

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MEGAN HUNT,)	Case No. CI23-5067
)	
Plaintiff,)	
)	
vs.)	BRIEF IN OPPOSITION TO
)	THE DEFENDANTS’
NEBRASKA FREEDOM COALITION,)	MOTION TO DISMISS
MALIA SHIRLEY, PATRICK)	
PETERSON, and ROBERT)	
ANTHONY,)	
)	
Defendants.)	

SUMMARY OF ARGUMENT

Defendants do not deny making unprivileged communications about Plaintiff to third parties. Nor do Defendants deny that they refused to comply with Plaintiff’s retraction requests per Neb. Rev. Stat. § 25-840.01. The only issue is whether Defendants’ statements, as alleged in the Complaint, ultimately may amount to defamation *per se* and/or defamation *per quod*.

Defendants’ statements—allegations that she is a “groomer,” that she is skilled in “grooming children, including her own,” and that she is engaged in sexually “manipulat[ing], exploit[ing], and abus[ing]” her own child—are defamatory *per se* because such accusations are unambiguous, false assertions of fact. Defendants accuse Plaintiff of criminal activity, they suggest Plaintiff is unfit to perform the duties of her office, and they prejudice Plaintiff in her profession. Further, Defendants made the statements with actual malice.

But even if the Court does not find that Plaintiff has alleged defamation *per se*, the campaign of harassment Plaintiff has faced could reasonably lead a trier of fact to determine Defendants have committed defamation *per quod*. Because Plaintiff has alleged both defamation *per se* and defamation *per quod*, dismissal is unwarranted.

STANDARD OF REVIEW

On consideration of a motion to dismiss, “[c]omplaints should be liberally construed in the plaintiff’s favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.” *Mckenna v. Julian*, 277 Neb. 522, 525 (2009); *see also Parkart v. Lindquist*, 269 Neb. 394, 396 (2005); *Kellogg v. Neb. Dept. of Corr. Servs.*, 269 Neb. 40, 45 (2005). In the specific context of public libel actions, the Court will not grant judgment on the pleadings and dismiss the case if an amendment could cure the defect. *Hoch v. Prokop*, 244 Neb. 443, 449, 507 N.W.2d 626, 631 (1993) (Finding the trial court committed plain error by not allowing the plaintiff to amend their petition).

ARGUMENT

I. DEFENDANTS’ ACCUSATIONS OF GROOMING AND CHILD ABUSE ARE DEFAMATORY *PER SE*

A. Defendants’ Allegations Are False Assertions of Fact

Courts routinely recognize that the First Amendment has allowed restrictions on speech, including defamation against public figures. *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 417 (2011). Further, even publications mixing fact and opinion are factual—and therefore actionable—where, as here, the totality of circumstances support such a finding. *Id.* at 425-26.

1. Defendants Allege Plaintiff Is Engaged in Illegal Conduct

Both grooming and child abuse are statutorily defined in Nebraska. *See* Neb. Rev. Stat. § 79-879; § 28-707. Consistent with the statutory definition, the Nebraska Attorney General has defined grooming as preparation for sexual abuse. *See* Office of the Nebraska Attorney General, *Report on Clergy Abuse* 15 (2021). Sexual abuse, defined at Neb. Rev. Stat. § 28-367, is an umbrella classification which includes both sexual assault, § 28-319, and incest, § 28-703. Notably, the

grooming statute cross-references the criminal sexual assault statute. *See* Neb. Rev. Stat. § 79-879(1)(c)-(d); *see also* § 28-318.

a) Defendants Accuse Plaintiff of Grooming

Defendants repeatedly asserted that Plaintiff is a “groomer” and that she is skilled in “grooming children, including her own.” Compl. at ¶¶ 16-19, 34-37; Defendants even labeled Plaintiff a “professional groomer.” *Id.* at 34-35. Defendants’ proffered definition of the term “groomer” leaves no ambiguity. In their words, a groomer is “someone [who] builds a relationship, trust and emotional connection with a child or young person so they can manipulate, exploit and abuse them [...]” or to prepare the child to be “sexually abused, exploited, or trafficked.” Compl. at ¶ 25. *Compare* Neb. Rev. Stat. § 79-879 (“Grooming means building trust [...] in an effort to gain access and time alone [...] with the ultimate goal of engaging in sexual contact or sexual penetration[.]”); Nebraska Attorney General, *Report on Clergy Abuse* 15 (2021) (“Grooming means conduct designed to gain access to and time alone with a child to prepare him or her for sexual abuse by building a trusting relationship and emotional connection between the abuser and the child[.]”).

Defendants claim that the Plaintiff is not a teacher and thus Neb. Rev. Stat. § 79-879 is not relevant. However, both the Legislature and the Attorney General have defined “grooming” as behavior calculated to create opportunities for engaging directly in criminal sexual conduct with children, regardless of context. Defendants have confirmed that this is the precise meaning they implied. *See* Compl. at ¶ 25. That the religious and educational settings have been given special attention in Nebraska does not mean grooming only occurs within those contexts. Ultimately, whether § 79-879 specifically applies is irrelevant; the definition of grooming set forth in that statute is coextensive with preexisting criminal law. *See* Neb. Rev. Stat. § 28-707(1)(d)–(f).

b) Defendants Accuse Plaintiff of Physical and Sexual Child Abuse

Defendants also accuse Plaintiff of promoting and engaging in various forms of physical and sexual abuse against a child, conduct violating Neb. Rev. Stat. §§ 28-707 (child abuse), 28-367 (sexual abuse), 28-318 (sexual assault), 28-

319 (sexual assault), and/or 28-703 (incest). Defendants claim Plaintiff seeks to “abuse” and “exploit” children sexually, Compl. at ¶ 25. In sum, even ignoring Defendants’ repeat description of Plaintiff as a “groomer,” Defendants falsely contend that Plaintiff engages in criminal conduct. False charges of illegal conduct are not protected opinion as a matter of law and are actionable as defamation *per se*.

2. Defendants’ Publications Are Statements of Fact Given the Totality of Circumstances

Even if the Court does not find that Defendants’ statements amount to allegations of criminal conduct, the totality of circumstances demonstrate that Defendants’ statements are statements of fact, not opinion. When determining whether a statement amounts to an actionable factual assertion or protected opinion, courts look to 1) “the general tenor of the entire work,” 2) the use of “figurative or hyperbolic language,” and 3) “whether the statement in question is susceptible of being proven true or false.” *Moats v. Republican Party of Neb.*, 281 Neb. 411 at 425-426 (2011). Because the Plaintiff can prove that she has not groomed or abused her child, the third consideration clearly supports a determination that the Defendants have alleged false statements of fact.

The first statement at issue, published on March 22, 2023, is completely factual. Compl. at ¶ 16. Defendants reposted a five-year-old picture from Plaintiff’s Facebook page depicting Plaintiff and her child, referred to that day’s legislative debate, and then tagged Plaintiff and called her a groomer. It contained no “figurative or hyperbolic language,” instead seeming to report on the day’s events. Defendants’ factual assertion is actionable as defamation.

Defendants’ next publications—made on March 24, March 31, and April 5—are self-satisfied and derogatory: they depict a “Madness Tournament” of Defendants’ political opponents. Compl. at ¶¶ 18, 34-36. While some of the claims within these posts are opinion, still others *are* meant to be construed seriously. All individuals appear with a seemingly professional headshot photo. Defendants list the actual heights of Senator Cavanaugh, reporter Chris Dunker and Nebraska Democratic Chairwoman Jane Kleeb. Defendants call Senator Cavanaugh “an obstructionist on the floor of the Legislature,” likely stemming from her filibuster of legislation Defendants supported. Defendants correctly list Kleeb as the Chairwoman of the Nebraska Democratic Party. Plaintiff is accused

of “com[ing] from big money in Omaha.” These assertions are neither figurative nor hyperbolic. They are factual, even in this context.

It is within the context of these three publications that Defendants repeatedly claimed Plaintiff is skilled in “grooming children, including her own.” Defendants’ accusation is serious and succinct, and it likely would be considered factual by most readers—particularly because this allegation is surrounded by clear factual assertions.

And, if there were any remaining doubt, on April 4, 2023, Defendants posted a definition of grooming from the National Society for the Prevention of Cruelty to Children in the United Kingdom, eliminating any possible ambiguity about what Defendants meant by “groomer.” Compl. at ¶ 25 (“someone [who] builds a relationship, trust and emotional connection with a child or young person so they can manipulate, exploit and abuse them [...]” or to prepare the child to be “sexually abused, exploited, or trafficked.”). In this publication, Defendants argued that opponents of the Let Them Grow Act (which included Plaintiff) “are fighting to build relationships with children, build trust, keep pronouns/binding/etc. a secret from adults, and then exploit them!” Compl. at ¶ 25.

In sum, Defendants repeatedly accused Plaintiff of grooming. The “general tenor” of these accusations suggest that they were intended to be understood as statements of fact. *Moats*, 281 Neb. at 425-426. The statements were surrounded by clear factual assertions and definitions of grooming from reputable sources rather than “figurative or hyperbolic” language. *Id.* And Plaintiff can prove that she is not, in fact, a groomer or a child abuser. *Id.* Most reasonable readers would interpret Defendants’ assertions as factual under the totality of circumstances. As such, Defendants’ publications are actionable as defamation *per se*.

B. Defendants Made the Statements with Actual Malice

Actual malice exists where Defendants act with “knowledge of falsity or reckless disregard for the truth.” *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 422 (2011). Plaintiff has alleged that Defendants knew that their statements are false. Indeed, Plaintiff sent Defendants letters stating as much and requesting retraction of their statements on March 31, 2023, and again on April 5, 2023. Compl. at ¶ 33. Instead of retraction, Defendants made additional defamatory comments. Even if Defendants were to argue they were originally

unaware of their statements' falsity, they effectively ratified their pre-retraction statements by republishing them after Plaintiff requested retraction. Their knowingly false publications demonstrate actual malice.

Because Plaintiff alleged that Defendants knew their statements were false, there is no need to consider whether Plaintiff also alleged that Defendants recklessly disregarded the truth about Plaintiff and her relationship with her son. But Plaintiff did, in fact, allege Defendants' reckless disregard for the truth. Compl. at ¶ 12. The story of Plaintiff's relationship with her son is easy to access—and, given Defendants' apparent obsession with Plaintiff, it is beyond belief that Defendants were not aware of Plaintiff's love and support for her child. Plaintiff has twice been elected to serve in the Nebraska Unicameral legislature, owns a small business, and is generally a beloved member of her community and family. Public comments by Plaintiff and her son, including to publications such as the New York Times (Lodoño, Ernesto. *Nebraska's Fight Over Transgender Care Turns Personal and Snarls Lawmaking*. The New York Times. March 30, 2023. [bit.ly/44BujCe](https://www.nytimes.com/2023/03/30/us/politics/nebraska-transgender-care.html)) indicate nothing but a loving and supportive relationship between the two. Unsurprisingly, Plaintiff has never been charged with, investigated for, or convicted of a crime against a minor, let alone her own child. Defendants offer no factual bases for their defamatory assertions because there are none. Defendants have acted with actual malice.

1. Plaintiff Does Not Need to Allege Special Damages

The Defendant relies in error upon *Moats* for the assertion that special damages must always be plead in a public libel claim. In the context of defamation *per se* the Court in *Moats* acknowledges it is not necessary to plead special damages. *Moats* at 423 (“Because the publications at issue were not defamatory *per se*, it was necessary for Moats to plead the defamatory nature of the words and special damages to properly plead his defamation *per quod* claims.”). Even then, according to statute the Plaintiff need not allege special damages because she has alleged that Defendants acted with actual malice. *See* Neb. Rev. Stat. § 25-840.01(2) (limitations on recovery to special damages “shall not apply if it is alleged and proved that the publication was prompted by actual malice”).

Additionally, actual malice is an issue for the jury to decide—reinforcing that dismissal is unwarranted. “[A]ctual malice shall not be inferred or presumed

from the publication.” *Id.* See also *Freeburg v. Artistic Woven Labels, Inc.*, No. A-96-808, 1997 WL 817831, at *4 (Neb. Ct. App. Dec. 23, 1997) (“The question of whether a statement was maliciously made is a question of fact for the jury to decide.”).

C. Defendants’ Statements Are Inherently Defamatory

Some assertions are so inherently damaging to a person’s reputation that they are *per se* defamatory and do not require a showing of special damages. Such assertions include those which a) “falsely impute the commission of a crime involving moral turpitude,” b) “falsely impute [...] unfitness to perform the duties of an office or employment,” and c) “prejudice one in [...] her profession or trade or tend to disinherit one.” *Nelson v. Rosenberg*, 135 Neb. 34, 280 (1938).

1. Defendants Falsely Accused Plaintiff of the Commission of Crimes Involving Moral Turpitude

As discussed in Section I(A), *supra*, Defendants have attributed to Plaintiff, *inter alia*, the statutory crimes of grooming, child abuse, and incest. Black’s Law Dictionary defines turpitudinous conduct as that which “is contrary to justice, honesty, or morality [...] also termed moral depravity.” Black’s Law Dictionary 1031-1031 (Bryan A. Garner ed., 8th ed., West 2004). In other words, “[t]urpitude is a base or corrupt act or condition that would cause others to shun the person who commits such an act or suffers from such a condition.” Wolters Kluwer Bouvier Law Dictionary Desk Edition, *Turpitude (Moral Turpitude)* (Stephen Michael Sheppard, 2012 Edition, CCH Incorporated, 2012). The crimes Defendants accuse Plaintiff of are unquestionably “base or corrupt”; sexual violence against children is perhaps the most reviled conduct in our society. As such, the statements are defamatory *per se*.

2. Defendants’ Falsities Suggest Plaintiff Is Unfit to Perform the Duties of Her Office or Employment

Individuals with felony convictions are ineligible for public elected office in Nebraska. Neb. Rev. Stat. § 29-112. Five out of the six classifications for child abuse carry felony sentences. Neb. Rev. Stat. § 28-707. Incest is a felony offense.

Neb. Rev. Stat. § 28-703. Given that Defendants have consistently referred to gender-affirming care for transgender youth such as Plaintiff's son as "genital mutilation," it seems most appropriate to construe their allegations in line with Neb. Rev. Stat. § 28-707(7): "a Class II felony if the offense is committed knowingly and intentionally and results in serious bodily injury [...]." As Defendants accuse Plaintiff of felonious conduct which would disqualify her from public office, they necessarily also assert that she is unfit for public office. Such an assertion is defamation *per se*.

3. Defendants' Falsities Prejudice Plaintiff in Her Profession

Plaintiff is the founder of a specialty shop selling stationery, paper goods, and art supplies in the Benson neighborhood in Omaha. Plaintiff's wares are available for purchase by people of all ages and backgrounds. Defendants' assertions that Plaintiff "groom[s] children, including her own" and engages in child abuse "subject [her] to public ridicule, ignominy, or disgrace," *Young v. First United Bank of Bellevue*, 246 Neb. 43, 48 (1994). Such public ridicule is evinced by the outpouring of hatred Plaintiff received in the wake of Defendants' statements, including, *inter alia*, calls for her public execution and genital mutilation. Compl. 21-23. Given that scores of people now believe Plaintiff to be a "fkng pedophile," Compl. at ¶ 22, an "abusive Muchausen mom," *id.* at ¶ 21, or worse, and she is necessarily prejudiced in her profession.

II. IN THE ALTERNATIVE, DEFENDANTS' STATEMENTS AMOUNT TO DEFAMATION *PER QUOD*

Even if the Court does not find defamation *per se* as a matter of law, a reasonable trier of fact could find defamation *per quod* given the defamatory

meaning of Defendants' words and the existence of special damages stemming from the Defendants' actions.

A. The Defamatory Meaning of Defendants' Statements Is Easily Discernible

As discussed above in Section I, Defendants claimed that Plaintiff is a "groomer," that she is skilled in "grooming children, including her own," and that she is engaged in "manipulat[ing], exploit[ing], and abus[ing]" her own child sexually. *Supra*. Violence against children, especially sexual violence, is considered universally abhorrent in our society. To accuse Plaintiff of such behavior is to expose her to disgust, disdain, humiliation, and ostracization.

III. DEFENDANTS' RELIANCE ON *MOATS* IS MISGUIDED

A. The Factual Context Is Not Analogous to *Moats*

In *Moats*, the plaintiff was an aspiring candidate for the Nebraska State Legislature who faced numerous attack ads while on the campaign trail from the defendant in the form of paper mailers. *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 413 (2011). The *Moats* Court grounded its discussion in "the fact that [the] case arises in the context of a political campaign" and that "discussions of *candidates*" is promoted by First Amendment values. *Id.* at 417-18 (emphasis added).

Plaintiff has twice been elected to serve in her role as State Senator and is therefore decidedly *not* a candidate for public office; instead, she is term-limited from seeking re-election. Defendants made the defamatory comments against Plaintiff not in the context of a contested election, but rather as an attack on her personally as an individual and as a mother. Voters can expect some amount of hyperbole in attack ads during campaign season, but non-campaign-related allegations of harming one's own child are likely to be taken far more seriously by the community at large. The present circumstances thus weigh more greatly in favor of a finding of defamation than those in *Moats*.

B. The Statements at Issue Are Qualitatively Different from Those in *Moats*

In *Moats*, the Court split over one particular statement in two different publications when considering defamation *per se*. The majority focused on the exact words used in the publications, finding that “the publications accused Moats of making *misleading* statements in an affidavit, not of making *false* statements in an affidavit” and thus “[did] not rise to the level of accusing Moats of committing any crime and therefore are not defamatory *per se*.” *Moats*, 281 Neb. 411, 423 (emphasis in original).

In the instant case, there is no gap between the language Defendants employed and the statutory language of prohibited conduct. As discussed above in Part I(A), grooming, child abuse, and sexual abuse are all legally defined terms in Nebraska. Because Defendants have accused Plaintiff of legally prohibited conduct in no uncertain terms, they are liable for defamation *per se*.

CONCLUSION

Plaintiff believes emphatically in the right to free speech. However, a peaceful society demands reasonable limits on some types of speech, including, *inter alia*, obscenity, incitement to violence, and defamation. *U.S. v. Stevens*, 130 S.Ct. 1577, 1584 (2010). Defendants’ actions—which have put Plaintiff’s safety, her son’s safety, and their livelihood in jeopardy—violate those limits.

In characterizing this suit as an attempt to silence or intimidate, Defendants confuse Plaintiff’s motivations with their own. Journalists have documented the resurgence of defamation targeting LGBTQ+ individuals—largely centered around false claims of pedophilia and grooming—as tactics meant to undermine and discredit political opponents (Nelson, Bryn. How Stochastic Terrorism Uses Disgust to Incite Violence. *Scientific American*. Nov. 5, 2022. bit.ly/43Pxsso; Wiggins, Christopher. Attacks on the LGBTQ+ Community Amount to Stochastic Terrorism. *The Advocate*. Aug. 16, 2022. bit.ly/44GjcII). Further, there are some who employ the tired and disproven, yet effective, “LGBTQ+ child predator” trope to provoke outrage, stoke disgust, and ultimately encourage aggression and violence against LGBTQ+ individuals (Nelson, *supra*).

Plaintiff urges the Court to deny Defendants' motion to dismiss. Defendants have falsely and maliciously accused Plaintiff of conduct which is inherently defamatory in unprivileged communications to the public.

In the alternative, Plaintiff asks to proceed on a defamation *per quod* theory, and for the case to be put to the trier of fact. Plaintiff and her family have suffered and continue to suffer harm as a result of Defendants' defamatory statements made with actual malice.

For these reasons the Plaintiff respectfully requests that the Court deny the Defendants' motion to dismiss.

MEGAN HUNT, Plaintiff

/s/ Adam S. Morfeld

Adam Morfeld #24950

Nebraska Legal Action Fund

3637 Holdrege Street

Lincoln, NE 68503

Tel: 402-613-0724

Adam.Morfeld@NebraskaAction.com

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with the word limits and typeface requirements set forth in the Nebraska Court rules, that the word count function in Microsoft Word was applied to all content in this brief, and that the Brief consists of 3,362 words.

Certificate of Service

I hereby certify that on Tuesday, August 08, 2023 I provided a true and correct copy of the Brief to the following:

Anthony,Robert, service method: First Class Mail

Shirley,Malia, service method: First Class Mail

Peterson,Patrick, service method: First Class Mail

Nebraska Freedom Coalition represented by Sullivan,Robert,M, (Bar Number: 20793)
service method: Electronic Service to bobsullivan402@gmail.com

Signature: /s/ Adam Morfeld (Bar Number: 24950)