

CAUSE NO. 2008-24181

VIRGIE ARTHUR,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFF,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
HOWARD K. STERN, BONNIE STERN,	§	
LYNDAL HARRINGTON, ART HARRIS,	§	
NELDA TURNER, TERESA STEPHENS,	§	
LARRY BIRKHEAD, HARVEY LEVIN,	§	
TMZ PRODUCTIONS, INC, and	§	
CBS STUDIOS, INC.	§	
	§	
DEFENDANTS.	§	80th JUDICIAL DISTRICT

**PLAINTIFF'S SURREPLY TO DEFENDANTS TMZ PRODUCTIONS, INC.'S
AND HARVEY LEVIN'S MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO THEIR OBJECTIONS TO PLAINTIFF'S SUMMARY
JUDGMENT EVIDENCE AND MOTION TO STRIKE**

Plaintiff Virgie Arthur files this her Surreply to Defendant TMZ Productions, Inc.'s and Harvey Levin's Motion for Summary Judgment ("Motion") and Response to Their Objections to Plaintiff's Summary Judgment Evidence and Motion to Strike, and, in support of her Surreply, Arthur would show as follows:

On May 7, 2010, TMZ and Levin filed a Reply in support of Defendants TMZ Productions, Inc.'s and Harvey Levin's Motion for Summary Judgment; Objections to Plaintiff's Summary Judgment Evidence and Motion to Strike ("Reply").

I.

In Part I of their Reply, TMZ and Levin argue that the gist of the TMZ Article was no more embarrassing than other facts that TMZ could have published. (Reply at 2.) The Reply then attempts to change the gist of the Article to be that "Arthur, as a young teenager, married and had a child with a person who, during the marriage, was also her stepbrother." (Reply at 3.) One searches the Article in vain for anything like that. The

gist of the Article is that Virgie Arthur “hooked up with her step-bro” and produced a child. That is what the Article says, and it is false and defamatory.

The Reply argues, “The true facts – that Arthur had a baby with and married the father who also became her stepbrother before the marriage ended – are at least as damaging to Arthur’s reputation as the gist of what TMZ published – that Arthur and her stepbrother had a child.” (Reply at 3.) The Reply still cannot get the “true facts” straight. Virgie Arthur and her stepbrother did not have a child. Virgie Arthur and her husband had a child. The couple soon separated. Later, Virgie’s mother married the young man’s father. The Reply does not even attempt to explain what is damaging to Arthur’s reputation about the true facts. □

The Reply inaccurately argues that Arthur protests in her Response that the facts surrounding Arthur’s marriages are “denigrating.” (Reply at 4, n. 2.) Actually, Arthur says the opposite of that – that, in Part C of their Motion, TMZ, Levin, and their legal counsel have engaged in a lame attempt to denigrate Arthur, although the true facts are injurious to her reputation only to the small-minded. (Plaintiff’s Response to Defendants TMZ Productions, Inc.’s and Harvey Levin’s Motion for Summary Judgment [“Response”] at 9.)

II.

In **Part II** of their Reply, TMZ and Levin argue that Arthur cannot pursue a defamation claim based on commenters’ opinions. (Reply at 5.) They argue that the opinions of commenters “are not actionable.” They have missed the point, which is that the comments – produced by them in discovery - are evidence of what readers understood to be the gist of the Article – not that the comments themselves give rise to a cause of action against TMZ and Levin.

III.

“Parties who reasonably foresee that their defamatory statements will be repeated to third parties may be held responsible for republications.” *Stephan v. Medical Center at Garland*, 20 S.W.3d 880, 891 (Tex. App. – Dallas 2000, no pet.) (citing *First State Bank v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.-Corpus Christi 1980, writ ref’d n.r.e.); *S.H. Kress & Co. v. Lindley*, 46 S.W.2d 379, 381 (Tex. Civ. App.-El Paso 1932, no writ)). In **Part III** of their Reply, however, TMZ and Levin seem to argue that they cannot be liable for the republication of their Article, because they did not foresee that their Article, published on the internet, would be republished by others. Really? Reasonable minds can differ about that. Although “TMZ” might stand for “Thirty-Mile Zone,”¹ TMZ and Levin have not shown that they live in a cocoon and that they lack awareness of the outside world and of their publication’s propensity for being republished. Their argument strains credulity and insults the reader’s intelligence.

IV.

In **Part IV** of their Reply, TMZ and Levin argue that they identified the particular elements to the conspiracy claim for which they argue there is no evidence. (Reply at 7.) No, they did not. What conspiracy, what defamation, other than the defamation in their Article, did TMZ and Levin identify in their Motion? None. Their argument failed to comply with TEX. R. CIV. P. 166a(i), and the issue is waived.

The Reply argues that the sworn statement of Chrystal Baker is hearsay. (Reply at 8.) TMZ and Levin cite no authority, however, for the notion that a sworn statement is not admissible in response to a motion for summary judgment, and Arthur has found no such authority. Indeed, Baker’s sworn statement is in the nature of an affidavit, which is

¹ <http://en.wikipedia.org/wiki/TMZ.com>.

the most common kind of summary judgment evidence. To object to a summary judgment affidavit on the ground of hearsay, one must point out the specific content that is hearsay and not simply object to the document itself as hearsay. The objection is waived. *See Moulton v. Vaughn*, 982 S.W.2d 107, 110 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). As for the statements by other persons that Baker relates in her sworn statement, they are admissible as admissions of a party opponent and/or statements made by a co-conspirator of a party in the course and furtherance of the conspiracy. *See* TEX. R. EVID. 801(e)(2)(A) & (E).

The Reply argues that the email from defendant Bonnie Stern to defendant Nelda Turner contains “a series of hearsay statements.” To the contrary, the statements of the defendants that are referred to in the email are not hearsay, because they are admissions of a party opponent and/or statements made by a co-conspirator of a party in the course and furtherance of the conspiracy. *See* TEX. R. EVID. 801(e)(2)(A) & (E).

As for the argument in the Reply that Arthur’s Response fails to supply any evidence of any conspiracy involving TMZ or Levin (Reply at 8), Arthur stands on her Response and the copious authority cited therein on pages 10 - 12, which the Reply ignores, especially the rule that circumstantial evidence is enough.

V.

In **Part V** of their Reply, TMZ and Levin argue that the evidence in Arthur’s Response is hearsay. (Reply at 10*ff.*) In a head-on assault on the Urban Dictionary definitions of “Boink” and “hooking up,” TMZ and Levin argue that the definitions are hearsay and irrelevant. (Reply at 10.) To the contrary, the words and their meanings obviously are relevant. Virgie Arthur supposedly “boinking” and “hooking up” with her stepbrother is the gist of the false and defamatory Article.

As for dictionary definitions being something to strike from the record as hearsay and irrelevant, as TMZ and Levin argue, that is nonsense. Nothing can be more common than for courts to rely on dictionary definitions, whether at the level of summary judgment or in the nation's highest court. *See, e.g., Little v. Needham*, 236 S.W.3d 328, (Tex. App. – Houston [1st Dist. 2007, no pet.]). *See also., St. Francis College v. Al-Khazraji*, 107 S.Ct. 2022, 2027 (1987) (Supreme Court used dictionaries and encyclopedias to interpret meaning of word “race” in nineteenth-century federal statute, concluding that “race” commonly was used in referring to national and ethnic groups, such as Finns, gypsies, Basques, Hebrews, Arabs, Swedes, Germans, and many others) (cited in Neil C McCabe, *State Constitutions and the “Open Fields” Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of “Possessions,”* 13 Vt. L. Rev. 179, 193 n. 74 1988)). TMZ and Levin do not deny that the Urban Dictionary definitions are correct or that their use of the words in question in their Article comport with those definitions. So what is the point?

The Reply next objects to anonymous internet comments posted on their own website. (Reply at 10.) They object “under optional completeness, hearsay, relevance, and prejudice grounds.” (Reply at 10.) As for optional completeness, that is not an objection; it is a rule that allows TMZ and Levin to provide as evidence the rest of the 2061 comments, if they wish. TEX. R. EVID. 106. But they do not wish.

The hearsay objection fails for the obvious reason that Arthur did not submit the nasty comments from the TMZ site for any supposed truth of the matter asserted therein but to show that readers understood the Article to say that Arthur had sex with her stepbrother and produced a child by him. Therefore the hearsay and relevance objections

are specious. TMZ and Levin do not explain what they mean by the “prejudice” ground that they assert.

As for the list of evidence that, on page 11 of the Reply, TMZ and Levin say Arthur has not provided, they do not explain or provide authority to show why that matters. Arthur might very well choose to provide such evidence at trial, and Arthur might seek this Court’s assistance in obtaining such information from TMZ and Levin as to the identity of the authors of the anonymous comments, but Arthur has no burden to do so at this stage. Arthur does hereby give fair notice that she might very well take the argument by TMZ and Levin about the anonymity of the defamatory commenters as an invitation to seek their identities through discovery directed to TMZ.

The Reply also argues that Arthur’s exhibit Q, a section of the Texas Family Code, which appears to show that Arthur’s marriage at age 14 does not reflect on her reputation because it was legal, does not show that it was in effect at the time. (Reply at 11.) Again, they miss the point, which is that the family code statutes are “legislative facts” that show current “societal understanding,” made known through the voice of its elected representatives, that marriage at age 14 does not reflect badly on a girl’s character. *See O’Quinn v. Hall*, 77 S.W.3d 438, 447 (Tex. App. – Corpus Christi 2002, no pet.) (noting categories of adjudicative facts, legislative facts, and law); *see also* Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402 (1942); Kenneth C. Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955); Neil Colman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 Temple L. Rev. 1229, 1231 (1992) (explaining that “legislative facts” show “societal understanding”) (citing *Muller v. Oregon*, 208 U.S.412,

419 – 20 (1908) (relying on Brandeis brief, replete with legislation from various states and foreign nations regarding women).

The Reply next attacks the affidavits of former Harris County Sheriff Tommy Thomas and Captain Ronnie Silvio on the basis that the affidavits are out-of-court statements offered for the truth of the matters asserted therein, *i.e.* hearsay. (Reply at 12.) The objection made is not that the affidavits *contain* hearsay but that they *are* hearsay. That objection is specious, of course, because, as the Court well knows, affidavits are the most common form of summary judgment evidence. To object to a summary judgment affidavit on the ground of hearsay, one must point out the specific content that is hearsay and not simply object to the document itself as hearsay. The objection is waived. *Moulton v. Vaughn*, 982 S.W.2d at 110.

The Reply also argues that the affidavits speak only of Arthur's performance as a Harris County Deputy Sheriff, but that is not true. For example, Captain Silvio says of Virgie Arthur "everyone in the community loved and trusted her," "that she has never been more than a telephone call away from friends in their time of need," and that "Virgie has always displayed a high degree of integrity, morality, and responsibility" (Response, Exhibit P.)

As for the argument in the Reply that Virgie Arthur's reputation is not relevant in this defamation case (Reply at 12), Arthur can only refer TMZ and Levin to *Prosser & Keeton on Torts* 771 (5th ed. 1984 & Supp. 1988): Defamation is defined as the invasion of a person's interest in her reputation and good name.

The Reply next argues that the sworn statement of Chrystal Baker is inadmissible as hearsay within hearsay. (Reply at 12.) Here again TMZ and Levin make the mistake of attacking the entire sworn statement as hearsay, rather than pointing to specific

objectionable content. The objection, therefore, is waived. *Moulton v. Vaughn*, 982 S.W.2d. at 110.

Furthermore, the passages relied on by Arthur are not hearsay, because they are within the personal knowledge of Baker and/or they are admissible as admissions of a party opponent or statements made by a co-conspirator of a party in the course and furtherance of the conspiracy. See TEX. R. EVID. 801(e)(2)(A) & (E). See also TEX. R. EVID. 805 (“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules”). TMZ and Levin argue that only Arthur’s attorneys were present at the taking of Baker’s sworn statement, but they do not explain why that should make the sworn statement any less admissible than an affidavit.²

Similar to their faulty arguments about Baker’s sworn statement and the affidavits of Sheriff Thomas and Captain Silvio, TMZ and Levin attack the affidavit and deposition of defendant Nelda “Rose” Turner as hearsay. (Reply at 12.) They then change their argument and say that the deposition is not hearsay but that the contents constitute hearsay. (Reply at 13.) Because TMZ and Levin are not specific about exactly what statements supposedly are hearsay, the objection is waived. *Moulton v. Vaughn*, 982 S.W.2d. at 110. At any rate, the statements in Turner’s affidavit and deposition excerpts are admissible because they are within her personal knowledge and/or they are admissible as admissions of a party opponent or statements made by a co-conspirator of a party in the course and furtherance of the conspiracy. See TEX. R. EVID. 801(e)(2)(A) & (E).

² The cover page of Baker’s sworn statement shows that the statement was witnessed and notarized by Gil Zvulony, a duly appointed barrister, solicitor, and notary public for the Province of Ontario, Canada, who attended the taking of the statement.

The Reply next attacks Arthur's evidence of republications of the TMZ Article as irrelevant and hearsay. (Reply at 13.) To the contrary, the republications are relevant to show that people took the TMZ Article to mean that Arthur had sex with a young man who at the time was her stepbrother, which is the false and defamatory gist of the TMZ Article. The republications are not hearsay, because Arthur is not offering them for the supposed truth of the matters asserted therein but for the reason stated above and to show the liability of TMZ and Levin for the republication of the false and defamatory TMZ Article.

Finally, the Reply argues that an email from defendant Howard Stern to a producer at Entertainment Tonight/The Insider (CBS) is inadmissible as irrelevant and hearsay. (Reply at 14.) It is not hearsay, however, because Arthur offers it, not for the truth of the matter asserted therein but to show that Howard Stern knew the stepbrother story was false or that he had serious doubts about the truth of the stepbrother story. The relevance is that, as explained in Arthur's Response at 13 - 15, Howard Stern's knowledge is imputed to the other conspirators, including TMZ and Levin, who offer this Court no authority to the contrary.

Prayer

Arthur prays that the Court deny the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 10th day of May, 2010, Plaintiffs served the above document to all counsel of record as follows:



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