

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA**

JB & ASSOCIATES, INC., et al.,	)	Case No. CI 15-6370
	)	
Plaintiffs,	)	
	)	
vs.	)	<b>ORDER ON DEFENDANTS' MOTION TO DISMISS</b>
	)	
NEBRASKA CANCER COALITION, INC., et al.,	)	
	)	
Defendants.	)	
	)	
	)	

This matter comes before the Court on Defendants' Motion to Dismiss. A hearing was held on October 22, 2015. Parties appeared by counsel. Arguments were heard and the matter was taken under advisement. Being fully advised in the premises, I now find and order as follows:

**FACTS AND PROCEDURAL HISTORY**

Plaintiffs are independent businesses that operate indoor tanning salons in Nebraska. Collectively, Plaintiffs claim that they account for 68% of the known tanning salons in the Omaha and Lincoln market areas, and an estimated 84% of sales of tanning services in those markets. The Nebraska Cancer Coalition, Inc. ("NCC"), led by Dr. Alan G. Thorson, M.D. (President) and Dr. J. David Watts, M.D. (Vice President) (collectively, "Defendants"), has started a campaign to educate the public on the perceived dangers of indoor tanning; more specifically, the connection between indoor tanning and cancer. As part of its campaign, the NCC maintains a public website located at [www.thebedisdead.org](http://www.thebedisdead.org). Defendants promote this website in multiple publications, social media outlets, and advertisements.

On July 22, 2015, Plaintiffs commenced this action against Defendants for: (1) defamation, and (2) deceptive trade practices and business disparagement based on certain statements Defendants have made on their website [www.thebedisdead.org](http://www.thebedisdead.org). On September 14, 2015,

Defendants filed their Motion to Dismiss on both causes of action for failure to state a claim upon which relief can be granted pursuant to Neb. Ct. R. § 6-1112(b)(6).

### STANDARD OF REVIEW

Whether a complaint states a cause of action is a question of law. *Broad ex rel. Estate of Schekall v. Randy Bauer Ins. Agency, Inc.*, 275 Neb. 788, 792, 749 N.W.2d 478, 482 (2008). On a motion made pursuant to Neb. Ct. R. § 6-1112(b)(6), the court accepts the plaintiff's allegations in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. *McKinney v. Okoye*, 282 Neb. 880, 882, 806 N.W.2d 571, 575 (2011). Complaints 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. *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 445-46, 778 N.W.2d 115, 118 (2010). Dismissal under Neb. Ct. R. § 6-1112(b) (6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Doe v. Bd. of Regents of Univ. of Nebraska*, 280 Neb. 492, 499, 788 N.W.2d 264, 274 (2010).

### ANALYSIS

Defendants' Motion to Dismiss asks this Court to dismiss both of Plaintiffs' claims against Defendants for failure to state a claim upon which relief can be granted. I consider the arguments surrounding each claim in turn.

#### **I. Defamation**

Plaintiffs argue that Defendants have made false and misleading statements in connection with Defendants' "The Bed is Dead" Campaign. These statements can be found on Defendants' website, [www.thebedisdead.org](http://www.thebedisdead.org). As a preliminary matter, I find that I can consider the content of

www.thebedisdead.org without converting this motion to a motion for summary judgment because the website is fundamental to the allegations and thus is “necessarily embraced by the pleadings.” See *DMK Biodiesel, L.L.C. v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013) (Documents “embraced by the pleadings” include materials “alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.”)

Plaintiffs contend that these statements were designed to destroy Plaintiffs’ businesses, reputations, and livelihood. Defendants move to dismiss Plaintiffs’ defamation claim by arguing that Plaintiffs have not pled and cannot establish the elements of a defamation claim against Defendants.

To establish a claim for defamation, Plaintiffs must plead the following elements:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

*Steinhausen v. HomeServices of Nebraska, Inc.*, 289 Neb. 927, 939-40, 857 N.W.2d 816, 828 (2015) (citing *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W. 2d 584 (2011)).

Defendants allege that: (1) Plaintiffs have not alleged sufficient facts to establish that Defendants’ statements “are concerning Plaintiffs;” (2) Plaintiffs have not alleged that Defendants’ statements are false; (3) the statements at issue are not defamatory because they are not factual assertions but are expressions of opinion; and (4) the statements are not defamatory per se and therefore require proof of special damages to be actionable. I will address each of Defendants’ argument separately.

A. Plaintiffs Have Alleged Sufficient Facts to Plausibly Establish That Defendants’ Statements “Are of or Concerning” Plaintiffs.

Defendants argue that because Plaintiffs have not asserted that any of the statements at issue are “of or concerning” any specific Plaintiff, but rather, the statements concern an entire

industry, Plaintiffs' defamation claim does not state a claim upon which relief can be granted. Plaintiffs oppose this assertion by arguing that Defendants ignore the content of the statements, the context of the statements, the intended audience, and the small number of businesses who provide indoor tanning services in Nebraska. I find that at the motion to dismiss level, Plaintiffs' Complaint and its allegations are sufficient to plausibly establish that Defendants' statements "are of or concerning" Plaintiffs.

Although no Nebraska case directly addresses the question of when an allegedly defamatory statement is "of or concerning" a plaintiff, Nebraska case law provides that a defamatory statement must be evaluated in light of the full context of the statement and how it was understood by the audience. *See Moats*, 281 Neb. at 422-23, 796 N.W.2d at 594 ("[T]he circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration."); *Steinhausen*, 289 Neb. at 940-41, 857 N.W.2d at 828-29 ("In addition to the content of the communication, a court looks to the knowledge, understanding, and reasonable expectations of the audience to whom the communication was directed, taking cues from the broader setting in which the statement appears."); *Hennis v. O'Connor*, 223 Neb. 112, 120, 388 N.W.2d 470, 476 (1986) ("In determining whether an alleged statement is defamatory, Nebraska law requires that the statements complained of not be isolated and that they be considered in the context of the entire broadcast.") Furthermore, Iowa and the Eighth Circuit have stated that "[a]lthough defamatory words must refer to an ascertainable person, the plaintiff need not be named if the alleged libel contains matters of description or other references therein, or the extraneous facts and circumstances...show that plaintiff was intended to be the object of the alleged libel, and was so

understood by others.” *Wisner v. Nichols*, 165 Iowa 15, 143 N.W. 1020, 1025 (Iowa 1913) (adopted and applied by the Eighth Circuit in *Ball v. Taylor*, 416 F.3d 915, 917-18 (8th Cir. 2005) and *Brummett v. Taylor*, 569 F.3d 890, 891-92 (8th Cir. 2009)). Finally, the Restatement (Second) of Torts, § 564A (1977), which is consistent with Nebraska case law, as well as the approach adopted by the Eighth Circuit and the Iowa courts, provides:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,

- (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
- (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.

In the case at hand, Plaintiffs allege that Defendants’ statements were intentionally targeted at and published to Plaintiffs’ customers and that the statements provided allegedly false information regarding indoor tanning services provided by Plaintiffs. Defendants attempt to argue that the statements were made on their website which is accessible to anyone in the world, not just those in Nebraska. However, under the “About” section of [www.thebedisdead.org](http://www.thebedisdead.org), Defendants state that their “campaign focuses on educating *Nebraska* girls ages 18 and under, and their parents, on the dangers of indoor tanning.” (emphasis added). Given this statement and Plaintiffs’ allegations that Defendants promoted their campaign at Omaha’s Fashion Week, bought ad space in the Omaha Fashion Magazine, and promoted and distributed to the Nebraska public, posters containing allegedly false and misleading statements related to indoor tanning, I find that it is plausible Defendants’ statements were targeted specifically to Nebraskans in both Omaha and Lincoln. I find that given Plaintiffs’ allegation that Plaintiffs account for 68% of known tanning salons in the Omaha and Lincoln market areas and 84% of sales of tanning services in those areas, that Defendants’ statements could plausibly be “of or concerning” Plaintiffs.

B. Plaintiffs Have Asserted That Defendants' Statements Are False.

Defendants claim that the defamation cause of action, as it relates to Statements 1, 4, 7, 8, 10 and 11 must be dismissed because Plaintiffs do not allege that the statements are false. I disagree. In their Complaint, Plaintiffs have alleged that all of the statements in question are false. See Pls.' Compl. ¶ 23 ("Among the false and misleading statements are the following:"); Pls.' Compl. ¶ 100 ("Defendants made false and defamatory statements regarding Plaintiffs as specifically outlined in all preceding paragraphs.") Therefore, I find that Plaintiffs have sufficiently alleged in their Complaint that Defendants' statements are false.

C. In the Context Alleged in the Complaint, Defendants' Statements Can Be Understood as Statements of Fact, Not Opinion.

Defendants argue that Plaintiffs' defamation claim fails because the statements complained of by Plaintiffs are not factual assertions but are expressions of opinion. A statement of opinion, as opposed to a statement of fact, cannot be defamatory. *Steinhausen*, 289 Neb. at 940-41, 857 N.W.2d at 828-29.

Nebraska courts utilize a totality of the circumstances test in determining whether Defendants' statements constitute "subjective impressions" that are not defamatory or "objective expressions of verifiable facts." *Steinhausen*, 289 Neb. at 940, 857 N.W.2d at 828. The "[r]elevant factors include (1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false." *Id.* Moreover, "context is important to whether an ordinary reader would view a statement as one of fact or opinion." *Id.*

In this case, the alleged defamatory statements were made on Defendants' website, [www.thebedisdead.org](http://www.thebedisdead.org), under the "FACTS" section with the statement "LEARN THE FACTS

ABOUT TANNING.” Furthermore, there is no hyperbolic language in Defendants’ statements or the “FACTS” section generally. Language is hyperbolic when it is “obviously understood as an exaggeration, rather than a statement of literal fact.” *Steinhausen*, 289 Neb. at 941, 857 N.W.2d at 829. Defendants concede that their campaign is intended to “educate Nebraska girls age 18 and under, and their parents.” If Defendants’ statements were intended to “educate,” it only seems logical that the statements were meant as facts, not opinions. Therefore, I find that the allegations in Plaintiffs’ Complaint plausibly establish that Defendants’ statements are facts, not mere opinions.

D. Plaintiffs Have Alleged Sufficient Facts to Plausibly Establish That Defendants’ Statements Are Defamatory Per Se.

Finally, Defendants’ argue that their statements are not defamatory per se, but require proof of special damages to be actionable. Plaintiffs contend that Defendants’ statements are defamatory per se because they prejudice Plaintiffs in their profession and trade.

The Nebraska Supreme Court has explained what constitutes defamation per se and how it should be determined:

Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they ***prejudice one in his or her profession or trade*** or tend to disinherit one. In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language in its ordinary and popular sense.....Further, the circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

*Matheson v. Stork*, 239 Neb. 547, 553, 477 N.W.2d 156, 160-61 (1991) (internal citations omitted) (emphasis added). As alleged in Plaintiffs’ Complaint, Defendants’ statements are a part of their campaign to educate the Nebraska public, particularly young women, that indoor tanning

is dangerous and can cause cancer. Plaintiffs are in the business of providing indoor tanning services to the particular audience the Defendants are targeting. I find that Defendants' statements, as alleged by Plaintiffs, prejudice Plaintiffs in their profession, trade, and business. Therefore, I conclude that Plaintiffs do not need to plead and prove special damages because Plaintiffs have sufficiently alleged that Defendants' statements are defamatory per se.

## **II. Deceptive Trade Practices and Business Disparagement**

Plaintiffs' second cause of action is brought under Nebraska's Deceptive Trade Practice Act ("NDTPA"), Neb. Rev. Stat. § 87-302(a)(8), which provides, "(a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she: ... (8) Disparages the goods, services, or business of another by false or misleading representation of fact."

First, Defendants claim that the statements are not "representations of fact," but rather are mere opinions. I find, for the same reasons outlined in Section I. C., above, that the allegations in Plaintiffs' Complaint plausibly establish that Defendants' statements are facts, not mere opinions.

Second, Defendants argue that Plaintiffs have not alleged that the statements at issue were made in the course of Defendants' "business, vocation, or occupation." Plaintiffs have alleged that Defendants' campaign is a "coordinated scheme [that] is funded in part by individuals and commercial entities having a direct financial interest in generating negative publicity about indoor tanning salons, including the sunscreen and cosmetic industries and those providing UV light treatments in medical facilities." Pls.' Compl. ¶ 20. Also, Plaintiffs allege that "Dr. Watts and other members of the NCC have a financial interest in destroying Plaintiffs' businesses, as Dr. Watts and others in his industry seek to offer cosmetic dermatology services to Plaintiffs' customers, in place of those services provided by Plaintiffs." *Id.* For these reasons, I find that Plaintiffs have

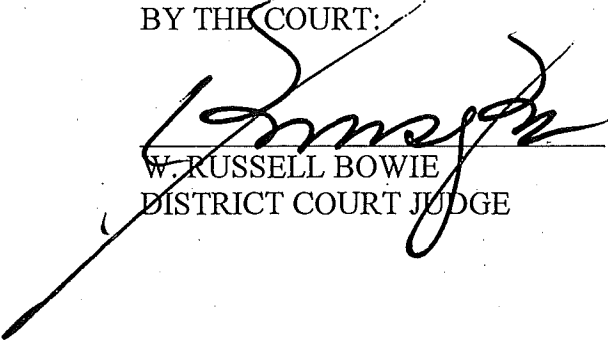


sufficiently alleged in their Complaint that Defendants' statements were made in the course of Defendants' business, vocation, or occupation.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Defendants' Motion to Dismiss is overruled.

DATED this 24 day of November, 2015.

BY THE COURT:

  
W. RUSSELL BOWIE  
DISTRICT COURT JUDGE