

EXHIBIT A

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

VIRGIE ARTHUR
PLAINTIFF

V.

Civil Action No. 4:07-CV-03742

HOWARD K. STERN,
CBS STUDIOS, INC. and
KPRC HOUSTON,
DEFENDANTS

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MOTION FOR REMAND

Plaintiff moves the Court to remand this case to state district court, from which it was removed. The case was removed to federal court by Defendants CBS Studios Inc. ("CBS") and KPRC Houston ("KPRC") on the erroneous basis that diversity jurisdiction exists because of the alleged improper joinder of KPRC.

I. THE PARTIES

1. Plaintiff VIRGIE ARTHUR is and was at all relevant times an individual citizen of the State of Texas.

2. Defendant HOWARD K. STERN ("STERN") is and was at all relevant times an individual citizen of California.

3. Defendant CBS STUDIOS, INC. ("CBS") is and was at all relevant times, a Delaware corporation with its principal place of business in Los Angeles, California and which is doing business in Texas.

4. Defendant KPRC HOUSTON ("KPRC") is a television station owned by Post Newsweek Stations, Houston, Inc. which is and was at all relevant times, a Delaware corporation with its principal place of business in Houston, Texas.

II. LACK OF BASIS FOR REMOVAL – NO DIVERSITY JURISDICTION

5. The removing defendant has the burden of alleging and proving the nondiverse party's joinder is inappropriate. *Jernigan v. Ashland Oil Co.*, 989 F.2d 812, 815-16 (5th Cir. 1993), *cert. denied*, 510 U.S. 868. "The burden of proving an inappropriate joinder is a heavy one." *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984). "The removing party must prove that there is *absolutely no possibility* that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." *Id.* (emphasis added). In determining whether fraudulent joinder exists, the court resolves "all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party." *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42-2 (5th Cir. 1992). Courts "do not decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a *possibility* that he may do so." *Id.* (emphasis added).

6. Plaintiff is a private figure. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (fact that divorce characterized by Florida Supreme Court as "cause celebre" does not mean that it is public controversy or that respondent must be considered public figure). The subject of the defamation in the present case, *i.e.* what did or did not happen to Plaintiff's daughter, Vicky Lynn Smith, when she was a child, is not a matter of public concern or controversy. When, as in the present case, a private-figure plaintiff sues a media defendant about a statement that involves a private issue, the plaintiff merely must prove negligence, not *N.Y. Times* malice. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 818-19 (Tex. 1976).

7. CBS and KPRC admit that KPRC is a non-diverse defendant. (Notice of Removal 3) Nevertheless, CBS and KPRC argue, without providing proof, that KPRC was improperly joined, because KPRC is “a local television station that merely aired, without editorial change, a television program it obtained from a satellite feed licensed from a third party.” (Notice 3) For that proposition, CBS and KPRC invoked the so-called “conduit” or “wire service” defense. (Notice 3) Under that theory, according to CBS and KPRC, the latter simply has no duty not to disseminate defamatory statements contained in a satellite feed from a national broadcaster. (Notice 4)

8. As an initial matter, regarding the assertion that KPRC might be a publisher protected by the conduit defense, “it is simply too early in the litigation to make a such a conclusion without the benefit of discovery.” *Global Relief Found. v. New York Times Co.*, 2002 U.S. Dist. LEXIS 17081, *37 (N.D. Ill. Sept. 9, 2002), *aff’d*, 390 F.3d 973, (7th Cir. 2004).

9. Furthermore, the conduit or wire service defense does not apply in the present case, for several reasons. First, it is not the law in Texas. Inexplicably, CBS and KPRC fail to mention Texas Civil Practices and Remedies Code (“CPRC”) Chapter 73: Libel and CPRC Section 73.004: Liability of Broadcaster, which provides as follows:

(a) A broadcaster is not liable in damages for a defamatory statement published or uttered in or as a part of a radio or television broadcast by one other than the broadcaster *unless the complaining party proves that the broadcaster failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.*

(b) In this section, “broadcaster” means an owner, licensee, or operator of a radio or television station or network of stations and the agents and employees of the owner, licensee, or operator.

CPRC sec. 73.004 (emphasis added). The quoted section makes it clear that a defendant such as KPRC has a duty to exercise due care in re-broadcasting, even if it is a conduit, as claimed. The section also provides that a defendant such as KPRC can be liable for defamation, if the plaintiff can prove that the broadcaster failed to exercise due care. The section leaves no room for KPRC's argument that it simply owes no duty not to republish defamatory statements.

10. Second, the case authority cited by CBS and KPRC is inapposite. The main case on which they rely is *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wash. 1992). (Notice 3) That case applied the law of the State of Washington and is, therefore, inapposite.¹ The second case they cite is *Merco Joint Venture v. Kaufman*, 923 F.Supp. 924 (W.D. Tex. 1996), a case that addressed a summary judgment motion brought by a local television station in a defamation case. Reliance by CBS and KPRC on that case is surprising, however, because, in discussing the *Auvil* case, the *Kaufman* opinion clearly distinguishes Washington law from Texas law, and places reliance on CPRC sec. 73.004, the very statute that the defendants in the present case completely ignore.

Though [*Auvil* contains] a correct recitation of the law in the State of Washington, which does not have a liability of broadcaster statute, the law in Texas does not ascribe to the "knew or had reason to know standard." On the contrary, Texas has a negligence standard for showing liability that of ordinary (or due) care.

Kaufman, 923 F.Supp. at 927.

¹ Similarly, *Matter of Medical Laboratory Management Consultants*, 931 F.Supp. 1487 (D. Ariz. 1996), cited by CBS and KPRC, is inapposite because, unlike the present case, it relies on Arizona law and involves a matter of public concern.

11. The court in *Kaufman* reasoned that the plaintiff had to prove defamation before the “defense” of due care afforded by section 73.004 could be used. *Kaufman*, 923 F. Supp. at 927. The court further reasoned that, because the plaintiff in that case was a public figure but could not prove *New York Times* malice, there was “no need to address the defense of ordinary care within the Liability of Broadcaster statute.”² *Id.* at 929. *Kaufman* is easily distinguishable, because the present case does not involve a public-figure plaintiff. Furthermore, before the *Kaufman* decision was filed, the plaintiff voluntarily dismissed the local television station, and the court therefore denied the summary judgment as moot, thereby reducing even more whatever persuasive value the opinion may have had on the point urged by the defendants in the present case. *Id.* at 931.

12. Third, the conduit or wire service defense does not apply in the present case, because the defense is founded on the fact that the broadcast or other publication in question came from an original publisher who was reputable, which is a fact not present in this case. *See, e.g., Global Relief Found.*, 2002 U.S. Dist. LEXIS 17081 at *37 (defense available when local media organization republishes release from “reputable news agency”). *Entertainment Tonight*, the CBS program that was the source of the KPRC broadcast at issue in the present case, is not a reputable news agency. Examples of what Entertainment Tonight considers to be “news” include the following: (1) an interview with Ryan Seacrest, host of the television show *American Idol*, about what he

² The *Kaufman* court seemed to think that a public figure plaintiff fails to prove defamation if he fails to prove malice. The better view is that, in the case of a public figure, an absence of malice does not negate defamation; it merely precludes liability for the defamation.

thinks is the “rollercoaster” nature of a normal day for Britney Spears³ (Exhibit A) and (2) an interview with boxer Oscar de la Hoya about whether or not certain photographs of him in fishnet and heels are real or photoshopped.⁴ (Exhibit B) *Entertainment Tonight* is tabloid television, an on-air version of a scandal sheet, which concentrates on “stories based on sensationalism,” and “has continued to frequently broadcast video and photography taken by paparazzi stalkers of celebrities.”⁵ (Exhibit C) Indeed, *Entertainment Tonight* is a self-described gossip monger. The title tag on their website home page says “news and gossip.”⁶

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Entertainment Tonight's website even has a page for the top ten scandals of 2007 (Exhibit D), with the top two relating to Plaintiff's daughter and Defendant Stern.⁷

Because *Entertainment Tonight* is not a reputable news agency, the wire service or conduit defense cannot be applied to KPRC.

13. CBS and KPRC also contend that Plaintiff's allegations of defamation and conspiracy are merely “conclusory.” (Notice 4) As to the defamation claims, the Plaintiff

³ <http://www.etonline.com/news/2007/11/55566/index.html#> (Interview online as of Dec. 5, 2007).

⁴ <http://www.etonline.com/news/2007/09/54444/index.html> (Interview online as of Dec. 5, 2007).

⁵ Wikipedia: The Free Encyclopedia. http://en.wikipedia.org/wiki/Entertainment_Tonight (Online entry Dec. 5, 2007).

⁶ <http://www.google.com/search?hl=en&q=etonline&btnG=Google+Search> (Online entry as of Dec. 6, 2007).

⁷ <http://www.etonline.com/yir2007/2007/11/55892/index.html> (Online entry as of Dec. 6, 2007).


trusts that the Court will see the allegations are detailed and specific, not conclusory. As to the conspiracy claim against KPRC, it is too early in the litigation to expect the Plaintiff to provide more details without discovery.⁸

III. CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff prays that this Court holds that it lacks jurisdiction and that this cause of action be remanded to the 280th Judicial District Court in Harris County, Texas. Plaintiff further prays for such other and further relief at law or in equity to which she may justly be entitled.

Respectfully submitted,

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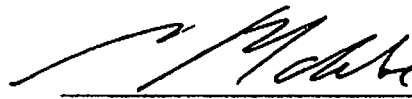
⁸ In the opinion cited by CBS and KPRC, the case had been on file for six years, leaving ample time for discovery. *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 383 (5th Cir. 2000) (original complaint filed in 1994).

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of December 2007, a true and correct copy of the foregoing Motion for Remand served upon the following counsel electronically via the CM/ECF system

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