IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; GAWKER MEDIA GROUP, INC. aka GAWKER MEDIA; GAWKER ENTERTAINMENT, LLC; GAWKER TECHNOLOGY, LLC; GAWKER SALES, LLC; NICK DENTON; A.J. DAULERIO; KATE BENNERT, and BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT aka GAWKER MEDIA,

Defendants.
_____/

PLAINTIFF TERRY BOLLEA'S OPPOSITION TO GAWKER DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF OTHER GAWKER ARTICLES (STYLED "Publisher Defendants' Motion *In Limine* to Preclude Plaintiff From Introducing Evidence Related to Other Gawker Articles")

Gawker Media, LLC's ("Gawker"), Nick Denton's, and A.J. Daulerio's (together, the "Gawker Defendants"), argument that there is no probative value to the significant evidence that Gawker Defendants knew their conduct was wrong and the high probability that injury or damage would result, and that Gawker admitted that posting illegally obtained nude images of people online was an invasion of privacy, is without merit. Such evidence is highly probative of Mr. Bollea's claims and Gawker Defendants' "good faith" defense.

A. The Evidence of Gawker's Similar Acts Is Admissible to Show Gawker's Intent, Lack of Good Faith, Outrageousness, and Depravity for Purposes of Punitive Damages.

"Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of **motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident**, but it is inadmissible when the evidence is relevant **solely** to prove bad character or propensity." Fla. Stat. § 90.404(2)(a) (emphasis added). Here, Mr. Bollea asserts claims for intentional torts, which makes Gawker Defendants' other publications involving substantially similar circumstances admissible to show **intent**, knowledge of the wrongfulness of the conduct at issue, and **conscious disregard** of privacy rights. This evidence also is relevant to the **outrage** element of intentional infliction of emotional distress,[1] Gawker Defendants' **"good faith" defense** to the Wiretap Act claim,[2] and the **depravity** of Gawker Defendants' conduct for purposes of punitive damages.

Florida law has long approved the use of other wrongful conduct and/or prior similar acts to show scienter. *Einstein v. Munnerlyn*, 13 So. 926, 928 (Fla. 1893) (in action seeking attachment of debtor's property on the ground of fraudulent conveyance, evidence of other fraudulent conveyances made by the debtor admissible to show intent; reversing trial court's exclusion of evidence of other frauds); *West Florida Land Co. v. Studebaker*, 19 So. 176 (Fla.

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[1] *See Smith v. Telophase National Cremation Society, Inc.*, 471 So.2d 163, 166 (Fla. 2d DCA 1985) (holding evidence of crematorium's prior commingling of ashes properly admitted in action for intentional infliction of emotional distress based on defendant's returning someone else's ashes to the plaintiff in lieu of those of her late husband; evidence was relevant to issue of outrageousness).

[2] *Collier v. State*, 681 So.2d 856, 859 (Fla. 5th DCA 1996), holds that where a party argues a defense based on its mental state, "character" evidence that tends to rebut that mental state is admissible. "[I]f a defendant places a character trait into evidence, he cannot later complain about rebuttal testimony concerning conduct inconsistent with that trait." *Id.* at 859. Thus, Gawker's "good faith" defense puts its scienter at issue.

1896) (in action for fraud in the sale of property, similar frauds by the same defendant are admissible to show motive; holding, however, that statements in newspaper advertisements were not competent evidence of other frauds); *West Florida Land Co. v. Lewis*, 25 So. 274 (Fla. 1899) (similar frauds are admissible to show intent; however, where intent was not at issue, and evidence of other frauds was offered solely to corroborate the plaintiff's testimony that the fraud occurred, the evidence was properly excluded); *River Hills, Inc. v. Edwards*, 190 So.2d 415, 424 (Fla. 2d DCA 1966) (contemporaneous usurious contracts admissible to show intent in usury action; reversing judgment where trial court excluded the evidence); *Continental Mortgage Investors v. Village by the Sea, Inc.*, 252 So.2d 833, 835 (Fla. 4th DCA 1971) (lender's other usurious contracts discoverable because they will be admissible at trial; affirming order compelling discovery).

In *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285-87 (11th Cir. 2008), evidence that the defendant had discriminated against **other employees** was held properly admitted in a racial discrimination case, because it was probative on the issue of the **employer-defendant's intent** and it rebutted the employer's **good faith defense**. *Accord Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160-61 (11th Cir. 2005) (holding evidence of jailer's mistreatment of other prisoners is admissible in suit alleging an execution of a political prisoner); *Washington v. School Board of Miami-Dade County*, 2002 WL 31056088 (S.D. Fla. Jul. 18) (prior acts of sexual harassment admissible in sexual harassment trial); *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1314-15 (11th Cir. 2001) (same).

Case law from other jurisdictions is in accord. *McElgunn v. Cuna Mutual Insurance Society*, 700 F. Supp. 2d 1141, 1151-52 (D.S.D. 2010) (holding insurance company's response to claims in other states was properly admitted in bad faith denial of claim action, as it showed the

insurance company's intent in denying the plaintiff's claim); *Smithfield Foods, Inc. v. United Food and Commercial Workers International Union*, 586 F. Supp. 2d 632 (E.D.Va. 2008) (denying motion *in limine* to exclude evidence in extortion case of defendant's other acts of extortion; admissible to show defendant's motive); *Rinehart v. Shelter General Insurance Co.*, 261 S.W.3d 583, 591 (Mo. App. 2008) (affirming admission of evidence of insurance company's handling of other claims in bad faith evidence; evidence was relevant to issue of bad faith and also to intent element of punitive damages claim); *Johnson & Johnson Consumer Cos. v. Aini*, 540 F. Supp. 2d 374, 392 (E.D.N.Y. 2008) (judicially noticing six separate federal actions for trademark infringement filed against defendant as probative on issues of intent and bad faith in action for trademark infringement); *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 50-51 (Mo. App. 2004) (affirming admission of evidence of other lawsuits brought by defendant in malicious prosecution action, to show malicious intent).

Contrary to Gawker Defendants' claim, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 423 (2003), **permits** the trier of fact to consider prior similar conduct of the defendant in determining punitive damages. "[O]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance. . . ." *Id.* "[C]ourts should look to 'the existence and frequency of similar past conduct' in making punitive damages determinations." *Id. Campbell* merely requires a showing that the acts are sufficiently similar. In the case at bar, the evidence at issue, on its face, is sufficiently similar (and substantially similar) to Gawker Defendants' misconduct directed toward Mr. Bollea. Gawker Defendants cannot exclude this highly probative evidence showing that they have repeatedly acted in callous disregard for privacy rights by publishing and linking to images and footage of nudity and sex that was highly

invasive of the privacy rights of the people being depicted. Such evidence is undeniably admissible under *Campbell*.

B. There Is No Basis To Exclude the Evidence on the Ground of Alleged Unfair Prejudice.

The Gawker Defendants' claim of undue prejudice is also unfounded. In *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991), the plaintiff introduced evidence of 58 prior police incident reports relating to incidents at a bar where the pending lawsuit involved a shooting that had occurred. The court held that this evidence **was admissible**, even though not all the incidents were similar to the incident that gave rise to the lawsuit. The court held that the Fla. Stat. § 90.403 (undue prejudice) objection had "no merit." *Id.* at 331. In *Vincent v. State*, 885 So.2d 963 (Fla. 3d DCA 2004), the defendant was on trial for stabbing her boyfriend, and the Court of Appeal held that evidence that she stabbed her **prior** boyfriend was admissible to show that she acted intentionally. "The evidence was relevant, probative, and not unfairly prejudicial." *Id.* at 967.

Gawker Defendants' motion *in limine* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail via the e-portal system this 25th day of June, 2015 to the following:

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