

IN THE DISTRICT COURT OF JOHNSON COUNTY  
STATE OF NEBRASKA

CHARLES W. HERBSTER,

Case No. CI 22-27

Plaintiff/Counterclaim  
Defendant,

v.

JULIE SLAMA,

Defendant/  
Counterclaim Plaintiff.

**BRIEF IN OPPOSITION TO  
PLAINTIFF/COUNTER-  
CLAIM DEFENDANT'S MO-  
TION FOR LEAVE TO  
AMEND AND MOTION FOR  
PROTECTIVE ORDER**

Defendant/Counterclaim Plaintiff Julie Slama (“Senator Slama”) submits this brief in opposition Plaintiff/Counterclaim Defendant Charles Herbster’s (“Herbster”) Motion for Protective Order and Motion for Leave to Amend pursuant to the Court’s order at the hearing held July 14, 2022. Senator Slama stands on her arguments submitted at the July 14th hearing and in her Objections to the Motion for Protective Order and Motion for Leave to Amend (filed May 9, 2022, and June 13, 2022, respectively), which are incorporated herein by reference. Pursuant to the Court’s order for additional briefing, Senator Slama submits the following supplemental arguments.

**1. Herbster’s Motion for Protective Order Should be Denied Because it is Not Supported by Evidence or Nebraska Law.**

As a threshold matter, the Court should concretely determine what is properly in dispute in Plaintiff’s motion. The counsel statements at issue before the Court are necessarily limited to the *two* (2) statements on which Herbster actually submitted evidence to the Court—*i.e.*, Exhibit 7 (the “April 22nd Statement”) and Exhibit 8 (the

“May 5th Statement”). Due to Herbster’s failure to offer evidence regarding any other purported counsel statement, the Court’s consideration should be limited to these exhibits, notwithstanding Herbster’s counsel’s unspecified and wide-ranging arguments at the hearing.

With regard to the only two statements at issue, Herbster’s motion effectively seeks a gag order on Senator Slama’s counsel under the trial publicity rule, Neb. Ct. R. of Prof. Cond. § 3-503.6. But Herbster’s evidence is insufficient to support Herbster’s brazen claims that Senator Slama and her counsel have “continually attempted to ‘try’ this dispute in the press,” “engaged in repeated gamesmanship,” or violated Neb. Ct. R. of Prof. Cond. § 3-503.6, particularly where such statements either were not subject to the trial publicity rule in the first place, stated matters expressly allowed by the plain text of the rule, or were in direct response to Herbster’s turbocharged media campaign to smear Senator Slama and her sexual battery claim as “manipulated.”

**A. The April 22nd Statement was not subject to the trial publicity rule at all.**

The April 22nd Statement is simply not subject to the trial publicity rule and should therefore be disregarded. The trial publicity rule applies to statements by “[a] lawyer who is *participating . . . in the litigation of a matter . . .*” Neb. Ct. R. of Prof. Cond. § 3-503.6(a) (emphasis added). As already described in the Objection filed with the Court, when the April 22nd Statement was made, Senator Slama had neither been served nor appeared in the litigation, nor had Herbster made any effort to serve her. As is apparent from the face of the April 22nd Statement, it was made in response to media reports that a lawsuit had been filed by Herbster and nothing more. Therefore, Herbster’s Motion for Protective Order should be overruled to the extent it is based on the April 22nd Statement.

**B. The May 5th Statement is permitted by the plain text of the trial publicity rule.**

The May 5th Statement is plainly permitted by multiple provisions of Neb. Ct. R. of Prof. Cond. § 3-503.6. That rule provides that a lawyer may state “information contained in a public record” and “the scheduling or result of any step in litigation.” Neb. Ct. R. of Prof. Cond. § 3-503.6 (b)(2) & (4). Providing a copy of an objection filed with the Court and stating the existence of a noticed deposition, Herbster’s confirmation that he would not appear for the deposition, and the existence of Nebraska Rules providing for sanctions against parties who fail to appear for a noticed deposition are all expressly allowed by the trial publicity rule. *See id.* Moreover, Herbster has failed cite any authority or make any showing that the statement had “a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter” as required by the trial publicity rule. Neb. Ct. R. of Prof. Cond. § 3-503.6(a) (describing what kinds of extrajudicial statements are proscribed). Nothing in the May 5th Statement could be deemed prejudicial to the trial of this matter and there is a total absence of proof on this critical element.

Not only was the May 5th Statement expressly allowed under Neb. Ct. R. of Prof. Cond. § 3-503.6(a) and (b), it is equally protected—and perhaps mandated—by subsection (c). That provision further provides:

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Neb. Ct. R. of Prof. Cond. § 3-503.6(c). This rule permits a lawyer to make statements in response to public statements made by another party, their lawyer, or other third persons because responsive statements may lessen any resulting adverse impact on the adjudicative proceeding. Neb. Ct. R. of Prof. Cond. § 3-503.6 cmt. 7.

Senator Slama submitted, and the Court received, evidence regarding eight examples of the myriad statements deployed by Charles Herbster, his agents, or other third parties through local and national media, social media, and a statewide political advertisement which attacked the credibility of Senator Slama's sexual battery claim. *See Exhibit 2* (Supp. Aff. of M. Jensen and attachments). Given the broader context, the statements made by Senator Slama's counsel are protected by the trial publicity rule. Indeed, far from having violated the rule, Senator Slama's counsel would, if anything, have been derelict in their duty to their client if they made no effort to mitigate the prejudice resulting from Herbster's media bullhorn.

Because the speech complained of is not subject to the trial publicity rule and is expressly permitted by the plain language of the same the Motion for Protective Order should be denied in its entirety.

**2. Herbster's Motion for Leave to Amend Should be Denied Because the Proposed Amendments are Futile, Duplicative, and Serve No Proper Purpose.**

A party may amend its pleading once as a matter of course before a responsive pleading is served. Neb. Ct. R. Pldg. § 6-1115(a). Otherwise, a party may only amend its pleading with leave of the Court. *Id.* Leave to amend is to be "freely given when justice so requires." *Id.* However, leave may be denied if undue delay, bad faith on the part of the moving party, futility of amendment, or unfair prejudice to the nonmovant can be shown. *McCaulley v. C L Enters., Inc.*, 309 Neb. 141, 152, 959 N.W.2d 225, 233 (2021). An amendment is futile if it fails to set forth a general scenario which, if proven, would

entitle the plaintiff to relief on some cognizable theory. *Hayes v. Cty. of Thayer*, 21 Neb. App. 836, 842, 844 N.W.2d 347, 353 (Neb. Ct. App. 2014).

The proposed amended complaint does not add any additional causes of action or theories of recovery, nor does it attempt to add additional parties to this litigation. Therefore, the only claim pursued by Herbster in this case, through either the original complaint or the proposed amended complaint, is a claim for defamation against Senator Slama. An ordinary defamation claim requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence by the publisher, and (4) special harm caused by the publication or actionability of the statement irrespective of special harm. *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 421, 796 N.W.2d 584, 593 (2011). In a case, like this one, involving a public figure and speech that is a matter of public concern, the burden is heightened and Herbster must prove falsity and actual malice by clear and convincing evidence and special damages. *Id.* at 421–22, 796 N.W.2d 593–94.

As with the initial complaint, the proposed amendments to the Complaint are entirely without merit and should be denied as futile because the statements made by Senator Slama are true. Further, the proposed amendments do nothing to advance the defamation claim or set forth any scenario that would entitle the Plaintiff to relief, beyond what was already alleged in the original complaint, and are therefore duplicative and futile. In fact, most of the proposed amendments are entirely unrelated to a claim for defamation. *See* Plaintiff’s Motion for Leave to Amend, Ex. E, at ¶¶ 17, 18, 40–42. As the Court noted at the hearing, a “short and plain statement of the claim showing the pleader is entitled to relief” is what is required. Neb. Ct. R. Pldg. § 6-1108. The proposed amendments, which are duplicative of the original pleading or unrelated to any claim for relief, do not satisfy this requirement. Finally, Herbster’s Motion for Protective Order is interrelated and if the Court finds that counsel’s statements are permitted by the

Nebraska Rules, Herbster should not be permitted to rely on the same statements as a basis to amend his complaint.

As Herbster's proposed amendments do nothing to advance his defamation claim, or any other claim, against Senator Slama, it appears that the amendments may be sought for no other reason than to interfere with Senator Slama's counsel or to unduly delay this litigation. Therefore, Herbster's Motion for Leave to Amend the Complaint should be denied.

WHEREFORE, Senator Slama requests the Court deny Charles Herbster's Motion for Protective Order and Motion for Leave to Amend.

Respectfully submitted July 1, 2022.

JULIE SLAMA,  
Defendant/Counterclaim Plaintiff.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2022, I filed the foregoing document using the Nebraska Judicial System's E-Filing function, causing notice of such filing to be served electronically on all parties' counsel of record.

/s/ David A. Lopez

# Certificate of Service

I hereby certify that on Friday, July 01, 2022 I provided a true and correct copy of the Brief to the following:

Herbster, Charles, W represented by Theodore Boecker (Bar Number: 20346) service method: Electronic Service to boeckerlaw@msn.com

Slama, Julie, represented by Marnie Jensen (Bar Number: 22380) service method: Electronic Service to marnie.jensen@huschblackwell.com

Signature: /s/ David A. Lopez (Bar Number: 24947)