

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.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,  
LLC aka GAWKER MEDIA; et al.,

Defendants.

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**THE PUBLISHER DEFENDANTS' MOTION *IN LIMINE*  
TO PRECLUDE PLAINTIFF FROM CALLING GAWKER'S  
GENERAL COUNSEL AS A TRIAL WITNESS**

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio (the "Publisher Defendants") hereby move *in limine* to preclude plaintiff Terry Bollea, professionally known as "Hulk Hogan," from calling Heather Dietrick, Gawker's General Counsel, as a witness at trial. Plaintiff first identified Ms. Dietrick as a potential trial witness on June 23, 2015, purportedly to testify about statements she made to the press over the past two weeks, as well as Gawker's financial condition. The Court should preclude plaintiff from calling her because her testimony would be barred by the attorney-client privilege and would otherwise be cumulative of other Gawker witnesses.

**FACTUAL BACKGROUND**

Heather Dietrick began working as counsel at Gawker in June 2013 (later becoming General Counsel for the company), many months after this lawsuit was filed. In 2012, Ms. Dietrick was an attorney at another company, and she thus had no involvement at all in the events giving rise to this lawsuit. Since becoming inside counsel for Gawker, Ms. Dietrick has

supervised and been an integral part of the Publisher Defendants' legal defense team in this case. She was not deposed as a witness, and indeed has attended many of the depositions in her capacity as an attorney. As a result, the only knowledge Ms. Dietrick has about the publication at issue in this case results from her communications with the employees of her client, Gawker.<sup>1</sup>

As this Court is no doubt aware, this case has garnered a substantial amount of media attention, both locally and nationally, especially so in the month leading up to this trial. As is commonplace in high-profile cases, one or more of the attorneys on both sides have talked to the press to explain their clients' legal and factual arguments that are being presented in court.

Mr. Harder has routinely performed that function for plaintiff, as is evidenced by the fact that he is quoted in most of the press reports about which plaintiff now wants to examine Ms. Dietrick. For example, on June 17, 2015, Mr. Harder told CNN that "Denton has only himself to blame" and claimed "the First Amendment has limitations" and thus the case poses "no potential danger whatsoever to the First Amendment." Ex. 1 at 1-3. Similarly, two days later, Mr. Harder told Fox News that Plaintiff "has the right to be naked in a private bedroom without the world being permitted to watch" and contended that "the First Amendment does not allow cameras into private [bedrooms] when the subject is not aware of it and does not consent to it." Ex. 2 at 1. On June 22, 2015, his firm issued a press release to the same effect. Ex. 3.

Ms. Dietrick has likewise performed the same function for the Publisher Defendants. For example, Ms. Dietrick told ABC News that "publishing the tape was an issue of newsworthiness" since "Hogan often spoke of his sex life during interviews." Ex. 4. And in the same CNN article in which Mr. Harder was quoted, Ms. Dietrick contended that "it's difficult to think of a huge news story about a celebrity or a politician or someone people care about that

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<sup>1</sup> In December, 2014, Ms. Dietrick was promoted to President, and now holds that title, along with General Counsel.

didn't involve some information that that person did not want disclosed . . . . That's the job of a journalist." Ex. 1 at 2.

On June 23, 2015, Plaintiff served an Amended Witness List, which for the first time identified Ms. Dietrick as a witness he intends to call at trial. Plaintiff stated he intends to call Ms. Dietrick for two purposes: she (1) "has made statements in the press relevant to this case and Defendants' defenses since June 8, 2015," and (2) "has information relevant to Defendants' financial worth." Pl.'s Updated Witness List at 1, n.1. Plaintiff also produced a number of press articles, which presumably contain the "statements to the press" that he wants Ms. Dietrick to testify about. *See, e.g.*, Ex. 1-2, 4.

### **ARGUMENT**

The fact that Ms. Dietrick does what attorneys are supposed to – act as advocates for their clients – is plainly no basis to seek her testimony about how she has articulated Gawker's defenses. Indeed, if the law were otherwise, each side in a high-profile case in which attorneys are interviewed by the media could routinely subpoena their opposing counsel and then seek to strike their appearance on the grounds that a lawyer may not be both an advocate and a witness. *See*, Fl. Rule Prof. Cond. 4-3.4. However, it is well-settled that "a party does not waive the attorney-client privilege merely by bringing or defending a lawsuit." *Coates v. Akerman, Senterfitt & Edison, P.A.*, 940 So. 2d 504, 508 (Fla. 2d DCA 2006).

Yet Ms. Dietrick's involvement in Gawker's defense is precisely why Plaintiff seeks her testimony. This is not a situation where an attorney was a participant in some underlying event involving third parties; Ms. Dietrick was not even employed by Gawker when the article at issue was published. Rather, any knowledge that Ms. Dietrick has concerning Gawker's "defenses" results from her subsequent role in the legal defense of this case and is therefore privileged.

Indeed, she stands in the same position as Mr. Harder, because communications between a company's general counsel and its employees or agents are privileged to the same extent as Mr. Harder's communications with plaintiff are privileged. *Id.*; *Alliant Ins. Services, Inc. v. Riemer Ins. Group*, 22 So. 3d 779 (Fla. 4th DCA 2009); *Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1153 (Fla. 3d DCA 2008).<sup>2</sup>

In fact, recognizing that opposing sides may nonetheless sometimes try to maneuver to convert opposing counsel into witnesses, as is the case here, courts have emphasized that "the waiver of the attorney-client privilege is not favored in Florida." *Lender Processing Services, Inc. v. Arch Ins. Co.*, --- So. 3d ----, 2015 WL 1809318 at \*6 (Fla. 1st DCA 2015). As a result, a failure to safeguard an in-house counsel's privileged communications was recently held to be an "error" that "rises to the level of inherent illegality, which would result in a gross miscarriage of justice were the order to stand, because it would have a chilling effect on communications between attorneys and clients." *Lacaretta Restaurant v. Zepeda*, 115 So. 3d 1091, 1093 (Fla. 1st DCA 2013). Plaintiff should therefore be precluded from calling Ms. Dietrick to testify about her "statements" concerning the "defenses" in this case.

The same holds true with respect to any testimony from Ms. Dietrick about Gawker's "financial condition." Much of the information Ms. Dietrick might possess would likewise be privileged, since it too was obtained in her capacity as the company's principal attorney. Moreover, any potential non-privileged information she might have about Gawker's finances would merely be cumulative of other witnesses Plaintiff intends to call who have the most direct

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<sup>2</sup> The fact that Plaintiff's personal attorney, David Houston, is a witness in the case is irrelevant to the question of whether it is proper to call Ms. Dietrick. Mr. Houston was actually involved in the underlying relevant facts, and was questioned about them at deposition. Ms. Dietrick, as explained, did not even join the company until many months after the publication at issue occurred.

knowledge of Gawker's finances, including its CEO Nicholas Denton and its COO Scott Kidder. There is therefore no sound reason to permit Plaintiff to call Ms. Dietrick solely to try to elicit cumulative testimony which, by its very nature, would pose a serious risk of invading the attorney-client privilege.

**CONCLUSION**

For the foregoing reasons, the Court should enter an Order, *in limine*, prohibiting the plaintiff from calling Heather Dietrick as a witness at trial.

June 26, 2015

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th 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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