

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

VIRGIE ARTHUR,	§	
	§	
PLAINTIFF,	§	
	§	
v.	§	Civil Action No. 4:07-CV-03742
	§	(Jury)
HOWARD K. STERN, BONNIE STERN,	§	
CBS STUDIOS, INC., and	§	
KPRC HOUSTON	§	
	§	
DEFENDANTS.	§	

**PLAINTIFF'S RESPONSE TO DEFENDANTS'  
CBS STUDIOS, INC. AND KPRC HOUSTON'S SUR-REPLY**

Plaintiff files this, her Response to Defendants' CBS Studios, Inc. and KPRC Houston's Sur-Reply, and in support, would show:

I.

The Media Defendants cite a memorandum opinion for the following statement: “When an amendment would destroy jurisdiction, most authorities agree that leave should be denied unless there exist strong equities in its favor.” *Whitworth v. TNT Bestway Transportation Inc.*, 914 F.Supp. 1434, 1435 (E.D. Tex. 1996). That decision cited only one authority, *i.e. Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5<sup>th</sup> Cir. 1987)<sup>1</sup>. The court in *Whitworth*, however, misread *Hensgens*, which did not say that “leave should be denied unless there exist strong equities in its favor.” *Hensgens* said nothing about a requirement of “strong equities.” Surely the Media Defendants know

<sup>1</sup> <http://bulk.resource.org/courts.gov/c/F2/833/833.F2d.1179.87-4251.html>

that. After all, both they and the Plaintiff orally argued *Hensgens* to this Court at the hearing on April 18, 2008. If the “strong equities” rule attributed to *Hensgens* by *Whitworth* actually existed, the Court would have heard about it then. There is no “strong equities” rule.

*Whitworth* is inapposite for other reasons as well. The plaintiff in *Whitworth* claimed a right to amend without leave of court and failed to seek leave of court. *Whitworth v. TNT Bestway Transportation Inc.*, 914 F.Supp. at 1435. In the present case, however, the Plaintiff claims no such right and properly has sought leave of court. More important, in *Whitworth* the court did not believe the plaintiff’s purported reason why the proposed new defendant was not added sooner. *Id.* The *Whitworth* court believed that the plaintiff “deliberately delayed “ the decision to add a non-diverse defendant until the case had been assigned to that federal court. *Id.* In the present case, however, counsel for the Media Defendants admitted at the hearing on April 18, 2008, that it could not establish that the Plaintiff had been dilatory. That is so because Plaintiff was not aware and could not have been aware of the private emails that form the basis of the motion for leave to amend until after two confessed former members of the conspiracy read Defendant Howard K. Stern’s jurisdictional deposition of January 4, 2008, formed the opinion that he had lied under oath, and contacted Plaintiff’s counsel with the intention to cooperate.

The Media Defendants argue that Plaintiff’s filing of a lawsuit in state district court, in order to avoid the possibility of a limitations issue, while this Court had the motion for leave to amend under advisement, renders the issue moot. Why that should be so, they do not explain. Surely the Media Defendants do not suggest that Plaintiff should have ignored the possible limitations issue and should not have filed in state court.

## II.

The Media Defendants argue that the new parties did not have anything to do with the alleged defamatory broadcast of statements made by Anna Nicole Smith on the Entertainment Tonight program. Of course, the new defendants were not the original conspirators who put Anna Nicole Smith up to making the defamatory statements broadcast on television. They joined the conspiracy later and took directions from Howard K. Stern, the kingpin of the conspiracy, through his sister, Bonnie Stern, and his legal counsel. Their inspiration for joining the conspiracy was the Entertainment Tonight broadcast, in which Anna Nicole Smith accused her mother, Virgie Arthur, of being complicit in sexual abuse of her as a child.<sup>2</sup> The new conspirators repeated that defamation every chance they got. The Media Defendants, being responsible for the original defamation, are responsible for its republication by the new defendants. *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 639-40 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.).<sup>3</sup>

Texas law recognizes a cause of action for conspiracy to defame. *Chevalier v. Animal Rehabilitation Ctr.*, 839 F.Supp. 1224, 1230 (N.D. Tex. 1993); *Boyne v. Harrison*, 647 S.W.2d 82, 88 (Tex. App. – Austin 1983, writ dismissed). Conspiracy liability extends beyond the active wrongdoer to those who may merely have planned, assisted, or encouraged the wrongdoer's acts. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925-26 (Tex. 1979). One who joins a conspiracy already in progress becomes responsible for the acts already committed by the conspirators. *Cleft of the Rock Foundation v. Wilson*, 992 F.Supp. 574, 584 (E.D. N.Y. 1998). One who joins a

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<sup>2</sup> See Exhibit A, sworn statements of Chrystal Baker, page 21.

<sup>3</sup> <http://www.lstcoa.courts.state.tx.us/opinions/html/opinion.asp?OpinionId=78578>.

conspiracy in progress ratifies all that has come before. *Dixon v. Mack*, 507 F.Supp. 350, 350-51 (S.D. N.Y. 1980). “Once a conspiracy is proven, each co-conspirator is “responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.” *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d at 925 (quoting *State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (1937)). Therefore, the new defendants are responsible for the defamation done by the Media Defendants, and *vice versa*.

A conspiracy may be established by circumstantial evidence, and that usually is the case. *Schlumberger Well Surv. Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968). Conspiracy liability can be established by proof showing circumstances from which a natural inference arises that the unlawful, overt acts were committed in furtherance of a common design, intention, or purpose of the conspirators. *International Bankers Life Ins. v. Hollaway*, 368 S.W.2d 567, 581 (Tex. 1963). Speech is an overt act. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 368 (Tex. 2000). It is not necessary to show that every act of a conspirator was in concert with the others or that all the conspirators agreed before each act. *Bankers Life Ins. v. Hollaway*, 368 S.W.2d at 583.

The exhibits presented to this Court are replete with evidence of a conspiracy that widened to include Rose Turner and others, who were being directed on Defendant Howard Stern’s behalf by his sister, Bonnie Stern,<sup>4</sup> and his legal counsel.<sup>5</sup> Bonnie and

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<sup>4</sup> Exhibit A, sworn statement of Chrystal Ann Baker, pages 6-12, 19

<sup>5</sup> An attorney can be liable for conspiring with a client to commit a tort against another party. *Lesikar v. Rapoport*, 33 S.W.3d 282, 318 (Tex. App. – Texarkana 2000, pet. denied). Because of the absolute immunity from defamation liability for an attorney under Texas law, however, Plaintiff has not sought to add legal counsel as defendants. *Daystar Residential Inc. v. Collmer*, 176 S.W.3d 24 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2004, pet. denied).

<http://www.lstcoa.courts.state.tx.us/opinions/html/opinion.asp?OpinionId=80250>.

Rose spoke on the telephone “numerous times a day, quite often.”<sup>6</sup> Bonnie and Rose directed other members of the group.<sup>7</sup> Bonnie was in a position to make someone leave the group.<sup>8</sup> Art Harris and Rose Turner collaborated on a defamatory story about Virgie Arthur and a cousin for the benefit of Howard Stern.<sup>9</sup> The conspirators gave Art Harris “scoops” from the information they were gathering; Rose and Art were “a team.”<sup>10</sup> TMZ and Harvey Levin entered into an agreement to publish articles favorable to Howard Stern, in return for “scoops,”<sup>11</sup> and Levin for TMZ wound up publishing the defamatory story about Virgie Arthur marrying her step-brother and having a child by him,<sup>12</sup> a story promoted by Rose Turner.<sup>13</sup>

At one point the conspirators engaged in a letter-writing campaign to get People Magazine to publish “Virgie dirt,” and all for the benefit of Howard Stern. As one conspirator put it, “Anything we did that could help him, either by painting Virgie dirty or any other character, and making sure that he was untarnished, was definitely the goal.”<sup>14</sup> Bonnie Stern published a note thanking Rose, Chrystal Baker (“Havana”) and others for helping her brother Howard.<sup>15</sup> Chrystal Baker later gave a sworn statement that Howard Stern lied in his deposition about the help she had given him.<sup>16</sup> She also

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<sup>6</sup> Exhibit A, sworn statement of Chrystal Ann Baker, page 57.

<sup>7</sup> *Id.*, page 41, 90.

<sup>8</sup> *Id.* at 59.

<sup>9</sup> *Id.*, pages 28-31, 47-8, 65.

<sup>10</sup> *Id.*, page 56

<sup>11</sup> *Id.* at 93-96.

<sup>12</sup> “Virgie Has Son with Her Stepbrother,” TMZ.com, April 19, 2007, <http://www.tMZ.com/2007/04/19/virgie-has-son-with-her-stepbrother/> (accessed May 14, 2008).

<sup>13</sup> Email from Rose Turner (“cajunrose”) to Yvonne Waddle (“Queen of VonDonia”), April 2, 2007, YW000046-000048, attached as Exhibit B.

<sup>14</sup> Exhibit A, sworn statement of Chrystal Ann Baker, page 71.

<sup>15</sup> *Id.* at 72.

<sup>16</sup> *Id.* at 82-9.

acknowledged that she had engaged in a conspiracy and that she and the other co-conspirators had acted recklessly.<sup>17</sup>

The Media Defendants have made no effort to explain why it would not be unjust to force Plaintiff to litigate in parallel proceedings or why that would not run the risk of inconsistent verdicts, to the detriment of the system of justice.

WHEREFORE, Plaintiff prays that this Court grant her leave to amend her Complaint to add additional party defendants and jurisdictional facts.

Respectfully submitted,

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<sup>17</sup> *Id.* 91-3.

**CERTIFICATE OF SERVICE**

This is to certify that on the 14<sup>th</sup> day of May 2008, a true and correct copy of the foregoing Response to Defendants' CBS Studios, Inc. and KPRC Houston's Sur-Reply was served upon the following counsel electronically via the CM/ECF system.

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