

IN THE DISTRICT COURT OF JOHNSON COUNTY
STATE OF NEBRASKA

CHARLES W. HERBSTER,

Case No. CI 22-27

Plaintiff/Counterclaim
Defendant,

v.

**OBJECTIONS TO MOTION
FOR PROTECTIVE ORDER**

JULIE SLAMA,

Defendant/Counterclaim
Plaintiff.

COMES NOW Defendant Julie Slama (“Senator Slama”) and submits the following initial objections to Charles Herbster’s (“Herbster”) Motion for Protective Order filed May 7, 2022 (the “Motion”):

Introduction and Preliminary Statement

1. Herbster’s latest protective order request effectively seeks a gag order to restrain Senator Slama’s counsel from undertaking the necessary advocacy and communications to protect her from the massively prejudicial effects of the media war Herbster continues to wage against her. Not only does Herbster’s Motion—like his underlying defamation claim—run headlong into the core speech protections of the First Amendment, it doubles down on Herbster’s demonstrated litigation tactic of omitting critical factual context from his representations to this Court. For these and the other reasons set forth below, the Motion should be summarily rejected.

The Motion is Technically Defective

2. As a threshold matter, like Herbster’s other submissions, the Motion is out of compliance with the plain text of the mandatory

technical and formatting requirements which went into effect in the Nebraska Courts system on January 1, 2022. This disregard of the basic procedural rules of this Court is reason enough to strike and/or summarily overrule the Motion without prejudice to its reassertion in a compliant format.

The “Trial Publicity” Rule

3. On its “substance,” the Motion is objectively without merit and rests its arguments on the omission of material facts and the misapplication of cherry-picked sections of the governing rule. Simply put, *nothing* Senator Slama’s counsel have stated in out-of-court public statements remotely approach a violation of Neb. Ct. R. of Prof. Cond. § 3-503.6.

4. That rule—the “Trial Publicity” rule—provides, in pertinent part:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement 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.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;

...

(c) 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.

Application of the Trial Publicity Rule to the Statements in Question

5. Subsections (b)(1), (b)(4), and (c) are of particular relevance in relation to Herbster's Motion. Herbster correctly notes that Senator Slama's counsel has made several public statements regarding this litigation. Herbster takes issue with several of such statements, and has included them in his submissions to this Court, specifically in Exhibit A attached to the underlying Motion (the "May 5th Statement"), Exhibit A to his Motion for Leave to Amend (filed May 5, 2022) (the "April 22nd Statement"), and Exhibit E to his Motion to Quash and for Protective Order (filed May 5, 2022) (same statement).

6. These statements are either not even subject to the trial publicity rule or are squarely allowed by its plain text.

7. First, the 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). To the extent any statement in question predated Senator Slama's voluntary appearance in this

case, such statement necessarily is not subject to the rule. The April 22nd Statement, at least, falls into this category, since it was made regarding media reports of a purported lawsuit which (deliberately) had not been served on Senator Slama. At that time, no lawyer for Senator Slama was “participating” in any litigation.

8. Regarding *any* other of Senator Slama’s counsel’s public statements—to include even the April 22nd Statement if somehow it is subject to the trial publicity rule—such statements alternatively state the claims and defenses at issue in the case (*e.g.*, Senator Slama’s formal assertion under Neb. Rev. Stat. § 25-824 that Herbster’s claim is sanctionably frivolous and made in bad faith), recite the scheduling of a step in the litigation (*i.e.*, the deposition Herbster refused to attend at the eleventh hour), and/or were necessary to stem the mounting prejudicial effect of Herbster’s own attacks on Senator Slama. The latter category is precisely what Neb. Ct. R. of Prof. Cond. § 3-503.6(c) is designed to protect.

Herbster’s Prejudicial Media War Against Senator Slama

9. To wit: since April 14, 2022, the day Nebraska Examiner released its article on reports by Senator Slama and seven other women of sexual assault and harassment by Charles Herbster, Herbster has weaponized his massive and well-funded communications apparatus to systematically attempt to politicize Senator Slama’s sexual battery claims and otherwise smear and discredit her in the local and national media. This has included, but is not limited to:

- a. The day Senator Slama’s and the other women’s accusations were reported, and in immediate response to that report, Herbster’s campaign manager fired the first shot in what would become principal counter-narrative—*i.e.*, that somehow Senator Slama’s and seven other women’s accounts of sexual assault and harassment are the product of “manipulation” by Nebraska’s Republican

political establishment. Herbster campaign manager Ellen Keast was quoted as follows: “Keast said that ‘this is a political hit-piece built on 100% false and baseless claims.’ Keast blamed the ‘political establishment’ for ‘smearing and trying to destroy him with lies.” Aaron Sanderford, *GOP state senator, seven other women say Charles Herbster groped them; he denies allegations*, Nebraska Examiner (Apr. 14, 2022), <https://nebraskaexaminer.com/2022/04/14/gop-state-senator-seven-other-women-say-charles-herbster-groped-them-he-denies-allegations/>.

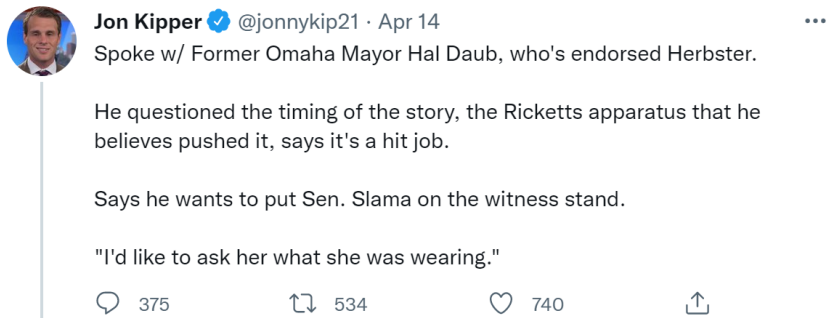
- b. In another statement issued that day, Herbster himself stepped up his “Slama-was-manipulated” attack, stating:

It’s only after I’ve threatened the stranglehold the establishment has on this state do they stoop to lies this large. This story is a ridiculous, unfounded dirty political trick being carried out by Pete Ricketts and Jim Pillen. For nearly a year now, Governor Ricketts and Jim Pillen’s campaign team have peddled this made-up story from one news outlet to another without any success. Now, with time running out, they’ve turned to a leftists news site to pick up and repeat their garbage. The fake-news story is based upon shadowy, unnamed sources and one person who was appointed by Governor Ricketts and her family has benefited from Governor Ricketts’ patronage for years.

Gina Dvorak, Kevin Westhues, Cassie Crowe, and Brian Mastre, *Herbster ‘unequivocally’ denies claims of sexual misconduct, calling a ‘dirty political trick’*, WOWT (Apr. 14, 2022), <https://www.wowt.com/2022/04/14/nebraska-unicameral-women-commend-victims-after-sexual->

[harassment-claims-made-against-herbster/](#) (full Herbster statement in article).

- c. The same day, ex-Omaha Mayor and Congressman Hal Daub, one of Herbster’s most prominent endorsers and political allies, embarked on an hours-long series of escalating and disgraceful media comments slandering the integrity of Senator Slama’s account, consisting of:



He then said this is how politics is these days and that the allegations are manufactured.

2:02 PM · Apr 14, 2022 · Twitter Web App

61 Retweets 12 Quote Tweets 664 Likes

followed by:



Paul Hammel @paulhammelNE
@PaulHammelNE



When I spoke to former Omaha Mayor @HalDaub09 he condemned the well-sourced story by @asanderford adding: "Maybe ask Sen. Slama what she was wearing. Was she nude? Was she wearing a one piece or two piece?" @NE_Examiner

4:40 PM · Apr 14, 2022 · Twitter Web App

48 Retweets 71 Quote Tweets 234 Likes

and finally culminating (for the evening) in Daub's taking to Channel 7's air to proclaim, "I saw her scrambling to try to get his attention because she was in a very tough race to be reelected." Abbie Petersen, *Former Omaha Mayor Hal Daub says Sen. Julie Slama 'was trying to attract Herbster's attention'*, KETV (Apr. 15, 2022), <https://www.ketv.com/article/hal-daub-julie-slama-trying-to-attract-charles-herbster-attention/39729378> (Daub interview video embedded in article).

- d. Five days after the initial Nebraska Examiner story broke, Herbster appeared on Stave Bannon's national conservative podcast "War Room" and deployed a slew of attacks on Senator Slama's report. Bannon asked, "Do you think that Governor Ricketts is in back of this?" Herbster responded, "There's no question in my mind about it. He is in back of this." Herbster went on to suggest that "this has been circulating for a year and came from him" and that "this is part of the establishment." Pounding the credibility attack home, when Bannon pressed Herbster as to whether what he is hearing is that Herbster's allegation is that "Pete Ricketts is in back of this [sic] allegations of this person against you, these kind of I guess sexually inappropriate touching—you're saying that

Pete Ricketts, who aspires to higher office, maybe even President of the United States, is in back of this?” Herbster replied, “That’s what you’re hearing. . . . Part of controlling the establishment of Nebraska is what he wants to do to make sure he can continue further with a political career.” Justin Horowitz, *Steve Bannon platforms Nebraska gubernatorial candidate Charles Herbster after eight reports of alleged sexual misconduct*, Media Matters for America (Apr. 20, 2022), <https://www.mediamatters.org/steve-bannon/steve-bannon-platforms-nebraska-gubernatorial-candidate-charles-herbster-after-eight> (Herbster interview video embedded in article).

- e. The weekend after Herbster filed this lawsuit, Herbster’s paid campaign consultant and surrogate Kellyanne Conway herself took to “War Room” to note Herbster’s filing of the defamation lawsuit (referring to it as “a legal document, everybody, this is not Twitter”), accuse Governor Ricketts of a “political vendetta” against Herbster and having “tried everything he could,” that “they’ve tried everything,” that “nothing was working,” and “so they laid this down.” Conway went on to name Senator Slama personally, noted her having been appointed by Gov. Ricketts, proceeded through a litany of Herbster’s cherry-picked rebuttal arguments, proclaims herself as being “a survivor of something much worse than what’s been described,” alluded to Senator Slama’s account as being part of a political “obsession,” and asserting, without evidence, that “they’ve been shopping this around for a very long time.” Mary Papenfuss, *Kellyanne Conway Knew Of ‘Sexual Allegations’ Against Nebraska Candidate Months Ago*, HuffPost (Apr. 25, 2022), <https://www.huffpost.com/entry/kellyanne-conway-groping-charles-herbster->

[nebraska n 62660167e4b0197ae3f7b0b6](#) (Conway interview video embedded in article).

- f. And in approximately the week after Herbster filed this lawsuit, he unleashed a television ad that, although not explicitly naming Senator Slama, doubled down on Herbster's Ricketts-Pillen conspiracy theory as the source of his "accuser's" story, noted that she was "employed by Ricketts," noted that Ricketts "gave [her husband and sister] jobs," and that Herbster was invited to "her destination wedding in the Dominican Republic." KETV, *Charles Herbster political ad*, YouTube (Apr. 26, 2022), <https://youtu.be/5xrc3vF1tkc>.

This is, without doubt, an incomplete listing of all the public comments Herbster and his agents have made impugning Senator Slama's sexual battery account as the product of "manipulation" by Nebraska's political leaders. Indeed, even Herbster's lawyers have joined the conspiracy theory chorus by baselessly peddling it in their submissions to this Court. *See, e.g.*, Motion at ¶ 10 ("[W]in or lose Herbster will prosecute this action and will seek to hold those accountable, *including those who may have manipulated Slama into this claim* accountable for their conduct." (emphasis added)).

10. These statements, individually and collectively, present substantial undue prejudice to Senator Slama. Not only in terms of improperly influencing her credibility for purposes of this litigation, but also more generally. Senator Slama is, of course, a public figure herself—a sitting State Senator who faces her own reelection in 2024. Although her counsel's efforts to utilize even a fraction of the publicity firepower possessed by Herbster would be permissible to protect even an ordinary citizen, those efforts were particularly warranted here given the specific career harm posed to Senator Slama as a result of Herbster's statements.

11. Indeed, the commentary to subsection (c) of the rule indicates that it is purpose-built for just this situation:

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Neb. Ct. R. of Prof. Cond. § 3-503.6, Comment [7]. The statements in question—and, indeed, *any* public statement made by Senator Slama's counsel in her defense—are categorically protected by one or more provisions of the trial publicity rule. The rule allows for a party, and her counsel, to “level the playing field,” which is exactly (and only) what has occurred here.

The Motion's Irrelevant Litany of Other Grievances

12. Herbster's lawyers' assorted other grievances are uniformly without merit. Their repeated complaint that Senator Slama's defensive press statement—*i.e.*, the May 5th Statement at Exhibit A of the Motion—was received by media before they personally received Senator Slama's Objection filing reflects a misapprehension of the technical process of this Court's electronic filing system. As the timestamps on the Objection and the May 5th Statement respectively indicate, the statement was released *after* the Objection was duly filed with the Court. To the extent Herbster implies that the undersigned somehow ran to the press about a formal legal submission before

actually *filing* that submission, that is false. And to the extent Herbster presses an imagined “simultaneous transmission” requirement, that, too, reflects a lack of awareness of Nebraska’s service requirements in the context of the e-filing system. There is no requirement whatsoever that a filer serve an opposing litigant by additional means where that litigant is represented by counsel registered on the e-filing system, and Herbster has identified none. That the filing is not actually processed by the Clerk until the following morning is of no import.

13. One last observation is warranted regarding Herbster’s foregoing “simultaneous transmission” grievance. Herbster’s lawyers claimed that, “As of the typing of this motion, for example, the press has a copy of [Senator Slama’s] ‘Objection’, but opposing counsel does not.” Motion at ¶ 7. Once again, digital timestamps tell a different story. All counsel received an email from the Clerk that Senator Slama’s Objection had been processed (and therefore distributed and on the docket) at 8:23 AM. But the timestamp on Herbster’s Motion reflects that it was *filed* at 9:19 AM, nearly an hour later. This suggests that Herbster’s lawyers *did*, indeed, “have” the Objection when they filed their Motion, they simply had not monitored their own emails. In any event, the Court should disregard this utterly irrelevant grievance.

Senator Slama’s Proper (and Necessary) Notice of Herbster’s Deposition

14. Finally, the Court should reject Herbster’s continued bemoaning of Senator’s Slama’s good-faith, and entirely rule-compliant, use of the civil discovery process to rebut Herbster’s prejudicial smears against her for his own gain. In other submissions, Herbster has deployed a litany of imagined defects with the deposition notice he received eleven (11) days before he was required to give testimony. These assertions range from a cut-from-whole-cloth prohibition on “unilaterally noticed” depositions to a rule-free claim that somehow the pleadings must be “closed” before discovery is

allowed—an argument squarely foreclosed by the plain text of Neb. Ct. R. Disc. § 6-330(a). Herbster partly regurgitates these arguments in his underlying Motion. Not only are they legally without merit, they continue to attempt to mislead the Court—and the public—from the reason *why* an expedited deposition of Herbster was necessary in the first place.

15. After Senator Slama’s report of Herbster’s sexual battery against her was published, Herbster sued her. He did so during the heat of the gubernatorial primary campaign, when attention to his counter-narrative statements—including several of those listed above—would be at its apex. But he simultaneously made no move to obtain summons or take any other action to actually *serve* Senator Slama, leaving her to learn of the lawsuit filed against her from press reports. This presented Senator Slama with the grave risk that Herbster may have initiated a defamation lawsuit against her, only to herald its existence as a sort of “name-clearing” device for his own political purposes, but would stop short of serving her, thereby subjecting himself to all the discovery accountability attendant to being an actual litigant in an active case. To mitigate that risk, and to take the necessary steps to conduct discovery in defense of *her own* integrity, Senator Slama availed herself of the procedural options at her disposal to not only voluntarily appear in the case, but simultaneously to provide reasonable notice to take Herbster’s testimony at a time when the same attention could be devoted to that testimony as it was to Herbster’s public rebuttal statements. That move may have been aggressive, and it may well have gone unanticipated by Herbster and his lawyers, but it was *entirely* within the bounds of the governing procedural and discovery rules. And it was a litigation imperative for Senator Slama. Herbster’s ongoing complaints about the sequence of noticing his deposition—which he refused to attend—should be rejected.

Conclusion

16. In sum, the Court should view the Motion for what it is: a blatant attempt to inject an unsupported professional conduct sideshow into these proceedings, based on incomplete submissions which glaringly omit the factual context of Herbster's own highly-publicized prejudicial statements about Senator Slama, from which she needs the protection the trial publicity rule empowers her attorneys to provide. The Court should not allow Herbster to distract from the central issue of the truth of his sexual battery of Senator Slama.

WHEREFORE, the Motion should be overruled in its entirety. Senator Slama reserves the right to supplement these arguments in briefing and/or at the hearing on the underlying Motion.

Respectfully submitted May 9, 2022.

**JULIE SLAMA,
Defendant/Counterclaim Plaintiff.**

By: /s/Marnie A. Jensen
Marnie A. Jensen (NE #22380)
David A. Lopez (NE #24947)
HUSCH BLACKWELL LLP
13330 California Street, Suite 200
Omaha, NE 68154
Telephone: (402) 964-5000
Fax: (402) 964-5050
marnie.jensen@huschblackwell.com
dave.lopez@huschblackwell.com

*Attorneys for Julie Slama,
Defendant / Counterclaim Plaintiff*

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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/Marnie A. Jensen

Certificate of Service

I hereby certify that on Monday, May 09, 2022 I provided a true and correct copy of the Objection 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 David A. Lopez (Bar Number: 24947) service method: Electronic Service to dave.lopez@huschblackwell.com

Signature: /s/ Marnie Jensen (Bar Number: 22380)