

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT

Amy Jo Mattson,

Civil No. 99-3734

Plaintiff,

v.

MKB Management Corporation
d/b/a Red River Women's Clinic,

Defendant.

**DEFENDANT'S MEMORANDUM CONSOLIDATED
IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY
JUDGMENT AND IN REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT, ATTORNEYS' FEES AND EXPENSES**

Nothing in the Plaintiff's cross-motion for summary judgment or her opposition to the Clinic's motion for summary judgment changes the undisputed facts in this case, all of which clearly establish that the Clinic is entitled to summary judgment. The undisputed facts establish that Plaintiff clearly lacks standing, she is precluded from invoking equity based on her own inequitable conduct, she has acknowledged that the Clinic's brochure is not false, her original claims are moot, and the Clinic exercised reasonable care in crafting its brochures. Moreover, to the extent that Plaintiff seeks summary judgment as to the merits of her claims, the Clinic's experts' testimony runs directly counter to Plaintiff's expert's testimony and, thus, in the event Plaintiff's claims are not dismissed, summary judgment is not appropriate because there are disputed facts on the issue of whether the Clinic's revised brochure is misleading. Finally, because the

undisputed facts as evidenced by Plaintiff's testimony and her attorney's affidavit establish that Plaintiff continues to misrepresent the basis for her claims in this Court, the Clinic is entitled to its attorneys' fees and expenses related to the defense of Plaintiff's baseless and frivolous claims.

STATEMENT OF FACTS

The majority of facts set forth in the Clinic's opening memorandum remain uncontroverted by Plaintiff. For example, it is undisputed that, at the time that Plaintiff filed her supplemental complaint and at the time of her deposition on March 1, 2001, she had not seen the Clinic's revised brochure. See Deposition of Amy Jo Mattson (Mattson Dep.) 50-51. Plaintiff has apparently still never seen the Clinic's revised brochure. See Affidavit of John Kindley (Kindley Aff.) ¶ 12.

It is also undisputed that Plaintiff was a self-identified "sidewalk counselor" for eight months during the pendency of this litigation and, as such, she attempted to dissuade women from seeking abortions by handing out more than 500 brochures that purported to describe the risks associated with abortion. Mattson Dep. 12, 19-20. It is undisputed that the brochure did not list breast cancer among the abortion risks, and that Plaintiff advised women that abortion causes breast cancer for only one month out of the eight months she counseled women and was suing the Clinic precisely for misrepresenting the alleged connection between abortion and breast cancer. See Mattson Dep. 15-16.

It is undisputed that the Clinic endeavors to provide the highest level of care to its patients, and that it relied on a fact sheet from the National Abortion Federation (NAF) when it crafted its original brochure. See Affidavit of Jane Bovard (Bovard Aff.) ¶ 2. It is

also undisputed that when the Clinic revised its brochure, it relied on the most current statement it had from the National Cancer Institute. See Bovard Aff. ¶ 7. The facts also establish that both of the Clinic's experts testified that the Clinic's revised brochure is neither false nor misleading. See Affidavit of Dr. Polly Newcomb (Newcomb Aff.) ¶ 43; Affidavit of Dr. Julie Palmer (Palmer Aff.) ¶ 53.

Contrary to Plaintiff's assertions, the facts regarding the connection between induced abortion and breast cancer *are* disputed. Both of the Clinic's experts have testified that the weight of the scientific evidence establishes that there is no causal connection between induced abortion and breast cancer. See, e.g., Newcomb Aff. ¶¶ 13-14, 17-19, 24; Palmer Aff. ¶¶ 15, 18-19, 29. The Clinic's experts have testified that although it is generally accepted that having a first-full term pregnancy before the age of 30 is protective against breast cancer later in life, that does not mean that having an abortion causes breast cancer. See Newcomb Aff. ¶¶ 33-39; Palmer Aff. ¶¶ 43-46. Both of the Clinic's experts have testified to the contrary, that a woman who has an abortion is in the same position as a woman of the same age who never becomes pregnant with regard to the loss of any long-term protective effect. See Newcomb Aff. ¶ 33; Palmer Aff. ¶ 42.

The Clinic's experts have also testified that there is no evidence of a direct relationship between induced abortion and breast cancer. See Newcomb Aff. ¶¶ 12, 17, 30, 31, 38; Palmer Aff. ¶¶ 13, 18, 34, 37-38. In addition, each has testified that that the only study on this issue was performed on rats and that study cannot be translated to directly apply to women. See Newcomb Aff. ¶¶ 30-31; Palmer Aff. ¶¶ 37-38.

It is undisputed that Plaintiff's expert, Dr. Joel Brind, is a member of several anti-abortion organizations, such as the "Culture of Life Foundation" and the American Bioethics Advisory Commission. See Bovard Aff. ¶ 22. It is also undisputed that the statements contained in the Clinic's current brochure are derived from correct statements representative not only of the National Cancer Institute, but also the American Cancer Society, the National Breast Cancer Coalition, and the American College of Obstetricians & Gynecologists Committee on Gynecologic Practice. See Bovard Aff. ¶ 23. It is also undisputed that the Clinic's current brochure is consistent with the standard of care for abortion providers. See Bovard Aff. ¶ 11. Finally, it is undisputed that the Clinic, its reputation, and its patients have been harmed as a result of the allegations in this lawsuit. Bovard Aff. ¶¶ 11-13, 17-18.

ARGUMENT

A. The Undisputed Facts Establish that Plaintiff Does Not Have Standing Under North Dakota Law.

The North Dakota Supreme Court has rejected out-right Plaintiff's contention that one has standing to pursue false advertising claims solely by virtue of the false advertising statute's "any person" language in a case involving nearly identical statutory language. See State v. Rosenquist, 51 N.W.2d 767 (N.D. 1952). Strikingly, in her opposition memorandum, Plaintiff completely fails to address Rosenquist and the North Dakota case law that demonstrates that a party must have a personal, cognizable interest in the claims she advances in order to maintain a lawsuit. See Def. Mem. at 4-9.

Instead of attempting to address the unassailable, Plaintiff offers a host of other arguments in an attempt to create standing for herself in this Court. None of them holds water, particularly in light of the controlling North Dakota law not addressed by Plaintiff.

First, although Defendant did initially move to dismiss Plaintiff's claims for lack of standing, it did so prior to having deposed Plaintiff and learning that Plaintiff, in fact, has no meaningful connection to the claims she advances in this suit. Defendant's prudential arguments rest in large part on the undisputed fact that Plaintiff acknowledges that she has not been personally harmed by the Clinic and she has almost no independent knowledge of the claims in this suit. See Mattson Dep. 36-38, 53-55, 67-68; see also Kindley Aff. The Clinic learned all of this through a recent deposition. See Def. Mem. 2-3, 8. This Court has a continuing duty to ensure that Plaintiff has standing (see Def. Mem. 8-9), and Defendant has not abused the litigation process by advancing prudential arguments that control the issue of standing in light of the recently discovered facts in this litigation.

Second, Plaintiff contends that she has standing because, hypothetically, a woman who has some personal connection to false advertising about abortion services might have significant privacy concerns that would discourage her from pursuing her claims. See Pl. Opp. Mem. 2. But Plaintiff ignores that the false advertising statute is not tailored to the abortion context and, thus, the Court's ruling in this case has far-reaching implications for the limitations on future false advertising claims brought by random people against other legitimate North Dakota businesses. Moreover, there are protections for litigants with genuine privacy concerns and a woman with a personal interest in false advertising claims

relating to abortion would likely be permitted to proceed under a pseudonym. See, e.g., Roe v. Wade, 410 U.S. 133 (1973) (abortion plaintiff permitted to sue using pseudonym); Doe v. Bolton, 410 U.S. 179 (1973) (same); Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975) (same), rev'd on other grounds, 432 U.S. 519 (1977); but see Southern Methodist Univ. Assoc. of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979) (“the mere filing of a civil action against other private parties may cause damage to their good names and reputation and may also result in economic harm. . . . Basic fairness dictates that those among the defendants’ accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names.”). In any event, speculation about some possible future individual’s concerns relating to her privacy are simply not sufficient to disregard the prudential considerations that the North Dakota Supreme Court has recognized inhere in a court’s institutional role.¹

Third, Plaintiff contends that courts (not legislatures or administrative agencies) are the ideal institutions to consider the “true weight of the scientific evidence” and that the North Dakota legislature has endorsed false advertising actions involving plaintiffs with no connection to the claims they espouse by virtue of permitting “any person” to pursue claims on behalf of the general public. See Pl. Opp. Mem. at 3. But both of these arguments ignore the well established principles that legislatures and administrative

¹ Plaintiff also appears to imply that she must have standing to pursue her claim because, if she does not, no person will be able to vindicate false advertising claims under North Dakota Century Code, citing City of Los Angeles v. Lyons, 461 U.S. 95 (1983). See Pl. Opp. 2. But Plaintiff’s argument simply does not make any sense. Lyons is a federal case under 42 U.S.C. § 1983 applying traditional standing principles to preclude speculative claims for injunctive relief. Consistent with Lyons and North Dakota law, there are plenty of people who might have genuine standing to pursue false advertising claims, even on behalf of third-parties. For example, groups with cognizable interests in this subject matter might include an

agencies have significantly greater fact-finding ability than courts and, thus, courts are traditionally deferential to determinations that require marshalling scientific evidence. See, e.g., Hofner v. North Dakota Workers Compensation Bureau, 612 N.W.2d 263 (N.D. 2000) (accordg “great deference” to administrative determinations); City of Richmond

association of North Dakota obstetricians and gynecologists or a North Dakota organization of physicians who treat breast cancer.

v. Croson, 488 U.S. 469 (1989) (“The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.”);

Minnesota v. Fed’l Energy Regulatory Comm’n, 734 F.2d 1286, 1288 (8th Cir. 1984)

(“we must defer to the [administrative agency’s] judgment in making determinations within its area of administrative expertise”); see also United States v. Kirk, 105 F.3d 997, 999 (5th Cir. 1997) (discussing nature of legislature and court, stating “Congress must respond actively to problems faced by political communities; its judgment is accented by its look to the future and its effort to offer solutions to social ills. The judicial decision looks backward, responding to the limits of a case or controversy. . . . Losing sight of these differences risks a blurring of the respective roles of Congress and the courts. . . .”);

Freedom Republicans, Inc. v. Fed’l Elec. Comm’n, 13 F.3d 412 (D.C. Cir. 1994)

(“ordinary deference to legislative factfinding does not translate into deference to congressional constructions of the demands of Article III [standing requirements].”). It also ignores the principle, long recognized by North Dakota courts, that a legislature may not expand the judiciary’s role beyond its basic institutional nature. See, e.g., City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969); Langer v. State, 284 N.W. 238 (N.D. 1939) (stating that North Dakota’s Declaratory Judgment Act does not authorize advisory opinions and that, ““In this state the Legislature is without power to charge the courts with the performance of non-judicial duties.””) (quoting Self-Insurers’ Assoc. v. State Indus. Comm’n, 119 N.E. 1027 (N.Y. 1918)).²

² Although a court may incidentally duplicate a legislature’s function, see Pl. Opp. at 3, North Dakota law clearly provides that the legislature may not expand a court’s duties beyond its institutional competence, for example, by eliminating a standing requirement. See Def. Mem. at 6-8 (citing cases).

As the North Dakota Supreme Court has recognized, independent of the literal wording of a statute, prudential considerations require that a party have a cognizable interest in her claims in order to have standing. See Rosenquist, 51 N.W.2d at 789 (quoting Herrick v. Churchill, 29 N.W. 129 (Minn. 1886)).³ Moreover, although Plaintiff focuses her attention on the statute’s language that “any person” may bring a lawsuit, she completely ignores the portion of the statute that provides that a false advertising may only be brought in a court of “competent jurisdiction.” See N.D. Century Code § 51-12-14. Although the North Dakota Legislature may have intended to confer liberal standing under the statute, it nevertheless required—as it must—that standing to pursue false advertising claims be consistent with the prudential limitations on the court’s jurisdiction. To construe the statute as Plaintiff prefers would thus not only run contrary to established North Dakota case law, but also to the plain language of the statute itself.

Plaintiff’s only connection to the claims she advances in this lawsuit is that she is a North Dakota citizen. She has never even seen the advertisement upon which she has based her Supplemental Complaint and her Amended Supplemental Complaint. See Mattson Dep. 50-51, 53-54; Kindley Aff. ¶ 12. In short, Plaintiff has no cognizable interest in the claims she purports to advance in this lawsuit. Accordingly, as demonstrated by the facts revealed in discovery and under North Dakota law, Plaintiff

³ The North Dakota Supreme Court’s decision in State Bd. of Architecture v. Kirkham, Michael & Assocs., 179 N.W.2d 409 (N.D. 1970), permitting the State Board of Architects to proceed with a false advertising claim under North Dakota Century Code Section 51-12-14 is perfectly consistent with traditional prudential standing principles. Unlike this case, in Kirkham, the Board and its members had cognizable interests that were directly harmed by the defendant’s representations. Id.

does not have standing to pursue her claims for false advertising. The Clinic respectfully requests that its motion for summary judgment be granted on this basis.

B. The Undisputed Facts Establish that the Clinic's Brochure is Not False, But Disputed Facts Preclude Summary Judgment as to Whether the Clinic's Brochure is Misleading.

As set forth in the Clinic's memorandum in support of its motion for summary judgment, the Clinic is entitled to summary judgment on Plaintiff's claim that the Clinic's revised brochure is false. In her deposition, Plaintiff acknowledged that each of the sentences in the Clinic's brochure is true. See Mattson Dep. 71-74. Contrary to Plaintiff's unsupported assertion that she was somehow tricked into the concession (see Pl. Opp. Mem. 7), the deposition colloquy speaks for itself and altogether demonstrates to the contrary. Id.⁴ Accordingly, the undisputed facts demonstrate that the Clinic is entitled to summary judgment on Plaintiff's claim that its brochure is false.

Nevertheless, Plaintiff contends that she is entitled to summary judgment on her claims that the Clinic's brochure is false and misleading because:

First, it is *established* and undisputed that for childless women under age 30 having an abortion increases breast cancer risk relative to childbirth by abrogating the protective effect of a full-term pregnancy. Second, while the likelihood that estrogen exposure during the first two trimesters of pregnancy increases long-term breast cancer risk if the pregnancy is aborted is a matter of controversy, there indisputably is medical research which *supports* this hypothesis. Since no research has *refuted* this hypothesis, it is accurate to say at the very least that abortion *may* increase breast cancer risk.

Pl. Mem. Cross-S.J. at 7 (emphasis in original).

⁴ Plaintiff was represented by two attorneys at her deposition; neither even objected to these questions.

Suffice it to say, these facts are disputed and, accordingly, Plaintiff's motion for summary judgment as to whether the Clinic's brochures are false and misleading should be denied. Plaintiff is not entitled to summary judgment as to the merits of her claims that the Clinic's brochures are false or misleading.

Both of the Clinic's experts have testified in affidavits submitted to this Court that the Clinic's brochure is neither false nor misleading. See Newcomb Aff. ¶ 43; Palmer Aff. ¶ 53. Both of the Clinics' experts have testified that, although it is generally accepted that a first-full term pregnancy before the age of 30 has long-term protective effects against breast cancer, that simply does not mean that terminating a pregnancy increases breast cancer risk for at least four reasons. See Newcomb Aff. ¶¶ 33-40; Palmer Aff. ¶¶ 42-46. First, the loss of a possible long-term protective benefit means only that a woman who has an induced abortion is no worse off than if she had never been pregnant. See Newcomb Aff. ¶ 33-34; Palmer Aff. ¶ 42. Losing the possibility of a possible long-term benefit is not the same thing as causing a long-term negative. Second, Plaintiff ignores the undisputed evidence that in the first several years after a woman gives birth, there is actually a sharp increase in her risk of getting breast cancer. See Newcomb Aff. ¶ 37; Palmer Aff. ¶¶ 43-45. Third, the long-term protective effect that Plaintiff relies upon is only associated with first full-term pregnancies. Plaintiff similarly ignores that many women who seek abortions may already have had a child and, thus, already gained the protective effect of a full-term pregnancy. See Newcomb Aff. ¶ 35-36; Palmer Aff. ¶¶ 43-45. Finally, even if a woman has not had a prior full-term pregnancy, Plaintiff ignores that the majority of women in this country will likely go on to have a first-full term

pregnancy before the age of 30. See Newcomb Aff. ¶ 35; Palmer Aff. ¶ 44. Thus, even if a childless woman has an abortion, she still has a significant chance of gaining the long-term protective effect associated with a first full-term pregnancy before the age of 30.⁵

Both of the Clinic’s experts have also testified that there is no direct evidence of a biological mechanism that would causally connect the termination of an abortion to breast cancer, including exposure to estrogen. See Newcomb Aff. ¶ 12, 17, 30, 31, 38; Palmer Aff. ¶¶ 13, 18, 34, 37-38. Indeed, the Plaintiff’s argument that the Clinic is obligated to disprove a negative is completely ludicrous. For example, there may be no research that refutes the hypothesis that eating ice cream causes breast cancer, but that certainly does not mean that it is accurate to say that “at the very least that [eating ice cream] *may* increase breast cancer risk.” See Pl. Mem. Cross-S.J. at 7.

Thus, contrary to Plaintiff’s representation, the facts regarding the lack of a connection between induced abortion and breast cancer are in dispute in this case.⁶ Accordingly, Plaintiff’s motion for summary judgment on the ground that the Clinic’s brochures are false and misleading should be denied, and the Clinic’s motion for summary

⁵ Plaintiff is now apparently attempting to attack the Clinic’s brochure statement that abortion is safer than childbirth based on the same theory regarding breast cancer. See Pl. Mem. Cross-S.J. at 3, Pl. Opp. Mem. at 6. For all of the reasons that the Clinic disputes that its statement regarding breast cancer is false or misleading, it similarly disputes the application of the theory to this accurate and appropriate statement.

⁶ Contrary to Plaintiff’s assertion, the Supreme Court’s discussion of commercial speech in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) is not applicable to Plaintiff’s request for a mandatory injunction in this case. See Pl. Mem. Cross-S.J. at 8. Zauderer involved a constitutional challenge to a state-required disclosure of accurate factual information. This case involves the construction of the North Dakota false advertising statute pursuant to which Plaintiff seeks to require the Clinic to provide its patients with factually *inaccurate* information that will harm the Clinic and its patients. See Bovard Aff. 17; Newcomb Aff. ¶¶ 32-42; Palmer Aff. ¶¶ 39-52.

judgment should be granted based on Plaintiff's undisputed testimony that the statements were each true.

C. The Clinic Exercised Reasonable Care to Ensure its Brochures were Not False or Misleading.

Plaintiff completely misstates the standard for determining a violation of North Dakota Century Code Section 51-12-14 by arguing that the Court may enjoin the Clinic without regard to whether the Clinic knew or should have known that its statements were false or misleading. See Pl. Mem. Cross-S.J. 9, 11. The statutory language is clear that not only must a statement be untrue or misleading, but also it must be known or, by the exercise of reasonable care, should be known to be untrue or misleading. See 51-12-08 (false advertising statutory section relied upon by Plaintiff as basis for injunction under North Dakota Century Code Section 51-12-14). Although Plaintiff seeks to invoke “common sense” and North Dakota Century Code Section 51-12-01 to impose strict liability upon the Clinic (see Pl. Mem. Cross-S.J. at 9), the applicable statutory language does not impose that standard. See N.D. Cent. Code §§ 51-12-08, 51-12-14.

Under the correct standard to evaluate the Clinic's statements, the undisputed facts establish that the Clinic has exercised appropriate and reasonable care in crafting its brochures. See Pl. Mem. at 10.⁷ Plaintiff provides no evidence to controvert—and thus

⁷ The only two cases Plaintiff's cites regarding reasonable reliance are either inapposite or actually helpful to the Clinic's argument that it reasonably relied on the most current National Cancer Institute statement that it found on the issue, as well as the opinions of its physician and expert witnesses. See, e.g., Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Auth., 148 F.3d 242 (3d Cir. 1998) (reversing district court's finding that it was reasonable for a municipal railway to find that an advertisement stating that “women who choose abortion suffer more and deadlier breast cancer” was “misleading” and “unduly alarming” based on First Amendment grounds); Harbeson v. Parke Davis, Inc., 746 F.2d 517, 522-23 & 525 (9th Cir. 1984) (stating that for informed consent a physician is not required

it is undisputed—that the Clinic did not know that its statements were either false or misleading at any point during this litigation. See Pl. Mem. Cross-S.J. at 9-11. Similarly, Plaintiff offers no evidence to controvert—and thus it is also undisputed—that the Clinic reasonably relied on the National Abortion Federation Fact Sheet when it published its original brochure. See Pl. Mem. Cross-S.J. at 9-11.

Indeed, although Plaintiff attempts to argue it is unreasonable for the Clinic to continue to use the National Cancer Institute statement it is currently using by pointing to her own expert’s statement that the statement is “wholly and unequivocally false,” (see Pl. Mem. Cross-S.J. at 11), Plaintiff ignores that it is reasonable for the Clinic to rely on its own physician’s and experts’ opinions that the statement is not false or misleading. See, e.g., Benedict v. St. Luke’s Hosp., 365 N.W.2d 499, 502 (N.D. 1985) (stating that, in North Dakota, a “medical specialist must exercise the care and skill ordinarily possessed and exercised by, and reasonably expected of, other specialists engaged in similar practice.”); see also Bovard Aff. ¶¶ 9-10; Newcomb Aff. ¶ 43 (stating that Clinic’s revised brochure is neither false nor misleading); Palmer Aff. ¶ 53 (same). Accordingly, the undisputed facts establish that the Clinic did not know and should not reasonably have been expected to know that its brochures were either false or misleading.

D. Equity Bars Plaintiff’s Request for Injunctive Relief.

Plaintiff incorrectly contends that equitable defenses may not bar her request for equitable relief under North Dakota’s false advertising statute. See Pl. Opp. Mem. at 4 (citing Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706, 716-17 (Cal. 2000)).

to disclose every remote risk, only those that are material, i.e., if “expert testimony can establish its

Plaintiff is incorrect. The California Unfair Competition statute discussed in Cortez provided for relief in addition to injunction relief. See id. Nevertheless, the court clearly held that equitable defenses could be considered in determining whether to grant equitable relief under that statute. Id.

Moreover, the North Dakota False Advertising Injunction statute provides this Court with discretion as to whether an injunction should be granted—even if the Court were to find that the Clinic had engaged in false advertising (which, of course, the Clinic maintains it has not). See N.D. Cent. Code § 51-12-14 (“Any person who violates or proposes to violate any of the provisions of sections 51-12-08 through 51-12-12 may be enjoined by any court of competent jurisdiction.”) (emphasis added). Accordingly, it is appropriate for this Court to consider Plaintiff’s actions in light of the fact that she seeks to invoke this Court’s equitable powers.

1. The Undisputed Evidence Establishes that Plaintiff Comes to this Court with Unclean Hands.

Plaintiff does not purport to have been harmed in any way by the Clinic’s actions. See Mattson Dep. 55. Instead, she contends that she represents the interests of the general public and all women in the state of North Dakota seeking abortions. Plaintiff, however, is not a suitable advocate for these groups because she herself has misrepresented the risks of abortion to women seeking abortion services.

For example, Plaintiff does not dispute—nor could she—that although she advised women of the alleged risks involved with abortion during the eight months pendency of

existence, nature, and likelihood of occurrence.”).

this litigation that she resided in Fargo, she only advised women about the alleged risk of breast cancer for one month during that period. See Pl. Opp. at 5; see also Mattson Dep. 15-16. She also does not dispute that the more than 500 brochures that she handed out that purported to describe the risks associated with abortion did not mention breast cancer, notwithstanding that the brochure included a range of alleged possible outcomes of having an abortion. See Mattson Dep. Exh. A (Brochure, listing among other risks of abortion obesity as well as anorexia).⁸ Plaintiff argues in her memorandum that she has clean hands because she “simply did not feel comfortable taking about the evidence linking abortion and breast cancer until she had become more familiar with it.” Pl. Opp. Mem. at 5. But Plaintiff was suing the Clinic for seven out of her eight months in Fargo for failing to inform women of *exactly* what she was failing to inform women as part of her undertaking to advise women of the risks of abortion. Plaintiff simply had no business dragging the Clinic into court and making public accusations if she was not “comfortable” with the substance of her claims.

Plaintiff argues that two wrongs don’t make a right, but by not informing women about the alleged link between breast cancer and abortion, Plaintiff was acting consistent with the Clinic and *against her own claims advanced in this lawsuit*. Either Plaintiff failed to advise women about what she believed to be a known risk of abortions, or she should never have been bringing this lawsuit. Either way, she cannot come to this Court seeking

⁸ In support of her actions and in an attempt to correct for the patent inaccuracies of the North Dakota Life League brochure she distributed, Plaintiff cites to a Finnish study she contends supports the discredited Speckhard study quoted in the brochure. See Pl. Opp. Mem. at 5. Although the Clinic contests the accuracy of that study also, the dispute regarding post-first-trimester abortion suicide rates is not material to the issue of Plaintiff’s unclean hands. Plaintiff’s undisputed failures to warn of breast cancer during the

to invoke its equitable powers and yet not act consistently with her own request for equitable relief. Cf. Minneapolis, St. Paul & Sult Ste. Marie Railroad Co. v. Duvall, 67 N.W.2d 593, 598-99 (N.D. 1954) (equitable estoppel applies to preclude request for equity when, inter alia, there is an “admission, statement, concealment or act by the plaintiff inconsistent with the claim now asserted”).

Plaintiff next argues that she has clean hands, notwithstanding that she purports to

seven out of eight months she “counseled” while she was simultaneously pursuing this lawsuit alone establish unclean hands.

counsel women in direct contravention of North Dakota Century Code Section 43-47-06. Although a license is not required to exchange opinions and ideas, see Pl. Opp. Mem. at 5, it is required to represent oneself as a counselor. See N.D. Century Code § 43-47-06.⁹ By holding herself out as a counselor to the public and, more specifically, to women seeking abortions, Plaintiff has advised women regarding alleged risks of abortion in violation of North Dakota law. Because the word “counselor” lends authority to statements made by someone who identifies as such, it is reserved for people who have been licensed by the State. Plaintiff misrepresents herself as a counselor and, consequently, has magnified the effect of her untrue statements about the risks of abortion. Plaintiff’s illegal activities are directly implicated by her claims in this suit and it is undisputed that her actions have harmed the Clinic and its patients. See Bovard Aff. ¶¶ 11-13, 17-18; see also Jacobsen v. Pederson, 190 N.W.2d 1, 4 (N.D. 1971) (unclean hands apply when one party’s behavior harms another). Accordingly, the undisputed facts establish that Plaintiff should be precluded from pursuing her false advertising claims.

2. Plaintiff’s Claims are Also Barred by her Continuing Abuse of Process.

Plaintiff does not offer any real argument regarding her abuse of the litigation process as to her false advertising claims in this action; instead she offers only an affidavit from her lawyer testifying about his involvement in the orchestration of this lawsuit. See

⁹ Plaintiff’s attorney seems to have an overabundance of dictionaries, which he selectively references based apparently on whichever has the more advantageous definition. Cf. Pl. Opp. Mem. at 5 (citing American Heritage definition of “counsel”) with Pl. Mem. in Support Cross-Motion for Summary Judgment at 8 (citing Merriam-Webster’s Dictionary definition of “safe”). Dictionary definitions, of course, cannot trump statutory definitions, let alone statutory prohibitions.

Pl. Opp. Mem. at 6. The very fact that Plaintiff's counsel submitted an affidavit is highly unusual, first and foremost because he has now made himself the sole witness on this issue. Cf. North Dakota Rules of Professional Conduct Rule 3.7 ("Lawyer as Witness") (providing, with limited exception, that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"). It is also surprising, however, because the affidavit reinforces conclusively that Plaintiff's entire knowledge of the claims in this lawsuit is predicated on hearsay provided to her by her attorney.

As set forth in the Clinic's opening memorandum, the "gist of the tort of abuse of process is the misuse or misapplication of legal process to accomplish an end other than that which the process was designed to accomplish." See Volk v. Wisconsin Mortgage Assurance Co., 474 N.W.2d 40, 43 (N.D. 1991). The undisputed facts demonstrate that Plaintiff, by and through her attorney, has attempted in this litigation to harass the Clinic.

It is undisputed that Plaintiff was first alerted to the Clinic's brochure by her attorney. See Kindley Aff. ¶ 8. Her attorney "educated" her about the "evidence and resources which showed . . . the [Clinic's brochure] to be false and misleading." Id. Plaintiff's counsel apparently did not discuss with Plaintiff the reliable evidence and resources that demonstrate that the Clinic's brochure is accurate and not misleading. See id. Although Plaintiff's counsel cites his own student publication exhorting the use of informed consent actions as evidence that he is not motivated by political views on abortion in his breast-cancer crusade, he has gone to great lengths to hide the fact that it was an anti-choice activist with a long track-record of harassing the Clinic who was originally collaborating with Plaintiff's attorney to bring this lawsuit. See Kindley Aff.

¶¶ 2, 6, 8, 16 (making repeated references to nameless “brochure recipient”); see also Mattson Dep. 37, 46 (stating that Martin Wishnatsky was the person to receive a copy of the Clinic’s brochure); State v. Wishnatsky, 491 N.W.2d 733 (N.D. 1992) (affirming criminal conviction of Wishnatsky for his violation of a restraining order protecting the Clinic from his abortion protesting activities). In short, Plaintiff’s attorney’s quotation of and citation to his own written work as some kind of evidence of his—or his client’s—lack of abortion animus in this lawsuit rings hollow in light of his and his client’s own testimony regarding the course of this litigation.

It is undisputed that Plaintiff believes that abortion should be stopped. See Mattson Dep. 76-77. It is also undisputed that plaintiff has never seen the Clinic’s revised brochure and thus comes to this Court asserting she has a right to be here based solely on her North Dakota citizenship and her out-of-state attorney’s representations regarding a brochure she herself has never even seen. The entire course of this litigation from its inception to the present constitutes a misuse and misapplication of the legal process as a means to harass a legitimate North Dakota business. Plaintiff has clearly abused the legal process and, accordingly, she should be precluded from seeking equitable relief from this Court.

E. Plaintiff’s Claim Regarding the Clinic’s First Brochure is Moot.

North Dakota law is clear—and Plaintiff does not dispute—that a court may only review a case that is otherwise moot if 1) public officials and matter of public interest is involved or 2) if matter is capable of repetition, but evades review. See, e.g., Sposato v. Sposato, 570 N.W.2d 212, 213-14 (N.D. 1997); Gosbee v. Bendish, 512 N.W.2d 450,

452-53 (N.D. 1994). Plaintiff cites no North Dakota law and the cases she does cite do not undermine settled North Dakota law. This case does not involve public officials, and it is not an inherently time-sensitive situation that evades review. See, e.g., Nord v. Herrman, 577 N.W.2d 782 (N.D. 1998) (boundary dispute issue was not moot where lake had history of rising and falling); Bolinske v. North Dakota State Fair Assoc., 522 N.W.2d 426, 430 (N.D. 1994) (issue was not moot where state fair was an annual event of short duration that prevented timely review). The Clinic has absolutely no intention of reverting to the previous brochure language. See Bovard Aff. ¶ 6. Nevertheless, if it did, nothing would prevent the Court from addressing the issue at such time. Cf. In the Interest of E.T., 617 N.W.2d 470, 471 (N.D. 2000) (issue was moot where involuntarily committed patient who was forced to use feeding tube was released and no longer on tube; “[i]f the trial court subjects [plaintiff] to involuntary medication in the future, she will not be prevented from appealing such an order.”). Plaintiff’s claims as to the Clinic’s original brochure are clearly moot and, thus, the Clinic is entitled to summary judgment on this ground as well.

F. The Undisputed Facts Establish that the Supplemental and Amended Supplemental Complaints Have No Basis in Fact and that Plaintiff Continues to Act in Bad Faith, Thus the Clinic is Entitled to its Attorneys’ Fees and Expenses.

Plaintiff relies solely on her attorney’s affidavit to oppose the Clinic’s motion that it is entitled to attorneys’ fees and expenses based on North Dakota Century Code Sections 28-26-01 and 28-26-31. Although she maintains that the Clinic’s request is “bizarre,” the undisputed facts establish that the Clinic is entitled to its fees and expenses based on Plaintiff’s actions in this litigation.

As set forth in the Clinic's opening memorandum, these statutes are designed to penalize a litigant who pleads false matters without any basis in law or fact and thereby places an undue burden on her opponents. See Def. Mem. at 19-21 (citing cases). Indeed, Section 28-26-01 provides that if the Court determines that there is a complete absence of actual facts or law to support a pleading, costs must be imposed. See, e.g., Jensen v. Zuern, 523 N.W.2d 388 (N.D. 1994).

The undisputed facts establish that Plaintiff's Supplemental Complaint, as well as her recently filed Amended Supplemental Complaint, were filed without an actual basis in fact. It is undisputed that Plaintiff's Supplemental Complaint contained false statements regarding her place of residence and her activities as a "sidewalk counselor." See Mattson Dep. 82-83. Either Plaintiff reviewed her Supplemental Complaint and did not correct those statements, in which case there is no excuse for her misrepresentations to this Court, or else she did not review those statements and, again, there is simply no reasonable excuse for the misrepresentations or the filing of unapproved papers. See, e.g., N.D. Rules of Prof'l Conduct 1.4 (requiring lawyer to communicate with client and requiring that client have sufficient information to participate intelligently in litigation). The undisputed facts establish that the statements in Plaintiff's pleading evidenced a complete absence of actual facts and no reasonable basis to support them.

In addition, the undisputed facts establish that, at the time that her Supplemental Complaint was filed, at the time of her deposition on March 1, 2001, and apparently even up until the present, Plaintiff has never seen the Clinic's revised brochure. See Mattson

Dep. 53; Kindley Aff. ¶ 12.¹⁰ Plaintiff's claims regarding the Clinic's revised brochure are all premised on the notion that she has seen the brochure. Plaintiff has acknowledged in her deposition that each of the challenged statements in the Clinic's brochure are true. See Mattson Dep. 71-74. The fundamental premise of a false advertising case must be

¹⁰ Plaintiff did not even see the Clinic's original brochure until a few months after the original complaint was filed. See Mattson Dep. 46.

that the complainant have *at least* viewed the advertisement upon which she bases her claims. Because there is no reasonable cause for Plaintiff to believe that a false advertising claim can proceed without her ever having seen the advertisement, and because there is an outright absence of facts and law to support her pleadings and claims in this action, the undisputed facts establish that the Clinic is entitled to its attorneys' fees and expenses.

Conclusion

For all of the reasons set forth in the Clinic's opening memorandum in support of its motion for summary judgment as well as above, the Clinic requests that its motion for summary judgment be granted. The undisputed facts establish that Plaintiff has no standing to pursue her false advertising claims and her claims are otherwise barred by equitable considerations. The facts establish that Plaintiff has acknowledged that the Clinic's brochures are false and her original claims are moot. The undisputed facts also establish that the Clinic has at all times exercised reasonable care to ensure that its brochures are true and not misleading. To the extent that Plaintiff requests summary judgment, her request should be denied, for there are clearly disputed facts regarding whether the Clinic's revised brochure is misleading. Finally, based upon Plaintiff's false and baseless filings in this lawsuit, the Clinic respectfully requests that it be awarded attorneys' fees and expenses.

Dated this _____ day of May, 2001.

Respectfully submitted,

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