SUMMARY
August 3, 2023

2023COA72

No. 22CA0393, *Rosenblum v. Budd* — Courts and Court Procedure — Action Involving Exercise of Constitutional Rights — Anti-SLAPP — Attorney Fees

In this anti-SLAPP case, a division of the court of appeals holds that the plaintiff established a reasonable probability of success at trial on two claims against one of the defendants but failed to do so on a third claim against that defendant. In a matter of first impression, the division concludes that a partially prevailing defendant on an anti-SLAPP motion filed pursuant to section 13-20-1101(3)(a), C.R.S. 2022, must be considered a prevailing party for purposes of attorney fees and costs unless the results of the partially successful motion were so insignificant that the defendant did not achieve any practical benefit from bringing the motion. Pursuant to C.A.R. 39.1, we remand for the district court

to determine whether that defendant is partially prevailing, to what extent his partial appellate success — if any — warrants an apportionment of fees, and the reasonableness of his appellate fees. The division also concludes that the plaintiff failed to establish a reasonable probability of success at trial against the other defendants and instructs the district court to award them reasonable appellate attorney fees and costs.

COLORADO COURT OF APPEALS **2023COA72**

Court of Appeals No. 22CA0393
Boulder County District Court No. 21CV30700
Honorable Thomas F. Mulvahill, Judge

Steven Rosenblum,

Plaintiff-Appellee,

v.

Eric Budd, Katie Farnan, Ryan Welsh, Mark Van Akkeren, Sarah Dawn Haynes, and Boulder Progressives, a Colorado nonprofit organization,

Defendants-Appellants.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE FOX
Welling and Kuhn, JJ., concur

Announced August 3, 2023

Brownstein Hyatt Farber Schreck, LLP, Stanley L. Garnett, Christopher O. Murray, Sean S. Cuff, Denver, Colorado, for Plaintiff-Appellee

Benezra & Culver, P.C., John A. Culver, Robert Goodwin, Denver, Colorado; Maxted Law, LLC, David Maxted, Denver, Colorado, for Defendant-Appellant Eric Budd

Killmer, Lane & Newman, LLP, Thomas Kelley, Darold W. Killmer, Mari Newman, Andy McNulty, Denver, Colorado, for Defendants-Appellants Katie Farnan, Ryan Welsh, Mark Van Akkeren, Sarah Dawn Haynes, and Boulder Progressives

¶ 1 In this anti-SLAPP case, defendant Eric Budd and Katie Farnan, Ryan Welsh, Mark Van Akkeren, Sarah Dawn Haynes, and Boulder Progressives (the BPO Defendants) appeal the district court's denial of their special motions to dismiss the complaint of plaintiff, Steven Rosenblum, for misappropriation, defamation, and civil conspiracy.[1] We conclude that Rosenblum established a reasonable probability of success at trial on his misappropriation and defamation claims against Budd but failed to do so on his civil conspiracy claim against Budd and the BPO Defendants.

¶ 2 Addressing a matter of first impression, we conclude that a partially prevailing defendant on an anti-SLAPP motion filed pursuant to section 13-20-1101(3)(a), C.R.S. 2022, must be considered a prevailing party for purposes of attorney fees and costs unless the results of the partially successful motion were so insignificant that the defendant did not achieve any practical benefit from bringing the motion. Pursuant to C.A.R. 39.1, we remand for the district court to determine whether Budd is a partially prevailing defendant, to what extent Budd's partial

[1] "SLAPP" is an acronym for "strategic lawsuits against public participation."

appellate success — if any — warrants an apportionment of fees, and the reasonableness of his appellate fees.

¶ 3 We also conclude that Rosenblum failed to establish a reasonable probability of success at trial against the BPO Defendants and instruct the district court to award them reasonable appellate attorney fees and costs.

¶ 4 Thus, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

¶ 5 This case arises from a local political candidate's suit against opposing political activists alleged to have "orchestrated a smear campaign" attacking his personal reputation.

A. Factual History

¶ 6 Rosenblum is a Boulder resident and a member of Safer Boulder, a community group that organized around public safety and housing issues. Rosenblum ran for a seat on Boulder's City Council in 2021. Boulder Progressives (BPO) is a local advocacy group that adopted opposing stances on homelessness and public safety. All defendants either were or remain members of BPO.

¶ 7 As a basis for his claims against the BPO Defendants and Budd, Rosenblum alleged the following facts. In September 2020, an unidentified John Doe published, on a blog called Safer Leaks, screenshots of comments made by members of Safer Boulder. Doe apparently had access to Safer Boulder's internal Slack channel[2] and publicized distasteful comments contained therein. For example, members of Safer Boulder proposed allowing bears and mountain lions to attack encampments of unhoused people, using rubber bullets or fire hoses to disperse encampments, and restraining those who attempt to film police and abandoning them near buckets of feces. The Safer Leaks blog made those originally private comments public.

¶ 8 Rosenblum denied responsibility for moderating the Slack channel and claimed that many comments were made before he was added to the channel. But Rosenblum admitted making some

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[2] Slack is an instant messaging program developed primarily for professional and organizational communications. Steven John, *'What is Slack?' Everything You Need to Know About the Professional Messaging Program*, Bus. Insider (Feb. 18, 2021), https://perma.cc/95GR-L2ND. Organizations that use Slack can create distinct chatrooms, called "channels," for various groups and topics. *Id.*

of the Slack channel comments published on the Safer Leaks blog, saying, "I stand by things I said and I would say them again." Those comments included the following:

- (Referring to a City Council member and her personal Twitter account) "I'm half convinced she's a Russian or Chinese bot trying to sow discord (like 70% of Twitter)."
- (Referring to an online request for support in opposing a sweep of an encampment) "SAFE sounding the call for backup for the Anal Wizard."[3]
- (In response to another member's statement comparing unhoused people to rats) "Wasn't someone supposed to chat with [the member] about word choice?"

¶ 9 The Safer Leaks blog contained links to subpages with separate profiles dedicated to certain Safer Boulder members. One subpage was dedicated to Rosenblum and attributed to him comments from an anonymous Reddit account called

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[3] Rosenblum explains that he referred to an unhoused individual living in the encampment — whom the parties claim identifies as transgender — by the name "Anal Wizard" because the individual apparently claimed to be a wizard and posted nude photographs online.

/u/AurochForDinner. /u/AurochForDinner made the following statements on Reddit:

- "We need to make life as miserable as possible for [unhoused people]."
- "[Transients] need to be treated like the filth that they are. The real homeless seek help and get a lot of it. These are travelers who come here to destroy our environment and city."
- "They aren't homeless, they are vagrants who choose to travel to Boulder to make our environment so filthy and filled with needles that kids can't use parks. . . . Are you getting the message yet that we are sick of this filth?"
- (In response to an online request that residents wear masks on trails and bike paths) "If it bothers you stay off the paths and trails."
- (In response to an observation that teachers were unwilling to teach in person during the COVID-19 pandemic) "Then they should be dismissed. The schools are operating out of fear . . . ."

¶ 10 Rosenblum has no connection to the /u/AurochForDinner Reddit account and did not make the statements falsely attributed to him.

¶ 11 On July 20, 2021, Rosenblum participated in a filmed interview with several community organizations regarding his upcoming candidacy for City Council. During the interview, Budd questioned Rosenblum's connection to Safer Boulder and the leaked Slack and Reddit comments. Rosenblum denied writing the Reddit comments but took responsibility for the Slack comments. During Budd and Rosenblum's colloquy, Budd said, "I agree that Reddit account is not you."

¶ 12 Budd later explained that, in making the foregoing admission, he was only trying to gain Rosenblum's trust and glean more information from him about the Slack comments, notwithstanding his claimed subjective belief that Rosenblum "could easily be /u/AurochForDinner." But the record reveals that Budd had initiated an email exchange with Doe, the creator of the Safer Leaks blog, almost two weeks earlier — on July 8, 2021 — asking whether Doe could "provide sufficient evidence" for the claim that Rosenblum was /u/AurochForDinner.

¶ 13 Shortly after the interview, Budd created a Twitter account in Rosenblum's name.[4] Budd does not deny creating the impersonation account. The name associated with the account was "Steven Rosenblum," and the account's handle was "@steveforboulder." Budd added a link to the Safer Leaks blog in the account's bio. Rosenblum also discovered an impersonation Instagram account in his name and a website under the domain stevenrosenblumforboulder.com that linked directly to the Safer Leaks blog.

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[4] The parties dispute when Budd created the Twitter account, but the exact date has no bearing on our analysis. While Colorado has not addressed the issue of online impersonation legislatively, some states have codified prohibitions on online impersonation, either in their criminal codes or elsewhere. *See, e.g.*, Cal. Penal Code § 528.5(a), (d) (West 2022) ("[A]ny person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense punishable . . . by a fine not exceeding one thousand dollars . . . or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment."); Okla. Stat. tit. 12, § 1450(B) (2022) ("Any person who knowingly uses another's name, voice, signature, photograph or likeness through social media to create a false identity without such person's consent . . . for the purpose of harming, intimidating, threatening or defrauding such person, shall be liable for online impersonation . . . .").

¶ 14 On August 5, 2021, Doe responded to Budd's July 8 inquiry regarding the assumed connection between Rosenblum and /u/AurochForDinner, saying that the attribution was based on "many coincidences." Doe agreed to conduct additional research on the connection and asked Budd if he had any relevant information. The same day, Budd replied,

> I don't have much to *invalidate* the connection. Although I also don't see anything direct that links the two, and that makes me uncomfortable since the Reddit account is much more aggressive and toxic than what I've seen from [Rosenblum] that can be directly attributed. Of course [Rosenblum] denied the Reddit account directly to me when I asked him.

¶ 15 On August 11, 2021, the BPO Defendants widely circulated a letter opposing Rosenblum's candidacy via email and blog. The letter contained a link to the Safer Leaks blog, copied several of the leaked screenshots from the blog, and provided analysis on Rosenblum's fitness for office. The letter contained the following disclaimer about the /u/AurochForDinner Reddit comments:

> It's important to note that the site linked above contains some screenshots from a Reddit account that Boulder Progressives agrees is not Steven Rosenblum. However, the content of the leaked Slack chats . . . is what the focus

> of this writing is about. It's up to the public to determine whether or not Steven Rosenblum wrote these Slack posts . . . whether he stands by them, and if a candidate with such positions should be elected to city council.

¶ 16 Later that day, Better Boulder — an organization of which Budd was a member — held a meeting to discuss whether it would endorse Rosenblum's candidacy. Budd raised the BPO letter at the meeting, and Better Boulder opted not to endorse Rosenblum. Haynes, a BPO Defendant, sent the letter to the local chapter of the Sierra Club shortly before it met to discuss endorsing Rosenblum; the chapter also decided not to endorse him.

¶ 17 On August 17, 2021 — approximately a week after the BPO Defendants circulated their letter — Doe removed the comments made by /u/AurochForDinner from the Safer Leaks blog, explaining on the Rosenblum subpage that Doe was no longer "confident in the connection" between the anonymous Reddit user and Rosenblum. Doe also emailed the same to Budd.

¶ 18 Budd left the impersonation Twitter account active until September. Rosenblum ultimately lost the election by less than one percentage point.

B. Procedural History

¶ 19 On September 22, 2021, Rosenblum filed a complaint alleging that Budd and Doe had defamed him and misappropriated his name and likeness. Rosenblum also alleged that all defendants engaged in a civil conspiracy against him.

¶ 20 On October 15, 2021, the BPO Defendants filed a special motion to dismiss under Colorado's anti-SLAPP statute. § 13-20-1101. They argued that the BPO letter contained constitutionally protected opinions about accurately recited words uttered by Rosenblum, that Rosenblum could not show actual malice, and that Rosenblum's choice to file the suit shortly before the election suggested a motive to silence his political adversaries. The BPO Defendants also denied any knowledge of or involvement in the creation of the impersonation account.

¶ 21 On November 24, 2021, Budd also filed a special motion to dismiss under the anti-SLAPP statute, arguing that Rosenblum could not establish actual malice, prove that Budd appropriated Rosenblum's name for a personal benefit, or demonstrate an agreement between the parties to disparage him.

¶ 22 After a February 1, 2022, hearing on the anti-SLAPP motions, the district court denied the special motions to dismiss after finding that (1) the anti-SLAPP statute applied to the conduct, and (2) Rosenblum established a reasonable probability that he could prove each claim by clear and convincing evidence at trial. The BPO Defendants and Budd now appeal the court's denial of their special motions to dismiss. *See* § 13-20-1101(7).

II. Applicable Law and Standard of Review

¶ 23 In 2019, the General Assembly enacted the anti-SLAPP statute to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b); Ch. 414, sec. 1, § 13-20-1101, 2019 Colo. Sess. Laws 3647-50; *see L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 1. The anti-SLAPP statute strikes such a balance by establishing a procedure allowing the district court to "make an early assessment about the merits of claims brought in response to a defendant's . . . speech activity." *Salazar v. Pub. Tr.*

Inst., 2022 COA 109M, ¶ 12; *see also Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶ 22.

¶ 24 The statute establishes a two-step process for considering a special motion to dismiss. *L.S.S.*, ¶ 20. First, the defendant filing the special motion to dismiss must make a threshold showing that the anti-SLAPP statute applies. *Id.* at ¶ 21. Specifically, the statute applies to any cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue." § 13-20-1101(3)(a). Second, if a defendant can establish that the claim falls within the anti-SLAPP statute's scope, the burden shifts to the plaintiff to demonstrate a "reasonable likelihood that the plaintiff will prevail on the claim." *Id.*; *Salazar*, ¶ 21. A "reasonable likelihood" is synonymous with a "reasonable probability." *Salazar*, ¶ 23. The district court must not weigh the evidence or resolve factual conflicts; instead, it must assess whether the plaintiff's factual assertions, if true, establish a reasonable likelihood of proving each claim under the applicable burden of proof. *Id.* at ¶¶ 21, 46-47; *see also L.S.S.*, ¶ 48.

¶ 25 If the district court, after considering the pleadings and supporting documents, concludes that there is a reasonable

likelihood that the plaintiff will prevail on the claim, it must deny the special motion to dismiss. § 13-20-1101(3)(a), (b); *see also Creekside*, ¶ 23.

¶ 26 A denial of a special motion to dismiss under the anti-SLAPP statute is immediately appealable. § 13-20-1101(7); § 13-4-102.2, C.R.S. 2022. We review a district court's ruling on a special motion to dismiss de novo. *Salazar*, ¶ 21. Like the district court, we do not assess the truth of allegations made in the complaint. We merely consider whether the allegations in the pleadings and supporting and opposing affidavits, if true, support "a legally sufficient claim and [make] a prima facie factual showing sufficient to sustain a favorable judgment." *Creekside*, ¶ 26 (quoting *L.S.S.*, ¶ 23).

III. Discussion

A. Step One: Protected Activity

¶ 27 The first step of our analysis is to determine whether the defendants' challenged conduct falls within the purview of the anti-SLAPP statute. The statute applies, as relevant here, to any conduct in connection with a public issue that furthers one's free

speech rights. § 13-20-1101(3)(a). The statute defines four categories of acts that further one's free speech rights:

> (I) Any written or oral statement . . . made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law;
>
> (II) Any written or oral statement . . . made in connection with an issue under consideration or review by a legislative, executive, or judicial body or any other official proceeding authorized by law;
>
> (III) Any written or oral statement . . . made in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (IV) Any other conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

§ 13-20-1101(2)(a).

¶ 28 We first consider whether the claims against Budd — misappropriation and defamation — qualify for anti-SLAPP protection before turning to the civil conspiracy claim against all defendants.

¶ 29 The parties dispute whether Budd's creation of the impersonation Twitter account and his inclusion of the Safer Leaks

blog hyperlink in the account's bio were acts in furtherance of his free speech rights. Budd appears to argue that his actions fall within subsection (2)(a)(III) of the statute — i.e., statements made in a public forum about an issue of public interest. Rosenblum answers that the impersonation Twitter account was not a "statement" and could only be considered under subsection (2)(a)(IV) of the statute — the "catchall" provision. *See FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1161 (Cal. 2019) ("The reference to 'any other conduct' in [California's version of subsection (2)(a)(IV)] also underscores its role as the 'catchall' provision meant to round out the statutory safeguards for constitutionally protected expression.").[5] Thus, the parties ask us to decide whether Budd's creation of an impersonation Twitter account was a "statement" or "conduct" within the meaning of the anti-SLAPP statute.

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[5] "Because few cases have applied Colorado's anti-SLAPP statute, and because it closely resembles California's anti-SLAPP statute, we look to California case law for guidance in outlining the two-step process for considering a special motion to dismiss." *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 20.

¶ 30 But Rosenblum argues elsewhere that the impersonation account constitutes a statement for purposes of his defamation cause of action. We agree, *see Balla v. Hall*, 273 Cal. Rptr. 3d 695, 714 (Ct. App. 2021) (holding that Facebook posts were statements made in a public forum for purposes of California's anti-SLAPP statute), and accept Rosenblum's concession that the account and link constitute a "statement" for purposes of anti-SLAPP statute applicability. Because the medium for the "statement" was a public Twitter account, we are satisfied that it was made in a "public forum."

¶ 31 While the parties dispute whether the creation of an impersonation account can, as a general matter, relate to an issue of public interest, we decline to set out a bright line proposition applicable to all cases. Instead, we conclude that *this* impersonation account was made in connection to an issue of public interest. When Budd created the impersonation account with a link to the Safer Leaks blog, Rosenblum was a public figure within the context of a City Council election. Indeed, Budd created the account shortly before Rosenblum officially declared his candidacy for a seat on the City Council. Moreover, the

impersonation account contained a link to public discourse about Rosenblum's fitness for public office. Thus, we are satisfied that Budd met his initial burden under subsection (2)(a)(III) of the anti-SLAPP statute. *See* § 13-20-1101(2)(a)(III).

¶ 32 Rosenblum concedes that his conspiracy claim against Budd and the BPO Defendants falls within the purview of the anti-SLAPP statute. *L.S.S.*, ¶ 28 (assuming without deciding that a statement fell within subsection (2)(a)(I) of the anti-SLAPP statute when plaintiff-appellee did not so dispute). Thus, we turn to whether Rosenblum demonstrated a reasonable likelihood that he will prevail on his misappropriation, defamation, and civil conspiracy claims at trial.

B. Step Two: Likelihood of Prevailing

1. Misappropriation Claim

¶ 33 Budd appeals the district court's denial of his special motion to dismiss Rosenblum's claim of misappropriation of name and likeness against him.

> [T]he elements of an invasion of privacy by appropriation claim are: (1) the defendant used the plaintiff's name or likeness; (2) the use of the plaintiff's name or likeness was for the defendant's own purposes or benefit,

> commercially or otherwise; (3) the plaintiff suffered damages; and (4) the defendant caused the damages incurred.

Joe Dickerson & Assocs., LLC v. Dittmar, 34 P.3d 995, 1002 (Colo. 2001).

¶ 34 The district court recognized that Budd might establish that the impersonation account was privileged under the First Amendment, but in declining to weigh competing evidence, it concluded that Rosenblum alleged enough at the preliminary stage of the proceedings to establish a reasonable likelihood of success at trial. *Creekside*, ¶ 26. We agree. Budd used Rosenblum's name to create an impersonation account on Twitter. In so doing, Budd prevented Rosenblum from using the account name for his own campaign purposes and, arguably, created the appearance that Rosenblum's campaign endorsed the contents of the Safer Leaks blog. We perceive no error in the district court's conclusion that Rosenblum was reasonably likely to prove that the foregoing conferred a noncommercial benefit on Budd: the ability to undermine the efforts of a political candidate he opposed.

¶ 35 Budd argues that the impersonation Twitter account did not benefit him because the account was created solely for "public

advocacy." Had Budd shared the link to the Safer Leaks blog on his personal Twitter account, we would be more inclined to agree. But the impersonation account laid claim on the username "@steveforboulder" so that Rosenblum could not use it. It also created a public connection between what appeared to be Rosenblum's campaign and the Safer Leaks blog — with the disparaging assertion attributing the content from /u/AurochForDinner to Rosenblum — that did not previously exist. Thus, we conclude that Rosenblum alleged enough here to state a "legally sufficient claim" and make a "prima facie factual showing sufficient to sustain a favorable judgment." *See Creekside*, ¶ 26 (quoting *L.S.S.*, ¶ 23).

¶ 36 Further, it is reasonably likely that a jury could find for Rosenblum notwithstanding Budd's claimed First Amendment privilege. *See Salazar*, ¶ 21. We reach this conclusion because the facts of this case — involving not only the use of another's name for a benefit, but the use of another's name to *impersonate* them online — are quite distinguishable from the facts of *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d at 1002-04, in which our supreme court recognized a "newsworthiness" privilege on which

Budd relies. In that case, Dickerson published a newsletter describing Dittmar's criminal activities, and included in the newsletter Dittmar's name and photograph. *Id.* at 998. But the case did not contemplate the use of one's name or likeness for the purpose of impersonation. *See id.* Thus, "ever cognizant that we do not sit as a preliminary jury," we conclude that Rosenblum has pleaded enough here to establish a reasonable likelihood of success such that the misappropriation claim may proceed. *Salazar*, ¶¶ 21, 46-47; *see also L.S.S.*, ¶ 48 (declining to weigh evidence, make credibility determinations, or conclude as a matter of law that a reasonable juror presented with competing arguments could not find for the plaintiff).

2. Defamation Claim

¶ 37 Budd also appeals the district court's denial of his special motion to dismiss as to Rosenblum's defamation claim.

¶ 38 The basic elements of defamation 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.

Creekside, ¶ 34 (quoting *Lawson v. Stow*, 2014 COA 26, ¶ 15). Statements of "pure opinion" are nonactionable under defamation principles. *Lawson*, ¶¶ 18, 30.

¶ 39 Where, as here, a statement concerns a public figure or a matter of public concern, it is subject to heightened standards. *L.S.S.*, ¶ 36; *Zueger v. Goss*, 2014 COA 61, ¶ 25. The plaintiff then bears the additional burden of proving by clear and convincing evidence that the speaker published the statement with actual malice. *L.S.S.*, ¶ 36. 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." *Id.* at ¶ 40. A publisher acts with "reckless disregard for the truth" if the publisher "entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity." *Creekside*, ¶ 38 (quoting *Fry v. Lee*, 2013 COA 100, ¶ 21).

¶ 40 Thus, to withstand a special motion to dismiss where a showing of actual malice will be required at trial, a plaintiff must establish a reasonable probability that he will be able to produce

clear and convincing evidence of actual malice at trial. *L.S.S.*, ¶ 41; *Creekside*, ¶¶ 31-32.

¶ 41 Rosenblum argued to the district court that Budd made two defamatory "statements." First, Budd made the impersonation Twitter account. Second, Budd republished the link to the Safer Leaks blog on the Twitter account — which Rosenblum argues amounted to an endorsement of the blog's contents. The district court agreed. First, the district court concluded that the impersonation account alone satisfied each element of defamation, including actual malice. While the district court did not agree with the argument that pasting the link, in isolation, constituted a "republication," it concluded that Budd's act of placing the link in the bio section of the impersonation account was a "statement" in its own right because it communicated an endorsement of the blog's contents through the falsified persona.

¶ 42 For several reasons, we conclude that Rosenblum established a reasonable likelihood of success here, where the impersonation account and the link were published together.

¶ 43 First, it is reasonably likely that Rosenblum will be able to prove that the "account + link" combination was a defamatory

statement. "Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage." *Lawson*, ¶ 15 (quoting *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994)); *see also* Restatement (Second) of Torts § 559 cmt. a (Am. L. Inst. 1977) (defining "communication" as when "one person has brought an idea to the perception of another"). The "account + link" combination could reasonably be interpreted to communicate an idea: that Rosenblum created the Twitter account for campaign purposes and that Rosenblum's campaign validated or endorsed the contents of the Safer Links blog. "To be defamatory, the statement need only prejudice the plaintiff in the eyes of a substantial and respectable minority of the community." *Arrington v. Palmer*, 971 P.2d 669, 671 (Colo. App. 1998). We conclude that Rosenblum has established a reasonable probability that the impersonation account could be so interpreted, and that the implication that Rosenblum recognized or endorsed the blog and its contents could lower his estimation in the eyes of at least a minority in the community. *See L.S.S.*, ¶ 48.

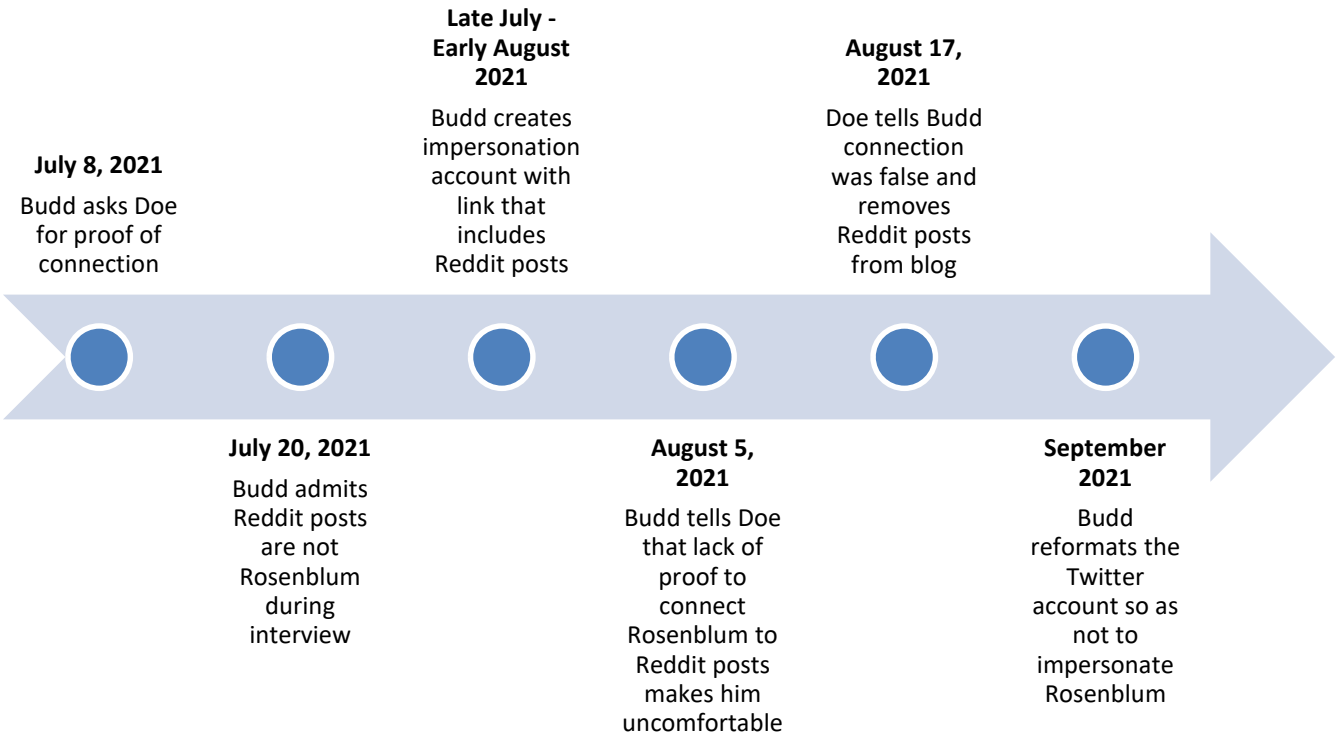
¶ 44 Budd argues that "no reasonable internet user" could believe that Rosenblum created the impersonation account or endorsed the

Safer Leaks blog, particularly because the internet is inherently unreliable and the account was relatively devoid of content. *See, e.g.*, *O'Donnell v. Knott*, 283 F. Supp. 3d 286, 296-302 (E.D. Pa. 2017). We are not prepared to make such an assertion as a matter of law at this juncture, especially where the evidence showed that Rosenblum announced publicly that he stood by his Slack comments and would say them again. *See Creekside*, ¶ 26. Moreover, the lack of any surrounding content actually undermines Budd's argument in this regard, as there is no added context — such as the use of parody, satire, or hyperbole — that would potentially put a reader on notice that neither Rosenblum nor his campaign was the speaker. And we are not called to sit as a preliminary jury, weighing the respective merits of each argument, at this point in the proceedings. *Salazar*, ¶¶ 21, 46-47; *see also L.S.S.*, ¶ 48.

¶ 45 Second, it is reasonably likely that Rosenblum will be able to prove Budd published the statement. To reach this conclusion, we need not opine on whether posting a hyperlink online is a republication. *Compare In re Phila. Newspapers, LLC*, 690 F.3d 161, 174-75 (3d Cir. 2012) (holding that posting a hyperlink is not a

republication), *with Nunes v. Lizza*, 12 F.4th 890, 900-01 (8th Cir. 2021) (holding that posting a hyperlink was a republication where it reached a new audience). Here, the defamatory communication was the "account + link" combination, which together created a false appearance of recognition or endorsement. Because the communication was available to any member of the public that searched for Rosenblum's name online, Rosenblum has alleged enough to satisfy a reasonable likelihood of success on this element.

¶ 46 Third, Rosenblum is reasonably likely to be able to prove actual malice. A timeline of the facts relevant to Budd's knowledge follows:



First and foremost, Budd admits in his opening brief that he made the account and that it was a false depiction of Rosenblum and his campaign. Thus, he made the impersonation account with "actual knowledge" that it was false. *L.S.S.*, ¶ 40. And as the above timeline demonstrates, Budd had reason to know that the link contained false information when he attached it to the impersonation account. On July 8, 2021, Budd asked for proof of the connection between Rosenblum and /u/AurochForDinner,

indicating that Budd had doubts about its accuracy. During the July 20, 2021, interview — in response to Budd's questioning — Rosenblum publicly denied that he was /u/AurochForDinner. Budd did not merely ignore the most obvious source of corroboration or refutation for the assumed connection, *see, e.g.*, *Kuhn v. Tribune-Republican Publ'g Co.*, 637 P.2d 315, 319 (Colo. 1981) ("[F]ailure to pursue the most obvious available sources of possible corroboration or refutation may clearly and convincingly evidence a reckless disregard for the truth."), he posted the link with knowledge that the most obvious source of corroboration denied the connection, and after admitting himself that Rosenblum did not write the Reddit posts. He later told Doe directly that he was "uncomfortable" because the blog showed no evidence linking the two, especially given Rosenblum's direct denial of the connection, and he still kept the link in the impersonation account's bio. The misattributed statements were available through the impersonation account for at least two weeks, until — on August 17, 2021 — Doe told Budd that the attribution was incorrect and immediately removed the Reddit posts from the blog.

Thus, Rosenblum has amply met his burden at this stage to present facts suggesting actual malice.

¶ 47 Fourth, the hyperlinked impersonation account injured Rosenblum to the extent that it created a falsified public persona of Rosenblum and his political campaign and connected Rosenblum's campaign to the Safer Leaks blog.

¶ 48 Finally, it is reasonably likely that a jury could find for Rosenblum notwithstanding Budd's claimed immunity under the Communications Decency Act (CDA). 47 U.S.C. § 230(c)(1); *see also Salazar*, ¶ 21. Simply put, the law protects providers and users of interactive computer services from, as relevant here, defamation claims based on information provided by another information content provider. *Salazar*, ¶ 21. Had Budd just posted the link without the false attribution, the outcome might be different under the CDA. But here, Budd was the content provider who made the impersonation account and attached the hyperlink to it. *See Roland v. Letgo, Inc.*, ___ F. Supp. 3d ___, 2022 WL 17416664, at *3 (D. Colo. Dec. 5, 2022) (holding that Section 230 of the CDA generally "protects websites from liability for material posted on the website *by someone else*") (emphasis added) (citation omitted).

Accordingly, we conclude that the immunity granted by the CDA does not extend to Budd.

¶ 49 For these reasons, we conclude that Rosenblum met his burden to survive the special motion to dismiss and his defamation claim may proceed.

3. Civil Conspiracy Claim

¶ 50 Budd and the BPO Defendants appeal the district court's denial of their special motions to dismiss Rosenblum's civil conspiracy claim.

¶ 51 To prove a claim for civil conspiracy, a plaintiff must establish "(1) two or more persons . . . ; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo. App. 2006) (quoting *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989)). Civil conspiracy is a derivative cause of action. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003), *overruled on other grounds by L.H.M. Corp., TCD v. Martinez*, 2021 CO 78, ¶ 24. "If the acts alleged to

constitute the underlying wrong provide no cause of action, then there is no cause of action for the conspiracy itself." *Id.*

¶ 52 While a civil conspiracy may be "implied by a course of conduct and other circumstantial evidence," *Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1327 (Colo. App. 1992), we will not infer a conspiracy absent some proof of an agreement. *More v. Johnson*, 193 Colo. 489, 494, 568 P.2d 437, 440 (1977). The plaintiff must present "some indicia of agreement in an unlawful means or end." *Schneider*, 854 P.2d at 1327 (quoting *Martinez v. Winner*, 548 F. Supp. 278, 324 (D. Colo. 1982)).

¶ 53 Rosenblum argued to the district court that the individual defendants conspired to defame him. The district court found that Rosenblum established a reasonable probability of success at trial because these defendants had close political ties and the BPO letter was circulated immediately before various groups considered endorsing Rosenblum, suggesting a coordinated effort by the defendants. We disagree that such evidence indicates agreement.

¶ 54 Rosenblum failed to establish a reasonable probability of success in proving a meeting of the minds on an object to be achieved (tarnishing Rosenblum's reputation by falsehood and

preventing his election) or a course of action to achieve the object (by spreading the Safer Leaks blog).[6]

¶ 55 Rosenblum failed to present indicia of a collective agreement between Doe, Budd, and the BPO Defendants — apart from, perhaps, their shared political ideology. A shared political ideology is insufficient to demonstrate the type of meeting of the minds necessary to support a civil conspiracy. Indeed, lawsuits premised on the concerted efforts of a political opponent present the exact type of litigation that could have a "chilling effect on the constitutionally protected right[s] of free speech" and association. *BKP, Inc. v. Killmer, Lane & Newman, LLP*, 2021 COA 144, ¶ 65 (quoting *Fry*, ¶ 24) (*cert. granted* Dec. 12, 2022); *see also Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 16 (Colo. App. 1996) (A plaintiff "may not avoid the strictures of defamation law by artfully pleading their defamation claims to sound in other areas of tort law."

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[6] Because we resolve this claim of error based on Rosenblum's failure to present a reasonable likelihood of prevailing on the basic elements of a civil conspiracy, we need not opine on whether Rosenblum was required to prove actual malice as to each defendant, as the parties ask. *Bd. of Cnty. Comm'rs v. Cnty. Rd. Users Ass'n*, 11 P.3d 432, 439 (Colo. 2000) ("[C]ourts may not issue advisory opinions . . . .").

(quoting *Vackar v. Package Mach. Co.*, 841 F. Supp. 310, 315 (N.D. Cal. 1993))). Thus, we turn to whether the evidence Rosenblum presented could support a meeting of the minds between any combination of the individual defendants and Doe.

¶ 56 As between Budd and Doe, the only evidence Rosenblum raises in his answer brief is the email exchange. Rosenblum argues that the emails, "at the very least," show that Doe and Budd communicated about the blog. But that is all they show. Budd emailed Doe to verify the accuracy of the claimed connection between Rosenblum and /u/AurochForDinner. Far from asking Doe to join in the misattribution, Budd asked Doe to authenticate it, causing Doe to conduct further research and later delete that portion of the blog. Budd's admission at the July 20 interview that he knew the attribution was false — while damaging for his defamation claim — works in his favor here because his public agreement that the statements were misattributed contradicts Rosenblum's argument that Budd worked with Doe to spread the misattribution. And Rosenblum failed to present any indicia of agreement between Budd and Doe to jointly create impersonation accounts and websites. That Budd and Doe committed acts that,

on their own, could give rise to meritorious defamation and misappropriation claims does not a conspiracy make. Indeed, the evidence of their limited interaction suggests the opposite.

¶ 57 As between Budd and the BPO Defendants, Rosenblum relies heavily on the close timing between the BPO Defendants' letter and Budd's use of the letter to oppose Rosenblum's potential endorsement within groups to which he belonged.[7] But this timing reflects, at most, an implied agreement between the defendants, who shared a political ideology, to use true information to oppose a candidate who they disagreed with — an entirely lawful course of conduct to reach a lawful goal. *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995) ("[T]he purpose of the conspiracy must involve an unlawful act or unlawful means. A party may not be held liable for doing in a proper manner that which it had a lawful right to do."). This is especially so where the BPO Defendants explicitly disclaimed

[7] Rosenblum argues that the BPO Defendants hung their hat on their actual malice arguments, thereby conceding the existence of an agreement based on the evidence Rosenblum presented if their actual malice argument failed. We are unpersuaded and thus address whether Rosenblum established a reasonable probability of success in establishing an agreement between Budd and the BPO Defendants.

the allegedly defamatory portion of the blog in their letter and where Rosenblum pointed to no evidence that the BPO Defendants knew of or were involved in Budd's creation of the impersonation account.

¶ 58 As between the BPO Defendants and Doe, Rosenblum presents no indicia of agreement. The evidence before the district court, again, suggests the opposite. The BPO Defendants explicitly disclaimed Doe's inaccurate attribution of /u/AurochForDinner to Rosenblum, rebutting Rosenblum's suggestion that the BPO Defendants worked with Doe to spread defamatory information about him.

¶ 59 Thus, the district court properly allowed Rosenblum's misappropriation and defamation claims against Budd to proceed. But the court erred by denying the BPO Defendants' special motion to dismiss Rosenblum's civil conspiracy claim against them. It also erred by denying the same as to Budd.

IV. Attorney Fees

¶ 60 All defendants invoke section 13-20-1101(4) in requesting attorney fees incurred on appeal.[8] According to the anti-SLAPP

[8] We do not read the BPO Defendants' or Budd's briefs to request an award of attorney fees incurred in the district court proceedings.

statute, "in any action subject to [the procedures established in] this section, a prevailing defendant on a special motion to dismiss is entitled to recover the defendant's attorney fees and costs." § 13-20-1101(4)(a).

¶ 61 Because we conclude that Rosenblum did not have a reasonable likelihood of prevailing on his civil conspiracy claim against the BPO Defendants, the BPO Defendants are entitled to recover appellate attorney fees and costs.

¶ 62 Although we partially reverse the district court's order denying Budd's special motion to dismiss, Rosenblum is still able to pursue a misappropriation and defamation claim against Budd at this time. Thus, the district court, in its discretion, may consider Budd a partially prevailing defendant. *See Mann v. Quality Old Time Serv., Inc.*, 42 Cal. Rptr. 3d 607, 613 (Ct. App. 2006) (holding that a defendant partially prevails "where the court strikes some but not all of the challenged causes of action"). This is the first published Colorado opinion to decide whether a partially prevailing defendant may recover attorney fees under the anti-SLAPP statute. *See Salazar*, ¶ 66. As such, we turn — as we have before — to

California's anti-SLAPP statute, which served as a model for ours. *L.S.S.*, ¶ 20.

¶ 63 "[A] party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." *Mann*, 42 Cal. Rptr. 3d at 614. Whether a party prevailed on an anti-SLAPP motion — and to what extent the partial success warrants an apportionment of fees — is a determination that lies within the broad discretion of a district court. *See id.* at 614-17, 619 ("[A] partially prevailing party is not necessarily entitled to all incurred fees even where the work on the successful and unsuccessful claims was overlapping.").

¶ 64 Thus, we exercise our discretion pursuant to C.A.R. 39.1 to remand for the district court to determine whether Budd is a partially prevailing defendant, to what extent Budd's partial appellate success — if any — warrants an apportionment of fees, and the reasonableness of his appellate fees. *See also City of Colton v. Singletary*, 142 Cal. Rptr. 3d 74, 102 (Ct. App. 2012); *Lin v. City of Pleasanton*, 96 Cal. Rptr. 3d 730, 743 (Ct. App. 2009).

V. Disposition

¶ 65 The judgment is affirmed in part and reversed in part, and the case is remanded with directions.

JUDGE WELLING and JUDGE KUHN concur.