues and/or profits of Gawker purportedly attributable to its publication of the Video Excerpts. *See, e.g.*, Expert Reports of Jeff Anderson (previously provided to the Court as Ex. 7 to Publ'r Defs.' *Daubert* Mot. re: J. Anderson); Pl.'s Fourth Supplemental Resp. to Interrog. No. 12 Propounded by Gawker Media, LLC (Mar. 6, 2015) (previously provided to the Court as Ex. 1 to Publ'r Defs.' *Daubert* Mot. re: S. Shunn).

2. It is firmly established under Florida law that a plaintiff seeking recovery for a tort claim of misappropriation of one's image or likeness cannot recover any of the financial

gains the defendants may have received as a result of such misappropriation (*i.e.*, a disgorgement of profits or "equitable restitution"). Instead, Florida law unequivocally restricts recovery to only the *plaintiff's actual damages* suffered as a result of the misappropriation, the monetary component of which is measured by the royalty payment or licensing fee plaintiff was entitled to receive for the unauthorized use, by the defendant, of his image, likeness or persona. *See Cason v. Baskin*, 20 So. 2d 243, 254 (Fla. 1944); Fla. Stat. § 540.08(2). Nor do any of Plaintiff's other tort and statutory claims authorize the recovery of defendant's profits.

3. Because any evidence, or mention, of the Publisher Defendants' net worth, profits or other financial information during the first liability and compensatory damages phase of the trial would cause undue delay, juror confusion, and would be highly prejudicial to the Publisher Defendants, all such evidence should be excluded.

MEMORANDUM OF LAW

All five of Plaintiff's claims to be tried: (1) for intrusion upon seclusion, (2) for publication of private facts, (3) for commercial misappropriation of his right of publicity, (4) for intentional infliction of emotional distress, and (5) for violation of the Florida Wiretap Act, are governed by Florida law. Under Florida law, a plaintiff asserting any of the above claims may recover only his damages that are proximately caused by the defendant's wrongful conduct; none of the pleaded causes of action permit the Plaintiff to recover any portion of the Defendants' profits (or revenues, more generally). Accordingly, information regarding the Defendants' profits cannot be relevant to any issue to be tried in the first phase of the trial which must be limited to issues of liability, compensatory damages, and liability for punitive damages. *See* Publ'r Defs.' Mot. in Limine to Bifurcate Liability and Compensatory Damages from Punitive Damages at Trial, filed contemporaneously herewith.

Under Florida law, it has long been established that a plaintiff asserting a right of publicity claim cannot recover any portion of the defendant's profits resulting from the unlawful misappropriation. *See Cason*, 20 So. 2d at 254 (affirming demurrer to claim seeking recovery of defendant's proceeds from sale of book that misappropriated plaintiff's persona on ground "that the publication of a book containing a biographical sketch of a person ***does not legally entitle*[ ] *such person to share whatever profit is realized from the sale of such book***") (emphasis added); *Jackson v. Grupo Indus. Hotelero, S.A.*, 2009 WL 8634834, at *1 n.1 (S.D. Fla. Apr. 29, 2009) ("the Lanham Act, ***unlike Florida Statutes, section 540.08***, provides for an award of the Defendants' profits under certain circumstances") (emphasis added); *Id.* at *13 (where celebrity rap-star "50 Cent" sued for both trademark infringement and misappropriation of his likeness under Fla. Stat. §540.80, court ruled that ***"Plaintiff is entitled to an award of profits for the infringing use of his trademark only"***) (emphasis added).

Indeed, Florida's courts have meticulously applied the express statutory right of action, under Fla. Stat. §540.80, which restricts the available monetary remedies to recovery only of plaintiff's "damages for ***any loss or injury*** sustained by reason" of an unauthorized use of his name or likeness, "including an amount which would have been a reasonable royalty." Fla. Stat. § 540.08(2) (emphasis added)[1]; *see, e.g., Stockwire Research Grp., Inc. v. Lebed*, 577 F. Supp. 2d 1262, 1269 (S.D. Fla. 2008) ("in order to recover monetary damages for Defendants' misappropriation under Fla. Stat § 540.08 [or] misappropriation under common law, . . .

[1] Notably, in this case, the plaintiff has expressly disclaimed any loss to his professional reputation or marketability as among the damages he seeks to recover. *See* Order re: Mot.'s of Pl. for Protective Order and Mot. of Gawker Media, LLC and A.J. Daulerio to Compel Further Resp.'s to Written Disc., Feb. 26, 2014 at 2 ¶ 4 (precluding any discovery of Plaintiff's financial records based expressly on representations by Plaintiff's counsel that "Terry Bollea is not seeking damages 'to his career' (including without limitation that his 'brand' has been diminished or that he has lost business opportunities)") (previously provided to the Court as Ex. 103 to the Aff. of R. Fugate in support of Publ'r Defs.' Mot. for Summ. J.).

Plaintiffs must conclusively demonstrate the manner in which Plaintiff . . . ***was personally damaged***") (emphasis added).

Similarly, the pleaded claims for "intrusion upon seclusion" and "publication of private facts," do not permit a plaintiff to recover any portion of defendant's profits but only his own damages. Indeed, it is black letter law that "an invasion of the right of privacy by a publication confers no right on the plaintiff to share in the proceeds of the publication." 19A Fla. Jur. 2d Defamation & Privacy § 232; *See Doe v. Beasley Broad. Grp., Inc.*, 105 So. 3d 1, 2 (Fla. 2d DCA 2012) (in private facts case, damages are available for emotional distress); s*ee also* Restatement (Second) of Torts § 652H, cmt. a (1977) ("one who suffers an intrusion upon his solitude or seclusion, under § 652B, may recover damages for the deprivation of his seclusion"); *Id.* ("One to whose private life publicity is given, under § 652D, may recover ***for the harm resulting . . . from the publicity***.") (emphasis added).

Nor does a plaintiff suing for "intentional infliction of emotional distress through outrageous conduct" have any right to seek a disgorgement of defendant's profits. *See Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278 (Fla. 1985); Fla. Standard Jury Instr. – Civ. No 410.6(a) (2015); 32 Fla. Jur. 2d Interference § 19 (a successful claim for the intentional infliction of emotional distress allows "recovery for mental pain and anguish").

Lastly, Florida's Wiretap Act does not allow plaintiff to recover any of defendant's profits. *See* Fla. Stat. § 934.10 (authorizing recovery, only, of "[a]ctual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher").

Because Plaintiff is precluded from recovering any portion of Gawker's profits under any of his pleaded claims, any evidence that would seek to establish Gawker's profits, revenues, or

net worth would quite plainly not be relevant to any jury issue in the first liability phase of the trial. Fla. Stat. 90.402; *see also W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994) (recognizing that allowing the jury to consider the defendant's net worth prior to a verdict finding of liability would be highly prejudicial).

Thus, any reference to the Publisher Defendants' financial net worth, earnings, or profits before the jury in the first liability phase of trial is highly likely to create unfair prejudice, mislead the jury, and divert its attention from the issues properly before it.[2] *See, e.g.*, *Sossa v. Newman*, 647 So. 2d 1018, 1019-1020 (Fla. 4th DCA 1994) (holding that defendant's financial information must not be discussed prior to a jury finding of liability because "if provoked by such inflammatory evidence, the jury is likely to apply the deep pocket theory of liability"). Such evidence is inadmissible pursuant to sections 90.402 and 90.403 of the Florida Statutes as the prejudicial nature of such evidence clearly outweighs its probative value. *See Hendry v. Zelaya*, 841 So. 2d 572, 575 (Fla. 3d DCA 2003) ("Evidence that is confusing to the jury can be excluded pursuant to section 90.403, Florida Statutes"); *Mount v. Camelot Care Ctr. of Dade,*

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[2] Moreover, even if Florida law did permit a plaintiff in a misappropriation case to recover the *defendant's profits directly attributable to its unauthorized use* of plaintiff's name or likeness (which it does *not*), the evidence that Hogan has proffered concerning defendant Gawker's net worth or the alleged increase in the company's value supposedly derived from the unauthorized use is completely irrelevant and must be stricken on that independent ground. *See Stano v. State*, 473 So. 2d 1282, 1285-86 (Fla. 1985). Plaintiff's proffered expert Jeff Anderson intends to opine about the supposed increase in the company's "market value" – what a reasonable investor would pay to acquire the website www.gawker.com – a figure that does not address the defendant's *profits*. *See* J. Anderson Dep. at 138:18-20 and 160:24 – 161:8 (previously provided to the Court as Ex. 8 to the Publisher Defs.' Daubert Mot. to Exclude Expert Testimony of Jeff Anderson). Whether through Mr. Anderson's testimony, or through any other means of proof, the purported increase in "fair market value" of the Gawker.com website is plainly irrelevant to any issue and would be highly prejudicial to Defendants if mentioned or admitted in Phase I of the trial.

Inc., 816 So. 2d 669, 670 (Fla. 3d DCA 2002) (trial court's error in allowing admission of unduly prejudicial evidence on damages issue required reversal also on all liability issues).

The pre-trial entry of an order (and especially *before* opening statements are delivered) precluding any reference to the defendant's financial status in the first phase of the trial is particularly appropriate, indeed, *required* by the authorities cited above. *See also Fischman v. Suen*, 672 So. 2d 644, 645 (Fla. 4th DCA 1996) ("A motion *in limine* is especially appropriate when addressed to evidence which will be highly prejudicial to the moving party and which, if referred to in a question which the court rules inadmissible, would be unlikely to be disregarded by the jury despite an instruction by the court to do so.") (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should enter an Order precluding the Plaintiff, during the first phase of the trial, from introducing any evidence, including though counsel's questioning of any witnesses or remarks in opening statement, that references or otherwise seeks to establish the revenues and/or profits of Gawker Media, LLC.

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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