SUMMARY
June 13, 2024

2024COA64

No. 23CA0436, *Wright v. Tegna Inc.* — Courts and Court Procedure — Regulation of Actions and Proceedings — Action Involving Exercise of Constitutional Rights — Anti-SLAPP — Reasonable Likelihood Plaintiff will Prevail

A division of the court of appeals considers the quality and quantity of evidence a plaintiff must present in order to "establish[] . . . a reasonable likelihood that the plaintiff will prevail on the claim," the second step in a court's assessment of an anti-SLAPP special motion to dismiss, § 13-20-1101(3)(a), C.R.S. 2023. The division determines that while a plaintiff need not support every allegation by affidavit or tendering "admissible evidence," a defendant will generally prevail when the defendant proffers evidence, such as affidavits, that refutes the plaintiff's unsupported allegations.

In addition, this is the first Colorado opinion to address a vicarious liability claim in an anti-SLAPP case.

COLORADO COURT OF APPEALS **2024COA64**

Court of Appeals No. 23CA0436
Elbert County District Court No. 22CV30078
Honorable Gary M. Kramer, Judge

Steven Wright,

Plaintiff-Appellee and Cross-Appellant,

v.

TEGNA Inc. and Multimedia Holdings Corp.,

Defendants-Appellants and Cross-Appellees.

ORDER AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE TAUBMAN*
Freyre and Schutz, JJ., concur

Announced June 13, 2024

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Defendants, TEGNA Inc. and Multimedia Holdings Corp. (collectively, 9News[1]), appeal the district court's order denying a portion of their anti-SLAPP[2] special motion to dismiss the claims of plaintiff, Steven Wright. The court denied dismissal of Wright's claim for direct negligent infliction of emotional distress under the theory of negligent hiring, retention, and/or supervision of a security guard and Wright's claim that 9News was vicariously liable for the security guard's negligent infliction of his alleged emotional distress. In addition, Wright cross-appeals the court's dismissal of his claim for direct negligent infliction of emotional distress under a second theory — that 9News engaged in a civil conspiracy. We reverse the court's finding that Wright established a reasonable likelihood that 9News was directly negligent in the hiring, retention, and/or supervision of the security guard. We affirm in all other respects.

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[1] Multimedia Holdings Corp. is a subsidiary of TEGNA Inc. Both do business as 9News, and all briefing specifically refers to TEGNA Inc. and Multimedia Holdings Corp. as "(collectively, 9News)." We follow the parties' use of "(collectively, 9News)." 9News is a television station in the Denver metropolitan area.

[2] "SLAPP" stands for "strategic lawsuit against public participation." *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 1 n.1, 522 P.3d 242, 245 n.1.

¶ 2 Addressing a matter of first impression, we further conclude that a plaintiff need not support every allegation of the complaint by affidavit or proffer "admissible evidence" (9News' words) to "establish[] . . . a reasonable likelihood that the plaintiff will prevail on the claim," as required by the second step in a court's assessment of an anti-SLAPP special motion to dismiss. § 13-20-1101(3)(a), C.R.S. 2023. However, we also conclude that if a defendant refutes mere allegations in a complaint with affidavits or other evidence, such documents will generally prevail over a complaint's allegations.

I. Background

¶ 3 In July 2020, Back the Blue, a pro-police organization, obtained a permit to host a "Patriot Muster" rally in Denver's Civic Center Park on October 10, 2020. A counterdemonstration entitled "Black Lives Matter - Antifa Soup Drive" was scheduled concurrently.

¶ 4 9News planned to cover the events. In anticipation of a "potential for violence," given the history of clashes between these groups, 9News decided to hire a security guard to protect its employees covering the events. It hired Pinkerton Consulting &

Investigations, Inc. (Pinkerton) as an independent contractor to provide security services.[3]

¶ 5 Pinkerton, in turn, hired Isborn Security Services, LLC (Isborn). Pinkerton had contracted with Isborn for several years for the provision of security services. Under their "Master Services Agreement," Isborn promised to "furnish to Pinkerton security and investigative services . . . as may be requested on an as-needed basis." The agreement specified that Isborn "shall provide personnel who have the appropriate technical skills, training, and experience." Isborn ensured its personnel would honor "all security requirements and all reasonable instructions and directions issued by Pinkerton or Pinkerton's client." In Pinkerton's emailed request to Isborn for these events, Pinkerton sought an armed guard with attire that was "casual to blend in" for "staff protection . . . on behalf of Tegna 9News."

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[3] The record does not contain 9News' request to Pinkerton, and thus does not specify whether 9News requested the hiring of an armed guard. The district court relied on the contract between Pinkerton and Isborn Security Services, LLC, which provided for hiring an armed guard for "staff protection . . . on behalf of Tegna 9News," to infer that 9News had requested an armed guard from Pinkerton.

¶ 6 Isborn hired Matthew Dolloff, who had worked for Isborn thirty-nine times (for Pinkerton thirty-three times), primarily as a "crowd control" or "roving security" independent contractor. Wright alleged that when Isborn hired Dolloff, it did not ensure that he was licensed. He further alleged that Dolloff was not authorized to carry a firearm or to provide security services under the applicable Denver Revised Municipal Code requirements.

¶ 7 On the day of the events, Dolloff accompanied 9News producer Zachary Newman. Both dressed in plainclothes, without identification as a security guard or member of the press, respectively. Dolloff was armed.

¶ 8 Wright attended the "Patriot Muster" rally with his friend, Lee Keltner. As they were leaving the rally, Wright and Keltner argued with Jeremiah Elliott, who was wearing a Black Lives Matter shirt. The argument quickly escalated to an altercation when Keltner pulled a can of pepper spray from his pocket.

¶ 9 Newman recorded the altercation on his phone. Keltner asked Newman to stop recording and reached for Newman's phone. Dolloff stepped in front of Newman. Keltner slapped Dolloff and

sprayed him with pepper spray. Dolloff then shot and killed Keltner. Wright was standing near Keltner when he was shot.

¶ 10 Following the shooting, Wright brought nine claims for negligent infliction of emotional distress against Elliott, Dolloff, Isborn, Pinkerton, and 9News. Wright's fifth and sixth claims were asserted against 9News.

¶ 11 In his fifth claim, Wright contended that 9News was directly negligent by creating an unreasonable risk of harm in its newsgathering. Wright theorized that 9News created an unreasonable risk in two ways: 9News negligently hired, retained, and/or supervised Dolloff, and 9News' newsgathering involved a civil conspiracy with Elliott to instigate an altercation that Newman could film.

¶ 12 In his sixth claim, Wright contended that 9News was vicariously liable for Dolloff's actions. He asserted that even though Dolloff was an independent contractor, the security services he provided were an inherently dangerous activity, and thus they made 9News liable under an exception to the general rule that a person or entity hiring an independent contractor is not liable for the independent contractor's actions.

¶ 13 In response, 9News filed a special motion to dismiss under Colorado's anti-SLAPP statute, section 13-20-1101. Following a hearing, the court ruled on 9News' anti-SLAPP special motion to dismiss (among the other defendants' motions) in a thorough opinion.

¶ 14 First, the district court determined that the anti-SLAPP statute applied, as 9News was engaged in newsgathering on an issue of public interest during the altercation "because it took place directly following the rally and appeared to be a continuation of the rally, because it was in a public place, and because it involved allegations and cross-allegations of racism."

¶ 15 Second, the court found that Wright demonstrated a reasonable likelihood of success on the merits of his theory of direct negligence via hiring, retention, and/or supervision and his vicarious liability claim "under the unique facts of this case." The court based its findings on the following allegations in the complaint and evidence submitted by the parties:

- 9News sought to hire a security guard because of a "potential for violence";

- Pinkerton requested that Isborn hire an armed security guard;
- Dolloff was unqualified to provide armed security; and
- Dolloff "followed and flanked" Newman, and 9News "dictated where Defendant Dolloff went during the event."

¶ 16 Thus, as to the theory of direct negligence in the hiring, retention, and/or supervision, the district court found that "9News should have done more than simply rely on Pinkerton and Isborn to supply a qualified security guard at the rally and, further, 9News should have taken steps to supervise Dolloff while he was performing his functions as a security guard at the rally." Likewise, the court found that these allegations could support a jury determination that 9News was vicariously liable for Dolloff's actions, even though Dolloff was an independent contractor, because the security services provided in these circumstances were inherently dangerous.

¶ 17 Separately, the district court determined that Wright had not established a reasonable likelihood of success on his theory of direct negligence via civil conspiracy because "the contacts between

9News and Elliott" were insufficient to demonstrate a meeting of the minds and 9News' affidavits refuted Wright's allegations.

¶ 18 9News appeals the district court's ruling on the direct negligence in the hiring, retention, and/or supervision theory and the vicarious liability claim; Wright cross-appeals the court's ruling on the direct negligence via civil conspiracy theory.

II. Applicable Law and Standard of Review

¶ 19 Colorado's anti-SLAPP statute serves to "safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government . . . and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b).

¶ 20 To balance these interests, the statute provides a mechanism for a defendant to file a special motion to dismiss early in the case. In this way, courts may "'make an early assessment about the merits' of a lawsuit brought in response to a defendant's protected . . . speech activity." *Anderson v. Senthilnathan*, 2023 COA 88, ¶ 9, 540 P.3d 1248, 1253 (quoting *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 12, 522 P.3d 242, 247).

¶ 21 The court evaluates the special motion through a two-step process. § 13-20-1101(3)(a)–(b); *see also L.S.S. v. S.A.P.*, 2022 COA 123, ¶¶ 20-24, 523 P.3d 1280, 1285-86. First, the court determines whether the defendant has shown that the conduct underlying the plaintiff's claim "arises from an act 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.'" *L.S.S.*, ¶ 21, 523 P.3d at 1285 (quoting § 13-20-1101(3)(a)). If the defendant meets that threshold, "the court turns to the second step, in which it reviews the pleadings and affidavits and determines whether the plaintiff has established a 'reasonable likelihood [of] prevail[ing] on the claim.'" *Id.* at ¶ 22, 523 P.3d at 1285-86 (quoting § 13-20-1101(3)(a)).

¶ 22 A court's denial of a special motion to dismiss under the anti-SLAPP statute is immediately appealable. § 13-20-1101(7); § 13-4-102.2, C.R.S. 2023.

¶ 23 We review such rulings de novo. *Salazar*, ¶ 21, 522 P.3d at 248.

III. Evidence for Anti-SLAPP Motions

¶ 24 Initially, 9News argues that Wright's claims must be dismissed because he failed to provide "admissible evidence" to establish a

reasonable likelihood of prevailing on the claims. 9News asserts that its use of the term "admissible evidence" means "information [that] is capable of later being admissible at trial despite not necessarily being in an admissible form." For example, 9News argues that because Wright "could have executed an affidavit," but "did not bring evidence and instead relied on the allegations of his complaint" to establish his direct negligence claim, it must be dismissed.

¶ 25 In contrast, Wright contends that the court may rely on the allegations of his complaint, even if they are rebutted by affidavits or other evidence presented by 9News.[4]

¶ 26 The district court disagreed with 9News' contention that "a Plaintiff 'must bring evidence' or do 'something more' than simply rely on its allegations in response to [an anti-SLAPP] special motion to dismiss." It stated that "although the statute permits parties to submit affidavits in support of and in response to a special motion to dismiss, it does not require that they do so." We agree. As explained below, we conclude that a court may consider the

[4] Wright's complaint was not a verified complaint.

allegations of a complaint when considering an anti-SLAPP special motion to dismiss. However, if those allegations are refuted by a defendant's affidavits or other evidence, the plaintiff will not have established a "reasonable likelihood [of] prevail[ing]" on the claim, *see L.S.S.*, ¶¶ 22-23, 523 P.3d at 1285-86 (quoting § 13-20-1101(3)(a)), and the defendant will generally prevail, unless the plaintiff responds with other evidence.

¶ 27 "To the extent our resolution of this appeal turns on interpretation of the anti-SLAPP statute, our review is de novo." *Salazar*, ¶ 14, 522 P.3d at 247 (citing *In re Estate of Garcia*, 2022 COA 58, ¶ 22, 516 P.3d 962, 965). We give effect to the plain language of a statute unless the result is absurd or unconstitutional. *See Rodriguez v. Schutt*, 914 P.2d 921, 925 (Colo. 1996).

¶ 28 The plain language of Colorado's anti-SLAPP statute states that when assessing whether a plaintiff has established a reasonable likelihood of prevailing on a claim, "court[s] shall consider the pleadings *and* supporting and opposing affidavits stating the facts upon which the liability or defense is based." § 13-20-1101(3)(b) (emphasis added); *see also L.S.S.*, ¶ 22, 523 P.3d at

1285 (stating that a court "reviews the pleadings *and* affidavits") (emphasis added); *Salazar*, ¶ 21, 522 P.3d at 248 ("We neither simply accept the truth of the allegations nor make an ultimate determination of their truth. Instead, . . . we assess whether the *allegations and defenses* are such that it is reasonably likely that a jury would find for the plaintiff.") (emphasis added).

¶ 29 As the district court stated, the plain language of the statute "does not provide that the Court must *only* consider affidavits." (Emphasis added.) In *Coomer v. Donald J. Trump for President, Inc.*, a division of this court observed the same principle:

> No party argues that the court may *only* consider affidavits, and we decline to impose such a limitation in this case. *See, e.g.*, *Creekside Endodontics*, [*LLC v. Sullivan*, 2022 COA 145,] ¶ 41[, 527 P.3d 424, 431] (considering patient notes and email communication); *L.S.S.*, ¶ 47[, 523 P.3d at 1290] (identifying various categories of evidence presented). *But see Salazar*, ¶ 40[, 522 P.3d at 251] ("A challenge under the anti-SLAPP statute . . . only allows the court to consider the pleadings and supporting and opposing affidavits . . . ."). Indeed, both Coomer *and* several defendants presented evidence beyond affidavits.

2024 COA 35, ¶ 79, ___ P.3d ___, ___. Likewise, in this case the parties presented evidence in addition to affidavits, such as videos,

emails, and contracts. The court properly considered those submissions.

¶ 30 Nor does the plain language of the anti-SLAPP statute state that we may only consider a complaint's allegations if they are supported by "admissible evidence." As quoted above, it mandates that courts conduct the second-step analysis based on "the pleadings and supporting and opposing affidavits." § 13-20-1101(3)(b); *see also* C.R.C.P. 7(a) ("pleadings" include the complaint). We may not "add words to the statute or subtract words from it." *Oakwood Holdings, LLC v. Mortg. Invs. Enters. LLC*, 2018 CO 12, ¶ 12, 410 P.3d 1249, 1252; *see also Elder v. Williams*, 2020 CO 88, ¶ 18, 477 P.3d 694, 698 ("[W]e avoid constructions that would render any words or phrases superfluous . . . .").

¶ 31 9News insists on a plaintiff's need to submit "admissible evidence" by reference to *Sweetwater Union High School District v. Gilbane Building Co.*, a case where the California Supreme Court[5] held that "evidence may be considered at the anti-SLAPP motion

[5] Because California has a substantially similar anti-SLAPP statute, "we look to California case law for guidance in construing and applying section 13-20-1101." *Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*, 2023 COA 114, ¶ 16, 544 P.3d 693, 697.

stage if it is reasonably possible the evidence set out in supporting affidavits, declarations or their equivalent will be admissible at trial." 434 P.3d 1152, 1161 (Cal. 2019).

¶ 32 However, the holding in *Sweetwater* was contextualized by observations "regarding the timing of an anti-SLAPP motion and the stay of discovery." *Id.* at 1163. In particular, the court noted that

> [t]o strike a complaint for failure to meet evidentiary obstacles that may be overcome at trial would not serve the SLAPP Act's protective purposes. Ultimately, the SLAPP Act was "intended to end meritless SLAPP suits early without great cost to the target," *not* to abort potentially meritorious claims due to a lack of discovery. Notwithstanding the discovery stay, the court has discretion to order, upon good cause, specified discovery if required to overcome the hurdle of potential inadmissibility.
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> . . . .
>
> [Therefore,] the court may consider affidavits, declarations, and their equivalents if it is reasonably possible the proffered evidence set out in those statements will be admissible at

> trial.[6] Conversely, if the evidence relied upon *cannot* be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection. If an evidentiary objection is made, the plaintiff may attempt to cure the asserted defect or demonstrate the defect is curable.

Id.

¶ 33 As an initial matter, we note that in Colorado as in California — as the parties addressed at the hearing, and as the court noted in its ruling — an anti-SLAPP special motion to dismiss is filed before and generally halts formal discovery. *See* § 13-20-1101(6) ("All discovery proceedings in the action are stayed upon the filing of a notice of motion made pursuant to this section. . . . The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subsection

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6 We note that *Sweetwater Union High School District v. Gilbane Building Co.* only expressly provides that a "court may consider *affidavits, declarations, and their equivalents*," not evidence more generally. 434 P.3d 1152, 1163 (Cal. 2019) (emphasis added). The "proffered evidence" in *Sweetwater* was "statements contained in the grand jury transcript and plea forms." *Id.* But in conducting its analysis, the court also considered examples of evidence including privileged statements; statements made only on information and belief; and, contrastingly, edited videotapes. *See id.* at 1162-63. Therefore, we understand the holding to apply to other forms of evidence as well.

(6)."); *see also Salazar*, ¶¶ 19-21, 522 P.3d at 248. It was in light of this reality that the *Sweetwater* court clarified the procedure for consideration of evidence that would be inadmissible.

¶ 34 Here, the district court did not follow this procedure. 9News did not make evidentiary objections to particular exhibits on the basis of categorical bars or undisputed factual circumstances, and Wright was not given an opportunity to address asserted defects. Further, the court did not exercise "discretion to order, upon good cause, specified discovery . . . to overcome the hurdle of potential inadmissibility." *Sweetwater*, 434 P.3d at 1163. Rather, as Wright argues, it seems the district court simply considered it "reasonably possible the proffered evidence . . . will be admissible at trial" and proceeded accordingly. *Id.*

¶ 35 Moreover, *Sweetwater* did not affirmatively require that plaintiffs proffer "something more" than allegations. Rather, it explained that if they choose to do so, it must be "reasonably possible" that the evidence would be admissible at trial. *Id.* As the district court observed, to require that all allegations be substantiated by affidavits or other "admissible evidence," before the party has had a meaningful opportunity to engage in discovery,

"appears to tip the delicate balance set forth above heavily in favor of the moving party; a result the legislature did not expressly sanction in the statute."

¶ 36 Nevertheless, 9News insists that plaintiffs must proffer "admissible evidence" because we have characterized our review in other anti-SLAPP cases "as a summary judgment-like procedure in which the court reviews the pleadings and the evidence to determine 'whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.'" *L.S.S.*, ¶ 23, 523 P.3d at 1286 (citation omitted); *see also Salazar*, ¶ 16, 522 P.3d at 247 ("In other respects, the special motion to dismiss is more like a motion for summary judgment."). However, in those cases we have also described how the anti-SLAPP statute operates differently from summary judgment proceedings. *See L.S.S.*, ¶ 17, 523 P.3d at 1285; *see also Salazar*, ¶¶ 15, 17, 522 P.3d at 247 ("In some respects, the special motion to dismiss is just that — a motion to dismiss. It seeks an early end to the litigation based, essentially, on the assertion that the plaintiff will ultimately, and inevitably, lose. . . . In yet other ways, an anti-SLAPP special motion to dismiss is similar to a request for

injunctive relief, as the moving party is essentially seeking to enjoin the nonmoving party's lawsuit.").

¶ 37 9News also emphasizes the use of the word "evidence" in a few anti-SLAPP opinions issued by this court. However, in each of these instances, the divisions stated the same standard outlined above, simply adding the word evidence. *See, e.g.*, *Anderson*, ¶ 11, 540 P.3d at 1254; *see also Gonzales v. Hushen*, 2023 COA 87, ¶ 21, 540 P.3d 1268, 1278 (stating that the court "reviews the pleadings, affidavits, and evidence"). In addition, the divisions' use of the word "evidence" was done when discussing the standard applied to evaluate the merits of the claims brought in those cases in different factual contexts. *See, e.g.*, *Rosenblum v. Budd*, 2023 COA 72, ¶¶ 39, 55, 538 P.3d 354, 365, 368; *Gonzales*, ¶ 80 n.13, 540 P.3d at 1288 n.13.

¶ 38 Thus, plaintiffs may submit affidavits or evidence to support their allegations, but they are not required to do so. The invocation of the word "evidence" in the opinions' analyses — if apprehended to mean anything more than a general reference to what was presented in support of or opposition to a special motion to dismiss — simply demonstrates that submitting more robust evidence may

strengthen a plaintiff's ability to establish a reasonable likelihood of prevailing. *See also Rosenblum*, ¶ 36, 538 P.3d at 364.

¶ 39 *Coomer* recently clarified this point, noting that, "*to defeat* an anti-SLAPP motion, the plaintiff *generally* must go further and present *evidence* establishing a reasonable likelihood of success." *Coomer*, ¶ 68, ___ P.3d at ___ (first and second emphases added) (citing *L.S.S.*, ¶ 23, 523 P.3d at 1286). The division explained that

> evidence can — and typically will — come in the form of an affidavit. But once affirmed in an affidavit, the plaintiff's assertions are no longer mere allegations; they are evidence. And that evidence must be accepted as true. . . .
>
> In other words, while we do not necessarily accept the plaintiff's *allegations* as true, we do accept as true the plaintiff's *evidence.*

Id. at ¶¶ 68-69, ___ P.3d at ___ (citations omitted). Thus, *Coomer* makes clear that references to evidence in our jurisprudence can refer to affidavits, more robust evidence may more readily spell success for a plaintiff, and we accept the plaintiff's evidence as true. None of this means that a complaint's unsupported allegations may not be considered.

¶ 40 *Coomer* also supports the principle that if a plaintiff provides only unsubstantiated allegations, without any evidence we would accept as true, and a defendant responds with evidence that "defeats the plaintiff's claim as a matter of law," *L.S.S.*, ¶ 23, 523 P.3d at 1286 (citation omitted), the plaintiff will not have established a "reasonable likelihood [of] prevail[ing] on the claim," *id.* at ¶ 22, 523 P.3d at 1285-86 (quoting § 13-20-1101(3)(a)), and the defendant will prevail. This does not contravene the principle that we must not "weigh evidence or resolve conflicting factual claims," *id.* at ¶ 23, 523 P.3d at 1286 (citation omitted).

¶ 41 In sum, we hold that a court may consider allegations that are unsupported by "admissible evidence." However, if those allegations are refuted by a defendant's evidence, the defendant will generally prevail, unless the plaintiff responds with other evidence.

IV. Negligent Infliction of Emotional Distress

A. Negligence in Hiring, Retention, and/or Supervision Theory of Direct Negligence

¶ 42 9News contends the district court erred in concluding that Wright established a reasonable likelihood of prevailing on his claim

that 9News negligently hired, retained, and/or supervised Dolloff. We agree.

¶ 43 Wright's allegations cannot support a theory of negligent hiring or retention. That theory of "[l]iability of the employer is predicated on the employer's antecedent ability to recognize a potential employee's 'attribute[s] of character or prior conduct' which would create an undue risk of harm to those with whom the employee came in contact in executing his employment responsibilities." *Moses v. Diocese of Colo.*, 863 P.2d 310, 327 (Colo. 1993) (quoting *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1321 (Colo. 1992)).

¶ 44 As noted, 9News did not directly hire Dolloff. Rather, it solicited security services from Pinkerton, which contracted with Isborn, which in turn hired Dolloff.

¶ 45 Moreover, as 9News notes, it "contracted with Pinkerton because 9News lacks the expertise to provide its own security." Beyond "finding a company with undeniable expertise in the needed service," 9News stated that it lacked the expertise to scout, screen, and select individual security guards. Wright does not allege to the contrary; rather, he contends only that Dolloff was unqualified and

that 9News hired Pinkerton, which hired Isborn, which hired Dolloff. Thus, 9News held no "antecedent ability" to recognize that Dolloff's attributes, such as his alleged lack of qualifications, would create an undue risk of harm. *Id.* Nor did 9News have any way to ascertain that its direct hire, Pinkerton, would create an undue risk of harm. Accordingly, we disagree with the district court that "9News should have done more than simply rely on Pinkerton and Isborn to supply a qualified security guard at the rally."

¶ 46 Additionally, we disagree with the district court that "9News should have taken steps to supervise Dolloff while he was performing his functions as a security guard at the rally."

¶ 47 No duty to supervise exists when an independent contractor has "exclusive control over the manner of doing the work." *W. Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 377, 578 P.2d 1045, 1049 (1978). A right to inspect work does not create a duty of supervision. *Id.*

¶ 48 Wright's allegations do not support a theory of negligent supervision. In particular, his allegations do not establish a reasonable probability that Dolloff's actions were within 9News' control on the day of the events.

¶ 49 The district court relied on Wright's allegations that Dolloff "followed and flanked" Newman and 9News "dictated where Defendant Dolloff went during the event" to determine that 9News had control over Dolloff. However, even if Newman dictated where Dolloff went — perhaps because Dolloff's assignment was to provide security for Newman — that does not demonstrate that 9News directed how Dolloff acted *in his provision of security services*. In fact, Newman stated in his affidavit that "Dolloff did not act at my direction or control. I lack the expertise to direct him on how to provide security. I am a journalist."

¶ 50 Our review of the video in the record confirms that Newman did not direct Dolloff during the altercation. *See Colo. Dep't of Pers. v. Alexander*, 970 P.2d 459, 467 (Colo. 1998) ("An appellate court may draw its own conclusions from operative documentary material in the record." (citing *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994))). The record shows that Newman did not direct Dolloff when or how to step in when Keltner reached for his phone, nor did he instruct Dolloff to shoot Keltner. As Newman attested, "9News or KUSA-TV took no actions or inactions that caused Mr. Dolloff to shoot Mr. Keltner." These attestations "defeat[] the

plaintiff's claim as a matter of law." *L.S.S.*, ¶ 23, 523 P.3d at 1286 (citation omitted). Therefore, Wright has not established a reasonable likelihood that 9News had control sufficient to support a duty to supervise Dolloff.[7]

¶ 51 In sum, the district court erred in concluding that Wright established a reasonable likelihood of prevailing on his claim that 9News negligently hired, retained, and/or supervised Dolloff.

B. Vicarious Liability

¶ 52 9News also contends the district court erred in concluding that Wright established a reasonable likelihood of prevailing on his claim that 9News was vicariously liable for the acts of Dolloff. We disagree.[8]

¶ 53 "As a general rule, a person hiring an independent contractor to perform work is not liable for the negligence of the independent contractor." *Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282,

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[7] Given that we find no duty based on Dolloff's hiring, retention, or supervision, we do not address the parties' arguments regarding causation or damages.

[8] On appeal, 9News did not raise the issues of duty or causation with respect to the vicarious liability claim. Thus, we do not address them.

287 (Colo. 1992). However, a hiring party may be held liable when it is proved

> (1) that the activity in question presented a special or peculiar danger to others inherent in the nature of the activity *or the particular circumstances under which the activity was to be performed*; (2) that the danger was different in kind from the ordinary risks that commonly confront persons in the community; (3) that the employer knew or should have known that the special danger was inherent in the nature of the activity *or in the particular circumstances under which the activity was to be performed*; and (4) that the injury to the plaintiff was not the result of the collateral negligence of the defendant's independent contractor.

Id. at 294 (emphasis added). "[T]he determination of whether an activity is inherently dangerous will ultimately depend on the state of the evidence bearing on that issue." *Id.* at 293. Relatedly, the trier of fact is best suited to evaluate what constitutes an inherently dangerous activity. *Sevit*, 195 Colo. at 378, 578 P.2d at 1050.

¶ 54 The district court concluded that a jury could determine that 9News was vicariously liable for Dolloff's actions, even though Dolloff was an independent contractor, because the security services provided in these circumstances were inherently dangerous. In its ruling, the court emphasized that "under the

unique facts of this case," and the "*specific circumstances as alleged*, the provision of an armed security guard at a public rally that was expected to lead to violence, constitutes an inherently dangerous activity — especially when, as alleged here, the security guard was not licensed to be a security guard and was not authorized to carry a concealed weapon."[9] (Emphasis added.) We agree.

¶ 55 9News contends that "Wright cannot prevail on his sixth claim because Dolloff was provided as a security guard by Pinkerton, through Isborn." Nevertheless, we conclude that 9News could be vicariously liable under the inherently dangerous exception if the independent contractors at issue here are deemed to have engaged in an inherently dangerous activity.

¶ 56 As noted above, for purposes of the anti-SLAPP special motion to dismiss, at this juncture Wright need only have "stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." *L.S.S.*, ¶ 23, 523 P.3d at 1286

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[9] 9News submitted no affidavits or other evidence disputing the allegations that Dolloff was unlicensed as a security guard and unauthorized to carry a concealed weapon at the event.

(citation omitted). The allegations in Wright's complaint, as well as the affidavits and evidence, demonstrate that all four *Huddleston* factors were met.

¶ 57 First, Wright "established a "reasonable likelihood of success," § 13-20-1101(3)(a), that the provision of security services "presented a special or peculiar danger to others inherent in . . . the *particular circumstances* under which the activity was to be performed." *Huddleston*, 841 P.2d at 294 (emphasis added). Reflecting on the history of clashes between opposing social groups like Back the Blue and Black Lives Matter, Newman believed there was a "potential for violence" at the events generally, and he predicted that "personal safety might be an issue" for him specifically. Accordingly, 9News sought security services. Newman described these services as entailing someone "literally watching my back as I record video or interview sources." We need not determine whether security services are always an inherently dangerous activity. Rather, it is sufficient that the provision of a security guard in the particular circumstances here "presented a special or peculiar danger." *Id.*

¶ 58 Second, Wright alleged enough to evince that "the danger was different in kind from the ordinary risks that commonly confront persons in the community." *Id.* While the parties extensively briefed the commonality of gun violence in our society, at this juncture, without the benefit of formal discovery, *see Salazar*, ¶¶ 19-21, 522 P.3d at 248, Wright has presented sufficient allegations to show a reasonable likelihood of success on this claim.

¶ 59 Third, the record establishes a reasonable likelihood of success that 9News "knew or should have known that the special danger was inherent in . . . the particular circumstances under which the activity was to be performed." *Huddleston*, 841 P.2d at 294. As described above, Newman acknowledged the "potential for violence" at the events was the primary impetus for 9News' decision to hire a security guard.

¶ 60 Fourth, Wright has alleged that his injuries were "not the result of the collateral negligence of the independent contractor,"

Dolloff.[10] *Id.* Collateral negligence is defined as negligence "that occurs after the independent contractor has departed from the ordinary or prescribed way of doing the work, when such departure is not reasonably to have been contemplated by the employer, and when such negligence would not have occurred but for such a departure." *Id.* at 288.

¶ 61 Whether Dolloff's shooting of Keltner occurred as part of or after the "ordinary or prescribed way" of providing security services and whether such actions were "reasonably to have been contemplated" by 9News are, at least, close questions. *Id.* At this juncture, however, the allegations and evidence proffered by Wright show that Dolloff was acting pursuant to "the ordinary or

[10] Wright does not argue that, for purposes of our consideration of collateral negligence, the contemplated independent contractor should be Pinkerton or Isborn, rather than Dolloff. Wright only argues that "Dolloff did exactly what a security guard might do in these circumstances."

prescribed way of doing the work," *id.*, as it had been requested from Isborn, Pinkerton, and 9News.[11]

¶ 62 The district court relied on the agreement between Pinkerton and Isborn contracting for an armed guard with attire that was "casual to blend in" for "staff protection . . . on behalf of Tegna 9News," to infer that 9News had requested armed security. This demonstrates that 9News anticipated use of arms to be within the ambit of any security hire's scope of employment. For purposes of our "'early assessment about the merits' of a lawsuit," *Anderson*, ¶ 9, 540 P.3d at 1253 (quoting *Salazar*, ¶ 12, 522 P.3d at 246), again an assessment made without the benefit of discovery, *see Salazar*, ¶¶ 19-21, 522 P.3d at 248, Wright has presented enough to establish a reasonable likelihood of success that his alleged emotional distress was not the result of Dolloff's collateral negligence. *See also Sevit*, 195 Colo. at 378-79, 578 P.2d at 1050

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[11] We do not address the possible collateral negligence of Isborn or Pinkerton, as the parties did not develop that theory in the district court or in their appellate briefs, as pertaining to the vicarious liability claim. *See Fiscus v. Liberty Mortg. Corp.*, 2014 COA 79, ¶ 35 n.1, 373 P.3d 644, 651 n.1, *aff'd on other grounds*, 2016 CO 31, 379 P.3d 278; *see also Est. of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992).

("The determination of what constitutes an inherently dangerous activity should be made by the trier of fact, which is in the best position to evaluate the inherent danger of the work in different circumstances.").

¶ 63 Therefore, Wright has adduced enough to establish a reasonable likelihood of prevailing on his vicarious liability claim by making a prima facie factual showing on all four *Huddleston* factors, meaning an inherently dangerous activity was at hand. Accordingly, the district court did not err by concluding that Wright established a reasonable likelihood of prevailing on his claim that 9News could be vicariously liable for Dolloff's actions.

C. Civil Conspiracy Theory of Direct Negligence

¶ 64 On cross-appeal, Wright contends that the district court erred in concluding that Wright did not establish a reasonable likelihood of prevailing on his claim that 9News created an unreasonable risk of harm in its newsgathering because Elliott, Newman, and Dolloff engaged in a civil conspiracy to instigate newsworthy events. We disagree.

¶ 65 To prove a claim for civil conspiracy, a plaintiff must establish "(1) two or more persons . . . ; (2) an object to be accomplished; (3) a

meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Rosenblum*, ¶ 51, 538 P.3d at 367 (quoting *Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo. App. 2006)).

¶ 66 "While a civil conspiracy may be 'implied by a course of conduct and other circumstantial evidence,' we will not infer a conspiracy absent some proof of an agreement. The plaintiff must present 'some indicia of agreement in an unlawful means or end.'" *Id.* at ¶ 52, 538 P.3d at 367 (citations omitted).

¶ 67 Wright's complaint and several affidavits, taken together, show that Elliott referred to 9News as "our news company"; that Elliott, Newman, and Dolloff talked during the rally; that Newman and Dolloff stood near the altercation; that Elliott cheered after Keltner was shot; and that 9News reported on Elliott's fundraising efforts for his personal safety.

¶ 68 In response, 9News submitted an affidavit from Newman attesting that Elliott was unaffiliated with 9News and that he, Elliott, and Dolloff had never agreed to act together. It also submitted affidavits from 9News personnel averring that Elliott was not a 9News employee.

¶ 69 Even accepting Wright's allegations as true and evaluating 9News' showing "only to determine if it defeats the plaintiff's claim as a matter of law," *L.S.S.*, ¶ 23, 523 P.3d at 1286 (citation omitted), we conclude that Wright did not establish a reasonable likelihood that Elliott, Newman, and Dolloff engaged in a conspiracy. More specifically, Wright did not make a "prima facie factual showing sufficient to sustain a favorable judgment," *id.* (citation omitted), because he did not demonstrate a meeting of the minds. Wright alleged only that others saw Elliott, Newman, and Dolloff speak. This does not demonstrate a meeting of the minds. *See Rosenblum*, ¶ 56, 538 P.3d at 368 (holding, in anti-SLAPP ruling, that there was no prima facie factual showing of civil conspiracy where a plaintiff alleged that emails showed that defendants communicated — "[b]ut that is all they show," which was "[f]ar from asking [another individual] to join in" a conspiracy).

¶ 70 The circumstantial evidence — references to "our news company," cheering, or fundraising on 9News, all of which were actions by Elliott that occurred after the shooting — does not provide the further necessary "indicia of agreement in an unlawful means or end." *Id.* at ¶ 52, 538 P.3d at 367 (citation omitted).

¶ 71 Further, Newman's affidavit denied that there was any agreement, thereby defeating Wright's claim as a matter of law. *See L.S.S.*, ¶ 23, 523 P.3d at 1286.

¶ 72 Therefore, the district court did not err in dismissing Wright's civil conspiracy claim.

V. Disposition

¶ 73 The order is affirmed in part and reversed in part. We remand for further proceedings consistent with this opinion.

JUDGE FREYRE and JUDGE SCHUTZ concur.