



EMERGENCY RELIEF REQUESTED

NO. _____

01-09-00438-CV

IN THE COURT OF APPEALS FOR THE FIRST OR FOURTEENTH
JUDICIAL DISTRICT
HOUSTON, TEXAS

IN RE HOWARD K. STERN

Original Proceeding From the 280th District Court of Harris County, Texas
(Cause No. 2008-24181)

EMERGENCY MOTION FOR TEMPORARY RELIEF

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Georgia Bar No. 774588 (Application for pro hac admission pending)
Walter A. Herring
State Bar No. 09535300
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ATTORNEYS FOR HOWARD K. STERN, Relator

ORAL ARGUMENT REQUESTED

TO THE HONORABLE FIRST OR FOURTEENTH COURT OF APPEALS:

Pursuant to Texas Rule of Appellate Procedure 52.10, Howard K. Stern, relator, files this Emergency Motion for Temporary Relief to accompany his Petition for Writ of Mandamus, and in support of this motion would show the Court as follows:

1. Howard K. Stern (“Stern”) is a California resident and a member of the State Bar of California. (R. tab 16, at 1.)

2. Virgie Arthur (“Arthur”) filed the underlying suit in which she alleges that Stern conspired with various Internet bloggers and a celebrity gossip website to defame her through publication of a blog article. (R. tab 1.)

3. After being served with Arthur’s Petition, Stern promptly filed a special appearance objecting to jurisdiction. (R. tab 4.) As of the filing of this Motion, Stern’s special appearance has not yet been heard by the trial court.

4. Despite Stern’s pending special appearance, on May 11, 2009, the trial court entered an order granting Arthur’s motion to compel responses by Stern to certain of Arthur’s requests for production (the “Order”). (R. tab 19.) The Order, in pertinent part, required the following:

a. Within ten (10) days of the signing of the Order, Stern is ordered to contact a computer forensic examiner located in Austin, Texas, who was appointed as a special master, to make arrangements for the capture and examination of all of Stern’s computer hard drives, external hard drives, jump drives, and other such repositories of electronic communications (collectively referred to as Stern’s “electronic media”);

b. The special master is ordered to conduct a forensic examination of Stern's electronic media using his own search terms to capture electronic communications that the special master in his sole discretion determines are responsive to Arthur's requests for production;

c. The special master is ordered to submit the captured documents to Stern for a privilege review;

d. Within fourteen (14) days after the special master provides Stern with the documents captured from Stern's electronic media, Stern is ordered to produce a privilege log to the special master and to Arthur listing all documents submitted by the special master to Stern, which Stern has not produced to Arthur, and the reasons for withholding the documents from production;

e. The special master is ordered to produce to Arthur all documents not listed on the log created by Stern and the special master is ordered to maintain the electronic media and all documents listed on Stern's privilege for the remainder of this lawsuit;

f. Arthur has the right to challenge any designation on the log without any showing of good cause and, in the event she issues a challenge, the special master is ordered to submit the log prepared by Stern, along with the disputed document(s), to the trial court for in camera inspection; and

g. Arthur shall pay for the examination unless the Court determines otherwise.

(R. tab 19.) Stern submits that the Order speaks for itself and can be viewed in its entirety at Record, Tab 19.

5. Stern's obligations under the Order begin on Thursday, May 21, 2009, which is ten (10) days after entry of the Order. (See R. tab 19, at 2, ¶ 4.)

6. Stern has alleged that the entry of the Order was an abuse of discretion because (i) the trial court could not enter an order mandating that Stern surrender his tangible personal property located outside of the forum state without first determining whether it has personal jurisdiction over Stern; (ii) the process and scope of the forensic examination ordered by the court violates the Texas Rules of Civil Procedure and Texas Rules of Evidence; and (iii) the discovery requests underlying the Order are impermissibly overbroad as they have no subject matter limitations.

7. If Stern is forced to comply with the Order, he and third parties to which he owes fiduciary duties will be irreparably harmed. For example, information contained in Stern's electronic media contains the following: (i) documents concerning his defense against the State of California's criminal prosecution of him; (ii) personal documents of Stern's parents, who share the computer; (iii) documents concerning the Estate of Anna Nicole Smith, to which Stern owes fiduciary duties as its Executor and attorney, which may include commercially valuable information concerning the Estate; (iv) attorney-client privileged and work-product protected documents concerning litigation in which Stern was formerly and is presently involved, including separate actions involving Arthur

and against her attorneys¹; and (v) other privileged, confidential, or otherwise personal documents that are unrelated to the claims or defenses in this litigation. Once information about these documents is disclosed, it is a bell that cannot be unrung.

8. Accordingly, Stern seeks an order from this Court staying Stern's obligations under the Order until this Court resolves the issues raised in Stern's Petition for Writ of Mandamus.

9. In further support of this Motion, Stern refers the Court to his Petition for Writ of Mandamus, filed contemporaneously herewith.

10. Issues concerning compelled production of a litigant's hard drives nearly identical to those raised by Stern in his Petition are presently before the Texas Supreme Court. On March 31, 2009, the Texas Supreme Court heard oral argument for nearly an hour in In re Weekley Homes, L.P., No. 08-0836, which involves a discovery order compelling a litigant to produce its entire hard drives for forensic inspection.

For these reasons, Howard K. Stern, relator in this case, respectfully requests that this Court grant temporary relief by issuing an order staying Stern's obligations under the Order Compelling Production by Defendant Howard K. Stern and Expanding Appointment of Independent Computer Forensic Examiner and Incorporated Protective Order until this Court resolves the issues raised in this Petition for Writ of Mandamus. Howard K. Stern requests any other relief to which he may be entitled.

¹ Though the Order excludes privileged information from production, privileged information will remain in the special master's possession by virtue of his making a carbon image of Stern's electronic media and will be reviewed by the necessity of the special master's review to determine whether information is, in fact, privileged or otherwise protected.

Respectfully submitted

By: 

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pro hac admission pending)

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**ATTORNEYS FOR RELATOR,
HOWARD K. STERN**

CERTIFICATION

On May 18, 2009, I certify that I have reviewed the foregoing motion and concluded that every factual statement in the motion is supported by competent evidence included in the accompanying record.



Walter A. Herring

CERTIFICATE OF CONFERENCE

As required by Texas Rule of Appellate Procedure 10.1(a)(5), I certify that counsel for Stern conferred, or made a reasonable attempt to confer, with all other parties which are listed below about the merits of this motion with the following results:

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Attorneys for Real Party in Interest
Virgie Arthur

Counsel for Arthur opposes this Motion.

Teresa Stephens
5022 Cloyce Court
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Pro se
Real Party in Interest

Stephens agrees with this Motion.

Charles L. Babcock
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Attorneys for Real Party in Interest
Art Harris

Counsel for Harris does not oppose this Motion.

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Attorneys for Real Parties in Interest
Harvey Levin & TMZ Productions, Inc.

Counsel for Levin and TMZ does not oppose this Motion.

Bonnie Stern
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Pro se
Real Party in Interest

Stern agrees with this Motion.

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Turner does not oppose this Motion.

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Larry Birkhead

Harrington does not oppose this Motion.

Counsel for Birkhead did not return message regarding this Motion.

Pursuant to Texas Code of Judicial Conduct Canon 3(B)(8), I did not confer with the trial judge regarding this motion in an original proceeding in which the trial judge is the respondent.




Walter A. Herring

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 52.10(a), I certify that counsel for Stern has notified or made a diligent effort to notify all parties by expedited means (telephone) that this motion for temporary relief has been or will be filed.

I further certify that in providing notice to the trial judge, who is the respondent in this original proceeding, counsel for Stern complied with Texas Code of Judicial Conduct Canon 3(B)(8).



Walter A. Herring

CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Appellate Procedure 6.3 and 9.5(b), (d), and (e), the undersigned hereby certifies that on the 18 day of May, 2009, a true and correct copy of the foregoing Emergency Motion for Temporary Relief is being served via Federal Express, priority overnight delivery, on:

Honorable Tony Lindsay
Judge, 280th Judicial District Court
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Respondent

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