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IN THE DISTRICT COURT OF JOHNSON COUNTY, NEBRASKA

CHARLES W. HERBSTER, Plaintiff/Counterclaim Defendant, vs. JULIE SLAMA, Defendant/Counterclaim, Plaintiff,	)	CASE NO: CI 22-27 PLAINTIFF'S BRIEF

COMES NOW Plaintiff Charles Herbster and hereby submits his Brief on the remaining issues before the Court. As Plaintiff understands the pending matters, the Court did not rule on Plaintiff's Motion for Leave to Amend or Plaintiff's Motion for Protective Order.

I. MOTION FOR LEAVE TO AMEND:

Plaintiff respectfully submits that objection to the Motion for Leave to Amend is entirely inconsistent with years of past precedent under Nebraska law.

As succinctly stated by the Nebraska Supreme Court:

"Leave to amend should be granted liberally…".

Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 195, 691 N.W.2d 116, 133 (2005)

There are numerous Nebraska cases which indicate not only should leave to amend be freely granted, but that quite literally the rules "require" that leave to amend be granted in nearly all circumstances:

The Nebraska Supreme Court observed:

> Generally, when a party seeks leave to amend a pleading, **our rules require that "'leave shall be freely given** when justice so requires."'In applying this rule, we have explained that the denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated
> McCaulley v. C L Enters., 309 Neb. 141, 152, 959 N.W.2d 225, 233 (2021)

A party opposing a proposed amendment must show some "prejudice" arising from the amendment, which is entirely missing from this case. The Nebraska Supreme Court explained the role and burden upon the party opposing amendment of demonstrating some actual prejudice:

> When a party seeks leave of court to amend a pleading, our rules require that "leave shall be freely given when justice so requires." A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. The Nebraska rules governing the amendment of pleadings are similar to those of the Federal Rules of Civil Procedure, and in applying our rules, we have looked to federal decisions interpreting the corresponding federal rule for guidance. Federal courts have held that "[d]elay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing amendment." **The burden of proof of prejudice is on the party opposing the amendment. "Prejudice does not mean inconvenience to a party," but instead requires that the nonmoving party "'show that it was unfairly disadvantaged or deprived of the opportunity to**

> **present facts or evidence which it would have offered had the . . . amendments been timely**."'
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> InterCall, Inc. v. Egenera, Inc., 284 Neb. 801, 811, 824 N.W.2d 12, 21 (2012) (emphasis supplied)

See also State v. Robertson, 294 Neb. 29, 41-42, 881 N.W.2d 864, 875 (2016)(leave "shall be freely given") and State v. Mata, 280 Neb. 849, 854-55, 790 N.W.2d 716, 720 (2010)(" denial of leave to amend pleadings is appropriate only in those limited circumstances").

The Nebraska Supreme Court has explained that a failure to grant leave to amend is reversible error. In fact, the Supreme Court has stated that where defendants "failed to show they would be unduly prejudiced if the amendment were granted", "the trial court abused its discretion in disallowing" amendment. See Pflueger-James v. Pope Paul VI Inst. Physicians, P.C., 21 Neb. App. 635, 641-44, 842 N.W.2d 184, 189-91 (2014)

There is no possible prejudice to the Defendant in granting leave to amend. First, the Motion for Leave to Amend was filed by the Plaintiff within less than thirty days of the original filing of the Complaint. No discovery had been completed or was even due at the time the Complaint was sought. So there is certainly no issue of timeliness or prejudice from a late amendment.

One of the incredible statements made by Defendant's counsel in resistance to the motion for leave to amend was the claim that the statements were "true". Of course, that is not a matter for the Defendant's counsel to determine. That is a matter for the trier of fact to determine, once the Plaintiff puts the claim at issue. This is precisely what the Plaintiff is attempting to do in this case. If the Defendant's opposition is predicated upon her claim that her statements are true, then that should be averred as an affirmative defense in response to each statement. It is not a basis to deny leave to amend the complaint.

Plaintiff sought leave to amend his Complaint to include allegations regarding additional statements made subsequent to the filing of the Plaintiff's Complaint. A fundamental proposition of the law is that a party pleading a complaint should specify the defamatory statements about which they complain. The proposed amendment gives notice of additional defamatory statements. These defamatory statements are interrelated to the original statements but have been more widely disseminated and have caused untold additional harm to the

Plaintiff. The statements are therefore independently actionable. The addition of these statements via amendment gives appropriate notice of such additional claims to the Defendant. Undoubtably, if notice was not given, there would be later objection to Plaintiff attempting to refer to them later as part of the basis of his complaint against Defendant.

It has been recognized that a Plaintiff is master of the terms of his Complaint. S*ee, e.g.*, Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 2433 (1987) ("the plaintiff is the master of the complaint"); and Grimm v. US W. Communs., Inc., 644 N.W.2d 8, 14 (Iowa 2002)("a plaintiff should be master of her pleadings"). It is not for Defendant or Defendant's counsel to determine the narrative through which the Plaintiff frames his Complaint.

The Plaintiff has set forth a narrative story and explanation as to what underlies his complaint against the Defendant. Plaintiff believes the evidence will ultimately show that the story concocted by the Defendant is/was motivated as a political hit piece calculated to attempt to bolster the political campaign of another. Furthermore, the underlying nature of the allegation made against the Plaintiff has changed since the original complaint and has gone from a general groping reference to a claim of "sexual assault", which is a decidedly different sort of statement, especially when connected with the false claim that Plaintiff used litigation as a weapon, rather than as a vehicle to attempt to reclaim his good name and reputation which was sullied by Defendant's false allegations. Whether Plaintiff succeeds is determined by the trier of fact, not by the Defendant attempting to limit what the Plaintiff can aver as the basis of his Complaint against Defendant.

Defendant has not set forth a specific line or statement or paragraph about which Defendant complains as being prejudicial or improper, rather there is simply the generalized claim that the claim in the Amended Complaint is "duplicative". The fact, however, that Defendant libeled/defamed and/or slandered Plaintiff on one occasion, does not preclude Plaintiff from demonstrating that Defendant continued to libel/defame and/or slander him through further public statements, especially when considering that there are differences in the statements both in verbiage and in the audience.

Furthermore, if there is some specific complaint about averments, those should be made via a motion to strike via Nebraska Ct. Rule of Pleading §6-1112(f), which authorizes a "motion to strike" is certain limited circumstances. It is not appropriate, however, to deny leave because Defendant or Defendant's counsel may have some complaint about an averment that the Plaintiff has made in his proposed Amended Complaint. If there is a specific averment to be challenged then it should be challenged after it is made part of the operative pleadings.

What really seems to underlie the objection to the proposed Amendment is the fact that several of the additional statements are made by counsel for Defendant Slama, as her authorized agent and representative. When counsel chose to publish such statements, especially when affirming that they were "authorized" by Defendant, they voluntarily assumed the risk that such statements might be actionable. The dilemma presented to counsel caused by their own statements, however, is not grounds to deny Plaintiff leave to amend.

In summary, the motion for leave to amend is timely. The motion is logical as it includes additional pertinent averments, including averments of additional defamatory/libelous statements that arose subsequent to the original filing and which were disseminated to broader and additional parties. No particular averments have been called to the Court's attention or identified in the objection with specific explanation as to why they would be inappropriate to include in the Amended Complaint. Furthermore, any argument as to whether or not the proposed Amended Complaint contains scandalous, irrelevant, or immaterial information would be the subject of a motion to strike filed after the Amended Complaint was filed and became an operative pleading. Any generalized notion that amendments should be denied because of the narrative framework of the proposed pleading is not a ground for denial of leave to amend the Complaint under any of the Nebraska cases cited above.

In short, given the Nebraska caselaw cited above, denial of leave to amend the Complaint would likely be reversible error given liberal Nebraska standards.

II. REQUEST FOR PROTECTIVE ORDER

It does not appear that Defendant disputes that Nebraska ethical rules indicate that extra judicial statements should not be made concerning litigation.

Nebraska Ct Rule §3-503.6 indicates that lawyers should not make extrajudicial statements about cases "that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter".

In this case, Defendant's counsel's extrajudicial statement clearly crosses the line by asserting, among other libelous and defamatory statements:

a. That Herbster committed a "sexual assault";
b. That Herbster's claims "would be categorically without merit and frivolous"; and
c. That Herbster has attempted "to weaponize the judicial process to scare victims from coming forward"

Courts across the country have imposed orders directing counsel to refrain from commenting upon cases in the public. This case should be tried in the courtroom, not in the press. Plaintiff respectfully submits that the way to accomplish this is for the Court to issue a protective order indicating that the parties and their attorneys are ordered to refrain from discussing this case outside the context of the courtroom.

The Florida Supreme Court has observed:

> "**Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court's inherent power to control professional conduct.** The constant spotlight of public attention focused upon public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons."
>
> State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976)

Similarly, the New Jersey Superior Court noted:

> "**There presently exists ample authority for the issuance by a trial court of an order limiting pretrial public comment by the parties and their attorneys**. *Nebraska Press Ass'n v. Stuart*, *U.S.* , 96*S. Ct.* 2791, 48 *L. Ed.* 2d , 44 *L.W.* 5149 (1976); *Sheppard v. Maxwell*, 384 *U.S.* 333, 86 *S. Ct.* 1507, 16 *L. Ed.* 2d 600 (1966); *State v. Kavanaugh*, 52 *N.J.* 7 (1968); *State v. Van Duyne*, 43 *N.J.* 369, 389 (1964), *cert.* den. 380 *U.S.* 987, 85 *S. Ct.* 1359, 14 *L. Ed.* 2d 279 (1965); *Hamilton v. Municipal Court*, 270 *Cal. App.* 2d 797, 76 *Cal. Rptr.* 168, 33 *A.L.R.* 3d 1029 (D. Ct. App. 1969), *cert.* den. 396 *U.S.* 985, 90 *S. Ct.* 479, 24 *L. Ed.* 2d 449 (1969); Annotation, "Validity and construction of state court's pretrial order precluding publicity or comment about pending case by counsel, parties or witnesses," 33 *A.L.R.* 3d 1041 (1970).
>
> State v. Carter, 143 N.J. Super. 405, 407, 363 A.2d 366, 367 (Super. Ct. App. Div. 1976)

Presumably one of the very reasons why an extrajudicial statement should not be made by counsel is that it can cause the lawyer making those statements to be entangled as a witness and/or it may give rise to further claims against his client, which is precisely what happened in this case, because Defendant's counsel chose to make further libelous statements concerning the Plaintiff. Plaintiff has every

right to pursue vindication, demand retraction, and to take action to seek to restore his good name from those statements. The fact that counsel's statements have become the basis of additional allegations demonstrates why the Court should preclude further press statements outside the courtroom.

More importantly, the case should be tried in the courtroom, not via dueling press statements or interviews with media members. It should be noted that no statement has been made by counsel for the Plaintiff's to any member of the press. Plaintiff's counsel has not even replied to inquiries by the press, let alone made statements. On the other hand, Defendant's counsel has chosen from the outset of this case to try the case in the media and to attempt to taint the jury pool.

The statements made by counsel for the Defendant are self-evident that they create a substantial likelihood of materially prejudicing an adjudicative proceeding. What other purpose could there truly be from Defendant's counsel issuing press release blasts asserting that Plaintiff is using litigation as a "weapon" and accusing him of the crime of sexual assault?

Plaintiff is making the reasonable request that the Court put an end to this tactic that is contrary to the letter and spirit of Nebraska Ct Rule §3-503.6.

WHEREFORE, Plaintiff prays that the Court grant him leave to amend and that it issues the requested protective order.

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Plaintiff

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served via electronic filing and/or sent by first class, United States mail, postage prepaid, on this the 1st day of July 2022, to the following:

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/s/ Theodore R. Boecker, Jr.

Certificate of Service

I hereby certify that on Tuesday, July 05, 2022 I provided a true and correct copy of the Brief to the following:

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

Slama,Julie, represented by David A. Lopez (Bar Number: 24947) service method: Electronic Service to dave.lopez@huschblackwell.com

Signature: /s/ Theodore Boecker (Bar Number: 20346)