SUMMARY
January 16, 2025

2025COA2

No. 23CA1235, *Coomer v. Salem* — Courts and Court Procedure — Regulation of Actions and Proceedings — Action Involving Exercise of Constitutional Rights — Anti-SLAPP — Special Motion to Dismiss; Torts — Civil Conspiracy — Intentional Infliction of Emotional Distress — Defamation — Respondeat Superior

Applying Colorado's anti-SLAPP statute, § 13-20-1101, C.R.S. 2024, a division of the court of appeals concludes that the plaintiff established a reasonable likelihood that he will prevail on his claims for defamation and intentional infliction of emotional distress against the defendants for statements made on a radio station where hosts and their guests asserted that the plaintiff talked about, and then followed through on, undermining the 2020 presidential election. In reaching this conclusion, the division determines that the doctrine of respondeat superior may apply to a claim for defamation. However, the division concludes that the plaintiff did not meet his burden on his claim for civil conspiracy

and, as to that claim, reverses the trial court's denial of the anti-SLAPP special motion to dismiss.

The special concurrence agrees with the outcome the majority reaches but disagrees with the majority's use of the analytical rubric for analyzing an anti-SLAPP special motion to dismiss outlined in *L.S.S. v. S.A.P.*, 2022 COA 123, ¶¶ 21-22. The special concurrence would instead apply the analytical rubric outlined in *Salazar v. Public Trust Institute*, 2022 COA 109M, ¶ 21.

COLORADO COURT OF APPEALS **2025COA2**

Court of Appeals No. 23CA1235
City and County of Denver District Court No. 21CV33632
Honorable David H. Goldberg, Judge

Eric Coomer, Ph.D.,

Plaintiff-Appellee,

v.

Salem Media of Colorado, Inc., and Randy Corporon,

Defendants-Appellants.

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

Division VII
Opinion by JUDGE KUHN
Gomez, J., concurs
Tow, J., specially concurs

Announced January 16, 2025

Cain & Skarnulis PLLC, Charles J. Cain, Bradley A. Kloewer, Salida, Colorado, for Plaintiff-Appellee

Gordon Rees Scully Mansukhani LLP, John R. Mann, Thomas B. Quinn, Melissa A. Wiese, Denver, Colorado, for Defendant-Appellant Salem Media of Colorado, Inc.

Campbell Killin Brittan & Ray, LLC, John S. Zakhem, Andrew C. Nickel, Denver, Colorado, for Defendant-Appellant Randy Corporon

¶ 1 The case before us stems from the same root as another case recently decided by a division of this court, *Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35 (*Coomer I*). After the 2020 presidential election, some members of the media, political figures, and pundits began publishing stories that the election had been compromised. One such story centered on the plaintiff, Eric Coomer, who is the former Director of Product Security and Strategy for Dominion Voting Systems, Inc.

¶ 2 The central allegation in both cases arises from a supposed "antifa" conference call in late September 2020. It was reported that on the call, someone purporting to be Coomer said he had "made sure" that then-President Donald J. Trump was "not going to win" the election. Coomer denies that he was ever on such a call, and there is no evidence that he took any action to undermine the election results. *See id.* at ¶ 1. Coomer filed multiple suits against the media outlets, political figures, and pundits who repeated these reports, asserting claims for defamation, intentional infliction of emotional distress (IIED), and civil conspiracy.

¶ 3 The issues in this appeal are before us on a special motion to dismiss under Colorado's anti-SLAPP[1] statute, section 13-20-1101, C.R.S. 2024. We conclude that Coomer established a reasonable likelihood that he will prevail on his claims for defamation and IIED against the defendants, Salem Media of Colorado, Inc. (Salem) and Randy Corporon. However, we reach the opposite conclusion regarding his civil conspiracy claim. Accordingly, we reverse the trial court's denial of the special motion to dismiss the conspiracy claim but otherwise affirm.

I. Background and Procedural History

¶ 4 This case arises from a series of radio interviews and broadcasts involving Corporon and Salem. Corporon is an attorney, a radio talk show host, and the Republican National Committee Committeeman for Colorado. Salem owns Denver-based radio station 710 KNUS and hosts Corporon's talk show. Coomer alleges that Corporon and Salem published over a hundred defamatory statements accusing him of participating in the late September 2020 antifa conference call, stating that he had "made sure" that

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[1] "SLAPP" stands for "strategic lawsuit against public participation." *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 1 n.1.

then-President Trump was "not going to win" the election and had taken steps to undermine the election.

¶ 5 The underpinning of these assertions is centered on Joseph Oltmann, a podcaster and Colorado business owner, as *Coomer I*, ¶¶ 7-30, more fully sets forth. We need not repeat all of the facts here. Instead, we focus on only those facts pertinent to the present appeal.

¶ 6 Oltmann is also an associate and former client of Corporon. He was repeatedly interviewed on Corporon's radio show, "Wake Up with Randy Corporon." On November 9, 2020, Oltmann, on his own podcast, claimed, in pertinent part, that

> (1) he was "going to expose someone," later identified as Coomer, who "is controlling elections"; (2) a person identified as "Eric, the Dominion guy" said on the conference call, "Don't worry about the election. Trump is not going to win. I made effing sure of that"; (3) Oltmann determined the "Eric" on the call was Coomer; and (4) Coomer was "interfering with the election."

Id. at ¶ 92.

¶ 7 Then, on November 14, 2020, Corporon hosted Oltmann as a guest on his radio show, introducing Oltmann with a description of an affidavit Corporon had helped Oltmann prepare[2]:

> The reason I know [Oltmann is] serious, the reason I know this is not some kind of publicity stunt, or to try and keep people's hopes up falsely, that there were such shenanigans in this election that it should not be certified, no way, no how, until all of the investigations and opportunities to find and present evidence are done, and [Oltmann] is part of that evidence now, because yesterday, we polished up an affidavit and sent it directly to Jenna Ellis, Donald Trump's [attorney], actually she sent it to me, because she put it together after conversations with him, and I reviewed it and cleaned it up.

¶ 8 As his show moved into its second hour, Corporon continued talking about Coomer and Dominion. He initially qualified his statements by stating, "Listen these are just pure speculation and allegation right now — well not the antifa, we've got the goods on that." However, a few minutes later, Corporon said, "I want to share with you *the sworn affidavit that we finished and polished*

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[2] Oltmann's affidavit repeated the claims he had made on his podcast, including his description of his internet research. Corporon attached the affidavit in support of his special motion to dismiss in this case.

and sent to Jenna Ellis yesterday *from Joe Oltmann about what he has discovered*, about not only Dominion, but especially Eric Coomer, who appears to be 100% enmeshed in the antifa organization." (Emphasis added.)

¶ 9 Throughout the remainder of the November 14 radio show, Oltmann repeated his story. Corporon added his own statements and commentary throughout the interview, noting that Coomer "actually made a statement that he had solved this problem for Antifa and the left of getting rid of Donald Trump, and that adds seriousness to what we're already concerned about."

¶ 10 Corporon followed up his interview by posting multiple tweets on Twitter — the social media platform presently known as "X" — linking to the audio of his November 14 show. The next day, Oltmann was interviewed again by Deborah Flora, another talk show host on 710 KNUS. And a couple of days after that, Oltmann appeared as a guest on the Peter Boyles Show, also on that station. All in all, Oltmann was interviewed eight times on 710 KNUS.[3]

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[3] Between November 14 and December, he reiterated his story, in part or in whole, four times on Corporon's show, twice on Boyles's show, and once each with Flora and George Brauchler, who was a guest host on the station.

¶ 11 Roughly a year later, Coomer filed suit against Corporon and Salem, asserting — as relevant to this appeal — claims for defamation, IIED, and conspiracy, and seeking a permanent injunction. Corporon and Salem filed an anti-SLAPP special motion to dismiss. The trial court held a hearing, after which it granted the special motion to dismiss as to the claim for an injunction but otherwise denied the motion.

II. Contentions

¶ 12 Corporon and Salem raise eleven separate contentions between them; because of their substantially overlapping nature, however, we have condensed them to the following six issues. Corporon and Salem jointly contend that Coomer failed to (1) show that they acted with actual malice; (2) establish his claim for IIED; and (3) present evidence of an agreement to conspire. Salem separately contends that (4) the trial court erred by finding that it can be held vicariously liable for defamation. And Corporon individually contends that the trial court erred by (5) misapplying the proper standard of proof and (6) disregarding the fair report privilege.

III. Anti-SLAPP Legal Principles and the Standard of Review

¶ 13 "The purpose of Colorado's anti-SLAPP statute is to 'encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government,' and, at the same time, to preserve the right to 'file meritorious lawsuits for demonstrable injury.'" *Coomer I*, ¶ 60 (quoting § 13-20-1101(1)(b)); *see also Gonzales v. Hushen*, 2023 COA 87, ¶ 19 (*cert. granted in part* May 28, 2024).

¶ 14 "The statute seeks to balance these often competing interests by creating a mechanism to 'weed[] out, at an early stage, nonmeritorious lawsuits brought in response to a defendant's petitioning or speech activity.'" *Coomer I*, ¶ 60 (alteration in original) (quoting *Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*, 2023 COA 114, ¶ 12).

A. Special Motion to Dismiss Standards

¶ 15 A court resolves a special motion to dismiss through a two-step process. *Anderson v. Senthilnathan*, 2023 COA 88, ¶ 10; § 13-20-1101(3)(a). In the first step, the court must determine whether the anti-SLAPP statute applies. *Coomer I*, ¶ 62. In doing

so, it determines whether the 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. v. S.A.P.*, 2022 COA 123, ¶ 21 (alterations in original) (quoting § 13-20-1101(3)(a)). "If a claim falls within the statute's scope, 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 (alterations in original) (quoting § 13-20-1101(3)(a)-(b)).

¶ 16 We review an order granting or denying a special motion to dismiss de novo, applying the same two-step analysis as the trial court. *Coomer I*, ¶ 64; *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 21.

B. The Reasonable Likelihood Standard and Review of the Evidence

¶ 17 Corporon argues that the trial court erred by not requiring Coomer to present clear and convincing evidence to support his claims. This argument is misplaced. The clear and convincing evidence standard represents the ultimate burden of proof for his

defamation claim.[4] "[A]t this preliminary stage, [Coomer] must show only a reasonable likelihood that [he] *will* be able to meet [his] burden of proof at trial." *Coomer I*, ¶ 77 (alteration in original); *see also Rosenblum v. Budd*, 2023 COA 72, ¶ 24.

> Where, as here, a plaintiff is "pursuing a defamation claim that will ultimately require proof of actual malice by clear and convincing evidence, . . . the plaintiff must establish a *probability* that they *will* be able to produce clear and convincing evidence of actual malice at trial." If the plaintiff meets this burden, the ultimate determination must be made by a jury.

Coomer I, ¶ 77 (alteration in original) (quoting *L.S.S.*, ¶ 42).

¶ 18 In determining whether Coomer has met his burden, "we do not 'accept the factual allegations in the complaint as true.'" *Id.* at ¶ 68 (quoting *Salazar*, ¶ 15). Instead, he "must go further and present *evidence* establishing a reasonable likelihood of success." *Id.* "[A]t the second step of the anti-SLAPP analysis, we must accept [his] evidence as true." *Id.* at ¶ 66. This evidence traditionally, but not necessarily exclusively, comes in the form of an affidavit, *id.* at

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[4] We recognize that at the time of Corporon's briefing and the proceedings below, the parties and the trial court lacked the benefit of recent case law discussing the proper standard of proof in anti-SLAPP special motion to dismiss proceedings.

¶ 68, and it "may be considered if 'it is reasonably possible the proffered evidence . . . will be admissible at trial.'" *Id.* at ¶ 78 (alteration in original) (quoting *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, 434 P.3d 1152, 1163 (Cal. 2019)). When evaluating this evidence, neither the trial court nor we make factual findings, make credibility determinations, or weigh the evidence to resolve factual conflicts.[5] *See id.* at ¶¶ 71-72.

¶ 19 Coomer "does not need to prove [his] case at the anti-SLAPP stage. Nor do we (or the district court) decide whether [he] will ultimately prevail — much less *has* prevailed — on [his] claims." *Id.* at ¶ 76. Instead Coomer has "to make 'a prima facie showing' of evidence that — if later presented at trial — is reasonably likely to sustain a favorable judgment." *Id.* (quoting *L.S.S.*, ¶ 42). "If [he] overcomes this initial hurdle, the case proceeds as normal and this 'early screening determination' has no further effect on the case." *Id.* (quoting *Salazar*, ¶ 46).

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[5] To the extent the trial court made factual findings, we disregard them because we review the special motion to dismiss de novo. *See Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, ¶ 71 (*Coomer I*).

IV. Whether Coomer Established a Reasonable Likelihood of Prevailing on His Defamation Claim

¶ 20 Coomer does not contest the trial court's conclusion that the defendants' statements satisfy the first step of the anti-SLAPP analysis — namely, that they were made "in connection with a public issue" and in furtherance of the defendants' constitutional rights of petition or free speech. § 13-20-1101(3)(a). Thus, we move directly to the second step and consider whether Coomer established a reasonable likelihood of prevailing on his claims. *See Coomer I*, ¶ 83; *Hushen*, ¶ 22. We address each of his claims in turn, starting with the defamation claim.

¶ 21 Coomer alleges that both Corporon and Salem defamed him. The trial court found that Coomer had met his special motion to dismiss burden for both defendants. We agree.

A. Legal Principles

¶ 22 "Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage." *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994). To prevail on a claim for defamation, "a plaintiff generally must prove four elements: (1) a defamatory statement concerning the

plaintiff; (2) publication; (3) fault amounting to at least negligence; and (4) either actionability of the statement irrespective of special damages or the existence of special damages." *Coomer I*, ¶ 85 (citing *Rosenblum*, ¶ 38).

¶ 23 Because the statements in this case involve a matter of public concern, there are "three modifications to the plaintiff's [ultimate] burden of proof." *L.S.S.*, ¶ 36. The plaintiff must ultimately (1) prove the statement's falsity by clear and convincing evidence, instead of a mere preponderance; (2) prove that the speaker published the statements with actual malice, instead of mere negligence; and (3) establish actual damages, even if the statement is defamatory per se. *Id.*

¶ 24 The defendants primarily challenge the trial court's defamation ruling on the issue of actual malice; however, Corporon also challenges whether some of the statements are defamatory. We address this issue before turning to actual malice.

B. Defamatory Statements

¶ 25 Corporon contends that Coomer must specifically plead each publication as a separate claim for relief and that the statements

alleged in the complaint only constitute statements of opinion.[6] He argues that the trial court erred by not adequately addressing each individual statement. We disagree.

¶ 26 Corporon argues that his actual statements — as distinct from those made by Oltmann on his radio show — were mere opinion and not defamatory as a matter of law.[7] But this argument overlooks Coomer's allegations in his complaint and the later evidence he supplied in connection with the special motion to dismiss. Coomer's complaint asserts that Corporon expressed more than an opinion. Instead, he alleges that Corporon endorsed Oltmann's factual statements and asserted that they were true during his radio show.

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[6] To the extent that Corporon attempts to challenge the form of the complaint or the trial court's rulings on his C.R.C.P. 12(b)(5) motion to dismiss and C.R.C.P. 12(e) motion for a more definite statement, those rulings are not before us in this anti-SLAPP appeal. *Coomer I*, ¶ 59 ("We therefore lack jurisdiction in this appeal to review any order other than the order denying the special motions to dismiss.").

[7] We note that "there is no 'wholesale defamation exemption for anything that might be labeled "opinion."'" *Id.* at ¶ 130 (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18 (1990)).

¶ 27 Corporon does not contest that Oltmann's statements could be defamatory. *See Coomer I*, ¶ 122 (concluding that Oltmann made statements that a jury could find defamatory). And an endorsement of Oltmann's statements as true could expose Corporon to liability. *See Anderson*, ¶¶ 38-47 (suggesting that a report of allegations may be an assertion of the allegations themselves where context indicates the speaker endorses their truth).

¶ 28 For example, Coomer alleges endorsement through Corporon's actions and statements boosting Oltmann's credibility and expertise. Coomer asserts that Corporon bolstered Oltmann by making the following statements, among others:

- "We've got this Dominion thing going on, it's right here in Denver . . . . But one of the heroes in my mind in exposing . . . the depraved depth of . . . ideology inside of Dominion, at least an important aspect of Dominion, is [Oltmann] right here in studio."
- "[Oltmann], what you have done and exposed may save the republic, or at least save the possibility of having an honest outcome to this election. . . . You have exposed the Antifa

basis to the man who has the knowledge and the influence on this company."

- "[Oltmann, y]ou're an expert in this department, so you're not talking out of school here. Explain to people how easy these are, how manipulable [these voting machines] can be, and how the fact that the piece of paper that you walk out with if you voted in person doesn't mean a gosh darn thing."
- "Oltmann has talked to you about this, and he established the motive for Eric Coomer of course, but, [Oltmann] also has the technical knowledge about how coding works and how computer systems work and how data gets manipulated and changed to talk about really how easy it would be."

Coomer further alleges that Corporon encouraged Oltmann to repeat the false claims about Coomer that he had already seen Oltmann present on *Conservative Daily* and, days prior, at the Arapahoe Tea Party meeting, where Corporon had similarly invited Oltmann to speak.

¶ 29 Corporon's statements spoke to Oltmann's credibility. A jury could find that they presented Oltmann as a subject matter expert speaking the truth and painted him as a hero uncovering a sinister

plot. We conclude that there is a reasonable likelihood that a jury could find that Corporon bolstered Oltmann's credibility and endorsed Oltmann's statements that Coomer had in fact attended an antifa conference call, said in that call that he had made sure that then-President Trump was not going to win the election, and had taken steps to undermine the election results.

¶ 30 Additionally, Coomer identified some of Corporon's other statements — excluding those bolstering Oltmann's credibility — that could themselves support an action for defamation. We view Corporon's statements "in context to determine how a reasonable person would have understood them." *Coomer I*, ¶ 90. During Corporon's conversation and interview with Oltmann, he made the following statements, among others:

- "[Coomer] actually made a statement that he had solved this problem for Antifa and the left of getting rid of Donald Trump, and that adds seriousness to what we're already concerned about."
- "[Oltmann, y]ou were on a call where a guy came on, he was identified as Eric from Dominion, and he made that infamous statement that now most people out there know about because

it's been in mainstream media, well, not mainstream media, conservative."

¶ 31 When determining whether a statement goes beyond mere opinion, we ask "whether the statement is sufficiently factual to be susceptible of being proved true or false" and "whether reasonable people would conclude that the assertion is one of fact." *Keohane*, 882 P.2d at 1299 (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990)).[8] Both statements satisfy these inquiries. Coomer either actually attended a call and stated that he undermined the election or he did not. And Coomer either took steps to undermine the election or he did not.

¶ 32 To the extent that Corporon argues his statements could not lead to these conclusions, we disagree. "Statements may, alone or in combination, 'reasonably be interpreted to communicate an idea' that they do not spell out expressly." *Coomer I*, ¶ 90 (quoting

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[8] We also note that some of Corporon's statements would clearly qualify as protected opinion or hyperbole. At this stage, we need not parse each of Corporon's statements. *See Coomer I*, ¶ 91 n.12. Instead, we only need to determine whether Coomer has identified statements sufficient to establish a reasonable likelihood that he will prevail on his claims. *Id.* Whether Coomer can eventually convince a jury that Corporon made any defamatory statements is an entirely separate matter.

Rosenblum, ¶ 43); *see also Keohane*, 882 P.2d at 1302-03 (explaining that a factual assertion may be implied).

¶ 33 There is a reasonable likelihood that a jury could interpret Corporon's statements as defamatory assertions that Coomer had in fact attended an antifa conference call and had in fact said he had made sure that then-President Trump was not going to win the election. Thus, Coomer has met his burden at this preliminary stage.

C. Actual Malice

¶ 34 Corporon and Salem contend that Coomer has not established "a reasonable probability that he will be able to produce clear and convincing evidence of actual malice at trial." *Coomer I*, ¶ 146 (quoting *Rosenblum*, ¶ 40). We disagree.

¶ 35 "Actual malice means that the speaker made the statement 'with actual knowledge that it was false or with reckless disregard for whether it was true.'" *Id.* at ¶ 147 (quoting *L.S.S.*, ¶ 40). "A speaker acts with reckless disregard if the speaker 'entertain[s] serious doubts as to the truth of the statement or act[s] with a high degree of awareness of its probable falsity.'" *Id.* (alterations in

original) (quoting *Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶ 38).

¶ 36 Actual malice is a subjective standard. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also In re Green*, 11 P.3d 1078, 1086 n.7 (Colo. 2000). "The question is not 'whether a reasonably prudent [person] would have published, or would have investigated before publishing.'" *Coomer I*, ¶ 148 (alteration in original) (quoting *St. Amant*, 390 U.S. at 731). Rather, "the evidence must 'permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication,' or was highly aware of its probable falsity." *Id.* (quoting *Creekside Endodontics*, ¶ 38).

¶ 37 However, this "does not mean that a defendant can defeat a defamation claim simply by 'testifying that he published with a belief that the statements were true.'" *Id.* at ¶ 149 (quoting *St. Amant*, 390 U.S. at 732). And it does not mean that what a reasonable person would have known or believed is irrelevant. *Id.* To the contrary, it is often necessary to prove actual malice by circumstantial evidence. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989). One way to show that "a

defendant in fact entertained serious doubts as to the truth of a statement is to show that any reasonable person would have entertained such doubts." *Coomer I*, ¶ 149; *see, e.g.*, *Harte-Hanks Commc'ns*, 491 U.S. at 667-68 (holding that departure from accepted standards of reporting supported a finding of reckless disregard).

¶ 38 Although a court may not make credibility determinations as to the evidence submitted, that does not mean that a court cannot make "determinations as to the reliability of [the defendants'] account *at the time of defendants' statements*, based upon the evidence presented by the parties." *Coomer I*, ¶ 75. Such determinations are "part of the substantive legal analysis as to whether [the plaintiff] had established a reasonable likelihood of prevailing on his claims." *Id.*

¶ 39 Furthermore,

> while inadequate investigation by a layperson is generally not alone sufficient to show actual malice, grossly inadequate investigation might be. *Creekside Endodontics*, ¶ 38. Similarly, while the failure to corroborate information received from an otherwise reliable source does not establish actual malice, *id.*, "a reporter's failure to pursue the most obvious available sources of possible corroboration or refutation"

> may do so, *Kuhn v. Tribune-Republican Publ'g Co.*, 637 P.2d 315, 319 (Colo. 1981). Other circumstantial evidence of actual malice may include (1) the speaker's hostility toward the plaintiff; (2) inconsistencies in the source's account; (3) reasons to doubt the veracity or reliability of the source; (4) the inherent improbability of the claim; and (5) other credible information contradicting the information. *See St. Amant*, 390 U.S. at 732; *L.S.S.*, ¶ 40; *Gonzales*, ¶ 81; *Anderson*, ¶¶ 64-67.

Id. at ¶ 150.

1. Corporon

¶ 40 Corporon contends that (1) Coomer has failed to demonstrate a reasonable probability of showing that he acted with actual malice and (2) the trial court erred in making such a finding.

¶ 41 Coomer, in turn, argues that Corporon

- allowed Oltmann to reiterate Oltmann's story multiple times on Corporon's show;
- repeatedly bolstered Oltmann's credibility;
- said that he had assisted Oltmann in drafting and editing Oltmann's supporting affidavit; and
- repeated Oltmann's claims.

¶ 42 For example, Corporon said, "[Oltmann], what you have done and exposed may save the republic . . . . You have exposed the Antifa basis to the man who has the knowledge and the influence on this company." Shortly thereafter he said, "[Coomer] actually made a statement that he had solved this problem for Antifa and the left of getting rid of Donald Trump, and that adds seriousness to what we're already concerned about."

¶ 43 Coomer also contends that circumstantial evidence shows that Corporon had reason to doubt the veracity or reliability of his source, and that this doubt should have driven Corporon to conduct a further investigation. We address each of these contentions in turn.

a. Veracity or Reliability of the Source

¶ 44 First, Coomer argues that there were reasons Corporon should have questioned Oltmann's reliability. Corporon counters that he had no "obvious reasons" to doubt Oltmann's veracity.

¶ 45 In support of this assertion, Corporon points to Oltmann's affidavit, which Corporon required before letting Oltmann on the air. But Coomer's affidavit alleges that Oltmann fabricated evidence of a September 2020 Google search supporting Oltmann's

investigation timeline on the advice of Corporon, who was Oltmann's counsel at the time. Coomer argues that the Google search is a key portion of Oltmann's affidavit. According to Coomer, Corporon's involvement in drafting and editing the affidavit — and the underlying alleged fabrication — shows that Corporon shouldn't have believed Oltmann.

¶ 46 Corporon argues — and provides an affidavit stating — that his proposed edits to Oltmann's affidavit were not accepted and that he did not advise Oltmann to recreate the Google search. He contends that this undercuts Coomer's argument that he had actual knowledge of falsity. However, Corporon's argument inherently requests that we weigh the evidence provided in his affidavit against the evidence in Coomer's affidavit, which we cannot do at this preliminary stage. *See Rosenblum*, ¶ 24. Instead, we must take Coomer's evidence — which has a reasonable possibility of being admitted at trial — as true.

¶ 47 Even accepting that evidence as true, though, this point doesn't really move the needle. It is *some* evidence that a jury could consider. But there's nothing in this evidence showing that Corporon knew that the Google search was falsified when he

advised Oltmann about the affidavit. And there's nothing in those materials suggesting that the Google search meant that Corporon knew that Oltmann had fabricated his story about Coomer or advised him to do so.

¶ 48 Regardless, Coomer next argues that the circumstances surrounding Oltmann's account of the call should have caused Corporon to — at the least — have serious doubts about whether Oltmann's allegations, or pivotal evidence supporting them, were true. In other words, Coomer argues that his evidence shows Corporon's actual knowledge of falsity and that Corporon knew Oltmann's account was not a reliable source of information.

¶ 49 As outlined in *Coomer I*, the underlying source of Oltmann's story is "an anonymous person identifying another anonymous person as 'Eric, the Dominion guy.'" *Coomer I*, ¶ 163. To connect this to Eric Coomer, Oltmann — and subsequently Corporon — relied "entirely on (1) the fact that Coomer was a person named 'Eric' who worked at Dominion Voting Systems, and (2) Coomer's social media posts in opposition to President Trump." *Id.* at ¶ 164.

¶ 50 Neither Oltmann nor Corporon had actual firsthand knowledge that Coomer interfered in the election or participated in

the call. Coomer's evidence demonstrates that Oltmann relayed a statement from an unverified, anonymous source, and Corporon, in turn, held out that wholly unsupported statement as credible. The connection between the statements on the call and Coomer is inherently tenuous. As the *Coomer I* division noted, "[E]ven if the alleged [antifa] call happened exactly as Oltmann described, that account could not itself establish the truth of the inferences defendants drew from it — namely, that the speaker on the call was Coomer and that Coomer took steps to subvert the election results." *Id.* at ¶ 166.

¶ 51 Corporon relies heavily on the facts that other pundits and political actors were also making claims of election irregularities and that Coomer posted things critical of then-President Trump on his social media page. He argues that these external events provided him with verification of Oltmann's story. We agree with the *Coomer I* division's resolution of a nearly identical argument from Oltmann: "Whether this information in fact sufficed to satisfy [Corporon] . . . or whether the claims of election irregularities by others emboldened him to trumpet a theory he . . . questioned . . . is a factual question we cannot answer." *Id.* at ¶ 156.

¶ 52 Finally, we acknowledge Corporon's position that he believed the statements were true. While this is certainly an argument for the jury, it's not enough to prevail at this stage of the proceedings. *See St. Amant*, 390 U.S. at 732.

¶ 53 Coomer's evidence, taken as true, shows that he has a reasonable likelihood of being able to present clear and convincing evidence that Corporon had reason to doubt the veracity of Oltmann as a source because Corporon knew that Oltmann's account was based on a wholly anonymous and unsubstantiated speaker.

b. Adequacy of the Investigation

¶ 54 Coomer's evidence, taken as true, also rebuts Corporon's argument that there were no obvious reasons to investigate, undercutting a finding of actual malice. A jury could reasonably find that — given the gravity of Oltmann's accusations — Corporon's "investigation was grossly inadequate." *Coomer I*, ¶ 168.

¶ 55 There is no indication that Corporon attempted to contact Coomer, the "most obvious source of corroboration or refutation," *Rosenblum*, ¶ 46, before publishing his accusations. And more to the point, Corporon does not argue that he made any investigation.

Instead, he asserts that under the holding of *St. Amant*, an investigation was not needed. We disagree. Rather than obviating the need for an investigation, *St. Amant* discussed how relying on similar self-reported information could constitute recklessness:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, 390 U.S. at 732.

¶ 56 We agree with Corporon's point that a talk radio host or podcaster does not need to investigate every topic before addressing it on their show. But "the wholesale failure to look into an account reported as fact — particularly one as explosive as [widespread election interference] — could bear on whether the host actually believes the account (or is simply using it to spur discussion without regard to its truth)." *Coomer I*, ¶ 168.

¶ 57 It's true that Corporon referenced materials and interviewed individuals who pushed back on Oltmann's story. These interviews occurred after he had interviewed Oltmann twice. But Coomer provides evidence that Corporon dismissed these countervailing viewpoints out of hand. So while a jury will eventually have to decide their import, they are not enough to prevail now.

¶ 58 At this stage, we must accept Coomer's evidence as true, and Corporon's evidence doesn't defeat Coomer's claim as a matter of law. In the context of the claims made on Corporon's radio show, there is evidence that Corporon failed to adequately investigate before he published his, and Oltmann's, statements. *See id.* at ¶¶ 169-170.

c. Other Credible Sources

¶ 59 Coomer also provides evidence from other reliable sources of information that contradicts Oltmann's story and Corporon's statements based on that story.

¶ 60 For example, the Cybersecurity & Infrastructure Security Agency (CISA) — the government agency responsible for election security — rejected any claim that the election had been compromised by anyone. CISA issued its statement days before

Corporon hosted Oltmann on his radio show, thereby directly undermining their subsequent claims to the contrary.

¶ 61 Coomer also points out that on November 21 and 28, 2020 — after Corporon's first two interviews with Oltmann — Corporon had two Republican former elected officials as guests on his show. First was Wayne Williams, a former Colorado Secretary of State. Next was Matt Crane, a former Arapahoe County Clerk. Both of these guests undermined Oltmann's story during on-air interviews with Corporon.

¶ 62 Williams rebutted some of Oltmann's election system claims directly and said, "Sir, I'm not sure what your familiarity is with Colorado, but you're just flat out wrong on that." Likewise, Crane pushed back on the idea that Coomer compromised the election, saying that

> I understand why people are concerned and why they want to keep digging. It doesn't change my opinion. I've known [Coomer] for a long time, I've known where he's at on politics for a long time, but I've never had any reason in working with him in a professional capacity to doubt his ethics.

¶ 63 A few days later, on December 1, 2020, then-United States Attorney General William Barr said to the Associated Press that "to

date, we have not seen fraud on a scale that could have effected a different outcome in the election." *Id.* at ¶ 176.

¶ 64 Despite these official repudiations, Corporon continued advancing the statements about Coomer. On December 5, just a week after the Crane interview and four days after Barr's statement, Corporon said the following while talking about the 2020 election, Dominion, and specifically Coomer:

> [W]e have witness after witness after witness, videotape evidence of things that, you know, they're not proven to be fraud yet, a judge hasn't made that determination, but I'll tell you what, if it walks like a duck, if it quacks like a duck, if it floats like a duck, it sure looks like fraud to me.

¶ 65 Ultimately, whether Corporon disregarded the CISA statement, Williams's interview, Crane's interview, and Barr's statement and what that means is a jury question. None of these other sources conclusively demonstrate Corporon's subjective belief, but they do contradict his assertions that Coomer influenced the election. And they are "evidence that could support a finding of actual malice." *Id.* at ¶ 178. "The actual impact of th[ose] statement[s] on defendants' subjective state of mind is a factual question that we cannot resolve." *Id.*

¶ 66 Given all this, we conclude that Coomer presented evidence demonstrating a reasonable likelihood that he could show by clear and convincing evidence that Corporon acted with actual malice. *See id.* at ¶ 149; *Harte-Hanks Commc'ns*, 491 U.S. at 667-68 (holding that departure from accepted standards of reporting supported a finding of reckless disregard); *Reader's Digest Ass'n v. Superior Ct.*, 690 P.2d 610, 618 (Cal. 1984) ("[E]vidence of negligence . . . may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or . . . knowledge of falsity.") (citation omitted).

¶ 67 We also acknowledge Corporon's argument that Coomer has not proved his case by clear and convincing evidence in connection with his motion. That may well be true. But at this early stage in the case, and before discovery has been completed, he does not yet have to marshal clear and convincing evidence to prove his case. Instead, he has to demonstrate a reasonable likelihood that he will be able to do so. *See Coomer I*, ¶ 149. While we express no opinion on the eventual outcome, on this record we conclude that he has done enough for his case to proceed.

2. Salem

¶ 68 Coomer alleges defamation against Salem both directly and under the theory of vicarious liability for Corporon's acts. We address both.

a. Direct Liability

¶ 69 Salem argues that Coomer failed to present evidence that Salem itself — independent of its hosts — had actual malice. We disagree.

¶ 70 Salem admits that it is the broadcaster of 710 KNUS, the radio station where Oltmann was interviewed eight times by various hosts, including Corporon, and where Corporon made the various statements referenced above. It also does not dispute that, as a broadcaster, it is treated as a publisher for the purposes of defamation. *See Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1361-62 (Colo. 1983) (determining that there was evidence to support actual malice by a broadcaster arising from the statements of a reporter); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) ("[E]very one who takes part in the publication . . . is charged with publication." (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113 (5th ed. 1984))) (alterations in

original); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (treating a publisher or broadcaster as interchangeable).

¶ 71 Coomer presents evidence, in the form of an affidavit from Craig Silverman, a former 710 KNUS talk show host, alleging that Salem monitors its hosts and will interrupt their broadcasts if they break with Salem's image.[9] Coomer also argues that Corporon believed "Salem management had expressly authorized him to defame Dr. Coomer." In support of this, Coomer points to statements by Phil Boyce, the Senior Vice President of Salem, who talked about his management approach during an interview with Boyles, one of Salem's hosts[10]:

> I'll tell you how I responded to it with my hosts. I don't ever send out a mass email to all my hosts and threaten them with firing. That would be a chilling thing. Can you imagine Dennis Prager or Sebastian Gorka or Charlie Kirk getting a memo like that from me? I don't need to because I am diligent when I hire somebody and give them that microphone. I hire smart people who are normal, who get it,

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[9] Silverman referred to the "Medved Rule," under which Salem deplatformed another host, Michael Medved, for breaking with the station's political preferences.

[10] Boyce's statements were made in response to questions about a competing news station that sent a memo to its hosts telling them to temper their rhetoric over election fraud.

> who understand it, and they're not going to go off half-cocked and say something they shouldn't.

¶ 72 Corporon addressed Boyce's statements on his radio show:

> Well that's true, and I'm glad to hear someone like Phil Boyce . . . saying that I trust my hosts to talk about things that they know. For instance, if I talk about Eric Coomer being an Antifa thug, that's because I've seen his social media, or what's purported to be his social media. If I talk about him being someone who treats the adjudication function of Dominion Voting machines as a feature rather than a bug, that's because I've heard him say it.

¶ 73 We don't think that statement — as Coomer argues — demonstrates that Salem expressly authorized Corporon to defame Coomer; however, it does tend to corroborate Silverman's version of events and is some support for Coomer's allegations that Salem was aware of Corporon's statements and the election fraud allegations playing out on its radio station.

¶ 74 Further, the same reasons a jury could find that Corporon acted with actual malice — the veracity of the source, need for investigation, and other credible sources calling the account into

question — apply with equal force to Salem.[11] Coomer provided evidence that Salem monitors its broadcasts and will remove hosts from the air who deviate from its brand. Taking that evidence as true, a reasonable jury could conclude that Salem knew what was on its airwaves and should have (1) doubted the inherent veracity or reliability of Oltmann's story; (2) conducted an adequate investigation; and (3) not disregarded refutation by credible sources. This is all circumstantial evidence that would, if accepted, allow a jury to conclude that Salem itself acted with actual malice by broadcasting a story containing statements it knew about with actual knowledge of their falsity or with reckless disregard for their truth. *See L.S.S.*, ¶ 40.

¶ 75 Considering all of this, Coomer has provided evidence demonstrating a reasonable likelihood of proving that Salem published the statements with actual malice.

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[11] Additionally, the above analysis provides support for Coomer's argument that Salem's "brand" is controversial conservative talk radio and that it intentionally ignored its hosts' allegedly defamatory comments because that content was what their audience wanted to hear.

b. Vicarious Liability

¶ 76 Salem next contends that the trial court erred by concluding that Salem may be held vicariously liable for Corporon's actions because (1) Coomer did not present evidence to support his vicarious liability claim; and (2) regardless of the evidence, the doctrine of vicarious liability does not apply in defamation cases. We disagree.

i. Legal Principles

¶ 77 Salem's initial argument turns on whether its hosts are independent contractors and not agents or employees subject to Salem's control. "An independent contractor 'is one who engages to perform services for another, according to his own methods and manner, free from the direction and control of the employer in all matters relating to the performance of the work, and accountable to him only for the result to be accomplished.'" *Digit. Landscape Inc. v. Media Kings LLC*, 2018 COA 142, ¶ 78 (quoting *Cont'l Bus Sys., Inc. v. NLRB*, 325 F.2d 267, 271 (10th Cir. 1963)).

¶ 78 However, merely stating that an employee is an independent contractor does not determine the putative employee's status. *See Perkins v. Reg'l Transp. Dist.*, 907 P.2d 672, 675 (Colo. App. 1995)

("[H]ow the parties refer to themselves in their contract is not dispositive."). A court examines several factors to determine whether an individual is an employee. *Id.* at 674. "The most important factor . . . is the right to control, not the fact of control." *Id.* at 674-75.

¶ 79 Even if Corporon isn't an employee, "[a]n independent contractor 'may or may not be an agent.'" *Digit. Landscape*, ¶ 79 (quoting Restatement (Second) of Agency § 2(3) (Am. L. Inst. 1958)). "An independent contractor is not an agent if 'he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.'" *Id.* (quoting Restatement (Second) of Agency § 2(3) cmt. b). The question of whether a person is an independent contractor, an employee, or an agent "is one of fact." *Varsity Tutors LLC v. Indus. Claim Appeals Off.*, 2017 COA 104, ¶ 39; *see also Perkins*, 907 P.2d at 674.

¶ 80 "The agency doctrine of vicarious liability is based on the theory of respondeat superior . . . ." *Moses v. Diocese of Colo.*, 863 P.2d 310, 329 (Colo. 1993). That doctrine, in turn, "is based on the theory that the employee acts on behalf of the employer when the

employee is within the scope of his or her employment." *Raleigh v. Performance Plumbing & Heating*, 130 P.3d 1011, 1019 (Colo. 2006). When acting within the scope of employment, the employee is the employer's agent. *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005). This is a special kind of agency relationship — "a master-servant relationship in which the employer has the right to control the employee's performance." *Id.*

¶ 81 Accordingly, when the employee is acting within the scope of employment, the employer is vicariously liable for the employee's negligent acts. *Raleigh*, 130 P.3d at 1019. And if the agent's intent is to further the employer's business, an employer can also be vicariously liable for an employee's intentional torts. *Moses*, 863 P.2d at 329 n.27.

¶ 82 "In order to sustain a claim based upon respondeat superior, a plaintiff must show that the defendant individually had actual control over or had the right to control the actions of the other." *Perkins*, 907 P.2d at 674. "[W]hether an employee is acting within the scope of the employment is a question of fact . . . ." *Raleigh*, 130 P.3d at 1019.

ii. Evidence of Vicarious Liability

¶ 83 As discussed above, the Silverman affidavit demonstrates Salem's ability to control its hosts, and its history of taking action with those hosts who made statements it disliked.

¶ 84 Salem doesn't assert that all its hosts are independent contractors. As the trial court noted, Salem does not claim that Flora and Boyles are independent contractors or challenge Coomer's assertions that they are employees and that it exercises control over them. Presuming they are employees, or within Salem's control, Coomer has demonstrated a reasonable likelihood of showing that Flora and Boyles were acting within the scope of their employment while hosting their shows. Based solely on the statements published by these two hosts, Coomer has met his burden as to Salem. Accordingly, Salem's special motion to dismiss fails on this ground alone.

¶ 85 Further, Coomer provided a portion of Corporon's employment agreement with Salem.[12] The agreement says that "[Corporon] shall have creative control over the content of the Programming and in the performance of [Corporon]'s on-air duties, *subject to the reasonable approval of the General Manager and the General Manager's designee and compliance with applicable law*." (Emphasis added.) This agreement, by its plain language, provides some evidence that Salem exercised some control over Corporon.

¶ 86 Coomer's evidence, taken as true, demonstrates that despite holding Corporon out as an independent contractor, Salem has the right to exercise some level of control over his radio show's content. This is evidence that Corporon is not an independent contractor who is "free from the direction and control of [Salem] in all matters relating to the performance of [his] work." *Digit. Landscape*, ¶ 78 (quoting *Cont'l Bus*, 325 F.2d at 271). Instead, it could support a finding that he was an employee or an agent who was acting within

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[12] We note that the agreement is titled "Independent Contractor Agreement." However, again, merely stating that an employee is an independent contractor does not determine the putative employee's status. *See Perkins v. Reg'l Transp. Dist.*, 907 P.2d 672, 675 (Colo. App. 1995).

the scope of his employment or agency in conducting the broadcasts. In this event, liability would attach to Salem through the doctrine of respondeat superior. *See Daly*, 134 P.3d at 452; *Perkins*, 907 P.2d at 674.

¶ 87 Corporon's actual status — as employee, agent, or independent contractor — and whether his actions were within the scope of his employment or agency are factual matters for the jury. *See Digit. Landscape*, ¶ 81. But at this preliminary stage, Coomer has established a reasonable likelihood that he will be able to prove that Corporon was acting within the scope of his employment or agency while hosting his talk show and that Salem "ha[d] the right to control [his] performance." *Daly*, 134 P.3d at 452.

iii. Respondeat Superior in Defamation Cases

¶ 88 Salem alternatively contends that it cannot be liable for Corporon's alleged defamation because the doctrine of respondeat

superior does not apply in defamation cases.[13] The core of this argument is that defamation is an intentional tort, which does not subject the employer to vicarious liability unless the employer ratifies or participates in the wrongful act, in effect adding its own

[13] Salem directs us to *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1302 (D.C. Cir. 1996), and argues that it holds that actual "malice of non-employee agent[s] cannot be imputed to principal." Salem misreads this case. *McFarlane* expresses "doubt that actual malice can be imputed *except under respondeat superior*." *Id.* at 1303 (emphasis added). Because Coomer is proceeding under the theory of respondeat superior, *McFarlane* cuts against Salem's argument.

actual malice to the act.[14] This argument misunderstands the application of the vicarious liability doctrine.[15]

¶ 89 We acknowledge Salem's argument that the doctrine of respondeat superior is traditionally applied to negligent conduct. *See Raleigh*, 130 P.3d at 1019. And we agree with it that "[u]nder the theory of vicarious liability, an employer may avoid liability if the employee commits an intentional tort because that act is *generally* not within the employee's scope of employment." *Keller v. Koca*, 111 P.3d 445, 448 (Colo. 2005) (emphasis added). However,

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[14] We note that Salem argues defamation is categorically an intentional tort. But because we determine that the doctrine of respondeat superior may apply to Salem here, whether or not defamation is always an intentional tort, we need not address this sweeping question. *See Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 928 (Colo. 1993) ("Because of our disposition of this issue, we do not need to address [defendant's] argument.").

[15] In its special motion to dismiss briefing, Salem supported its position with *Kramer v. Kroger Co.*, a Georgia case stating that "[t]he doctrine of respondeat superior does not apply in slander cases, and a corporation is not liable for the slanderous utterances of an agent acting within the scope of his employment, unless it affirmatively appears that the agent was expressly directed or authorized to slander the plaintiff." 534 S.E.2d 446, 450 (Ga. Ct. App. 2000) (quoting *Lepard v. Robb*, 410 S.E.3d 160, 162 (Ga. Ct. App. 1991)). This out-of-state case law is contrary to the Colorado law outlined below. We do not find it persuasive.

this is not an all-or-nothing standard. Instead, as *Keller* indicates — and the Colorado Supreme Court has held — the key factor is whether the commission of that tort, intentional or not, falls within the scope of employment and is intended to further the employer's business. *See Moses*, 863 P.2d at 329 n.27; *Cooley v. Eskridge*, 241 P.2d 851, 856 (Colo. 1952) (stating that authority to do an unlawful act will not be implied unless it is warranted from the nature of the employment itself). For example, in some circumstances a bar owner employing a bouncer may be vicariously liable to a patron if the bouncer injures the patron while removing him from the premises. *See Moses*, 863 P.2d at 329 n.27 (citing *Byrd v. Faber*, 565 N.E.2d 584, 587 (Ohio 1991)).

¶ 90 Additionally, courts from other states have directly held that vicarious liability applies in a defamation suit. *See, e.g.*, *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996) ("An employer or corporation may be held liable for defamation by an employee if the defamatory statement was published while the employee was acting within the scope of his or her employment."). We find all of these authorities persuasive.

¶ 91 However, if an employee commits an intentional tort solely for reasons that do not further his employer's business or cannot be considered a natural incident of employment, the employer cannot be vicariously liable. *See Moses*, 863 P.2d at 329-30.

¶ 92 Here, if Corporon's allegedly defamatory statements were made within the scope of his employment (or agency) and were designed to further his employer's business, then it follows that Salem may be held vicariously liable for those statements. *See generally id.* Thus, we reject Salem's contention that it cannot be held vicariously liable for defamation.

V. Whether Coomer's Claims Are Barred By the Fair Report Privilege

¶ 93 Corporon contends that the trial court erred by failing to consider the fair report privilege. We disagree.

¶ 94 Corporon argues that his statements are privileged because the fair report privilege protects substantially accurate reporting on judicial and other official proceedings, even when the reporter knows or believes that the reported statements are false. *See Tonnessen v. Denver Publ'g Co.*, 5 P.3d 959, 964 (Colo. App. 2000) ("[U]nder the common law doctrine of fair report, reports of in-court

proceedings containing defamatory material are privileged if they are fair and substantially correct, or are substantially accurate accounts of what took place."); *Wilson v. Meyer*, 126 P.3d 276, 279-80 (Colo. App. 2005) (determining that the doctrine of fair report applies to reports of judicial proceedings as well as other public proceedings).

¶ 95 We recognize that the trial court did not address this argument. Regardless, we review the issue de novo. *See Salazar*, ¶ 21. On the record before us, the bulk of Corporon's statements about Coomer cannot reasonably be characterized as reporting on an ongoing judicial or other public proceeding.[16] Corporon's allegedly defamatory statements referencing ongoing lawsuits "went well beyond merely reporting" on those suits. *Quigley v. Rosenthal*, 327 F.3d 1044, 1062 (10th Cir. 2003); *see* Restatement (Second) of Torts § 611 cmt. c (Am. L. Inst. 1977) (noting that the privilege "extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public").

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[16] We note that Corporon does not argue, nor is there support for the idea, that the "antifa call" constituted an official proceeding subject to the fair report privilege.

Much like the defendant in *Quigley*, "[i]t is apparent from [Corporon's] statements that he was asserting, as a matter of fact, that [Oltmann's story was] true." 327 F.3d at 1062.

¶ 96 Further, his first two interviews with Oltmann occurred on November 14 and 21. The cases he relies on from Michigan and Georgia were filed on November 25, and the Wisconsin and Arizona cases were filed on December 1 and 2, respectively. These judicial proceedings all began after the first two interviews during which, Coomer alleges, Corporon made multiple defamatory statements. So he could not have been reporting on those cases.

¶ 97 Lastly, even if Corporon was reporting on a judicial proceeding that existed at the time of his statements, Colorado courts adhere to "the original Restatement rule which precludes a defamation defendant from invoking the judicial proceedings privilege on the basis of a filed complaint alone." *Id.* And a "report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are . . . reported." *Id.* (quoting Restatement (Second) of Torts § 611). Therefore, publication "of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the [fair

report doctrine]." *Id.* (quoting Restatement (Second) of Torts § 611 cmt. e).

¶ 98 Thus, as to the fair report privilege, we discern no error in the trial court's denial of Corporon's special motion to dismiss.

VI. Whether Coomer Established a Reasonable Likelihood of Prevailing on His IIED Claim

¶ 99 Corporon and Salem challenge the trial court's denial of their special motion to dismiss Coomer's claim of IIED. We address the claim as it applies to each defendant in turn.

A. Legal Principles

¶ 100 In analyzing a claim for IIED, we determine whether the defendant "(1) . . . engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) causing the plaintiff severe emotional distress." *Mackall v. JPMorgan Chase Bank, N.A.*, 2014 COA 120, ¶ 49 (quoting *Archer v. Farmer Bros. Co.*, 70 P.3d 495, 499 (Colo. App. 2002)); *see also Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999) (approving the definition of IIED set out in the Restatement (Second) of Torts § 46 (Am. L. Inst. 1965)).

¶ 101 The actual malice requirement applies to Coomer's claim for IIED because it is premised on publications that are subject to heightened constitutional protections. *See Hustler Mag., Inc v. Falwell*, 485 U.S. 46, 56 (1988); *Coomer I*, ¶ 202. In other words, Coomer also must show that the statements "contain[] a false statement of fact which was made with 'actual malice.'" *Hustler*, 485 U.S. at 56.

B. Corporon

¶ 102 Corporon contends that the trial court erred by not dismissing Coomer's IIED claim. However, he only argues that Coomer "failed to present clear and convincing evidence establishing a reasonable likelihood that Corporon acted with actual malice." Coomer's IIED claim relies on the same actual malice determination as his defamation claim. We have already determined above in Part IV.C.1 that Coomer has satisfied his burden with respect to actual malice for defamation, so we also reject Corporon's argument that Coomer failed to meet his burden with respect to his IIED claim.

C. Salem

¶ 103 Salem makes a twofold IIED argument. First, it argues that the trial court erred because there was no evidence that Salem

itself, independently of its hosts, engaged in IIED. Second, it argues that it cannot be liable for the actions of its hosts because vicarious liability does not apply to intentional torts.

¶ 104 The trial court's ruling on IIED walked through evidence presented for each of the tort's elements; however, it did not specifically touch on Salem's actual malice independent of Corporon, its alleged employee. But we have already determined above in Part IV.C.2.a that Coomer has presented evidence of actual malice as to Salem for defamation, and that analysis applies equally to his claim for IIED. Thus, we reject Salem's first argument.

¶ 105 Likewise, Salem's vicarious liability argument is premised on the same legal foundation that we addressed in Part IV.C.2.b, so we reject that argument as to Coomer's IIED claim for the same reasons.

VII. Whether Coomer Established a Reasonable Likelihood of Prevailing on His Conspiracy Claim

¶ 106 Corporon and Salem assert that the trial court erred by denying the anti-SLAPP special motion to dismiss Coomer's conspiracy claim against them. Similarly to the defendants in *Coomer I*, "[t]hey argue that Coomer did not establish a reasonable

likelihood of success on this claim because he failed to present any evidence of an agreement." *Coomer I*, ¶ 207. We agree.

A. Legal Principles

¶ 107 "A claim for civil conspiracy has five elements: (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) an unlawful overt act; and (5) resulting damages." *Id.* at ¶ 208 (citing *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995)). "Because Coomer alleges a conspiracy to defame him and inflict emotional distress upon him, he must show an agreement as to that objective or the course of action to achieve it." *Id.* (citing *Rosenblum*, ¶ 54). "He need not show a single collective agreement among *all* defendants, but he must show a meeting of the minds between each defendant and at least one other person." *Id.* (citing *Rosenblum*, ¶ 55).

¶ 108 It's true that "[a] civil conspiracy may be 'implied by a course of conduct and other circumstantial evidence.'" *Id.* at ¶ 209 (quoting *Rosenblum*, ¶ 52). However, "we will not 'infer the agreement.'" *Id.* (quoting *Nelson*, 908 P.2d at 106). Instead, the "plaintiff must present 'evidence of such an agreement,' whether direct or circumstantial." *Id.* (quoting *Nelson*, 908 P.2d at 106).

¶ 109 In making this showing, however, the plaintiff may not rely only on "shared political ideology" or "close political ties," and it's not "enough to show 'concerted efforts' to advance a political message." *Id.* (quoting *Rosenblum*, ¶¶ 52-55). Rather, to prevail, a plaintiff must present some evidence of the defendant's actual agreement with at least one other person to make the defamatory statements. *Id.*

B. Coomer Did Not Present Evidence of an Agreement

¶ 110 Coomer argues that he does not need to present evidence of an express agreement to establish a conspiracy. We agree. *See Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1326-27 (Colo. App. 1992). However, he must still present evidence that establishes a reasonable likelihood of prevailing on his claim. It is not enough for Coomer to argue that the defendants' actions constituted part of a greater political scheme to undermine the 2020 election generally. Instead, Coomer had to show that the two defendants actually agreed to defame him or inflict emotional distress upon him. Demonstrating a shared political motive is not enough. *See Coomer I*, ¶ 209 (citing *Rosenblum*, ¶¶ 53, 55). We do not see any evidence in his materials, direct or circumstantial, showing that Corporon

and Salem agreed to advance a shared purpose by defaming him or inflicting emotional distress upon him.[17]

¶ 111 Thus, we conclude that Coomer failed to meet his burden and that the trial court erred by denying the special motion to dismiss on this claim. Coomer's claim for conspiracy against the defendants must be dismissed.

VIII. Attorney Fee Requests

¶ 112 Salem and Corporon request an award of attorney fees and costs on appeal and in the trial court under section 13-20-1101(4)(b). Section 13-20-1101(4)(a) entitles "a prevailing defendant on a special motion to dismiss" to an award of fees and costs.

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[17] We note that Coomer brings his claim for conspiracy as an alternative theory to his vicarious liability claim, which has him simultaneously alleging that Corporon is Salem's agent and employee. In general, "[a] corporation and its agents acting on its behalf 'do not constitute the "two or more persons" required for a civil conspiracy.'" *Coomer I*, ¶ 213 (quoting *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1390 (Colo. App. 1986)). Coomer's alternative theory posture means that his claim doesn't fail on this ground. However, it also doesn't assist him in demonstrating any evidence of an agreement between Salem and Corporon to defame or inflict emotional distress on him.

¶ 113 Corporon's attorney fee request constitutes a single sentence with a statutory citation and no explanation as to any entitlement to fees. He provides no facts or legal argument in connection with his demand. He therefore has not made a "specific request, and explain[ed] the legal and factual basis, for an award of attorney fees." C.A.R. 39.1. Thus, he is not entitled to his fees on appeal.

¶ 114 Salem, however, presented legal and factual argument as required by C.A.R. 39.1, and despite losing the majority of its claims, it has prevailed on the conspiracy claim. Prior divisions of this court have determined that a partially prevailing party on an anti-SLAPP special motion to dismiss may be entitled to attorney fees. *See Rosenblum*, ¶¶ 62-63; *Wright v. TEGNA Inc.*, 2024 COA 64M, ¶¶ 74-75 (determining partial success because the plaintiff failed to "establish a reasonable likelihood of prevailing on his claim . . . [for] civil conspiracy"). "Whether a party prevailed on an anti-SLAPP motion — and to what extent the partial success warrants an apportionment of fees — is a determination that lies within the broad discretion of a district court." *Rosenblum*, ¶ 63. Thus, we exercise our discretion under C.A.R. 39.1 and remand the matter to the district court to determine whether this partial

success entitles Salem to an award of reasonable attorney fees and, if so, the amount of those fees.

IX. Disposition

¶ 115 The trial court's order is reversed as to the denial of the special motion to dismiss the conspiracy claim against both defendants. The case is remanded with instructions to dismiss that claim and to evaluate Salem's entitlement to reasonable attorney fees. The trial court's order is affirmed in all other respects.

JUDGE GOMEZ concurs.

JUDGE TOW specially concurs.

JUDGE TOW, specially concurring.

¶ 116 I agree with my colleagues on the appropriate outcome of this appeal. Thus, I concur in the judgment.

¶ 117 Where I diverge from my colleagues is in the recitation of the proper analytical rubric applicable to a special motion to dismiss under the anti-SLAPP statute, § 13-20-1101, C.R.S. 2024 — specifically, whether a court reviewing a special motion to dismiss must accept the plaintiff's evidence as true or, instead, engage in a preliminary, nonbinding weighing of the conflicting evidence. I write separately to note the split among divisions of this court regarding this point and to state my agreement with one of the two methods — the one not used by the majority in this case.

¶ 118 A division of this court first addressed the steps a trial court should undertake in resolving a special motion to dismiss in *Salazar v. Public Trust Institute*, 2022 COA 109M. The division noted that a special motion to dismiss has aspects similar to a motion to dismiss under C.R.C.P. 12(b)(5), a motion for summary judgment under C.R.C.P. 56, and a request for preliminary injunctive relief under C.R.C.P. 65; yet such a motion is not

precisely like any of these. *Salazar*, ¶¶ 15-18. The division explained,

> [T]he question is not merely whether the claim asserts a plausible basis for relief but whether the plaintiff has a reasonable likelihood of success. The question is not whether undisputed facts demonstrate that one party is entitled to judgment but whether any material disputes of fact are reasonably likely to be resolved in the plaintiff's favor. And the question is not whether the court should grant *preliminary* injunctive relief (which can, of course, be revisited at a later point in the litigation) but whether the case should be dismissed with prejudice.

Id. at ¶ 18 (citation omitted). Because of these differences, the division concluded that the court "neither simply accept[s] the truth of the allegations nor make[s] an ultimate determination of their truth." *Id.* at ¶ 21. Instead, the reviewing court must "assess whether the allegations and defenses are such that it is reasonably likely that a jury would find for the plaintiff." *Id.*

¶ 119 The next division of this court to consider a special motion to dismiss announced a different rubric. *L.S.S. v. S.A.P.*, 2022 COA 123. That division held that a court reviewing a special motion to dismiss

> 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." In making that determination, "[t]he court does not weigh evidence or resolve conflicting factual claims" but simply "accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law."

Id. at ¶ 23 (quoting *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)). Although the division characterized its framework as "expand[ing]" on *Salazar*, *id.* at ¶ 1, in my view, this is not a correct description of the interplay between the two opinions. Rather, I see these analytical rubrics as irreconcilably inconsistent.

¶ 120 Specifically, these two frameworks provide different answers to the fundamental threshold question: Does a court reviewing a special motion to dismiss under the anti-SLAPP statute have to accept as true the evidence proffered by the plaintiff? *Salazar* says no; *L.S.S.* says yes. I believe *Salazar* is correct for several reasons.

¶ 121 First, in my view, the requirement that the defendant's evidence must "defeat[] the plaintiff's claim *as a matter of law*," *L.S.S.*, ¶ 23 (emphasis added) (quoting *Baral*, 376 P.3d at 608), is inconsistent with the statutory language. The statute requires that

the *plaintiff* must establish a reasonable likelihood that they will prevail on their claim. The language in *L.S.S.* appears to shift the burden to the defendant to show the plaintiff cannot possibly prevail. And even if it does not shift the burden, the *L.S.S.* approach converts the statutory standard of "reasonable likelihood the plaintiff will prevail" to one of "the slightest chance the plaintiff will prevail" because, under *L.S.S.*, unless the plaintiff must lose "as a matter of law," the special motion to dismiss must be denied.

¶ 122 Second, *L.S.S.*'s mandate that the plaintiff's evidence be accepted as true essentially reduces the anti-SLAPP statute to a redundancy — or worse, creates an additional hurdle for a defendant to clear before obtaining relief. C.R.C.P. 12(b)(5) already exists, and that rule requires a court to dismiss a claim that is not plausible. If a defendant can show "as a matter of law" that the plaintiff's evidence — even taken as true — cannot support recovery, the defendant can obtain dismissal of the claim without resorting to the anti-SLAPP statute.

¶ 123 I acknowledge that the anti-SLAPP statute permits — indeed, directs — the court to consider supporting and opposing affidavits, as opposed to the bare allegations of the complaint (as required by

C.R.C.P. 12(b)(5)). Put another way, the statute essentially requires that a special motion to dismiss be treated like a motion to dismiss that includes attached materials not contained within the complaint — in other words, treated as a motion for summary judgment. *See* C.R.C.P. 12(b). Importantly, however, in that scenario the court does not accept the truth of the plaintiff's allegations but, instead, reviews only for whether a dispute of material fact exists. (As noted in *Salazar*, though, the anti-SLAPP special motion to dismiss is different from a traditional summary judgment motion because, in the former, "[t]he question is not whether undisputed facts demonstrate that one party is entitled to judgment but whether any material disputes of fact are reasonably likely to be resolved in the plaintiff's favor." *Salazar*, ¶ 18.) Beyond this distinction, however, I note that the *L.S.S.* rubric arguably makes it *more difficult* for a defendant to obtain a dismissal because instead of being left to fend off dismissal with only the complaint's allegations, the plaintiff is given the opportunity to shore up any weaknesses in the complaint by asserting yet more facts that would have to be accepted as true. That would seem to directly obstruct

the General Assembly's intent that the anti-SLAPP special motion to dismiss be a *protective* measure for defendants.

¶ 124 Third, the anti-SLAPP statute provides,

> If the court determines that the plaintiff has established a reasonable likelihood that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination is admissible in evidence at any later stage of the case or in any subsequent proceeding, and no burden of proof or degree of proof otherwise applicable is affected by that determination in any later stage of the case or in any subsequent proceeding.

§ 13-20-1101(3)(c). As I read the statute, this language is intended to prevent the initial screening decision by the court from being given preclusive effect by the jury. If the court is prohibited from doing *any* weighing of the evidence — even preliminarily — it is unclear what purpose this language serves. Indeed, if the court must accept as true all of a plaintiff's evidence, the court is not making any "determination" at all.

¶ 125 And fourth, I believe that the *L.S.S.* rubric abrogates the protections the General Assembly intended to provide to defendants who are being sued as a result of their "participation in matters of public significance." § 13-20-1101(1)(a). Indeed, the special motion

to dismiss becomes nary a speed bump in the path of a plaintiff who seeks to "chill[such participation] through abuse of the judicial process." *Id.*

¶ 126 I say this because, if the court must take the plaintiff's evidence as true, a plaintiff will often be able to defeat a special motion to dismiss by doing nothing more than filing an affidavit that denies doing what the defendant said (in an allegedly defamatory fashion) the plaintiff did and asserting — even falsely — that the defendant knows that the plaintiff did not do it.

¶ 127 Consider the following example: A news outlet runs a story describing an individual as having taken an active part in storming the United States Capitol on January 6, 2021. That individual sues the news outlet for defamation. The news outlet files affidavits indicating that it possesses clear video footage of the plaintiff shattering a window at the Capitol and climbing into the building. The plaintiff responds with an affidavit denying that he was at the Capitol that day and asserting that the news outlet doctored its footage. Under *L.S.S.*, despite compelling video evidence, the court must take the plaintiff at his word that he was not at the Capitol

and, thus, deny the motion to dismiss. This, I submit, cannot possibly be what the General Assembly intended.

¶ 128 I recognize that the *Salazar* approach will usually not be so easy to apply as it would be in the foregoing scenario. Nevertheless, courts are often called upon to make preliminary assessments of the *weight* of the evidence without actually resolving the conflicts in that evidence and deciding the matter. For example,

- resolving a preliminary injunction request requires the court to determine not whether the plaintiff has succeeded in demonstrating harm but, rather, whether the plaintiff has demonstrated a reasonable likelihood that they *will* succeed in doing so, *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982);
- resolving whether a criminal defendant charged with a capital offense is entitled to bond pending prosecution requires the court to assess not whether the defendant is guilty but, rather, whether the proof is evident that he *will be* convicted, Colo. Const. art. II, § 19; and
- resolving whether criminal charges should be bound over for trial requires a court to determine not whether the

defendant is guilty but, rather, whether the evidence is "sufficient to persuade a person of ordinary prudence and caution to have a reasonable belief that the defendant committed the crime charged," *People v. Platteel*, 2023 CO 18, ¶ 30 (quoting *People v. Moyer*, 670 P.2d 785, 791 (Colo. 1983)).

¶ 129 While, with the possible exception of the probable cause determination, these scenarios generally do not dispose of litigation, I do not consider that fact to undercut my construction of the statute. The General Assembly was explicitly attempting to balance "the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law" with protecting "the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b). It is well within the legislative prerogative to create a structure under which the court acts as a gatekeeper to determine when a claim fails to fall within the second category.

¶ 130 Finally, I note that the division in *L.S.S.* adopted the test used by the California courts in applying that state's anti-SLAPP provision, Cal. Civ. Proc. Code § 425.16 (West 2024). *See L.S.S.*,

¶ 23 (citing *Baral*, 376 P.3d at 608). And while the language of the two statutes is similar, it is not identical. For example, in our statute, a defendant may file a "special motion to dismiss," and the plaintiff must establish "a reasonable likelihood" that they will prevail. § 13-20-1101(3)(a). In California, the procedure is to file a "special motion to strike," and the plaintiff must establish "a probability" that they will prevail. Cal. Civ. Proc. Code § 425.16. There may or may not be a substantive difference between striking a pleading and dismissing a claim, but I note that California's civil procedures are statutory rather than rule based and are not essentially parallel to our C.R.C.P. 12. *See, e.g.*, Cal. Civ. Proc. Code §§ 435-437 (West 2024). And there is certainly a difference between a "reasonable likelihood" and a "probability." While the division in *L.S.S.* correctly pointed out that the division in *Salazar* acknowledged that reasonable likelihood and reasonable probability are substantially the same, *L.S.S.*, ¶ 23 n.3, it is in my view far less clear that a showing of a probability is the same as a showing of a *reasonable* probability.

¶ 131 In any event, even if these language differences are immaterial, it does not mean that we must simply follow California in lockstep.

We, of course, *may* look to other jurisdictions' similar statutes for guidance in interpreting a statute. *See People v. Palomo*, 272 P.3d 1106, 1112 (Colo. App. 2011). But we should not simply adopt another state's interpretation of *its* statutory language as dispositive of the meaning of *our* statutory language — at least without some language in the enacted statute indicating that the General Assembly intended us to do so.

¶ 132 For example, the General Assembly knows how to incorporate other states' construction of similar language into the application and construction of our law and has often done so — particularly when enacting laws originating with the Uniform Law Commission. *See, e.g.*, § 13-21-1409, C.R.S. 2024 ("In applying and construing this part 14, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."). Nothing in the anti-SLAPP statute explicitly directs courts to California law for interpretive guidance.

¶ 133 I acknowledge that there is some indication in the legislative history that California's statute was selected as a model to follow. However, there is also an indication in that same history that the bill was simply designed to move our established screening device

articulated in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (*POME*), to a much earlier stage in the process, thereby permitting parties who should not have been haled into court as a result of exercising their First Amendment rights to escape the litigation more quickly and with greater protection from the financial burdens of such litigation. Hearings on H.B. 1324 before the H. Judiciary Comm., 72d Gen. Assemb., 1st Reg. Sess. (Apr. 23, 2019).[1] (In fact, notwithstanding its announcement of an analytical approach that differs from *POME*, the division in *L.S.S.* characterized the anti-SLAPP statute as "codif[ying] and expand[ing] the *POME* framework." *L.S.S.*, ¶ 17.)

¶ 134 Moreover, in my view, the California courts have made the same error I believe the division in *L.S.S.* did: by making the threshold showing nothing more than "a prima facie factual showing sufficient to sustain a favorable judgment," *id.* at ¶ 23 (quoting *Baral*, 376 P.3d at 608), they have made California's

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[1] Indeed, this conflicting hearing testimony points out the very danger of relying on such testimony to discern the General Assembly's intent. I simply do not see a clear indication from this history that each of the legislators who voted to pass the bill — or the body as a whole — meant to simply parrot California's interpretation of the language.

anti-SLAPP special motion to dismiss all but indistinguishable from a motion to dismiss for failure to state a claim — and, to the extent there is a difference, made it *more difficult* for a defendant to end the litigation early.

¶ 135 Even acknowledging that it is permissible (though certainly not mandatory) to seek guidance from other jurisdictions, I submit we should do so cautiously when we lack a complete understanding of the legal landscape the legislation is woven into in the other jurisdiction. For example, unlike the Colorado Constitution, the California Constitution provides a state constitutional right to a jury trial in civil cases. *Compare* Cal. Const. art. I, § 16, *with Kaitz v. Dist. Ct.*, 650 P.2d 553, 554 (Colo. 1982) ("In Colorado there is no constitutional right to a trial by jury in a civil action."). California's prohibition on the court weighing the evidence at all in ruling on a special motion to dismiss is rooted in concerns that doing so might interfere with that constitutional right. *See Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 574-75 (Cal. 1999). In *Briggs*, the California Supreme Court observed that the appellate courts of that state,

> noting the potential deprivation of jury trial that might result were [the anti-SLAPP statute] construed to require the plaintiff first to *prove* the specified claim to the trial court, have instead read the statute[] as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim.

Id. (quoting *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1071 (Cal. 1996)).

¶ 136 In Colorado, on the other hand, the General Assembly is free to establish a right to a jury trial by statute. *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 580 (Colo. 2004). If the General Assembly can *create* a right to a jury trial, it necessarily has the authority to establish procedures that might result in the disposition of a civil matter before it reaches a jury. *See Huston v. Wadsworth*, 5 Colo. 213, 216 (1880) (noting that the Colorado Constitution "secures the right of trial by jury in criminal cases, but imposes *no restriction* upon the legislature in respect to the trial of civil causes") (emphasis added). Because the very foundation of California's "no weighing" approach is absent here, I question why we should superimpose that approach onto our statute.

¶ 137 I also note that, even if a jury trial right were implicated, the *Salazar* analysis would not substantially infringe such a right. Consistent with — though perhaps not as extreme as — the California Supreme Court's exercise of caution, the *Salazar* analysis does not require the plaintiff to *prove* their claim but, rather, merely to convince a court that there is a *reasonable probability* that they will be able to do so. Admittedly, failure to do so will result in dismissal of the claims short of a jury hearing them, but that is no different in outcome than the result of a successful C.R.C.P. 12(b)(5) motion to dismiss or C.R.C.P. 56 motion for summary judgment.

¶ 138 Even if the lack of a constitutional jury trial right in Colorado is not grounds enough to refrain from uncritically engrafting California law onto our system, there is another reason to be cautious. I can find no indication that when the California legislature adopted its anti-SLAPP legislation, the California courts had already created a mechanism like the one the Colorado Supreme Court announced in *POME*. We should not blithely assume that, with such a protection already in place here and the possibility of simply legislatively moving it earlier in the process, our

General Assembly instead intended to supplant our system with an entirely new one.

¶ 139 To recap, I believe the *L.S.S.* rubric contradicts the statutory language and structure and disrupts the careful balance the General Assembly struck between competing rights. And I believe that reflexive adoption of California's approach to anti-SLAPP proceedings without extensive consideration of differences in statutory language and legal landscape is unwise. Instead, in my view, *Salazar* announced the correct analytical rubric for addressing a special motion to dismiss under the anti-SLAPP statute. Accordingly, I disagree that we must assume the truth of Coomer's evidence.

¶ 140 That being said, after conducting the preliminary weighing of the evidence that I believe is required, I believe that Coomer has established a reasonable likelihood that he will prevail on the defamation and IIED claims, though not on the conspiracy claim. Thus, I concur in the judgment.