SUMMARY
January 16, 2025

2025COA4

No. 23CA1713, *Jogan Health v. Scripps Media* — Torts — Defamation; Courts and Court Procedure — Regulation of Actions and Proceedings — Action Involving Exercise of Constitutional Rights — Anti-SLAPP — Reasonable Likelihood Plaintiff Will Prevail

In this defamation case, the plaintiffs sued the defendants for statements made in four news stories published by Denver7 Investigates. The district court granted the defendants' special motion to dismiss under section 13-20-1101, C.R.S. 2024, commonly known as Colorado's anti-SLAPP (strategic lawsuit against public participation) statute, finding that the plaintiffs failed to demonstrate a reasonable likelihood of prevailing at trial.

After conducting a de novo review of the evidence presented on the special motion to dismiss, a division of the court of appeals affirms the district court's judgment because the plaintiffs failed to demonstrate material falsity in the news stories. In doing so, the

majority follows *L.S.S. v. S.A.P.*, 2022 COA 123, and its progeny, which state that "[t]he court does not weigh evidence or resolve conflicting factual claims" but simply "accepts the plaintiff's evidence as true" when deciding a special motion to dismiss. *L.S.S.*, ¶ 23 (citation omitted).

The special concurrence, though concurring in the judgment, disagrees that courts should decide a special motion to dismiss under the standard set forth in *L.S.S.* Instead, the special concurrence believes that *Salazar v. Public Trust Institute*, 2022 COA 109M, which allows courts to perform a qualitative evaluation of whether the claims are reasonably likely to succeed at trial, is more aligned with the language and purpose of the anti-SLAPP statute.

COLORADO COURT OF APPEALS **2025COA4**

Court of Appeals No. 23CA1713
Arapahoe County District Court No. 22CV32372
Honorable Ben L. Leutwyler III, Judge

Jogan Health, LLC, and Daniel Dietrich,

Plaintiffs-Appellants,

v.

Scripps Media, Inc., d/b/a KMGH-TV, and Bayan Wang,

Defendants-Appellees.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE YUN
Kuhn, J., concurs
Berger*, J., specially concurs

Announced January 16, 2025

Patteson LLP, John Patteson, Denver, Colorado, for Plaintiffs-Appellants

Zansberg Beylkin LLC, Steven D. Zansberg, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2024.

¶ 1 In this defamation case, plaintiffs, Jogan Health, LLC, and its principal, Daniel Dietrich (collectively, Jogan), sued defendants, Scripps Media, Inc., and Bayan Wang (collectively, Scripps Defendants),[1] for defamation and other torts based on statements made in four investigative, multimedia (audio, video, and text) news stories published between December 2021 and October 2022.

¶ 2 Jogan appeals the district court's order and judgment of dismissal granting the Scripps Defendants' special motion to dismiss the complaint under section 13-20-1101, C.R.S. 2024, commonly known as Colorado's anti-SLAPP (strategic lawsuit against public participation) statute. Jogan also appeals the court's award of attorney fees and costs under section 13-20-1101(4)(a) to the Scripps Defendants as the prevailing parties.

¶ 3 We address and reject all of Jogan's arguments for reversal, affirm both the judgment and the attorney fees order, and award reasonable appellate attorney fees to the Scripps Defendants.

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[1] Jogan's initial complaint named additional defendants, but those defendants were dismissed at various points for various reasons during the proceedings. This appeal addresses only the claims against the Scripps Defendants.

I. Relevant Facts and Procedural History

¶ 4 In March 2021, Dietrich submitted an application on behalf of his recently formed company, Jogan Health, LLC, for the Colorado Vaccination Point of Distribution Program (COVID POD Program), which is run by the Colorado Department of Public Health and Environment (CDPHE). CDPHE awarded a contract to Jogan that provided $72 million to fund staffing and operations management for vaccine distribution sites and mobile clinics across Colorado.

¶ 5 In December 2021, as Jogan was scaling up operations, Denver7 Investigates reporter Wang began looking into a tip he received that Jogan employees were not timely receiving their contractually required pay. As a result of his investigation, Wang wrote four Denver7 news stories published over the course of ten months:

(1) *Nurses Helping Vaccinate Coloradans are Leaving, Saying Company Underpaid Them and Broke Agreement*, Denver7 (Dec. 23, 2021), https://perma.cc/EP9F-UARU (December 23 article);

(2) *'A Lot of People Aren't Getting Paid': Traveling Nurses Claim Jogan Health Solutions Owes Them Money*,

Denver7 (originally published Feb. 4, 2022), https://perma.cc/626C-QDA7 (February 4 article);

(3) *No Reference Checks Done on Company that Colo. Paid $72 Million before Cutting Off Their Work*, Denver7 (June 20, 2022), https://perma.cc/T82L-SGDL (June 20 article); and

(4) *Jogan Health Intentionally Falsified Wage Records, Willfully Violated Wage Laws, State Investigation Reveals*, Denver7 (Oct. 12, 2022), https://perma.cc/F89U-4ZN7 (October 12 article).[2]

¶ 6 The articles detailed various issues including (1) complaints about Jogan's delay or failure to pay its employees; (2) government findings that Jogan violated Colorado's wage laws; (3) Jogan's false representation about its experience in its application to CDPHE; and (4) CDPHE's decision to cease sending work to Jogan. Jogan provided comment on some, but not all, of the articles before

[2] The article was published online on October 12, 2022, although both Jogan's complaint and the district court order state the article was published on October 14, 2022. We use the online publication date.

publication but did not contact Wang or Denver7 Investigates to correct any of the statements after publication.

¶ 7 Shortly after the articles were published, Jogan filed a complaint in the district court against the Scripps Defendants for defamation, intentional infliction of emotional distress (IIED), interference with business relationships, trespass,[3] and injunctive relief. The complaint alleged fourteen instances in which the Scripps Defendants defamed Jogan in the four articles. As the district court did in its dismissal order and the parties do on appeal, we divide the alleged defamatory statements into three categories concerning

(1) Jogan's application to CDPHE;

(2) employee wage complaints; and

(3) the termination of Jogan's contract with CDPHE.

¶ 8 The Scripps Defendants filed a special motion to dismiss under Colorado's anti-SLAPP statute, arguing that Jogan could not demonstrate a reasonable likelihood of proving either material falsity or actual malice at trial. *See* § 13-20-1101. The motion

[3] Jogan's trespass claim was originally asserted against only Wang and has since been withdrawn by Jogan.

included documentary evidence addressing Wang's research and corroborating his reporting, as well as affidavits from Wang and others. In a supplementary motion, the Scripps Defendants withdrew their actual malice defense for purposes of the special motion to dismiss; therefore, the district court did not address actual malice.

¶ 9 In its response, Jogan conceded that the statements alleged fell within the scope of the anti-SLAPP statute but maintained that the news articles were defamatory because they contained false statements. Jogan submitted copies of Jogan's contract extension with CDPHE and an affidavit from Dietrich.

¶ 10 The district court held a nonevidentiary hearing; reviewed the parties' briefs, documentary evidence, and affidavits; and granted the Scripps Defendants' special motion to dismiss. The district court issued a detailed written order finding that Jogan failed to establish a reasonable likelihood that it would prevail on any of its claims at trial. Consistent with that ruling, the district court determined that the Scripps Defendants were the prevailing parties and awarded them reasonable attorney fees and costs.

II. Analysis

¶ 11 Jogan contends that the district court erred by (1) applying an incorrect evidentiary standard when it granted the special motion to dismiss; (2) concluding that Jogan failed to show a reasonable likelihood of prevailing on its claims; (3) denying Jogan's request to conduct discovery regarding material falsity; and (4) awarding attorney fees to the Scripps Defendants. The Scripps Defendants, in turn, request their attorney fees incurred in defending this appeal. After setting forth the legal principles governing the anti-SLAPP statute and the standard of review, we address each of these contentions in turn.

A. Anti-SLAPP Statute and Standard of Review

¶ 12 Colorado's anti-SLAPP statute was enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b). To balance these interests, the statute introduces a procedural mechanism, through a special motion to dismiss, whereby the district court can "make

an early assessment about the merits of claims brought in response to a defendant's . . . speech activity." *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 12.

¶ 13 The statute lays out a two-step process for considering a special motion to dismiss. *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 20. In the first step, which Jogan concedes, the defendant must make a threshold showing that the anti-SLAPP statute applies to the plaintiff's claims. *See id.* at ¶ 21. Specifically, the defendant must show that the alleged conduct "aris[es] from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue." § 13-20-1101(3)(a).

¶ 14 In the second step, if the claims are governed by the statute, the burden shifts to the plaintiff to demonstrate a "reasonable likelihood that the plaintiff will prevail on the claim[s]." *L.S.S.*, ¶ 18 (quoting § 13-20-1101(3)(a)); *Salazar*, ¶ 21. "[T]his step has been described 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 (citation omitted). "In making [the reasonable

likelihood] determination, '[t]he court does not weigh evidence or resolve conflicting factual claims' but simply 'accepts the plaintiff's evidence as true,[4] and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.'" *Id.* (citation omitted); *see also Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, ¶¶ 67-69 (describing the different treatment of allegations and evidence in a special motion to dismiss). If the plaintiff fails to establish a reasonable likelihood of prevailing, the district court must grant the special motion to dismiss. *Coomer*, ¶ 63.

¶ 15 We review an order granting a special motion to dismiss de novo, applying the same two-step analysis as the district court. *Id.* at ¶ 64; *Salazar*, ¶ 21.

B. District Court's Application of the Burden of Proof

¶ 16 Jogan contends that the district court applied an incorrect standard in two different contexts. Jogan first contends that the

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[4] When the plaintiff comes forward with evidence (typically in the form of an affidavit), the court no longer accepts the plaintiff's allegations in the complaint as true but rather accepts the plaintiff's tendered evidence as true. *Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, ¶¶ 66-67.

district court erred by requiring it to prove its claims at the special motion to dismiss stage by clear and convincing evidence, rather than requiring it to establish a reasonable likelihood that it would prevail at trial. Jogan next contends that the district court did not accept Jogan's evidence as true but, instead, weighed the evidence presented by both parties to conclude that there was no reasonable likelihood of success. We address these contentions in turn.

¶ 17 First, the district court concluded that Jogan's "arguments d[id] not provide a reasonable likelihood, based on clear and convincing evidence, of establishing that [the Scripps] Defendants' [statements relating to the specific defamation category addressed] were false." We agree with Jogan that the district court incorrectly stated the statutory burden of proof under the anti-SLAPP statute. Despite this misstatement, however, the court's order demonstrates that it nevertheless applied the correct burden of proof to Jogan's claims — whether a reasonable probability exists that Jogan could prove its claims by clear and convincing evidence at trial. We reach this conclusion because the court articulated the correct standard in the section of its order reciting the applicable law. *Cf. People v. Washington*, 2014 COA 41, ¶¶ 28-29 (the defendant failed to show

that court applied incorrect prejudice standard where the court articulated correct standard in its order).

¶ 18 Second, the district court's order correctly stated that under the second step of the anti-SLAPP analysis, "the burden shifts to the plaintiff[s] to establish a reasonable probability of prevailing" and that "[t]o succeed on their defamation claim, ultimately [(i.e., at trial)], Plaintiffs must establish by clear and convincing evidence that the substance or gist of the defamatory statement was false at the time it was published." Further, the district court clearly understood that to resolve the anti-SLAPP motion, it was not permitted to engage in any "weighing" of the evidence. As the court explicitly stated, "At this [second] step, the 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." *See L.S.S.*, ¶ 23. As discussed below, we see no evidence that the district court deviated from this standard. *See Washington*, ¶¶ 28-29.

C. Reasonable Likelihood of Prevailing on Defamation Claims

¶ 19 Jogan contends that the district court erred by concluding that there was not a reasonable likelihood it would prevail on its defamation claims at trial. After conducting a de novo review of the evidence presented on the special motion to dismiss, we also conclude that Jogan failed to meet its burden. Although we are not bound by the district court's analysis, we substantially agree with its reasoning. *See Salazar*, ¶ 23.

¶ 20 Additionally, because we conclude that Jogan's defamation claims do not survive the special motion to dismiss, its ancillary claims of IIED, interference with business relationships, and injunctive relief,[5] which rise and fall with the defamation claims, were also correctly dismissed by the district court. *See Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶ 54 n.8; *Fry v. Lee*, 2013 COA 100, ¶¶ 61-62.

1. Defamation Law

¶ 21 "Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or

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[5] "[A]n injunction, even if pleaded as a claim for relief, is a remedy, not an independent cause of action." *Coomer*, ¶ 217.

damage." *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994). To prevail on a defamation claim, the plaintiff must establish

> (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication.

Lawson v. Stow, 2014 COA 26, ¶ 15 (quoting *Williams v. Dist. Ct.*, 866 P.2d 908, 911 n.4 (Colo. 1993)).

¶ 22 When, as the parties here agree, a statement concerns a public figure or a matter of public concern, certain elements of a defamation claim are subject to a higher evidentiary standard. *Anderson v. Senthilnathan*, 2023 COA 88, ¶ 13. As relevant here, the plaintiff must prove the statement's material falsity by clear and convincing evidence, rather than a mere preponderance. *Coomer*, ¶¶ 76-77, 86, 113 (determining that the defendants established a prima facie case when they created a factual dispute about the claim's falsity); *Fry*, ¶ 21. Clear and convincing evidence is evidence that is "highly probable and free from serious or substantial doubt." *Creekside*, ¶ 36 (quoting *Destination Maternity v. Burren*, 2020 CO

41, ¶ 10). However, as previously discussed, in resolving a special motion to dismiss, the court determines only whether the plaintiff has established a reasonable likelihood of prevailing under this standard at trial. *Coomer*, ¶ 87; *Rosenblum v. Budd*, 2023 COA 72, ¶ 24.

¶ 23 A plaintiff must prove that the alleged defamatory statement is both false and material. *SG Ints. I, Ltd. v. Kolbenschlag*, 2019 COA 115, ¶ 22 (citing *Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011)). To establish falsity, a plaintiff must show that the substance or the gist of the statement was inaccurate. *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1972). "Minor inaccuracies do not amount to falsity" so long as the substance or the gist of the statement was true. *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991) (citation omitted); *see also* CJI-Civ. 22:13 (2024) ("The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false."). Thus, "[t]o qualify as a material falsehood, the challenged statement must be false and 'likely to cause reasonable people to think "significantly less favorably" about the

plaintiff' than if they knew the whole truth." *Fry*, ¶ 50 (quoting *Bustos*, 646 F.3d at 765).

¶ 24 Finally, in evaluating whether an article is materially false, courts should be mindful that

> [e]very news story . . . reflects choices of what to leave out, as well as what to include . . . . Courts must be slow to intrude into the area of editorial judgment not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors. It is not the business of government.

Fry, ¶ 55 (quoting *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6, 15 (Colo. 1994)).

2. Statements Related to Jogan's Application to CDPHE

¶ 25 In its written application to CDPHE, Jogan set forth its proposal for staffing and managing the vaccination program in Colorado. In support of the proposal, as shown in the image of

Jogan's application below, Jogan provided,

CLINICAL EXPERIENCE

Our Clinical Services Division is based on the US Gulf Coast, is part of one of the largest privately held ambulance companies in the US and has 40+ years of experience responding to large-scale natural and man-made disasters, including hurricanes, floods, fires, hydrocarbon spills and public health emergencies. We serve as a premier provider of remote and emergency medical staffing and project management services and other FEMA response situations. Within this division we serve government and private sector clients, including the energy and industrial construction industries.

Prior to COVID-19 reaching US soil, our Clinical Services Division partner developed services and protocols to help our clients safely and efficiently navigate the coming crisis. Those services have included screening, testing, facility decontamination, field hospital operation, case management, and most recently, vaccine administration. Over the last year we've been a major provider of staff and expertise to numerous government agencies like the Louisiana, Florida, and Harris County (TX) Departments of Health. In addition, we have provided these same critical services to energy sector customers like Shell, Chevron, BP, Total, and Oxy, as well as broader market clients like Sanderson Farms, CBS Productions, Harvest Sherwood and Cargill.

Then Jogan listed three clients it allegedly served with a description of the services provided, the service location and scope, and the dates of service. In each description, Jogan repeatedly used the pronoun "we."

¶ 26 In the June 20 article, the Scripps Defendants published the following statement:

> It took Denver7 Investigates just three emails to the entities Jogan Health claimed to have done work for to figure out Dan Dietrich and his Jogan Health, LLC did not have the experience it claimed in its application. CDPHE still insists it did extensive vetting of Jogan Health before handing over $72 million of Coloradans' tax dollars.

¶ 27 Jogan argues that the June 20 article, in substance, asserted that Jogan lied about the extent of its experience in its application

to CDPHE. It claims that the application was clear that Jogan was referring to the experience of its "partner," Safety Management Systems (SMS), rather than its own experience.

¶ 28 The district court disagreed, finding that the statements in the article were not materially false because Jogan was founded only two months prior to the submission of the application. Therefore, the district court reasoned that it was impossible for Jogan to have acquired the experience it claimed.

¶ 29 On appeal, Jogan argues that the district court incorrectly interpreted the "plain language" of its application and reasserts that it was referencing SMS's experience. As evidence of this, Jogan points to Dietrich's affidavit, which states in relevant part,

> [On the application submitted to CDPHE,] I specifically and explicitly listed that the experience was gained by Safety Management Systems ("SMS"), our partner in servicing the COVID vaccination programs . . . . When drafting the Application, because I was clearly relying upon experience gained prior to the existence of Jogan, and because I explicitly noted that the Project Manager was employed by SMS, I expected that CDPHE would understand that the extensive clinical experience I listed was related to SMS and it would not believe that Jogan obtained such significant experience in [its] two short months of existence.

¶ 30 We agree with the district court that the words of Jogan's application govern. When determining whether the statements in Jogan's application are true or false, it makes no difference what Jogan subjectively intended the meaning to be. The application does not identify SMS as Jogan's partner, let alone explain its affiliation with Jogan. Therefore, the record clearly establishes that Dietrich's statement that he "specifically and explicitly listed that the experience was gained by [SMS]" is false, as the district court correctly found.

¶ 31 Even accepting Jogan's argument that SMS is its "Clinical Services Division Partner" as true, *see Coomer*, ¶ 66-69 (requiring that the plaintiff's evidence, typically in the form of an affidavit, be accepted as true), the district court was not required to read into the plain words of the application concepts that Jogan intended to convey but failed to articulate.

¶ 32 Because the statements in the article were not materially false, we conclude, like the district court, that Jogan did not establish that there was a reasonable likelihood that it would prevail on its defamation claim premised on the Scripps Defendants' statements concerning Jogan's CDPHE application. Therefore, the court

correctly granted the special motion to dismiss as to these publications.

3. Statements Related to Employee Wage Complaints

¶ 33 Jogan contends that statements in the December 23 and February 4 articles reporting on employees' complaints regarding the delay or non-payment of wages and expenses were false.

¶ 34 The district court determined that Jogan had not demonstrated a reasonable likelihood of prevailing on this category of statements for two alternative reasons. First, it concluded that the fair report privilege applied to a citation issued by the Colorado Department of Labor and Employment (CDLE) that found that Jogan had willfully violated Colorado wage law. The district court reasoned that, because the reporting by the Scripps Defendants accurately tracked CLDE's findings in the citation, Jogan's argument that it paid its employees on time and accurately failed.

¶ 35 Second, even if the fair report privilege did not apply, the court concluded that the evidence presented by the Scripps Defendants — including emails detailing the employee complaints and forum discussions about compensation delays — was sufficient to

demonstrate that the statements in the articles "regarding the payroll issues" were not materially false.

¶ 36 On appeal, Jogan reiterates its claim that the district court did not take its evidence as true and improperly considered only the evidence presented by the Scripps Defendants. Although Jogan seemingly agrees that there *were* payroll issues and that some employees did not get paid, Jogan explains that these problems resulted from the employees' failure to properly complete their time sheets. And, according to Jogan, rather than emphasizing the employees' accountability, the articles implied that the payroll issues were solely Jogan's fault. Jogan also contends that the district court erred because it considered the single complaint described in the CDLE citation as definitive proof of the multiple wage complaints reported in the articles.

¶ 37 Although the articles indeed implied that the employees believed it was Jogan's fault that they were not getting paid, they also presented Jogan's perspective. Both the video and text versions of the February 4 article stated, "Dietrich put the blame on the nurses, saying in part, '99% of the time, it's because they didn't complete their stuff in the HR system . . . people don't turn their

time-sheets in, and they don't turn them in correctly, and they don't turn them in on time.'" Under these circumstances, the statements in the articles were not materially false.

¶ 38 Moreover, we agree with the district court that citations issued by state government agencies fall within the scope of the fair report privilege. *See Wilson v. Meyer*, 126 P.3d 276, 279-280 (Colo. App. 2005) (expanding the fair report doctrine to "other public proceedings"). Under this privilege, reports of public proceedings "containing defamatory material are privileged if they are fair and substantially correct, or are substantially accurate accounts of what took place." *Tonnessen v. Denver Publ'g Co.*, 5 P.3d 959, 964 (Colo. App. 2000). "The privilege exists even if the reporter of the defamatory statements believes or knows them to be false." *Id.* The CDLE citation establishes that there were multiple instances of untimely or insufficient compensation. The citation states that, in addition to the wage complaint it was investigating, "falsifying records was a well-known practice at the job site," suggesting more than a single instance of improper payroll practices by Jogan. Indeed, Dietrich's affidavit acknowledges multiple "difficulties" concerning employee compensation.

¶ 39 For all these reasons, at a bare minimum, the "gist" of the Scripps Defendants' statements was true and the coverage of the CDLE citation was a fair report. Because Jogan could not demonstrate a reasonable likelihood of success on its related defamation claim, the district court properly dismissed the claims as to these publications.

4. Statements Related to the Termination of Jogan's Contract with CDPHE

¶ 40 Jogan contends that the articles published on June 20 and October 12 assert, in essence, that CDPHE "halted" Jogan's work "several months" earlier than the contracted end date and that CDPHE "cut off [Jogan] from all new work." Jogan says that the articles' portrayal of the reasons behind the contract winding down — that CDPHE had "mounting concerns . . . about . . . payroll practices," "[CDPHE's] confidence began eroding," and "complaints [were] flooding [CDPHE's] offices" — implied that Jogan was a "bad actor" and had "improperly performed the work" under the contract.

¶ 41 In support of its argument, Jogan emphasizes that CDPHE stated, at one point at least, that Jogan "[met] the . . . contractual

obligations" and confirmed via email (on April 26, 2022,[6] and May 12, 2022) that the contract with Jogan ended on June 30, 2022. Jogan relies on Dietrich's affidavit in which he claims that "CDPHE did not fire Jogan" and that Jogan remained a COVID POD Program provider "longer than any other [vendor]." It also relies on its contract renewal with CDPHE, which extended the contractual term to June 30, 2022.

¶ 42 Even if we accept all this evidence as true, Jogan cannot demonstrate a reasonable likelihood that the statements in the article were materially false. While Jogan's evidence supports a finding that the actual terms of the contract did not expire until June 30, 2022, and that Jogan was not terminated by CDPHE, it does *not* demonstrate that CDPHE did not stop assigning work to Jogan before the contract's term expired. In fact, Dietrich admits that "in early 2022, CDPHE began winding down the COVID POD program."

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[6] The April 26 email from CDPHE to Jogan was not considered by the district court because the court excluded the evidence based on its untimely disclosure. However, we need not decide whether the court properly excluded the email because even considering its content, Jogan has failed to establish a reasonable likelihood of prevailing on this claim.

¶ 43 Jogan's complaint alleges that it will suffer damages because as early as January 25, 2022, "CDPHE [said it] decided not to give new work to Jogan under the contract." And in the April 26 email, CDPHE confirmed that it did not "have any work that Jogan will be performing from May 1st until the end of the contract, June 30th. For now, please demobilize all teams and efforts as if no more work will be provided to Jogan between May 1st and June 30th." So, by its own admission, despite an official end date of June 30, 2022, Jogan was *not* assigned any new work as early as January 25, 2022, a fact that CDPHE confirmed directly to Jogan on January 25 and April 26, 2022. Therefore, the fact that CDPHE, for whatever reason, stopped assigning Jogan work before the contract's end date is not in reasonable dispute.

¶ 44 This leaves only Jogan's claim that the article created the impression or perception that Jogan was a "bad actor." But Jogan has not presented any evidence disputing the statements that CDPHE had "mounting concerns" about Jogan's payroll practices, that its confidence in Jogan was eroding, or that CDPHE was receiving complaints. To the contrary, in the January 25, 2022, email referenced in Jogan's complaint, CDPHE told Dietrich it was

"seriously worried about Jogan continuing work in the state as the complaints are just piling up." Therefore, the underlying fact that CDPHE was concerned about Jogan's performance remains uncontested. As the court said in *Bustos*, a truthful statement cannot be defamatory "no matter how much the statement may have defamed or hurt the plaintiff's reputation in the public's estimation." 646 F.3d at 764.

¶ 45 Meanwhile, the Scripps Defendants provided several emails from CDPHE containing language nearly identical to that used in the articles. *See Wright v. TEGNA Inc.*, 2024 COA 64M, ¶ 40 (where the plaintiff simply provides unsubstantiated allegations of falsity, while the defendant presents evidence of truth, the plaintiffs have not established a reasonable likelihood of success). For example, an email from May 12, 2022, stated that CDPHE finds "Jogan's alleged treatment of staff . . . *quite troubling*, and *not aligned with the state's values*. . . . [CDPHE's] *confidence* in Jogan Health has

eroded. We believe our decision to stop assigning them work was absolutely the right decision to make."[7] (Emphases added.)

¶ 46 Therefore, based on its own admissions, in addition to the evidence provided by the Scripps Defendants, Jogan has not carried its burden of demonstrating a reasonable likelihood that it could prove at trial that the statements concerning the termination of its contract were false.

¶ 47 Because Jogan has failed to establish a reasonable likelihood of success as to any of the challenged publications, we conclude that the district court correctly dismissed its complaint under the anti-SLAPP statute.

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[7] In a last-ditch effort to salvage its claims, Jogan makes an unsupported attempt to discredit four emails the district court relied on in its decision, stating they were "ambiguous" about the dates and parties and did not specify which contract they were referring to. But Jogan does not challenge the authenticity of the emails and, based on the quotations above, we disagree that any imprecision in their content bears upon their impact. Moreover, each email was sent in the spring of 2022 directly to Dietrich or in response to Wang's questions about Jogan, and Jogan has not asserted (nor provided evidence) that it had any other contracts with CDPHE during this timeframe.

D. Jogan's Discovery Request

¶ 48 Under the anti-SLAPP statute, the filing of a special motion to dismiss stays discovery until the motion is resolved. § 13-20-1101(6). However, the district court has the discretion to lift the stay upon a showing of "good cause." *Id.* To establish good cause, the requesting party is required to show that discovery is necessary and tailored to oppose the anti-SLAPP motion. *Balla v. Hall*, 273 Cal. Rptr. 3d 695, 729-30 (Ct. App. 2021).[8] We review the district court's ruling for an abuse of discretion. *Id.*

¶ 49 In supplemental briefing, the Scripps Defendants withdrew the defense of actual malice that they initially asserted in their special motion to dismiss. The next day, Jogan filed a motion for discovery requesting, as relevant here, three items: (1) an audio recording of a telephone conversation between Dietrich and Wang; (2) documents obtained by Wang through a Colorado Open Records Act request and Wang's correspondence with state agencies; and (3) Wang's

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[8] Colorado courts have frequently recognized that, because of the substantial similarity between the California and Colorado anti-SLAPP statutes, courts may look to California case law for guidance. *Rosenblum v. Budd*, 2023 COA 72, ¶ 62; *Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*, 2023 COA 114, ¶ 16 (*cert. granted in part* Sept. 3, 2024).

deposition. The district court denied the motion, finding that "Plaintiffs have no need to obtain the discovery they seek in order to rebut a defense that no longer exists."

¶ 50 The district court did not abuse its discretion by finding that Jogan's discovery request was solely relevant to the actual malice element. Jogan's request for discovery cited legal principles relating only to actual malice and emphasized the importance of showing actual malice — not falsity. More specifically, Jogan explained that discovery was necessary to show "what Dietrich said to Wang" to establish "that Wang had knowledge that his articles contained false statements but chose to publish them regardless," and "Wang's knowledge of the facts surrounding his articles [would] help[] Plaintiffs to establish actual malice." Once the Scripps Defendants withdrew their argument that they did not make the statements with actual malice, discovery on that issue was no longer necessary.

¶ 51 Additionally, even after the Scripps Defendants withdrew the actual malice issue for purposes of the special motion to dismiss, Jogan did not amend its discovery request to address questions of falsity or its reasonable likelihood of prevailing. Under these

circumstances, the district court did not abuse its discretion by denying the discovery request.

E. Attorney Fees Award

¶ 52 Jogan contends that, should we reverse the district court's order granting the Scripps Defendants' special motion to dismiss, we must also reverse its award of attorney fees. Because we affirm the dismissal of Jogan's claims, the Scripps Defendants are the prevailing parties and are entitled to recover reasonable attorney fees and costs for the district court proceedings. *See* § 13-20-1101(4)(a); *Creekside*, ¶ 54. Accordingly, we affirm the district court's award of attorney fees.

¶ 53 Additionally, the Scripps Defendants request their appellate attorney fees under C.A.R. 39.1. Because we conclude that Jogan failed to demonstrate, as a matter of law, a reasonable likelihood of prevailing on its claims, the Scripps Defendants are entitled to recover reasonable attorney fees incurred in defending against this appeal; therefore, we remand to the district court for a determination of that amount. *See Rosenblum*, ¶ 61; *Creekside*, ¶ 54.

III. Disposition

¶ 54 The trial court's judgment granting the special motion to dismiss and its order awarding reasonable attorney fees to the Scripps Defendants are affirmed. We also award the Scripps Defendants their reasonable attorney fees incurred on appeal, and we remand the case for the district court to determine the amount of those fees.

JUDGE KUHN concurs.

JUDGE BERGER specially concurs.

JUDGE BERGER, specially concurring.

¶ 55 I agree with the majority that the district court correctly dismissed Jogan's claims under the anti-SLAPP statute. Accordingly, I concur in the judgment. I also agree with the majority that if the standard set forth in *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 23, correctly describes Colorado law, then neither the district court nor the majority violated the strictures of *L.S.S.*

¶ 56 But I do not agree that *L.S.S.* correctly applies the anti-SLAPP statute. Therefore, the majority errs in deciding this case under *L.S.S.* (but nevertheless reaches the correct result). Instead, I believe that the division's opinion in *Salazar v. Public Trust Institute*, 2022 COA 109M, correctly interprets the anti-SLAPP statute.

I. The Words and Purposes of Colorado's Anti SLAPP Statute

¶ 57 Colorado's anti-SLAPP statute was enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b), C.R.S. 2024. The statute provides a procedural mechanism, through a special motion to

dismiss, whereby the district court can assess, at an early stage, whether the plaintiff can "establish[] that there is a reasonable likelihood that [she] will prevail on the claim." § 13-20-1101(3)(a).

¶ 58 The statute mandates a two-step process. In the first step, the court must determine if the defendant has shown that the claims arise from the defendant's exercise of the right to petition or the right to free speech. § 13-20-1101(3)(a); *Salazar*, ¶ 21. If the first step of the test is met, the court proceeds to the second step. If not, litigation under the anti-SLAPP statute terminates, and the case is adjudicated under the rules applicable to all civil cases.

¶ 59 Step two requires the plaintiff to assume the burden to establish a "reasonable likelihood" of prevailing on the claim at trial. § 13-20-1101(3)(a). The obvious question is: What does "a reasonable likelihood" of prevailing mean?

¶ 60 *Salazar* is the first Colorado reported decision to consider this question. After examining the statutory language and the various standards applicable to different types of dispositive motions under Colorado law, the division set forth the following standard:

> We neither simply accept the truth of the allegations nor make an ultimate determination of their truth. Instead, ever

> cognizant that we do not sit as a preliminary jury, we assess whether the allegations and defenses are such that it is reasonably likely that a jury would find for the plaintiff.

Salazar, ¶ 21.

¶ 61 Shortly after *Salazar* was announced, a different division of this court decided *L.S.S.* After stating that the division was "expand[ing] upon" *Salazar*, *L.S.S.*, ¶ 1, the division formulated its "reasonable likelihood" standard as follows:

> In making [the reasonable likelihood] 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)).

¶ 62 Thus far, with one exception, Colorado case law has not distinguished between the *Salazar* and *L.S.S.* articulations of the

standard for a special motion to dismiss.[1] *See, e.g.*, *Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶¶ 24-25; *Tender Care Veterinary Ctr., Inc. v. Lind-Barnett*, 2023 COA 114, ¶¶ 14-15 (*cert. granted in part* Sept. 3, 2024); *Wright v. TEGNA Inc.*, 2024 COA 64M, ¶ 28. Apparently, these divisions read the two cases as consistent. But they are not consistent.

¶ 63 In my view, the *L.S.S.* articulation of the standard falls short of realizing the statutory purpose for several reasons. *L.S.S.*'s prohibition on "weigh[ing] evidence" and its pronouncement that we must take the plaintiff's evidence as true, ties the hands of district courts so that they effectively cannot make the "reasonable likelihood" determination they are required to make under the anti-SLAPP statute. *L.S.S.*, ¶ 23 (quoting *Baral*, 376 P.3d at 608); § 13-20-1101(3)(a). In adopting this articulation of the standard for

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[1] In *Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, the court noted a possible inconsistency between *L.S.S. v. S.A.P.*, 2022 COA 123, and *Salazar v. Public Trust Institute*, 2022 COA 109M, but concluded they were not, in fact, inconsistent on the basis that *Salazar* says that the court does not accept *allegations* as true while *L.S.S.* says the court accepts only *evidence* as true. *Coomer*, ¶¶ 67-69. Whether or not that is a fair reading of *Salazar*, it still does not address my concerns that the *L.S.S.* test is not consistent with the anti-SLAPP statute.

evaluation, *L.S.S.* has departed from the text of Colorado's anti-SLAPP statute and muddied the waters between a special motion to dismiss and other methods of dismissing litigation. Finally, *L.S.S.* seemingly imposes an additional requirement on district courts to determine if the claim can be defeated "as a matter of law." *L.S.S.*, ¶ 23 (quoting *Baral*, 376 P.3d at 608).

A. Weighing Evidence

¶ 64 *L.S.S.* and its progeny prohibit courts from "weigh[ing] evidence" to determine whether the plaintiff has proven a reasonable likelihood of prevailing. *L.S.S.*, ¶ 23 (quoting *Baral*, 376 P.3d at 608). However, none of these cases define what it is to "weigh" evidence. Does that mean that the court must treat as true any statement of historical fact included in an affidavit opposing the special motion to dismiss, regardless of how unsupported or weak that allegation might be? If so, isn't that a rather obvious invitation for any clever litigant to avoid the operation of the anti-SLAPP statute simply by filing an affidavit that says, in essence, "I didn't

do it"?[2] That appears to be the plain result of the *L.S.S.* formulation. To that extent, the *L.S.S.* division applies the same standard for a motion for a directed verdict in the special motion context, a standard explicitly rejected by the *Salazar* division. *See Salazar*, ¶¶ 15-21 (discussing the similarities and differences between a special motion to dismiss and various other dispositive motions).

¶ 65 Apparently, following the *L.S.S.* articulation of the standard, the most recent anti-SLAPP cases have explored what evidence the plaintiff is required to produce at this stage of the proceedings. *See, e.g.*, *Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, ¶¶ 66-82; *Wright*, ¶¶ 24-41. Despite stating that their analyses do not run contrary to *L.S.S.*'s prohibition on "weighing" evidence, it appears that recent cases, at points, compare the evidence on both

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[2] I recognize that *L.S.S.* and its progeny accept as true only the defamation plaintiff's evidence. According to these cases, "we assess the defendant's evidence "only to determine if it defeats the plaintiff's claim as a matter of law." *L.S.S.*, ¶ 23; *Coomer* ¶ 72. I suggest that one will look in vain for anything in the statutory language (or its stated purpose) that, in essence, gives the defamation plaintiff's evidence on the special motion to dismiss preclusive effect while relegating the defamation defendant to a secondary status (depending, of course, on what it means to defeat the plaintiff's claim as a matter of law).

sides while addressing the merits. *See, e.g.*, *Wright*, ¶¶ 44, 49; *Anderson v. Senthilnathan*, 2023 COA 88, ¶¶ 49-51 (determining that the defendant's evidence established the factual truth of allegedly defamatory statements, so the plaintiffs did not have a reasonable likelihood of success); *Coomer*, ¶ 142 (determining that the defendant's evidence does not sufficiently refute the plaintiff's showing of falsity).

¶ 66 *Wright* appears to address this aspect of *L.S.S.* by placing a substantial gloss on it. *Wright* states that if the plaintiff provides "unsubstantiated" allegations of falsity, while the defendant presents evidence of truth, the plaintiffs have not established a reasonable likelihood of success. *Wright*, ¶ 40.

¶ 67 It is not entirely clear what "unsubstantiated" means in this context. If "unsubstantiated" allegations of falsity means mere allegations, not supported by any admissible evidence, this standard is consistent with both *Salazar* and *L.S.S.* But if *Wright* says that certain types of evidence, such as an "unsubstantiated" statement (which would be admissible evidence despite being "unsubstantiated") in an affidavit supplied by the plaintiff, are insufficient, I suggest this gloss is inconsistent with *L.S.S.* That

sure sounds like weighing evidence to me; that is, crediting some types of admissible evidence over other admissible evidence. This gloss materially changes the *L.S.S.* test and brings the test applied in *Wright* closer to *Salazar*'s.

B. What Does Reasonably Likely to Prevail at Trial Mean?

¶ 68 Under the plain language of the anti-SLAPP statute, the court is tasked with deciding whether the plaintiff's claim is reasonably likely to prevail at trial. The reasonable likelihood standard is very different than the standards applicable to a motion to dismiss under C.R.C.P. 12(b)(5) or a motion for summary judgment under C.R.C.P. 56. The task facing a court on a motion to dismiss a civil claim or a motion for summary judgment on a civil claim is not to make a qualitative decision on whether the claim is likely to succeed if a trial is held. The purpose of a motion to dismiss is to weed out claims that do not, under substantive law, state a claim that the law recognizes. *Salazar*, ¶ 15 (stating that a special motion to dismiss is similar to a motion to dismiss because they both "seek[] an early end to the litigation based, essentially, on the assertion that the plaintiff will ultimately, and inevitably, lose").

Nothing in Rules 12(b)(5) or 56 says anything about a "reasonable likelihood of success."

¶ 69 The concept of "reasonable likelihood" is, by definition, a qualitative evaluation as to whether a claim is likely to succeed. Unlike other civil actions, the anti-SLAPP statute entrusts that preliminary determination to trial judges, with de novo review by appellate judges. § 13-20-1101(3)(a)-(b); *Salazar*, ¶ 21. Such qualitative evaluations are not foreign to Colorado judges. There are a multitude of situations in which the validity of judgments, including those in criminal cases in which a defendant's constitutional liberty interests are implicated, turn on a court's qualitative evaluation of evidence. Consider, for example, the concept of plain error, where a court, not a jury, determines whether a legal error committed by a trial court substantially affected the fairness of the proceeding.

¶ 70 The Colorado General Assembly has made a value judgment. It decided that certain types of claims — defamation claims (and claims related to defamation claims) that involve matters of public interest or concern — must meet standards that do not apply to other civil claims.

¶ 71 Therefore, it is the task of the courts to apply that statute as written, not to dilute it because judges think it treats defamation claims, but not other civil claims, unequally or unfairly or even because the statute may be difficult to apply in certain factual situations.

¶ 72 The *L.S.S.* line of cases does not do this. Instead, it applies rules that have entirely different purposes than to address the legislatively stated purposes of the anti-SLAPP statute. *See* § 13-20-1101(1)(b). To be sure, the *L.S.S.* test may lead to more certain results regarding the resolution of special motions to dismiss. But if it does that by sacrificing the purpose underlying the statute, that is not an acceptable tradeoff. In my view, that is exactly what the *L.S.S.* test does.

¶ 73 I do not contend that *Salazar*'s test for when a defamation claim survives an anti-SLAPP challenge is easy to apply in all circumstances. But the fact that it may be difficult to apply in some circumstances is not a warrant for courts to disregard the statute's plain language.

C. The "Matter of Law" Requirement in *L.S.S.*

¶ 74 *L.S.S.* states as follows: "The court does not weigh evidence or resolve conflicting factual claims" but simply "accepts the plaintiff's evidence as true . . . ." *L.S.S.*, ¶ 23 (alteration omitted) (quoting *Baral*, 376 P.3d at 608). I have already addressed why that standard is not faithful to the anti-SLAPP statute. And, as mentioned, it appears that *L.S.S.* imposes a separate requirement that a court evaluate "the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." *Id.* (quoting *Baral*, 376 P.3d at 608).

¶ 75 It is not clear to me what *L.S.S.* means when it speaks of defeating the plaintiff's claim "as a matter of law." To be sure, some defamation claims will fail scrutiny under the anti-SLAPP statute because the claim is not recognized under or is barred by Colorado substantive law. If that is what the *L.S.S.* division intended, then I agree. But if the "matter of law" requirement also applies to factual questions raised in the special motion dismiss, I see no textual or other basis to apply such a standard. If that requirement is merely a restatement of the applicability of the rules governing motions to

dismiss and summary judgment, then I would reject those rules for the reasons articulated above.

II. Conclusion

¶ 76 Because the *L.S.S.* test is not faithful to either the words of the anti-SLAPP statute or its intended purpose, it should be rejected. Instead, the *Salazar* test provides the appropriate vehicle to determine under the anti-SLAPP statute whether a defamation claim is reasonably likely to prevail. If a defamation claim fails under the *L.S.S.* standard, it necessarily fails under the *Salazar* standard. But the converse is not true.

¶ 77 Therefore, I concur in the majority's judgment. But given the split in published decisions of the court of appeals, I respectfully urge the Colorado Supreme Court to address this question and resolve the split in authority.