

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

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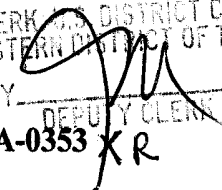
DENISE McVEA

vs.

JAMES CRISP

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CASE NO. SA-07-CA-0353 XR

CLERK OF DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY   
DEPUTY CLERK

**DEFENDANT'S RULE 12 MOTIONS**

James Crisp makes the following motions pursuant to FED. R. CIV. P. 12(b) (2) and (6).

These motions are made before any other pleadings by this Defendant.

**Rule 12(b) (2) Motion: Lack of Personal Jurisdiction**

1. This Court lacks personal jurisdiction over James Crisp ("Crisp").
2. Crisp is not a resident of Texas. Crisp is a resident of the State of North Carolina, and a tenured Associate Professor in American History on the faculty of North Carolina State University. Crisp's residence and office are in Raleigh, North Carolina.
3. Crisp does not maintain a registered agent for service of process in Texas. Crisp does not own property in Texas or pay taxes in Texas. Crisp has no substantial connection with Texas arising from any action or conduct purposely directed toward Texas, and Crisp's contacts in Texas are not continuous, systematic or substantial. Crisp's Affidavit is attached hereto as Exhibit A and incorporated by reference.
4. Plaintiff's complaint alleges no acts or transactions in Texas giving rise to a cause of action for libel. Rather, the petition simply alleges that Crisp posted three electronic mail comments on an internet website known as www.thealamofilm.com, an internet website devoted to topics concerning Texas history. Crisp's web postings are not in controversy, and for the

convenience of the Court the three postings are attached to Crisp's Affidavit as Exhibits A-1, A-2 and A-3.

5. As a matter of law, the posting of three electronic mail communications on an internet website is insufficient to confer personal jurisdiction over a non-resident author. *See, Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (Texas court lacked personal jurisdiction over Columbia University for an allegedly defamatory article concerning a Texas resident posted on Columbia's internet bulletin board; Columbia's internet presence in Texas is "not in any way substantial."); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (Virginia court could not constitutionally exercise jurisdiction over Connecticut-based newspaper merely from the posting of an article regarding a Virginia resident on an internet website).

6. Crisp has not purposely established minimum contacts with the State of Texas, and this Court's exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789 (Tex. 2002); *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801 (Tex. 2002), *cert. denied*, 537 U.S. 1191 (2003). This case should be dismissed for lack of personal jurisdiction.

**Rule 12(b) (6) Motion: Failure to State a Claim**

7. Subject to the foregoing motion to dismiss for want of personal jurisdiction, and without waiving same, Crisp further moves to dismiss this Complaint pursuant to FED. R. CIV. P. 12(b) (6), for failure to state a claim upon which relief can be granted.

8. The contents of Crisp's three emails are not in dispute. They are attached both as exhibits to the Plaintiff's Complaint, and again for the Court's convenience, as Exhibits A-1, A-2 and A-3 to this motion. Even a cursory reading of the emails compels the conclusion that they cannot sustain a cause of action for libel. Libel requires false statements of fact (not opinion), and the false facts must be "objectively verifiable." *Bentley v. Bunton*, 94 S.W.3d 561 (Tex.

2002). Whether a publication is a protected statement of opinion, or an actionable statement of fact, is a question of law for the Court. *Id.*; *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989).

9. In particular, research papers discussing scientific or academic controversies, in which one scholar may criticize or debunk the opinions of another scholar or researcher, constitute protected opinion as a matter of law. *Ezrailson v. Rohrich*, 65 S.W.3d 373 (Tex. App.—Beaumont 2001, no pet.). In academic and scholastic debate, which is precisely what occurred here, the criticized scholar's remedy lies in publication of a rebuttal, rather than litigation. *Id.* at 382.

10. Thus, for example, a tenant's statement that his landlord's property is "dangerous and unhealthy" is protected opinion, and not actionable in libel. *MKC Energy Investments, Inc. v. Sheldon*, 182 S.W.3d 372, 378 (Tex. App.—Beaumont 2005, no pet.). A statement that the plaintiff is "incompetent" is protected opinion. *Robertson v. Southwestern Bell Yellow Pages, Inc.*, 190 S.W.3d 899 (Tex. App.—Dallas 2006, no pet.). A description of a dismissed employee as "a walking E&O" is protected opinion. *Brown v. Swett & Crawford of Texas, Inc.*, 178 S.W.3d 373, 383 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Descriptions of a doctor's surgeries as "ill advised, poorly performed," and "totally unreasonable and substantially failed to meet the professionally recognized standards" are constitutionally protected statements of opinion. *Morris v. Blanchette*, 181 S.W.3d 422, 425 (Tex. App.—Waco 2005, no pet.).

11. Texas law on opinion is consistent with the federal constitutional standard. Thus, a statement that mad cow disease could make "AIDs look like the common cold," coupled with a charge that beef inspectors "treated it as a public relations issue and failed to take substantial measures," were protected opinions, even though stridently stated: "exaggeration does not equal defamation." *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. 2000). A description of an anti-abortion activist as an "accomplice to murder" is protected opinion. *Horsley v. Rivera*, 292

F.3d 695 (11th Cir. 2002). Description of a faculty member as “litigious” with “poor teaching skills and poor leadership skills” is protected opinion. *Miller v. Bunce*, 60 F.Supp.2d 620 (S.D. Tex. 1999). In a libel case arising from the best-selling novel A Civil Action, dealing with a notorious environmental impact lawsuit, descriptions of the plaintiff as a “liar” who “covered up,” “destroyed evidence” and “committed perjury” were protected opinions, since the context indicated that the author was expressing a subjective view, a theory or interpretation. *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2000).

12. These authorities are dispositive here. Crisp’s first two email posts on April 11 (Exhibit A-1) and April 20 (Exhibit A-2) either make no mention of the Plaintiff at all, or are in fact complimentary to her. It is a threshold question of law for the Court to determine in the first instance whether or not a statement is capable of a defamatory meaning. *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989). The first two email postings plainly are not. The criticisms in Crisp’s third email (Exhibit A-3) are plainly the type of unverifiable opinions as were analyzed in the foregoing cases. The statements that Ms. McVea’s “provocative and interesting theory is wrong,” as well as the colorful descriptions of her scholarship as “balderdash” and “malicious nonsense” are precisely the type of unverifiable and rhetorical comments that constitute protected opinion.

13. Furthermore, the context in which Crisp’s statements were made has strong bearing on the protected nature of the speech. Under Texas law, the test for opinion “focuses the analysis on a statement’s verifiability and the entire context in which it was made.” *Bentley v. Bunton*, 94 S.W.2d 561, 581 (Tex. 2002). Crisp’s statements were posted on a web log or “blog” internet forum dedicated to spirited and opinionated controversies, where anyone can post any comments for criticism on any topic whatsoever. The name of the forum is “No Holds Barred,” and the description of the forum states as follows: “This forum is going to be where

you can knock each other for a loop if you so desire.” Crisp Affidavit, Exhibit A. Even a cursory review of the postings will reveal a style of commentary that is often critical, caustic, sarcastic and highly opinionated -- including the comments of Ms. McVea herself, which appear in a box immediately preceding Mr. Crisp’s postings on Exhibit A-3. Topics recently discussed on this forum include House Speaker Nancy Pelosi, a ruling that the U.S. Government’s wiretapping program was held unconstitutional, the Iranian nuclear stalemate, and the decades-old claim of a UFO investigation at Roswell, New Mexico. *Id.* Plainly, this forum is precisely the type of eclectic, spirited, and controversial free-for-all where one can expect to find sharply divergent statements of opinion. By comparison to many of the posts, Crisp’s comments here were positively benign, and by all accounts, not actionable as libel.

WHEREFORE, PREMISES CONSIDERED, Defendant James Crisp prays for relief under FED. R. CIV. P. 12(b) (2) and (6) as set forth above.

DATED and SERVED this 10<sup>th</sup> day of July, 2007.

Respectfully submitted,

OGDEN, GIBSON, BROOKS & LONGORIA, L.L.P.

By:



William W. Ogden  
State Bar No. 15228500  
1900 Pennzoil South Tower  
711 Louisiana  
Houston, Texas 77002  
Telephone: 713-844-3000  
Facsimile: 713- 844-3030

ATTORNEYS FOR DEFENDANT  
JAMES W. CRISP

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendant's Rule 12 Motions has been forwarded to Plaintiff appearing *pro se* via certified mail, return receipt requested and/or facsimile on this 10 day of July, 2007, addressed as follows:

Denise McVea  
P.O. Box 201731  
San Antonio, Texas 78220



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William W. Ogden

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

DENISE McVEA

vs.

JAMES CRISP

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CASE NO. SA-07-CA-0353

AFFIDAVIT OF JAMES CRISP

STATE OF NORTH CAROLINA §  
  §  
COUNTY OF WAKE                          §

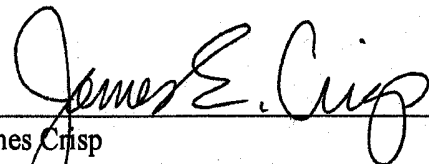
BEFORE ME, the undersigned authority on this date personally appeared JAMES CRISP, known to me to be the person whose name is subscribed below, who being by me first duly sworn, deposed and stated on his oath as follows:

1. My name is James Crisp. I am over the age of 18 years, have never been convicted of a felony, and am fully competent and duly authorized to make this affidavit. I have personal knowledge of the facts stated herein, and these facts are true and correct.
2. I am a resident of Raleigh, North Carolina, where I live and work and where I maintain my only residence and professional office. I am a tenured Associate Professor of American History at North Carolina State University. I do not maintain an office or residence in the state of Texas. I do not own any property, real or personal, within the State of Texas. I pay no taxes in Texas. I do not maintain a registered agent for service of process in Texas.
3. It is a fact that I authored and posted three electronic mail communications on an internet website known as www.thealamofilm.com. This website is dedicated to postings and topics of interests to academic and amateur historians on the subject of the Texas Revolution. I do not control or administer this website, and I do not know who the website administrator is. I have posted exactly three emails to this website. My first posting occurred on April 11, 2006, a true and correct copy of which is attached to this Affidavit as Exhibit A-1. My second was posted on April 20, 2006, a true and correct copy of which is attached hereto as Exhibit A-2. My third and final posting occurred on April 27, 2006, a true and correct copy of which is attached hereto as Exhibit A-3. These are the only three internet postings authored by me concerning any of the matters raised in Plaintiff's Original Complaint. I have not authored or posted any messages on this or any other internet forum regarding these matters since the posting of April 27, 2006, attached as Exhibit A-3.

EXHIBIT "A"

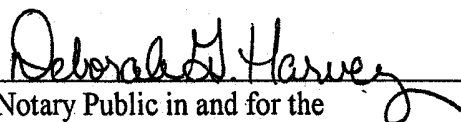
4. To put my comments in context, the issue I was addressing concerns what historians refer to in shorthand as the "One-Emily/Two-Emily" debate. This debate concerns the identity of the woman known as Emily West, immortalized in song as "The Yellow Rose of Texas," who according to legend was in Santa Anna's tent when the Battle of San Jacinto began. Contemporaneous writings suggest two women with a similar name. The debate and historical research focuses on whether there were actually two different women with similar names, or simply one whose identity has been confused over time. My first two email postings, Exhibits A-1 and A-2, were intended to inform the website readers of recent publications of interest regarding the identity of Emily West. It is a fact that Ms. McVea and I are on opposite sides of this historical debate. Ms. McVea supports the "One-Emily" thesis. I believe in the "Two-Emily" thesis. By definition, researchers on both sides are attempting to identify persons who lived in 1836, by making deductions from the partial historical records and documents known to exist. While the debate is of interest to historical researchers, neither theory is objectively verifiable to a standard of scientific proof. In other words, we must deduce our conclusions from a mass of historical documents, none of which explicitly answer the "One-Emily/Two-Emily" question.
  
5. My initial email postings were addressed to a forum site on www.thealamofilm.com dedicated to topics dealing solely with Texas historical research. At some point the comments and exchanges on this issue, including mine, were moved by the website administrator to a separate forum on the website called "No Holds Barred." At the time of this affidavit they are currently obtainable on the internet under the "No Holds Barred" forum. The website administrator describes "No Holds Barred" as follows: "This forum is going to be where you can knock each other for a loop if you so desire." It is a fact that many comments and criticisms posted on this forum contain sharp disagreements of opinion, often written in a style more caustic, sarcastic and rhetorical than is typical in scholarly publications. Other comments and opinions posted on "No Holds Barred" deal with subjects as divergent as House Speaker Nancy Pelosi, a ruling declaring the wiretapping policies of the United States Government to be unconstitutional, the nuclear stalemate with Iran, and the UFO Museum in Roswell, New Mexico. In short, it is obvious to any reasonable viewer that the context in which these web postings now appear is a forum devoted to opinion and hyperbole, rather than a dry recitation of verifiable facts.

Further, Affiant sayeth not.

  
 \_\_\_\_\_  
 James Crisp

SWORN TO and SUBSCRIBED BEFORE ME, the undersigned authority on this 10<sup>th</sup> day of July, 2007.



  
 \_\_\_\_\_  
 Notary Public in and for the  
 State of North Carolina



**crisp**

Posted: Tue Apr 11, 2006 9:54 am Post subject:



Joined: 05 Apr 2005  
Posts: 3  
Location: Raleigh, NC

**Alamo Colleagues:**

In an article titled "A Fresh Look at the Texas Revolution" which I published in THE JOURNAL OF SOUTH TEXAS in the spring on 2000 (vol. 13, no. 1) I noted (endnote 26 on page 75) that Moreland's letter on Emily D. West's behalf to Dr. Irion, the Secretary of State for the Texas Republic, was received and transcribed by the State Department in the month of July of 1837. Thus the letter exists in two copies at the Texas State Archives: the original written by Moreland, and the copy transcribed in the Department of State Letterbook: Letters Received, Nov. 28, 1836 - Mar. 24, 1841, pages 47-48. (Available on microfilm reel #23, Secretary of State, Executive Record Books, Texas State Library, Archives Division, Austin.) No copy of an actual passport for Emily D. West, however, has ever been found.

Jim Crisp

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crisp

Posted: Thu Apr 20, 2006 4:43 pm Post subject:



Joined: 05 Apr 2005  
Posts: 3  
Location: Raleigh, NC

Ladies and Gentlemen:

For those of you wondering about the question of whether Emily West de Zavala and Emily D. West were one woman or two, you should read the article published today by the Compass Rose at the University of Texas at Arlington.

The link is listed below:

<http://libraries.uta.edu/SpecColl/crose06/CR-Spr2006.pdf>

Let me say in passing -- I'm writing in haste from the University of Houston, where I will moderate the sixth annual San Jacinto Symposium this Saturday -- that I want to commend Jeff Dunn on a superb job of historical sleuthing which relies on hard evidence rather than speculation and conjecture. It is a very persuasive piece, which relies NOT AT ALL on the indenture agreement which Jeff discovered some years ago, and which he worked tirelessly to place in an archive where it could be made available to all scholars on an equal basis. It has been housed at Special Collections at UTA now for more than a year.

I've quoted before Francis Bacon's dictum that "truth arises more readily from error than from confusion." I believe that Ms. McVea's "one Emily" thesis is in error, but I've always thought that it was a tantalizing idea which deserved careful and even-handed evaluation.

Now that error has stimulated the research that will correct it, and tell us more than we knew before.

It has been a privilege to find myself connected through a fascination for this story to Jeff Dunn, Denise McVea, and my former grad student Jim Lutzweiler. I look forward to your responses to Jeff's article in the Compass Rose.

Now I'm heading for Galveston Bay -- for what research I can't presently reveal, but it has to do with looking at something no one has seen before -- the inside of the oysters that I plan to eat tonight.

Adios for now,  
Jim Crisp

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Jim Crisp



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**crisp**

Posted: Thu Apr 27, 2006 9:49 pm Post subject:



Joined: 05 Apr 2005  
Posts: 3  
Location: Raleigh, NC

**Defuera2006 wrote:**

**AllenW. wrote:**

**blackben wrote:**

AllenW, I think that Repo Man is referring to his separation from Denise in regard to whether the one Emily could pass. We should applaud the man for showing some rationality and flexibility about his theory of the Two Emilys. Hell, I eat crow here all the time. Tim

He should.

Listen to me very carefully:

I have followed Jeff Dunn's footnotes to original sources and I have found what I found 10 years ago with his treatment of the so-called indenture agreement.

Jeff Dunn has once again produced a work that:

1. Purposefully and without shame misreads the public record to suit his

**EXHIBIT A-3**

own designs;

2. Omits information that he would rather his readers not know. (In fact, I have never read a writer who feels so comfortable manipulating his readers through omission and distortion.)

3. Creates information and then pretends it is supported by the record, when in fact it is not.

It is shameful what he has done in that article. You will see my full and detailed response to his almost pathological misrepresentations the way you saw his: in a link on this forum when my response is published.

If you didn't want to share your names before, you certainly won't want to do so now.

Denise McVea  
San Antonio, Texas

P.S. Please spare us the whining about why won't I just post it now. I would just quiet down if I were you.

**Alamo Forum Readers:**

Having read many drafts of the work of both Denise McVea and Jeff Dunn over the past few years -- at their request -- I think I ought to weigh in on the libel posted above by Ms. McVea.

Yes, I know that I am part of the alleged "two-Emily conspiracy" -- but I would invite any and all of you to actually read that Special Extra Chapter of MAKING MYTH OF EMILY wherein all of my e-mails to Denise McVea -- part of an exchange initiated by her when she asked me to read her manuscript -- were published without my permission.

I am actually quite happy to have those messages on the public record; you will see from them that I was willing to give her research the benefit of the doubt, but ultimately unwilling to lend my support to a work which stretched both the evidence and credulity, as her book clearly does.

You will see that when I offered Ms. McVea specific indications of her errors, such as her misidentification of Sec. of State Dr. Robert Irion as "Judge D. Irion," she dismissed my points as trivial, despite their obvious significance, as recently shown in this forum in the case of Dr. Irion; yet when I criticized her basic methodology as unbalanced, she demanded specifics! When confronted by logical contradictions in her argument, she simply denies them.

The crimes attributed to Jeff Dunn in her screed quoted above are, I would submit, PRECISELY the methodologies practiced by Ms. McVea throughout MAKING MYTH OF EMILY; she is quite right to call such deeds "pathological misrepresentations." But such deeds are hers, not Dunn's.

On the other hand, Dunn, after years of archival research carried out in his spare time, has now brought forth a succinct article which, using passport applications,

census data, newspaper accounts, and ships' passenger lists, makes a rock-solid case that Denise's provocative and interesting theory is wrong -- just flat wrong. There were, quite obviously as many of you have now realized, two Emilys. The indenture agreement, which Dunn identified in the 90s, was equally effective in disproving the "one Emily" thesis, but it has been curtly dismissed by McVea for reasons that defy logic and fact. Dunn was completely cooperative in allowing my 1990s graduate student Jim Lutzweiler to quote and reproduce the document in full in his Master's Thesis, and Dunn over the next few years worked mightily to get the collection of documents of which the indenture agreement is a part transferred from the inconvenience of a bank vault to an archive where the entire collection is now available to all scholars.

Now McVea claims that the evil Jeff Dunn has prepared another tissue of mistruths. Her accusation is balderdash.

McVea, I have discovered -- in large part thanks to this forum -- is at her nastiest when her arguments are at their weakest -- and she is plenty nasty just now.

The documents which Dunn has used -- documents either ignored, not found, or suppressed by Denise McVea -- are in the public domain, and available for anyone to check. The "Sutherland and others" passport application file has been microfilmed, and is available at the Clayton Genealogical Library in Houston. The census data is there as well, and so are the microfilmed passenger lists.

It is never as much fun to be proven wrong as it is to be proven right -- and years ago the great Texas historian Walter Prescott Webb suggested in "An Honest Preface" that "academic courtesy" could mean cutting your colleagues' conclusions to shreds. But the kind of character assassination practiced by McVea against Dunn in her posting of April 25 is, at best, malicious nonsense.

Please read very carefully any "rebuttal" submitted by Ms. McVea, and check her references with equal care. That's what I did when I found that her arguments in previous submissions -- arguments based on prodigious and ingenious archival research -- nevertheless simply did not match the documentary evidence.

Sincerely,

James E. Crisp, Dept. of History, N. C. State University, Raleigh NC 27695-8108

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Jim Crisp

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