

NO. 01-09-0771-CV

---

*In the  
Court of Appeals  
For The  
First District of Texas*

---

**IN RE ART HARRIS**

---

**Original Proceeding from the 280<sup>th</sup> Judicial District Court  
(underlying proceeding is now in the 80<sup>th</sup> Judicial District Court)  
Harris County, Texas  
Cause No. 2008-24181**

---

**Real Party in Interest Virgie Arthur's Response to  
Relator Art Harris's Motion to Strike Portions of Real party in  
Interest Virgie Arthur's Appendix in Support of Her Response  
to Relator's Petition for Writ of Mandamus *and* Documents  
Cited in Her Response to Relator's Petition for Writ of  
Mandamus that were Attached to her Response to Relator's  
Emergency Motion for Temporary Relief**

---

**THE O'QUINN LAW FIRM**

**Neil C. McCabe**

**Texas Bar No. 13335300**

**M. Michael Meyer**

**Texas Bar No. 13993850**

**440 Louisiana, Suite 2300**

**Houston, Texas 77002**

**713-223-1000**

**713-222-6903 – facsimile**

**ATTORNEYS FOR REAL PARTY IN INTEREST, VIRGIE ARTHUR**

TO THE HONORABLE JUSTICES OF THE FIRST COURT OF APPEALS:

Real Party in Interest Virgie Arthur files this her Response to Relator Art Harris's Motion to Strike Portions of Real Party in Interest Virgie Arthur's Appendix in Support of Her Response to Relator's Petition for Writ of Mandamus *and* Documents Cited in Her Response to Relator's Petition for Writ of Mandamus that were Attached to her Response to Relator's Emergency Motion for Temporary Relief (the "Motion"), and, in support of her Response, Arthur shows as follows.

### **I. Introduction**

There are several false statements in Harris's Motion to Strike. The most important is that, contrary to Harris's claims, many of the documents Harris seeks to strike were before the trial court at the time the relevant rulings were issued. Other of the documents presented by Arthur were part of the record of other related original proceedings. There is nothing that was presented to this Court by Arthur that is unauthentic.

The false assertions in the Motion result from the apparent lack of command of the trial court record exhibited by counsel for Harris. The lack of command of the record exhibited in the Motion is consistent with the fact that Harris filed a motion to remove the Special Master, unaware that previous counsel for Harris had drafted and signed a Rule 11 agreement for the appointment of the Special Master. (MAND00002171)

The statement in Harris's Certificate of Conference that Arthur's counsel did not respond to Harris's attempt to confer about this Motion also is untrue. On

October 9, 2009 Harris's counsel sent an email stating that she intended to file a Motion to Strike documents Arthur had placed into the record and attempting to confer on the motion. That same day, Arthur's counsel responded by asking for a list of documents Harris sought to strike.<sup>1</sup> Five days later, Arthur's counsel received a reply email listing the documents Harris wanted to strike<sup>2</sup>, and Arthur's counsel began researching Harris's claims related to these documents. On October 16, Arthur had located most of the documents on Harris's list in the trial court record. Before Arthur was able to inform Harris of the location of the documents, Harris filed his Motion to Strike. Had Arthur been able to respond prior Harris filing his Motion to Strike, Harris's Motion may have become unnecessary.

## **II. Documents before the Trial Court**

Listed below are documents that Relator Harris incorrectly claimed are not in the trial court record, along with an explanation of how each document came to be before the trial court. Because these documents were before the trial court, they should remain part of the appellate court record.

**Appendix Tab D, MANDR 000079.** This email from Neil McCabe to William Ogden dated December 18, 2008 was filed with the trial court on March 23, 2009 for the Court's information when considering Harris's Motion to Reconsider the appointment of the Special Master. Another copy of this email is contained in Appendix, Tab C at MANDR 000054, along with the file-stamped cover letter.

**Appendix Tab F, MANDR 000098-0000101.** This letter from Nancy Hamilton to Craig Ball dated August 14, 2009 was filed with

---

<sup>1</sup> See email attached as Exhibit A.

<sup>2</sup> See email attached as Exhibit B.

the trial court on August 24, 2009 by Nelda Turner in her Response to Harris's Motion to Reconsider the appointment of the Special Master.

**Appendix Tab G, MANDR 000102.** This email from Nelda Turner to Neil McCabe dated December 31, 2008 was filed in the trial court by Arthur on May 4, 2009 as part of Exhibit D to her Second Motion to Compel Nelda Turner.

**Tab H, MANDR 000133.** This email from Teresa Stephens to the parties in the trial court case was forwarded to Judge Lindsay on at least two occasions: as an exhibit to Arthur's August 5, 2009 filing in Case No. 01-09-681-CV and on August 14, 2009 as an exhibit to Arthur's filing in Case No. 01-09-699-CV.

**Tab H, MANDR 000146.** This is the same document listed above as MANDR 000079 and as MANDR 000054. It was filed with the trial court on March 23, 2009.

### **III. Other Documents in Question**

Arthur acknowledges that the documents listed below were not before the trial court at the time of the rulings made the basis of this mandamus proceeding. However, Harris does not challenge the authenticity of the documents, nor does he challenge the truth of the facts that they were presented to support. Arthur only asserts the right to retain one of the documents set out in this section. The other documents discussed in this section are cumulative of other evidence, and Arthur withdraws those, as specified below.

**Appendix Tab B, MANDR 000016-000017.** This is an email from Craig Ball dated December 18, 2009. Harris does not deny the truth of the argument for which the document was presented: that Special Master Craig Ball and counsel for Harris participated in the drafting of the order appointing Ball. The fact that both counsel for Harris and Ball participated in the drafting of the order appointing him is supported by other portions of the record, such as the email exchange between the Special Master and counsel for Arthur found

in the record submitted by Harris at MAND00002401-2405. Because Arthur's argument is supported by Harris's record submission at MAND00002401-2405, Arthur withdraws MANDR 00016-00017.

**Appendix Tab H, MANDR 000143-000144** is another copy of the email cited above as Appendix Tab B, MANDR 000016-000017. Arthur withdraws MANDR 000143-000144.

**Appendix Tab I, MANDR 000231.** This email dated August 26, 2009, Neil McCabe brings the Rule 11 Agreement regarding the appointment of Craig Ball as Special Master to the attention of Nancy Hamilton, and asks her to withdraw her Motion to Reconsider the Special Master's appointment. Again, the authenticity of the document is not questioned and Harris does not deny that Ms. Hamilton was informed of the Rule 11 agreement and was offered the opportunity to withdraw her motion. In fact, this topic was brought to the trial court's attention at the August 28, 2009 hearing on Harris's Motion to Reconsider, and counsel for Harris did not deny that the communications took place. See the record submitted by Harris at MAND00002171. Because Arthur's point is supported by the hearing transcript, Arthur withdraws MANDR 000231.

**Tab B to Arthur's Response to Harris's Emergency Motion for Temporary Relief.** This is an email exchange between Harris's co-defendant, Teresa Stephens, and Special Master Craig Ball dated September 4-5, 2009. Harris denies neither the authenticity of this document nor the argument for which it is presented. This document was provided simply for background information. Arthur withdraws it.

**Tab E to Arthur's Response to Harris's Emergency Motion for Temporary Relief.** This is the invoice dated August 30, 2009 that Special Master Craig Ball prepared in this case, with a related email exchange between Neil McCabe and Craig Ball. Not only does Harris not challenge the authenticity of these documents or the argument for which they are presented, Harris included them in the record he filed on September 11, 2009 in the Supreme Court in support of his Emergency Motion for Temporary Relief. (MAND00002401-2405) Harris actually cites to this document in his Supreme Court motion, drawing attention to the amount billed by the Special Master. (Supreme Court motion at page 10) TEX. R. APP. P. 52.7(c)(1) provides that materials served as part of a related

original appellate proceeding need not be served again. After relying on this document, it is disingenuous for Harris to complain that Arthur relies on it. This document should not be struck.

#### **IV. Conclusion and Prayer**

For the reasons set forth above, Arthur asks this Court to deny Harris's Motion to Strike and retain the following documents in the record:

**Appendix Tab D, MANDR 000079**

**Appendix Tab F, MANDR 000098-0000101**

**Appendix Tab G, MANDR 000102**

**Tab H, MANDR 000133**

**Tab H, MANDR 000146**

**Tab E to Arthur's Response to Harris's Emergency Motion for Temporary Relief**

Arthur voluntarily withdraws the following documents from the record:

**Appendix Tab B, MANDR 000016-000017**

**Appendix Tab H, MANDR 000143-000144**

**Appendix Tab I, MANDR 000231**

**Tab B to Arthur's Response to Harris's Emergency Motion for Temporary Relief.**

Filed October 23, 2009

Respectfully submitted,



---

**THE O'QUINN LAW FIRM**

Neil C. McCabe

State Bar No. 13335300

M. Michael Meyer

State Bar No. 13993850

440 Louisiana, Suite 2300

Houston, Texas 77002

Telephone: (713) 223-1000

Facsimile: (713) 222-6903

**VERIFICATION**

BEFORE ME, the undersigned authority personally appeared Neil McCabe, having first been sworn, upon oath, deposed and said:

"My name is Neil McCabe. I am over eighteen years of age and otherwise competent to make this Affidavit. I am an attorney employed by The O'Quinn Law Firm and serve as lead counsel for Plaintiff in the above-styled case. I have read the foregoing document. The statements of fact in the foregoing document are within my personal knowledge and are true and correct and the exhibits attached thereto are true and correct copies of the documents they purport to be."

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Neil McCabe

SWORN AND SUBSCRIBED before me this 23rd day of October, 2009, by Neil McCabe, who is personally known to me.

  
\_\_\_\_\_  
Notary Public

My commission expires:



CERTIFICATE OF SERVICE

On the 23rd day of October, 2009, Plaintiff served the foregoing Real Party in Interest Virgie Arthur's Response to Relator Art Harris's Motion to Strike as follows:

  
NEIL MCCABE

*Via Email and Fax*

Mr. Harry Susman  
Mr. Richard Hess  
Susman Godfrey LLP  
1000 Louisiana, 51<sup>st</sup> Floor  
Houston, Texas 77002  
(713) 651-9366  
Fax: (713) 654-6666  
[HSUSMAN@SusmanGodfrey.com](mailto:HSUSMAN@SusmanGodfrey.com)  
[rhess@SusmanGodfrey.com](mailto:rhess@SusmanGodfrey.com)

*Via Email and Fax*

Mr. L. Lin Wood  
Mr. Luke Lantta  
Bryan Cave  
One Atlantic Center, 14<sup>th</sup> Floor  
Atlanta, GA, 30309  
404 572 6600  
Fax: 404 572 6999  
[lin.wood@bryancave.com](mailto:lin.wood@bryancave.com)  
[luke.lantta@bryancave.com](mailto:luke.lantta@bryancave.com)  
[B.Lyle@BryanCave.com](mailto:B.Lyle@BryanCave.com)

*Via Email and Fax*

Mr. Charles Babcock  
Ms. Amanda Bush  
Ms. Nancy Hamilton  
Jackson Walker  
1401 McKinney, Suite 1900  
Houston, Texas 77010  
713.752.4200  
Fax: 713.752.4221  
[cbabcock@jw.com](mailto:cbabcock@jw.com)  
[nhamilton@jw.com](mailto:nhamilton@jw.com)  
[abush@jw.com](mailto:abush@jw.com)

*Via Email and Fax*

Ms. Diana Marshall  
Marshall & Lewis, LLP  
1010 Louisiana, Suite 450  
Houston, Texas 77002  
713-655-0300  
Fax: 713-655-0130  
[DEMarshall@MarshallLewisLLP.com](mailto:DEMarshall@MarshallLewisLLP.com)  
[PKThiele@marshalllewisllp.com](mailto:PKThiele@marshalllewisllp.com)

*Via Certified Mail*

Ms. Teresa Stephens  
5022 Cloyce Court  
North Richland Hills, Texas 76180  
[butterfly75218@yahoo.com](mailto:butterfly75218@yahoo.com)

*Via Email and Certified Mail*

Ms. Bonnie Stern  
269 S. Beverly Dr., No. 1247  
Beverly Hills, CA 90212  
[bonnies10@yahoo.com](mailto:bonnies10@yahoo.com)

*Via Email and Certified Mail*

Ms. Lyndal Harrington  
8318 Burning Hills Dr.  
Houston, TX 77071  
[tx\\_babee@yahoo.com](mailto:tx_babee@yahoo.com)

*Via Email and Certified Mail*

Ms. Nelda Turner  
13348 County Road 3111  
Gladewater, Texas 75647  
[cajunrose@verizon.net](mailto:cajunrose@verizon.net)