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COLORADO COURT OF APPEALS 2 East 14th Ave Denver, Colorado 80203	
Appeal from Pitkin County District Court Honorable Christopher G. Seldin Case No. 2020CV30099	
Appellant: S.A.P. v. Appellee: L.S.S.	**▲COURT USE ONLY▲**
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**PROPOSED BRIEF OF PROPOSED *AMICI CURIAE*
THE COLORADO BROADCASTERS ASSOCIATION
AND THE COLORADO PRESS ASSOCIATION IN
SUPPORT OF APPELLANT**

EXHIBIT 1

CERTIFICATE OF COMPLIANCE

I hereby certify that this Proposed Brief of *Amici Curiae* in Support of the Appellant complies with the requirement of Rule 29(d) that an amicus brief must contain no more than 4,750 words. This amicus brief contains 3,670 words. In addition, I certify that this brief complies with the content and form requirements of C.A.R. 29 and 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/Steven D. Zansberg, #26634
Counsel, Bar Number

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IDENTITY OF THE AMICI AND THEIR INTEREST IN THIS CASE

The parties to this *amicus curiae* brief are identified in the Motion for Leave to File a Brief as *Amici Curiae* in Support of Appellant ("Motion"). As stated in the Motion, *Amici* have a significant interest in the issues of this case. *Amici* represent both individual and institutional members of the press, operating throughout the state and presenting their news information to the public via broadcast airwaves, newspapers, and website. *Amici* play a vital role in the functioning of our democracy, by gathering and disseminating information of legitimate, substantial, and often compelling public interest. *Amici* submit this brief in support of Appellant S.A.P. (hereinafter "Mother").[1]

As more fully set forth in the Motion, *amici* and the citizens of Colorado, all have a vested and continuing interest in the issues presented to this Court. *Amici* write in support of Mother's position that the District Court erred in denying her Special Motion to Strike under Colorado's Anti-SLAPP Act, because that Court applied the incorrect legal standard in resolving that Motion. In response to a properly founded anti-SLAPP motion, a libel plaintiff suing on a publication that addresses a matter of legitimate public interest or

[1] This brief adopts the same protocol as used in Appellant's Opening brief, referring to the plaintiff/appellee as "Father," and the defendant/appellant as "Mother."

concern must come forward with competent admissible evidence sufficient to demonstrate (s)he has a reasonable likelihood of producing clear and convincing evidence of actual malice, should the case proceed to trial. Here, the District Court did not take that burden of proof into account and therefore denied Mother's Special Motion to Dismiss in error.

As routine and professional publishers of information on matters of public concern, Amici are especially vulnerable to being sued for libel. Accordingly, they are particularly concerned that this Court's precedential published decision herein must set forth the appropriate standard for District Courts to apply in future cases arising from amici's exercise of their rights protected by the First Amendment to the Constitution of the United States and by article II section 10 of the Colorado Constitution. *See also Sonoma Media Invs., L.L.C. v. Superior Court*, 34 Cal. App. 5th 24, 34 (2019) ("[n]ewspapers and publishers, who regularly face libel litigation, were intended to be one of the 'prime beneficiaries' of the anti-SLAPP legislation.")

ARGUMENT

I. INTRODUCTION

In 2019, Colorado's General Assembly passed, and Governor Jared Polis signed into law, HB-19-1324, entitled "Strategic Lawsuits Against Public Participation – Concerning Motions to Dismiss Certain Civil Actions

Involving Constitutional Rights." Modeled after, and virtually identical to, California's anti-SLAPP statute, the law declares, "[I]t is in the public interest to encourage continued participation in matters of public significance and . . . this participation should not be chilled through abuse of the judicial process." § 13-20-1101(1), C.R.S. (hereinafter, Colorado's "anti-SLAPP Act").

This case is among the first few to come before this Court on the newly-created mandatory interlocutory appeal from a denial of a Special Motion to Dismiss under the anti-SLAPP Act. Accordingly, it is incumbent on this Court, in issuing a precedential (published) decision herein, to correctly articulate the roles of both the District Court and reviewing courts in resolving such motions.

In reviewing the District Court's decision, it is of crucial importance that this Court apply *de novo* review to the pure issues of law that are presented by this appeal: (1) Did the District Court apply the proper legal standard in issuing its ruling? and (2) Did the Plaintiff ("Father") satisfy his burden of proof to defeat Mother's anti-SLAPP motion, by demonstrating he had a reasonable likelihood of being able to produce clear and convincing evidence of actual malice?

Because the answer to both of those questions is "no," the Court should reverse the District Court's order below and remand with directions to grant the Mother's Special Motion to Dismiss.

II. THIS COURT MUST REVIEW THE DISTRICT COURT'S RULING ON THE MOTHER'S SPECIAL MOTION TO STRIKE *DE NOVO*

A Special Motion to Dismiss under Colorado's Anti-SLAPP Act, presents one of two alternative *questions of law*:[2] either (1) does the Complaint (or cross-claim) state a legally sufficient claim, in the absence of any evidence introduced by the moving party? *or* (2) has the responding party met its burden of demonstrating a "reasonable likelihood of prevailing" on its claims?

The first of these two inquiries occurs when the moving party contends that the challenged claim is legally invalid on its face, *i.e.,* taking all of the pleaded averments of fact as true, the challenged claim nevertheless "fails to state a claim upon which relief can be granted," just as would occur under a

[2] This brief focuses only on the plaintiff's burden under "prong 2" of the Anti-SLAPP Act, operating on the assumption, as the District Court found, that the moving party has satisfied "prong one" – by showing that the claims at issue are premised on the movant's exercise of constitutionally protected rights of freedom of speech or petitioning activity. *Amici* do point out, however, that merely because a plaintiff *avers* that a defendant's statement – to police, a mandatory reporter, or any government official – was "knowingly false" cannot exempt the claim from application of the anti-SLAPP act, lest such routine pleading practice render that statute meaningless, i.e., applicable only to a null set.

routine motion to dismiss pursuant to C.R.C.P. 12(b)(5). In that regard, the only, but quite significant, advantage to filing an anti-SLAPP motion is the movant's right to an immediate interlocutory appeal of any denial of the Special Motion to Dismiss, which would *not* be available under C.R.C.P 12(b)(5).[3]

The second type of Special Motion to Dismiss under the anti-SLAPP Act is what occurred in the case at bar, where the movant tendered documentary and testimonial evidence in support of her motion. In those instances, as here, the statute requires the District Court (in the first instance) to determine whether, in responding to the Special Motion to Dismiss, the non-moving party has come forward with competent admissible evidence that demonstrates it has a "reasonable likelihood" of prevailing on the challenged

[3] Because Colorado law already provided for an immediate "stay" of all discovery upon filing a Rule 12(b)(5) motion, *and* for a mandatory attorney's fee award for a defendant who prevails on such a motion, the added procedural *and substantive* right of automatic interlocutory appeal of a denial decision was the primary benefit gained from enacting Colorado's anti-SLAPP Act. *See* Steven D. Zansberg, *Recent High-profile Cases Highlight the Need for Greater Procedural Protections for Freedom of the Press,* 33:2 *Comm'n Lawyer* 7 - 14 (Am. Bar Ass'n, Fall 2017) (advocating for all states to adopt anti-SLAPP statutes for the *primary* benefit of immediate interlocutory appeal: "to fully protect the 'breathing space' the First Amendment affords reporting on matters of legitimate public interest . . . the press must be provided a 'second look' by an appellate court before being forced to endure the financially crushing costs of trial and potentially business-ending jury verdicts."), http://bit.ly/33GeQWY.

claim. *See* §§ 13-20-1101(3)(a), and 1101(3)(b) C.R.S. (2021) ("In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (2007) ("The showing [of a party opposing an anti-SLAPP motion] must be made through competent and admissible evidence.") (internal marks omitted); *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 15 (1995) (explaining in detail why "this showing must be made . . . , with reference to the familiar standard applied to evidentiary showings in summary judgment motions").[4] Indeed, this latter type of anti-SLAPP motion is "intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities." *Taus v. Loftus*, 151 P.3d 1185, 1205 (Cal. 2007); *Flatley v. Mauro*, 139 P.3d 2, 9 (Cal. 2006) (anti-SLAPP statute "establishes a

[4] The parties to this appeal agree that the District Court properly looked to published rulings from California's courts interpreting that state's anti-SLAPP statute, which is practically verbatim identical to Colorado's. *Amici*, whose undersigned counsel testified in the hearings in support of Colorado's HB-19-1324, strongly encourage the Court to follow this same approach, as the bill's sponsor declared in those hearings that he chose California's statute as a template for the bill precisely to allow our state's judiciary to benefit from the decades of litigation and voluminous common law developed in that larger, more populous jurisdiction. *See also Pueblo Bancorporation v. Lindoe, Inc*., 63 P.3d 353, 364 (Colo. 2003) ("The interpretation of other states is especially persuasive" because "the language of the Colorado statute . . . is nearly identical to the language of [other] statutes around the country.").

procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation").

Because District Courts' rulings on motions to dismiss pursuant C.R.C.P 12(b)(5) and for summary judgement pursuant to C.R.C.P. 56 are both subject to *de novo* review, *see, e.g.,* M*elat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.,* 2012 CO 61, ¶ 16; *Harvey v. Catholic Health Initiatives*, 2021 CO 65, ¶ 15, is incumbent on this Court, in reviewing a denial of an anti-SLAPP motion, to apply *de novo* review. *See also Flatley v. Mauro*, 39 Cal. 4th 299, 325 (2006) ("Review of an order granting or denying a motion to strike under [the anti-SLAPP Act] is de novo."); *Gallano v. Burlington Coat Factory of Cal., L.L.C.*, 67 Cal. App. 5th 953, 960 (2021) (same); *Mundy v. Lenc*, 203 Cal. App. 4th 1401, 1408 (2012) ("An appellate court reviews an order denying an anti-SLAPP motion from a clean slate.").

Furthermore, when issues of "constitutional fact" are at issue, such as whether there has been a sufficient showing of actual malice to support a libel claim, it is incumbent on reviewing courts to exercise "independent [*de novo*] appellate review" in order to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 (1984) (quoting *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964)).

III. BECAUSE IT APPLIED THE INCORRECT LEGAL STANDARD, THE DISTRICT COURT ERRED IN RESOLVING THE MOTHER'S SPECIAL MOTION TO DISMISS

The District Court erred when it failed to take into account what Father must demonstrate to overcome Mother's Special Motion to Dismiss: that he is *reasonably likely* to be able to produce *"clear and convincing evidence"* of actual malice – the quantum of proof necessary for him to prevail on his libel claim.

A. To Defeat the Anti-SLAPP Motion, Father Was Required to Come Forward With Competent Admissible Evidence Demonstrating A Reasonable Likelihood of Being Able to Produce Clear And Convincing Evidence of Actual Malice

To prevail on a libel claim premised (as here) on a publication that addresses a matter of legitimate public interest or concern, the plaintiff must prove, *by clear and convincing evidence*, that Defendants published materially false statements about him with constitutional "actual malice." *See* C.J.I Civ. 22:1, 22:2 (2021). Actual malice is defined as "knowledge that it was false or . . . reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Diversified Mgmt., Inc. v. Denver Post, Inc*., 653 P.2d 1103, 1109-1110 (Colo. 1982); *Smiley's Too, Inc. v. Denver Post Corp*., 935 P.2d 39, 41 (Colo. App. 1996). To establish "reckless disregard of the truth," the plaintiff must demonstrate that the

defendants "in fact entertained serious doubts as to the truth of [their] published statement[s]." *DiLeo v. Koltnow*, 613 P.2d 318, 321 n.4 (Colo. 1980) (citations omitted); *Fry*, 2013 COA 100 at ¶ 21 ("Actual malice can be shown if the author entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity.").

Most importantly, and here, dispositively, "in addressing . . . whether plaintiff has demonstrated the existence of a *prima facie* case, [the Court] must bear in mind the higher clear and convincing standard of proof." *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 274 (2001) (internal quotation marks and citation omitted); *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1166 (2004) ("Courts must take into consideration the applicable burden of proof in determining whether the plaintiff has established a probability of prevailing."); *Hoang v. Tran*, 60 Cal. App. 5th 513, 537 (2021) (in responding to anti-SLAPP motion, plaintiff is required to "establish[] a [reasonable likelihood][5] *that he can show by clear and convincing evidence* that [defendant] acted with actual

[5] As Father concedes, Answer Br. at 9-10 n.5, there is no cognizable difference between California's "probability" and Colorado's "reasonable likelihood" standards. *See, e.g., Wilcox v. Superior Court* , 27 Cal. App. 4th 809, 824, (1994) (concluding that "by eliminating the adjective 'substantial' [from the bill] the Legislature [did not intend to erect] a threshold lower than a 'reasonable probability'"); *see also* MERRIAM WEBSTER DICTIONARY (2022) (identifying "probability" and "likelihood" as synonyms), https://www.merriam-webster.com/dictionary/probability#synonyms

malice") (emphasis added); *Young v. CBS Broad., Inc.*, 212 Cal. App. 4th 551, 563 (2012) (to defeat an anti-SLAPP motion, the plaintiff "must establish a reasonable probability that she can produce clear and convincing evidence showing that the statements were made with actual malice"). The reasoning of this requirement is straightforward: "To demonstrate a [reasonable likelihood] of prevailing under the anti-SLAPP statute's second prong, the plaintiff must make a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. . . Thus, in considering whether plaintiffs have met their burden of demonstrating a probability of prevailing on the actual malice issue here, we must determine whether, if credited, their evidence is *sufficient to sustain a judgment rendered in their favor* by the trier of fact." *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 86 (2007). Because the plaintiff must prove "clear and convincing evidence" that defendant published with actual malice "to sustain a judgment" on a libel claim premised on a publication addressing a matter of public interest or concern, the plaintiff must *demonstrate* he is reasonably likely to be able to produce that quantum of evidence. Indeed, Father acknowledges that to defeat the Special Motion to Dismiss he must "establish[] *a probability that he could produce clear and convincing evidence of actual malice* at trial." Answer Br. at

18-19; *id.* at 19 (acknowledging that he "needs to establish a reasonable probability that he will be able to do so"); *id*. at 24 (claiming he has done so).

The above case law is fully consistent with Colorado's precedents that require the Court to take into account the applicable standard of proof concerning actual malice when evaluating a defendant's motion for summary judgment. *See Dileo,* 613 P.2d at 323 (holding that the clear and convincing evidence "standard of proof applies equally at the summary judgment stage of judicial proceedings"); *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 944 P.2d 646, 651 (Colo. App. 1997) ("This 'clear and convincing' proof standard applies equally at the summary judgment stage of proceedings."), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999); *Russell v. McMillen*, 685 P.2d 255, 259 (Colo. App. 1984) ("In determining whether a genuine issue of fact exists as to the presence of actual malice, the trial court must decide whether 'the plaintiff has offered *evidence of a sufficient quantum to establish a prima facie case*, and the offered evidence can be equated with the standard or test of convincing clarity prescribed by United States Supreme Court decisions . . . .'") (emphasis added) (citations omitted); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254 (1986) (same). Father also concedes that his burden in opposing Mother's anti-SLAPP motion "is akin to that of a party opposing a

motion for summary judgment." Answer Br. at 27 (citing *Feldman v. 1100 Park Lane Associates*, 160 Cal.App.4th 1467, 1478 (2008)).

Here, as demonstrated in Mother's Opening Brief, the District Court stated on the record that the clear and convincing evidence standard applied *only* to Father's burden of proving material falsity, but not to the element of actual malice. Op. Br. at & 27 n.12. Accordingly, the District Court failed to apply the proper legal standard in resolving Mother's Special Motion to Dismiss. *See, e.g., Conroy v. Spitzer,* 70 Cal. App. 4th 1446, 1454 (1999) (affirming trial court's grant of anti-SLAPP motion: "Conroy was required to show a likelihood that he could produce clear and convincing evidence that Spitzer's statements were made with actual malice. . . . [Because he did not do so] Conroy failed to establish a probability of prevailing on his defamation claim." (emphasis added) (citation and internal quotation marks omitted)).

B. Upon Exercising Independent Appellate Review, the Court Must Conclude That Father Did Not Satisfy His Evidentiary Burden

Ordinarily, "a trial court ruling made with an incorrect legal standard must be reversed and the case remanded to afford the court an opportunity to apply the correct standard to the facts." *Martin v. Union Pac. R.R. Co.*, 186 P.3d 61, 72 (Colo. App. 2007) (citation omitted), *rev'd on other grounds*, 209 P.3d 185 (Colo. 2009). However, when constitutionally-protected

fundamental rights are at stake, including the freedom of speech, the Court departs from that general approach to ensure that **"**the judgment does not constitute a forbidden intrusion on the field of free expression." *See, e.g.,* L*ockett v. Garrett,* 1 P.3d 206, 210 (Colo. App. 1999) ("Whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law" subject to de novo review)**.**

California's Court of Appeal has cogently explained the reviewing court's role in these circumstances:

> Reviewing courts [ordinarily] must reject challenges to the sufficiency of the evidence if substantial evidence supports the judgment. . . .*The requirement that a . . . plaintiff demonstrate actual malice, however, calls for a different analysis*. . . .
>
> Normal principles of substantial evidence review do not apply to *the appellate court's independent review of an actual malice determination in a First Amendment libel case*. . . .
>
> The question whether the evidence in the record in a defamation case is of *the convincing clarity required* to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross *the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice*. . . .
>
> Independent review is applied with equal force in considering *whether a plaintiff has established a probability of demonstrating [actual] malice by clear and convincing evidence* in opposing an anti-SLAPP motion.

Christian Res. Inst., 148 Cal. App. 4th at 86 (emphasis added) (internal quotation marks and citations omitted)

Here, *de novo* review of the admissible evidence presented below in support of Mother's Special Motion to Dismiss points inescapably to the conclusion that Father failed to demonstrate he has a "reasonable likelihood" of being able to produce clear and convincing evidence of actual malice. Mother spoke to her therapist within one day after hearing from her five-year-old daughter's own lips that she had been sexually assaulted by Father. Mother's one statement reporting that information to her therapist, and no other statement, serves as the sole grounds for Father's libel claim. (Obviously, any subsequent statements Mother provided to child welfare investigators from Colorado's Department of Human Services or local law enforcement officials, as part of their official investigations, are absolutely privileged. *See, e.g., Dep't of Admin. v. State Personnel Bd.,* 703 P.2d 595, 598 (Colo. App. 1985) (defendant's statements made to employee "of an administrative agency conducting an official hearing, and related to the subject of the inquiry" absolutely privileged), *overruled in part on other grounds, Hoffler v. Colo. Dept. of Corr*., 27 P.3d 371, 376 n.6 (Colo. 2001); *MacLarty v. Whiteford*, 496 P.2d 1071, 1072 (Colo. App. 1972) (holding that statements made in direct

response to an inquiry from a liquor licensing authority were absolutely privileged).

The only competent and admissible evidence before the Court concerning Mother's subjective state of mind at the time she spoke to her therapist was (and is) the Mother's own affidavit, in which she states unequivocally she fully believed her daughter's story and had no subjective doubts, whatsoever, regarding its veracity.[6] *See* Mother's Affidavit ¶¶ 10-14, 16, 21 ; CF 282-284. The District Court acknowledged that the record evidence before it did not support a finding that when Mother communicated this information to her therapist, she had "a high degree of awareness of its probable falsity," and certainly not by the requisite "clear and convincing evidence." *See* Hearing Tr. at 111:11 -16; *id*. at 112:23 – 113:8. Accordingly, Father failed to meet his burden under "prong 2" of the anti-SLAPP Act, by demonstrating he has a "reasonable likelihood" of being able to produce "clear and convincing evidence" of Mother's actual malice.

[6] While Father complains, in his Answer Brief, that it is too early in the case – before discovery has begun – to resolve fact-intensive questions such as Mother's subjective state of mind at the time of publication, he had the opportunity (as is true under C.R.C.P. 56(f)) to request discovery prior to submitting his Response to the Special Motion to Dismiss. *See* §13-80-1101(6), C.R.S. Because Father waived his opportunity to conduct such discovery, he has lacks standing to complain about any purported lack of "due process."

CONCLUSION

For the reasons stated above, *Amici Curiae*, the Colorado Broadcasters Association and the Colorado Press Association, respectfully ask the Court to reverse the judgment below and order the District Court to grant The Mother's Special Motion to Strike under Colorado's anti-SLAPP Act.

DATED: January 19, 2022

Respectfully submitted,

/s/ Steven D. Zansberg
Steven D. Zansberg
Counsel for Proposed *Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PROPOSED BRIEF OF PROPOSED *AMICUS CURIAE* IN SUPPORT OF APPELLANT** was e-filed and served January 19, 2022 via the Colorado Courts E-filing System, to the following:

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