COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 On Appeal from the Denver District Court, Judge Ross B.H. Buchanon 2021CV33715	DATE FILED: December 9, 2022 7:52 PM FILING ID: 46CAFC49726ED CASE NUMBER: 2022CA774
Plaintiff-Appellant: CHAD BURMEISTER v. Defendants-Appellees: KYLE CLARK and TEGNA, INC.	***COURT USE ONLY***
Attorneys for Plaintiff-Appellant Burmeister Dan Ernst, Esq., Colo. Bar No. 53438 ERNST LEGAL GROUP, LLC 4155 E. Jewell Ave., #500 Denver, CO 80222 720-798-3667 dan@ernstlegalgroup.com R. Daniel Scheid, Esq., Colo. Bar No. 11536 SCHEID CLEVELAND, LLC 501 S. Cherry Street, Suite 1100 Denver, Colorado 80246 Tel.: (303) 331-7970 Email: dan@cololawyers.com Steven S. Biss, Virginia State Bar # 32972 300 West Main Street, Suite 102 Charlottesville, Virginia 22903 Tel: (804) 501-8272 Email: stevenbiss@earthlink.net	Court of Appeals Number: 2022CA774
REPLY BRIEF OF APPELLANT	

CERTIFICATE OF COMPLIANCE

In accordance with Colorado Appellate Rule ("C.A.R.") 28(a)(1), the undersigned hereby certifies that this Reply Brief of Appellant complies with all requirements of C.A.R. 28 and C.A.R. 32. Appellant used Microsoft Office Word to prepare this Reply Brief. This Reply Brief uses a proportionally spaced face (Times New Roman, 14-Point). The total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 4,134.

By: */s/ Dan Ernst*
ERNST LEGAL GROUP, LLC
Dan Ernst, Esq., Colo Bar No. 53438
4155 E. Jewell Ave., #500
Denver, CO 80222
720-798-3667
dan@ernstlegalgroup.com

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

		Page No.
Table of Authorities ……...		iv
I.	DEFENDANTS PUBLISHED THE MATERIALLY FALSE STATEMENT THAT BURMEISTER PARTICIPATED IN A VIOLENT RIOT WITHIN THE UNITED STATE CAPITOL	1
II.	PLAINTIFF ALLEGED FACTS SUFFICIENT TO MAKE A PRIMA FACIE SHOWING OF ACTUAL MALICE	11
III.	CONCLUSION	16

TABLE OF AUTHORITIES

	Page No.
Anderson v. Cramlet, 789 F.2d 840 (10th Cir.1986)…….	9
Bose Corp. v. Consumers Union of the United States, Inc., 692 F.2d 189 (1st Cir. 1982) ……..……	13
Brokers' Choice of Am. v. NBC Universal, Inc., 861 F.3d 1081 (10th Cir. 2017) …….……..……	9
Bustos v. A&E Networks, 646 F.3d 762 (10th Cir. 2011) ……..	5, 6, 7, 9
Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1361 (Colo. 1983) …….	2, 11, 12
Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163 (2nd Cir. 2000) ……	13
Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921 (2nd Cir. 1987) …….	13
Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986) …….	14
Fink v. Combined Communications Corp., 679 P.2d 1108 (Colo.App. 1984)	14
Fry v. Lee, 2103 COA 100 ……	10
Garrison v. Louisiana, 379 U.S. 64 (1964)	13
Gomba v. McLaughlin, 180 Colo. 232 (1972) ……	3, 4, 5, 7
Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970)	13
Harte-Hanks Communications, Inc. v. Connaughton 491 U.S. 657 (1989) …….	16

Herbert v. Lando, 441 U.S. 153 (1979) …….. 11

Kuhn v. Tribune-Republican Publishing Co.,
637 P.2d 315 (Colo. 1981) ……...… 2, 11

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C.Cir.1984) …… 5, 7

Linn v. United Plant Guard Workers,
383 U.S. 53 (1966) 13

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)…… 5

Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983) …… 9

Schwartz v. Am. Coll. of Emergency Physicians,
215 F.3d 1140 (10th Cir. 2000) ……. 9

REPLY

COMES NOW Plaintiff-Appellant Chad Burmeister ("Burmeister"), by and through his legal counsel, to submit his Reply Brief in response to the arguments of the Answer Brief of Defendants-Appellees Kyle Clark and Tegna, Inc. ("Defendants") and in opposition to the attorneys fees requested therein, and states as follows:

I. DEFENDANTS PUBLISHED THE MATERIALLY FALSE STATEMENT THAT BURMEISTER PARTICIPATED IN A VIOLENT RIOT WITHIN THE UNITED STATE CAPITOL

Defendants held out Burmeister as a counter-example to serve as a rejoinder to Colorado State Representative Baisley's claim that the violent, deadly assault on the United States Capitol was not the work of supporters of Donald Trump, but rather that it was Antifa who rioted in the Capitol.

> **State lawmaker says Antifa rioted at Capitol; Coloradan's social media post shows otherwise**
>
> Republican Rep. Mark Baisley points to Antifa without evidence after the insurrection at the Capitol, as a Coloradan who claimed to storm the building heads home.

To demonstrate the factual inaccuracy of Baisley's contention, Defendants showed their audience Trump supporter Chad Burmeister, "who claimed to storm the building". Defendants thereby invited the inference that Burmeister admits to

being a participant in the violent, deadly assault on the United States Capitol on January 6, 2021. This inference is false. Plaintiff did not participate in the riot, he participated in the peaceful march. A Defendant can be held liable for the false and derogatory inference his statements invite. *See Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351, 1362 (Colo. 1983) (citing *Kuhn v. Tribune-Republican Publishing Co*., 637 P.2d 315, 319 (Colo. 1981).

The Court below concludes that Defendant's use of the phrase, 'Coloradan who claimed to storm the building' to refer to Burmeister in this context, "would not impress upon an average reader that Plaintiff had in fact entered the Capitol building." CF 244. This is because, according to the Court below, the word 'claimed' means asserting something "typically without providing any evidence or proof." *Id.* (quoting Merriam-Webster's Dictionary). Therefore, "[t]he court finds that the statement that Plaintiff 'claimed' to have 'stormed the building,' as commonly understood, would not imply that there was evidence that he did, in fact, enter the building." *Id.* The Court below is in error. The assertion that Burmeister admits, against interest, to having stormed the building would commonly be taken as evidence that he did so.

But, even further, in the context of the purpose of the publication to serve as a rejoinder to Mr. Baisley's contention that Antifa rather than Trump supporters were the ones responsible for the violent and deadly attack, Defendants' statement

that Burmeister "claimed to storm the building" implies that he participated in the riot at the Capitol. *See* CF 7, ¶12 ("Viewed in context and as a whole, the defamatory gist and implication of Clark and Tenga's Statements is that Burmeister was part of the 'insurrectionist mob' that stormed the United States Capitol on January 6, 2021."). This implication – that Burmeister participated in the riot in the Capitol – is false, and each of the cases cited in Defendants' Answer support the conclusion that it is *materially* false.

In *Gomba v. McLaughlin*, 180 Colo. 232 (1972), Plaintiff alleged that the statement that he assaulted an elderly man in Cheyenne was false. As it turns out, Plaintiff had assaulted an elderly man *from* Cheyenne while at a dog show near Brighton. The Court held that the "odium associated with the alleged act is equally [] despicable whether the assault occurred in Cheyenne or near Brighton. Geographical discrepancy alone is immaterial when the proper legal test is applied to determine the truth as it relates to the alleged defamatory statement." *Id.* at 235. The Court held that the publication was not *materially* false and thus could not support a defamation claim; and provided the following guidance to test for materiality:

> The question, a factual one, is whether there is a substantial difference between the allegedly libelous statement and the truth; or stated differently whether the statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter.

Id. at 236.

In our case, Defendants' statement is that Burmeister participated in the violent riot in the Capitol. The literal truth of the matter is that he did not participate in the violent riot in the Capitol, but that he participated in the peaceful march to the Capitol. The Court below erred when it determined that, as a matter of law, the statement "Burmeister participated in the riot in the Capitol" would not produce a different effect upon the reader than the literal truth that "Burmeister participated in the peaceful march to the Capitol."

Defendants' Answer cites *Gomba* for the new rule it announced:

> Common sense dictates a relaxation of the strictness of the old rule, and we now formalize the rule which should be followed in Colorado: A defendant asserting truth as a defense in a libel action is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true.

Id. at 236; *see also* C.J.I.-Civ. 22:13 (2022). In *Gomba*, the gist of the accusation was that Plaintiff assaulted an elderly man. It is evident, *on its face*, that the "odium" or "sting" of that accusation is not changed whether the assault happened in Cheyenne or Brighton. In Burmeister's case, it's not *prima facie* evident that it is immaterial whether he participated in the violent riot, as Defendants imply, or whether he expressed his sympathy for the "Stop the Steal" movement by participating in the peaceful march and posting his political opinions online.

Therefore, the Answer is incorrect in asserting that the rule announced in *Gomba* applies here.

The Answer also cites *Bustos v. A&E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) in support of Defendants' position that its statement was not *materially* false. The more complete quote cited in the Answer is as follows:

> Under Colorado law, much as elsewhere, it is not enough for the plaintiff to show that the defendant got some innocuous detail wrong; the plaintiff must show that the challenged defamatory statement is not just false but material. *See Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337, 338–39 (1972). A report that the defendant committed 35 burglaries when he actually committed 34 isn't enough to warrant relief. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 n. 6 (D.C.Cir.1984), *overruled on other grounds*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Neither is a report that mistakenly says that the plaintiff stabbed a man *in* Cheyenne, Wyoming when he really stabbed a man *from* Cheyenne, Wyoming. *Gomba*, 504 P.2d at 338–39. Unless a statement contains a *material* falsehood it simply is not actionable. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." (internal quotation omitted)).

But, Burmeister alleges that the false statement leveled against him was that he participated in the *riot at* the Capitol when what he did was participate in the *march to* the Capitol. This is not analogous to the circumstances cited above, where a man stabbed a man *from* Wyoming rather than *in* Wyoming, or committed 34 burglaries rather than 35. It is not even the case that Burmeister participated in a

riot somewhere other than the Capitol. He did not riot or commit any violent action anywhere, and there is no allegation by Defendants that he did.

Furthermore, Judge Gorsuch in the *Bustos* opinion explicitly rejects the interpretation of the phrase "comparative harm" that Defendants and the Court below seem to be using when they argue that Defendants' statements are not 'materially false' because Plaintiff's own posts (made prior to Defendants' broadcast) had already damaged his reputation. *See* Answer p. 23, quoting *Bustos* at 765 ("a misstatement is not actionable if the comparative harm to the plaintiff's reputation is real but only modest."); *see also* Trial Court's Order at CF 244 - 246 ("Under these circumstances, and considering the ordinary meaning of the terms used by Defendants, the court finds that the comparative harm of any defamatory implications that could have potentially stemmed from Defendants' statements that Plaintiff 'claimed' to have or was 'bragging' or 'boasting' about his participation in the events of January 6th is minimal, if not non-existent. … Thus, the court finds it is clear that any reputational damage incurred by Plaintiff was primarily caused by his own decision to publicly post a photograph and caption which average members of the public understood indicated that he was proud of either being, or being with, the '[f]irst guy to storm the capital [sic] today.').

Judge Gorsuch, in *Bustos*, rejects such an 'incremental harm analysis' because:

> Taken to its logical conclusion, moreover, incremental harm analysis suggests that individuals with really bad reputations in one area may be "libel proof" in all areas, free game for the publication of even the most outrageous and damaging lies. Call Benedict Arnold whatever you like; his public reputation is already so soured by his treason that no incremental harm could be done to it. *See id.* [*Liberty Lobby*, 746 F.2d] at 1569 (calling the libel-proof plaintiff a "bad idea").

Bustos, at 766.

By contrast, the 'material falsehood' analysis Judge Gorsuch says we take in Colorado "focuses judicial attention on the comparatively narrow question whether the *particular* challenged statement is true or false on its *own terms*—a task that falls well within the traditional (if human and imperfect) truth-finding function of juries and judges." *Id.* (*citing* RST § 581A, cmt. f; *Liberty Lobby,* 746 F.2d at 1568 n. 6.[*]). That is to say, in determining whether a statement is 'materially false' what should be compared is the harm done by the statement actually made by the Defendant with the harm that would have been done had Defendant stated the precise truth. For example, to determine whether the challenged statement in *Gomba* is 'materially' false, we compare the harm done by Defendant's having published the statement "Mr. Gomba stabbed a man in Cheyenne" with the harm that would have been done had Defendant stated that "Mr. Gomba stabbed a man from Cheyenne"; and we compare the reputational damage caused by Defendant's publishing that "Plaintiff committed 35 burglaries" with the reputational damage that would have been caused had Defendant published that "Plaintiff committed 34

burglaries." This analysis for determining material falsity is different from the analysis the Court below used when it reasoned that Plaintiff's prior postings caused him such reputational damage that "any defamatory implications that could have potentially stemmed from Defendants' statements … is minimal, if not non-existent." CF 246.

Incremental harm analysis cannot be used under Colorado law to determine whether a false statement is not material. But in any case, the facts alleged in Plaintiff's complaint establish that a great deal more harm resulted from Defendants' broadcast and publication to its vast viewership and nearly 500,000 social-media followers as compared to Plaintiff's own posting to his few followers (or Gagladla's posting to its roughly 6,500 followers). *See e.g.*, CF 8, ¶ 14, listing virulent replies to @KyleClark's twitter account; CF 9, ¶ 15, listing linked-in posts of people who heard and viewed Tegna's publication; CF 9, ¶ 16, listing posts that 'doxed' Plaintiff's home address and work number by people responding to Defendants' publication (*e.g.,* "Replying to @KyleClark Call him at work and let him know what you think of his "storming". 800-933-0886 (#3 is his direct line) 8:24 PM · Jan 7, 2021") that resulted in "personal threats on the company voicemail, website, and chat … [including] callers threatened Burmeister's life and hoped he would be sodomized in jail. One caller stated that a "hit" had been put out on Burmeister" (*see* CF 12, ¶ 20); and *see also* CF 11, ¶ 18, regarding the

cancellation of Plaintiff's award by Forbes resulting from Defendants' publications.

The Court below erred in making a determination that all these damages, alleged to be causally related to Defendants' publications, were either minimal or caused by Plaintiff's own publication. Were such a determination of causation appropriate to decide whether Defendants' publication was a "material" falsehood, in any event, such a determination would be premature at this stage of the proceedings. The Court in *Bustos*, at 767 provides the following further relevant guidance:

> Unsurprisingly, deciding the materiality of a falsehood often requires a jury. Whether a particular misstatement is likely to injure the plaintiff's reputation in the mind of a reasonable member of the community is often best decided by reasonable members of the community. But like nearly any other element of a tort this one is amenable to resolution at summary judgment when, viewing the facts in the light most favorable to the non-movant, the answer is beyond cavil. *See Anderson v. Cramlet*, 789 F.2d 840, 842–43 (10th Cir.1986).

Defendants' Answer also cites *Brokers' Choice of Am. Inc. v. NBC Universal, Inc*., 861 F.3d 1081 (10th Cir. 2017) in support of its conclusion that the alleged falsity of Defendants' statement are not "material". But the examples of immaterial falsity provided in *Brokers' Choice* are also clearly distinguishable from our case:

> For example, in *Bustos*, we held that reference to a prisoner as a "member" rather than an "affiliate" of a gang was not a material

> falsehood. 646 F.3d at 767. In *Rinsley*, we held publishing that a child patient's parents had sued the plaintiff doctor when, in fact, they only consulted counsel about filing suit was an "inaccuracy" that "was too minor to be actionable." 700 F.2d at 1308. And in *Schwartz*, we held that a "technically inaccurate" statement that the plaintiff was "being sued for stock fraud" was nonetheless substantially true when the plaintiff was actually "being sued for making deceptive statements made relating to stock transactions." 215 F.3d at 1146-47.

Id., at 1107.

In Plaintiff's case, the false statement was that Plaintiff participated in a violent riot at the Capitol. The truth is he participated in a peaceful march and posted expressions of his political opinions. The difference in those actions are not so insignificant and trivial as to be "immaterial" as a matter of law.

The Answer also cites *Fry v. Lee*, 2103 COA 100 in support of its position. The relevant paragraphs cited to in the Answer actually support Plaintiff's position. Paragraph 23 states that, "In determining whether a challenged statement is substantially true, the inquiry should focus on how an average reader would read the statement." As discussed above, the average reader would read Defendants' publication as putting forward the claim that Burmeister participated in a violent riot at the Capitol. "The test is whether the challenged statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter." *Id.* The literal truth is that Burmeister participated in a peaceful march, not a violent riot. These two actions, participating in a peaceful

march and a violent riot, cannot as a matter of law be properly held to have the same effect upon a reasonable reader.

II. PLAINTIFF ALLEGED FACTS SUFFICIENT TO MAKE A PRIMA FACIE SHOWING OF ACTUAL MALICE

In *Burns v. McGraw-Hill, supra*, the Court held that:

> When one uses language which invites an inference that an individual has acted significantly at variance with community standards, and one fails to provide a factual basis for the derogatory characterization, then one "knowingly risks the likelihood that the statements and inferences are false and thereby forfeits First Amendment protections."

Id. at 1362 (quoting *Kuhn*, 637 P.2d at 319).

In *Herbert v. Lando*, 441 U.S. 153 (1979), the U.S. Supreme Court held that:

> The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration.

Id. at 164 n. 12 (emphasis added).

Plaintiff claims that Defendants both harbored ill will towards Trump supporters and "Stop the Steal" supporters and that they published the accusation against him specifically regardless of not having any factual basis for the claim that

he participated in the riot at the Capitol. Defendants do not argue that they did have a factual basis for that derogatory inference, but rather they simply deny that they made the claim that Burmeister participated in the Capitol riot. Instead of providing the factual basis for publishing the claim that Burmeister participated in the riot, Defendants argue in their Answer that "the only reasonable interpretation a viewer of the publications as a whole could conclude is that Burmeister had 'stormed' the Capitol in the manner he intended it – 'to march to the Capitol and be on the grounds.' And, Burmeister admits that he did, in fact, march to the base of the Capitol and was present on its grounds (behind the police barricades) while the rioting was occurring there." Answer pp. 25-26.

As discussed in the section above, Defendants' publication was intended as a rejoinder to Rep. Baisley's claim that Antifa rather than Trump supporters were the ones involved in the violent attack in the Capitol. Given that context, the publication as a whole invited an inference that Burmeister was part of that violent attack in the Capitol. By publishing this inference when there was no factual basis therefore, each Defendant "knowingly risks the likelihood that the statements and inferences are false and thereby forfeits First Amendment protections." *Burns*, 659 P.2d at 1362 (quoting *Kuhn*, 637 P.2d at 319). Thus, Plaintiff claims that Defendants acted in reckless disregard for the truth of the claim that he participated in the riot at the Capitol.

Rather than answer Plaintiff's defamation claim by showing that they had indeed discovered sufficient facts to support the accusation against Plaintiff, in their Answer Defendants (a) deny that they made the accusation and (b) state that Plaintiff has a mistaken the concept of "malice" in the context of a defamation claim (quoting *Greenbelt, Garrison, Linn*). *See* Answer pp. 30-31. The first response is refuted in the section above, and the second is refuted in the Opening Brief which clearly states that in the context of a defamation claim, "Actual malice requires proof that the publisher had a subjective awareness of either falsity or probable falsity of the defamatory statement, or acted with reckless disregard of the its truth or falsity." Opening Brief, p.25.

Plaintiff knows that a person's stating something that *is true* with the specific intent of hurting another, would not constitute defamation. The point of Plaintiff's bringing up Defendants' disdain for Trump supporters and those sympathetic to the "Stop the Steal" movement was to provide a fact that would tend to explain why Defendants acted with reckless disregard of the falsity of their accusation against him. Because actual malice "is a matter of the defendant's subjective mental state, revolves around facts usually within the defendant's knowledge and control, and rarely is admitted," *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 927 (2nd Cir. 1987), a "court typically will infer actual malice from objective facts." *Celle v. Filipino Reporter Enterprises, Inc.*,

209 F.3d 163, 183 (2nd Cir. 2000) (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 692 F.2d 189, 196 (1st Cir. 1982) ("whether [the defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts."), *aff'd*, 466 U.S. 495 (1984)). As the Court in *Herbert v. Lando*, 441 U.S. 153 (1979) found, the existence of ill-will can serve as evidence of actual malice in a defamation claim.

Furthermore, the Court below erred in requiring that Plaintiff establish malice "by clear and convincing evidence" at this early stage of the proceedings in order to withstand Defendants' anti-SLAPP motion. *See* CF 250 (citing *Dominguez v. Babcock*, 727 P,2d 362 (Colo. 1986) which concerned a motion for summary judgment, and *Fink v. Combined Communications Corp.*, 679 P.2d 1108 (Colo.App. 1984), which also concerned a motion for summary judgment). The Court below concluded its analysis of the arguments regarding 'actual malice' in this case as follows, "In any event, the court cannot conclude that Defendants' investigation was so inadequate as to amount to actual malice, by clear and convincing evidence." CF 251.

Perhaps it is true that clear and convincing evidence of Defendants' malice has yet to be offered, but Plaintiff did plead an accumulation of facts sufficient to demonstrate a "reasonable likelihood" (*i.e.*, a *prima facie* showing) that Clark and

Tegna published, with reckless disregard for the truth, the implication that Burmeister participated in the riot at the Capitol.

Given Burmeister's express statements to Clark that he merely participated in a peaceful march and the expression of his first-amendment rights, as well as his express denial that he broke any laws, Defendants' implication that Burmeister participated in the riot at the Capitol building and that he admitted to doing so is groundless and "inherently improbable". Indeed, Defendants have provided no indication, either in the Court File below or in their Answer, that they discovered any countervailing facts to support the claim, despite his direct denial, that Burmeister participated in the riot. Instead, Defendants deny that they implied he participated in the riot. Nevertheless, the Court below held:

> Accordingly, there being no evidence in the record to indicate that Mr. Clark had reason to doubt the accuracy of the information provided by Plaintiff's Facebook page, the court finds that Plaintiff has failed to demonstrate Defendants acted with actual malice.

CF 253.

As discussed above, however, *there is* evidence in the record to indicate that Mr. Clark had reason to doubt the accuracy of the claim that Burmeister participated in the riot, including Mr. Burmeister's direct statement to Mr. Clark that he only participated in a "peaceful march to the Capitol" and was "not in the building this trip." *See* CF 72, Clark Declaration ¶¶ 17-18. What *is not* in the record is any evidence to substantiate Mr. Clark's belief that Burmeister was in the building and

participating in the riot. Nevertheless, despite having no evidence to contradict Plaintiff's explicit statements quoted above, Defendants published the false and derogatory claim that Plaintiff participated in the Capitol riot. This is *prima facie* demonstration of Defendants' reckless disregard for the truth of such a consequential accusation, and reason for the Court to determine that there is sufficient merit to Plaintiff's claim of Defendants' liability.

The Court below also takes Plaintiff to task for failing to provide clear and convincing evidence of Defendants' actual malice that could have been discovered through deposition:

> Part of the reason the record is so devoid of any such evidence is that Plaintiff failed to depose—or even request to depose—Mr. Clark or anyone associated with TEGNA, Inc. to determine what they knew at the time they made the allegedly defamatory statements. *See, e.g.*, *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 682–84 (1989) (permitting the question of actual malice to be submitted to the jury because the plaintiff established, partly through deposing the reporter who wrote the allegedly-defamatory story, that the reporter had deliberately chosen not to interview potential witnesses who might tell a different story than the one printed, and that therefore there was a question of fact as to whether the reporter recklessly published a false statement).

CF 252.

The case cited by the Court below, *Harte-Hanks Comms.,* is one where the trial court entered judgment on a jury verdict in favor of the Plaintiff and the newspaper appealed. Once again, the standards by which Plaintiff's pleadings are being judged deficient are not appropriate to the early stage of the proceedings below.

Plaintiff respectfully requests this Court remand the case with leave to take the depositions of Kyle Clark, and other relevant persons discovered after written discovery and Rule 26 disclosures.

CONCLUSION

Plaintiff respectfully requests this Court of Appeals reverse the District Court's Order granting Clark and Tegna's anti-SLAPP motion to dismiss, and remand the case for discovery and trial on the merits of Burmeister's claim of defamation. In addition, Plaintiff respectfully requests this Court reverse and deny any award of costs and attorneys' fees against Plaintiff.

DATED: December 9, 2022 Respectfully Submitted,

By: */s/ Dan Ernst*
ERNST LEGAL GROUP, LLC

Attorney for Plaintiff-Appellant Chad Burmeister

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 9, 2022, I caused Appellant's Reply Brief to be filed electronically with the Clerk of the Court using the ICCES System, which will send notice of such filing to counsel for the Appellee.

By: */s/ Dan Ernst*

ERNST LEGAL GROUP, LLC
Dan Ernst, Esq., Colo Bar No. 53438
4155 E. Jewell Ave., #500
Denver, CO 80222
720-798-3667
dan@ernstlegalgroup.com