

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.

GAWKER MEDIA, LLC aka GAWKER  
MEDIA; NICK DENTON; A.J. DAULERIO,

Defendants.

---

**PLAINTIFF TERRY BOLLEA’S OPPOSITION TO DEFENDANTS’ MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF EVENTS AT GAWKER MEDIA, LLC RELATING TO A 2015 GAWKER STORY ABOUT A MEDIA EXECUTIVE (STYLED “Defendants’ Motion *In Limine* No. 6: Evidence and Testimony About Subsequent Remedial Measures”)**

Mr. Bollea opposes Gawker Defendants’ motion in limine to exclude evidence which has been mischaracterized as “subsequent remedial measures” as follows:

**I. INTRODUCTION**

Gawker Defendants seek an order prohibiting the introduction of evidence relating to the adverse publicity surrounding the publication, and later withdrawal, by Gawker.com of a story in mid-2015 falsely accusing a male media executive of soliciting the services of a gay porn star/escort (the “Media Executive Story”). This evidence is relevant for many reasons: it establishes both Gawker Defendants’ scienter in violating the standards of journalism (which will be presented to the jury by Mr. Bollea’s expert witness, Mike Foley) and that Gawker Defendants have knowledge of what such standards require. Additionally, Gawker Defendants’ admissions following the Media Executive Story are direct evidence of their editorial “litmus test” and disprove the central defense they seek to assert in this case.

Gawker Defendants contend that admission of such evidence violates Fla. Stat. § 90.407, which precludes admission of subsequent remedial measures to show Gawker Defendants' culpability. This argument fails because much of the evidence that Gawker Defendants seek to admit is not evidence of subsequent remedial measures, but rather, evidence of Gawker Defendants' actions and the controversy that erupted surrounding them.

Independently, even if some of the evidence could arguably be characterized as evidence of subsequent remedial measures, Section 90.407 does not bar the admission of such evidence unless it is used to show Gawker Defendants' culpability when they published the Media Executive Story. Mr. Bollea is **not** making the argument that Section 90.407 prohibits. Instead, Mr. Bollea is arguing that the Media Executive Story demonstrates Gawker Defendants' abhorrence of privacy, rejection of the recognized standards of journalism (a claim which Gawker Defendants vigorously contest), their knowledge and awareness of the journalistic norms that they have denied and decried in the past, and their willingness to retract stories based on purely economic standards. These are each permissible grounds to admit this evidence under Section 90.407.

## **II. THE SECTION 90.407 EXCLUSION IS EXTREMELY LIMITED.**

Section 90.407 provides for a limited exclusion of evidence of subsequent remedial measures, when they are offered to prove negligence or culpable conduct: "Evidence 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, the existence of a product defect, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for

another purpose, such as proving ownership, control, or the feasibility of precautionary measures, if controverted, or impeachment.” Fla. Stat. § 90.407.

**III. MUCH OF THE EVIDENCE THAT IS THE SUBJECT OF THIS MOTION IS NOT EVEN EVIDENCE OF “SUBSEQUENT REMEDIAL MEASURES” COVERED BY THE STATUTE.**

Much of the evidence that Gawker Defendants identify in their motion is not “evidence of measures taken after an injury or harm caused by an event” at all. *See* Ex. 457 (interview with Nick Denton where he answers questions relating to a “revolt” at Gawker over the handling of the Media Executive Story and the public “condemnation” of the story); Ex. 458 (story describing resignation of two Gawker editors after Media Executive Story was withdrawn); Ex. 462 (interview with Mr. Denton where he discusses resignations of editors); Ex. 466 (story quoting Mr. Denton on the “backlash” over the Media Executive Story); Ex. 468 (story quoting Mr. Denton as not seeing the point of the Media Executive Story even **before** it was published and his responsibility for running the story); Ex. 471 (interview with Gawker senior vice president and general counsel Heather Dietrick regarding controversies that Gawker was embroiled in); Ex. 472 (interview with Mr. Denton in which he calls the Media Executive Story “pure poison”); Ex. 476 (story discussing resignations of editors); Ex. 477 (story setting forth former Gawker Editor Max Read’s justifications for running the Media Executive Story); Ex. 481 (article discussing resignations of editors); Ex. 486 (Mr. Denton discussing the “Gawker tax”, which refers to the possibility that a Gawker article could cause internal dissent or cross a legal line and end up costing the company significant amounts of money).

**IV. EVEN IF SOME OF THE EVIDENCE CONCERNS “SUBSEQUENT REMEDIAL MEASURES”, THE STATUTE DOES NOT REQUIRE EXCLUSION OF THIS EVIDENCE.**

Even to the extent that some of these exhibits discuss subsequent measures taken by Gawker Defendants in the wake of the Media Executive Story fallout, those measures are not

being introduced by Mr. Bollea for the purpose of proving Gawker Defendants' culpability in **this** case. Rather, Gawker Defendants have repeatedly denied the existence of journalistic ethics or that such norms apply to Gawker. Gawker Defendants actions in instituting new editorial policies, announcing that they will now have more respect for privacy, and their comments relating to such new policies (admittedly based upon fears over loss of advertisers and damage to their reputation headed into the "Hogan Trial"), are relevant to establish their knowledge and awareness of the existence of the norms, their choice to ignore those norms in the case of Mr. Bollea, and to impeach testimony from Gawker Defendants to the contrary.

Under Section 90.407, such evidence is admissible. *Murray v. Almaden Vineyards, Inc.*, 429 So.2d 24, 26 (Fla. 2d DCA 1983), holds that subsequent remedial measures are admissible to rebut the claim that a defendant was acting in good faith. In *Murray*, the court reversed a judgment for the defendant where the trial court had excluded evidence that after an accident, a warning label was placed on wine bottles cautioning purchasers about the risk of spontaneous ejection of the cork. While the warning label was a subsequent remedial measure, it was offered to rebut the defendant's testimony that it believed the cork would not eject from the bottle.

Similarly, evidence of subsequent remedial measures is admissible "to disprove the defendant's claimed lack of knowledge." *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 256 (Fla. 1st DCA 1984). In this case, Gawker Defendants deny the existence or applicability of numerous standards of journalistic ethics, and have made numerous public statements to that effect. Evidence of their implementation of such standards after the Media Executive Story was published and withdrawn establishes their knowledge of such standards.

If the Court is inclined to exclude any evidence based on Gawker Defendants' arguments, this evidence should not be excluded *in toto*. The evidence at issue contains numerous

admissions by Gawker Defendants which, standing alone, are directly relevant to and specifically address their feelings towards privacy, their editorial litmus test, the alleged “newsworthiness” of the video of Terry Bollea, and other matters.

**V. CONCLUSION**

Gawker Defendants have not established that the evidence at issue is inadmissible under the substantive remedial measures exclusion. The motion should be denied.

Respectfully submitted,

*/s/ Kenneth G. Turkel*

---

Kenneth G. Turkel, Esq.  
Florida Bar No. 867233  
Shane B. Vogt  
Florida Bar No. 0257620  
BAJO | CUVA | COHEN | TURKEL  
100 North Tampa Street, Suite 1900  
Tampa, Florida 33602  
Tel: (813) 443-2199  
Fax: (813) 443-2193  
Email: [kturkel@bajocuva.com](mailto:kturkel@bajocuva.com)  
Email: [svogt@bajocuva.com](mailto:svogt@bajocuva.com)

- and -

Charles J. Harder, Esq.  
PHV No. 102333  
Jennifer J. McGrath, Esq.  
PHV No. 114890  
HARDER MIRELL & ABRAMS LLP  
132 S. Rodeo Drive, Suite 301  
Beverly Hills, CA 90212  
Tel: (424) 203-1600  
Fax: (424) 203-1601  
Email: [charder@hmafirma.com](mailto:charder@hmafirma.com)  
Email: [jmcgrath@hmafirma.com](mailto:jmcgrath@hmafirma.com)

**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 12th day of February, 2016 to the following:

Barry A. Cohen, Esquire  
The Cohen Law Group  
201 E. Kennedy Blvd., Suite 1950  
Tampa, Florida 33602  
[bcohen@tampalawfirm.com](mailto:bcohen@tampalawfirm.com)  
[jhalle@tampalawfirm.com](mailto:jhalle@tampalawfirm.com)  
[mwalsh@tampalawfirm.com](mailto:mwalsh@tampalawfirm.com)  
*Counsel for Heather Clem*

Gregg D. Thomas, Esquire  
Rachel E. Fugate, Esquire  
Thomas & LoCicero PL  
601 S. Boulevard  
Tampa, Florida 33606  
[gthomas@tlolawfirm.com](mailto:gthomas@tlolawfirm.com)  
[rfugate@tlolawfirm.com](mailto:rfugate@tlolawfirm.com)  
[kbrown@tlolawfirm.com](mailto:kbrown@tlolawfirm.com)  
[abcene@tlolawfirm.com](mailto:abcene@tlolawfirm.com)  
*Counsel for Gawker Defendants*

David R. Houston, Esquire  
Law Office of David R. Houston  
432 Court Street  
Reno, NV 89501  
[dhouston@houstonatlaw.com](mailto:dhouston@houstonatlaw.com)  
[krosser@houstonatlaw.com](mailto:krosser@houstonatlaw.com)

Seth D. Berlin, Esquire  
Paul J. Safier, Esquire  
Alia L. Smith, Esquire  
Michael D. Sullivan, Esquire  
Levine Sullivan Koch & Schulz, LLP  
1899 L. Street, NW, Suite 200  
Washington, DC 20036  
[sberlin@lskslaw.com](mailto:sberlin@lskslaw.com)  
[psafier@lskslaw.com](mailto:psafier@lskslaw.com)  
[asmith@lskslaw.com](mailto:asmith@lskslaw.com)  
[msullivan@lskslaw.com](mailto:msullivan@lskslaw.com)  
*Pro Hac Vice Counsel for  
Gawker Defendants*

Michael Berry, Esquire  
Levine Sullivan Koch & Schultz, LLP  
1760 Market Street, Suite 1001  
Philadelphia, PA 19103  
[mberry@lskslaw.com](mailto:mberry@lskslaw.com)  
*Pro Hac Vice Counsel for  
Gawker Defendants*

Allison M. Steele  
Rahdert, Steele, Reynolds & Driscoll, P.L.  
535 Central Avenue  
St. Petersburg, FL 33701  
[amnestee@aol.com](mailto:amnestee@aol.com)  
[astele@rahdertlaw.com](mailto:astele@rahdertlaw.com)  
[ncampbell@rahdertlaw.com](mailto:ncampbell@rahdertlaw.com)  
*Attorneys for Intervenor Times Publishing  
Company*

Timothy J. Conner  
Holland & Knight LLP  
50 North Laura Street, Suite 3900  
Jacksonville, FL 32202  
[timothy.conner@hklaw.com](mailto: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](mailto:charles.tobin@hklaw.com)  
*Attorneys for Intervenor, First Look Media, Inc.,  
WFTS-TV and WPTV-TV, Scripps Media, Inc.,  
WFTX-TV, Journal Broadcast Group, Vox Media,  
Inc., WFLA-TV, Media General Operations, Inc.,*

*Cable News Network, Inc., BuzzFeed and The  
Associated Press.*

*/s/ Kenneth G. Turkel*  
Kenneth G. Turkel

---