SUMMARY
October 20, 2022

2022COA123

No. 21CA0853, *LSS v. SAP* — Courts and Court Procedure — Regulation of Actions and Proceedings — Action Involving Exercise of Constitutional Rights — Anti-SLAPP — Special Motion to Dismiss

A division of the court of appeals outlines the framework for considering special motions to dismiss under Colorado's recently enacted anti-SLAPP statute, section 13-20-1101, C.R.S. 2022, expanding on the discussion in another division's recent opinion, *Salazar v. Public Trust Institute*, 2022 COA 109M. As part of that framework, the division concludes that in order to withstand a special motion to dismiss where a plaintiff's defamation claim will require a showing of actual malice at trial, the plaintiff must establish a probability that they will be able to produce clear and convincing evidence of actual malice at trial.

Applying this framework, the division concludes that the trial court properly denied the special motion to dismiss. It therefore affirms the order.

COLORADO COURT OF APPEALS **2022COA123**

Court of Appeals No. 21CA0853
Pitkin County District Court No. 20CV30099
Honorable Christopher G. Seldin, Judge

L.S.S.,

Plaintiff-Appellee,

v.

S.A.P.,

Defendant-Appellant.

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE GOMEZ
Fox and Freyre, JJ., concur

Announced October 20, 2022

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¶ 1 In 2019, the General Assembly enacted a statute to address lawsuits aimed at stifling or punishing the exercise of the First Amendment rights to free speech and to petition the government, commonly known as strategic lawsuits against public participation (SLAPP). This case requires us to outline and apply the framework for considering special motions to dismiss under that anti-SLAPP statute, section 13-20-1101, C.R.S. 2022. In doing so, we expand upon the recent opinion by another division of this court in *Salazar v. Public Trust Institute*, 2022 COA 109M.

¶ 2 In this case, L.S.S. (father) asserted defamation and related claims against S.A.P. (mother) after she reported that he might be sexually abusing their five-year-old child. Mother appeals the trial court's denial of her special motion to dismiss those claims under the anti-SLAPP statute. Applying the framework we outline for considering such motions, we affirm the order and remand the case to the trial court for further proceedings.

I. Background

A. The Parents' Relationship and Separation

¶ 3 Mother and father were in a romantic relationship for nearly ten years. They had a child together and separated two years later.

¶ 4 The separation was contentious, with the parties contesting various issues regarding the child in a domestic proceeding. In the course of that proceeding, mother expressed a desire to move back to her native Australia with the child.

¶ 5 The parties eventually entered into a settlement agreement, under which mother was the primary custodial parent, father had visitation rights, and mother agreed to forgo any attempt to relocate to Australia with the child in exchange for father's payment of $700,000 to help her buy a home in the Aspen area, where they lived. After father initially defaulted on the $700,000 payment, the parties agreed on a payment plan whereby he would pay the funds to mother over a period of several months.

B. The Two Videos

¶ 6 Shortly after making his first payment to mother, father had some difficulty getting the child to go with him for his parenting time. He hadn't seen the child in a month due to an illness, and when he arrived at mother's home the child, then age five, ran under her bed.

¶ 7 Mother recorded a video as father tried to coax the child out from under the bed.[1] In the video, father tells the child several times to come out, but she declines. Eventually, she comes out and jumps onto her bed. As she does so, father lifts the back of her dress and pats her behind. He then tells her to sit down so they can talk. She lies down on the bed, and he says, "When you misbehave, and you have your butt up in the air, someone might give you a spanking, huh." She squeals. He tries to engage her in play with a stuffed animal. She then gets off the bed and walks toward mother, who is standing just outside the door.

¶ 8 A few days later, mother recorded a second video. In it, the child points toward her vagina and says father tickles her there. The child then says, "It's so funny, so, so funny. You should see me." Mother asks, "Oh my goodness, Daddy tickles you there?" The child responds, "Uh huh." Mother asks, "On the front bottom?" and the child responds, "Uh huh."

¶ 9 The next day, mother told her therapist about the child's statements about tickling. Mother said that the child had come to

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[1] The two videos cited by the parties aren't in the record, so we base our descriptions off the detailed accounts in the police report.

her, asking to be tickled and pointing toward her vagina, and that when she responded, "Mommy doesn't tickle you there," the child replied, "Daddy does," prompting mother to grab her phone and record the interaction shown in the video.

C. The Investigations

¶ 10 As a mandatory reporter, the therapist notified the authorities, leading to criminal and child welfare investigations by the Aspen Police Department (APD) and the Pitkin County Department of Human Services (DHS), respectively. During the investigations, mother shared the videos and raised other concerns about father's care of the child. Father denied the allegations and suggested that mother might be coaching the child. A forensic interview with the child didn't disclose any abuse. Both agencies concluded that there was insufficient evidence to pursue the matter further.

D. The Lawsuit

¶ 11 After the agencies concluded their investigations, father filed this lawsuit against mother, asserting claims for defamation (libel/slander), knowingly making a false claim of child abuse, and

extreme and outrageous conduct.[2] The case was assigned to the same judge who had presided over the earlier domestic case.

¶ 12 Mother filed a special motion to dismiss under the anti-SLAPP statute. The trial court held a non-evidentiary hearing, after which it denied the motion. Following the two-step analysis California courts have applied to that state's anti-SLAPP statute, the court first concluded that mother's statements involved matters of public concern and, therefore, fell within the protections of the statute. Then, under the second step, the court determined that, while father's narrative wasn't "terribly persuasive," he had presented enough evidence to proceed with his claims.

¶ 13 Mother appeals the decision. She contends that the trial court correctly resolved the first step but applied the wrong standard and reached the wrong result in the second step. Father disagrees and seeks affirmance under either or both steps. We first set forth the standards for resolving motions under the anti-SLAPP statute and then address each step in turn.

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[2] Father initially brought an abuse of process claim as well, but he later withdrew it, and mother brought counterclaims that the trial court dismissed on father's special motion to dismiss. None of those claims are at issue in this appeal.

II. The Anti-SLAPP Statute

¶ 14 A few decades ago, courts and legislatures began adopting measures to address a growing trend of SLAPP lawsuits. *See* George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938-44, 960 (1992).

¶ 15 Among the earlier measures to address such suits was a framework that our supreme court established in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (*POME*). In *POME*, after an environmental group brought an unsuccessful action challenging a zoning decision in favor of a developer, the developer sued the group and its attorneys, claiming abuse of process and civil conspiracy. *Id.* at 1362-64. After the trial court declined to dismiss the developer's suit, the supreme court accepted jurisdiction and established what came to be known as the *POME* framework. *Id.* at 1362, 1368-69.

¶ 16 Under the *POME* framework, special standards apply to motions to dismiss where the plaintiff's claims are based on prior administrative or judicial activities and the defendant's motion invokes the First Amendment right to petition the government to

redress grievances. *Id.* at 1368-69. Specifically, the motion is treated as one for summary judgment; and to withstand the motion, the plaintiff must show that the defendant's petitioning activities were not immunized from liability under the First Amendment because they (1) were "devoid of reasonable factual support" or "lacked any cognizable basis in law," (2) were brought primarily "to harass the plaintiff or to effectuate some other improper objective," and (3) "had the capacity to adversely affect a legal interest of the plaintiff." *Id.* at 1369. Over time, courts extended this framework to other circumstances involving "matters of public concern." *Boyer v. Health Grades, Inc.*, 2015 CO 40, ¶¶ 10-15.

¶ 17 The General Assembly codified and expanded the *POME* framework with the anti-SLAPP statute. § 13-20-1101. Like the *POME* framework, the statute provides a mechanism to dismiss nonmeritorious lawsuits infringing on First Amendment rights. *See id.* But it also provides additional relief beyond *POME* — for instance, by providing for the early filing and consideration of a special motion to dismiss, an automatic stay of discovery until the motion is decided, the recovery of attorney fees and costs by a defendant who prevails on such a motion, and a right to

immediately appeal an order granting or denying the motion. § 13-20-1101(4)(a), (5)-(7).

¶ 18 The statute allows a person (usually a defendant) to file a special motion to dismiss "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States constitution or the state constitution in connection with a public issue." § 13-20-1101(3)(a). The trial court then "consider[s] the pleadings and supporting and opposing affidavits" to determine whether "the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." § 13-20-1101(3)(a)-(b).

III. Standard of Review and Legal Standards

¶ 19 We review de novo a district court's ruling on a special motion to dismiss. *Salazar*, ¶ 21. And, to the extent that our resolution of this appeal turns on interpretation of the anti-SLAPP statute, our review likewise is de novo. *See id.* at ¶ 14.

¶ 20 Because few cases have applied Colorado's anti-SLAPP statute, and because it closely resembles California's anti-SLAPP statute, we look to California case law for guidance in outlining the two-step process for considering a special motion to dismiss. *See* Cal. Civ.

Proc. § 425.16 (West 2022); *see also People v. Palomo*, 272 P.3d 1106, 1112 (Colo. App. 2011) ("On matters of first impression, we may refer to decisions of other jurisdictions construing and applying similar statutes on the same subject for guidance."); *Stevens v. Mulay*, Civ. A. No. 19-cv-01675-REB-KLM, 2021 WL 1153059, at *2 n.7 (D. Colo. Mar. 26, 2021) (unpublished order) ("[B]ecause Colorado's anti-SLAPP law is relatively new and untested, and given that it tracks California's statute almost exactly, it is appropriate to draw from the more well-established body of authority interpreting the California law.").

¶ 21 In the first step, the court determines whether the defendant has made a threshold showing that the conduct underlying the plaintiff's claim falls within the scope of the anti-SLAPP statute — that is, that the claim arises from an act "in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue." § 13-20-1101(3)(a); *see also Salazar*, ¶ 21; *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016) (under the California anti-SLAPP statute, "the defendant [first] must establish that the challenged claim arises from activity protected by [the statute]").

¶ 22 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." § 13-20-1101(3)(a)-(b). *See* § 13-20-1101(3)(a)-(b); *Salazar*, ¶ 21.

¶ 23 Under the California anti-SLAPP statute, which is substantively identical to the Colorado statute, this 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." *Baral*, 376 P.3d at 608; *see also* Cal. Civ. Proc. § 425.16(b)(1)-(2).[3]

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[3] California's statute requires the plaintiff to show a "probability" of success on the claim, Cal. Civ. Proc. § 425.16(b)(1) (West 2022), whereas Colorado's statute requires a showing of "reasonable likelihood," § 13-20-1101(3)(a), C.R.S. 2022. But courts have used these terms interchangeably, and we agree that they are substantively the same. *See Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 22-23 (concluding that "'reasonable likelihood' in the anti-SLAPP statute is synonymous with 'reasonable probability'"); *Krutsinger v. People*, 219 P.3d 1054, 1061 (Colo. 2009) (using "reasonable probability" and "reasonable likelihood" interchangeably); *People v. Casias*, 2012 COA 117, ¶ 63 (recognizing that "reasonable likelihood" and "reasonable probability" are "substantively identical" (quoting *State v. Knight*, 734 P.2d 913, 919-20 (Utah 1987))).

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." *Baral*, 376 P.3d at 608.

¶ 24 We adopt this standard as consistent with the terms of Colorado's anti-SLAPP statute.

IV. Discussion

¶ 25 We now consider the trial court's application of this two-step process to mother's special motion to dismiss.

A. Step One: Protected Activity

¶ 26 We agree with the trial court's determination that mother satisfied the first step by establishing that father's claims arise from acts "in furtherance of [her] right of petition or free speech . . . in connection with a public issue." § 13-20-1101(3)(a).

¶ 27 The statute expressly provides that an "'[a]ct in furtherance of a person's right of petition or free speech . . . in connection with a public issue' includes" four enumerated actions, the first of which is "[a]ny written or oral statement or writing made before a legislative,

executive, or judicial proceeding or any other official proceeding authorized by law." § 13-20-1101(2)(a)(I).

¶ 28 Father does not dispute that this provision could encompass mother's statements to the investigating authorities and to her therapist. We therefore assume, without deciding, that it could. Indeed, California courts have interpreted identical language in that state's anti-SLAPP statute to encompass "[c]ommunications that are preparatory to or in anticipation of commencing official proceedings," including "statements . . . designed to prompt action by law enforcement or child welfare agencies" and "reports of child abuse to persons who are bound by law to investigate the report or to transmit the report to the authorities." *Siam v. Kizilbash*, 31 Cal. Rptr. 3d 368, 373-74 (Ct. App. 2005); *see also Dwight R. v. Christy B.*, 151 Cal. Rptr. 3d 406, 415-16 (Ct. App. 2013) (statements made during a child protective services investigation were protected activity); *Chabak v. Monroy*, 65 Cal. Rptr. 3d 641, 647-48 (Ct. App. 2007) (statements made during a police investigation were protected activity); Cal. Civ. Proc. § 425.16(e)(1).

¶ 29 Father's only argument under step one is that mother's statements were false reports, which cannot constitute protected

activity. He relies on *Lefebvre v. Lefebvre*, which held that the filing of a false police report didn't constitute protected activity under California's anti-SLAPP statute "[b]ecause [the] act of making a false police report was not an act in furtherance of [the plaintiff's] constitutional right of petition or free speech." 131 Cal. Rptr. 3d 171, 175 (Ct. App. 2011) (emphasis omitted).

¶ 30 But, critically, the defendant in *Lefebvre* admitted that she had filed an illegal, false police report. *Id.* at 176. California courts have held that "where . . . the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." *Flatley v. Mauro*, 139 P.3d 2, 15 (Cal. 2006). But the courts have also held that "when allegations of making false reports are controverted, they are insufficient to render that alleged conduct unlawful as a matter of law and outside the protection of [the statute]." *Kenne v. Stennis*, 179 Cal. Rptr. 3d 198, 209 (Ct. App. 2014) (citing cases); *see also Dwight R.*, 151 Cal. Rptr. 3d at 416-17 (allegedly false report accusing the plaintiff of sexually abusing a child was protected activity, as the falsity of the report

was in dispute); *Stevens*, 2021 WL 1153059, at *3 (allegedly false allegations of criminal conduct fall within Colorado's anti-SLAPP statute if "the purported falsity of the charges is contested").[4]

¶ 31 We apply the same standard here. Certainly, if a defendant were precluded from satisfying step one anytime a plaintiff alleged that the defendant's otherwise-protected statements were false, it would undercut the purposes of the anti-SLAPP statute and would allow a plaintiff to evade the statute merely by alleging falsity.

¶ 32 In this case, the veracity of mother's report is in dispute. Although father claims that mother fabricated her allegations and coached the child, mother disputes those claims. And while the investigating authorities didn't find enough evidence to pursue criminal charges or other proceedings against father, there is no conclusive evidence establishing that mother made false reports. Therefore, we cannot say as a matter of law that her conduct was not protected, and we agree with the trial court that she satisfied the first step.

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[4] *Gerbosi v. Gaims, Weil, West & Epstein, LLP*, cited by father, doesn't hold otherwise. 122 Cal. Rptr. 3d 73 (Ct. App. 2011). There, the defendant's alleged conduct was undisputedly criminal; therefore, the anti-SLAPP statute didn't apply. *Id.* at 81-82.

B. Step Two: Likelihood of Prevailing

¶ 33 Turning to step two, we must consider whether father established a reasonable likelihood of success on his claims. We agree with the trial court's conclusion that he has.

¶ 34 We first address father's defamation claim and then address his other two claims.

1. Defamation Claim

a. General Standards for Proving Defamation

¶ 35 Defamation is a communication that holds someone up to contempt or ridicule, causing them to incur injury or damage. *SG Ints. I, Ltd. v. Kolbenschlag*, 2019 COA 115, ¶ 19. The elements of a defamation claim are "(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." *Id.* at ¶ 20 (quoting *McIntyre v. Jones*, 194 P.3d 519, 523-24 (Colo. App. 2008)).

¶ 36 If a statement concerns a public figure or a matter of public concern, it is subject to heightened standards. *Zueger v. Goss*,

2014 COA 61, ¶ 25. This includes three modifications to the plaintiff's burden of proof:

1. The plaintiff must prove the statement's falsity by clear and convincing evidence, rather than by a mere preponderance.
2. The plaintiff must prove by clear and convincing evidence that the speaker published the statements with actual malice.
3. The plaintiff must establish actual damages, even if the statement is defamatory per se.

Id.; *Lawson v. Stow*, 2014 COA 26, ¶ 18.

¶ 37 The parties agree that this case involves a matter of public concern. Although what constitutes a matter of public concern is a legal question that must be determined on a case-by-case basis, "[g]enerally, a matter is of public concern whenever 'it embraces an issue about which information is needed or is appropriate,' or when 'the public may reasonably be expected to have a legitimate interest in what is being published.'" *Lawson*, ¶ 18 (quoting *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo. App. 1996)).

¶ 38 Because father doesn't dispute that mother's statements involved matters of public concern, we assume, without deciding, that they did. At any rate, a division of this court has held that a parent's statements reporting alleged child abuse to governmental authorities related to matters of public concern. *Id.* at ¶¶ 23-25; *see also* § 19-3-302(1), C.R.S. 2022 ("The general assembly declares that the complete reporting of child abuse is a matter of public concern . . . ."). And, by statute, a person who reports or participates in the investigation of possible child abuse is presumed to act in good faith and is immune from liability unless a court determines that their actions were willful, wanton, and malicious. § 19-3-309, C.R.S. 2022; *Lawson*, ¶ 23; *Credit Serv. Co. v. Dauwe*, 134 P.3d 444, 448 (Colo. App. 2005).

¶ 39 Because the heightened standards apply, to prevail on his defamation claim father must, among other things, establish actual malice by clear and convincing evidence. Clear and convincing evidence is "evidence that is highly probable and free from serious or substantial doubt." *Destination Maternity v. Burren*, 2020 CO 41, ¶ 10 (quoting *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995)).

¶ 40 A statement is published with actual malice if it is published with actual knowledge that it was false or with reckless disregard for whether it was true. *Lawson*, ¶ 18. A plaintiff can establish actual malice if the defendant "entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity." *Fry v. Lee*, 2013 COA 100, ¶ 21. "[I]ll will and bad motive toward the plaintiff are not elements of actual malice." *Fink v. Combined Commc'ns Corp.*, 679 P.2d 1108, 1111 (Colo. App. 1984). Nonetheless, evidence of the defendant's "anger and hostility toward the plaintiff" may serve as circumstantial evidence of actual malice "to the extent that it reflects on the subjective attitude of the publisher." *Balla v. Hall*, 273 Cal. Rptr. 3d 695, 722 (Ct. App. 2021) (quoting *Reader's Dig. Ass'n v. Superior Ct.*, 690 P.2d 610, 610, 618 (Cal. 1984)); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) ("[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." (citations omitted)); *Thompson v. Pub. Serv. Co. of Colo.*, 800 P.2d 1299, 1307 (Colo. 1990) (evidence of the defendant's actions

displaying allegedly "malicious motives with regard to [the plaintiff]" helped to create a triable issue on actual malice).

b. Standards Applicable to a Special Motion to Dismiss

¶ 41 But what sort of showing is required in the context of a special motion to dismiss under the anti-SLAPP statute? We conclude that in order to withstand a special motion to dismiss where a showing of actual malice will be required at trial, a plaintiff must establish a probability that they will be able to produce clear and convincing evidence of actual malice at trial.

¶ 42 This rule is consistent with California courts' application of their state's anti-SLAPP statute. Ordinarily, California courts only require a plaintiff to meet a "minimal merit" standard to survive an anti-SLAPP motion — that is, the plaintiff only needs to state a claim and substantiate it with a prima facie showing of evidence that would support a favorable judgment. *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 718 (Cal. 2019). But the courts "take into consideration the applicable burden of proof in determining whether the plaintiff has established a probability of prevailing." *Annette F. v. Sharon S.*, 15 Cal. Rptr. 3d 100, 114 (Ct. App. 2004). Thus, if a plaintiff is pursuing a defamation claim that will

ultimately require proof of actual malice by clear and convincing evidence, the courts have held that, to survive an anti-SLAPP motion, the plaintiff must establish a probability that they will be able to produce clear and convincing evidence of actual malice at trial. *See Edward v. Ellis*, 287 Cal. Rptr. 3d 467, 476 (Ct. App. 2021); *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 193 (Ct. App. 2016).

¶ 43 The rule we espouse is also consistent with Colorado cases applying the clear and convincing evidence standard at the summary judgment stage. *See DiLeo v. Koltnow*, 200 Colo. 119, 125-26, 613 P.2d 318, 323 (1980) (concluding that the "convincing clarity" standard of proof, which is interchangeable with the "clear and convincing evidence" standard, "applies equally at the summary judgment stage of judicial proceedings," and that summary judgment was appropriate on a defamation claim where the plaintiff did "not successfully show[] by convincing clarity that the defendants published the [statements] with actual malice"); *accord Lockett v. Garrett*, 1 P.3d 206, 211 (Colo. App. 1999); *Russell v. McMillen*, 685 P.2d 255, 259 (Colo. App. 1984).

¶ 44 Finally, this rule appropriately balances the competing interests at stake. The General Assembly, in enacting the anti-SLAPP statute, expressed a purpose of safeguarding the rights "to petition, speak freely, associate freely, and otherwise participate in government" from the chilling effect of "abuse of the judicial process." § 13-20-1101(1). Yet at the same time, it also expressed a concern for "protect[ing] the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b). The statute accordingly "seeks to balance both parties' constitutionally protected interest in petitioning the government, be it by participating in the legislative process, invoking the government's administrative or executive authority (such as by reporting suspected unlawful activity), or instigating litigation to protect or vindicate one's interests." *Salazar*, ¶ 11. Likewise, Colorado courts have recognized that "prompt resolution of defamation actions . . . is appropriate" "because the threat of protracted litigation could have a chilling effect on the constitutionally protected right of free speech," *Fry*, ¶ 24, but have also held that where there is sufficient evidence to support a finding of actual malice, the question should

be resolved by a jury, *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1346 (Colo. 1988).

c. Application of the Standards to this Case

¶ 45 As an initial matter, we agree with mother's contention that the trial court applied the wrong standard on the issue of actual malice. The trial court relied on language in *Lawson* indicating that where a statement relates to a matter of public concern, the plaintiff must satisfy heightened burdens of proof, including that the plaintiff (1) "must prove the falsity of the statement by clear and convincing evidence, rather than by a mere preponderance," and (2) "must prove that the speaker published the statement with actual malice." *Lawson*, ¶ 18. The trial court interpreted this to mean that the clear and convincing evidence standard applies only to the showing of falsity and not to the showing of actual malice. But the division in *Lawson* was just explaining the differences in the standards when a matter of public concern is involved, one being that the clear and convincing evidence standard rather than the preponderance of the evidence standard applies to the issue of falsity and another being that actual malice must be established. The division didn't, in doing so, signify that a lower burden of proof

applies to the issue of actual malice. Rather, as various cases before and after *Lawson* confirm, where actual malice must be shown, the applicable burden is clear and convincing evidence. *See, e.g.*, *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1108-09 (Colo. 1982); *Zueger*, ¶ 25; *Reddick v. Craig*, 719 P.2d 340, 342 (Colo. App. 1985).

¶ 46 However, we disagree with mother's contention that the trial court's misapplication of this standard led to an erroneous result. Notwithstanding its consideration of a different burden of proof, the court correctly recognized that, while father's evidence wasn't "terribly persuasive," it wasn't the court's role to weigh that evidence or evaluate the witnesses' credibility. Instead, the court drew all inferences from the evidence in father's favor and determined that he had provided sufficient evidence of actual malice to withstand the special motion to dismiss.

¶ 47 We agree. In affidavits submitted to the trial court, father alleged that he never abused the child and that mother fabricated the allegations and coached the child to say false things. He also presented the following evidence to show actual malice:

- *Mother's intent to move to Australia*: Father alleged that mother had repeatedly expressed a desire to move to Australia with the child, both in the earlier domestic case and after the parties had settled that case.
- *Father's payments to mother*: Mother made her reports soon after father made his first installment on the $700,000. He alleged that mother was upset by his earlier default on the lump sum payment, that she made her reports only after he started making payments under their new agreement, and that the funds were supposed to go toward mother's purchase of a home in Aspen but she'd resisted making such a purchase.
- *Mother's alienation of the child from father*: Father alleged that when he resumed visits after his illness, mother started alienating the child from him, discouraging the child from staying overnight with him, and offering to pick up the child early.
- *Mother's journal*: A few months earlier, mother, at the advice of her attorney, had started a journal recording her concerns with father's care of the child. She shared

details from that journal during the investigation. Father argued that mother was creating evidence against him and selectively sharing it with authorities.

- *"Under the bed" video*: Father argued that mother didn't help get the child out from under the bed but stood back and recorded the video in an effort to create evidence to support her cause.
- *"Ticklish video"*: Father argued that mother didn't capture the entire conversation with the child on the video, that she asked the child leading questions, and that she may have coached the child to make the statements.
- *Mother talking with the child about touching*: Mother indicated during the investigations that she was having the child draw body parts and label them to discuss "good" and "bad" touching. Father argued that the timing of those discussions, "in and around the time of the allegations," was "highly suspect."
- *The parents' conversation*: In a follow-up conversation between mother and father, which mother recorded, she admitted that she'd never seen him acting like a "sexual

deviant" and that she "d[id]n't know" but "wouldn't think" that he was "capable of something" like the allegations lodged against him.

- *Mother's continued complaints*: Father alleges that as the investigations failed to turn up any evidence of abuse, mother provided even more false evidence to try to turn things around, like reporting that the child said he blew "raspberries" on her vagina and massaged her bottom, that he told the child secrets and "predators use secrets to manipulate kids," and that he left the child naked and unsupervised in his home.
- *The findings from the investigations*: APD and DHS both closed their investigations after finding nothing to substantiate the allegations of abuse.

¶ 48 Although we agree with the trial court that father's showing isn't particularly compelling, we, too, cannot weigh the evidence or make credibility determinations. Nor can we conclude, as a matter of law, that a reasonable juror presented with such evidence would not be able to find by clear and convincing evidence that mother knew at least one of her statements was false.

¶ 49 We acknowledge mother's argument that her own evidence indicates she acted as any reasonable parent would and had no reason to doubt the child's statements. But we cannot weigh that evidence at this juncture, and father's contrary evidence creates a factual dispute on those issues.

¶ 50 We also recognize mother's and the amici's concerns that allowing this case to move forward could embolden abusers to further victimize others through misuse of the judicial process and could discourage victims and their families from seeking help. But, at the same time, we must acknowledge the potential for false accusations and the right that someone who is falsely accused has to recover for the harm thereby caused. As another division of this court recently explained, "[a] mere allegation of sexual misconduct can be devastating to the accused," and "[a] determination that a person engaged in non-consensual sexual contact can potentially destroy the accused's educational, employment, and other future prospects." *Doe v. Univ. of Denver*, 2022 COA 57, ¶ 66. Those risks are even greater with allegations of sexual assault on a child. Indeed, investigations like the ones undertaken in this case could

lead to the termination of parental rights and an indeterminate sentence of several years to life in prison.

¶ 51 Such concerns explain why the privilege for a person reporting or participating in the investigation of possible child abuse is a qualified one, which disappears if the person's actions are found to be willful, wanton, and malicious. *See* § 19-3-309; *Lawson*, ¶ 23; *Credit Serv. Co.*, 134 P.3d at 448. As a division of this court explained in addressing a similar qualified privilege for statements to law enforcement officers, "a qualified privilege 'is sufficiently protective of [those] wishing to report events concerning crime and balances society's interest in detecting and prosecuting crime with a defendant's interest not to be falsely accused.'" *Burke v. Greene*, 963 P.2d 1119, 1122 (Colo. App. 1998) (quoting *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992)).

¶ 52 And when faced with similar competing narratives, courts in Colorado and elsewhere have routinely held that a plaintiff's allegations that the defendant made false accusations are sufficient to create a factual issue as to actual malice. *See, e.g.*, *Thompson*, 800 P.2d at 1307 (the plaintiff created a triable issue on actual malice supporting his defamation claim by denying the defendant's

accusations of sexual harassment and presenting contrary evidence); *Stevens*, 2021 WL 1153059, at *3 (the plaintiff presented sufficient evidence to survive a special motion to dismiss his malicious prosecution claim under Colorado's anti-SLAPP statute where he offered evidence casting doubt on the defendant's accusation that he assaulted her); *McDonald v. Wise*, 769 F.3d 1202, 1220 (10th Cir. 2014) (the plaintiff sufficiently pleaded actual malice to support his defamation claim by alleging facts that "raise the reasonable inference that [defendant] did not believe he had sexually harassed her and therefore that she knew she was making a false statement, or at a minimum had reckless disregard for the truth"); *Chastain v. Hodgdon*, 202 F. Supp. 3d 1216, 1221-22 (D. Kan. 2016) (the plaintiff sufficiently pleaded actual malice to support his defamation claim by alleging facts suggesting that the defendant falsely accused him of sexual assault and had a motive to harm his reputation; "[i]f defendant knew that the events were false, and nonetheless wrote the detailed narrative describing exactly how plaintiff sexually assaulted or attempted to rape her when it actually never occurred, it is axiomatic that she wrote the narrative with actual malice, or actual knowledge that it was false"); *Linetsky*

v. City of Solon, No. 16-CV-52, 2016 WL 6893276, at *12 (N.D. Ohio Nov. 23, 2016) (the plaintiff created a triable issue on malice to support his malicious prosecution claim by presenting evidence that his ex-wife encouraged their child to lodge false accusations of sexual assault against him; "[f]alse sexual assault accusations suggest malice"); *Siam*, 31 Cal. Rptr. 3d at 383-84 (in response to an anti-SLAPP motion on defamation and related claims, the plaintiff presented "evidence . . . sufficient to permit a jury to find that [the] defendant . . . made knowingly false reports of child abuse" where he offered evidence disputing the accusations and showing the defendant's antagonistic behavior toward him).

2. Other Claims

¶ 53 The parties agree that father's claims for knowingly making a false claim of child abuse and for extreme and outrageous conduct are subject to the same constitutional standards as the defamation claim and, therefore, are ancillary to that claim. *See Fry*, ¶¶ 59-62; *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1124-25 (Colo. App. 1992). And mother doesn't raise any separate reasons why the other two claims cannot proceed. Accordingly, because father's

defamation claim survives the special motion to dismiss, so, too, do his other two claims.

V. Conclusion

¶ 54 The order is affirmed, and the case is remanded to the trial court for further proceedings on father's claims.

JUDGE FOX and JUDGE FREYRE concur.