IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

CATHERINE A. DOUGHERTY, Plaintiff, vs. STEVE ANDERSEN, Individually and OAK HILLS HIGHLANDS CONDO ASSOCIATION a/k/a OAK HILLS HIGHLANDS ASSOCIATION, INC., a Nebraska non-profit corporation, and STEVE ANDERSEN ELECTRICAL CONTRACTORS, INC., a Nebraska Corporation, Defendants.	CI 12-8311 **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

This matter came before the Court on March 4, and May 9, 2014 on Defendants' motions for summary judgment. Plaintiff, Catherine Dougherty, appeared through counsel, David Selby and Defendants Steve Andersen (Andersen) and Steve Andersen Electrical Contractors, Inc. ("Andersen Electrical") appeared through counsel Betty Egan. David Stubstad appeared on behalf of Defendant Oak Hills Highlands Association, Inc. (Oak Hills).

This action involves claims for relief alleging defamation and for damages. Plaintiff, at all times relevant to this proceeding, was a resident in the Oak Hills Highlands Condominium Property Regime in Omaha, Nebraska and Andersen was the President of Oak Hills and owner of Andersen Electrical.

Plaintiff alleges that Andersen, with the apparent authority of the other Defendants, commenced a campaign of egregious and bullying tactics against Plaintiff culminating in an alleged defamatory communication attached to the Complaint as Exhibit A.

Oak Hills argues that it did not expressly or impliedly authorize the allegedly defamatory statement and that Plaintiff has not been damaged as a result of the allegedly defamatory statement.

Andersen and Andersen Electrical also argue that Plaintiff cannot demonstrate any damages. Oak Hills points to statements Plaintiff made in her deposition that she placed the condominium she owned in Oak Hills up for sale and sold it prior to the July 25, 2012

email from Andersen, that Plaintiff admits that the email communication had nothing to do with her selling her condominium or determining the price she accepted for the sale of the condominium; that she cannot identify any lost income she incurred as a result of the email; and she cannot identify anyone who thinks less of her as a result of the email.

Summary of Undisputed Facts

1. On or about July 25, 2012, Andersen sent an email (which is attached to the Complaint as Exhibit A) (the Email) to various members/residents of Oak Hills which stated in relevant part:

> If I knew a year or ago what I know now, I would have called the Foster Care Hotline (1800-652-1999) to report (Plaintiff's) antagonistic and verbally abusive ways with our neighbors and the neglectful way she kept the exterior of her property; after the first complaint that I received from our Directors and neighbors. I've learned from a pretty good source that you remain anonymous when reporting to them and they pick up on key words like "antagonistic" and "abusive". I'm told that they would have taken immediate action and it may have prevented one of our condo owners from selling their "dream home" just to move away from her and saved the other neighbors a lot of grief.

2. Andersen admits to sending out the Email. (Exhibit 15, Andersen Deposition 93:14-21).

3. Plaintiff previously owned a condominium located at 6410 S. 120th Plaza (the Condominium) in Omaha, Nebraska, located in Oak Hills. (Exhibit 1, Dougherty Deposition 5:24-6:2); (Exhibit 2, Kerkhove Deposition 74:19-21).

4. Plaintiff purchased the Condominium in March, 2011. (Exhibit 1, Dougherty Deposition 5:24-6:1).

5. Plaintiff entered into a contract for the sale of the Condominium on July 16, 2012, and moved out on July, 25 2012. (Exhibit 1, Dougherty Deposition 5:1-2, 59:14-15, 86:23-87:9).

6. Andersen is a resident of Oak Hills and is a now former President and Director of Oak Hills. (Exhibit 16, Kerkhove Deposition 8:9-15, 75:2-5). Andersen also is president of Andersen Electric.

7. As of July 25, 2012, the following individuals were members of the Oak Hills Board of Directors:

1. Steve Andersen

2. Al Kerkhove
3. Don Broman
4. Ziggie Moriarty
5. Diane Terkelsen
6. Larry Morrissey
7. Mike McFarlin
8. Neal Morien
9. Sue Meier

(Exhibit 16, Kerkhove Deposition 75:2-21).

8. Plaintiff's Complaint alleges that "[f]rom the time Plaintiff moved into said unit, and thereafter, Defendant Steve Andersen has individually, and with apparent authority on behalf of and as President of the Board of Directors of Defendant [Oak Hills] ... commenced a campaign of egregious behavior and bullying tactics against Plaintiff. (Complaint ¶ 8, Exhibit 4).

9. Plaintiff's Complaint alleges that "on or about July 25, 2012, Defendant Steve Andersen, and as President of Defendant [Oak Hills], ... maliciously prepared and composed, of and concerning the Plaintiff, the writing attached hereto as Exhibit 'A' and hereby made a part hereof." (Complaint ¶ 9). The relevant portion of the Email is set out in ¶ 2 above.

10. There is no evidence that the Oak Hills Board of Directors took any action expressly authorizing Andersen to send an email or otherwise communicate regarding Plaintiff. (Exhibit 16, Kerkhove Deposition 77:7-13, 80:18-81:7).

11. Andersen admitted at his deposition that an official meeting of the board of directors never took place to discuss whether to send the Email. (Exhibit 15, Andersen Deposition Exhibit C 144:11-15).

12. In her deposition, Plaintiff stated that she has no evidence that the Oak Hills Board of Directors authorized Andersen to send the July 25th email:

> Q. The email that is marked as Exhibit No. 1 [the July 25th email], there is something at the bottom that provides a title for Mr. Andersen; correct? What does it say?
>
> A. Steve Andersen, President, Oak Hills Highlands Condo Association, Steve Andersen Electrical Contractors, Incorporated.

Q. Okay. Now, do you have any evidence that anyone from the condo association board authorized Mr. Andersen to write that email, if he did?

A. I do not have evidence.

Q. Do you have any evidence that anyone on the condo association board knew that Mr. Andersen was writing those statements, if he did?

A. I do not have evidence.

(Exhibit 1, Dougherty Deposition 85:18-86:7).

13. Plaintiff has claimed the following damages resulted from the allegedly defamatory Email: (a) loss of income from the sale of her condominium (6410 S. 120th Ave.), which she alleges was sold for "considerably less" than its present value (Plaintiff's Complaint ¶ 13); (b) loss of rental income from terminating a lease for a rental property Plaintiff owned because Plaintiff moved out of her condominium located at 6410 S. 120th Plaza (Plaintiff's Complaint ¶ 14); (c) moving costs (Plaintiff's Complaint ¶ 15); (d) damages to her reputation (Plaintiff's Complaint ¶ 16); and (e) loss of income from no longer boarding foster children (Exhibit 13, Plaintiff's Supplemental Response to Oak Hills's Interrogatory No. 16).

14. Plaintiff stated at her deposition that she first contemplated selling the Condominium in January, 2012, and the Condominium was listed for sale on February 2, 2012. (Exhibit 1, Dougherty Deposition 88:24-89:9); (*See also* Dougherty Deposition Exhibit 3 (MLS listing for 6410 S. 120th Ave., with a listing date of February 2, 2012).

15. The purchase agreement for the Condominium was executed on July 16, 2012 before the Email was sent by Andersen. (Exhibit 1, Dougherty Deposition Exhibit 2 (dated 7/16/2012)).

16. Plaintiff stated in her deposition that the Email Andersen sent had nothing to do with the sale of the Condominium:

Q. Can you and I now agree that that email that is Exhibit1 had nothing to do with your selling your condo?

A. Yes.

Q. Can you and I also agree that that e-mail had nothing to do with determining the price for which you sold the condo.

A. Correct.

(Exhibit 1, Dougherty Deposition 87:12-19).

17. Plaintiff testified in her deposition that she had no evidence that the Condominium sold for less than it should have:

> Q. We went through the incidents involving board members; correct?
>
> A. Correct.
>
> Q. Do you have any evidence that your condominium sold for less than it otherwise would have sold for, but for those incidents with those board members?
>
> A. I don't have evidence that it sold for less, but I know why it sold. I took the first bid. It was the very first offer I ever got.
>
> Q. But obviously one of the damages that you're claiming in this case is you sold your condominium for less than its fair market value.
>
> A. Absolutely.
>
> Q. And my question is, do you believe that it sold for less than the fair market value because of any of the incidents involving the board members other than Mr. Andersen?
>
> A. Yes.
>
> Q. What evidence?
>
> A. I took a lower bid because I wanted to get out. I took the first bid that came in.

(Exhibit 1, Dougherty Deposition 91:18-92:14).

18. Plaintiff is also seeking damages related to the loss of rental income from another condominium she owns, located at 5626 S. 125th Cir. (the Rental Condominium). Plaintiff moved into the Rental Condominium after moving out of the Condominium. (Exhibit 1, Dougherty Deposition 95:17-23).

19. For the two years Plaintiff owned the Rental Condominium, she incurred a loss of $25,000.00 in 2011, and a gain of $896.00 in 2012. (Exhibit 1, Dougherty Deposition 94:21-97:25).

20. Plaintiff testified in her deposition about the damage to her reputation as a result of the alleged defamatory email:

Q. Other than the addresses on page 2 of 4 of Exhibit 1 [the July 25th email], do you know anybody else who has seen this email?

A. I do not know that anybody has seen it. I know that people have heard about it.

Q. Okay. How have they heard of it.

A. I have no idea. This group is a very tight – knit group. We belong to Oak Hills Country Club, so I don't know if these people talked about it down at Oak Hills. I don't know if Steve talked about it down at Oak Hills, but there were a number of people that when I would go down to the club would approach me and say, I am sorry about the letter, I am sorry about what I've heard, I'm sorry about what is happening with you.

So I don't know how it got out and I don't know if these -- like I said, if these people talked about it down there and, you know, having their idle gossip or what, so --

Q. Can you identify anyone who thinks less of you because of the email?

A. Well, that's kind of a thought. I mean, that's just me basically thinking that they think less of me. I have my ideas. Polly and John Huebert, who were friends of the family -- our daughters were raised together – and so it's been – I mean, the relationship's been a little -- I don't know the word I'm looking for. Tense. It's been more of a tense relationship.

Bill and Sue Selde, it's been a little bit of a tense relationship, and I don't know if the email went out to them. I don't know their email address at this -- you know, I don't know it by heart.

Nessa Rollis, when I'm out running, there used to always be a friendly hello, and now when he sees me coming, he turns his back. So, yes, those four at this time.

(Exhibit 1, Dougherty Deposition 44:11-45:23).

21. Plaintiff testified in her deposition that she is unaware of anyone who actually thinks less of her regarding the subjects raised in the Email.

Q. Can you identify anyone who, based on the email, now believes you are antagonistic and verbally abusive with neighbors?

A. No, I cannot mention any names so --

Q. Okay. Can you identify anybody who thinks you are neglectful of the way you keep the exterior of your property?

A. Absolutely not. As a matter of fact – I want to throw this out. I have had numerous neighbors, when I was living in the condo association, when they were walking their dogs, stop me and tell me how absolutely incredible my home looked due to all the updates, because I not only did the inside, I also did the outside.

Q. How do you believe that your reputation has been injured?

A. Well, like I was stating before, you know, I – some of the neighbors are not as friendly as they used to be. Some of the relationships seem to be a little tense, and I have not had any foster children.

Q. And you attribute that all to the email?

A. I do.

(Exhibit 1, Dougherty Deposition 51:9-5)

22. Plaintiff testified in her deposition that she could not identify any opportunities to provide foster care for children that she lost as a result of the Email and she continued to have foster children in her home after the Email was allegedly sent, until December 2012.(Exhibit 1, Dougherty Deposition 45:24-49:2; 46:2-20).

23. In her deposition, Plaintiff testified that when she asked a representative of the Nebraska Children's Home in March, 2013 about why Plaintiff was not receiving foster children, Plaintiff stated she was told:

...Number one, she said, a lot of the kids coming in are teenagers, which I understand. And she said because, you know I'm limited -- I limited myself to a certain age group.

...

I take younger [children].

...

And so she said, So, you know, that's why a lot of them aren't coming in. And she also stated, she said, And we as an organization have to hold our foster parents to the highest, highest reputation that we -- that Nebraska has.

And I said, Okay, I have an impeccable reputation as a foster mother. And she said, Well, you do, but there's a few things going on. And I said, Can you elaborate? And she said, No.

(Exhibit 1, Dougherty Deposition 47:25-48:15).

24. Plaintiff testified in her deposition that she is unaware of whether the Nebraska Children's Home, from which Plaintiff received her foster children placements, ever saw the Email. (Exhibit 1, Dougherty Deposition 48:20-22).

25. Plaintiff testified in her deposition that she is unaware of whether anyone ever called the Nebraska foster care hotline as a result of the Email. (Exhibit 1, Dougherty Deposition 48:16-17, 48:23-49:2).

26. Plaintiff testified in her deposition that none of the interactions she had with board members, other than Andersen, involved a false statement:

> Q. In all of those incidents involving those other board members, can you and I agree that not one of those board members ever said a false statement about you?
>
> A. Meaning saying?
>
> Q. Did they say something that wasn't true?
>
> A. No.
>
> Q. No, they did not?
>
> A. No, they did not.

(Exhibit 1, Dougherty Deposition 75:1-75:9).

Discussion

This case involves a claim for defamation and damages arising out of the Email sent by Andersen. In resisting these motions for summary judgment, Plaintiff argues that her claim also alleges "generally alleged egregious against Plaintiff" by Andersen. However, Plaintiff's Complaint, while referencing other alleged acts of Andersen, specifically makes her claim arising out of Andersen's email.

Paragraph 15 of the Complaint states as follows

> 15. Plaintiff has incurred moving costs as a result of her forced move due to the defamatory conduct of Defendants.

Paragraph 16 of the Complaint states as follows:

> 16. As a result of Defendants' publication of such defamatory matter and actions, Plaintiff has been damaged by an amount lost from the forced and quick sale of the condo unit located at 6410 S. 120th Plaza, loss of rental income, moving costs, as well as damages to her reputation.

Plaintiff argues in her brief resisting these motions that her claim is not strictly for defamation but also is for "other actions" by Andersen which include such things as Andersen entering her home and following her through the neighborhood in his truck and Oak Hills board members "watched" a party Plaintiff held at the Oak Hills pool and at her home. But, Plaintiff never states how these "other actions" rise to a cognizable claim for relief. Her only specific claim for relief lies in her claim for defamation.

As to these motions, Defendants do not argue that the communication by Andersen is not defamatory (nor do they concede that it is). Rather, Andersen and Andersen Electric simply argue that Plaintiff has failed to prove any damage as a result of the communication. Oak Hills also argues that Plaintiff has failed to prove any damages as a result of Andersen's communication and, in addition, argue that there is no proof that Oak Hills expressly or impliedly authorized Andersen to send the Email.

Did Oak Hills Expessly or Impliedly Authorize Andersen to Send the Email?

The premise of Plaintiff's claims against Oak Hills is that Andersen acted with "apparent authority" on behalf of Oak Hills when he sent the Email.

Nebraska law recognizes two ways in which a principal can authorize an agent: actual (or express) authority and apparent (or implied) authority. *Western Fertilizer and Cordage Co., Inc. v. BRG, Inc.*, 228 Neb. 776, 783 (1988). In this case, Plaintiff is not alleging that Oak Hills gave actual (or express) authority for Andersen to send Email. (Exhibit 1, Dougherty Deposition 85:18-86:7). And the deposition testimony of Vice President and Director Al Kerkhove (on behalf of Oak Hills) and Andersen confirms that the Board did not expressly authorize Andersen to send the Email. (Exhibit 16, Kerkhove Deposition 77:7-13, 80:18-81:7; Andersen Deposition 144:11-15, 145:3-10).

Plaintiff's cause of action against Oak Hills can only survive if she can demonstrate there was apparent or implied authority from the Oak Hills Board of Directors authorizing Andersen to send the Email. .

The Nebraska Supreme Court most recently described apparent authority as follows:

> Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care

> causes third persons to act upon an agent's apparent authority. ... Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships. ... Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. ... Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.

StoreVisions, Inc. v. Omaha Tribe of Nebraska, 281 Neb. 238, 246-47 (2011), *modified*, 281 Neb. 978 (2011) (emphasis added) (internal citations omitted); *see also Koricic v. Beverly Enterprises--Nebraska, Inc.*, 278 Neb. 713, 719-21 (2009); *State ex rel. Medlin v. Little*, 270 Neb. 414, 419-20, (2005). The key to a finding of apparent authority is the principal's actions. *Little*, 270 Neb. at 419-20.

The annotations to the Nebraska Jury Instruction on apparent authority contrasts it against actual authority:

> It may be helpful to consider the difference between actual authority and apparent authority in this way: to create actual authority, the principal "communicates" directly with the agent; to create apparent authority the principal "communicates" directly with a third person. Creating apparent authority does not create an agency relationship; rather it allows the third party to rely upon the authority.

Agency-Apparent Authority Instruction (NJI2d Civ. 6.08 (2012-2013 ed.).

In the present case, Oak Hills, through the actions of its Board of Directors, did nothing that could be construed as impliedly authorizing Andersen to send the Email. The Oak Hills Board did not direct that Andersen send the alleged defamatory email. The Oak Hills by-laws, which define the scope of authority for the officers and directors of Oak Hills, do not in any way authorize the President or a board member (e.g., Andersen) to communicate about past, present, or future residents of the Oak Hills community. And when asked at her deposition the basis for her contention that Andersen was authorized by Oak Hills to send the Email, Plaintiff stated "I do not have evidence." (Exhibit 1, Dougherty Deposition 85:18-86:7).

The agent's subjective beliefs are irrelevant to the determination regarding whether apparent authority exists. *W. Fertilizer*, 228 Neb. at 785, ("In this case, Garwood believed that he had authority to sign the plats and dedications for Western. Garwood's belief, however, was not enough to bind Western by virtue of Garwood's apparent authority"). It is irrelevant that the Email states in the signature block that Andersen is the "President" of the "Oak Hills Highlands Condo Association" because Andersen's subjective belief regarding his authority do not create apparent authority. Similarly, Andersen's deposition testimony that he sent the Email in his capacity as Oak Hills's President is similarly irrelevant. Therefore, Andersen's subjective beliefs regarding the scope of his authority are insufficient to establish apparent authority and hold Oak Hills liable for Andersen's submission of the Email.

This case is distinguishable from the cases where courts have found apparent authority. In *StoreVision, Inc. v. Omaha Tribe of Nebraska*, 281 Neb. 238, 247 (2011), the Nebraska Supreme Court found that a tribal council had created apparent authority for its council chairman and vice chairman to sign a waiver of sovereign immunity. In that case, a written waiver of sovereign immunity was entered in the presence of five of seven tribal council members at the Tribe headquarters. By contrast, Andersen sent the Email without having consulted with the other Board members in any official capacity, and none of the Board members ever saw the content of Email before Andersen sent it. And, unlike in *StoreVision*, where there was evidence that the tribal chairman and vice chairman executed all of the other contracts between the Tribe and the plaintiff, there is no evidence in the present case that Andersen had sent to third parties other messages like the Email regarding Plaintiff.

In another case, *State ex rel. Medlin v. Little*, 270 Neb. 414, 420, (2005), a county commissioner (Little) was found to have given apparent authority to a fellow county commissioner (Thieman) to deliver a letter of resignation to the county clerk, despite Little later reconsidering the decision and seeking to recant the resignation. The Nebraska Supreme Court found that Little had clothed Thieman with apparent authority "[b]y drafting the letter [of resignation], signing it, delivering it to Thieman, and then instructing him to 'do what you have to.'" These facts were known to the county clerk who "reasonably believed" that Thieman had authority to tender Little's resignation. Because the lack of

ordinary care was traceable to the principal (i.e., Little) and not to the agent (i.e., Thieman), it was appropriate to find that Thieman had apparent authority to deliver the letter of resignation. The circumstances presented in Medlin are wholly different from the present case. Here, the Oak Hills Board took no action and made no statement that would have allowed anyone, including Andersen or Plaintiff, to believe that Andersen was authorized to send the Email.

Rather, this case is similar to the circumstances in *Koricic v. Beverly Enterprises – Nebraska, Inc.*, 278 Neb. 713 (2009), where no apparent authority was found. The issue in *Koricic* was whether the decedent's son had apparent authority to sign an agreement with a nursing home, which contained a mandatory arbitration clause that the nursing home later sought to enforce after the decedent's death. In finding the mother had not created apparent authority for her son to enter into the agreement, the Nebraska Supreme Court focused on the lack of evidence indicating (1) the mother knew the son would be asked to sign the agreement, (2) the mother representing she had authorized the son to sign the agreement, or (3) the mother later ratifying the agreement. Because there was no evidence to suggest the son was authorized to sign the agreement on the mother's behalf, the Court found the nursing home could not have reasonably believed that the son had authority to sign the agreement under the circumstances. This finding of no apparent authority even withstood the fact that the mother had authorized the son to sign on her behalf other admission paperwork.

Like the circumstances in *Koricic*, where the mother did not know her son would be signing the arbitration agreement, the Oak Hills Board was not informed regarding the content Andersen intended to send, and there is no evidence that a majority of the Board members had any knowledge that Andersen would be sending the Email. And, like the mother in *Korcic*, who never authorized her son to sign the arbitration agreement, the Oak Hills Board never authorized Andersen to send the Email. Nor did the Oak Hills Board ever ratify Andersen's actions in sending the Email, just as the mother in *Korcic* never ratified her son's signing of the arbitration agreement after the fact.

No evidence exists in this case supporting Plaintiff's contention that Oak Hills actually or apparently authorized Andersen to send the Email. Accordingly, no genuine issue of material fact exists on Plaintiff's claims as to Oak Hills.

Is There Evidence To Support Plaintiff's Claim For Damages?

Plaintiff has claimed the following damages resulted from the allegedly defamatory July 25th email: (a) loss of income from the sale of her condominium (6410 S. 120th Ave.), which she alleges was sold for "considerably less" than its present value (Plaintiff's Complaint ¶ 13); (b) loss of rental income from terminating a lease for a rental property Plaintiff owned because Plaintiff moved out of her condominium located at 6410 S. 120th Plaza (Plaintiff's Complaint ¶ 14); (c) moving costs (Plaintiff's Complaint ¶ 15); (d) damages to her reputation (Plaintiff's Complaint ¶ 16); and (e) loss of income from no longer boarding foster children (Plaintiff's Supplemental Response to Oak Hills's Interrogatory No. 16).

A claim for defamation requires proof of 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.

Norris v. Hathaway, 5 Neb. App. 544, 547-48, (1997). The damages claimed in a defamation case must have been caused by the alleged defamatory statement. *See McCune v. Neitzel*, 235 Neb. 754, 766 (1990)

Recoverable damages in a defamation case include (1) general damages for harm to reputation, (2) special damages, (3) damages for mental suffering, and (4) if none of these are proven, nominal damages. *McCune*, 235 Neb. at 765; *Jones v. Burns,* 4:06CV3051, 2007 WL 2993827 (D. Neb. Oct. 11, 2007) *rev'd and remanded on other grounds*, 330 F. App'x 624 (8th Cir. 2009). "Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages." *Stewart v. Spade Twp.,* 157 Neb. 93, 97 (1953) (internal citation marks omitted).

(a) Loss from the sale of the Condominium.

Plaintiff has alleged in her Complaint that she was damaged by the defamatory statements contained in the Email attributed to Andersen through being "forced to move from the residence located at 6410 S. 120th Plaza (the Condominium), and has sold said residence, at an amount considerably less than for it's present value." (Complaint ¶ 13).

Additionally, Plaintiff claims "[a]fter the sale of said unit, Plaintiff will be moving into a property owned by Plaintiff which had been previously leased to a family under a two (2) year lease, which lease had to be terminated, thereby losing Plaintiff rental income of $48,200.00." (Complaint, ¶ 14. Plaintiff also alleges she has suffered "moving costs as a result of her forced move due to the defamatory conduct of Defendants." *Id.* ¶ 15.

The following timeline summarizes the facts surrounding the sale of the Condominium:

- January 2012 – Plaintiff forms an intent to sell her condominium (Plaintiff's Deposition, at 88:24-89:9);
- February 2, 2012 – Plaintiff lists her condominium through a real estate agent (Plaintiff's Deposition at 88:24-89:9; see also Plaintiff's Deposition, Exhibit 3 (MLS listing for 6410 S. 120th Ave., with a listing date of February 2, 2012));
- July 16, 2012 – Plaintiff signs a Purchase Agreement for the sale of her condominium (Plaintiff's Deposition at 86:23-85:9; *see also* Plaintiff's Deposition, Exhibit 2 (Purchase Agreement dated 7/16/2012));
- July 25, 2012 – The alleged defamatory email attributed to Defendant Steve Andersen is sent (Complaint, Exhibit A);

Plaintiff listed and sold the Condominium before the Email was ever sent. At her deposition, Plaintiff admitted that the sale and price for the sale of her condominium was unrelated to the Email. (Exhibit 1, Dougherty Deposition 87:12-19).

Plaintiff also has no evidence to support her allegation that she lost revenue from not being able to rent the Rental Condominium into which she moved. In order to recover lost profits, the claim must be "supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both its occurrence and the extent thereof." *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 280-81 (1996). Where a claim of lost profits is not supported by "conclusive financial data," it is "speculative and conjecture as a matter of law." *Id.* at 283. And, evidence that is speculative and conjecture cannot be used to support a claim for damages. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 579 (2011). In the two years Plaintiff owned the Rental Condominium, she incurred a $25,000.00 loss in 2011 and an $896.00 gain in 2012. Plaintiff's damages claim of $48,200.00 in lost profits is speculative

and unsupportable, as demonstrated by the undisputed evidence found in Plaintiff's tax returns. Further, any loss of income would be offset by the expenses Plaintiff would incur living elsewhere (and there is no evidence to allow calculation of this expense).

Loss of Income for Foster Care

No evidence exists to demonstrate that Plaintiff's alleged damages relating to her care for foster children are linked to the Email. First, Plaintiff continued to care for foster children for five months after the Email was sent, until December 2012. (Ex. 1, Dougherty Deposition 46:2-20). Second, Plaintiff has no evidence that anyone at the foster care placement agency was ever made aware of the Email. (Exhibit 1, Dougherty Deposition 48:20-22). Third, Plaintiff is unaware of anyone calling the foster care hotline and reporting Plaintiff. (Exhibit 1, Dougherty Deposition 48:16-17, 48:23-49:2). In fact, Plaintiff admitted that she was unaware of anyone who believes she is "antagonistic and verbally abusive." (Exhibit 1, Dougherty Deposition 51:9-12). And fourth, by her own admission, Plaintiff testified that she was told the reason she was not receiving foster children was because Plaintiff only wanted to care for younger foster children and would not accept teenagers. (Exhibit 1, Dougherty Deposition 47:25-48:15).

Because Plaintiff cannot show her alleged damages relating to her care for foster children were caused by the Email, this claim fails.

Damage to Reputation

Similarly, no evidence supports Plaintiff's contention that she has suffered reputational damages as a result of the Email. Plaintiff testified that she cannot identify anyone who thinks less of her as a result of the email. Rather, Plaintiff can only identify certain isolated instances where her relationships with others in her neighborhood has become "tense." (Exhibit 1, Dougherty Deposition 45:5-23, 51:9-52:6). But Plaintiff is unable to show that those "tense" relationships were caused by the Email.

No evidence exists supporting Plaintiff's contention that her reputation was damaged as a result of the Email.

Conclusion

For the foregoing reasons, Defendants' motions for summary judgment are sustained as to all issues related to damages incurred by Plaintiff.

DATED: August 29, 2014.

BY THE COURT:

J. RUSSELL DERR
District Court Judge

c: David J. Selby, Esq.
Betty Egan, Esq.
David Stubstad, Esq.