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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 EXCLUDE EVIDENCE OF CEASE AND DESIST COMMUNICATIONS (STYLED "Publisher Defendants' Motion In Limine to Exclude Evidence of Cease and Desist Communications And Incorporated Memorandum of Law")

The motion filed by Gawker Media, LLC ("Gawker"), Nick Denton and A.J. Daulerio (together, the "Gawker Defendants") to exclude evidence of the cease and desist communications sent to them by other victims of Gawker Defendants' history and philosophy of invading people's privacy fails for several reasons.

First, Florida law is clear that the rule against the admissibility of offers to compromise does not apply to communications that do not relate to the dispute at issue in the case at bar. The cease and desist letters Gawker Defendants are trying to exclude do not relate to the current litigation (Gawker Defendants filed a separate motion *in limine* as to those communications) but rather to other invasions of privacy and similar wrongful acts of Gawker. Thus, the settlement

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communications rule has no application. Second, the rule does not apply to demand letters that do not offer to compromise, but rather demand the cessation of conduct (which is the case here).

The rule against character evidence does not bar these communications, because they are relevant to and probative of several key issues in this case: notice, intent, motive, and Gawker Defendants' "good faith" defense. Finally, the communications are not unfairly prejudicial to Gawker Defendants under Florida law. The fact that this evidence is damaging to Gawker Defendants' defense does not render it unfairly prejudicial.

A. The Settlement Communications Doctrine Does Not Apply To These Documents.

Under Fla. Stat. § 90.408, communications relating to offers to compromise are not admissible to establish liability for the claim that is the subject of the offer. This doctrine does not apply here. First, the doctrine would only apply to offers to compromise the claim at issue in this litigation (*i.e.,* Mr. Bollea's claims against Gawker Defendants). "A fundamental premise for the application of this rule is that the offer to compromise must relate to the claim disputed in the lawsuit." *Rease v. Anheuser-Busch, Inc.*, 644 So.2d 1383, 1388 (Fla. 1st DCA 1994); *accord Ritter v. Ritter*, 690 So.2d 1372, 1376 (Fla. 2d DCA 1997) ("The offer here pertained to the claim contested in Mrs. Ritter's personal injury lawsuit; it did not propose to settle any issue in her divorce proceeding. As such, section 90.408 did not bar admission of evidence concerning the offer in this case."); *Levin v. Ethan Allen, Inc.*, 823 So.2d 132, 135 (Fla. 4th DCA 2002) ("Although settlement offers are generally not admissible as evidence in the lawsuit in which the offers are made, an offer of settlement in one case can be relevant in another case."). The cease and desist letters at issue in the motion undisputedly concern other claims.

Second, the cease and desist letters at issue in Gawker Defendants' motion are not "offers to compromise." *Sunstar, Inc. v. Alberto-Culver Co.*, 2004 WL 1899927 at *22 (N.D. Ill. Aug.

23) (holding "a demand for payment accompanied by a threat of legal action is not a settlement offer or a part of settlement negotiations excludable" under Fed. R. Evid. 408, the analogous federal offer to compromise rule). Thus, the letters cannot be excluded under § 90.408, Fla. Stat.

B. The Prior Bad Acts Doctrine Does Not Bar These Documents.

Gawker Defendants' argument that the cease and desist letters are improper character evidence also fails. "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). As set forth above, Mr. Bollea offers the subject evidence to prove Gawker Defendants' motive, intent, and knowledge; the evidence also is relevant to the outrage element of intentional infliction of emotional distress;[1] and the evidence is relevant to refute Gawker Defendants' "good faith" defense.[2] The evidence also is directly relevant to prove the elements of Mr. Bollea's claim for entitlement to 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

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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 which 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 Defendants' "good faith" defense puts their scienter at issue.

exclusion of evidence of other frauds); *West Florida Land Co. v. Studebaker*, 19 So. 176 (Fla. 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's intent and 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 case; 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).

C. There Is No Basis To Exclude This Evidence on Grounds of Alleged Undue Prejudice.

The danger of unfair prejudice does not substantially outweigh the direct relevance of Gawker Defendants' prior misconduct in proving notice, intent, motive, outrageousness, lack of good faith, and entitlement to punitive damages. 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 a lawsuit was filed over 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 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 **ex-**boyfriend was admissible to show that she acted **intentionally**. "The evidence was relevant, probative, and not unfairly prejudicial." *Id.* at 967.

D. Conclusion

For the foregoing reasons, there is no basis for exclusion of the cease and desist letters and Gawker Defendants' responses thereto, and the motion *in limine* therefore 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 26th day of June, 2015 to the following:

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