COLORADO COURT OF APPEALS

DATE FILED: February 16, 2023
CASE NUMBER: 2021CA1625

Court of Appeals No. 21CA1625
Jefferson County District Court No. 19CV31764
Honorable Diego G. Hunt, Judge

David Daleiden and The Center for Medical Progress, Inc.,

Plaintiffs-Appellants,

v.

Dr. Savita Ginde,

Defendant-Appellee.

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FREYRE
Furman and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 16, 2023

The Contiguglia Law Firm, P.C., Andrew Contiguglia, Denver, Colorado; Dhillon Law Group, Krista L. Baughman, San Francisco, California, for Plaintiffs-Appellants

The Law Office of Steven D. Zansberg, LLC, Steven D. Zansberg, Denver, Colorado; Ross-Shannon & Delaney, P.C., Bradley Ross-Shannon, Patrick C. Delaney, Lakewood, Colorado; Killmer, Lane, and Newman, LLP, Thomas B. Kelley, Denver, Colorado, for Defendant-Appellee

¶ 1 In this defamation case, plaintiffs, David Daleiden and The Center for Medical Progress, Inc., (CMP) (collectively, Daleiden), sued defendant, Dr. Savita Ginde, for statements she made in a book and during a TEDx talk claiming that Daleiden had deceptively edited undercover videos to create a false impression that she and the staff at Planned Parenthood of the Rocky Mountains (PPRM) sold human fetal tissue for profit in violation of federal law. Daleiden appeals the district court's order granting Dr. Ginde's special motion to dismiss those claims under Colorado's anti-SLAPP statute, section 13-20-1101, C.R.S. 2022. Because we conclude there is not a reasonable likelihood that Daleiden will prevail on his claims, we affirm the district court's order and remand the case for the determination and award of Dr. Ginde's reasonable attorney fees and costs under section 13-20-1101(4)(a).

I. Background

A. The Human Capital Project

¶ 2 In 2013, Daleiden formed CMP to investigate the alleged illegal sale of aborted fetal tissue for profit by Planned Parenthood. The goal of the project, later called The Human Capital Project, was to generate public outrage toward Planned Parenthood and to create

maximum negative impact to its business through a series of undercover hidden camera "gotcha" videos.

¶ 3 The project involved a series of covert investigations where Daleiden and his associates posed as representatives of a fictitious fetal tissue procurement company called Biomax Procurement Services, LLC. They attended abortion industry events and interviewed abortion providers and staff to generate interest in building business relationships for the procurement of fetal tissue to be used in biomedical research. Daleiden secretly recorded numerous interviews and gathered nearly 200 hours of footage of the "inner workings of the abortion industry." He planned to disseminate the footage on the internet in two formats — five-to-ten-minute-long "gotcha" videos of meetings with Planned Parenthood providers and staff, and a thematic documentary.

B. The Two Videos

¶ 4 In April 2015, Daleiden secretly recorded an interview with Dr. Ginde, then Vice President and Medical Director of PPRM (Raw Footage). Daleiden then edited the Raw Footage (approximately two hours and forty minutes long) into a series of short videos that were published online. The short videos and the Raw Footage were (and

continue to be) accessible on CMP's website. The Center for Medical Progress, https://perma.cc/PFX9-RUG2.

¶ 5 At issue in this case are two of these short videos (collectively, Edited Videos) that Dr. Ginde publicly said were "deceptively edited" and superimposed with inaccurate text to create the false impression that she and members of PPRM were selling fetal tissue for profit in violation of federal law.

¶ 6 The first video, entitled "Human Capital — Episode 1: Planned Parenthood's Black Market in Baby Parts" (Episode 1), is eleven minutes and forty-nine seconds long and contains numerous segments of hidden camera interviews of Planned Parenthood employees, including Dr. Ginde. In one segment, Dr. Ginde can be heard saying, "I think a per item thing works a little better, just because we can see how much we can get out of it," while closeup shots of fetal tissue are shown with a caption indicating the specimen was "prepared for procurement."

¶ 7 The second video, entitled "Planned Parenthood VP Says Fetuses May Come Out Intact, Agrees Payments Specific to the Specimen" (Episode 2), is eleven minutes and twenty-nine seconds long and contains lengthy sections of Daleiden's interview with

Dr. Ginde, including segments from Episode 1. During Episode 2, Dr. Ginde describes the process of retrieving intact fetal tissue during the second trimester and then shows Daleiden fetal tissue from a recent procedure. She can be heard saying

> [i]ntact is probably less than 10 percent . . . if someone delivers before we are able to see them for a procedure, then we are intact . . . with the second-tris, we won't even put water [in] because it's so big you can put your hand in there and pick up the parts, and so, I don't think it would be as war torn.

In another segment of Episode 2, the words "It's a baby" appear in subtitles attributed to Dr. Ginde while she examines fetal tissue in a glass dish.

¶ 8 In both videos, there is intermittent suspenseful background music playing, along with subtitles and, at times, photos on the side of the screen accompanying sections of the footage. Both videos conclude with the following message: "Share this video. Hold Planned Parenthood accountable *for their illegal sale of baby parts*."

¶ 9 National news and social media coverage of the Edited Videos engendered widespread public outcry for an investigation of Planned Parenthood, which prompted a two-year long congressional investigation and thirteen separate state investigations of Planned

Parenthood clinics around the country. None of these investigations found any wrongdoing by any Planned Parenthood clinic or by Dr. Ginde. *See* Danielle Kurtzleben, *Planned Parenthood Investigations Find No Fetal Tissue Sales*, NPR, https://perma.cc/2AW3-Y67E; Samantha Allen, *Planned Parenthood 'Fetal Tissue' Investigation Finds Nothing*, The Daily Beast, https://perma.cc/M4SC-ZKDR.

C. Dr. Ginde's Book and TEDx Talk

¶ 10 In 2018, Dr. Ginde published a book entitled *The Real Cost of Fake News: The Hidden Truth Behind the Planned Parenthood Video Scandal*, wherein she describes the harmful effects of the footage and its aftermath on her personal and professional life. In the book, she recounts how, shortly after the release of the Edited Videos, she received credible death threats from anti-abortion activists that forced her and her family to leave their home and live in hiding for nearly two years.

¶ 11 The book repeatedly states that the Edited Videos were deceptively edited and thus were "fake" videos created to give the false impression that members of PPRM were violating federal law by selling human fetal tissue for profit. The book also advocates for

civil discourse on contentious topics and urges its readers to think critically before buying into "unfounded, ill-intended, propaganda-based harassment" and to recognize that a difference in opinion or belief is not an excuse for violence, bullying, harassment, or intimidation.

¶ 12 Shortly after the release of her book, Dr. Ginde gave a TEDx talk where she discussed many of the same topics raised in her book, although she never specifically identified Daleiden. In the talk, she discussed her experiences following the release of the Edited Videos, which she offered as a "tangible illustration when we promote division and hatred over tolerance, curiosity, and compassion," and she described how the Edited Videos were deceptively edited to make it appear that she and Planned Parenthood were selling fetal tissue for profit.

D. Defamation Suit by Daleiden and the District Court's Ruling

¶ 13 In November 2019, Daleiden filed this lawsuit against Dr. Ginde, asserting claims for slander and libel. Dr. Ginde filed a special motion to dismiss under the anti-SLAPP statute.

¶ 14 The district court held a nonevidentiary hearing. During the hearing, Daleiden argued that the court was not required to review and compare the Raw Footage with the Edited Videos because his evidence (and Dr. Ginde's) raised a factual dispute for trial. Specifically, Daleiden asserted that expert testimony would be needed to address his evidence (the declaration of Daleiden and the affidavit of his videographer) and Dr. Ginde's (a report of a forensic investigative firm concluding that words were superimposed in the Edited Videos and attributed to Dr. Ginde).

¶ 15 Distinguishing *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1108 (10th Cir. 2017) (*Brokers' Choice IV*), Daleiden argued that because the underlying facts regarding falsity of the statements were "very disputed" and "the recordings alone [were] not independently sufficient to test [his] claims," it was improper for the court to grant Dr. Ginde's motion at this stage of the proceedings.

¶ 16 Dr. Ginde responded that it would be "entirely appropriate" for the court to compare the Raw Footage with the Edited Videos to determine material falsity as a matter of law. Citing several cases,

including *Fry v. Lee*, 2013 COA 100, ¶¶ 49-58, and *Brokers' Choice IV* and its progeny, Dr. Ginde urged the court to

> [c]ompare the two and a half hour interaction, all of it, and what the Court will determine is the substance or gist of that interaction and compare it to the shorter video[s] that the Plaintiffs produced and see whether or not they were an accurate – basically accurate representation of the longer footage.

¶ 17 In response to a question from the court about Daleiden's argument distinguishing *Brokers' Choice IV*, Dr. Ginde asserted that for the purpose of resolving her motion, she did not contest the authenticity of the Raw Footage and therefore, consistent with the holding in *Brokers' Choice IV*, the court could compare the undisputedly authentic Raw Footage with the Edited Videos as a matter of law to determine whether they were a fair and accurate representation of the Raw Footage.

¶ 18 Following the hearing, Dr. Ginde provided the court with a copy of the Raw Footage together with the transcript of the Raw Footage prepared by Daleiden that was posted on CMP's website, "to facilitate the Court's comparison" between the Raw Footage and the Edited Videos. Daleiden did not object to these filings.

¶ 19 The court issued a thorough written order granting the motion to dismiss. Addressing the libel per quod claim first, the court relied on the holding in *Lininger v. Knight*, 123 Colo. 213, 221, 226 P.2d 809, 813 (1951), to find that because Daleiden relied on extrinsic evidence to show that the publication was defamatory in nature or that it was about him, he had established a prima facie claim for libel per quod. Relatedly, it also found that Daleiden had sufficiently pleaded special damages for a libel per quod claim.

¶ 20 Turning to the defamation claim, the court employed the two-step analysis California courts have applied to that state's anti-SLAPP statute. It first concluded that Dr. Ginde's statements involved matters of public concern and, therefore, fell within the protections of the statute.[1]

¶ 21 The court then concluded, from a comparison of the Raw Footage with the Edited Videos, that it was "beyond dispute" that the Edited Videos were deceptively edited and presented in a way to create a false narrative that Dr. Ginde and PPRM were selling fetal

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[1] Neither party disputed the matter of public concern step of the analysis, nor do they do so on appeal.

tissue for profit in violation of federal law. It therefore concluded that Daleiden had failed to produce clear and convincing evidence that the "substance" or "gist" of Dr. Ginde's statements was materially false and granted the motion to dismiss.

II. Standard of Review and Applicable Law

¶ 22 Colorado's anti-SLAPP statute seeks to minimize the risk of nonmeritorious lawsuits used to silence another based on their exercise of First Amendment rights. § 13-20-1101(1)(a); *L.S.S. v. S.A.P.*, 2022 COA 123, ¶¶ 14-17. It aims to balance the "constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government" with the "rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b); *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶¶ 11-12.

¶ 23 To that end, the statute creates a procedural mechanism that allows a district court to assess the merits of a lawsuit in its early stages. *See* Andrew L. Roth, Comment, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. Rev. 741, 745-48 (2016) (describing the theoretical underpinnings of SLAPP lawsuits).

¶ 24 As cogently described by another division of this court,

> 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).

L.S.S., ¶ 18 (emphasis added). If the court determines there is not a reasonable likelihood that the plaintiff will prevail on their claim, it must grant the motion and award the defendant attorney fees and costs.[2] § 13-20-1101(3)(a), (4)(a).

¶ 25 We review de novo a district court's ruling on a special motion to dismiss to determine whether the plaintiff has established a "reasonable likelihood" that they will prevail on their claim. *Salazar*, ¶ 21. This entails a two-step process. First, we consider "whether the defendant has made a threshold showing that the

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[2] There is one exception to this rule: a prevailing party is not entitled to attorney fees and costs "if that cause of action is brought pursuant to part 4 of article 6 of title 24 or the 'Colorado Open Records Act', part 2 of article 72 of title 24." § 13-20-1101(4)(b), C.R.S. 2022.

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.'" *L.S.S.*, ¶ 21 (quoting § 13-20-1101(3)(a)).

¶ 26 If step one is satisfied, then we evaluate whether the plaintiff has established a "reasonable likelihood [of] prevail[ing] on the claim." *Id.* at ¶ 22 (quoting § 13-20-1101(3)(a)-(b)). In doing so, we review "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.'" *Id.* at ¶ 23 (quoting *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)). We do not "weigh evidence or resolve conflicting factual claims," but simply "accept[] the plaintiff's evidence as true, and evaluate[] the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." *Id.* at ¶¶ 23-24 (quoting *Baral*, 376 P.3d at 608).

III. Discussion

¶ 27 Daleiden contends that the district court erroneously found that he proffered insufficient evidence to show that the "substance"

or "gist" of Dr. Ginde's statements was materially false. He reasons that (1) the court improperly acted as the fact finder and made its own credibility and weight assessments by comparing the Raw Footage with the Edited Videos to find that the videos were deceptively edited, and (2) the court failed to consider his claim that Dr. Ginde's claims that the short videos were fake or fabricated defamed him. Daleiden also contends that the court erred by finding Dr. Ginde's TEDx Talk statements were libel per quod rather than libel per se. We address both steps of the anti-SLAPP analysis in turn.[3]

A. Protected Activity

¶ 28 The district court concluded that Dr. Ginde's publications "were public speech in furtherance of her free speech rights" and therefore subject to section 13-20-1101(3)(a). Although what

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[3] Dr. Ginde's answer brief does not address the district court's ruling on the libel per quod claim; nor does she challenge the court's ruling concerning special damages. Because we affirm the district court's order granting Dr. Ginde's special motion to dismiss, we do not further address this issue. *See Sedgwick Props. Dev. Corp. v. Hinds*, 2019 COA 102, ¶ 31 ("[W]e follow the 'cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more.'" (quoting *Mulberger v. People*, 2016 CO 10, ¶ 23 (Gabriel, J., concurring in the judgment))).

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 v. Stow*, 2014 COA 26, ¶ 18 (quoting *Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo. App. 1996)).

¶ 29 Because the parties do not dispute step one, we assume, without deciding, that Dr. Ginde's publications involve matters of public concern. *See L.S.S.*, ¶ 28 (declining to decide whether an act was made "in connection with a public issue" because the parties agreed that it was).

B. Reasonable Likelihood

1. Defamation: General Principles

¶ 30 Defamation is a communication that holds an individual up to contempt or ridicule, causing them injury or damage. *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994). The elements 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.

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

¶ 31 The defamed party, however, is subject to a heightened burden of proof when the statement relates to a matter of "public concern." *Id.* at ¶ 18; *see also Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1121 (Colo. App. 1992). As relevant here, the plaintiff must prove, by clear and convincing evidence, that the speaker made the statements with "actual malice." *Lawson*, ¶ 18.

¶ 32 In contrast to the preponderance of evidence standard — which only requires proof that a fact is "more probable" than not, *Page v. Clark*, 197 Colo. 306, 318, 592 P.2d 792, 800 (1979) (quoting Charles T. McCormick, *The Law of Evidence* § 339 (2d ed. 1972)) — the clear and convincing standard requires proof that a fact is "highly probable and free from serious or substantial doubt." *Destination Maternity v. Burren*, 2020 CO 41, ¶ 10 (citation omitted).

¶ 33 A communication is made with actual malice if it is published with "actual knowledge that it was false" or "with reckless disregard for whether it was true." *L.S.S.*, ¶ 40. To be sure, it is rare for there

to be evidence that the speaker *knew* their statement was false yet published it anyway. *See, e.g.*, *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1361-62 (Colo. 1983) (where speaker in fact "knew" that the statements were false). Our inquiry therefore typically turns on whether the publisher made the statement with "reckless disregard."

¶ 34 Actual malice is proved by evidence that the publisher "entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity." *Fry*, ¶ 21. Unless it is "grossly inadequate," an investigation by a layperson that forms the basis of a defamatory statement is insufficient to show actual malice. *Reddick v. Craig*, 719 P.2d 340, 342 (Colo. App. 1985). Similarly, a speaker's "failure to corroborate information received from [an otherwise] reliable source" — which later turns out to be incorrect — does not establish actual malice. *Lewis*, 832 P.2d at 1124. Nor does evidence that the defamed party simply denied the veracity of the speaker's statement show actual malice. *Seible v. Denver Post Corp.*, 782 P.2d 805, 809 (Colo. App. 1989); *accord DiLeo v. Koltnow*, 200 Colo. 119, 126-27, 613 P.2d 318, 324 (1980) (concluding actual malice was not proved because

the “defendants’ sources were reliable, and a thorough independent investigation was conducted to substantiate the truthfulness of the statements”).

¶ 35 Although a speaker’s ill will toward the defamed party is not an element of actual malice, evidence of bad motive “may serve as circumstantial evidence of actual malice ‘to the extent that it reflects on the subjective attitude of the publisher.’” *L.S.S.*, ¶ 40 (quoting *Balla v. Hall*, 273 Cal. Rptr. 3d 695, 722 (Ct. App. 2021)) (collecting cases on this point).

¶ 36 “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.” *Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) (citing *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337, 338–39 (1972)). “[M]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge [is] justified.” *Brokers’ Choice IV*, 861 F.3d at 1107 (quoting *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991)).

¶ 37 "[D]etermining whether a publication is materially false requires examination of the published statements in context, not in isolation." *Id.* at 1108. Concerning the material falsity element, "[s]ubstantial truth, not absolute or literal truth, is the standard for the affirmative defense of truth to a defamation claim — 'it is sufficient if the substance, the gist, the sting, of the matter is true.'" *Id.* at 1109–10 (quoting *Gomba*, 180 Colo. at 236, 504 P.2d at 338–39).

2. Daleiden's Contentions

¶ 38 Daleiden identifies two groups of statements where he claims Dr. Ginde accused him of (1) faking or fabricating the Raw Footage (termed by Daleiden as "deep fake") by adding audio and/or subtitles (i.e., "dubbing") that did not exist in the original footage or by otherwise manipulating or generating video content to make it appear as if Dr. Ginde made statements or took actions that she did not; and (2) deceptively editing the Raw Footage into the Edited Videos by "splicing and dicing" statements, questions, and answers together in a misleading manner to portray a false narrative. Specifically, he alleges the following statements falsely accuse him of faking or fabricating the Raw Footage:

- “As I give you a glimpse into the impact of these fictional videos . . . .”
- “The words and actions are completely false — literally, FAKE NEWS — and nevertheless, the immediate aftermath of the infiltration was devastating.”
- “The entire video campaign that David Daleiden and the Center for Medical Progress created is based on lies. The facts were fabricated. The videos that included me were edited to manipulate context, with words and phrases that I never said dubbed in and attributed to me.”
- “[F]ake videos were all over social media.”
- “In the videos in which I’m featured, some words are taken out of context, others are even dubbed in, and actions are attributed to me that never actually happened.”
- “David Daleiden manipulated the audio and added words to make it look like I did something that I have actually never done and said things I actually never said.”
- “After penetrating both the national office and many local Planned Parenthood organizations, these undercover and dishonorable CMP agents took surreptitious video of

meetings and medical procedures, which they subsequently edited (*even dubbing in their own audio!*) to make it appear that Planned Parenthood was engaged in the sale of fetal tissue and body parts from human fetuses."

¶ 39 Daleiden further alleges that the following statements falsely accuse him of deceptively editing the Raw Footage to create the Edited Videos.

- "In July of 2015, following a multiyear infiltration led by a well-known anti-abortion extremist named David Daleiden, a series of deceptively edited videos were released attempting to implicate Planned Parenthood in the selling of fetal tissue."
- "After people spoke to Deborah[4] directly and re-watched the video, it became clear that this wasn't just a video. It was a *spliced-and-diced* video; it was fake."

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[4] Dr. Deborah Nucatola was Senior Director of Medical Services for Planned Parenthood Federation of America (PPFA).

- "Mary[5] has a very dry sense of humor, and this was merely an example of that, but David spliced that line into the video to make it look like she would be open to selling fetal body parts for profit."
- "[A] series of deceptively edited videos were released attempting to implicate me in the selling of fetal tissue."
- "And then [Daleiden] went back home, and he spliced and diced, and he created the story that he wanted to tell."
- "I wouldn't lie. I wasn't good at it because it never felt right to me. Then there is David Daleiden, who knowingly built a house of cards based on lies."

¶ 40 Daleiden claims that the publication of the foregoing statements substantially damaged his reputation as an investigative journalist when it caused a "shift in reporting" on CMP's videos by worldwide media outlets, who began describing the videos as "fake" or "doctored" when they had previously described them as "edited" or "heavily edited."

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[5] Dr. Mary Gatter was President of Medical Directors' Counsel for PPFA.

3. Analysis

¶ 41 Based on our de novo review of the record, we conclude that Daleiden has not shown a reasonable probability that he will prevail on his defamation claim, i.e., that the substance or "gist" of Dr. Ginde's statements is materially false. Put another way, Daleiden has not rebutted Dr. Ginde's showing that her statements are substantially true. We reach this conclusion for several reasons.

¶ 42 First, we conclude that the district court did not err when it compared the Raw Footage to the Edited Videos. To be sure, Colorado law requires us to view the evidence in the light most favorable to the plaintiffs. *Bewley v. Semler*, 2018 CO 79, ¶ 14. But it also requires us to consider the defendant's evidence. Indeed, this step of the anti-SLAPP analysis operates in a "summary-judgment-like" fashion where we must "accept[] as true the evidence favorable to [Daleiden] and evaluat[e] [Dr. Ginde's] evidence only to determine whether [she] has defeated [Daleiden's] evidence as a matter of law." *Lefebvre v. Lefebvre*, 131 Cal. Rptr. 3d 171, 174 (Ct. App. 2011) (citation omitted); *see also Salazar*, ¶ 20 (when reviewing a special motion to dismiss, a court must "determine whether the plaintiff's allegations and supporting

affidavit, viewed in conjunction with any opposing affidavit, meet the legal threshold of establishing a reasonable likelihood of success on the merits"). "[D]etermining whether a publication is materially false requires examination of the published statements in context, not in isolation." *Brokers' Choice IV*, 861 F.3d at 1108. This is important because "[w]hile statements may appear to be true when viewed in isolation, we consider the entire context to determine if a false impression is projected." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1137 (10th Cir. 2014) (*Brokers' Choice II*).

¶ 43 Here, Dr. Ginde's proffered evidence included a copy of the Raw Footage that she filed with the court as a supplemental exhibit following the hearing. Notably, Daleiden did not object to this supplemental exhibit.[6] Daleiden proffered a declaration from himself and an affidavit from his videographer stating that the Raw Footage was not fabricated and that the Edited Videos were not

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[6] Dr. Ginde also proffered the report of a forensic investigative firm that concluded that the words "It's a baby" were, "either through transcription error or intentional fabrication," superimposed as subtitled text in Episode 2 and attributed to Dr. Ginde.

deceptively edited because Dr. Ginde admitted making all of the statements attributed to her, and the Raw Footage was edited in accordance with industry standards to create the Edited Videos.

¶ 44 In his declaration, Daleiden attested that the Raw Footage "authentically captures [his] interactions with Dr. Ginde and the events that took place during [their] discussions on April 7, 2015." He further attested that he did not alter any of the Raw Footage when creating the Edited Videos and that he personally oversaw the work of the videographer, who, at his direction, "used industry-standard video editing techniques in industry-standard ways."

¶ 45 Similarly, the videographer attested that he used "industry-standard video editing techniques at the direction of Plaintiffs" and did not take any actions to fabricate the footage or render it inauthentic. He further attested that he did not use, nor was he asked by Daleiden to use, any deceptive or misleading techniques.

¶ 46 We conclude that both of Daleiden's claims necessitate reference to the "entire context," which involves assuming that his claims are true and viewing the Raw Footage "in conjunction" with the Edited Videos. *Salazar*, ¶ 20; *Brokers' Choice II,* 757 F.3d at 1137. A side-by-side comparison was not only proper in this case,

but was necessary and unavoidable. Thus, we discern no error by the district court when it performed the comparison. *See Brokers' Choice IV*, 861 F.3d at 1110-11 (affirming trial court's grant of motion to dismiss defamation claim on grounds of substantial truth where the court compared the unedited footage of the plaintiffs' seminar with the defendants' broadcast episode excerpting from and characterizing the seminar).

¶ 47 Next, having conducted our own de novo comparison, we conclude that Daleiden edited the Raw Footage in such a way as to falsely suggest that Dr. Ginde and PPRM were presently engaged in the illegal sale of aborted fetal tissue for profit and, thus, that the gist of Dr. Ginde's statements is not materially false.

¶ 48 The Raw Footage shows Daleiden and his colleague posing as representatives of a fetal tissue procurement company and meeting with Dr. Ginde and PPRM staff to discuss a potential business relationship involving the procurement of fetal tissue for biomedical research. During the meeting, Dr. Ginde repeatedly emphasizes that any business agreements would need to be approved by PPRM's legal counsel. Indeed, federal law permits women to donate fetal tissue for research purposes and for abortion providers to

receive reimbursement for costs related to transportation, implantation, processing, preservation, quality control, and storage of such tissue for donors. 42 U.S.C. §§ 289g-1(b)(1), -2(e)(3). What it prohibits is the sale of fetal tissue for profit. 42 U.S.C. § 289g-2.

¶ 49 Dr. Ginde can be heard saying that PPRM was not presently engaged in donating fetal tissue to any organization, for profit or otherwise, and had never done so in the past. Nothing in the Raw Footage shows that Dr. Ginde or PPRM was engaged in the sale of fetal tissue for profit. Instead, the Raw Footage shows that Dr. Ginde was cognizant of the potential for anti-abortionists to learn of any such arrangement and misconstrue (either intentionally or unintentionally) the proposed business arrangement as constituting the illegal sale of fetal tissue for profit. She told Daleiden that she wanted to ensure not only that her legal counsel approved of the proposed arrangement, but also that PPRM coordinated with other Planned Parenthood clinics who were engaged in similar business arrangements to ensure consistent messaging and that everyone was "on the same page."

¶ 50 By contrast, the Edited Videos omit all references to the need for legal review and juxtapose selected statements with subtitles,

captions, and graphics to convey the impression that Dr. Ginde and PPRM were presently engaged in the illegal sale of fetal tissue for profit. For example, Episode 1 contains a segment of footage in which Dr. Ginde is heard saying, "I think a per item thing works a little better, just because we can see how much we can get out of it." While the footage plays, closeup shots of fetal tissue are shown on the screen with a caption indicating the specimen was "prepared for procurement." But the context for this statement is missing from the Edited Video. The Raw Footage shows that Dr. Ginde and Daleiden were referencing the reasonable processing fees that PPRM would be entitled to receive for the specific tissue procurement, a topic that was discussed earlier in the meeting (and with the added context of requiring legal review before any agreement could be reached). Moreover, Dr. Ginde's staff was not preparing any specimens for procurement, but instead was showing Daleiden the quality of tissue PPRM routinely obtained from procedures to see whether it met prospective researchers' standards.

¶ 51 Similarly, Episode 1 contains segments from an interview with a phlebotomist and self-entitled "ex-procurement technician" who worked for a tissue procurement company, StemExpress, LLC. In

the interview, the phlebotomist expounds on her experience at the company where she was asked to draw blood and dissect fetuses, which she claims would be sold to researchers. She further claims that the company partnered with Planned Parenthood to use its facilities for tissue procurement for compensation. She describes how, at StemExpress, she saw medical personnel identifying various human parts in dishes containing fetal tissue from a recent abortion. However, interspersed with her description of this event, the video has footage of Daleiden's hidden camera recording of Dr. Ginde and her staff at PPRM showing Daleiden fetal tissue at their facility. Nothing in the Raw Footage (or the record) connects Dr. Ginde or PPRM with StemExpress, yet the edited video presents the footage as if Dr. Ginde were corroborating events described by the phlebotomist.

¶ 52 Further, Episode 2 contains large portions of the interview with Dr. Ginde, but a side-by-side comparison reveals that select segments have been removed, including, but not limited to, references to the need for legal review and Dr. Ginde's statement that PPRM had never donated fetal tissue to anyone before.

¶ 53 Based on our comparison, we conclude that the gist of Dr. Ginde's statements is true — that the Raw Footage was deceptively edited to create the Edited Videos and to convey the false impression that Dr. Ginde and PPRM were engaged in the illegal sale of fetal tissue for profit.

¶ 54 Finally, we perceive no error by the district court in declining to specifically address Daleiden's claim that Dr. Ginde accused his footage of being "fake" or fabricated. Daleiden identifies several of Dr. Ginde's statements that he claims "communicate to the reader that he did more than 'deceptively edit' their authentic video footage — they accuse [him] of manufacturing a 'deep fake' video." He focuses on Dr. Ginde's statement that the words "It's a baby" were "dubbed" into the Edited Videos and attributed to her. We do not agree that these isolated misstatements, including her now disavowed use of the word "dubbed," change the gist of Dr. Ginde's statements about Daleiden.

¶ 55 Indeed, at the hearing, Dr. Ginde acknowledged that her use of the word "dubbed" was misplaced. She clarified her contention that the words in the Edited Videos were either transcribed mistakenly or intentionally; not that the audio portion of the Raw

Footage was manipulated or "messed with in any material way." Likewise, in her answer brief, Dr. Ginde acknowledges that she misused the word "dubbed" and that what she meant was that the Edited Videos included subtitled text superimposed on the video that attributed the words "It's a baby" to her, effectively "put[ting] words in her mouth." Other than the foregoing statement, Dr. Ginde admits she said everything that is shown in the Edited Videos. And during an unrelated federal jury trial in *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, No. 16-CV-00236-WHO, 2020 WL 2065700, at *28 (N.D. Cal. Apr. 29, 2020), the parties, including Dr. Ginde, stipulated "that the words used by plaintiffs' personnel and the defendants in videos recorded by the defendants were spoken by those persons."

¶ 56 More importantly, substantial truth, not literal truth, is the standard for the affirmative defense of truth to a defamation claim. *Brokers' Choice IV*, 861 F.3d at 1110. It is enough that the gist, sting, or heart of the matter is true, and "minor inaccuracies do not count." *Id.* at 1110-11 (quoting *Masson*, 501 U.S. at 517). Finally, in addition to stipulating to the authenticity of the Raw Footage for

purposes of this motion, Dr. Ginde provided the Raw Footage as evidence for the court to consider.

¶ 57 We are not persuaded otherwise by Daleiden's attempt to distinguish the *Brokers' Choice* decisions from the instant case. *Brokers' Choice II* involved an appeal from the grant of NBC's motion to dismiss defamation claims brought against it by an insurance marketing company regarding a news show episode concerning insurance agents taking advantage of senior citizens that showed excerpts and information from a seminar the insurance company used to teach agents how to sell annuities to seniors. The appellate court held, among other things, that the district court's statement-by-statement analysis was insufficient and that it needed to use a more "global approach" considering "[t]he totality of the circumstances," because the insurance company claimed NBC presented the statements out of context and thereby created a false impression. *Brokers' Choice II*, 757 F.3d at 1138 (citing *Burns*, 659 P.2d at 1360, for the proposition that to determine whether statement is defamatory, "the entire published statement must be examined in context, not just the objectionable word or phrase"). Thus, the court in *Brokers' Choice II* remanded the case to the

district court and ordered that "the full . . . episode must be compared to the entirety of [the company's] seminar." *Brokers' Choice IV*, 861 F.3d at 1096 (citing *Brokers' Choice II*, 757 F.3d at 1138).

¶ 58 On remand, the district court compared the two recordings and found that, as a matter of law, the "comparison did not clearly and convincingly show the aired statements would have left viewers with a false impression of the gist of the [company's] seminars." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 138 F. Supp. 3d 1191, 1215 (D. Colo. 2015) (*Brokers' Choice III*), *aff'd*, *Brokers' Choice IV*, 861 F.3d 1081. Instead, NBC's portrayal of what occurred at the seminar was, in fact, "substantially true," and consequently the plaintiffs were not defamed. *Id.* The insurance company appealed.

¶ 59 In *Brokers' Choice IV*, the Tenth Circuit Court of Appeals compared the episode with the seminar recording. In a lengthy analysis, the court broke the gist of the episode into three categories: teaching agents to (1) scare and (2) mislead seniors into (3) buying unsuitable annuities. Next, it examined the episode's statements to inform its comparison of the gist of the seminar.

From that analysis, the court concluded that the episode was not materially false and subsequently affirmed the district court's dismissal of the insurance company's action. *Brokers' Choice IV*, 861 F.3d at 1111-39.

¶ 60 Daleiden argues that the courts in the *Brokers' Choice* decisions permitted a side-by-side comparison because "the parties had agreed that the recordings were 'independently sufficient, in and of themselves,' to test the sufficiency of the complaint" and because the contents of the communications being compared were undisputed. Citing *Brokers' Choice II*, he asserts that the issue of substantial truth (i.e., a finding of material falsity) may be resolved as a matter of law only when the "underlying facts as to the gist or sting are undisputed." *Brokers' Choice II*, 757 F.3d at 1137 (quoting *Lundell Mfg. Co. v. Am. Broad. Cos.*, 98 F.3d 351, 360 (8th Cir. 1996)). Here, he argues, there was no such agreement, as the authenticity of the Raw Footage remains disputed, and therefore the district court improperly decided contested factual issues by performing the comparison to determine the material falsity of Dr. Ginde's statements.

¶ 61 We disagree with Daleiden's characterization of the holding in *Brokers' Choice II*. Nowhere in that case or its progeny did the parties agree that the recordings were "independently sufficient, in and of themselves" to test the sufficiency of the complaint. Rather, this language appears in the *Brokers' Choice IV* procedural summary of the district court's findings. *See Brokers' Choice IV*, 861 F.3d at 1097 (citing *Brokers' Choice III*, 138 F. Supp. 3d at 1196-97). In that summary, the Tenth Circuit court noted that the district court had decided the motion as one to dismiss rather than as a summary judgment for four reasons, one of which was that the recording was "independently sufficient, in and of [itself], to test the sufficiency of the [amended] [c]omplaint." *Id.* (quoting *Brokers' Choice III*, 138 F. Supp. 3d at 1196-97). We do not read this language as *requiring* the parties to agree the recordings were independently sufficient to test the sufficiency of the complaint, nor are we aware of any authority requiring such an agreement. Accordingly, we discern no error in the court's determination, as a matter of law, that the Edited Videos did not constitute a fair and accurate representation of the Raw Footage.

¶ 62 But even assuming Daleiden were correct, our conclusion would not change. As we understand his argument, Daleiden claims that Dr. Ginde's statements in the Raw Footage reflect a willingness to sell donated fetal tissue for profit, contrary to law, while Dr. Ginde denies any such intent. Thus, the dispute concerns Dr. Ginde's intent when making the statements. No one disputes that the Edited Videos characterize PPRM and Dr. Ginde as engaging in illegal activity. And if we assume that Dr. Ginde's statements in the Raw Footage reflect a criminal intent to sell fetal tissue for profit as Daleiden claims, that alone is insufficient to constitute a crime, as portrayed in the Edited Videos. A crime requires criminal intent (mens rea), accompanied by a criminal act (actus reus). *People v. Chastain*, 733 P.2d 1206, 1211 (Colo. 1987) (holding that the commission of a crime requires concurrence of an unlawful act and a culpable mental state). The Raw Footage contains no evidence of a criminal act, nor has Daleiden directed us to any record evidence of a criminal act. Accordingly, we affirm the court's order granting Dr. Ginde's special motion to dismiss.

IV. Attorney Fees and Costs

¶ 63 Section 13-20-1101(4)(a) provides that "a prevailing defendant on a special motion to dismiss is entitled to recover the defendant's attorney fees and costs." Because we conclude that Daleiden does not have a reasonable likelihood of prevailing on his defamation claim, Dr. Ginde is entitled to recover her attorney fees and costs.

V. Disposition

¶ 64 The order is affirmed, and the case is remanded to the district court for the determination and award of Dr. Ginde's attorney fees and costs incurred on appeal.

JUDGE FURMAN and JUDGE WELLING concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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