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E-Discovery at Issue in Case Involving Anna Nicole Smith's Mom

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A defamation suit brought by the mother of Anna Nicole Smith, the blond bombshell who died suddenly in 2007, has hit a snag. On April 22, the 1st Court of Appeals held in a mandamus proceeding stemming from the mom's suit that the trial court abused its discretion when it ordered a correspondent for "Entertainment Tonight" to turn over his computer hardware to a court-appointed special master for a forensic examination.

Houston's 1st Court also held in *In Re: Art Harris* that the trial court abused its discretion in appointing the special master. The 1st Court's opinion spells out key differences between the role of a special master and that of a forensic examiner. [**See the court's opinion.**]

Charles "Chip" Babcock, who represents "Entertainment Tonight" correspondent Harris, says the 1st Court opinion expands the Texas Supreme Court's 8-0 decision in 2009's *In Re: Weekley Homes* — a case in which the high court set out steps a plaintiff must take to obtain electronic discovery under Texas Rule of Civil Procedure 196.4.

Under *Weekley Homes*, a party seeking to discover electronic information first must make a specific request for that information and specify the form of production. According to the 1st Court's opinion in *Harris*, plaintiff Virgie Arthur, Smith's mother, failed to specifically request the electronic documents she seeks from Harris.

Babcock, a Jackson Walker partner in Dallas and Houston, says the three-justice 1st Court panel that decided *Harris* "went beyond *Weekley Homes* to say it's an abuse of discretion to appoint a special master."

Weekley Homes did not involve a special master, Babcock says. Harris presents yet another circumstance in which it is improper to require a citizen to have to submit his computer to a third party, in this case a special master, he says.

Specifically, the 1st Court held in *Harris* that the trial court abused its discretion by

appointing a special master in a suit that did not meet the Texas Rule of Civil Procedure 171 requirement that such an appointment is justified in an exceptional case for good cause.

Neil McCabe, who represents Arthur in the underlying case — *Arthur v. Stern, et al.* — says the 1st Court's decision is "an unfortunate setback" for his client's case. "The most the [*Harris*] opinion says is you've got to follow *Weekley Homes* ," says McCabe, senior counsel at The O'Quinn Law Firm in Houston.

McCabe says his client likely will return to the trial court and go through the *Weekley Homes* steps to obtain electronic discovery from Harris. [**See the court's opinion.**]

Motion to Compel

The 1st Court's opinion provides the following background on the case: In April 2008, Arthur filed *Arthur v. Stern, et al.* against Harris and seven other defendants, alleging that they had defamed Arthur and conspired to defame her in certain syndicated television broadcasts and Internet publications, harming her efforts to seek custody and visitation of her granddaughter, Smith's child Dannielynn. Beginning Aug. 1, 2008, Arthur served Harris with three requests for production of electronically stored documents and electronic communications between Harris and 38 e-mail addresses from September 2006 to the time Arthur made the requests.

But on Aug. 28, 2008, Harris served Arthur with an objection and responses to her requests for the electronic communications. In his objection, Harris invoked his privilege as a journalist and requested a protective order against the production of material obtained in newsgathering. The trial court did not act on these matters.

As the 1st Court's opinion noted, the discovery dispute was far from over. On Nov. 21, 2008, the trial court heard Arthur's motion to compel discovery from a defendant other than Harris. At a second hearing on Dec. 11, 2008, the trial court granted Arthur's motion to compel discovery. Arthur's counsel stated at the hearing that he would file a motion that afternoon for an independent forensic examiner. According to an excerpt from the transcript of the Dec. 11, 2008, hearing included in the 1st Court's opinion, Arthur's counsel told the trial court that it would "be best to proceed step by step" and approve the forensic examination for the one defendant named in Arthur's Nov. 21, 2008, motion to compel. The trial court then told attorneys for the plaintiff and defendants that it was their responsibility to select a forensic examiner.

According to the 1st Court's opinion, William Ogden, who at the time represented Harris and three other defendants, wrote in a Jan. 5, 2009, e-mail to Arthur's counsel that: "Defendants agree to using Craig Ball as the independent forensic examiner. You may file this agreement with the Court pursuant to [Texas Rule of Civil Procedure] 11."

The 1st Court's opinion noted that on Jan. 27, 2009, the trial court ordered Harris to produce documents that Arthur had requested. In its order, the trial court also appointed Ball as a "special master" to conduct an independent forensic examination of the relevant computer hard drives — including Harris'. Attached to the order was the consulting agreement between the firm of Arthur's counsel and Ball, which read in part: "Ball is an

independent contractor who will serve as the duly appointed neutral agent of the Court and is not an employee or agent of Client [the firm of Arthur's counsel]."

Ogden, a partner in Houston's Ogden, Gibson, Broocks & Longoria, says the trial court's Jan. 27, 2009, discovery order was "overbroad and invasive," but he declines further comment. He and his firm no longer represent the four defendants.

As noted in the 1st Court's opinion, Harris filed a Feb. 3, 2009, motion seeking clarification of the Jan. 27, 2009, order. Harris' new attorney argued at a May 8, 2009, hearing before the trial court that Harris had not agreed to surrender his computer. At that hearing, Harris' attorney also noted that *Weekley Homes* was pending before the state Supreme Court. On May 11, 2009, the trial court denied Harris' motion to clarify the Jan. 27, 2009, order and ordered Harris to turn over the relevant hard drives and jump drives to the special master. Harris then turned over a desktop computer and a laptop computer to the special master, who subsequently questioned whether Harris had replaced his hard drive.

The 1st Court's opinion noted that Harris filed an Aug. 23, 2009, motion asking the trial court to reconsider appointment of the special master and also requesting a protective order. The trial court denied Harris' motion to reconsider at a hearing on Aug. 28, 2009, the same day the state Supreme Court decided *Weekley Homes* .

According to the 1st Court's website, Harris filed a petition for writ of mandamus with the 1st Court on Sept. 4, 2009, in which he argued, among other things, that "the trial court abused its direction in ordering Harris to turn over 'electronic media' for forensic examination when there was neither a pending request for production nor any request for production with which he had not complied."

Overbroad Discovery

Justice Evelyn Keyes, author of the 1st Court's opinion in *Harris* , wrote that the trial court "acted arbitrarily and without considering the discovery rules" when it compelled production of documents. The trial court issued its order even though Arthur had not filed a motion to compel discovery from Harris or identified specific discovery requests with which Harris had not complied, Keyes wrote. The 1st Court also held that the trial court abused its discretion by ordering "overbroad discovery" and because it failed to determine whether the documents Arthur sought from Harris were privileged or relevant to Arthur's claims.

" *Weekley Homes* . . . held that direct access to a responding party's electronic storage devices is more likely to be appropriate 'when there is some direct relationship between the electronic storage device and the claim itself,' " Keyes wrote. Justices Elsa Alcala and George Hanks joined Keyes in the decision.

According to the 1st Court's opinion, the *Arthur* trial court caused confusion with its "conflation" of the roles of a forensic examiner and a special master. Keyes wrote that a special master has the power to regulate all proceedings in every proceeding before him and to take all measures necessary for the efficient performance of his duties. "[A] forensic examiner as contemplated in *Weekley Homes* is a computer expert whose sole purpose is to create forensic images of a particular electronic storage device and then to

search the images for specified documents using a predesignated list of search terms."

As noted in the 1st Court's opinion, Ball made several requests to Harris and his counsel seeking additional information. Ball also asked that Harris produce more electronic devices to satisfy Ball's questions about the alleged replacement of the hard drive, Keyes wrote in the opinion.

Ball, an Austin solo, says he finds the 1st Court's description of a forensic examiner's role troubling. "I am afraid they are reading *Weekley Homes* too narrowly," Ball says, adding that the 1st Court's language could deprive litigants of the thorough analysis of metadata and information on a computer that a forensic examiner can provide.

Keyes wrote in *Harris* that *Arthur* does not meet the Texas Rule of Civil Procedure 171 criterion for "exceptional case" and "good cause" to justify appointment of a special master. The 1st Court held that if the appointment of Ball was as a forensic examiner, the trial court abused its discretion by failing to comply with *Weekley Homes* .

Dallas appellate solo Peter Smythe, who has written about the *Weekley Homes* decision on his website, has reviewed the 1st Court's opinion in *Harris* . Smythe says he thinks the 1st Court correctly found that the *Arthur* trial court abused its discretion by using Rule 171 to appoint Ball as a special master, which Smythe says gave Ball too many powers.

"A master can regulate all the proceedings before him," says Smythe, who is not involved in *Harris* .

Smythe says the 1st Court's opinion points out that a forensic examiner needs to be a neutral party. Although Smythe says he thinks that "overall the 1st Court got it right" in *Harris* , he cites the need for appellate courts to "flesh out" the role of a forensic examiner.

Former state Supreme Court Justice Craig Enoch, a shareholder in Winstead's Austin office and chairman of the firm's appellate group, represented *Weekley Homes* in its mandamus proceeding at the high court. Enoch, who is not involved in *Harris* , says he thinks *Weekley Homes* is the key case in describing what needs to be done by a plaintiff and the trial court before a party in a case must turn over a computer hard drive to a third party for examination.

Enoch says a judge would never order a litigant to turn over the filing cabinet in his office for examination unless the judge gets the sense that the litigant is not doing what he is supposed to do to respond to a discovery request.

A computer hard drive is really a filing cabinet, Enoch says. "It's hard to argue that everything in there is relevant to any particular case."

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