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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VIRGIE ARTHUR . C.A. NO. H-07-3742
VS. . HOUSTON, TEXAS
HOWARD K. STERN, ET AL . APRIL 18, 2008
. 3:36 P.M. to 5:25 P.M.

TRANSCRIPT of MOTION HEARING
BEFORE THE HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 P R O C E E D I N G S

2 *THE COURT:* Good afternoon.

3 *MR. MCCABE:* Good afternoon, Your Honor.

4 *THE COURT:* State your appearances, please.

5 *MR. MCCABE:* Neil McCabe for plaintiff Virgie Arthur.

6 *MR. MEYER:* Michael Meyer for plaintiff Virgie Arthur.

7 *MR. PATTON:* John Patton for defendant Howard K.

8 Stern.

9 *MR. LANTTA:* Luke Lantta for defendant Howard K.

10 Stern.

11 *MR. BABCOCK:* Charles Babcock and Nancy Hamilton for
12 defendants CBS Studios and KPRC.

13 *THE COURT:* I think we have one lawyer participating
14 by telephone.

15 *MR. WOOD:* We do, Your Honor. This is Lin Wood, and I
16 am participating by phone from my office in Atlanta, Georgia,
17 for Howard K. Stern.

18 *THE COURT:* All right. But you have local counsel
19 here?

20 *MR. WOOD:* We have Mr. Patton and Mr. Lantta present.

21 *MR. OGDEN:* Your Honor, I'm Bill Ogden. I'm here for
22 nonparty witnesses.

23 *THE COURT:* You're here for the subpoenas?

24 *MR. OGDEN:* Nelda and -- Rose and Ken Turner, yes,
25 ma'am.

1 *THE COURT:* All right.

2 *MS. HARRINGTON:* I'm Lyndal Harrington. I'm pro se
3 for myself.

4 *THE COURT:* Thank you.

5 All right. Let's talk briefly about the most
6 sensible order to deal with the several motions that are before
7 me. The motion to -- the motions that raise the jurisdiction,
8 subject matter jurisdiction obviously need to be dealt with,
9 that is, Arthur's motion to remand and the responses and the
10 related later motion filed by Arthur to add additional party
11 defendants that would provide an additional basis for this
12 Court not having jurisdiction. So, that's one set of motions
13 that we probably ought to deal with first.

14 The second set of motions, then, would deal with
15 the personal jurisdiction defense asserted by Mr. Stern.

16 And the third set of motions would deal with the
17 subpoenas that have been directed against the third parties.

18 Does that order make sense?

19 *MR. BABCOCK:* Yes, Your Honor.

20 *THE COURT:* Except for requiring Mr. Ogden to sit for
21 a long time.

22 *MR. MEYER:* Well, Your Honor, if I might, we might be
23 able to cut Mr. Ogden loose earlier. The subpoenas directed to
24 his clients were issued out of the Eastern District of Texas.
25 He filed his response to cancel those subpoenas in this court,

1 and that's improper. He has to go to the Eastern District to
2 do that.

3 *THE COURT:* Mr. Ogden?

4 *MR. OGDEN:* I believe the Court does have jurisdiction
5 to hear them. It certainly makes sense to hear them in
6 conjunction with all the other matters here. While I could go
7 through that exercise, I'm sure what would happen is the
8 Eastern District would then transfer it here, because I have to
9 give them notice of ancillary proceedings and they would defer
10 to this Court's jurisdiction.

11 More to the point, I have never received a
12 subpoena. What I attached to my motion to quash was a notice
13 and a document list and I pointed out in the filing that there
14 was never a subpoena attached.

15 *THE COURT:* All right.

16 *MR. MCCABE:* Your Honor, may I just give one
17 authority? On February 8th, 2007, the Fifth Circuit held that
18 unless you have an MDL or consolidated cases, then the only
19 court that can quash a subpoena is the court that issued it.
20 And in this case it was in the Eastern District. That's *In Re:*
21 *Clients and Former Clients of Baron and Budd*, 478 F.3d 670,
22 Fifth Circuit 2007.

23 *THE COURT:* I'll certainly look at that authority. In
24 terms of our proceedings today, it does make sense to hear the
25 arguments. And if I decide that it is improper for me to make

1 a decision, then I will not make it. But I do think it would
2 be most helpful and efficient for me to hear the reasons either
3 to quash the subpoenas or to decline to do so.

4 *MR. MCCABE:* And one other thing, Your Honor, as far
5 as Ms. Harrington is concerned, the subpoena to her has been
6 withdrawn. She asked for more time to get counsel, and I
7 withdrew the subpoena on that basis.

8 *THE COURT:* The last time a subpoena was withdrawn, it
9 was, I believe, later reissued.

10 *MR. MCCABE:* Yes.

11 *THE COURT:* So, it sounds like you anticipate
12 precisely that.

13 *MR. MCCABE:* Yes, Your Honor.

14 *THE COURT:* Okay.

15 *MR. MCCABE:* And, so, hearing arguments on it might
16 also be proper.

17 *THE COURT:* All right. Well, I'll certainly hear
18 Mr. Ogden and decide whether it makes sense to at least
19 understand what the issues are with respect to Ms. Harrington.
20 But since I'm going to hear that, we go back to my first
21 question, the order of doing so. Let's get the remand issues
22 dealt with first.

23 You may all be seated, please.

24 It is your motion.

25 *MR. MEYER:* Yes, Your Honor.

1 *THE COURT:* Go ahead.

2 *MR. MEYER:* May it please the Court. My name is
3 Michael Meyer, and I represent plaintiff Virgie Arthur.

4 Virgie Arthur sued numerous defendants, including
5 KPRC, in the 280th Judicial District Court of Harris County,
6 Texas. As we all know, for the purposes of determining the
7 citizenship and diversity, KPRC is a citizen of Texas and
8 diversity therefore is not proper if KPRC was properly joined.

9 KPRC and CBS then removed the case to this court
10 claiming they were improperly joined and claiming that there is
11 no realistic possibility that Virgie Arthur will be able to
12 establish a cause of action against KPRC for rebroadcasting
13 defamatory statements made about Virgie Arthur on *Entertainment*
14 *Tonight* even if Virgie Arthur shows that in airing the
15 broadcast KPRC failed to exercise due care to prevent the
16 utterance of the statement in question. We then moved to
17 remand.

18 Now, just to boil it all down, essentially, Your
19 Honor, KPRC and CBS are claiming that even if the executives of
20 KPRC sat around a table, watched the episode in question and
21 said, "Wow, those are really defamatory statements and those
22 are really going to damage Ms. Arthur's reputation," and went
23 ahead and aired them anyway, that they would have absolute
24 immunity as a rebroadcaster and we would not be able to prove a
25 cause of action.

1 Because there is no such absolute immunity that's
2 ever been recognized by any Texas court, state or federal, KPRC
3 is wrong and this case should be remanded to state court. Now,
4 before going into any of the further argument, let me just go
5 through the standard of review because there is --

6 **THE COURT:** I know the standard of review.

7 **MR. MEYER:** There is one additional case, Your Honor.
8 We all know the traditional standard, but on April 11th, 2008,
9 the United States Court of Appeals for the Fifth Circuit
10 decided a case called *Memorial Hermann Health Care Systems*.
11 And they stated that a federal court sitting in diversity
12 should not make an Erie guess unless there was good sound state
13 law supporting that guess. And I see Your Honor shaking her
14 head, so I think she's familiar with the case.

15 **THE COURT:** I am.

16 **MR. MEYER:** The issue before this Court, then, is not
17 whether Texas has adopted a defense for a broadcaster who
18 rebroadcasts a defamatory statement. They have. There can be
19 no doubt about that. The issue is whether Texas has adopted as
20 a matter of its common law an absolute immunity for a
21 broadcaster who rebroadcasts and airs defamatory statements.
22 The reason I say that is because in the Texas Civil Practices
23 and Remedies Code, Section 73.004, the Texas legislature
24 adopted --

25 **THE COURT:** I'm familiar with the statute, but I have

1 a question about it --

2 *MR. MEYER:* Okay. Yes, ma'am.

3 *THE COURT:* -- raised in -- there's precious little
4 case law on this statute, which has been remarked in cases
5 talking about the lack of case law on this statute, and there
6 are not many of them. But I do have a question about the due
7 care standard under this statute. The statute obviously was --
8 predates much of the constitutional law that has developed
9 under the First Amendment and on its face appears inconsistent
10 with some of that law, particularly in the area of public
11 figures or limited public figures.

12 So, my threshold question is how do -- I know
13 there are some cases that continue to cite the Texas statute
14 but do so in a very cursory way. The most recent says, that
15 I've been able to -- well, no, not the most recent. None of
16 them in any way explore this apparent tension.

17 *MR. MEYER:* I agree, Your Honor.

18 *THE COURT:* How does it affect this case, assuming,
19 without deciding -- I know that your position is that
20 Ms. Arthur is not in any way a public figure, but assuming
21 without deciding that she is, how does that affect your
22 position?

23 *MR. MEYER:* I don't know the answer to that question,
24 Your Honor.

25 *THE COURT:* Don't I have to?

1 *MR. MEYER:* I would think you would first have to
2 determine she is, in fact, a public figure or a limited public
3 figure.

4 *THE COURT:* I'm not disagreeing with that.

5 *MR. MEYER:* And I think that then indicates that there
6 is a realistic possibility that a court would find she is not,
7 and in that case --

8 *THE COURT:* Well, wait, wait, wait.

9 *MR. MEYER:* Yes, Your Honor.

10 *THE COURT:* Why would I have to find it? I don't
11 understand how that follows. Why couldn't I find based on the
12 record before me -- or I guess I'm anticipating your argument.
13 I assume you will tell me why in your judgment a court could
14 disagree, reasonable courts could disagree as to whether she
15 was or wasn't a public figure for this purpose.

16 *MR. MEYER:* No, Your Honor, I'm not going to tell you
17 that.

18 *THE COURT:* What are you going to --

19 *MR. MEYER:* I'm going to tell you that I don't believe
20 that is relevant to the issue before this Court, as KPRC and
21 CBS both said. That whether or not she is a public figure or a
22 limited public figure is not an issue in determining whether or
23 not the defense, either absolute immunity or the limited
24 immunity found in 73.004, is applicable. Now, my statement was
25 therefore --

1 *THE COURT:* But doesn't it determine what the extent
2 of whatever immunity available under the statute might be?

3 *MR. MEYER:* No, I don't read the statute that way,
4 Your Honor.

5 *THE COURT:* But due -- what care is due?

6 *MR. MEYER:* Due care.

7 *THE COURT:* I know. What care is due care post --

8 *MR. MEYER:* And, Your Honor, that is another issue
9 that has never been decided. I've looked. I found four cases.

10 *THE COURT:* Well, maybe not by a Texas court, but the
11 United States Supreme Court may have decided that and that's
12 not an Erie guess. That's binding.

13 *MR. MEYER:* I don't think they have decided it in the
14 context of the statute, Your Honor.

15 *THE COURT:* If I was to apply the statute and say that
16 mere negligence on the part of a broadcaster would violate --
17 and in the context of the story about a public or a limited
18 public figure, would violate -- would rise -- mere negligence
19 is all that that statute requires. Okay?

20 *MR. MEYER:* Or -- I'm sorry, Your Honor. Go ahead. I
21 didn't mean to interrupt.

22 *THE COURT:* Okay. That is, I wouldn't -- if I was to
23 apply it to hold that a broadcaster who was merely negligent
24 could be liable for rebroadcasting a story about a public
25 figure, am I defining due care in that statute in a way that is

1 unconstitutional?

2 *MR. MEYER:* I believe you are, yes, Your Honor,
3 because I don't believe --

4 *THE COURT:* So, I don't have to have an Erie guess. I
5 can look to the Supreme Court law to apply the standard of care
6 that due care would require.

7 *MR. MEYER:* I don't think you would even ever get to
8 the statute in that case, Your Honor, because I don't think
9 there would be any defamation in that case.

10 *THE COURT:* Then the statute is meaningless?

11 *MR. MEYER:* No, the statute is not meaningless.

12 *THE COURT:* It only has meaning if there's a private
13 figure? It's meaningless in any application to public or
14 limited public figures, stories about people in that category,
15 because it then --

16 *MR. MEYER:* I believe the statute --

17 *THE COURT:* -- totally collapses into the
18 constitutional standard of malice?

19 *MR. MEYER:* I believe in the context of a public
20 figure or a limited public figure, the statute would run afoul
21 of constitutional guidelines.

22 *THE COURT:* Because the standard that is -- unless due
23 care is the same standard that the Supreme Court
24 has recognized, in which case it's not defamation either.

25 *MR. MEYER:* That's correct.

1 *THE COURT:* The standards collapse?

2 *MR. MEYER:* That's correct.

3 *THE COURT:* Okay. Then why is it irrelevant to
4 determine whether Ms. Arthur was or wasn't a public figure?

5 *MR. MEYER:* Well, I think it's irrelevant for the
6 purposes of determining whether or not the statute is
7 applicable. The statute is applicable any time defamation is
8 found.

9 My argument was that if she is a public figure or
10 a limited public figure and you cannot show malice, then you
11 are not entitled to recover and therefore you never need to get
12 to the affirmative defense. You only need to get to the
13 affirmative defense if, in fact, the plaintiffs can prove a
14 prima facie case of defamation, which against a public figure
15 or a limited public figure would require malice.

16 *THE COURT:* The one federal case that discusses this
17 statute -- let me get the language -- is it in any way helpful
18 on this issue?

19 *MR. MEYER:* No, Your Honor. I was going to make that
20 point in my argument. The defendants seem to believe that the
21 *Kaufman* case, which was decided in 1996 out of the Western
22 District of Texas is somehow relevant. But, in fact, if you
23 read the *Kaufman* case, what the court really said, and I think
24 I have the language here before me, on page 929 of the opinion
25 was, the Court said, "That this court must come to the

1 conclusion that the evidence put forth by Merco, the plaintiff,
2 is insufficient to overcome the standard of a clear and
3 convincing demonstration of actual malice by the defendant."
4 That is the issue they've decided.

5 And, in fact, I think it's in the very next
6 paragraph the court went on to point out that the defendants
7 had initially filed a motion based upon -- a summary judgment
8 motion based upon 73.004, and that they lost that motion. But
9 that their second motion for summary judgment based upon the
10 plaintiff's failure to show actual malice was what indeed was
11 being granted.

12 So, I don't believe that case has any
13 applicability to 73.004 except to acknowledge that it is there.
14 It is a viable statute. And that apparently at least, although
15 the court didn't address it, we can assume to some extent it
16 passed constitutional muster, because the court didn't --
17 although that's kind of thin, but they didn't make any
18 constitutional questions about infirmity of the statute.

19 And, Your Honor, in conclusion I would just say,
20 then, that there are only three cases --

21 *THE COURT:* Well, except --

22 *MR. MEYER:* Oh, sorry, I'm not concluding yet.

23 *THE COURT:* -- Footnote 1 actually does seem to me to
24 bear on this discussion. Footnote 1 says, "District courts
25 have found that the so-called defense, the statute, is actually

1 a definition of ordinary care with regard to the use of wire
2 service stories," which is how we got into this discussion in
3 the first place. "This Court," that would be Judge Bunton, "is
4 of the opinion that the wire service defense and the liability
5 of broadcaster defense are correlative enough to be used
6 interchangeably." And I raise that because it is the wire
7 service defense that we are essentially talking about.

8 *MR. MEYER:* Correct.

9 *THE COURT:* So, under that approach, if Judge Bunton
10 was right in that insight, looking at the other states that
11 have similar statutes, yes, you're right, it's sort of a
12 circular argument because you don't get to it unless you first
13 found defamation.

14 *MR. MEYER:* Correct.

15 *THE COURT:* But in order to determine whether
16 there's -- you do examine it as part of the wire service's
17 defense. And if he's right, if they're correlative, then
18 that's not an Erie guess. It's using the statute that at least
19 one federal judge has found to be the statutory expression of
20 the wire service's defense.

21 *MR. MEYER:* The liability in broadcasting statute?

22 *THE COURT:* Correlated in a way that doesn't change
23 the statutory language but recognizes that it is very cleverly
24 crafted to have the standard of care depend on and -- on
25 whether it's a public figure or a private figure and therefore

1 to be -- even though it was drafted before those distinctions
2 were perhaps fully charged with their present meaning, but the
3 point is that if that insight is correct, there is a Texas
4 statutory expression of the wire service's defense.

5 *MR. MEYER:* I'm not completely following that, Your
6 Honor, and I'll have to think about that.

7 *THE COURT:* It might be too much weight to put on
8 Footnote 1.

9 *MR. MEYER:* Yeah.

10 *THE COURT:* But there's not a lot of discussion on
11 this issue.

12 *MR. MEYER:* In summary, Your Honor, our argument is
13 just very direct and to the point. They've only cited three
14 cases. One is Washington law. One is Arizona law. One is a
15 Western District court case that I did go back and check, Your
16 Honor.

17 *THE COURT:* Have you looked at the case law in -- and
18 I'm going to ask the other side this too -- in Kentucky,
19 Michigan, Ohio, Wisconsin, and Wyoming, which have these
20 statutes to see if any of the case law under those statutes,
21 particularly post recent Supreme Court cases, has been applied
22 (A) if it exists and (B) if not, if there is a wire service
23 defense recognized in those states?

24 *MR. MEYER:* I have not.

25 *THE COURT:* It might be interesting.

1 **MR. MEYER:** But I will.

2 In summary, Your Honor, there are only three
3 cases they've cited. One is Washington. One is Arizona. One
4 is Western District of Texas. I did go back and shepardize the
5 Western District of Texas case. It's never been cited by any
6 other court in Texas, out of Texas. We believe that as to a
7 nonpublic figure, 73.004 is good law and provides a qualified,
8 but not an absolute immunity to KPRC.

9 We believe that there's a realistic possibility,
10 which is all we have to have at this point in time, that we
11 will show that Virgie Arthur is not a public figure, that she's
12 not a limited public figure, that, in fact, KPRC failed to
13 exercise due care. And we believe that we will eventually show
14 that the state law is, in fact, as we say it is, that 73.004
15 sets forth the immunity defense for a broadcaster.

16 But in any event, in light of *Memorial Hermann*
17 *Healthcare*, we believe it's a state court and not a federal
18 court sitting in diversity that should get the first bite at
19 the apple whether or not 73.004 is still good law.

20 **THE COURT:** The way you just framed the analysis, you
21 start with whether she's a public figure or not. Let's assume
22 for the sake of this discussion, again, going back, that I find
23 she is at least a limited public figure and that it is crystal
24 clear on the face of the record that I am permitted to look at
25 to determine fraudulent joinder. Okay?

1 Does that then lead me to either because I have
2 to then determine whether the affirmative defense applies or
3 whether there is a wire service defense otherwise recognized or
4 if they are the same for this purpose, but doesn't that fact
5 then shape the rest of the analysis?

6 *MR. MEYER:* Your Honor, I don't believe the question
7 before the Court is whether she is a public figure or whether
8 she is not a public figure.

9 *THE COURT:* Or whether there is a reasonable basis for
10 a finder of fact to make that decision.

11 *MR. MEYER:* I think the question is whether there is a
12 realistic possibility --

13 *THE COURT:* Sure.

14 *MR. MEYER:* -- that we can establish she is not a
15 public figure. That is the question before the Court.

16 *THE COURT:* Is that the starting question?

17 *MR. MEYER:* I believe it is a question. Yeah, it
18 would be very close to the beginning, if it's not at the start.

19 *THE COURT:* All right. Thank you.

20 Mr. Babcock?

21 *MR. BABCOCK:* Yes, Your Honor. Thank you. Charles
22 Babcock for the defendants CBS Studios and KPRC.

23 First of all, whether Ms. Arthur is a public
24 figure or not is a question of federal law. It is a question
25 of law, a pure question of law, and the Fifth Circuit tells you

1 that in a case like this it is pervasive and must be decided as
2 quickly as possible. That's *Miller versus Transamerican Press*,
3 621 F.2d 721. And there's a modified opinion later in the
4 Federal Reporter.

5 From this record the Court could certainly
6 determine that Ms. Arthur is, as a matter of law, a limited
7 purpose public figure. The test is laid out by the Fifth
8 Circuit in the *Trotter* case. We have briefed it and
9 demonstrated, I think, without any contradiction in the record
10 that she is. She reached out to the media. It's in the
11 pleading, that she reached out to the media before the
12 broadcast in question. She made use of the media. There is
13 evidence in the records that she was bartering with the media
14 for payment for her appearances. She appeared after the
15 broadcasts in question. And the evidence is quintessential
16 public figure. If the Court reaches that conclusion as a
17 matter of law --

18 **THE COURT:** And you think that's the starting point?

19 **MR. BABCOCK:** I think that is a starting point.

20 If the Court reaches that conclusion as a matter
21 of law, then *New York Times versus Sullivan* teaches us -- and
22 *Gertz versus Welch*, teaches us that an element of the
23 plaintiff's cause of action is constitutionally compelled as a
24 matter of federal law. It's a federal rule, as the *New York*
25 *Times* court said. And that is, that the plaintiff must prove

1 by clear and convincing evidence that the publications were
2 made with actual malice.

3 And actual malice does not mean, of course, the
4 common law malice of hatred, ill will or spite, but rather the
5 constitutional definition that the people responsible for the
6 publication either knew of the falsity that they were
7 publishing or, secondly, acted in reckless disregard of the
8 truth, which has been defined by the court in *St. Thomas versus*
9 *Amant* to mean that the people responsible for the publication,
10 in fact, entertained serious doubt about the truth of what they
11 were publishing.

12 **THE COURT:** Are you asserting that there's an absolute
13 immunity on the part of KPRC?

14 **MR. BABCOCK:** Immunity is a word that has been misused
15 by my learned opponent. The actual malice element is not an
16 immunity at all. It is an element of the plaintiff's cause of
17 action.

18 **THE COURT:** Well, let me rephrase it then. Counsel
19 portrayed a scenario under which KPRC's employees would be
20 sitting around a table watching the footage from *Entertainment*
21 *Tonight* and saying with glee, "This is false. It is
22 defamatory, and we can't wait to put it on the nightly news."

23 **MR. BABCOCK:** Yeah. The scenario he posits is an
24 interesting one. Of course, it is far afield from the record
25 in this case, where there is a contract in place where KPRC is

1 obligated to broadcast the program *Entertainment Tonight* as
2 it's transmitted to them in a satellite feed and on the days in
3 question was, in fact, transmitted to them.

4 The affidavit testimony of the KPRC general
5 manager is that they had nothing to do with the preparation of
6 the program. There is a counterpart affidavit from CBS Studios
7 that says KPRC didn't have anything to do with this. So, and
8 the contract, of course, says they're not permitted to change
9 it. So, there is no possibility of the sitting around saying,
10 "Oh, boy, we really got her now," because that is not --
11 there's no possibility of that under the facts of this case,
12 and there's been no counter-affidavit or counterproof in that
13 regard.

14 So, it is not an immunity, but the Constitution
15 says that if the plaintiff is a public figure, then there is no
16 possibility KPRC at least could be held responsible in a
17 constitutionally valid judgment for this broadcast.

18 There is another element to this. And I think
19 before I go to it, I want to talk about this statute 73.004,
20 because it to my way of thinking is a red herring in this
21 argument. 73.004 is a defense. It's something that is pled as
22 defensive matter.

23 *THE COURT:* I think you agree on that. First, you
24 have to have defamation before you ever get to the defense.

25 *MR. BABCOCK:* Well, I think I heard agreement on that

1 point from opposing counsel. The Court is quite right, that it
2 was drafted by the legislature before *New York Times versus*
3 *Sullivan*. And the reason why there's a derth of authority on
4 it is because nobody cites it anymore because it doesn't fit.

5 *THE COURT:* But here's what they cite it for in a
6 couple of recent cases: Broadcasters are generally not liable
7 in defamation for broadcasts made by third parties, citing
8 statute.

9 *MR. BABCOCK:* Yeah. And that may or may not be an
10 accurate description of the statute.

11 *THE COURT:* It may not be accurate, but it sure
12 doesn't require a remand.

13 *MR. BABCOCK:* Yeah, that's fair enough. So, we didn't
14 cite it in defense. I mean, if you'll notice, we did answer
15 and we didn't cite the statute. And it is -- you know, whether
16 it's an absolute immunity or not, I don't know that that's
17 particularly germane since we didn't raise it as a defense.

18 But even if you don't get -- you don't start with
19 public figure and even if you don't get to Ms. Arthur as a
20 public figure either because you don't think she is or because
21 the evidence is not developed enough to determine whether she
22 is or not, the removal is still proper under Texas law, and the
23 Court doesn't have to guess at all about it.

24 If you'll take a look and compare the *Auvil*
25 decision, which, of course, if the Court follows that, then

1 we're here and we're happy to stay. But if you compare that to
2 a Houston Court of Appeals *Felder versus KTRK*, almost exactly
3 the same language is found in the *Felder* case as you find in
4 *Auvil*. And it is in a slightly different context, but my
5 brother Ogden started this whole line of cases in Texas with
6 the *McIlvain versus Jacobs* case in the Texas Supreme Court.

7 And what happened in that case was, there were
8 allegations about a PIRG investigation here in Houston, and
9 Ogden got summary judgment for KHOU. The Court of Appeals
10 said, no, no, no, a summary judgment is not proper unless the
11 television station can prove the truth of the underlying
12 allegations. It's not just enough to say there's a PIRG
13 investigation going on and they say this and they say that and
14 they say the other thing, you've got to prove the truth of that
15 and there's a disputed fact on that, so you go back to the
16 trial court.

17 The Texas Supreme Court said, no, that's not
18 right. If you are republishing allegations, you don't have to
19 prove the truth -- the underlying truth of the allegation. All
20 you've got to do is prove that the allegations were, in fact,
21 made and you accurately reported them. And if you do that, you
22 have negated an element of the plaintiff's cause of action,
23 that being the falsity element, which the burden is on them at
24 trial. And by "them" I mean the plaintiffs.

25 The *McIlvain* case has spawned a whole bunch of

1 other cases in Texas law, which we've cited the Court, but
2 *Felder versus KTRK* describes it in such a perfect way, because
3 they say, look, no newspaper, no television station could be in
4 business if they had to prove the underlying truth of
5 accusations that come across the transom every day. And
6 cited -- and it was an opinion, I think, by Justice O'Neill who
7 went through this whole litany about, you know, when would you
8 ever know when there's an indictment, you know, that the person
9 is guilty or not guilty. That's the same type of analysis that
10 the *Auvil* court went through, a slightly different situation.

11 But if you listen to the plaintiff's argument,
12 what under Texas law, the result that they would reach would be
13 that the person that didn't have, like KPRC, that didn't have
14 anything to do with the preparation of the broadcast would be
15 more liable, more responsible than the original broadcaster.
16 And that can't be the law, and it certainly isn't Texas law.
17 And Texas law is as or more supportive of speech in the face of
18 a charge of libel than practically any other state in the
19 country. And you don't have to make an Erie guess about that.
20 You can read *McIlvain*. You can read *Felder*. You can read
21 *Grotti*. You can read *CBS versus Green*, which is a Fifth
22 Circuit case, which follows the *McIlvain* line of cases.

23 So, I just want to say for the record, Ogden, way
24 to go, nice job on your part, but others have carried that
25 document forward.

1 One other point I want to make --

2 *THE COURT:* May I ask a question here?

3 *MR. BABCOCK:* Yes, Your Honor.

4 *THE COURT:* Does the defense -- defense, wrong term.
5 Does the theory that you are asserting --

6 *MR. BABCOCK:* Yes.

7 *THE COURT:* -- apply if there is a basis for finding
8 that the republisher, your client, KPRC, knows of the falsity
9 of the story?

10 *MR. BABCOCK:* Is there a difference if they know of
11 the falsity of the story? I'm trying to think how that would
12 fit. No, I don't think it matters.

13 *THE COURT:* Well, I understand that it certainly does
14 operate to remove any exposure to liability for failing to
15 verify --

16 *MR. BABCOCK:* Yes.

17 *THE COURT:* -- whether what is being republished is
18 true.

19 *MR. BABCOCK:* Right. And there are -- under the
20 *McIlvain, Felder* line of cases, there are certainly
21 circumstances where the republishers, as the Court indicates,
22 may either know or be strongly suspicious that the allegation
23 is not true. If you take *Felder* itself, it was a bunch of
24 parents who were protesting about a teacher at a middle school
25 here in Houston and the allegations were somewhat to say that

1 at least far-fetched, that the teacher had taken scissors and
2 was trying to stab the kids and was slapping them around the
3 classroom and everything. And the court, the Houston Court of
4 Appeals said, look, it may be true, it may be not true, the
5 television station may have even thought that these are kind of
6 wild accusations, but they were being made. The president of
7 the PTA was there. They were certainly accurately reported.
8 And, therefore, an element of the plaintiff's cause of
9 action -- it's not a matter of immunity. It's an element of
10 their cause of action is missing in the case. And on that
11 question, the mental state of the republisher is irrelevant.
12 They may think this is wacky.

13 In fact, *CBS versus Green* is another case where
14 the allegation is a family dispute and a typical family
15 dispute. And they're saying all sorts of things about each
16 other, and CBS published the statements. But they were
17 admittedly true accusations. So, I think that the subjective
18 state of mind of the publisher in that instance is not
19 relevant.

20 Now, in actual malice, it certainly is, because
21 actual malice can be defeated or shown by knowledge or falsity
22 or reckless disregard if true. So, I think that's the way I
23 would respond to the Court's question in that regard.

24 *THE COURT:* Well, I think everybody agrees that it
25 provides protection against negligence exposure at a minimum.

1 MR. BABCOCK: That's the minimum standard required
2 under *New York Times* -- under *Gertz versus Welch*.

3 THE COURT: Under any --

4 MR. BABCOCK: You cannot constitutionally get to a
5 judgment without showing a minimum standard of negligence. I
6 mean, that's what *Gertz versus Welch*, the U.S. Supreme Court
7 said. And it said the states are free to apply a false
8 standard as long as it doesn't dip below negligence. And Texas
9 adopted sort of a negligence standard, *Foster versus Laredo*
10 *Press*, but it's an odd way of formulating it, but that's sort
11 of what everybody believes about the false standard for a
12 private figure in Texas.

13 THE COURT: I understand. I understand.

14 MR. BABCOCK: I know I've taken some time, and if I
15 could have a couple more seconds. In doing an analysis, it
16 seems to us, under -- on whether or not a remand is proper, the
17 Fifth Circuit and the Supreme Court have told us to look
18 initially at the allegations of the complaint. I think the
19 *Smallwood* case maybe said that directly. And if you go down
20 paragraph by paragraph in the complaint, it talks about how
21 Marshall was interviewed by *Entertainment Tonight*, a television
22 show produced and distributed by defendant CBS Studios, Inc.
23 So, there's a recognition and an admission that the show was
24 produced and distributed by CBS. That's their Roman numeral
25 III, Paragraph 6, page 3.

1 *THE COURT:* Are you going to the reputable point?

2 *MR. BABCOCK:* Excuse me?

3 *THE COURT:* Are you going to the reputability of
4 *Entertainment Tonight?*

5 *MR. BABCOCK:* I'm going to get there, although they
6 don't get to that in their pleading. They talk about that in
7 their brief.

8 *THE COURT:* Right.

9 *MR. BABCOCK:* But, yeah, I will talk about that in a
10 minute.

11 They next say in Paragraph 8, page 4, "In
12 November 2006, defendant CBS Studios broadcast portions of the
13 interview through its *Entertainment Tonight*. CBS distributed
14 the interview to its affiliates." So, again, they are pleading
15 that it was CBS that did it, not KPRC.

16 And then in Paragraph 10, page 5, "Defendant CBS
17 produced that episode of *Entertainment Tonight*," the
18 February 14th broadcast that they complain of, a composite of
19 two interviews defendant CBS conducted, not KPRC, defendant
20 CBS.

21 And then at Paragraph 10, page 4 and 5, the first
22 time they get to KPRC, "KPRC aired the February 14th broadcast
23 produced by CBS." And then they say, "The CBS production and
24 the manner in which KPRC produced it had a distinctly
25 defamatory tenor." I'm not sure what that means, because you

1 have to plead that it's defamatory under the statute, but in
2 any event. And then they say, "KPRC published with actual
3 malice." So, that's all they say about KPRC.

4 They do talk about how *Entertainment Tonight* is
5 not reputable. And I think if the Constitution says anything,
6 it says that courts shouldn't be getting into what publication
7 is reputable and what isn't. And what they may be thinking is
8 reliable rather than reputable. But in any event, we cited the
9 FCC decision that provided *Entertainment Tonight* with a bona
10 fide news exemption so that they could cover debates and have
11 political candidates on *Entertainment Tonight*. And it is a --
12 it's a road that most courts don't go down in determining
13 whether or not a portion of a news broadcast or television
14 broadcast may have silly entertainment in one part of it and
15 news in the other and, therefore, it's not entitled to full
16 recognition as a news program. It would be like saying, well,
17 the *Houston Chronicle* has an entertainment section, which it
18 does, or a garden section, which it does, and that's not news
19 and, therefore, the *Chronicle* is not a newspaper. Well, of
20 course, it's a newspaper and it's entitled for others to rely
21 on it.

22 The second thing that the Fifth Circuit and the
23 Supreme Court directs, I think, district courts to look at on a
24 remand motion is the evidence that is presented outside -- I
25 think, as they say, piercing the pleadings, considering summary

1 judgment type evidence. The *Ross* case and the *Badon* case, both
2 say that.

3 And our declarations, without contradiction,
4 Blackerby on behalf of KPRC testified that KPRC has no input
5 into or control over the reporting, production, content, or
6 editing of *Entertainment Tonight*. Contractually required to
7 broadcast it as it is. Did not review the program before they
8 aired it.

9 So, apparently they weren't on this occasion
10 anyway, not sitting around the table having cigars and saying
11 how much they're going to hurt Ms. Arthur.

12 And the declaration of Mr. Sloane was similar.
13 And Mr. Sloane being the vice president of legal affairs for
14 CBS Studios. KPRC didn't have any input into it. There's a
15 contract that prohibited them from making any changes.

16 So, based on all of this, the law and the facts,
17 there is no reasonable possibility that the plaintiff can state
18 a claim against the nondiverse defendant and for that reason,
19 the motion to remand, in our judgment, should be denied.

20 *THE COURT:* All right.

21 *MR. BABCOCK:* Thank you, Your Honor.

22 *THE COURT:* Thank you. Did you want to add anything?
23 That's been helpful. Thank you.

24 The second set of issues deals with the personal
25 jurisdiction challenge that Howard Stern has raised.

1 *MR. PATTON:* Yes, Your Honor.

2 *MR. MCCABE:* Your Honor, may I suggest that we haven't
3 finished jurisdictional discovery yet.

4 *THE COURT:* With respect to Howard Stern?

5 *MR. MCCABE:* Yes, Your Honor.

6 *THE COURT:* What discovery is outstanding?

7 *MR. MCCABE:* Well, we have a motion to compel
8 production since he provided nothing at the time of his
9 deposition by way of documents and we've asked the Court to
10 reopen his deposition for that purpose.

11 *THE COURT:* The motion to compel was -- I don't have a
12 response filed.

13 *MR. MCCABE:* Well, Your Honor, that's because --

14 *MR. PATTON:* Go ahead, Mr. McCabe.

15 *MR. MCCABE:* -- we filed the motion prematurely
16 without seeking conference with the Court and, therefore, I'm
17 sure it was perceived that there was no need to respond until
18 we have a conference with the Court about whether such a motion
19 should be heard.

20 *THE COURT:* All right.

21 *MR. PATTON:* I believe we confirmed that with your
22 clerk, Your Honor. But I can certainly address that.

23 *THE COURT:* Let's talk about -- let's have the
24 conference.

25 *MR. PATTON:* As far as -- can I move over here? Thank

1 you.

2 As far as the plaintiff's motion to compel, I'd
3 like to point out to the Court that Ms. Arthur has had five
4 full months in which to conduct jurisdictional discovery as it
5 relates to the issues raised by Mr. Stern in his motion to
6 dismiss for lack of personal jurisdiction. 21 days before --
7 the plaintiffs issued a notice for Mr. Stern's deposition and
8 accompanying that was a request for production of documents.
9 This notice was issued only 21 days before Mr. Stern's
10 deposition.

11 In order to facilitate the deposition, we
12 conducted a review for the documents that were sought by
13 Ms. Arthur, and we provided them with our formal responses
14 prior to that deposition. Our client's position, as Mr. McCabe
15 thoroughly questioned him on, is that he has no documents
16 within his custody or control that are responsive to the
17 requests that have been issued by Ms. Arthur.

18 Moreover, Your Honor, and I would suggest, that
19 the allegation in the petition of Ms. Arthur with regard to
20 jurisdiction -- personal jurisdiction over Mr. Stern relates to
21 specific jurisdiction, not general jurisdiction. All the
22 requests for production of documents related to potential
23 activities Mr. Stern would have in the state of Texas unrelated
24 to the alleged allegations, the alleged defamatory statements
25 that Mr. Stern is accused of conspiring to issue. In other

1 words, it didn't have anything to do with the jurisdictional
2 basis for which they allege in their petition. It was all
3 general jurisdiction documents. And Mr. Stern just doesn't
4 have those documents.

5 What Mr. Stern did, however, during his
6 deposition was point Ms. Arthur in the direction of where he
7 can access those documents that are in the public record. In
8 this particular situation, I think Mr. McCabe --

9 *THE COURT:* You mean the bankruptcy records, the
10 bankruptcy filings?

11 *MR. PATTON:* Yes, Your Honor. In particular, a fee
12 agreement that was executed between Mr. Stern's former law
13 firm, not Mr. Stern individually -- let me make that correction
14 on the record, between Mr. Stern's law firm and Ms. Marshall or
15 Ms. Smith, as they might refer to her. And there are other
16 documents, I believe, that were referred to. But at the end of
17 the day, what Mr. Stern said, "Look, any documents that you
18 want, I'll tell you where they are. I don't have anything in
19 my possession, custody, or control."

20 And at the end of the day what we would submit,
21 Your Honor, is that forcing us to respond to Mr. McCabe's -- or
22 Ms. Arthur's, I apologize, Ms. Arthur's motion to compel when
23 there just aren't any documents to produce and to reopen
24 Mr. Stern's deposition so Ms. Arthur's counsel can ask
25 questions such as -- and this is specifically in the motion to

1 compel, I believe Paragraph 3 or Paragraph 6, "Did you,
2 Mr. Stern, have sex with Ms. Smith?" I do not know how that
3 relates to anything with regard to either specific or general
4 jurisdiction.

5 So, we would submit that it should be rejected
6 out of the hand and that we should not be forced to respond.

7 I'll turn the floor over to my esteemed
8 colleague.

9 *MR. MCCABE:* Well, the sex issue came up because
10 Mr. Stern brought it up. He said he had been intimate. I just
11 wanted to define what that meant. That's not some area we're
12 trying to --

13 *THE COURT:* Not a jurisdictional inquiry?

14 *MR. MCCABE:* -- explore at any great length.

15 One of the positions that we have before the
16 Court today regarding this is that Mr. Stern's representations
17 that as a lawyer and a person, he doesn't have things such as a
18 contingency fee agreement for 6 percent of 88 point something
19 million dollars is incredible. And there has to be, I suppose,
20 a credibility determination made at some point about whether
21 the truth was told about whether he has any documents at all.

22 The second position is within your custody or
23 control, he made it clear he understood from that, that if he
24 has access to them. That means if he can get them from the
25 lawyers he used to work with, or wherever they are, he should

1 be the one providing them. The plaintiff should not have to go
2 and dig them out, the way we did from the bankruptcy court,
3 which actually is not an easy process. We got one document.
4 We got that 6 percent contingency fee agreement, and we
5 provided it to the Court in the record. So, we're not still
6 seeking that one.

7 *THE COURT:* What specifically are you seeking?

8 *MR. MCCABE:* We're seeking whatever other documents he
9 has access to that he can go get instead of making us go get
10 them. His responsibility is to provide the documents that he
11 has access to, Your Honor.

12 *THE COURT:* Well, what specific documents are we
13 talking about? That would be helpful.

14 *MR. MCCABE:* Contracts, bank records.

15 *THE COURT:* His contracts or his law firm's contracts?

16 *MR. MCCABE:* Well, Your Honor, contracts which he and
17 his law firm were a party to involving Anna Nicole Smith. Now,
18 it's somewhat unclear at times when --

19 *THE COURT:* And bank records?

20 *MR. MCCABE:* Yes, Your Honor.

21 *THE COURT:* Give me a more specific description.

22 *MR. MCCABE:* Well, any bank records relating to
23 activities in Texas. Now, Mr. Stern claimed there were none.

24 *THE COURT:* Of Mr. Stern?

25 *MR. MCCABE:* Regarding Mr. Stern, yes. And he claimed

1 there were none. This happened to be incredible to us, that
2 the man has no bank records for the entire time that he was in
3 Texas, which was like a five-month period while he was the
4 personal attorney for Anna Nicole Smith in *Marshall versus*
5 *Marshall*, or that he does not have access to them, and that's
6 the point. And we would like to see what those show, what
7 those transactions are and question him about them.

8 *THE COURT:* Any others?

9 *MR. MCCABE:* Contracts and bank records are the main
10 thing of interest, Your Honor.

11 *THE COURT:* All right. Let me have a response,
12 please.

13 *MR. PATTON:* Yes, Your Honor, just a very brief
14 response. And Mr. Stern testified under oath truthfully, he
15 doesn't have any of these documents in his possession, custody,
16 or control. Mr. McCabe --

17 *THE COURT:* Doesn't he have control over his own bank
18 records?

19 *MR. PATTON:* Well, he does have control over his bank
20 records presumably, of course, but what he said is that he
21 doesn't have bank records or bank accounts, I believe was the
22 line of questioning, in Texas or hold these things in Texas.
23 And this was for 2000 to 2001. This was seven years ago.

24 And I would point out, Your Honor, just having
25 access to standard as part of the possession, custody, or

1 control is simply not a standard that's accepted in the Fifth
2 Circuit. Along those lines, I would point to the *Wiwa versus*
3 *Royal Dutch Petroleum Company* case, 392 F.3d 812. It was a
4 subpoena that requested all documents to which the subpoenaed
5 individual had access. And the subpoenaed individual said, you
6 know, this is overbroad. And the Fifth Circuit agreed.

7 **THE COURT:** Well, is your concern that this request
8 for bank records is overbroad or that you don't -- or the fact
9 that they are in the bank's possession and not Mr. Stern's
10 possession means he doesn't have to go get them, they have to
11 go subpoena them from the bank?

12 **MR. PATTON:** Well, I think what the testimony was,
13 Your Honor, it wasn't related to bank records per se. I think
14 the line of questioning as it relates to Mr. McCabe's
15 deposition of my client was: Did you have any bank accounts?
16 Did you pay any business expenses? Did you do any of these
17 things while you were in the state of Texas for that five
18 months from 2000 through -- the end of 2000 to the beginning of
19 2001? It's not so much an access. What it is is that
20 Mr. Stern said, no, I don't. The Texas attorney paid for
21 everything. That is where the expenses came from.

22 And even so, Your Honor, I would submit that if
23 we're talking about a limited time in 2000 -- between 2000 and
24 2001, I address this in the motion argument, but, again, we're
25 talking about general jurisdiction. And the evidence, the

1 uncontroverted evidence that's been presented to the Court is
2 that Mr. Stern did not have continuous, systematic, substantial
3 contact with the state of Texas for the reasonable period
4 leading up to the time that this lawsuit was filed. He was
5 here twice, in that one time period in 2000 and 2001 and then I
6 think more recently maybe in August or September of last year
7 when he was asked to come here in his capacity as the executor
8 of the estate of Anna Nicole Smith to meet with FBI agents
9 regarding an ongoing investigation into somebody trying to sell
10 a video of some plastic surgery done on Ms. Smith.

11 This does not rise to the level. And even if
12 they had access to these records or even if Mr. Stern had
13 access to the records, what are these going to show? That he
14 was here between 2000 -- you know, for 5 months in 2000, 2001.

15 *THE COURT:* What about the contracts with the -- him
16 or his law firm with respect to Anna Nicole Smith?

17 *MR. PATTON:* And I think, and correct me if I'm wrong,
18 Mr. McCabe, but the argument was it was preposterous that he
19 wouldn't have a fee agreement, a retainer. Mr. McCabe, I
20 believe, submitted that fee arrangement and that fee agreement
21 that he pulled from public record after we told him that's
22 where he could go get it in support of his motion to compel.
23 So, as far as contracts go --

24 *THE COURT:* So, that's no longer the subject of the
25 motion to compel?

1 *MR. MCCABE:* Yes, Your Honor.

2 *THE COURT:* Is that the only contract that was at
3 issue?

4 *MR. MCCABE:* Well, that's the only contract we've
5 obtained, Your Honor. And we've submitted that just to show
6 that it's incredible that he wouldn't have a contract. No
7 lawyer would not have a copy is the point there.

8 Now, this is where we actually -- Your Honor, if
9 I had a contract I thought was going to be worth 240 --
10 \$88 million, which is what they thought at the time, I would
11 have a copy of it, I guarantee you that. This is where,
12 though, the argument actually bleeds over into the issue of
13 whether we can amend the complaint. Because since the time of
14 the deposition of Mr. Stern, two people we've alleged are
15 former co-conspirators to defame our client have now begun
16 cooperating with the plaintiff and have provided lots of
17 evidence of Mr. Stern's involvement in a continuing conspiracy
18 to defame our client. And these are going to be contacts with
19 the state of Texas, people operating Web sites in the state of
20 Texas, putting out information that turns out to be false about
21 our client and continuing to defame our client.

22 So, one shouldn't just think that at the time of
23 his deposition that that ends the analysis on jurisdiction.
24 Because we have come up with more evidence and we've presented
25 it to the Court in the process of trying to get the Court to

1 give us leave to amend the petition.

2 *MR. PATTON:* Back and forth, and you can cut me off at
3 any time, Your Honor. I don't want to take up too much time.

4 *MR. MCCABE:* Do you want the podium?

5 *MR. PATTON:* I'm fine right here, if Your Honor is
6 fine with me standing here.

7 *THE COURT:* No, I can hear.

8 *MR. PATTON:* We had a meet to prepare this joint
9 discovery case management plan. At that time -- although it
10 wasn't discussed at that time about this proposed amendment,
11 although Mr. McCabe alluded that he would do that, I would
12 point out that this happened, I believe, in March -- I don't
13 want to get it wrong here. It was filed on March 14th, 2008.
14 Mr. McCabe took the deposition of Mr. Stern at the beginning of
15 January of this year. In that deposition Mr. McCabe asked a
16 number of questions about these very people that he's now
17 seeking to amend to add to this complaint. Havana Rose, Bonnie
18 Stern. TMZ, I believe, maybe not. But I don't want to go out
19 on a limb there. But they had these information. They've had
20 five months to do this discovery.

21 *MR. MCCABE:* That's false. We didn't have the
22 information until the two people who were involved with the
23 blogging read the deposition of Mr. Stern and came to the
24 conclusion that he had testified falsely about not having any
25 bloggers volunteer or paid working for him. They then provided

1 the plaintiff independently of each other, they have provided
2 the plaintiff with e-mails and Web postings. And only
3 yesterday we took a sworn statement here in Houston from one of
4 those people who came down from Ohio to do so.

5 The case is still developing, Your Honor. And we
6 still have the intention, if the Court permits us to continue
7 with jurisdictional discovery, to get more information on this.
8 We've got the possibility we could depose Bonnie Stern. We
9 would be requesting her computer records. She was, according
10 to the information we've developed, contacting the Texas
11 bloggers, asking them to do things for Howard K. Stern. She
12 would say, "I've got Howard on the phone," or, "I just talked
13 to Howard." Howard apparently knew that they were using these
14 Texas people to continue to attack the reputation of my client.

15 It doesn't get cut off at the time that the
16 statements are made to *Entertainment Tonight* or the time those
17 *Entertainment Tonight* broadcasts are made. That's our
18 allegation and we have evidence to support it and we submitted
19 that to the Court.

20 **THE COURT:** Are you asking to have me defer the
21 decision on the personal jurisdiction over Howard Stern until
22 you have an opportunity to depose Bonnie Stern and supplement
23 the record?

24 **MR. MCCABE:** Bonnie Stern, yes. Rose Turner, yes.
25 And the other bloggers that we need to depose, such as

1 Ms. Harrington.

2 *THE COURT:* You're telling me you have to depose all
3 of these people in order to determine whether you have -- this
4 Court has personal jurisdiction over Howard Stern?

5 *MR. MCCABE:* I don't think we have to.

6 *THE COURT:* That sounds like it goes well beyond
7 jurisdictional discovery.

8 *MR. MCCABE:* Your Honor, I don't think we have to. I
9 think we've already provided enough to the Court, if the Court
10 will consider on the issue of personal jurisdiction the
11 evidence, the exhibits that we have presented along with our
12 motion for leave to amend and then the supplement to that.

13 *MR. PATTON:* I'll argue the motion. We believe that
14 he's had sufficient time to conduct the discovery that he
15 needs. We believe that the motion to amend should be denied.
16 I believe Mr. Babcock and Ms. Harrington --

17 *THE COURT:* Well, I'll hear from Mr. Babcock on the
18 merits of the motion for leave to amend. But if I consider in
19 deciding personal jurisdiction the information that is attached
20 to the later filed motion for leave to amend, do you then --
21 (A) do you object to that and (B) do you then want an
22 opportunity to respond to that evidence as it would apply to
23 the arguments relating to personal jurisdiction?

24 *MR. PATTON:* The latter, Your Honor, absolutely.

25 *THE COURT:* Okay. All right. I'll consider the

1 evidence. I don't think -- and based on that, I will -- based
2 on that expanded record, if you will, consider the merits of
3 your jurisdictional motion and response. And I'll give you,
4 what, two weeks from today to file a response to the motion or,
5 I guess, a reply to his response on the personal jurisdictional
6 issue specifically addressing the application or significance
7 of the evidence that was attached to the motion for leave to
8 amend.

9 *MR. PATTON:* One thing I might suggest, Your Honor, is
10 that I'm not fully clear on how Ms. Arthur is contending that
11 this is going to change the issues as it relates to personal
12 jurisdiction. When we're looking at the first amended
13 complaint, it's still that very basic --

14 *THE COURT:* I don't think it's the complaint itself
15 that Mr. McCabe is relying on.

16 *MR. PATTON:* Right.

17 *THE COURT:* It's the e-mails and stuff attached to the
18 motion for leave to file the proposed amended complaint that
19 he's relying on. Does that clarify it?

20 *MR. PATTON:* Yes, that sounds correct. And I could
21 address that today, but I would like time to go back and --

22 *THE COURT:* Well, I will consider that material in
23 deciding personal jurisdiction and I'll give you two weeks to
24 respond to the papers -- to add to the papers you've already
25 filed to address that additional information.

1 *MR. PATTON:* Okay. And would it -- Your Honor, does
2 it make any sense -- and I apologize if I'm stepping out of
3 line -- for the Court to issue a decision on the motion to
4 amend? Because if --

5 *THE COURT:* No, I want to hear the argument.

6 *MR. PATTON:* Right, right. But in the motion --

7 *THE COURT:* I don't think they're part and parcel.

8 *MR. PATTON:* Okay.

9 *THE COURT:* Because I can easily see saying, yeah,
10 I've got personal jurisdiction over Howard Stern, but I don't
11 think that it's appropriate to allow amendment to add these
12 additional parties.

13 *MR. PATTON:* I understand. Very good, Your Honor.
14 Thank you.

15 *THE COURT:* All right.

16 *MR. MCCABE:* Thank you, Your Honor.

17 *THE COURT:* I think that's where we are on motion to
18 compel.

19 *MR. PATTON:* Do you want our -- no argument today on
20 the motion to dismiss based on personal jurisdiction or --

21 *THE COURT:* I thought we've been hearing that. I
22 think I've heard everything.

23 *MR. PATTON:* No, that was arguing the motion to compel
24 actually.

25 *THE COURT:* Well, it kind of collapsed. I mean, your

1 argument, as I understand it, is that there is no basis for
2 general jurisdiction. You made that argument.

3 *MR. PATTON:* Yes. Yes.

4 *THE COURT:* And on specific jurisdiction, it's a too
5 little and too long ago.

6 *MR. PATTON:* Absolutely. As far as specific
7 jurisdiction goes, we believe the case law citing the *Revell*
8 matter and the *Young* matter that's also cited in *Revell*, that
9 there's just not -- they haven't made their prima facie showing
10 in establishing that minimum contact with Mr. Stern with the
11 state of Texas as it relates to the alleged tort conspiracy to
12 defame. And they haven't made any showing of a manifest intent
13 on behalf of Mr. Stern to direct those alleged defamatory
14 statements to the state of Texas. We believe the case law is
15 pretty clear on that.

16 Of course, we're going to come back and we're
17 going to deal with these issues that are out there with regards
18 to the attachments to his motion to amend and we'll do it all
19 at that time.

20 *THE COURT:* All right. Very well. Is there anything
21 you want to add at this point to that or do you think it's
22 addressed well enough?

23 *MR. MCCABE:* I think we're in good shape except, Your
24 Honor, I would wish to be able to -- if I can get the
25 transcription done, provide the Court with the one statement

1 that I took yesterday from one of the former co-conspirators.

2 *THE COURT:* And when are you going to provide that?

3 *MR. PATTON:* The alleged former co-conspirators. I
4 believe he was the one that took that transcript. I haven't
5 taken any testimony.

6 *THE COURT:* No, I understand.

7 *MR. MCCABE:* The cooperating witness, I should have it
8 by Monday. The court reporter is working on it now.

9 *THE COURT:* File any supplementation you want to by
10 Monday. You'll have two weeks from Monday to file your
11 response.

12 *MR. PATTON:* I appreciate that, Your Honor. Thank
13 you.

14 *THE COURT:* All right.

15 *MR. MCCABE:* Will the Court now hear the motion for
16 the --

17 *THE COURT:* Motion for leave to amend.

18 *MR. MCCABE:* -- motion to amend?

19 *THE COURT:* Yes.

20 *MR. MCCABE:* Your Honor, the Court's, of course, well
21 aware that Rule 15 says that leave shall be freely granted and
22 justice shall require it. So, the burden on us, the
23 plaintiff --

24 *THE COURT:* You're citing the old version of the rule.
25 It's no longer in effect since December 1st, 2007. Now,

1 there's no substantive change in meaning, but --

2 *MR. MCCABE:* Yes, Your Honor.

3 *THE COURT:* -- I want to point it out.

4 *MR. MCCABE:* Justice is still what we're seeking on
5 this, Your Honor.

6 *THE COURT:* I hope so.

7 *MR. MCCABE:* So, we just have to establish that
8 there's a reason.

9 *THE COURT:* Well, it's a slightly different test when
10 the effect of adding a party would be to destroy diversity, and
11 that's really what we're talking about.

12 *MR. MCCABE:* And, of course, one position we take on
13 this issue is that there is no diversity, because we have a
14 Texas defendant, KPRC, and, of course, that all depends on this
15 Court's decision --

16 *THE COURT:* Fraudulent joinder, right.

17 *MR. MCCABE:* -- about our motion to remand. And I
18 think the Court's given us some insight as to where it is on
19 that issue.

20 *THE COURT:* Still looking at it.

21 *MR. MCCABE:* What we're saying now when we say let's
22 amend the complaint and we should be given leave to do so, is
23 that since the deposition of Howard K. Stern was taken, as I
24 mentioned earlier, people have come forward. In fact, they've
25 even gone public and posted on a Web site why they believe that

1 it's been hidden until then, that there was a wider conspiracy
2 than we originally realized.

3 The original conspiracy is Howard K. Stern and
4 *Entertainment Tonight*, CBS Productions, putting Anna Nicole
5 Smith up to this defamatory couple of interviews where she says
6 that her mother was complicit in physical and sexual abuse of
7 her as a child, which by the way is not a subject that Virgie
8 Arthur had spoken on prior to those defamatory remarks. So,
9 our argument would be that she didn't make herself a public
10 figure as to that, that issue, Anna Nicole Smith and whether
11 she was abused as a child.

12 And, of course, a person doesn't make himself or
13 herself into a public figure for all purposes just by going on
14 television and talking about something else.

15 After those remarks were made and after Anna
16 Nicole Smith died, it turns out, and we have the facts to
17 support it, that people sort of volunteered to try to help
18 Howard K. Stern maintain his position as the father of the
19 baby, because they believed he was, because he said he was and
20 because it seemed Anna Nicole Smith was saying that he was the
21 father of the baby, Dannielynn.

22 They came together and started doing everything
23 they could in their own words to support Howard K. Stern,
24 because they believed in him, and to destroy those who were
25 opposed to Howard K. Stern's interest. And at the time that

1 included Larry Birkhead, whom they thought was falsely claiming
2 to be the father of the child, and my client, Virgie Arthur,
3 because they believed, I think, what her daughter had said on
4 television, that she had been a monstrous mother.

5 So, the belief was on the part of these folks on
6 the Internet, that they should keep my client from getting her
7 hands on, that's their words, that child. Some of them
8 persisted in this even after it was shown by DNA evidence that
9 Howard K. Stern was not the father. All I can do is call them
10 true believers that he was a good man, and they decided to
11 support him anyway because they believed he was going to do
12 what's in the best interest of the child, all understandable.

13 The methods, however, and the results of some of
14 those methods are very regrettable and they're defamatory. And
15 what we've outlined in the e-mails that we so far have been
16 able to acquire from cooperating former conspirators show that
17 we have Bonnie Stern on the Internet communicating either in
18 chat rooms or through e-mails with Rose -- well, her name is
19 Nelda Turner, but she goes by the name Rose, who's in Texas,
20 and other people around the country, to gather evidence,
21 anything they can. They called it "digging up Virgie dirt."
22 They talk about finding skeletons in her closet. Anything they
23 could to hurt the reputation of my client or anyone else
24 opposed to Howard K. Stern is the way they put it, or his
25 interests. And they were successful.

1 And it's not just Bonnie Stern asking them for
2 these things or directing them what to look for. She is
3 representing -- now, maybe she was lying. But she's
4 representing to these people in Texas, Rose Turner and others,
5 that she's on the phone with Howard or was just on the phone
6 with Howard and this is what he wants from them, and they're in
7 Texas.

8 So, we have, unless Bonnie is lying, a clear
9 connection with Howard K. Stern directing through her, Bonnie,
10 activities in Texas to try to defame my client. Now, what's
11 the defamation? There was more than one piece of it. First of
12 all, there was a steady stream of calling her "Mommie Dearest,"
13 which is a way of sort of encapsulating the defamation that her
14 daughter engaged in. The "Mommie Dearest," of course, is the
15 title of a book about Joan Crawford and what a monster she was
16 in the eyes of one of her children. So, every time you say
17 "Mommie Dearest," it's as if you're recalling that *ET* interview
18 where Anna Nicole Smith is alleging that her mother was
19 complicit in sexual abuse of her as a child.

20 What do they come up with? Well, these Texas
21 bloggers, and others, came up with more than one story. One
22 story was that Virgie Arthur had a child by her own
23 step-brother. That story made its way to TMZ.com, published by
24 Harvey Levin, who is the managing director there, and that's
25 why we're trying to add those two defendants, TMZ and Harvey

1 Levin. It went on their Web site. Now, they said, well, they
2 weren't blood. TMZ said they weren't blood, but what do you
3 think about it. No, the intention is to hurt her reputation in
4 the eyes of the public. They even do a poll with 115,000
5 respondents, 85 percent of them saying that that's creepy. But
6 if you look at the comments that go with the story on TMZ --
7 and they're still there, by the way. There are thousands of
8 comments. Many of the comments say that what Virgie Arthur did
9 was incest.

10 Now, there's a problem with the story. It's not
11 true. That is, the truth is Virgie Arthur was, like, 14, got
12 pregnant, a teenage male. They get married. She has the baby.
13 They get divorced. Later on Virgie Arthur's mother and the
14 young man's father get together. At no time were these two
15 young people married as step-brother and step-sister. That
16 story has been terrifically damaging to her reputation. And we
17 have the e-mails to at least indicate -- we don't have all the
18 discovery, so we can't prove everything, but indicate that at
19 least at one point Rose Turner was the one looking for more on
20 that story. And then we have one of the people she's
21 corresponding with exalting in an e-mail and saying that TMZ
22 picked up the story and we've known about it for a long time.

23 Now, do I have the actual person who sent the TMZ
24 story? I don't have that yet. I've questioned people about it
25 and don't have it, but I think that's enough to see the pattern

1 of Howard K. Stern through his sister, Bonnie, using people in
2 Texas to get more defamation.

3 The second piece of defamation was that Virgie
4 Arthur had an incestuous relationship with her cousin. Not
5 true. That went up. I know who put that one up. It's one of
6 the people who's now cooperating with us and is very sorry
7 about it. And that went up about the same time or maybe even
8 the same day as the step-brother story and was taken down.

9 So here we have people in Texas cooperating with
10 Bonnie Stern and through her with Howard K. Stern. I believe
11 that we have plenty of evidence to show that the conspiracy
12 that originally existed broadened and it was virulent and they
13 were dedicated to destroying Virgie, in their own words,
14 destroying Virgie. And I think that's plenty of good grounds
15 to add people to this law suit.

16 Now, Art Harris is another one. He has postings
17 where he's repeating the defamation. He's a Georgia -- I guess
18 he calls himself an investigative journalist. He has a blog.
19 He sometimes appears on *Entertainment Tonight* as a special
20 correspondent. His own postings show he's clearly cooperating
21 with the Texas bloggers. He talks about them. His own
22 bloggings show that he's clearly intimately connected with
23 Howard K. Stern and is getting information from Howard K.
24 Stern. He's also getting information from his lawyers,
25 sometimes in violation of a court order in New York, getting

1 postings to put on his blog. So, he's intimately involved with
2 them.

3 We also have postings where when one of the --

4 *THE COURT:* I'm not going to ask what you mean by
5 intimately involved.

6 *MR. MCCABE:* And I don't mean any kind of innuendo in
7 that regard, Your Honor.

8 *THE COURT:* Because he had told me you had made a
9 point of that in the deposition.

10 *MR. MCCABE:* Well, that was someone else's words I was
11 asking for a definition on. Please don't ask for mine on that.

12 We have at one point the e-mails to show that
13 when one of the co-conspirators read Howard K. Stern's
14 deposition and became convinced that he had lied about her, she
15 then contacts Art Harris, Bonnie Stern, and Rose Turner and
16 asks what's going on and gets responses from all of them. At
17 one point Art Harris says, "They may be trying to push your
18 buttons to see if you're going to jump ship." Well, that tells
19 me they're all in the same boat. You can't jump ship unless
20 you're all in the same boat, Your Honor.

21 So, we have, I think, enough indication. Can we
22 prove our case by clear and convincing evidence? At the
23 moment, maybe not, but I don't think we have to be able to do
24 that right at the moment. We get to do some more discovery and
25 do that, Your Honor. I think I'll leave it there. I think

1 I've painted enough of a picture and I'll pass at the time.

2 *THE COURT:* Mr. Babcock?

3 *MR. BABCOCK:* I think our argument, Your Honor, is
4 going to presume that the motion to remand is denied. And just
5 chronologically what happened was we removed this case to this
6 Court. They filed a motion to remand I think the day after
7 Christmas or sometime late in December. And we filed our
8 response to that motion to remand. And then a couple of months
9 later they filed this motion to amend, which I think everybody
10 concedes, if it's granted and Ms. Turner is added as a
11 defendant, then that would destroy diversity.

12 And, so, if the motion to remand is denied, they
13 may be able to accomplish their purpose of going back to state
14 court by adding Ms. Turner. So, I'm going to argue the
15 *Hensgens* case, assuming that we're still here to have this
16 argument. And *Hensgens*, I think, sets out three factors for
17 the Court to consider -- four factors actually. Whether, one,
18 the purpose of the amendment is to defeat diversity; two,
19 whether the plaintiffs have been dilatory; three, whether the
20 plaintiff is going to be significantly injured if the amendment
21 is not allowed; and, four, other factors, of which there are
22 some, I think, in this case.

23 On the issue of the purpose being to defeat
24 diversity, I think the Court can consider in the first instance
25 that although they joined KPRC as a defendant, they did not

1 join the person who was the defamer. It was Anna Nicole Smith,
2 now her estate, that was the defamer here, and they didn't join
3 Anna Nicole Smith. That is an indicia, in my judgment, of an
4 effort to avoid diversity jurisdiction by joining somebody
5 who's got nothing to do with it and not adding as a defendant
6 the person who did it.

7 The second is they do seek to join a diversity
8 destroying defendant who has no connection and not even any
9 alleged connection to the *Entertainment Tonight* broadcast,
10 specifically the February 14th, 2007, broadcast. There's no
11 allegation, there's no e-mail, there's no Web site that has
12 anything to do with Turner or frankly any of these other
13 defendants to that defamation.

14 And I notice that the way they've pled
15 conspiracy, they almost seem to plead it as if it is an
16 independent tort, which it is not. It's just a way to get
17 additional people tied into an existing tort. And the only
18 tort that is pled in the original complaint is this
19 *Entertainment Tonight* broadcast on February 14th where the
20 allegation, as they characterize it, was that Ms. Smith said
21 that her mother had beaten her and been mean to her during
22 childhood.

23 We'll see in a second that these allegations that
24 were just talked about are something completely different, not
25 whether Anna Nicole Smith was abused by her mother, but rather

1 whether her mother married a step-brother and had a child or
2 whether there was incest or some other thing, but nothing
3 related to the original defamation, which is what we're here
4 about. And there is no e-mail, there's no Web site that has
5 anything to -- that's attributed to any defendant and certainly
6 not CBS or KPRC.

7 So, for those reasons we think the first element
8 weighs heavily against the plaintiff's amendment in this
9 regard.

10 The second factor being dilatory, we pointed out
11 that all of these e-mails and Web site postings that are
12 referenced in the motion occurred in April or May of 2007,
13 which was five months before they filed their lawsuit and yet
14 they didn't join these people. Their explanation is, well, we
15 didn't know about it. There is no proof of that. But,
16 frankly, on the other side, we don't have any proof that they
17 did know about it. So, maybe that factor is a push.

18 The third factor is the prejudice to the
19 plaintiffs. Since the proposed amendment does not relate to
20 the *Entertainment Tonight* broadcast, it seems to us that there
21 will not be any prejudice to the plaintiffs. Whether they have
22 to or whether they do file a separate lawsuit is, frankly,
23 nothing that we can control, nothing that anybody can control.
24 I suppose that they can file another lawsuit if they want to.

25 But it is fairly -- not fairly. It is clear from

1 their proposed amendment, which they attached as Exhibit H to
2 their reply brief, it's clear that what they're talking about
3 now has nothing to do with the *Entertainment Tonight* broadcast
4 in February of 2007. In fact, the proposed amendment is
5 unchanged -- essentially unchanged -- they've moved some
6 sentences around a little bit -- through Paragraph 21 of their
7 proposed amendment. And then starting with Paragraph 22 of
8 their proposed amendment, they pick up the story after Anna
9 Nicole Smith dies and say that Howard Stern got very upset
10 because Virgie Arthur had warned her daughter to be careful and
11 now she's dead. And then it says, "Defendant Stern, infuriated
12 over this and working with others, expanded the conspiracy to
13 destroy Virgie." But those others are not CBS and they're not
14 KPRC either.

15 *THE COURT:* Mr. Babcock, is this a Rule 20 problem?

16 *MR. BABCOCK:* It is a --

17 *THE COURT:* Permissive joinder of parties?

18 *MR. BABCOCK:* Yes, I think so. And that actually was
19 going to be my argument on the other factors. Because even if
20 they had brought this case originally in this court or in state
21 court, I mean, we would be up here arguing wait a minute, we've
22 got nothing to do with this. You should split these cases,
23 sever them in some fashion. Move these guys over to this
24 corner of the room and let us fight our battle over here in the
25 other corner. And I think that's another factor that the Court

1 should consider here in order to deny the amendment, which
2 would destroy diversity and allow them to achieve indirectly
3 what I hope they will not be able to achieve directly.

4 And that said, that's all I have unless --
5 although I will say that the new amended rules are a
6 spectacular work product, by the way.

7 *THE COURT:* What's the significance of the fact that
8 Howard K. Stern is a defendant in the original suit and in the
9 proposed expanded suit?

10 *MR. BABCOCK:* Well --

11 *THE COURT:* I mean, obviously your argument would be
12 even stronger if Howard K. Stern was not named until the
13 proposed amended complaint. And, indeed, the original petition
14 could have been written without naming Howard Stern, just --

15 *MR. BABCOCK:* True.

16 *THE COURT:* -- going after the media defendants. But
17 it does name Howard Stern obviously. So, what's the -- how
18 does that affect your argument?

19 *MR. BABCOCK:* I think it affects it in this way:
20 There certainly is a burden on Mr. Stern if he's got to defend
21 two lawsuits instead of one lawsuit. I note with interest, and
22 his counsel is here, of course, but they have joined in our
23 opposition. So, at least on that issue, Mr. Stern has weighed
24 in --

25 *THE COURT:* I really wasn't thinking of it in terms of

1 the burden on Mr. Stern. I was thinking of it more in terms of
2 whether that provides (A) some and then the question is whether
3 it is enough relationship between the facts alleged in the
4 present pleading and the facts alleged in the proposed amended
5 pleading.

6 *MR. BABCOCK:* Yes, and I think that that bridge is
7 virtually nonexistent and so as slim as not to be a way to get
8 to us. I mean, in the original pleading Mr. Stern is said to
9 be present at the interview where Ms. Smith defames her mother.
10 And the allegation is he had his arm around her and maybe he
11 had been whispering in her ear or something, but that's it for
12 Mr. Stern in the original case.

13 Now, in the amended case, they start off after
14 Ms. Smith has died and obviously after the interview, because
15 she was alive at the time she gave the interview, but after she
16 died and now he's supposedly mad and he gets all these attack
17 bloggers to go take out after Ms. Arthur, but it has nothing to
18 do with us.

19 *THE COURT:* All right.

20 *MR. BABCOCK:* Thank you, Your Honor.

21 *THE COURT:* Let me hear from Mr. Stern's lawyer.

22 *MR. LANTTA:* Well, Your Honor, under either the
23 original complaint or the amended complaint we're confident
24 that under neither set of facts does this Court or any court in
25 the state of Texas under the facts pled by the plaintiff have

1 personal jurisdiction over Mr. Stern.

2 And with respect to the amended --

3 *THE COURT:* But I take you're also opposed to the
4 amended complaint?

5 *MR. LANTTA:* To the amended complaint. I would just
6 remind the Court that the unilateral acts of third parties,
7 perhaps in this case parties with delusions of grandeur
8 involvement in a high-profile case than exists in actuality --

9 *THE COURT:* Well, as I understand the theory, though,
10 of the plaintiff's approach, it wouldn't be the unilateral acts
11 of third parties. It would be at least some sort of agency
12 relationship with Mr. Stern through the role of, I guess,
13 Bonnie Stern.

14 *MR. LANTTA:* Right. And I understand that that's the
15 position that they're taking, but I think when we look at what
16 they've even attached to their pleadings here, it does not
17 support any sort of agency theory. And I'm still waiting for
18 the e-mail or the documentation of Mr. Stern directing his
19 sister to then set into motion this group of conspirators,
20 because you're not going to find it.

21 I just wanted to follow up on the motion to amend
22 the complaint to add additional jurisdictional facts. And I
23 think to a certain extent we may have resolved that through the
24 briefing with a schedule set of two weeks from now, so that the
25 amendment of the complaint to add these additional

1 jurisdictional facts will be unnecessary since the Court has
2 indicated that it will consider them in the context of the
3 motion to dismiss for lack of personal jurisdiction. Am I
4 correct?

5 *THE COURT:* I think that's right. I mean, these
6 aren't jurisdictional facts in the sense of alter ego kinds of
7 facts of the sort that are evidenced in the materials you want
8 me to consider. And I think you're right.

9 *MR. LANTTA:* Okay. I just wanted that clarification.
10 And then just to reiterate our position, that we do join in the
11 media defendants' motion and ascribe to the argument by
12 Mr. Babcock.

13 *THE COURT:* All right. Thank you.

14 Anything further on that before we take up the
15 issue of the subpoenas briefly?

16 *MR. MCCABE:* Yes, Your Honor, just briefly. The
17 question was raised by Mr. Babcock about our not suing the
18 estate of Anna Nicole Smith. Obviously there's a reason for
19 that. It's not any kind of game we're playing. We don't want
20 to take money away from the baby. And if we did sue Anna
21 Nicole Smith's estate, that's what we would have been pounded
22 with, that we're trying to take money away from the little
23 girl. No desire to do that whatsoever. That decision was
24 made, a very sensible, tactical, oriented and strategic
25 decision not to go after the estate. Could have done so,

1 certainly.

2 Now, the idea that there's no relation of this
3 blogging and Bonnie Stern and these newer defendants to the *ET*
4 broadcast is just factually wrong. I mean, that's why these
5 new defendants hated my client, were willing to defame her,
6 because they saw the broadcast. They believed the broadcast.
7 They joined a conspiracy and they therefore ratified the
8 broadcast. That's what happens when you join a conspiracy
9 already in progress. You ratify the tortious acts that that
10 conspiracy has done. So, there's plenty of relation to the *ET*
11 broadcasts.

12 I think the idea that we were dilatory has been
13 dispensed with. I represent to the Court that we did not get
14 these e-mails and Web postings from these folks who left the
15 conspiracy and came to cooperate with us until after
16 Mr. Stern's deposition, after these two folks became convinced
17 that he had lied in his deposition about his contact with
18 bloggers, and that was only recently. We got one set of them
19 verified. I think only within a week we filed to amend the
20 complaint. Others we got just a week ago today and filed them
21 that day with this Court. There's been no dilatory nature of
22 our proceedings at all.

23 Now, how does -- I'm not quite sure what CBS's
24 position was just now on Mr. Stern and his relationship to the
25 new defendants being different from the relationship to the old

1 defendants. It seems to me that Mr. Stern engaged in a
2 conspiracy to defame and then he broadened that conspiracy by
3 contacting through his sister some other people. It really
4 doesn't matter for purposes of the law whether CBS was part of
5 those new activities. They were already part of the
6 conspiracy. If new conspirators join a conspiracy even without
7 the knowledge of CBS, CBS can be liable for what those new
8 conspirators do in the course and furtherance of the
9 conspiracy. That's black letter conspiracy law. You don't
10 even have to know -- one does not even have to know who the
11 other conspirators are to be liable for the acts of the other
12 conspirators in the conspiracy of which they are a part.

13 Now, if what CBS is really saying is that if
14 these new defendants come in, they'd want out, we're not going
15 to take a position on that right now. We think we can keep
16 ahold of CBS as a defendant in this case one way or another.
17 We're not going to have to have people severed out, because the
18 conspiracy once begun, taking on new people, that doesn't give
19 CBS a chance to get out of being in the same case with the new
20 conspirators, even though they had no direct contact with them
21 as far as we know.

22 Well, I would have to note that one of the new
23 conspirators actually worked for CBS Studios.

24 *THE COURT:* But not in connection with any of the
25 events at issue here?

1 *MR. MCCABE:* Well, we just don't know that yet. We
2 would love to get some discovery on Mr. Harris and see to the
3 extent that he was involved with CBS. He continued to appear
4 on *Entertainment Tonight*. I don't know what his communications
5 were with them.

6 *THE COURT:* All right.

7 *MR. MCCABE:* That's what discovery is for.

8 *THE COURT:* Thank you.

9 *MR. BABCOCK:* Your Honor, I have one other thing in
10 quick response, if I could just stand here. You asked me
11 about Rule 20 --

12 *THE COURT:* Yes, sir.

13 *MR. BABCOCK:* -- and I stand by my answer, but
14 Ms. Hamilton asked me to also say that under Rule 19, joint
15 tortfeasors or co-conspirators are not indispensable parties
16 and it is not an abuse of discretion for the Court to deny a
17 motion to amend to join a nonindispensable party. And I did
18 not make that point at all, much less clearly.

19 *THE COURT:* All right. Thank you.

20 Subpoenas? Yes, sir.

21 *MR. BABCOCK:* It's about time we heard from him.

22 *MR. OGDEN:* I'm not so sure. Thank you, Your Honor.
23 Bill Ogden for Rose and Ken Turner. You want to hear on the
24 motion for the subpoena?

25 My client, Rose Turner, is -- has nothing to do

1 with this. She is unfortunately housebound with a terminal
2 autoimmune disorder in Gladewater, Texas, and as distraction
3 she spends what she would probably admit is too much time on
4 the Internet, like a lot of people, focusing on sensational or
5 celebrity trials and issues. She speaks out about them. She
6 is a blogger and she posts a Web site. And on the Web site
7 she's uploaded public information and documents from court
8 cases that relate to Anna Nicole Smith and that also relate to
9 Britney Spears and Michael Jackson and others.

10 She had nothing to do with *Entertainment Tonight*.
11 She had nothing to do with the interview. She doesn't know
12 Anna Nicole Smith. She's never met Howard Stern. Her sin is
13 expressing an opinion that Mr. O'Quinn and Mr. McCabe disagree
14 with.

15 The subpoena is, I think, overbroad. It's
16 clearly a strike effort to intimidate people who express an
17 opinion that is different than the opinion of Ms. Arthur. But
18 Rose Turner has really nothing of substance to add to the
19 issues in this lawsuit, in our view, and simply seeks
20 protection from having to go through the expense of having
21 someone paid to image essentially her entire hard drive. The
22 subpoena asks for everything that relates to 20 -- 15 or 20
23 different Web sites and 20 to 25 different people. And if you
24 start from the premise that she is an unpaid, perhaps unwanted
25 volunteer, solo critic and commentator lost out there in

1 cyberspace who in her circumstances comments about a lot of
2 public celebrity trials, well, there's probably a lot of stuff
3 out there.

4 But that there are cyber critics who are free
5 these days to comment on these public issues is a far cry from
6 making them co-conspirators. She hasn't agreed with anyone to
7 do anything. Mr. McCabe just said there were a lot of people
8 who volunteered to help one side or the other, and I think that
9 my client falls into that category. She wasn't solicited to
10 help anybody. She didn't agree to help anybody. She just does
11 this, frankly, to pass the time.

12 So, she's asking the Court to please intervene
13 and give her some protection from this onerous subpoena on
14 issues that we think are remote to the initial complaint.

15 *THE COURT:* Is your argument in part the expense of
16 compliance or simply the fact of compliance?

17 *MR. OGDEN:* It's both. It's both the expense, because
18 of the breadth, overbreadth of the subpoena. It's also,
19 frankly, for her a fear factor. She feels intimidated and
20 threatened. And, frankly, part of the reason why I got
21 involved is I don't like people who -- punished for speaking
22 out. And I think that's all she did. Perhaps, again, her
23 opinion is unpopular, perhaps it's one Mr. McCabe doesn't like,
24 but she's entitled to it and she's entitled to express it. And
25 the fact that she speaks on the Internet, by e-mail, or

1 otherwise, doesn't make her a conspirator with anybody. It
2 makes her a citizen who's entitled to express her opinion. I
3 do think she is entitled to a privilege.

4 *THE COURT:* We kind of have three separate issues
5 here. One is making her a party, which your argument is
6 sliding towards.

7 *MR. OGDEN:* Yeah, I didn't understand you to be asking
8 me to address the motion for joinder --

9 *THE COURT:* No.

10 *MR. OGDEN:* -- and since I'm not privy to the
11 pleadings and not a party, I didn't feel qualified to do so.

12 *THE COURT:* Well, but your argument was couched in
13 part in she's not a conspirator, which is part of the argument
14 about the propriety of adding additional parties from the
15 blogger cohorts.

16 The second aspect is the financial burden of
17 compliance. The obvious -- an obvious response to that concern
18 would be to require those seeking the discovery to pay the
19 costs of it. And we haven't talked about that.

20 The third source of concern is the overbreadth.
21 That is, that there's probably a lot of stuff there that would
22 require review in order to at least remove things that were not
23 responsive or were irrelevant or lodge whatever other
24 objections might be appropriate. And the point of that is that
25 the cost of compliance might include the cost of having that

1 review done, which is -- or some way to address that burden.

2 *MR. OGDEN:* I guess the other component to it, which
3 is in my motion, is she has a concern about privacy.

4 *THE COURT:* That is part of the --

5 *MR. OGDEN:* Which would be part of the burden.

6 *THE COURT:* -- the need for review to address that
7 concern and minimize the impact or ask the Court to at least
8 limit what is sought in discovery, which means that there's a
9 bunch of attorneys' fees being ginned up and somebody has got
10 to pay them and she's a third party at least right now.

11 *MR. OGDEN:* And obviously if we start down this road,
12 her request to me was to seek, if there were particular bullet
13 points of information that Your Honor felt were relevant, she
14 would be asking the Court for permission to submit them in
15 camera for your review prior to production. There have been
16 efforts by people in the community, she tells me, to hack into
17 her Web site. There's been an accusation that was floating
18 around about some of these scurrilous charges and that she had
19 engaged in them or they engaged in all sorts of nefarious
20 activities, and she's frightened.

21 *THE COURT:* Did you want to respond?

22 Thank you.

23 *MR. MCCABE:* Yes, Your Honor. The argument that Rose
24 Turner is not involved in this matter I think is answered best
25 by looking at what was submitted to the Court. We've clearly

1 got communications between Rose Turner and Bonnie Stern. She's
2 taking directions from Bonnie Stern about what Howard wants
3 done. She's giving directions to people about the particular
4 TMZ story that we eventually see, about the step-brother story,
5 telling people to research it. She's involved all right.

6 Now, the other concerns about the subpoena
7 allegedly being too broad or -- and the expense, those are
8 concerns that I can understand anyone would try to voice. And
9 our suggestion to the Court would be, I think we signaled to
10 the Court coordinator earlier, that we would want to suggest to
11 the Court the appointment of an independent, neutral forensic
12 examiner to decide --

13 *THE COURT:* Which you would pay for?

14 *MR. MCCABE:* Your Honor, yes, we would pay for it.

15 To decide what we get to see, in conjunction with
16 the Court, of course, having the ultimate determination. Yes,
17 we would.

18 And I notice -- I also heard no argument about
19 Ken Turner and why he shouldn't have to comply. He's the man
20 really running the site. He's involved in some of the e-mails.
21 And I heard nothing about why he shouldn't have to comply.

22 Also, the argument is not directed, the one you
23 heard today and the one you see in the writing, not directed to
24 most of what's being asked for. I mean, there are other sites
25 here, not just this "Rose Speaks" site. And as for "Rose

1 Speaks," the main site being one that involves a number of
2 celebrity cases, that happened only after Rose got the
3 subpoena. Then she starts putting on her Web site something
4 other than all Anna Nicole all the time. And there's nothing
5 wrong with that, but I think the Court's judgment should be
6 informed by that fact, which I don't believe they're going to
7 deny. The only time we see more stories of different kinds of
8 cases is after the subpoena shows up.

9 That's all I have, Your Honor.

10 *THE COURT:* Anything further on this point?

11 I guess I have some concerns about the broader
12 implications for importing the law of defamation into the
13 electronic world in which everybody who is a blogger is facing
14 all sorts of exposures that are not new but certainly have a
15 perhaps different dimension than they did when we were limited
16 to news print.

17 *MR. MCCABE:* Is the Court asking for a response, Your
18 Honor?

19 *THE COURT:* I'm not sure. Probably not, given the
20 time.

21 Yes, ma'am. You wanted to say something about
22 the subpoena issued to you or do you think that your --

23 *MS. HARRINGTON:* I'm not sure where to start. I could
24 add so much to this whole thing here, because I've been
25 involved -- I've been involved from the very beginning. The

1 first --

2 *THE COURT:* Well, hold on, hold on. You're not
3 represented and --

4 *MS. HARRINGTON:* Right.

5 *THE COURT:* -- I'm mindful of that.

6 *MS. HARRINGTON:* Then I'll --

7 *THE COURT:* State your name and --

8 *MS. HARRINGTON:* Lyndal Harrington.

9 *THE COURT:* All right. I'm not, frankly, interested
10 in --

11 *MS. HARRINGTON:* I understand.

12 *THE COURT:* -- the merits. And I have a feeling that
13 most of what you want to tell me probably goes to whether you
14 agree with one side's description of what the evidence would
15 show or the other side's description of what the evidence would
16 show.

17 *MS. HARRINGTON:* I really do.

18 *THE COURT:* And, frankly, I don't need to decide those
19 kinds of issues today.

20 *MS. HARRINGTON:* Okay.

21 *THE COURT:* So, unless you have something else you
22 want to say about the subpoena.

23 *MS. HARRINGTON:* Overburdensome, overbroad, hardship.
24 That's just it. It's just outrageous as far as what they're
25 asking for. I don't even know why I was brought in. It makes

1 no sense. I'm not the Web site owner. I moderate it.

2 *THE COURT:* All right. Thank you. Anything further?

3 *MR. BABCOCK:* Not from us, Your Honor.

4 *MR. PATTON:* No, Your Honor.

5 *THE COURT:* All right. Well, thank you very much. It
6 was interesting. And I'll get your briefing in two weeks and
7 your materials on Monday. Thank you.

8 *MR. MCCABE:* Thank you, Your Honor.

9 *MR. BABCOCK:* Thank you, Your Honor.

10 *MS. HAMILTON:* Thank you, Your Honor.

11 *(Concluded at 5:25 p.m.)*

12 * * *

13 I certify that the foregoing is a correct transcript from the
14 record of proceedings in the above-entitled cause, to the best
15 of my ability.

16 /s/
17 Kathy L. Metzger
Official Court Reporter

Date _____

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