

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 TO BIFURCATE
LIABILITY AND COMPENSATORY DAMAGES FROM
PUNITIVE DAMAGES AT TRIAL**

Defendants Gawker Media, LLC (“Gawker”), Nick Denton, and A.J. Daulerio (collectively, the “Publisher Defendants”) hereby respectfully move the Court to bifurcate liability and compensatory damages from punitive damages during the trial of this matter. In support thereof, the Publisher Defendants state as follows:

I. PRELIMINARY STATEMENT

Bollea seeks to have the jury award punitive damages against the Publisher Defendants. Evidence of the Publisher Defendants’ net worth is completely irrelevant to the liability portion of this case and could potentially waste the time of the Court, the jury and the parties if there is no finding of liability made against the Defendants. It would also be highly prejudicial to the Publisher Defendants if such evidence were admitted or discussed prior to a jury finding of liability for punitive damages. Accordingly, the Court should, in conformity with Florida Supreme Court precedent, bifurcate the punitive damages portion of this trial unless and until the jury awards compensatory damages, and also makes a finding of punitive liability against the Publisher Defendants. As the Florida standard jury instructions for civil matters state:

Upon timely motion, a demand for punitive damages and determination of the issues raised by such a demand **must** be submitted to the jury under the bifurcated procedure established in *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994). Instruction 503.1 is intended to comply with the **required** bifurcated procedure.

Fla. Standard Jury Instr. – Civ. § 503.1 (Introductory Note) (2015) (emphasis added).

II. FACTUAL BACKGROUND

1. Plaintiff Terry Bollea (a/k/a Hulk Hogan) has filed the following five tort and statutory claims against the Publisher Defendants: (1) Invasion of Privacy, Publication of Private Facts; (2) Invasion of Privacy, Intrusion upon Seclusion; (3) Common Law Right of Publicity; (4) Intentional Infliction of Emotional Distress; and (5) Violation of Florida’s Wiretap Act.

2. On May 29, 2015, a hearing was held on Plaintiff’s Motion for Leave to Amend to Add a Claim for Punitive Damages. After considering the Plaintiff’s proffer and argument of counsel, the Court granted Plaintiff’s Motion. Thus, Plaintiff will be seeking an award of punitive damages on the claims to be tried to the jury.

III. LEGAL STANDARD

Rule 1.270(b) of the Florida Rules of Civil Procedure specifically states:

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third party claim, or *of any separate issue* or of any number of claims, crossclaims, counterclaims, third party claims, or issues.

Additionally, Florida Statutes Section 768.73 provides that punitive damages are to be based on the amount of compensatory damages awarded. Therefore, the amount of compensatory damages **must** be assessed before an award of punitive damages can be determined.

Furthermore, the law in Florida is settled that cases involving punitive damages *must* be tried in two phases if the defendant so requests. In *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994), the Florida Supreme Court held that a case involving a claim for punitive damages *must* be tried in two distinct and sequential phases: Phase 1 of the trial addressing the issues of liability, amount of compensatory damages and entitlement to punitive damages; and Phase 2 addressing the issue of the amount of punitive damages. Specifically, the Court in *W.R. Grace* held that:

“. . . henceforth trial courts, when presented with a timely motion, **should bifurcate the determination of the amount of punitive damages from the remaining issues at trial.** At the first stage of a trial in which punitive damages are an issue, **the jury should hear evidence regarding liability for actual damages, the amount of actual damages, and liability for punitive damages, and should make determinations on those issues.** If, at the first stage, the jury determines that punitive damages are warranted, the same jury should then hear evidence relevant to the amount of punitive damages and should determine the amount for which the defendant is liable.

638 So. 2d at 506 (emphasis added).

The Florida Supreme Court further recognized that defendants “are prejudiced” when evidence of defendants’ net worth is permitted to be “introduced when liability for punitive damages has not yet been determined.” *W.R. Grace & Co*, 638 So.2d at 506; *see also St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 488 (Fla. 5th DCA 2002) (finding that the trial court correctly followed the Florida Supreme Court’s bifurcation protocol established in *W.R. Grace*).

Moreover, the United States Supreme Court has expressed concern that punitive damages may unconstitutionally be assessed against a defendant not because of its wrongful conduct toward a specific plaintiff, but rather because the defendant is unpopular or unsavory.¹

As the Florida Supreme Court recognized in *W.R. Grace*, to avoid unfair prejudice and unconstitutional fundamentally unfair procedure, a jury must determine whether the conduct at issue warrants punitive damages before any evidence of the defendants' financial condition is provided to the jury. Thus, whenever a case involving a claim for punitive damages is tried, Phase 1 of the trial must be limited to having the jury determine liability, compensatory damages, and whether defendants are subject to punitive damages.

The Office of the Attorney General of the State of Florida relying on *W.R. Grace* has also rendered an opinion reflecting the need to have an award of compensatory damages prior to the determination of an award of punitive damages. The opinion specifically states:

Florida's common law requires that an award of compensatory damages is a prerequisite to an award of punitive damages where actual damage is an essential element of the underlying tort. . . . **Florida law is clear that compensatory damages must be determined prior to any award of punitive damages in cases of this nature.**² . . . This requirement that compensatory damages must be determined before punitive damages is based on constitutional concerns of due process. As the United States Supreme Court has made clear, the due process clause of the Fourteenth Amendment prohibits the state from imposing a grossly excessive punishment on a tortfeasor.³ In determining whether an award is excessive, the courts have examined the ratio between

¹ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

² Citing *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989).

³ Citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

compensatory damages and punitive damages. While not the sole factor to be considered, this relationship is, nevertheless, a critical element in determining whether the due process clause is implicated.

Fla. Att'y Gen. Op. 2000-21, 2000 WL 329587 (2000) (emphasis added).

Moreover, as reflected in the Attorney General Opinion, in *Ault v. Lohr*, 538 So. 2d at 457, the Court held that, “where actual damage is an essential element of the underlying cause of action, an award of compensatory damages must be a prerequisite to an award of punitive damages.”

In the instant case, the underlying claims for intentional infliction of emotional distress, intrusion upon seclusion, publication of private facts, and commercial misappropriation of one’s likeness all require a showing of actual damage for plaintiff to recover. *See* Fla. Standard Jury Instr. - Civ. §§ 410.2 & 410.7; Fla. Stat. § 540.08 (2014); Restatement (Second) of Torts §§ 652B & 652D (1977); Fla. Stat. § 934.10 (authorizing recovery of “actual damages”).

Because actual damages are an essential element of the underlying causes of action in this matter, an award of compensatory damages is a prerequisite to an award of punitive damages according to the Florida Supreme Court.

IV. ARGUMENT

A. Bifurcation Is Convenient And Serves The Interests Of Judicial Economy

The liability aspect of this case has absolutely nothing to do with the evidence pertaining to punitive damages; the testimony as to punitive damages involves evidence of the Publisher Defendants’ finances and net worth, and is in no way necessary to explain or prove the issue of Defendants’ purported liability. Unless and until there is a finding that Defendants are liable for actual damages and punitive damages, Defendants’ finances and net worth are of no

consequence. As such, failure to bifurcate the punitive damages portion of the trial will result in the extra expenditure of resources and time of the Court, the jury and the parties, when it could turn out to be wholly unnecessary.

B. Bifurcation Will Avoid Severe Prejudice To The Defendants

According to Rule 1.270(b) of the Florida Rules of Civil Procedure, bifurcation is also appropriate in order to “avoid prejudice.” Here, testimony regarding the Defendants’ net worth prior to a finding of liability stands to severely prejudice the Publisher Defendants. In Florida, **“[t]he general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other’s.”**

Batlemento v. Dove Fountain, Inc., 593 So. 2d 234, 241 (Fla. 5th DCA 1991) (emphasis added).

The basis for this rule is the recognition that “if provoked by such inflammatory evidence, the jury is likely to apply the deep pocket theory of liability.” *Sossa v. Newman*, 647 So. 2d 1018, 1019-1020 (Fla. 4th DCA 1994); *see also, Velilla v. VIP Care Pavilion, Ltd.*, 861 So. 2d 69, 72-73 (Fla. 4th DCA 2003) (holding that the case should be remanded and that all testimony regarding the plaintiff’s financial status should be precluded); *Hollenbeck v. Hooks*, 993 So. 2d 50, 51 (Fla. 1st DCA 2008) (“As the trial court noted, a jury trial must be focused solely on the merits of the case, and it is not appropriate to appeal to a jury’s sympathy; appeals to sympathy and attempts to inject a party’s wealth, or lack thereof, are improper.”).

Plaintiff should not be permitted to use Defendants’ net worth improperly to influence the jury to find liability in a case where evidence of Defendants’ finances have absolutely no bearing on the issue of liability. The purpose of Rule 1.270(b) is to prevent exactly this type of prejudice.

C. The Court Should Follow The Florida Supreme Court’s Bifurcation Protocol

The Publisher Defendants respectfully request that this Court follow the Florida Supreme Court’s bifurcation protocol established in *WR Grace & Co. v. Waters*, and enter an order bifurcating the trial in this case so that the liability portion can be tried first. Then, *only if* there is a finding of punitive liability against the Publisher Defendants, should the same jury hear evidence of those Defendants’ finances and net worth in order to determine the amount of punitive damages for which they may be liable. Accordingly, the Publisher Defendants respectfully request that this case be tried in two phases:

Phase 1: (a) Liability, (b) amount of compensatory damages, to be proven by a preponderance of the evidence, and (c) whether punitive damages should be assessed, to be proven by clear and convincing evidence; and

Phase 2 (if necessary): Determination of the amount of punitive damages to be assessed and to be proven by clear and convincing evidence.⁴

V. CONCLUSION

For all of the foregoing reasons, the Publisher Defendants respectfully request that the Court bifurcate the punitive damages portion of the trial unless and until there is a determination by the jury that Defendants are liable for punitive damages.

⁴ The prescribed jury instructions to effectuate this mandatory bifurcation of issues are set forth in Florida Standard Jury Instructions – Civil (2015), § 503.1; *see also Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (“The standard jury instructions should be used when applicable” and “failure to give a requested instruction constitutes reversible error when the complaining party establishes that the requested instruction accurately states the applicable law, the facts in the case support giving the instruction, and the instruction was necessary to allow the jury to properly resolve all issues in the case.”)

Dated: 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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