

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

TERRY HOBBS

Plaintiff,

v.

Case No. 4:09CV00008 BSM

**NATALIE PASDAR, Individually, and
NATALIE PASDAR,
EMILY ROBISON, and
MARTHA MAGUIRE (formerly SEIDEL) d/b/a DIXIE
CHICKS,**

Defendants.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Terry Hobbs, pursuant to Federal Rules of Civil Procedure Rule 56, for his Motion for Summary Judgment respectfully states:

1. On November 25, 2008, Plaintiff Terry Hobbs filed a complaint alleging among other things, that certain statements which appeared in a letter written by Natalie Pasdar of the Dixie Chicks and posted on the Dixie Chicks' web page contained false and defamatory statements about Plaintiff.

2. January 7, 2009, Defendants Natalie Pasdar, individually and Natalie Pasdar, Emily Robison and Martha Seidel¹ d/b/a the Dixie Chicks, filed a Notice of Removal, attached to which was their Answer filed in Pulaski County Circuit Court. Defendants alleged diversity of citizenship as the basis for this Court's jurisdiction.

3. In Paragraph 36 of their Answer, Defendants allege that "All statements

¹ Counsel for Plaintiff has been advised that the person referred to as Martha Seidel in the Complaint, Notice of Removal and Answer filed by the Defendants, has divorced and is correctly identified as Martha Maguire.

Defendants allegedly made were part of an official report and/or a public meeting, ...” It is reasonable to construct this statement as an attempt to raise the fair-report privilege recognized under Arkansas law as a defense in a defamation case. See *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983), *Butler v. Hearst-Argyle Television, Inc.*, 345 Ark. 462, 49 S.W.3d 116 (2001) and *Restatement (Second) of Torts* Section 611 (1977).

4. The fair report privilege recognized under Arkansas law protects only those statements which are a report of an official proceeding or public meeting if those statements are an accurate and complete or a fair abridgement of the occurrence reported.

5. The statements at issue in this proceeding relate primarily to statements made by Defendant Natalie Pashar in a letter posted on the Dixie Chicks’ web page, a copy of which is attached to the Brief in Support of Motion for Partial Summary Judgment filed herewith marked as Exhibit “A”. The context of Ms. Pashar’s letter makes it clear that the official proceeding she claims to be reporting about is the October 29, 2007 filing by Damien Echols of the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody and the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on the same date. A copy of the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody and the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus has been stipulated to by the parties and filed with the Court on June 12, 2009 in a pleading titled Stipulation No. 2: Regarding Petition of Writ of Habeas Corpus of Damien Echols.

6. In responses to Requests for Admission filed in this proceeding, Defendant

Natalie Pasdar admitted she had not read the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus or the exhibits attached thereto. A copy of such Responses to Requests for Admission is attached to the Brief in Support of Motion for Partial Summary Judgment filed herewith marked as Exhibit "B". The fair report privilege is lost upon a showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment. As discussed in detail in Plaintiff's Brief in Support of Motion for Partial Summary Judgment, reading the court filing that a person claims to be reporting about is, as a matter of law, something that is reasonably necessary to insure that the report is fair and accurate.

7. As discussed in detail in Plaintiff's Brief in Support of Motion for Partial Summary Judgment, the fair report privilege defined in the *Restatement (Second) of Torts* does not apply to the filing of a pleading because no "official action" was taken and a report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported, as stated in Section 611, Comment e. As a result, Plaintiff is entitled to judgment as a matter of law that Defendant Natalie Pasdar's statements are not protected by the fair-report privilege.

8. Even if the filing of a pleading is sufficient for statements regarding the pleading to be privileged under the fair-report privilege, the statements made by Defendant Natalie Pasdar were not an accurate and complete or a fair abridgement of the pleadings filed by Damien Echols on October 29, 2007. In fact, as stated in detail in Plaintiff's Brief in Support of Motion for Partial Summary Judgment, Defendant Natalie Pasdar's "report" regarding the pleadings is so filled with omissions, inaccuracies and

contradictions that it is not an “accurate and complete or a fair abridgement” as a matter of law.

9. In Paragraph 46 of their Answer, Defendants allege that the allegedly defamatory statements are expression of opinion, among other things.

10. As discussed in detail in Plaintiff’s Brief in Support of Motion for Partial Summary Judgment, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990), the United States Supreme Court established that the question in defamation actions is not whether a statement could be considered an “opinion” but rather whether a reasonable fact finder could conclude that the statement implies an assertion of an objective verifiable fact. The Arkansas Supreme Court adopted a three part test for application of the Supreme Court’s holding in *Milkovich* which was first stated in *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990).

11. The allegedly defamatory statements made by Defendant Natalie Pascar include numerous assertions of objective verifiable fact and do not include the kind of hyperbolic, conclusory statements which are sometimes found not actionable in a defamation case because they are statements of opinion, not fact. As discussed in detail in Plaintiff’s Brief in Support of Motion for Partial Summary Judgment, the statements made by Defendant Natalie Pascar are so clearly objective and verifiable that they are not statements of opinion as a matter of law.

12. Attached hereto is Plaintiff’s Statement of Material Issues as to Which There is No Genuine Issue to be Tried pursuant to Local Rule 56.1.

13. Counsel for Defendant has stated that his client might argue that the law of Tennessee applies in this case. Paragraphs 38, 39, 43 and 48 of Defendants’ Answer

assert defenses based on the Constitution of Arkansas and the Arkansas Civil Justice Reform Act of 2003. If Defendants argue that Tennessee law applies in this case and the Court so finds, Plaintiff requests that the Court grant partial summary judgment with respect to defenses asserted based on Arkansas law. Plaintiff reserves his right to file a later motion for summary judgment regarding whether the Arkansas Civil Justice Reform Act of 2003 is consistent with the Arkansas Constitution. See *Johnson v. Rockwell Automation, Inc.*, --- S.W.3d ---, 2009 WL 1218362, (2009) and *Burns v. Ford Motor Co.*, 549 F.Supp.2d 1081 (W.D.Ark., 2008).

WHEREFORE, for the reasons stated herein and stated in more detail in the Plaintiff's Brief in Support of Motion for Partial Summary Judgment, Plaintiff respectfully requests that the Court find that Defendant Natalie Pasdar's statements are not protected by the fair report privilege as a matter of law and that such statements are not merely statements of opinion as a matter of law.

RESPECTFULLY SUBMITTED this the ___ day of June, 2009.

TERRY HOBBS

BY: /s/ J. Cody Hiland
J. CODY HILAND, Bar No. 2002041
Attorney for Plaintiff
557 Locust Ave.
Conway, AR 72034
Phone: (501) 932-1007
Fax: (501) 336-8688
Email: chilandlaw@alltel.net

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served in compliance with the Federal Rules of Civil Procedure on the following persons on this ____ day of June 2009:

Mr. John E. Moore
Huckabay, Munson, Rowlett and Moore
Regions Center
400 W. Capitol , Suite 1900
Little Rock, AR 72201

Mr. Dan D. Davison
Ms. D'Lesli M. Davis
Fulbright & Jaworski L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, TX 75201-2784

Robert B. Wellenberger
Thompson, Coe, Cousins & Irons, L.L.P.
700 North Pearl Street, Twenty-fifth Floor
Dallas, Texas 75201-2825

/s/ J. Cody Hiland
J. CODY HILAND

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

TERRY HOBBS

Plaintiff,

v.

Case No. 4:09CV00008 BSM

**NATALIE PASDAR, Individually, and
NATALIE PASDAR,
EMILY ROBISON, and
MARTHA MAGUIRE (formerly SEIDEL) d/b/a DIXIE
CHICKS,**

Defendants.

**STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE
ISSUE TO BE TRIED PURSUANT TO LOCAL RULE 56.1**

Plaintiff Terry Hobbs, pursuant to Local Rule 56.1, for his Statement of Material Issues as to Which There is No Genuine Issue to be Tried respectfully states:

1. The Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody and the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols collectively are the "200-page court filing" referred to by Natalie Pasdar in the letter posted on the Dixie Chick's web page and on the MySpace posting of Natalie Pasdar.

2. Natalie Pasdar did not read the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody or the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols prior to the posting of her letter on the Dixie Chick's web page or on her MySpace page.

3. At the time that Natalie Pasdar posted her letter on the Dixie Chick's web page or on her MySpace page, there had been no judicial action taken on The Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody and the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols.

4. The fingerprint referenced on page 46 and pages 106 -107 of the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols is not the fingerprint of Terry Hobbs.

5. Thomas Fedor, the DNA expert on the Echols legal team, stated that the mitochondrial sequence recovered from cigarette butt items 8 and 10¹ **differs** (emphasis added) at one nucleotide position from the sequence Bode obtained from hair 2S04-114-03Aa², described as a hair from ligature (Moore).

6. Thomas Fedor, the DNA expert on the Echols legal team, in a presentation to the press on November 2, 2007 stated that 1.5% of the population could be the source of the hair from which Terry Hobbs could not be excluded.

7. Thomas Fedor, the DNA expert on the Echols legal team, in a presentation to the press on November 2, 2007 stated that 7% of the population could be the source of the hair from which David Jacoby could not be excluded.

8. Exhibits V and W to the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by

¹ Cigarette butts 8 and 10 were alleged to be the items known to contain Hobbs' DNA.

² This item of evidence is the hair from which Hobbs cannot be excluded as the donor.

Damien Echols refer to a “Hair from C. Byers ligature” and that Terry Hobbs is excluded as the donor of such “Hair from C. Byers ligature”.

9. Thomas Fedor, the DNA expert on the Echols legal team, stated in a presentation to the press on November 2, 2007 that because of passive transfer, someone else could have delivered the hair linked to Hobbs to the scene even if it is assumed that the hair did come from Hobbs.

10. Thomas Fedor, the DNA expert on the Echols legal team, stated in a presentation to the press on November 2, 2007 that there was no way to be sure whether the hair was carried to the scene by Hobbs or by passive transfer.

11. The Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols states at page 65, “Do the mitochondrial results in themselves establish the guilt of Hobbs or Jacoby. No. Mitochondrial DNA is held commonly by those in a maternal line, as opposed to being unique to an individual, as is true of nuclear DNA.”

12. The only reference to the time of death of the victims in Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols appears on page 37: “Doctor Peretti’s best estimate of the time of the victims’ death was between 1:00 a.m. and 7:00 a.m. on May 6th.”

13. Natalie Pasdar caused a letter posted on the Dixie Chick’s web page and on her MySpace which stated that “The filing also includes a chronology of Hobbs' activities on the night of the crimes, when he washed his clothes and sheets at odd hours for no reason other than to hide evidence from the crimes.” “The filing” referred to in the

preceeding sentence refers to the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody or the Memorandum of Points and/or the Authorities in Support of Second Amended Petition for Writ of Habeas Corpus filed on October 29, 2007 by Damien Echols.

14. The time of death of Steve Branch, Chris Byers and Michael Moore was between 1:00 a.m. and 7:00 p.m. on May 6, 1993.

15. The following list of statements which appear in a letter that Natalie Pasdar caused to be posted on the Dixie Chick's web page and on Natalie Pasdar's MySpace page and are statements capable of being proven true or false:

- a. Below, I have written what the DNA and forensics evidence shows.
- b. Their killer(s) is still out there, and justice has yet to be served.
- c. DNA tests also show that a hair belonging to Terry Hobbs, the step-father of one of the victims, was found in the ligature of one of the victims.
- d. DNA tests also match a hair at the crime scene to a friend of Hobbs that was with him that day.
- e. The filing also includes a chronology of Hobbs' activities on the night of the crimes, when he washed his clothes and sheets at odd hours for no reason other than to hide evidence from the crimes.

RESPECTFULLY SUBMITTED this the 25th day of June, 2009.

TERRY HOBBS

BY: /s/ J. Cody Hiland

J. CODY HILAND, Bar No. 2002041
Attorney for Plaintiff
557 Locust Ave.
Conway, AR 72034
Phone: (501) 932-1007
Fax: (501) 336-8688
Email: chilandlaw@alltel.net

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served in compliance with the Federal Rules of Civil Procedure on the following persons on this 25th day of June 2009:

Mr. John E. Moore
Huckabay, Munson, Rowlett and Moore
Regions Center
400 W. Capitol , Suite 1900
Little Rock, AR 72201

Mr. Dan D. Davison
Ms. D'Lesli M. Davis
Fulbright & Jaworski L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, TX 75201-2784

Robert B. Wellenberger
Thompson, Coe, Cousins & Irons, L.L.P.
700 North Pearl Street, Twenty-fifth Floor
Dallas, Texas 75201-2825

/s/ J. Cody Hiland
J. CODY HILAND