

VIRGIE ARTHUR,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
HOWARD K. STERN, BONNIE STERN,	§	HARRIS COUNTY, TEXAS
LYNDAL HARRINGTON, ART HARRIS,	§	
NELDA TURNER, HARVEY LEVIN,	§	
TMZ PRODUCTIONS, INC., and	§	
LARRY BIRKHEAD,	§	
	§	
Defendants.	§	80 TH JUDICIAL DISTRICT

DEFENDANT ART HARRIS’S MOTION FOR SANCTIONS AND OPPOSITION TO PLAINTIFF’S MOTION FOR LEAVE TO JOIN BUSYSTREET PRODUCTIONS, LLC.

Defendant Art Harris (“Harris”) files this Motion for Sanctions and Opposition to Plaintiff Virgie Arthur’s (“Arthur”) Motion for Leave to Join Busystreet Productions, LLC (the “Motion”) pursuant to Texas Rules of Civil Procedure 13 and 215 and Texas Civil Practice and Remedies Code §§ 10.001 and 10.002, and in support thereof, would show the Court the following:

I. INTRODUCTION

Harris seeks monetary and deterrent sanctions against Arthur and her counsel for their flagrant bad faith conduct in this case in repeatedly filing and nonsuiting frivolous claims against Harris. For the same reasons, Harris opposes Arthur’s Motion to Join Busystreet Productions, LLC (“Busystreet”) as yet another and further attempt to harass, intimidate, and silence Harris with regard to the same baseless claims. Busystreet is a limited liability company, which was formed by Harris in 2004. (Ex. “A” at ¶ 3). Harris owns 100% of the shares of the corporation,

and it has no insurance for the claims asserted by Arthur in her proposed Sixth Amended Petition (See *Id.*), the bogus reason Arthur proffered for her nonsuit of Harris.¹

Under settled Texas law, it is within this Court's plenary power to impose sanctions against Arthur and her counsel for both deterrent and compensatory purposes, whether by motion or *sua sponte*, regardless of whether such motion was filed prior to the nonsuit of Harris. See *Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009) (holding the defendant was not precluded from seeking monetary sanctions even though sanctions were not sought until after nonsuit of the defendant); *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (holding nothing in Rule 162 deprives a trial court from entertaining Rule 13 sanctions sought after nonsuit); *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (holding that the filing of nonsuit by plaintiff did not by itself deprive the trial court of its plenary jurisdiction, and the court had power to impose sanctions *sua sponte* for counsel's prior misconduct before signing order of dismissal). The Court's plenary power to act on such a motion does not expire until 30 days after it has signed the final judgment in this case; that is, the judgment disposing of all claims and all parties. See *Scott & White Mem'l Hosp.*, 940 S.W.2d at 596; TEX. R. CIV. P. 329b(d) and (e); See also TEX. R. CIV. P. 163.

As the Texas Supreme Court has held, the rule recognizing a plaintiff's right to nonsuit should not be confused with the rule recognizing the power of the Court to grant injunctive relief to prevent the multiplicity of groundless suits. See *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex. 1982) (citing *Renfro v. Johnson*, 177 S.W.2d 600 (Tex. 1944)). Harris therefore asks that, in addition to awarding him monetary sanctions, the Court enjoin Arthur from joining Busystreet. Otherwise, Harris will suffer immediate and irreparable harm because he would

¹ See Plaintiff's Notice of Nonsuit of Defendant Art Harris, Docket No. 46075901.

have to again defend the very same claims that Arthur has previously alleged against him, individually, which is not only harassing but would cause him undue expense and further burden. (Ex. "A" at ¶¶ 4-6).

Finally, in the alternative, Arthur's Motion for Leave to Join Busystreet should be denied because Busystreet is neither a necessary nor a proper party to this litigation. The claims against it are baseless, and Arthur seeks to join Busystreet in the face of a Rule 11 agreement with Harris that she would join "NO NEW PARTIES." (Exs. "B" and "C").²

II. ARGUMENT & AUTHORITY

Arthur's and Mr. McCabe's conduct warrant sanctions under Texas Rule of Civil Procedure 13 and 215 and Texas Civil Practice Remedies Code §§ 10.001(1)-(3) and 10.002³ for filing frivolous claims against Harris and attempting through a nonsuit to vitiate a binding Rule 11 Agreement, to deter similar conduct in the future, and to compensate Harris by reimbursing him for the costs incurred in responding to Arthur's baseless pleadings, including preparing and filing a motion for summary judgment, preparing a response to Arthur's latest motion for

² Mr. McCabe informed this Court at the hearing on May 7, 2010, "We've got the agreement of all the represented parties, and we've got the agreement of Nelda Rose Turner as shown by the attached signatures attached to the motion for continuance." (Ex. "B" at pp. 3-4). Additionally, after the Court inquired whether the counsel present at the hearing and the counsel on the telephone were provided with the proposed new Docket Control Order, the Court stated, "I'd like to have counsel present to sign off on the scheduling order." (*Id.* at p. 5:7-10). Mr. McCabe did so in the presence of this Court, and thereafter the Court signed the agreed Docket Control Order. (Ex. "C").

³ Texas Civil Practice & Remedies Code § 10.002 provides that a party may file a motion for sanctions, or the Court may on its own initiative impose sanctions, for violating § 10.001, which provides, in pertinent part: "The signing of a pleading or a motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry: (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [or] (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . ." TEX. CIV. PRAC. & REM. CODE §§ 10.001(1)-(3) and 10.002.

continuance, and preparing a motion to compel Arthur to produce documents responsive to Harris's Second and Third Requests for Production of Documents.

Within one week after Harris filed his comprehensive motion for summary judgment on all matters, including Arthur's status as a public figure, and only days after this Court ordered Arthur's counsel to respond to Harris's discovery requests, Arthur filed a notice of nonsuit as to Harris.⁴ Typically this might not warrant further action or relief on behalf of Harris. But this is not a typical case – for a multitude of reasons.

For one, *the very same claims* that Arthur has now nonsuited against Harris were previously the subject of the case she brought against CBS Studios Inc. ("CBS") and Howard K. Stern in October 2008 in federal court, which she dismissed with prejudice in 2009.⁵ *Those very same claims* were filed again in August 2009 against CBS and Harris in this case when Judge Lindsey granted one of Defendant Nelda Turner's several Motions to Designate Responsible Third Parties, and Plaintiff's later filed Motion for Leave to Join CBS as a defendant.⁶ *Those very same claims* were subsequently the subject of CBS's Motion for Summary Judgment in this case, which the Court granted on February 26, 2010 and later severed, making it a final

⁴ See Notice of Nonsuit, Docket No. 4607591, filed on August 10, 2010.

⁵ See Unopposed motion to Dismiss with Prejudice and Order of Dismissal with Prejudice in *Arthur v. Stern et al.*; C.A. NO. 4:07-cv-03742 in the United States District Court for the Southern District of Texas, ("Federal Case") attached as Exhibits 4 and 5 to CBS Studios, Inc.'s Motion for Final Summary Judgment, Docket No. 43506266, filed on October 1, 2009.

⁶ See Defendant Nelda Turners Motion for Leave to Designate Responsible Third Parties, Docket No. 43348612 , filed January 30, 2009 and Defendant Nelda "Rose" Turner's Amended Motion for Leave to Designate Responsible Third Parties, Docket No. 43351223, filed on May 18, 2009; Defendant Art Harris's Objection and Response to Nelda "Rose" Turner's Motion for Leave to Designate Responsible Third Parties, Docket No. 42355503, filed on June 2, 2009; Order Granting Nelda "Rose" Turner's Leave to Designate Responsible 3rd Parties, Docket No. 42621395, signed on June 26, 2009; Plaintiff's Motion for Leave to Join CBS Studios Inc., Docket No. 43351435, filed on July 27, 2009; Defendant Art Harris's Response to Plaintiff's Motion for Leave to Join CBS Studios Inc. as a Defendant and Request for Oral Hearing, Docket No. 42991356, filed on August 7, 2009; Order Granting Plaintiff's Motion for Leave to Join CBS Studios Inc., Docket No. 4301270, signed on August 11, 2009.

judgment.⁷ Arthur did not appeal the Court's judgment. Now, on the heels of Harris's filing his Motion for Summary Judgment *on those very same claims*, Arthur and her counsel once again seek to avoid the termination of her frivolous lawsuit by nonsuiting Harris while at the same time seeking to join Harris's limited liability corporation, Busystreet, as nothing more than a surrogate defendant. Harris's Motion for Summary Judgment was filed on August 2, 2010 and was set for submission on August 23, 2010.⁸ Arthur nonsuited Harris just a week later on August 10, 2010 and filed her Motion for Leave to Join Busystreet 3 days later on August 13, 2010.⁹ Plainly stated, Arthur's attempt to join Busystreet is a transparent attempt to continue to harass, intimidate, and cost Harris extraordinary time, embarrassment, and expense by now prosecuting him as the "agent" of his limited liability corporation *again on the very same claims she previously dismissed with prejudice in the Federal Case that were disposed of by final summary judgment in this case.*¹⁰

Indeed, the allegations against Busystreet in Arthur's proposed Sixth Amended Petition, attached as Exhibit "B" to her Motion for Leave to Join Busystreet Productions, LLC are *identical* to those alleged against Harris in the Fifth Amended Petition – except that Harris is now alleged to be an agent of Busystreet. Plaintiff's intent and plan to continue to harass, intimidate, and cost Harris untold personal and tremendous monetary expense while at the same time abuse this Court's resources and the judicial system could not be clearer. Plaintiff and her

⁷ See CBS Studios Inc.'s Motion for Final Summary Judgment, Docket No. 43506266, filed on October 1, 2009; Order Granting CBS Studios Inc.'s Motion for Final Summary Judgment, Docket No. 44664894, signed on February 26, 2010; Order Granting Motion to Sever, Docket No. 44946749 signed on March 31, 2010.

⁸ See Defendant Art Harris's Motion for Final Summary Judgment, Docket No. 45996176, filed on August 2, 2010; Notice of Submission of Defendant Art Harris's Motion for Final Summary Judgment, Docket No. 45996178, filed on August 2, 2010.

⁹ See Plaintiff's Notice of Nonsuit of Defendant Art Harris, Docket No. 46075901; Plaintiff's Motion for Leave to Join Busystreet Productions, LLC, Docket No. 46063744, filed on August 13, 2010.

¹⁰ Compare Plaintiff's Fourth, Docket No. 43215339, and Fifth Amended Petition, Docket No. 45704642, with her proposed Sixth Amended Petition, attached as Exhibit "B" to her Motion for Leave to Join Busystreet.

counsel should not be permitted to continue their unconscionable and frivolous course of conduct any longer. They should not be permitted to continue to drag Harris through the quagmire and travesty they have created in the name of the Texas legal system.

According to Arthur, Busystreet is being brought into the litigation within 60 days of its being designated as a responsible third party under TEX. CIV. PRAC. & REM. CODE § 33.004 by *pro se* Defendant Nelda Turner. Turner, whom judge Lindsay previously found to be colluding with Arthur as a matter of law,¹¹ has continued her symbiotic relationship with Arthur's counsel Mr. McCabe, which has included providing him with research and documents, seeking his advice, and joining efforts in drafting and editing Turner's affidavits, and counseling her on same.¹² Indeed, in one email Mr. McCabe wrote: "Dear Rose, . . . of course you understand that you are not my client. ***I do. However, regard you as a key cooperating party, and I have a strong incentive to protect you.*** Best regards, Neil McCabe."¹³ In another email, Mr. McCabe wrote to Turner: "You have my assurance as to the dismissal of your estate, if, after you have cooperated fully, you were to pass away before I had dismissed you as a party. ***But we still have work to do. Soon I will apprise you of my latest brilliant plan, and you will be central to it. But I must be able to trust you and Ken to keep something ultra secret for a few days before you get to publish a huge scoop. Can I trust you two to keep a secret?***"¹⁴ Even more recently, on August 6, 2010, Mr. McCabe (who failed to even acknowledge or produce the June 29, 2009 settlement agreement with Turner in accordance with TEX. R. CIV. P. 194 until a year later in April 2010), informed the Court and the parties that Arthur and Turner have "vitiating" their

¹¹ See Order Granting Plaintiff's Motion for Leave to Join CBS Studios Inc., Docket No. 4301270, signed on August 11, 2009.

¹² See Ex. "D" (Emails produced by Rose Turner)

¹³ *Id.* at "D-1," January 16, 2009.

¹⁴ *Id.* at "D-2," January 22, 2009 at 12:17:59.

settlement agreement.¹⁵ There is no doubt that Arthur's nonsuit of Harris and substitution of Busystreet via yet another motion to designate responsible third parties is but another effort to achieve Mr. McCabe's "latest brilliant plan" to perpetuate the continued fraud on the other defendants and this Court and to presumably start the clock over once again. It is of little surprise that Mr. McCabe, after being ordered to produce damning documents in response to Harris's Motion to Compel¹⁶, seeks days later to avoid such Order by non-suiting Harris and substituting Busystreet in his stead.

The transparency of Arthur's and her counsel's deliberate plan to relentlessly continue to harass, intimidate, and injure Harris¹⁷ (who has had to suffer the indignities and falsehoods of Arthur's and her counsel's continued, false and meritless diatribes despite Harris's having been vindicated on two occasions by the First Court of Appeals in granting mandamus relief),¹⁸ forcing further expenditure of enormous additional sums of attorneys' fees and expenses to defend *against the very same claims* Arthur once again non-suited, warrants this Court's consideration of not only monetary sanctions but the fairness and equities of enjoining Arthur from suing Busystreet, or alternatively, denying Arthur's Motion for Leave to Join Busystreet.

This is not a case in which Arthur is joining a previously unknown party. Indeed, reference to Busystreet Productions, LLC is beneath Harris's signature line on *several of the emails that were produced by Harris to Arthur on December 4, 2008*.¹⁹ Additionally, Busystreet appears in emails forwarded to Mr. McCabe by Turner in January 2009.²⁰

¹⁵ See Ex. "E" at p. 19.

¹⁶ *Id.* at p. 5-43.

¹⁷ See Ex. "A" at ¶¶ 4-6.

¹⁸ See *In re Art Harris*, No. 01-09-771-CV, 2010 WL 1612205 (Tex. App.—Houston [1st Dist.] April 22, 2010); *In re Art Harris*, No. 01-09-771-CV, 2010 WL 2650638 (Tex. App.—Houston [1st Dist.] July 1, 2010).

¹⁹ See, e.g., Ex. "F."

²⁰ See Ex. "G" (Emails produced by Rose Turner)

Arthur and Mr. McCabe are mistaken if they believe they can continue to game this Court and Harris with impunity and without consequence. As noted above, Arthur's nonsuit does not deprive this Court of its plenary jurisdiction to entertain and impose sanctions for counsel's prior misconduct or to enjoin Plaintiff from filing further frivolous actions against Busystreet or to deny Arthur's motion to join Busystreet. See *Scott & White Mem. Hosp.*, 940 S.W.2d at 596; *In re Bennett*, 960 S.W.2d at 38; *Renfro v. Johnson*, 177 S.W.2d 600 (Tex. 1944) (granting injunctive relief to prevent a multiplicity of groundless suits, finding that future suits would harass defendant and cause undue expense). As the Texas Supreme Court stated in *Scott & White Mem'l Hosp.*:

Rule 13 sanctions serve both deterrent and compensatory purposes. Courts impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by reimbursing the costs incurred in responding to baseless pleadings. Rule 162 would frustrate these purposes if it allowed a party to escape sanctions by simply nonsuiting the aggrieved party. The United States Supreme Court has pointed to a similar rationale in upholding the imposition of sanctions under Federal Rule of Civil Procedure 11 three and a half years after voluntary dismissal of a case.

Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to 'stop, think and investigate more carefully before serving and filing papers.'

Scott & White Mem'l Hosp., 940 S.W.2d at 596-97 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990)) (citations omitted).

Likewise, in *Johnson v. Chesnutt*, 225 S.W.3d 737, 742 (Tex. App.—Dallas 2007, pet. denied), the Dallas Court of Appeals stated, “The fact that the merits of the case were extinguished by the nonsuit does not necessarily mean that there was no longer a basis to impose sanctions. Sanctions serve a variety of purposes, including the compensation of a party for past prejudice or punishment and deterrence of bad faith conduct.” *See also Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 807 n.4 (Tex. 1993).

Even more recently in *Crites v. Collins*, the Texas Supreme Court again stated:

Rule 162 merely acknowledges that a nonsuit does not affect the trial court’s authority to act on a pending sanctions motion; it does not purport to limit the trial court’s power to act on motions filed after a nonsuit. In this case, the trial court imposed sanctions while it retained plenary jurisdiction. Nothing in Rule 162 or any previous decision of this Court deprives a trial court of this power.

Crites, 284 S.W.3d at 842-43 (Tex. 2009) (citing *Schexnider*, 940 S.W.2d at 596). The Court held that “the fact that Dr. Crites filed her motion for sanctions after the plaintiffs had already filed their effective-immediately nonsuit does not affect whether the trial court had the power to grant sanctions, so long as the trial court’s plenary authority has not expired.” *Id.* at 843. “For these reasons, we hold that the court of appeals erroneously determined that the Collinses’ notice of nonsuit prevented Dr. Crites from seeking sanctions under Chapter 74. Because the court of appeals did not consider the merits of Dr. Crites’s sanctions motion, we grant the petition for review, reverse the judgment of the court of appeals, and remand this case to that court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1, 60.2(f).” *Id.* at 843-44; *see also Joiner v. Stephens*, 457 S.W.2d 351, 352 (Tex. App.—El Paso 1970, no writ) (holding that “the rule is based on the policy that defendants are not to be subjected to repeated expense of pressing venue claims in successive actions by a plaintiff who, through abuse of the

privilege of non-suit, prevents a final adjudication upon the question.”) (citing *Southwestern Inv. Co. v. Gibson*, 372 S.W.2d 754, 757 (Tex. Civ. App.—Fort Worth 1963, no writ)).

The frivolousness of Arthur’s claims and the pure unadulterated harassment occasioned by Arthur’s bad faith is demonstrated by the two and a half years of this litigation, the two opinions by the First Court of Appeals granting mandamus relief for abusive discovery orders entered against Harris, Arthur’s prior dismissal of these same claims in the Federal Case against CBS with prejudice, CBS’s final summary judgment in this case, Arthur’s and McCabe’s incessant false and misleading lies and accusations against Harris, and now the nonsuit of Harris in advance of the submission of his summary judgment motion, and in its wake the attempted joinder of Busystreet *on those very same claims*. Such conduct should not be condoned by this Court. Arthur and Mr. McCabe should be sanctioned in order to deter this type of conduct in the future and to compensate Harris. Harris therefore seeks monetary sanctions of \$179,862.70²¹ in attorneys’ fees expended in researching, drafting, and filing Harris’s Motion for Summary Judgment, in preparing his Opposition to Plaintiff’s Motion for Continuance, in researching and preparing Harris’s Motion to Compel Arthur to Respond to Harris’s Second Request for Production of Documents, and in preparing for and attending the August 6, 2010 hearing on his Motion to Compel and Arthur’s Motion for Continuance. (See Ex. “H”). Harris further requests that this Court enjoin Arthur from suing Busystreet due to the irreparable harm occasioned to Harris,²² or in the alternative, deny Arthur leave to join Busystreet Productions as a defendant in this matter which is within the Court’s discretion.

²¹ See Ex. “H.”

²² See Ex. “A” at ¶ 4.

WHEREFORE, PREMISES CONSIDERED, Art Harris respectfully requests that this Court enjoin Plaintiff Virgie Arthur from suing Busystreet Productions, LLC, or alternatively, that it deny Plaintiff's Motion for Leave to Join Busystreet Productions, LLC, that it impose monetary sanctions against both Plaintiff and Mr. McCabe in the amount of \$179,862.70, and for such other and further relief at law or in equity to which Harris may justly be entitled.

Respectfully submitted,

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ATTORNEYS FOR ART HARRIS

CERTIFICATE OF CONFERENCE

This is to certify that Amanda L. Bush, counsel for Art Harris, conferred with Neil McCabe, counsel for Plaintiff, on Friday August 20, 2010 regarding the foregoing Motion, and on Mr. McCabe, on Sunday August 22, 2010 stated that he is opposed.

s/ Nancy W. Hamilton
Nancy W. Hamilton

CERTIFICATE OF SERVICE

This is to certify that on this 24th day of August 2010, a true and correct copy of the foregoing was served upon all counsel of record and *pro se* defendants as indicated below:

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