

**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.

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Terry Hobbs, pursuant to Federal Rules of Civil Procedure Rule 56, and Local Rules 7.2 and 56.1 for his Brief in Support of Motion for Summary Judgment respectfully states:

I. INTRODUCTION

At issue in this proceeding are statements made by Defendant Natalie Pasdar (“Pasdar”) made in a letter posted on the Dixie Chicks’ web page (“Pasdar letter”), a copy of which is marked hereto as Exhibit “A”. Pasdar denied the allegations in the complaint and has asserted the affirmative defense that the statements at issue are privileged under the fair report privilege because they constitute a fair report regarding an official proceeding, namely 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 at the same time. 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 and the exhibits attached thereto (“the Echols memorandum”) were filed in this case on June 12, 2009, in a pleading titled Stipulation No. 2: Stipulation Regarding Petition of Writ of Habeas Corpus of Damien Echols. Echols is in the custody of the State of Arkansas on death row after having been convicted of the 1993 murders of Steve Branch, Chris Byers and Michael Moore. Furthermore, Pasdar alleged the affirmative defense that the allegedly defamatory statements were statements of opinion, which is not actionable in a defamation case.

As stated below, Plaintiff Terry Hobbs is entitled to judgment as a matter of law in that the statements are not protected by the fair-report privilege and that the statements are not mere opinion and therefore un-actionable under the law of defamation.

II. PASDAR’S STATEMENTS ARE NOT PROTECTED BY THE FAIR-REPORT PRIVILEGE AS A MATTER OF LAW.

A federal court with jurisdiction based on diversity of citizenship applies state law with respect to privilege defenses in defamation cases. *Landers v. National R.R. Passenger Corp.*, 345 F.3d 669 (8th Cir. 2003). In *Butler v. Hearst-Argyle Television, Inc.*, 345 Ark. 462, 49 S.W.3d 116 (2001), the Arkansas Supreme Court addressed the fair-report privilege citing and *Restatement (Second) of Torts* Section 611 (1977). The Court stated that the fair-report privilege is defined in the *Restatement (Second) of Torts* Section 611 (1977), specifically:

The publication of defamatory matter concerning another in a report of an

official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is an accurate and complete or a fair abridgment of the occurrence reported.

345 Ark. at 467-468.

The 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 abridgement.” 345 Ark. 469. On March 24, 2009, Pasdar filed Objections and Responses to the First Set of Requests for Admission of Plaintiff Terry Hobbs. Pasdar was asked to admit that she had read the Memorandum of Points and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus (“the Echols memorandum”) prior to November 27, 2007. In Response to Request for Admission No. 3, Pasdar denied that she had read the Echols memorandum prior to November 27, 2007, the day after she posted a the letter on the Dixie Chicks’ web page and six days after she posted a similar letter on her MySpace page. A copy of Defendant Natalie Pasdar’s Objections and Responses to the First Set of Requests for Admission of Plaintiff Terry Hobbs is attached hereto marked Exhibit “B”. Pasdar was also asked to admit that she had not read the Echols memorandum. In Response to Request for Admission No. 4, Pasdar admitted that she had not read the Echols memorandum prior to writing her letter or making her MySpace posting¹.

Similarly, in Request for Admission Nos. 6 and 7, Pasdar admitted she had not read the exhibits to the Echols memorandum. In short, Pasdar has admitted that she did not bother to read the document about which she claims to be making a “fair report”. It is basic and obvious that reading a pleading is reasonably necessary to insure that a report

¹ Pasdar’s MySpace posting is a letter which is in content is identical to the letter posted on the Dixie Chicks’ web page attached hereto as Exhibit “A”.

regarding such pleading is accurate and complete. The Court should grant partial summary judgment for Plaintiff on the question of whether statements made by the Defendant are privileged fair report of a judicial proceeding, because Pasdar did not read the report she claims to have summarized.

Alternatively, the fair report doctrine requires that the report be regarding a judicial action, not merely a pleading. In *Butler*, the official report at issue was a report by a special prosecutor concluding that while Butler had not committed a crime, he had engaged in an unprofessional relationship that reflected adversely on the Prosecutor's Office, the criminal justice system, the legal profession and Butler himself. Butler tried to argue that Comment e to Section 611 requires that an official action be taken, but his argument was rejected because he failed to make this argument before the trial court. 345 Ark. at 471. Comment e to Section 611 states:

Necessity of official action in judicial proceedings. A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as complaint or petition before any judicial action has been taken is not within the rule stated in this Section.

The Arkansas Supreme Court has clearly adopted Section 611, and in *dicta* has adopted the provisions of Comment e.² In that Pasdar claims to be reporting what the pleadings filed by Echols said, rather than reporting on an action taken by the government, her statements are not privileged as a matter of law.

Furthermore, Pasdar's statements are not privileged because they do not constitute an accurate and complete or a fair abridgment of the occurrence reported. The privilege

² There is a split of authority as to whether jurisdictions should apply Comment e of the fair report privilege to pleadings. See *First Lehigh Bank v. Cowen*, 700 A. 2d 498 (1997).

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 abridgement. *Restatement (Second) of Torts*, Section 611, Comment b. Even if it is possible for Pasdar to claim the fair report privilege regarding a document she did not read and if the no judicial action is required in order to assert the privilege, Pasdar's summary is so riddled with incompleteness, inaccuracies and contradictions that it cannot be considered a fair report as a matter of law.

The major omissions, inaccuracies and contradictions are as follows:

1. Pasdar failed to mention in her summary fingerprint evidence detailed in the Echols Petition.

The sixth paragraph of the Pasdar letter states that “[b]elow, I have written what the DNA and forensics evidence shows.” Despite having claimed to state what the DNA and forensic³ evidence shows, omitted from Pasdar's summary is fingerprint evidence detailed on pages 106-107 of the Echols memorandum. According to the Echols memorandum, “Tony Anderson, the fingerprint evidence expert on the crime scene when the victims' bodies were discovered” a print was found at the scene “within five to ten feet of where the first body was located, and it was at an angle that made clear that it had been left by someone who had been in the water.” Anderson compared the print to the convicted, the victims and every police officer on the scene, and found no match. The fingerprint is “powerful circumstantial evidence” that someone other than the three accused committed the charged murders, according to the Echols memorandum.

³ Despite having written about forensic evidence, Pasdar now claims that even after reasonable inquiry she is unable to determine whether fingerprints are forensic evidence. See Exhibit “B”, Response to Request for Admission No. 12.

Despite the fact that the Echols memorandum describes the print evidence as “powerful circumstantial evidence” the Pasdar letter makes no mention of the print evidence in her letter or MySpace posting. Subsequent testing of the print evidence by Wesley A. Sossamon of the Arkansas State Crime Laboratory found that the print did not match Plaintiff Terry Hobbs.⁴ In a pleading titled Stipulation No. 3: Regarding News Articles and Lab Reports filed in this case on June 12, 2009 the parties stipulated to the authenticity Mr. Sossamon’s lab report and to the fact that the print tested by Mr. Sossamon is the same print referred to on page 46 and pages 106-107 of the Echols memorandum. See stipulations d., e., f. and g. in Stipulation No. 3. Any reasonably accurate summary of the evidence presented in the Echols memorandum would have included a fingerprint described by the petition itself as “powerful circumstantial evidence.”

Furthermore, Exhibit UU⁵ attached to the Echols Memorandum is a report regarding the crime written by John Douglas, who is described in the Echols memorandum at page 108 as “[p]robably the country’s leading expert in criminal investigative analysis” offers an opinion that the offender “acted alone”. If the print belongs to the real killer, and the real killer acted alone, Terry Hobbs is conclusively eliminated as the killer. The Pasdar letter omits the print evidence stated in the Echols

⁴ Plaintiff obviously does not contend that the Pasdar letter should have referenced the fact that the fingerprint did not match Hobbs, in that the fingerprint report is dated 10 months after the Pasdar letter. However, had the fingerprint received the media attention that the DNA evidence received, inquiries might have been made as to whether the print belonged to Terry Hobbs, and there might have been press coverage regarding the fact that the print did not belong to Terry Hobbs, mitigating the damages suffered by Hobbs as a result of being falsely accused. As it stands, counsel for Plaintiff is not aware of a single instance of media coverage which states that the print that Echols contends belongs to the real killer does not match Terry Hobbs.

⁵ Pasdar cannot claim that she summarized the pleading and not the exhibits for two reasons. First, in that she read neither the pleadings nor the exhibits thereto, she can not know what facts appear in the pleadings and what facts appear in exhibits. Second, her summary contains some items that are ONLY referenced in exhibits and not referenced in the petition or memorandum itself.

memorandum, and omits the claim in the Echols memorandum that the killer acted alone. The Paskar letter mentions Terry Hobbs by name five times, despite omitting statements from the Echols memorandum which if true, conclusively demonstrate the innocence of Terry Hobbs. No accurate and complete or fair abridgement of the Echols memorandum would fail to mention the fingerprint evidence and the evidence from the nation's "leading expert in criminal investigative analyst" that the killer acted alone.

2. What Paskar inaccurately describes the DNA evidence offered in the Echols memorandum as a DNA "match" and makes no mention of another hair on a ligature used to bind a victim for which Terry Hobbs has been excluded.

The Paskar letter states that "-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." and "-DNA tests also match a hair at the crime scene to a friend of Hobbs that was with him that day." In contrast, the Echols memorandum 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." Similarly, Thomas Fedor, the DNA expert on the Echols legal team, stated that the mitochondrial sequence recovered from cigarette butt items 8 and 10⁶ **differs** (emphasis added) at one nucleotide position from the sequence Bode obtained from hair 2S04-114-03Aa⁷, described as a hair from ligature (Moore). Exhibit AA, page 3 of 3. That which differs is not a match, a fact which would have been apparent to Paskar had she bothered to read the Echols memorandum.

Mr. Fedor, in a presentation to the press on November 2, 2007, stated that 1.5% of

⁶ Cigarette butts 8 and 10 were alleged to be the items known to contain Hobbs' DNA.

⁷ This item of evidence is the hair from which Hobbs cannot be excluded as the donor.

the population could be the source of the hair from which Hobbs could not be excluded and that 7% of the population could be the source of the hair from which Jacoby could not be excluded⁸. What Pasdar claims as a match is not a match as that term is used by those who actually are competent to discuss DNA evidence. For a general discussion of the legal significance in the use of the term “match” and “cannot be excluded” see *U.S. v Hicks*, 103 F.3d 837, 844-846 (9th Cir. 1996). While Pasdar can argue as a non-scientist she cannot be expected to know the precise differences used to describe statistical probabilities, such is the risk you take when you falsely accuse someone of a brutal and infamous murder. The fact remains that the Echols memorandum and the statement by Mr. Fedor differ from the characterization of the DNA evidence stated by Ms. Pasdar in her letter.

Additionally, the Pasdar letter fails to mention 5 other items of evidence which match neither the convicted nor the accused, including an additional hair that was also found on a shoestring used to bind one of the victims. Exhibit W to the Echols memorandum lists 6 items of evidence that do not match the DNA of the victims on Page 3 of 13, Item 6.).⁹ Item a. (2S04-114-03Aa) is the hair from which Hobbs cannot be excluded as the donor. Exhibit V to the Echols memorandum provides a list of all the evidence tested and the numbers assigned to each evidence item at pages 1-3. Item no. 2S04-114-15 is labeled as “Hair from C. Byers ligature” on page 2 of 11 from Exhibit V. This same item is identified as one of the 6 items that does not match the victims in

⁸ The parties have stipulated to the authenticity of a dvd on which appears a video of the Echols defense team presentation. In her responses to requests for Admission, Pasdar acknowledged that she had seen the video and that she generally accepted the truth of the video. Statements made in the video are not hearsay because they are adoptive admissions as to Pasdar, as discussed in more detail below. Fedor’s statements regarding the two hairs begin 21 minutes and 19 seconds into the question and answer section of the video and end 24 minutes and 32 seconds into the video (21:19-24:32).

⁹ Items 41, 43, and 45 are the known samples of the 3 victims.

Exhibit W, as stated above. Subsequent testing excluded Hobbs as the donor of the “Hair from C. Byers ligature”. Exhibit 3 of Stipulation No. 3. is a laboratory report from Bode Laboratories which reports the results of DNA testing conducted on behalf of Echols and his co-defendants.¹⁰ Item no. 2S04-114-15 is included on a list of items from which Hobbs can be excluded as the source. Pasdar’s letter mentions a hair on a ligature for which Hobbs cannot be excluded and implies this is evidence of Hobbs’ guilt, but fails to mention a second hair for which Hobbs has been excluded.¹¹ Pasdar implies that Hobbs is the killer because of a hair found on a ligature, but ignores a second hair found on a ligature that does not match Hobbs.

Pasdar focuses on one item of evidence from which Hobbs cannot be excluded and falsely states that it “belongs to” Terry Hobbs. Pasdar makes the same error with respect to a hair supposedly “matched” to David Jacoby, the friend of Hobbs referenced in the Echols memorandum and Pasdar’s letter. Pasdar fails to mention other items of evidence for which the victims have been excluded, for which Terry Hobbs as also been excluded as a possible donor. Furthermore, by stating that a hair belonging to a friend of Hobbs is evidence of Hobbs involvement in the crime, Pasdar implicitly acknowledges that hair evidence can be passively transferred in a manner that does not indicate the guilt of any person whom the hair might belong to. The Echols memorandum’s position on DNA evidence is founded upon the notion that hair evidence can be passively transferred; yet no mention of the possibility of passive of the hair linked to Hobbs is found in

¹⁰ The Bode DNA reports are business records within the meaning of Federal Rule of Evidence 803(6). See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163, 109 S.Ct. 439, 446 (1988).

¹¹ Although Hobbs was not specifically excluded as the donor of the “Hair on the ligature of C. Byers” until May 2008, the fact that the Echols defense team tested the item and did not state that it could be linked to Hobbs creates an inference that it did not match Hobbs and such inference can be made by relying only on the Echols memorandum and its exhibits. Such inference was confirmed when the later test results were reported.

Pasdar's letter. Pasdar's letter is not accurate and complete or fair abridgement of the Echols memorandum; rather it falsely exaggerates what the Echols petition said about Hobbs and entirely ignores statements made by the Echols defense team that demonstrate the innocence of Hobbs.

3. The time of death of the victims stated in the Echols memorandum is inconsistent with what Pasdar describes as a “chronology of Hobbs’ alleged 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 Pasdar letter claims that the Echols memorandum includes a chronology of Hobbs’ alleged 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 (emphasis added). This is a direct accusation that Terry Hobbs killed Steve Branch, Chris Byers and Michael Moore. The Pasdar letter states that it is a “chronology” but it fails to mention that such “chronology” is inconsistent with the single most important point of time in any murder chronology: the time of death. The only reference to the time of death in the Echols memorandum 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.” See Echols memorandum, page 37, at footnote 13¹².

The Echols memorandum also states that independent evidence indicates that Mr. Hobbs was alone or possibly with his 4 year old daughter Amanda in the area of Robin Hood Hills for approximately one hour between 5:00 and 6:00 p.m. on the night of May 5, 1993. Echols memorandum at page 61. Although Pasdar claims to be making a fair report, the only time of death referenced in the Echols memorandum is on May 6, 1993,

¹² A transcript of the sworn testimony of Dr. Peretti will be offered as a supplemental exhibit to this motion when it is obtained by counsel for Plaintiff.

which makes a chronology of Hobbs' activities on May 5, 1993, irrelevant to the crime. In reality, there was no chronology in the Echols memorandum, a point that Ms. Pasdar might have discovered had she bothered to read the pleading before making the serious and false allegation that Terry Hobbs murdered three eight year old boys. Even if a chronology is pieced together by reading various parts of the Echols memorandum, the time of death stated in the memorandum is consistent with the innocence of Terry Hobbs, and inconsistent with Pasdar's statement that Hobbs washed clothes for no other reason than to hide evidence from the crimes. The Pasdar letter is not accurate and complete or fair abridgement of the Echols memorandum.

4. Issues regarding juror misconduct and the confession of Jesse Misskelley, Jr. are not mentioned in Pasdar's letter, despite voluminous argument on those topics in the Echols memorandum.

Pasdar's purported "fair report" regarding the Echols memorandum is also incomplete, and thus cannot be described as a fair abridgment. Lengthy arguments appear in the Echols memorandum regarding juror misconduct and the Misskelley confession, but those arguments are not mentioned in the Pasdar letter. For the most part, the Pasdar letter is a summary of false allegations against Terry Hobbs, not a summary of what was actually filed on behalf of Damien Echols on October 29, 2007. The Court should enter partial summary judgment for Plaintiff Terry Hobbs on the issue of whether statements made by Natalie Pasdar constitute a fair report regarding the Echols memorandum.

5. Pasdar's description of the Echols defense teams filing is inconsistent with the Echols defense team's description of its filing.

On November 2, 2007, the Echols defense team conducted a press conference

regarding the filings it made on behalf of Mr. Echols on October 29, 2007. A video recording of the press conference is filed in this case as Exhibit “A”, No. 99 to a pleading titled Stipulation No. 1: Regarding New Articles, Blog Entries, Transcripts and Digital Video Disks filed on June 12, 2009.

In an interrogatory¹³ Ms. Pasdar was asked to “State the extent to which you [Pasdar] were aware of and believed the factual assertions contained in Damien Echols legal team’s press conference of November 1, 2007, were true statements of fact on or before November 26, 2007. Under oath, Ms. Pasdar stated: “I believe I had visited the WM3.org website and had reviewed a video of the press conference prior to November 26, 2007. I generally believed the factual assertions therein at that time (as I do today) and had (and have) no reason to believe that the statements are false or misleading.”

In that Pasdar has manifested an adoption of or belief in the truth of the statements made by attorneys and expert witnesses on behalf of Damien Echols, such statements are adoptive admissions as to Pasdar. Federal Rules of Evidence Rule 801 (d)(2)(B) provides that statements are not hearsay if it is “a statement of which the party has manifested an adoption or belief in its truth.” Pasdar stated that she viewed the video and generally believed the factual assertions therein at the time she viewed the video and that she still believed the factual assertions made at the press conference when she answered the interrogatory under oath. Pasdar manifested a belief in the truthfulness of the statements made in the press conference and adopted the statements as her own, therefore they are an admission as to Pasdar and are not hearsay.

Federal Rules of Evidence Rule 801 (d)(2)(B) has been construed to permit silent

¹³ See Objections and Responses of Defendant Natalie Pasdar to Plaintiff’s First Set of Interrogatories, Interrogatory No. 13 and the response thereto, attached hereto as Exhibit “C”.

acquiescence to statements of co-defendants to constitute adoption of the co-defendants statements. *U.S. v. Kehoe*, 310 F.3d 579 (8th Cir. 2002). The act of demoting an employee has been construed as an adoption of a report detailing the discriminatory conduct of that employee. *Pilgrim v. Trustees of Tufts College*, 118 F.3d 864 (1st Cir.1997). Similarly, a report and interview notes were considered adoptive admissions because a supervisor sought the resignation of an employee who had engaged in discriminatory conduct. *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir 1998). In that silent acquiescence can constitute adoption of a statement for purposes of admitting it as an adoptive admission, and actions based on a report can constitute adoption of the report for purposes of admitting the report as an adoptive admission, a statement under oath that adopts statements made in the Echols team press conference should be admitted as adoptive admissions by Pasdard.

Although Pasdard claims to be summarizing the Echols filing, the characterization of the Echols memorandum offered by those who prepared and filed it stands in marked contrast to Pasdard's characterization of what was filed on behalf of Mr. Echols. The essential reason offered by Pasdard in her letter as to why she thinks that Echols is innocent is that scientific and forensic evidence shows that Hobbs committed the crimes. In her letter, Pasdard stated, "Below, I have written what the DNA and forensics evidence shows. I hope after reading it and looking at the WM3.org website, you will know that the wrong guys are sitting in jail right now, and feel compelled to help." The first two things mentioned by Pasdard in her list of what she claims the DNA and forensic evidence show are as follows:

-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.

-DNA tests also match a hair at the crime scene to a friend of Hobbs that was with him that day.

Pasdar characterizes the evidence as “so strong” and “irrefutable”.

As stated above, Thomas Fedor, Echols DNA expert, contradicted Pasdar’s contention that the DNA was a match as to Hobbs and Jacoby. When asked as to the press conference, “Is this evidence strong enough to say Terry Hobbs could have really done this?” Fedor replied as follows:

The two hairs I know about – the one that could have in fact come from Mr. Hobbs and the other one that could have in fact come from David Jacoby – constitute what I would call weak evidence. Because there are other people it could have come from and there isn’t any way to really prove our selection of possible sources for that hair. I don’t think – my personal opinion – I don’t think that that hair evidence would be enough to convict Mr. Hobbs or Mr. Jacoby or anyone that would be in a similar situation because it’s simply not strong enough. The percentages I gave of people who could be the source of those hairs are 1.5% of the population in the respect to one hair and 7% in respect to the other hair. That’s not particularly strong evidence especially in the context of what most people are accustomed to with DNA testing. These odds are considerably weaker than what we would call an STR DNA test that virtually provides a source.

See the stipulated video of the Echols defense team question and answer session, at 36:20-38:00. Immediately after Mr. Fedor’s remark, Dennis Riordan, lead counsel for Mr. Echols, agreed with Mr. Fedor’s characterization of the evidence as weak.¹⁴

Furthermore, Mr. Fedor characterized the weakness of the evidence based only on the percentages chances that the hairs did not come from Hobbs or Jacoby. This weak

¹⁴ The view of Mr. Fedor and Mr. Riordan that the DNA evidence was weak as to Hobbs was subsequently confirmed by Judge Burnett in his order denying Echols’s motion for a new trial. A certified copy of the order is attached hereto as Exhibit “D”. On pages 5-6 of his order, Judge Burnett stated “On the other hand, that two other persons [Hobbs and Jacoby] are not excluded from the two hairs does not place them there nor make them killers.” There has been virtually no media coverage of the fact that there has been a judicial finding regarding the quality of the DNA evidence as it applies to Hobbs.

evidence is further weakened by Mr. Fedor's acknowledgement 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. Mr. Fedor stated that there was no way to be sure whether the hair was carried to the scene by Hobbs or by passive transfer. See stipulated video question and answer session at 11:10-12:40.

The Echols memorandum 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." Dennis Riordan, lead counsel for Mr. Echols stated "No one is saying that we have developed in this case evidence that establishes the guilt, much less the guilt beyond a reasonable doubt.

Pasdar's conclusions about the strength and irrefutability of the DNA evidence are not a fair and accurate abridgment of the Echols memorandum because they contradict statements in the Echols memorandum and the characterizations of the DNA evidence offered by the DNA evidence expert and lead attorney on the defense team of Damien Echols.

III. PASDAR'S STATEMENTS ARE NOT STATEMENTS OF OPINION AS A MATTER OF LAW.

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. In *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991), 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). The three factors to be weighed are: (1) whether the author used figurative or hyperbolic language that would negate the impression that she was seriously maintaining implied fact; (2) whether the general tenor of the publication negates this impression; and (3) whether the published assertion is susceptible of being proved true or false. 306 Ark. at 111.

In this case, the author did not use figurative or hyperbolic language. Rather, she stated that “[b]elow, I have written what the DNA and forensics evidence shows.” At the end of her letter is a series of bullet points which represent that which Pashdar claims the “DNA and forensics evidence show.” It cannot be reasonably stated that Ms. Pashdar was not “seriously maintaining implied fact” from the words used in her letter, either when parsed or taken as a whole. Thus, if the published assertions are susceptible of being proved true or false, then Ms. Pashdar's statements are not opinion for purposes of determining whether they are actionable in a defamation case. The following is a list of statements by Pashdar that are capable of being proven true or false:

1. Below, I have written what the DNA and forensics evidence shows.
2. Their killer(s) is still out there, and justice has yet to be served.
3. 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.
4. DNA tests also match a hair at the crime scene to a friend of Hobbs that was with him that day.

5. 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.

6. I am confident that you will see the DNA evidence is irrefutable and that these three men did not get the kind of trial that is promised to us - as Americans.

The above factual assertions by Pasdar are both capable of being proven false and are in fact false. Pasdar was seriously maintaining that her statements were fact and the general tenor of her statements is that Terry Hobbs killed three eight year old boys. The Court should find that the statements at issue in this case are not statements of opinion as a matter of law.

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

TERRY HOBBS

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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:

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Mr. Dan D. Davison
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/s/ J. Cody Hiland
J. CODY HILAND