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

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' MOTION *IN LIMINE* NO. 6:
EVIDENCE AND TESTIMONY ABOUT SUBSEQUENT REMEDIAL MEASURES

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio hereby move *in limine* to preclude plaintiff Terry Bollea, professionally known as "Hulk Hogan," from introducing any evidence or testimony concerning measures taken by Gawker to make changes to its staffing, editorial, corporate, and/or operating policies or procedures. As explained below, such evidence and testimony is categorically barred by Fla. Stat. § 90.407, which prohibits the introduction of subsequent remedial measures.

I. The Exhibits At Issue

Plaintiff's Fourth Supplemental Exhibit List, filed January 29, 2015, seeks to offer into evidence a number of newspaper articles, internal Gawker memoranda, and other documents regarding an array of actions by Defendants after the publication of the post at issue in this case. These include changes in editorial policy and decision-making, issuance of new guidelines and advice to writers, the removal or reassignment of staff, changes to Gawker's management structure, changes to Gawker's approach to privacy and journalism, and a shift, for the website gawker.com, away from celebrity news and towards politics.

In particular, Bollea seeks to admit, *inter alia*:

- Plaintiff's trial exhibit 369 (attached as Exhibit A), which is a *CapitalNewYork.com* article describing changes to the management structure of Gawker and the removal of its editorial director;

- Plaintiff's trial exhibits 457-58, 462, 466, 468, 471-72, 476-77, 481, 486 (collected together in Exhibit B), which are articles from July 2015 regarding intervention by management into editorial decision-making, the removal of a controversial post, staff changes, the issuance of new editorial guidance, and newly introduced "limits" on editorial freedom at Gawker;

- Plaintiff's trial exhibit 474 (attached as Exhibit C), which is a *CapitalNewYork.com* article reporting that Gawker planned to "prioritize high-quality editorial content over viral posts that drew large amounts of traffic," and change its bonuses structure to reward "stories that editors judged to be high-quality, rather than for stories that drew the most unique visitors";

- Plaintiff's trial exhibit 465 (attached as Exhibit D), which is a *Recode.net* article regarding staff changes at Gawker; and

- Plaintiff's trial exhibits 467, 478-80 (collected together as Exhibit E), which are articles about a November 17, 2015 memo issued to staff at Gawker, announcing new staff appointments, a new business focus, and a shift to political news, commentary and satire.

Each of these exhibits addresses actions taken by Defendants after Gawker posted the video excerpts at issue in this litigation. Based on Bollea's identification of these documents as trial exhibits, it appears that he also intends to question defense witnesses about alleged changes to Gawker's staffing and editorial, corporate, and operating policies or procedures.

II. The Exhibits Are Inadmissible As Evidence Of Subsequent Remedial Measures.

The proposed trial exhibits described above are inadmissible under Fla. Stat. § 90.407.[1] Under that statute, "[e]vidence of measures taken ***after an injury or harm caused by an event***, which measures if taken before the event would have made injury or harm less likely to occur, is not admissible to prove negligence . . . or culpable conduct in connection with the event." Fla. Stat. § 90.407 (emphasis added). This prohibition is well-established "as a matter of sound

[1] Many, if not all, of these exhibits are also inadmissible as hearsay or because they are irrelevant and prejudicial. Those grounds for excluding these exhibits are addressed in other motions *in limine* filed by Defendants.

public policy." *Walt Disney World Co. v. Blalock*, 640 So. 2d [redacted], [redacted]-59 (Fla. 5th DCA 1994). "The policy behind this exclusion is to encourage repairs and other remedial measures, recognizing that persons would be deterred from making repairs or taking other steps to make the condition safer if that evidence was admissible to prove culpability." C. Ehrhardt, Florida Evidence § 407.1 (2015 ed.)*; see also Sikes v. Seaboard Coast Line R.R. Co.*, 429 So. 2d 1216, 1219 (Fla. 1st DCA 1983) ("The legislative reason expressed for barring the admissibility of such evidence is 'that if such evidence could be received against a defendant he would be penalized for an attempt to prevent injuries to others. . . .'" (quoting Law Revision Council Note-1976, 6B F.S.A. § 90.407 at 435 (1979)).

Section 90.407 applies to *any* "measures taken after the event which if taken before the event occurred would have made the event less likely to occur." Ehrhardt § 407.1. This evidentiary bar extends to any remedial step, including instructions to employees to change operating practices, the implementation of new policies designed to avoid future tort claims, and changes in staff or management. Thus, section 90.407 excludes evidence of instructions to employees to be more careful or to change operating procedures following harm to the plaintiff. *See, e.g.*, *Sikes*, 429 So. 2d at 1216 (evidence of instructions to take greater care and implementation of new policy inadmissible); *see also Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1173 (Fla. 3d DCA 1985) (trial court erred in permitting cross examination of defense witness about whether he was fired after injuring the plaintiff).

In applying this rule, it is irrelevant whether the subsequent measures were taken immediately following the alleged harm to the plaintiff or some time later, after other allegedly similar incidents occurred. For example, in *Glanzberg v. Kauffman*, 788 So. 2d 252 (Fla. 4th DCA 2000), plaintiff alleged she fell and was injured on irregular steps outside a home. She

sought to introduce evidence that, after she fell, other people also fell on the steps and the design of the steps was then changed. The court excluded this evidence for the simple reason that "[e]vidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct" pursuant to Section 90.407. *Id.* at 255.

So, too, in this case. In order to prove that Defendants violated his right to privacy and should be subjected to punitive damages, Bollea seeks to introduce evidence that, following the conduct he is challenging in this lawsuit (*i.e.*, the publication of the video excerpts from the sex tape), Gawker made a series of changes to its staffing and its editorial orientation, standards and approach in order to avoid future tort claims and/or in recognition of the riskiness of its past conduct. Under Section 90.407, he may not do so.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an order precluding Bollea from offering into evidence exhibits, or seeking testimony, regarding subsequent remedial measures undertaken by Gawker, including plaintiff's trial exhibits 369, 457-58, 462, 465-68, 471-72, , 474, 476-80, 481, 486.

February 1, 2016

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*
Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard, P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440

Michael D. Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

Attorneys for Plaintiff

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Attorney for Plaintiff

Timothy J. Conner
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, FL 32202
timothy.conner@hklaw.com

Charles D. Tobin
Holland & Knight LLP
800 17th Street N.W., Suite 1100
Washington, D.C. 20006
charles.tobin@hklaw.com

Attorneys for Intervenors First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, and The Associated Press

Charles J. Harder, Esq.
charder@HMAfirm.com
Jennifer McGrath, Esq.
jmcgrath@hmafirm.com
Harder Mirell & Abrams LLP
132 S. Rodeo Drive, Suite 301
Beverly Hills, CA 90212
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Allison M. Steele
Rahdert, Steele, Reynolds & Driscoll, P.L.
535 Central Avenue
St. Petersburg, FL 33701
amnestee@aol.com
asteele@rahdertlaw.com
ncampbell@rahdertlaw.com

Attorney for Intervenor Times Publ'g Co.

/s/ Gregg D. Thomas
Attorney