

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, *et al.*,

Defendants.

**DEFENDANTS' BENCH MEMORANDUM REGARDING
THE INVALIDITY OF A TORT CLAIM BASED ON
REFUSING TO REMOVE ONLINE MATERIAL**

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio respectfully submit this Bench Memorandum regarding Plaintiff's contention that the jury should be directed, in determining liability, to consider Defendants' alleged refusal to remove the publication giving rise to Plaintiff's claims. Specifically, Plaintiff's Proposed Jury Instructions Nos. 6, 9, 25, 26, 27, and 28 propose that the jury be asked to consider, as a separate and independent basis for finding Defendants liable, Defendants' alleged conduct in "refusing to remove" the video excerpts from *gawker.com*. That is incorrect as a statement of the law.

It is well-settled that the continued availability of a tortious publication does not give rise to additional liability. This rule, typically referred to as the "single publication rule" predates the advent of the internet and provides that liability only accrues at the time of the initial publication. By statute, Florida follows the single publication rule. *See Fla. Stat. § 770.07*. Under this rule, the fact that an allegedly tortious publication is not withdrawn or retracted does not constitute a separate or an additional tort. *See Van BusKirk v. New York Times Co.*, 2000 WL 1206732, at *2

(S.D.N.Y. Aug. 24, 2000) (continued sale of an allegedly defamatory book from stock is not a tort, even though it could be withdrawn).

The same “single publication” rule applies to internet publications: a publisher of a defamatory or intrusive article online is only liable for the initial publication. The fact that the publication at issue *stays* on the internet and is not removed does not create an addition or continuing tort. The leading case on this issue is *Firth v. State*, 98 N.Y.2d 365 (N.Y. 2002), where plaintiff sued for a report published on the internet. Plaintiff claimed the initial publication was tortious and also argued that the ongoing posting of the report on the internet constituted a continuing wrong. *Id.* at 368. The court rejected that claim, holding that the single publication rule that had for decades applied to newspapers and books also applies to online publications. *Id.* at 370. The reasoning of *Firth* has been adopted by jurisdictions across the country: “After *Firth*, ***no other court in the country has failed to extend the single publication rule to the online domain.***” *Clark v. Viacom Int’l Inc.*, 617 F. App’x 495, 503-04 (6th Cir. 2015) (citing *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 615–16 (7th Cir. 2013) (emphasis added)).¹

In sum, Plaintiff’s proposed jury instructions present an incorrect statement of the law on this issue. Defendants’ continued posting of the video, even in the face of Plaintiff’s “take-down” demand, is not relevant to liability and cannot be considered by the jury in connection

¹ See also *In re Phila. Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012) (same); *Oja v. U.S. Army Corps of Eng’rs*, 440 F.3d 1122, 1130–33 (9th Cir. 2006) (same); *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 141–46 (5th Cir. 2007) (observing that that every court that has decided the issue has held the single publication rule applies to information publicly available on the internet); *Mayfield v. Fullhart*, 444 S.W.3d 222, 228 (Tex. Ct. App. 2014) (rejecting argument that plaintiff “has been defamed every day because the report remains accessible to third parties”); *McCandliss v. Cox Enters., Inc.*, 593 S.E.2d 856 (Ga. Ct. App. 2004) (single publication rule applies to internet publications; additional hits on an internet article do not create a new tort).

with that issue. *See, e.g., Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1167 (9th Cir. 2011) (failure to “take down” online publication in the face of demand was not actionable because that would be contrary to the single publication rule); *Cruz v. Van Sickle*, 452 S.W.3d 503, 517 (Tex. Ct. App. 2014) (refusal to take down online publication in the face of demand was irrelevant to liability).

February 22, 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 22nd 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@hkllaw.com

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

Attorney for Intervenor Times Publ'g Co.

/s/ Gregg D. Thomas
Attorney