SUMMARY
September 28, 2023

2023COA87

No. 22CA0696, *Gonzales v. Hushen* — Torts — Defamation — Intentional Infliction of Emotional Distress; Courts and Court Procedure — Regulation of Actions and Proceedings — Action Involving Constitutional Rights — Anti-SLAPP — Special Motion to Dismiss; Administrative Law — Quasi-Judicial Proceedings — Absolute Immunity — Title IX Investigations

This anti-SLAPP case concerns a plaintiff's defamation and intentional infliction of emotional distress claims relating to statements made by defendants accusing plaintiff of sexual misconduct. Defendants' statements closely preceded, or were made in the course of, a Title IX investigation into plaintiff's alleged actions. Defendants argue that their statements are absolutely privileged because they were made in connection with the Title IX investigation, which they assert is a quasi-judicial proceeding.

A division of the court of appeals holds that, for a proceeding to be considered "quasi-judicial" for the purposes of applying absolute immunity, the proceeding must contain sufficient procedural safeguards to ensure reliability and fundamental fairness. Courts must look to the totality of the circumstances in determining whether the safeguards are sufficient.

Applying this holding to the Title IX proceeding at issue, the division affirms the portion of the district court's order concluding that the proceeding is not quasi-judicial. Therefore, the division concludes that defendants' statements are not absolutely privileged.

Because the division also concludes that the plaintiff presented sufficient evidence of actual malice to survive an anti-SLAPP motion, it reverses the portion of the district court's order dismissing plaintiff's claims as to certain statements.

Finally, the division reverses the portion of the district court's order declining to analyze certain statements under the anti-SLAPP framework.

COLORADO COURT OF APPEALS **2023COA87**

Court of Appeals No. 22CA0696
Jefferson County District Court No. 21CV30468
Honorable Robert C. Lochary, Judge

Benjamin Gonzales,

Plaintiff-Appellee and Cross-Appellant,

v.

Ashley Hushen, Julie Hushen, Alexandra Weary, and Nicole Weary,

Defendants-Appellants and Cross-Appellees.

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

Division III
Opinion by JUDGE LUM
J. Jones and Vogt*, JJ., concur

Announced September 28, 2023

Carolyn Pelloux, Denver, Colorado, for Plaintiff-Appellee and Cross-Appellant

Sutton Booker P.C., Joel S. Babcock, Katie B. Johnson, Lily E. Nierenberg, Denver, Colorado, for Defendant-Appellants and Cross-Appellees Ashley Hushen and Julie Hushen

Steven D. Zansberg, Denver, Colorado, for Defendants-Appellants and Cross-Appellees Alexandra Weary and Nicole Weary

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 In this action for defamation and intentional infliction of emotional distress, defendants — Ashley Hushen and Alexandra Weary (defendant daughters) and their mothers, Julie Hushen and Nicole Weary (defendant mothers)[1] — appeal the trial court's order partially granting and partially denying their special motion to dismiss under section 13-20-1101, C.R.S. 2023. Plaintiff, Benjamin Gonzales, cross-appeals. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. Background

A. Underlying Facts, Complaint, and Anti-SLAPP Motion

¶ 2 Defendant daughters were classmates with Gonzales at Evergreen High School (EHS), a public high school in Jefferson County. Defendant daughters alleged that Gonzales sexually

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[1] We note that this case involves allegations of sexual misconduct. Although we do not typically identify sexual assault victims by name, *see* C.A.R. 32(f), 35, we do so in this opinion because the parties have already identified themselves by name in filings before the trial court, in their appellate briefing, and at oral argument, and no party has moved to restrict access to court files. We note that by citing these appellate rules, we express no opinion about the nature or truthfulness of the sexual misconduct allegations. Additionally, because some parties share the same last name, we will occasionally refer to parties by their first names. We mean no disrespect in doing so.

harassed them at school. The allegations resulted in a Title IX investigation that led to Gonzales's expulsion from EHS. Gonzales was also tried as a juvenile on criminal charges relating to the allegations but was acquitted on December 20, 2019.

¶ 3 After acquittal, the Jefferson County School District (JCSD) communicated with Gonzales regarding re-admittance to EHS and recission of the Title IX findings that led to his expulsion.[2] JCSD then notified defendants that Gonzales might be permitted to return to EHS. Between February 20 and 28, 2020, defendant mothers sent several emails to school officials voicing concerns about Gonzales's potential return.

¶ 4 On March 4, 2020, JCSD formally rescinded its prior Title IX finding due to Gonzales's acquittal, but it also re-opened the Title IX investigation.[3] On April 24, 2020, during the re-opened investigation, an attorney representing defendants prepared a "Title IX supplement," in which defendants reasserted some of their

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[2] There is some factual dispute as to whether JCSD contacted Gonzales of its own volition or whether Gonzales pressured JCSD to revoke or rescind the findings.

[3] Gonzales asserts that the re-opening was at least partially due to defendant mothers' emails.

allegations. The attorney sent the Title IX supplement to the JCSD Title IX coordinator, apparently at the coordinator's request.

¶ 5 Approximately one year later, Gonzales filed his complaint in the underlying matter for defamation and intentional infliction of emotional distress. Gonzales attached multiple February 2020 emails to his complaint. The complaint also referenced the Title IX supplement and noted that Gonzales expected to uncover additional communications through the discovery process.

¶ 6 Defendants jointly filed a special motion to dismiss under section 13-20-1101 (anti-SLAPP motion), asserting that the statements at issue were protected activity under the statute. Defendants additionally asserted that, because the statements were made in connection with a Title IX investigation — which they alleged to be a quasi-judicial proceeding — the statements were absolutely privileged and could not form the basis for civil liability. Alternatively, defendants argued that, even if the statements were not absolutely privileged, they were subject to a qualified privilege because they addressed a matter of public concern and were made between parties with a legitimate common interest in the subject

matter. Further, defendants asserted that Gonzales could not produce the evidence of "actual malice" necessary to defeat the qualified privilege. Therefore, contended defendants, Gonzales could not meet his burden to show he had a reasonable likelihood of prevailing on the merits. To their motion, defendants attached three additional communications within the relevant timeframe, including the Title IX supplement.

¶ 7 Gonzales responded that the emails and Title IX supplement were not protected activity under section 13-20-1101 because they were made "not in furtherance of [defendants'] right to participate but as a defamatory campaign . . . designed to mislead authorities to punish [him] for no credible reason." He also contended that he could show a reasonable likelihood that he would prevail on the merits; that the proceeding was not "quasi-judicial" because it did not afford him any due process; and that, in any event, the emails that preceded the re-opened Title IX investigation were not sufficiently connected to the proceeding to merit the application of absolute privilege. He also contended that he could demonstrate that defendants made their statements with actual malice.

B. Anti-SLAPP Order

¶ 8 The trial court determined that there were fifteen communications before it at the time it issued its order on defendants' anti-SLAPP motion (anti-SLAPP order):

Title	**Type**	**Date**
Communication 1	E-mail	2/20/2020
Communication 2	E-mail	2/20/2020
Communication 3	E-mail	2/21/2020
Communication 4	E-mail	2/22/2020
Communication 5	E-mail	2/25/2020
Communication 6	E-mail	2/25/2020
Communication 7	E-mail	2/25/2020
Communication 8	E-mail	2/26/2020
Communication 9	E-mail	2/26/2020
Communication 10	E-mail	2/26/2020
Communication 11	E-mail	2/27/2020
Communication 12	E-mail	2/28/2020
Communication 13	E-mail	2/28/2020
Communication 14	Letter	3/4/2020
Communication 15	Letter (Title IX Supplement)	4/24/2020

¶ 9 Of these, the trial court analyzed only communications 2, 4, 12, 13, and 15 (the analyzed communications). The court determined that the remaining listed communications were "not relevant to the analysis presently before the Court."

¶ 10 Of the analyzed communications, the trial court determined as follows:

- communications 2, 4, 12, and 15 were protected activity under section 13-20-1101;
- communication 13 was not protected activity;
- absent the application of any privilege, Gonzales demonstrated a reasonable likelihood of prevailing on his claims as to communications 2, 4, 12, and 15;
- the Title IX investigation was not a quasi-judicial proceeding and, therefore, none of the communications was absolutely privileged; and
- communications 2, 4, 12, 13, and 15 were subject to the qualified "common interest" privilege, and Gonzales was unable to refute the privilege with proof of actual malice.

¶ 11 Based on these conclusions, the court granted the anti-SLAPP motion as to communications 2, 4, and 12. However, in addition to the fifteen listed communications, the court found that Gonzales's complaint referred to "additional defamatory communications" (the additional communications). Because the court did not have copies of those additional communications, it could not make findings as to anti-SLAPP or privilege. However, it ruled that the existence of the additional communications was supported by the evidence, including Gonzales's affidavit and statements contained within communications 13 and 15. The court therefore denied the remainder of the anti-SLAPP motion and ruled that, with the exception of communications 2, 4, and 12, Gonzales's claims could proceed.[4]

[4] Although the trial court determined that communications 13 and 15 were privileged "and as they are currently offered to the Court would not survive" the anti-SLAPP motion, the court did not grant the motion as to those two communications, apparently because they contained evidence of the additional communications.

C. Motion to Reconsider and Order

¶ 12 Following the anti-SLAPP order, defendants filed a motion for partial reconsideration or clarification relating to the additional communications. Defendants argued as follows:

- Gonzales's first amended complaint failed to adequately plead the additional communications and did not state a plausible claim for relief relating thereto;
- by denying the anti-SLAPP motion based on those communications, the trial court erred by shifting the burden of proof to state a plausible claim from Gonzales to defendants; and
- the complaint did not provide defendants with sufficient notice of the additional communications, and, therefore, defendants were unable to assert all available defenses.

¶ 13 Defendants requested that the trial court revise its order to dismiss Gonzales's complaint as to the additional communications for failure to state a claim. Alternatively, defendants requested that the court clarify which additional communications were adequately

pleaded such that they required defendants to respond when they filed their answer.

¶ 14 In its order on the motion for reconsideration, the trial court ruled that because defendants filed the anti-SLAPP motion, they bore the initial burden to make a prima facie showing that the communications arose from protected activity. And without a copy of the additional communications, the court ruled that defendants could not meet that burden. The court declined to address defendants' argument that the additional communications were inadequately pleaded because defendants never previously raised those contentions under C.R.C.P. 12(b)(5). Finally, the court construed defendants' request for clarification as a motion for more definite statement, which it granted. The court ordered Gonzales to file an amended complaint on or before April 29, 2022.

¶ 15 Gonzales timely filed his (second) amended complaint on April 29, one day after defendants filed their notice of appeal.

D. Summary of Contentions on Appeal

¶ 16 On appeal, defendants assert that the trial court erred by (1) ruling that the Title IX investigation was not a quasi-judicial

proceeding and that the statements made in connection therewith were not absolutely privileged; (2) denying the anti-SLAPP motion based on additional communications that weren't adequately pleaded in the amended complaint; and (3) failing to make an anti-SLAPP ruling as to communications 1, 3, 5-9, and 11.

¶ 17 Gonzales contends that the trial court erred by (1) ruling that he did not establish actual malice and therefore concluding that communications 2, 4, 12, 13, and 15 were privileged; and (2) failing to make an anti-SLAPP ruling as to communications 1, 3, 5-9, and 11.

¶ 18 We first review the analytical framework established by section 13-20-1101 for evaluation of an anti-SLAPP motion. Next, we apply that framework to the parties' contentions relating to whether the Title IX proceeding is a quasi-judicial proceeding entitling the speakers to absolute immunity for statements made in connection therewith. In so doing, we examine the criteria for a proceeding to be "quasi-judicial" and conclude that those criteria differ depending on whether the purpose of the inquiry is (1) to decide whether absolute immunity applies or (2) to decide whether the proceeding

is subject to C.R.C.P. 106(a)(4) review. We next apply the anti-SLAPP framework to the issue of establishing actual malice to rebut a qualified privilege. Finally, we address the parties' assertions of procedural error.

II. Anti-SLAPP Principles

¶ 19 The purpose of Colorado's anti-SLAPP[5] statute is to "safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government . . . and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b); *see also L.S.S. v. S.A.P.*, 2022 COA 123, ¶¶ 14-18; *Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 11. To balance these interests, the statute provides a mechanism to "make an early assessment about the merits" of a lawsuit brought in response to a defendant's protected petitioning or speech activity. *Salazar*, ¶ 12.

¶ 20 To that end, a defendant may file a special motion to dismiss early in a case, and the court must evaluate the special motion

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[5] "SLAPP" is an acronym for "strategic lawsuit against public participation." *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 1.

through a two-step process. § 13-20-1101(3)(a); *L.S.S.*, ¶¶ 20-24. First, the court must determine whether the defendant has made a threshold showing that the plaintiff's claims fall within the scope of the statute; that is, whether the claims arise from the defendant's exercise of free speech or right to petition in connection with a public issue. *L.S.S.*, ¶ 21. Second, if the defendant meets that threshold, the burden shifts to the plaintiff to establish a reasonable likelihood of prevailing on the claim. § 13-20-1101(3)(a); *L.S.S.*, ¶ 22. If the plaintiff fails to satisfy this burden, then the court must grant the special motion to dismiss. § 13-20-1101(3)(a); *Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶ 23.

¶ 21 In its evaluation, the court applies a "summary judgment-like" procedure whereby it reviews the pleadings, affidavits, and evidence submitted by both sides to determine if the plaintiff has met the burden. *L.S.S.*, ¶¶ 22-23. A court "'does not weigh evidence or resolve conflicting factual claims' but simply 'accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.'" *Id.*

at ¶ 23 (quoting *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016)); *see also* § 13-20-1101(3)(b).

¶ 22 Because neither party contests the trial court's rulings regarding which statements were protected activity under section 13-20-1101, we need not address step one of the anti-SLAPP framework.[6] Instead, we turn directly to step two: whether Gonzales has demonstrated a reasonable likelihood of prevailing on the merits of his claims.

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[6] Although Gonzales challenged the trial court's step-one analysis in his opening-answer brief, his counsel conceded at oral argument that communications 2, 4, 12, and 15 were protected activity under the anti-SLAPP statute. Defendants did not raise their argument that the trial court erred by concluding that communication 13 was *not* protected activity until their answer-reply brief. While we acknowledge that Gonzales referenced the trial court's ruling that communication 13 was not protected activity in his opening-answer brief, he did not assert that the trial court erred in making that ruling but rather that the court correctly decided that issue. We therefore do not construe Gonzales's reference to communication 13 as a claim on appeal that required a response. Accordingly, we construe defendants' assertion that the trial court erred with respect to communication 13 as raised for the first time on reply, and we decline to address that issue. *See In re Marriage of Dean*, 2017 COA 51, ¶ 31 ("We do not consider the arguments [the appellant] makes for the first time in her reply brief or those that seek to expand upon the contentions she raised in her opening brief.").

III. Anti-SLAPP Step Two: Reasonable Likelihood of Prevailing

¶ 23 For communications 2, 4, 12, and 15, the trial court concluded that Gonzales established a reasonable likelihood of prevailing on his defamation and intentional infliction of emotional distress claims absent the application of any privilege. Neither party contests this aspect of the anti-SLAPP order. We therefore turn to the parties' arguments relating to the defenses of absolute privilege and qualified privilege.

A. Absolute Immunity (a/k/a "Absolute Privilege") — Communications 2, 4, 12, and 15

1. Background and Standard of Review

¶ 24 Generally, statements made in the course of judicial or quasi-judicial proceedings are absolutely privileged and cannot form the basis for a subsequent civil claim if the statements "bear some relation or reference to the subject of the inquiry." *Dep't of Admin. v. State Pers. Bd.*, 703 P.2d 595, 597-98 (Colo. App. 1985); *see Hoffler v. Colo. Dep't of Corr.*, 27 P.3d 371, 373 (Colo. 2001). This is the case even if the statements "are false or defamatory and made with knowledge of their falsity." *Dep't of Admin.*, 703 P.2d at 597. Thus, if defendants' statements are absolutely privileged — or, put

another way, if defendants are entitled to "absolute immunity"[7] — Gonzales's claims for defamation and intentional infliction of emotional distress cannot succeed.

¶ 25 In the anti-SLAPP motion, defendants contended they were entitled to absolute immunity because their statements were made in connection with a quasi-judicial proceeding: JCSD's re-opened Title IX investigation. Gonzales responded that the Title IX investigation lacked sufficient indicia of due process to be considered quasi-judicial. The trial court agreed with Gonzales and ruled that the Title IX investigation was not quasi-judicial because it lacked sufficient procedural safeguards and was not "adversarial" in nature. Therefore, the court concluded that defendants weren't entitled to absolute immunity for their statements. On appeal, defendants contend that the trial court erred, raising largely the same arguments that they raised below.

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[7] We use the term "absolute privilege" to refer to statements that cannot form the basis of subsequent civil liability. We use the term "absolute immunity" to refer to the immunity from liability for individuals who make those statements.

¶ 26 We review de novo a trial court's determination of absolute immunity, including its determination of whether a proceeding is "quasi-judicial" for purposes of applying the immunity.[8] *Churchill v. Univ. of Colo.*, 293 P.3d 16, 25 (Colo. App. 2010), *aff'd on other grounds*, 2012 CO 54.

2. Quasi-Judicial Proceeding

¶ 27 "Quasi-judicial" decision-making, as its name suggests, bears similarities to the adjudicatory function performed by courts. *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625-26 (Colo. 1988). The vast majority of Colorado case law regarding whether a proceeding is quasi-judicial examines the proceeding for the purpose of determining whether judicial review is appropriate under C.R.C.P. 106(a)(4). *See, e.g.*, *id.*; *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 527 (Colo. 2004); *Gilpin Cnty. Bd. of Equalization v. Russell*, 941 P.2d 257, 262 (Colo. 1997); *Brooks v. Raemisch*, 2016 COA 32, ¶ 23; *Hellas Constr., Inc. v. Rio Blanco County*, 192 P.3d 501, 506-07 (Colo. App. 2008). C.R.C.P.

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[8] In its order, the trial court erroneously stated that whether a proceeding is quasi-judicial is a question of fact.

106(a)(4) provides a mechanism for judicial review where "any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law."

¶ 28 In this context, the scope of proceedings considered "quasi-judicial" is very broad:

> The central focus, in our view, should be on the nature of the governmental decision and the process by which that decision is reached. If, for example, the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity in making its determination.

Cherry Hills, 757 P.2d at 627. These expansive criteria have been interpreted to encompass a wide range of proceedings, from a hearing at which the party is represented by counsel, *Widder*, 85 P.3d at 528, to a written notification restricting an inmate's ability

to file grievances after the inmate filed multiple frivolous grievances in violation of prison regulations, *Brooks*, ¶¶ 16-20.

¶ 29 Defendants urge us to apply this broad view to conclude that the Title IX investigation was quasi-judicial for a very different purpose than assessing the appropriateness of judicial review under C.R.C.P. 106(a)(4): determining that defendants are absolutely immune from civil liability for statements they made in relation to the proceeding. Gonzales urges us to take a narrower approach and conclude that the proceeding wasn't quasi-judicial because it lacked the "fundamental procedural safeguards" associated with due process.

¶ 30 The parties' arguments, and the cases they both cite, raise a question that does not appear to have been directly addressed by any Colorado court: Is the "quasi-judicial" inquiry different depending on whether the court is assessing reviewability under C.R.C.P. 106(a)(4) versus the applicability of absolute immunity?

¶ 31 After reviewing the purposes of C.R.C.P. 106(a)(4) and the doctrine of absolute immunity (particularly how the presence or absence of procedural safeguards relates to the rationales

underpinning those rules), the decisions of our supreme court that touch on this topic, and the decisions of other courts regarding the interface of absolute immunity and Title IX proceedings, we answer that question in the affirmative.

a. C.R.C.P. 106(a)(4)

¶ 32 C.R.C.P. 106(a)(4) and its predecessors were enacted to replace the common law writs of certiorari and prohibition. C.R.C.P. 106(a). The function of a writ of prohibition was to prevent a lower decision-making body from acting without or in excess of its jurisdiction. *Hill v. Dist. Ct.*, 134 Colo. 369, 374, 304 P.2d 888, 891 (1956). The purpose of the common law writ of certiorari was to permit "a higher court to review the conduct of a lower tribunal of record" in cases "obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding." 14 Am. Jur. 2d *Certiorari* § 2, Westlaw (database updated May 2023), *cited with approval in Sutterfield v. Dist. Ct.*, 165 Colo. 225, 228-29, 438 P.2d 236, 239 (1968)); *see also Union Pac. R.R. Co. v. Wolfe*, 26 Colo. App. 567, 569, 144 P. 330, 331 (1914) (purpose of certiorari under then-existing code of civil procedure is to "review[] the action of any

inferior tribunal, board, or officer exercising judicial functions . . . where there is no appeal, or . . . any plain, speedy, and adequate remedy").

¶ 33 Thus, C.R.C.P. 106(a)(4) provides a mechanism to review the judicial or quasi-judicial decisions of a governmental body or officer where no other plain, speedy, or adequate remedy is available. Review is limited to whether the decision-maker exceeded its jurisdiction or abused its discretion. C.R.C.P. 106(a)(4).

¶ 34 Cases interpreting the meaning of "quasi-judicial" action under C.R.C.P. 106(a)(4) are primarily concerned with distinguishing quasi-judicial actions, which are entitled to review under that rule, from legislative actions, which aren't. *See, e.g.*, *Farmers Water Dev. Co. v. Colo. Water Conservation Bd.*, 2015 CO 21, ¶¶ 17-21; *Cherry Hills*, 757 P.2d at 625; *City & Cnty. of Denver v. Eggert*, 647 P.2d 216, 222-23 (Colo. 1982); *Hellas Constr.*, 192 P.3d at 504-05.

¶ 35 As our supreme court has noted, "It is important to distinguish a legislative from a quasi-judicial function because the exercise of quasi-judicial authority, unlike legislative authority, is

conditioned upon the observance of traditional procedural safeguards against arbitrary governmental action," such as notice and an opportunity to be heard. *Cherry Hills*, 757 P.2d at 625.

¶ 36 But the absence of those safeguards doesn't mean that a proceeding isn't quasi-judicial for purposes of C.R.C.P. 106(a)(4) review. In fact, "denial of due process by an agency in its exercise of quasi-judicial functions may serve as the basis for a determination under C.R.C.P. 106(a)(4) that the agency abused its discretion." *Tepley v. Pub. Emps. Ret. Ass'n*, 955 P.2d 573, 578 (Colo. App. 1997); *see also Carpenter v. Civ. Serv. Comm'n*, 813 P.2d 773, 777 (Colo. App. 1990) (holding that a commission exercising a quasi-judicial function denied the appellant a "realistic and meaningful opportunity to present her case").

¶ 37 The broad scope of quasi-judicial proceedings therefore helps C.R.C.P. 106(a)(4) fulfill its purpose: to provide an avenue for relief when an individual is adversely affected by a governmental action that is undertaken without due process, *Tepley*, 955 P.2d at 578; undertaken without (or in excess of) the governmental body's jurisdiction; or arbitrary and capricious. *Cherry Hills*, 757 P.2d at

626; *see also Hellas Constr.*, 192 P.3d at 506-07 (a governmental body abuses its discretion where the ultimate decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority" (quoting *Widder*, 85 P.3d at 526-27)).

b. Absolute Immunity

¶ 38 Absolute immunity is a concept that derives from English common law. *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983). "Under common-law principles, an individual who is an integral part of the judicial process is provided absolute immunity from subsequent civil damages liability." *Hoffler*, 27 P.3d at 373. The immunity extends only to "those functions intimately related and essential to the judicial decision-making process." *Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 714 (Colo. App. 2001).[9]

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[9] "Communications preliminary to a judicial proceeding are protected by absolute immunity only if they have some relation to a proceeding that is actually contemplated in good faith." *Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 714 (Colo. App. 2001). "The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." Restatement (Second) of Torts § 588 cmt. e (Am. L. Inst. 1977).

¶ 39 "The purpose behind a grant of absolute immunity is to preserve the independent decision-making and truthfulness of critical judicial participants without subjecting them to the fear and apprehension that may result from a threat of personal liability." *Stepanek v. Delta County*, 940 P.2d 364, 368 (Colo. 1997). "A witness who knows that he might be forced to defend a subsequent lawsuit . . . might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Briscoe*, 460 U.S. at 333.

¶ 40 At the same time, the doctrine of absolute immunity recognizes that it is important for the judicial process to be able to determine whether the witness's testimony is, in fact, true.

> It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge."

Id. at 335 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (White, J., concurring in the judgment)).

¶ 41 Put another way, the doctrine of absolute immunity is "justified" by features of judicial proceedings that "enhance the reliability of information and the impartiality of the decisionmaking process." *Hoffler*, 27 P.3d at 374 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

> If shadowed by the threat of liability, a witness might testify in a manner that would prevent a potential lawsuit, but would deprive the court of the benefit of candid, unbiased testimony. *However, if the threat of subsequent civil liability is removed, witness reliability is otherwise ensured by oath, cross-examination, and the threat of criminal prosecution for perjury*.

Dalton v. Miller, 984 P.2d 666, 669 (Colo. App. 1999) (emphasis added); *see also Doe v. Roe*, 295 F. Supp. 3d 664, 674 (E.D. Va. 2018) (Absolute immunity assures that "'witnesses can perform their . . . functions without harassment or intimidation,' while, at the same time, 'the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of

controlling . . . conduct.'" (quoting *Butz*, 438 U.S. at 512)) (alterations in original).

c. Separating the C.R.C.P. 106(a)(4) Quasi-Judicial Inquiry from the Quasi-Judicial Inquiry for Absolute Immunity

¶ 42 The facts of this case illustrate why the rationale underpinning absolute immunity stresses both the importance of the freedom to testify without fear of civil liability and the importance of procedural safeguards that ensure reliability. On one hand, we are mindful of the need to encourage victims of sexual assault to report the crimes allegedly committed against them, particularly because such victims are often reluctant to speak out due to "shame, guilt, [and] embarrassment," "concerns about confidentiality," and "fear of not being believed." *Roe*, 295 F. Supp. 3d at 676. We are also aware of the potential for abusers to use civil liability, or the threat of it, to silence or further victimize survivors. *See L.S.S.*, ¶ 50; *Khan v. Yale Univ.*, 295 A.3d 855, 862-63 (Conn. 2023).

¶ 43 At the same time, we recognize that the "mere allegation of sexual misconduct can be devastating to the accused. A determination that a person engaged in non-consensual sexual contact can potentially destroy the accused's educational,

employment, and other future prospects." *Doe v. Univ. of Denver*, 2022 COA 57, ¶ 66 (*cert. granted* Mar. 6, 2023). The right of the accused to receive fundamental fairness before imposing such consequences is no less important than the right of the victim to seek justice. *Khan*, 295 A.3d at 863.

¶ 44 Therefore, although the lack of procedural safeguards is not a barrier to a proceeding being considered "quasi-judicial" for purposes of C.R.C.P. 106(a)(4), we conclude that the application of absolute immunity cannot be justified where those safeguards are absent. Proceedings "that lack fundamental procedural safeguards 'do not adequately protect a critical public policy undergirding the doctrine of absolute immunity — to encourage robust participation and candor in judicial and quasi-judicial proceedings while providing some deterrent against malicious falsehoods.'" *Id.* (quoting *Priore v. Haig*, 280 A.3d 402, 412 (2022)).

¶ 45 The notion that a proceeding must share more features of the judicial process for absolute immunity to apply than are required for the proceeding to be reviewable under C.R.C.P. 106(a)(4) finds support from Colorado Supreme Court cases, *Hoffler v. Colorado*

Department of Corrections, 27 P.3d 371 (Colo. 2001) and *Churchill v. University of Colorado*, 2012 CO 54.

¶ 46 In *Hoffler*, the supreme court considered whether absolute immunity applied to statements made by a Colorado Department of Corrections (DOC) employee during an investigation and disciplinary hearing for another employee. 27 P.3d at 372. Although the supreme court partially relied on a C.R.C.P. 106(a)(4) case for the "essential characteristics of quasi-judicial activity," the court determined that the proceeding was quasi-judicial because (1) it was "adversarial in nature, and the employee is entitled to be represented, to present oral and documentary evidence, and to cross-examine adverse witnesses"; (2) the proceeding was subject to judicial review; and (3) the hearing officer was required to make written findings of fact and conclusions of law. *Id.* at 374-75. Importantly, the court noted, "[I]f the DOC had not pursued [the] investigation to the personnel hearing stage at which [the employee] testified, [the employee] would have no claim to absolute immunity." *Id.* at 375. Thus, the court clearly considered the hearing, with its

attendant procedural safeguards, to be critical to its quasi-judicial determination.

¶ 47 In *Churchill*, a former professor sued the Board of Regents of the University of Colorado under 42 U.S.C. § 1983, alleging that the Regents violated his right to free speech by terminating his employment after he published a controversial essay. *Churchill*, ¶ 1. The Regents asserted that they were absolutely immune from liability for their decision to terminate the professor because the termination proceeding was quasi-judicial in nature. *Id.* After reviewing multiple factors related to the proceeding, including the "[p]rocedural [s]afeguards," the "[a]dversarial [n]ature of the [p]roceeding," and the "[c]orrectability of [e]rror on [a]ppeal," the court concluded that it was quasi-judicial. *Id.* at ¶¶ 50, 61-62, 67.

¶ 48 Crucially, however, the supreme court expressly disagreed with the use of C.R.C.P. 106(a)(4) cases to define whether a proceeding is "quasi-judicial" for purposes of considering the application of absolute immunity. The court noted, "We have defined the term 'quasi-judicial' more broadly to define the scope of Rule 106(a)(4) than the federal courts have to determine when

absolute immunity applies." *Id.* at ¶ 47 n.14. Therefore, in making its determination, the court looked to "federal case law and not to our decisions construing Rule 106(a)(4)." *Id.*

¶ 49 We acknowledge some differences between *Churchill* and the present case. Specifically, *Churchill* involved a civil rights lawsuit brought under a federal statute and concerned the immunity of a public official who functioned as the decision-maker, not a party or witness in the proceeding. But absolute immunity is a common law concept, and the supreme court's observations about the expansive definition of "quasi-judicial" for purposes of C.R.C.P. 106(a)(4) apply equally to this case.

¶ 50 For these reasons, we now hold that, for a proceeding to be considered "quasi-judicial" for purposes of applying absolute immunity to party and witness statements, the proceeding must contain sufficient procedural safeguards to ensure reliability and fundamental fairness. The safeguards must allow for adversarial presentation and testing of the evidentiary facts.

¶ 51 These safeguards may include, but are not limited to, the right to notice, the right to a hearing, the right to present oral and

documentary evidence, the right to call witnesses, the right to cross-examine witnesses, the right to have the meaningful assistance of counsel (or other representation) during the proceeding, and the right to appeal the decision. *See Hoffler*, 27 P.3d at 374; *Churchill*, ¶¶ 45-46, 50-53; *Roe*, 295 F. Supp. 3d at 674-75; *Khan*, 295 A.3d at 871-76. Courts may also consider whether statements relied on by the decision-making body are made under oath or whether the decision-making procedures provide some other deterrent against untruthful statements. *See Khan*, 295 A.3d at 873; *Hartman v. Keri*, 883 N.E.2d 774, 778 (Ind. 2008). Because each proceeding is unique, no one safeguard is determinative. Rather, courts should look to the totality of the circumstances in determining whether the safeguards are sufficient to consider a proceeding quasi-judicial.[10]

[10] To the extent prior divisions of this court have determined that proceedings were quasi-judicial for absolute immunity purposes without conducting such an inquiry, we respectfully disagree. *See, e.g.*, *Dep't of Admin. v. State Pers. Bd.*, 703 P.2d 595, 597-98 (Colo. App. 1985).

3. Application

¶ 52 We conclude that the Title IX proceeding in this case did not contain sufficient procedural safeguards to be considered "quasi-judicial" for absolute immunity purposes. While the JCSD investigators apparently "collected" and reviewed evidence from defendants and Gonzales and interviewed unspecified "supplemental witness[es]," it is undisputed that there was no hearing, and there is no indication that Gonzales had the right or opportunity to call witnesses, cross-examine adverse witnesses or defendant daughters, or even review and respond to the "supplemental witness" statements and other evidence that JCSD reviewed in reaching its decision. The only procedural safeguards that are apparent from the record are that (1) Gonzales and defendants were notified of the re-opened investigation; (2) Gonzales and defendants were permitted to view each other's statements; and (3) the parties had some opportunity to appeal the investigation's conclusion. And although Gonzales was represented in some capacity during the investigation, it's unclear whether counsel had the ability to meaningfully assist Gonzales in combatting the

allegations against him. *See Khan*, 295 A.3d at 882-83 (counsel's ability to meaningfully participate in the proceeding bears on whether the proceeding is quasi-judicial).

¶ 53 Effectively, the Title IX proceeding conducted by JCSD ended after the investigation phase without moving forward to anything that could be considered "quasi-judicial." *Cf. Hoffler*, 27 P.3d at 375 ("[I]f the DOC had not pursued [the] investigation to the personnel hearing stage at which [the employee] testified, [the employee] would have no claim to absolute immunity.").

¶ 54 Defendants nevertheless contend that our inquiry should not end at the shortcomings of the proceeding as it was conducted. Instead, they assert that we should review the JCSD Title IX procedures that were *supposed to be* followed. Defendants contend that refusing to apply absolute immunity to a proceeding in which the tribunal failed to adhere to established procedural safeguards effectively and unjustly holds parties and witnesses responsible for the tribunal's shortcomings. We acknowledge that this argument has some merit: it is difficult to imagine that absolute immunity

would cease to apply to witnesses in a criminal trial if the defendant were denied the right to counsel or to cross-examination.

¶ 55 Nevertheless, even if we review the JCSD procedures that defendants represent were in place at the time of the Title IX proceeding,[11] we conclude that they do not contain adequate procedural safeguards to warrant the application of absolute immunity.

¶ 56 According to JCSD's website, the filing of a Title IX complaint for sexual harassment triggers a specific grievance process. Jeffco Public Schools, *Title IX Policies and Procedures: Sex-Based Discrimination and Sexual Harassment*, https://perma.cc/9TNQ-HV7Z. First, each party will be notified of the allegations and the grievance process. *Id.* Next, JCSD will conduct an investigation. *Id.* Per JCSD, "[t]he specific steps of the investigation will vary

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[11] The evidence in the record of JCSD's Title IX procedures is a link to JCSD's website, which indicates that it was copyrighted in 2022. At oral argument, counsel for defendants represented that the procedures were the same in 2018 (and presumably in 2020) as they are today. We note that there may be some factual dispute as to whether that is the case. However, we need not resolve that issue because, even accepting defendants' representation as true, we hold that the procedures are insufficient to warrant absolute immunity.

based on the nature of the allegations and other factors. . . . The investigation may include, but is not limited to," interviews of parties and witnesses, requests for written statements from parties and witnesses, and review and collection of "relevant documentation or information." *Id.* Both parties have "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint." *Id.* The investigator then creates an investigative report. *Id.*

¶ 57 After the investigation concludes, but prior to the completion of the investigative report, JCSD sends the parties the "evidence subject to inspection and review." *Id.* Each party may submit a written response for the investigator to consider. *Id.* The investigator will then send a copy of the investigative report to each party for review and written response. *Id.* The report and responses are then provided to the decision-making panel. *Id.* The decision-making panel is not bound by the report's conclusions. *Id.*

¶ 58 After receiving the investigative report and the parties' responses, the decision-making panel gives each party the

opportunity to submit "written, relevant questions that the party wants asked of any other party or witness. The decision-making panel will provide each party with the answers to those questions and will allow for additional, limited follow-up questions from each party." *Id.* After the panel makes its determination, either party may appeal on limited grounds. *Id.*

¶ 59 Although these procedures may seem adequate at first glance, we conclude that they are insufficient to ensure reliability and fundamental fairness, nor do they allow for adversarial testing of the facts. First and foremost, there is no right to a hearing and no meaningful right to cross-examine witnesses. The decision-making panel reviews only the investigative report, written responses to that report, and written questions and answers the parties may ask of each other. Moreover, questions submitted by the parties may be "screened out" if they are not considered relevant by the decision-maker, and there is no mechanism for parties or their counsel to submit argument about why a particular question is relevant. Jeffco Public Schools, *Title IX: Gender-Based Violence, Discrimination, and Harassment*, https://perma.cc/Q3CP-RWVW.

¶ 60 The lack of a hearing and contemporaneous cross-examination limits the ability of the decision-making panel to "assess a witness's demeanor and determine who can be trusted." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (concluding that due process at university disciplinary hearing requires opportunity for live cross-examination when the university's determination "turns on the credibility of the accuser, the accused, or witnesses"); *Khan*, 295 A.3d at 881 ("Meaningful cross-examination allows for witness testimony to be challenged in real time, whether in person or through advanced video technology that allows for instant two-way communications and follow-up questions."). Further, while investigators must notify the parties of all interviews they conduct, they are not required to conduct live interviews. Thus, under JCSD's procedures, it is apparently possible for the panel to reach a decision without a single party or witness ever describing their allegations or observations in person. We question whether any tribunal could adequately assess credibility or perform a truth-seeking function under such circumstances.

¶ 61 Second, there may not be a meaningful opportunity for parties to call witnesses to testify on their behalf. While the website indicates that parties have "[e]qual opportunity" to "present witnesses and other evidence," Jeffco Public Schools, *Title IX Policies and Procedures*, the mechanism for that is unclear. Again, while investigators "may" interview witnesses or ask for written statements, the procedures don't appear to require them to do so. And we don't see any independent mechanism for a party to call witnesses before the decision-making panel in the event those witnesses weren't interviewed by the investigators. *Khan*, 295 A.3d at 882. This shortcoming significantly limits the parties' ability to present their respective cases.

¶ 62 Third, while parties have the right to be represented by counsel, we question whether that representation is sufficiently robust, given the shortcomings described above. Counsel can suggest to the investigators that they review certain evidence or interview certain witnesses, but the investigators aren't bound to comply. And while counsel can assist in preparing written questions for the "cross-examination" of parties or witnesses, the

cross-examination procedure deprives counsel of the ability to "sequence questions in a way [counsel] believe[s] would test the veracity" of the party or witness being questioned. *Id.* at 881.

¶ 63 Finally, we observe that procedural safeguards to ensure that a party or witness provides truthful testimony are limited. Statements made to the investigators and decision-making panel need not be made under oath. And while the grievance procedures provide for various disciplinary sanctions against a student who is found to have committed sexual harassment, the policies as set forth on the website don't reflect the existence of sanctions for providing deliberately false statements. *See id.* at 873 ("Because absolute immunity removes the threat of private defamation actions in order to incentivize witnesses to participate candidly and willingly in the proceeding, it is crucial that there be some strong deterrent, such as the threat of a perjury prosecution, against abuse of the privilege by the giving of untruthful testimony.").

¶ 64 Considering the totality of the circumstances, we cannot conclude that JCSD's procedures, as described on its website,

would render a proceeding quasi-judicial for purposes of applying absolute immunity.

4. Cases Cited by Defendants

¶ 65 We recognize that defendants have cited a number of cases from other states applying absolute immunity to Title IX proceedings. However, those cases are distinguishable.

¶ 66 Defendants primarily rely on *Laker v. Board of Trustees of California State University*, 244 Cal. Rptr. 3d 238 (Ct. App. 2019). However, that case applied absolute immunity because the California Civil Code bars liability for communications made "[i]n any . . . official proceeding authorized by law." Cal. Civ. Code § 47(b) (West 2023). The plaintiff did not question the applicability of that law to the Title IX proceeding. Rather, the plaintiff asserted that the statements weren't sufficiently connected to the investigation to warrant immunity. *Laker*, 244 Cal. Rptr. 3d at 260. Colorado has no similar statutory immunity.

¶ 67 In *Fogel v. University of the Arts*, Civ. A. No. 18-5137, 2019 WL 1384577 (E.D. Pa. Mar. 27, 2019) (unpublished opinion), the parties did not dispute the quasi-judicial nature of the proceeding

in question. Rather, the plaintiff argued only that the lower court could not determine the applicability of an affirmative defense like absolute immunity when resolving a motion to dismiss. *Id.* at *9-10. Therefore, the nature of the Title IX proceeding was not examined in detail.

¶ 68 Defendants' reliance on *Ralston v. Garabedian*, ___ F. Supp. 3d ___, 2021 WL 6072881 (E.D. Pa. Dec. 23, 2021), and *Doe v. University of Dayton*, Case No. 3:17-cv-134, 2018 WL 1393894 (S.D. Ohio Mar. 20, 2018) (unpublished order), *aff'd*, 766 F. App'x 275 (6th Cir. 2019), is misplaced because those cases support the notion that, to be quasi-judicial, a proceeding must contain more safeguards than are required by JCSD. In *Ralston*, the court stated that (1) a proceeding is quasi-judicial if it "requires notice and a hearing"; and (2) in making the quasi-judicial determination, Pennsylvania courts look to "the existence of procedural safeguards in the administrative proceeding similar to the safeguards afforded at a judicial proceeding (e.g., notice, hearing, right to cross-examine witnesses, etc.)." ___ F. Supp. 3d at ___, 2021 WL 6072881, at *11 (quoting *Pollina v. Dishong*, 98 A.3d 613, 620-21 (Pa. Super. Ct.

2014)). Likewise, *Doe v. University of Dayton* considered a Title IX proceeding to be quasi-judicial but also noted that Ohio treats university disciplinary proceedings as quasi-judicial if there is notice, a hearing, and the opportunity to present evidence. 2018 WL 1393894, at *4.

¶ 69 Finally, we reject defendants' suggestion that the Colorado Supreme Court's decision in *Lininger v. Knight*, 123 Colo. 213, 226 P.2d 809 (1951), compels us to conclude that they are entitled to absolute immunity.

¶ 70 The plaintiff in *Lininger* operated a club that was issued a liquor license by the board of county commissioners. 123 Colo. at 214-15, 226 P.2d at 809-10. The defendant circulated a petition to the board asking that the liquor license be canceled. *Id.* A newspaper later republished the petition in two separate articles. *Id.* at 218, 226 P.2d at 811. The plaintiff sued for defamation based only on the defendant presenting the petition to the board. *Id.* at 215, 226 P.2d at 810. The trial court determined that the petition to the board was protected by a qualified privilege. *Id.* at 221, 226 P.2d at 813. However, the court admitted evidence concerning

whether the defendant was involved in causing the petition to be republished in the newspaper twice, even though the plaintiff had not alleged the republications as bases for causes of action in the complaint. *Id.* at 218, 226 P.2d at 811. The jury eventually found the defendant guilty of defamation based solely on the newspaper republications. *Id.*

¶ 71 The primary issue before the supreme court was whether the trial court erred by permitting the jury to decide the case based on the newspaper publications when the court had already decided that the single cause of action identified in the complaint — the circulation of the petition to the board — was protected by a qualified privilege. *Id.* at 221, 226 P.2d at 813. The supreme court answered that question in the affirmative and additionally held that the trial court erred by concluding that the petition was libelous per se. *Id.*

¶ 72 Although neither party asserted that the trial court erred by concluding that the petition was subject to a qualified privilege, the supreme court then addressed that issue:

> The trial court held the petition as presented to be a qualified or conditional privilege. While

> the class of absolutely privileged communications is carefully narrowed by the decisions, its scope embraces communications relating to legislative and judicial proceedings, and other acts of state. We believe this communication to fall within the class including acts of state . . . .

Id.

¶ 73 We conclude that defendants' reliance on the supreme court's remarks about privilege is misplaced. The court did not opine on whether any "proceeding" before the board of county commissioners was quasi-judicial, as defendants argue. We also question whether the privilege the supreme court applied is truly absolute. To apply the privilege, the supreme court relied, at least in part, on the defendant's "good faith in presenting the petition." *Id.* But a defendant's "good faith" is wholly irrelevant to an absolute privilege inquiry. *See Dep't of Admin*, 703 P.2d at 597-98 (absolute privilege protects statements even if the statement was false and was made with knowledge of its falsity).

¶ 74 In any event, the discussion of the privilege issue was unnecessary to the resolution of the case, and therefore it is not precedential. *See Sullivan v. People*, 2020 CO 58, ¶ 21 n.5 (Obiter

dictum is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive." (quoting Black's Law Dictionary 569 (11th ed. 2019))). Therefore, we aren't bound by it.

B. Qualified Privilege — Communications 2, 4, 12, and 15

1. Standard of Review and Applicable Law

¶ 75 Even if defendants' statements are not absolutely privileged, they may nevertheless be protected by a qualified (or "conditional") privilege.

¶ 76 A statement is "conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter . . . to believe that there is information that another sharing the common interest is entitled to know." *Dominguez v. Babcock*, 727 P.2d 362, 365 (Colo. 1986) (quoting Restatement (Second) of Torts § 596 (Am. L. Inst. 1977)). The qualified privilege protects "communications by a party with a legitimate interest to persons having a corresponding interest and

communications promoting legitimate individual, group, or public interests." *Id.*

> Where the qualified privilege exists, there is a presumption that the communication was made in good faith without malice. The plaintiff has the burden of rebutting that presumption, and may do so by proving that the defendant published the statement with malice; that is, knowing the statement is false or communicating it in reckless disregard for its veracity. "Reckless disregard" in this context means "a high degree of awareness for probable falsity or serious doubt as to the truth of the statement."

McIntyre v. Jones, 194 P.3d 519, 529 (Colo. App. 2008) (citations omitted) (quoting *Dominguez*, 727 P.2d at 366). While ill will and improper motive toward the plaintiff are not elements of actual malice, "evidence of the defendant's 'anger and hostility toward the plaintiff' may serve as circumstantial evidence of actual malice 'to the extent that it reflects on the subjective attitude of the publisher.'" *L.S.S.*, ¶ 40 (quoting *Balla v. Hall*, 273 Cal. Rptr. 3d 695, 722 (Ct. App. 2021)).

¶ 77 Whether a common-interest qualified privilege exists is a question of law that we review de novo. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo. 1988); *Denver Pub. Warehouse*

Co. v. Holloway, 34 Colo. 432, 437, 83 P. 131, 132 (1905). But if the privilege is applicable, whether the defendant acted with malice is a question of fact for the jury. *McIntyre*, 194 P.3d at 529.

2. Analysis

¶ 78 Communications 2, 4, and 12 are emails that Nicole Weary sent to EHS. The allegedly defamatory material in each of these emails is substantially the same: each directly or indirectly refers to Gonzales as having committed sexual misconduct against one or more students. Communication 15 is the Title IX supplement submitted to JCSD by all defendants and directly alleges that Gonzales committed sexual misconduct.

¶ 79 The trial court concluded that the communications were subject to a qualified privilege because the speakers and the school officials to whom the communications were published shared a common interest. Gonzales does not contest that aspect of the court's order. Instead, he asserts that the court erred by concluding that he was unable to rebut the privilege because he did

not establish actual malice.[12] We therefore confine our review to that issue.

¶ 80 We conclude that the trial court misapplied the anti-SLAPP framework when it determined that Gonzales failed to overcome the presumption of qualified privilege by showing actual malice. Gonzales need not establish actual malice at this stage of the proceedings to survive an anti-SLAPP motion. Rather, Gonzales must demonstrate a reasonable probability of proving that, at that time the communications were made, the speakers knew that Gonzales had not committed sexual misconduct or in fact had "serious doubt" as to the truth of the sexual misconduct allegations.[13] *McIntyre*, 194 P.3d at 529. In making this

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[12] To the extent Gonzales asserts for the first time in his reply brief that he should not be required to show actual malice to overcome qualified privilege or that the communications were not entitled to qualified privilege, we decline to address those contentions. *Peña v. Am. Fam. Mut. Ins. Co.*, 2018 COA 56, ¶ 21 n.4.

[13] For purposes of appeal, the parties agree that the burden of proof Gonzales must meet at trial is clear and convincing evidence. However, it's unclear whether that is the case. In general, a plaintiff is required to prove the elements of defamation by a preponderance of the evidence. *McIntyre v. Jones*, 194 P.3d 519, 524 (Colo. App. 2008). Only if the statement involves a matter of public concern or pertains to a public official is the plaintiff

determination, the court cannot weigh evidence, resolve conflicting factual claims, or make credibility determinations. *L.S.S.*, ¶ 23. Rather, the court must accept Gonzales's evidence as true and evaluate defendants' showing only to determine if it defeats Gonzales's claim as a matter of law. *Id.*

¶ 81 In his affidavit submitted to the court, Gonzales vehemently denied the sexual misconduct allegations. In support of his contentions that defendants made their statements with actual malice, Gonzales relied on evidence relating to (1) inconsistencies in defendant daughters' allegations that were elicited during the criminal trial; (2) evidence of defendant daughters' ill will toward

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required to prove by clear and convincing evidence that the statement is false and made with actual malice. *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 45. The trial court did not directly address whether the statements in this case involved a matter of public concern for purposes of applying the heightened burden of proof. Rather, it analyzed actual malice through the lens of the common interest privilege, which may apply regardless of whether the statements involve a matter of public concern. *See McIntyre*, 194 P.3d at 529-30 (analyzing common interest privilege in the context of private defamation). However, we need not resolve this matter because we conclude that Gonzales produced sufficient evidence to survive an anti-SLAPP motion regardless of which burden of proof he is required to meet at trial.

Gonzales; (3) credibility findings made by the judge presiding over the criminal trial; (4) his acquittal; and (5) the Title IX supplement.

¶ 82 Defendant daughters both asserted in their criminal trial testimony that they were approached by a teacher who became concerned after noticing that Gonzales would stare at defendant daughters. However, the teacher testified that this did not occur and that she only suggested that defendant daughters file a report after Alexandra complained to her about Gonzales. The Title IX supplement repeated some aspects of the teacher's involvement. However, instead of alleging that the teacher approached defendant daughters due to her concerns about Gonzales's behavior, the Title IX supplement alleged that the teacher asked defendant daughters if they had made written reports to the school "upon hearing about [Gonzales's] concerning behavior and noticing [defendant daughters'] unease during class."

¶ 83 At the criminal trial, Alexandra testified in detail about an incident that she said took place during a school lockdown drill; however, the EHS principal subsequently testified that the only lockdown drill in the relevant year took place after Gonzales had

already left the school. The Title IX supplement later submitted by defendant daughters and defendant mothers omitted this incident.

¶ 84 Ashley testified that Gonzales touched her inappropriately at theater rehearsals on specific days in late August and early September. However, the judge presiding over the criminal trial found that Gonzales was not present at rehearsals on some of those days due to prior commitments. The Title IX supplement maintained that Gonzales had inappropriately touched Ashley beginning in late August but omitted reference to specific dates.

¶ 85 An investigator hired by Gonzales's parents attested that Alexandra altered the timeline of her allegations "multiple times" during her criminal trial testimony and that she identified multiple witnesses who she claimed had seen the alleged assaults. The investigator also attested that witnesses at the criminal trial, some of whom Alexandra had named in her testimony, did not recall observing or could not corroborate the problematic behavior that Alexandra described.

¶ 86 Testimony was also elicited at the criminal trial relating to a group chat in which defendant daughters participated. The chat

"centered on [Gonzales] and his being weird or being thought of as weird." A witness described the chat as "hateful."

¶ 87 In the ruling from the criminal trial, the judge noted that the verdict "[came] down to issues of credibility and corroboration or lack of corroboration as to the charges," and while defendant daughters corroborated each other, "[t]here's no independent corroboration as to any of the incidents in terms of their sexual context for sexual arousal, gratification, or abuse." The judge further commented on defendant daughters "collaborat[ing]" with each other and noted that "[t]he accusations against [Gonzales] began to evolve and become more serious" after defendant daughters engaged in the group chat, which "appeared to solidify [their] belief that any [contact] was deliberate, not accidental."

¶ 88 Gonzales and his parents submitted affidavits attesting that defendant mothers were present during defendant daughters' testimony and during the testimony of the teacher who partially refuted their claims relating to the teacher's observations in class. It's unclear whether Nicole was present during the testimony of the

other witnesses or for the judge's ruling; however, the record reflects that Julie "watched almost the entirety" of the criminal trial.

¶ 89 Finally, based on the relief requested in the Title IX supplement, Gonzales argues that defendants persisted in making allegations against him after the criminal trial in order to raise defendant daughters' grades, allow them to graduate with academic honors, and provide them with tuition credits for certain college courses.

¶ 90 This evidence, taken as true, establishes multiple inconsistencies in defendant daughters' allegations of sexual misconduct and that defendant mothers witnessed at least some, if not most, of those inconsistencies when they were elicited at the criminal trial. Additionally, when defendants submitted the Title IX supplement, they changed or omitted details relating to portions of the allegations that had been directly refuted during the criminal trial, which tends to show an awareness by all defendants that at least some of the allegations were false or that there was, at least, reason to doubt some aspects of the allegations.

¶ 91 Further, Gonzales submitted evidence tending to demonstrate that defendant daughters bore ill will toward him. *See L.S.S.*, ¶ 40 (evidence of a defendant's hostility toward plaintiff may serve as circumstantial evidence of actual malice). And he asserts that the Title IX supplement establishes a possible motive for why defendants might persist in making false allegations despite the outcome of the criminal trial. *Id.* at ¶ 47 (accepting the plaintiff's allegations regarding the defendant's statements that defendant wanted to move abroad with the parties' child as evidence of actual malice where defendant accused plaintiff of sexually abusing the child).

¶ 92 Taking this evidence together, we cannot conclude, as a matter of law, that a reasonable juror would not be able to find that defendants knew the allegations were false or had serious doubt as to their truth when they made their statements.

¶ 93 We are mindful that, as the trial court observed, Gonzales's acquittal does not necessarily mean that he did not commit sexual misconduct against defendant daughters. We acknowledge that defendant mothers submitted their own affidavits, in which they

attested that they had no reason to disbelieve the allegations against Gonzales and had in fact received information tending to corroborate those allegations. And we acknowledge that the relief requested in the Title IX supplement may well be related to injuries suffered by defendant daughters as a result of sexual misconduct and the school's action (or lack thereof) in response. But we cannot make credibility determinations or weigh the evidence at this stage, and Gonzales's evidence creates a factual dispute as to these issues. *See id.* at ¶¶ 48-49 (although the plaintiff's evidence that the defendant fabricated sexual abuse allegations was not "particularly compelling," the court could not weigh the evidence and the plaintiff's claim survived anti-SLAPP motion); *see also Salazar*, ¶ 21 (court evaluating anti-SLAPP motion "do[es] not sit as a preliminary jury").

C. Communication 13

¶ 94 Communication 13 is an email from an unknown author (presumably one of the defendant mothers) to EHS expressing concern that Gonzales had been seen on campus that day, alleging that his appearance "created a panic through the school," and

noting "the amount of fear [Gonzales's] behavior has placed on the student body."

¶ 95 The trial court determined that communication 13 was not protected activity; therefore, it did not analyze whether the communication was defamatory. Neither party asserts error with respect to these rulings, and we therefore decline to disturb them.

¶ 96 The court did analyze communication 13 with respect to absolute and qualified privileges. Recall that, although the court determined that Gonzales did not establish actual malice, it nevertheless declined to dismiss his claims as to communication 13 because the communication itself contained evidence of "additional communications" that were not part of the anti-SLAPP motion.

¶ 97 We affirm the portion of the order declining to dismiss the claims as to communication 13, but for a different reason. Because communication 13 doesn't fall within the scope of the anti-SLAPP statute, the trial court's analysis should have ended there, and it should have denied defendants' motion. *See* § 13-20-1101(3)(a) (anti-SLAPP standard applies only to an act "in furtherance of the person's right of petition or free speech"); *see also L.S.S.*, ¶ 22 (court

should only turn to the second step of the anti-SLAPP analysis "[i]f [the] claim falls within the statute's scope"). Because we affirm on this ground, we express no opinion as to the propriety of the court's rulings as to qualified privilege and actual malice regarding communication 13.

IV. Procedural Challenges

A. Unresolved Communications

¶ 98 All parties assert that the trial court erred by declining to analyze communications 1, 3, 5-9, and 11, concluding, without explanation, that they were "not relevant" to its analysis. But Gonzales alleged that all of those communications were made by one of the defendants, and the communications were attached to Gonzales's complaint, so we fail to see how that is the case. Therefore, we agree that the trial court erred by failing to review them under the anti-SLAPP framework, and we direct the court to do so on remand.[14]

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[14] The trial court also did not analyze communications 10 and 14. Because those communications were made by third parties and are not listed in Gonzales's amended complaint, we discern no error (and the parties do not assert any) with respect to the court's finding that these communications were irrelevant.

¶ 99 However, we decline to review each communication de novo, as the parties request. The parties generally assert that we should apply the anti-SLAPP framework to the unresolved communications and resolve each in their favor. But apart from cursory arguments, neither Gonzales nor defendants provide any analysis as to why their contentions should prevail as to any individual unresolved communication, or even basic information regarding the content of the unresolved communications. We will not address such underdeveloped arguments. *See People v. Hill*, 228 P.3d 171, 177 (Colo. App. 2009).

B. Additional Communications

¶ 100 Defendants assert that the trial court erred by ruling that Gonzales's complaint would survive the anti-SLAPP motion due (at least in part) to the presence of unidentified "additional communications" that were referenced in the complaint and evidenced in the materials Gonzales submitted. We discern no basis for reversal.

¶ 101 Defendants first assert, as they did below, that Gonzales, not defendants, had the burden of proving a reasonable likelihood of

success. But we agree with the trial court that, before Gonzales can be required to show a reasonable likelihood of success, defendants have the burden to demonstrate that the statements fall within the scope of the anti-SLAPP statute. § 13-20-1101(3)(a); *L.S.S.*, ¶ 21. And because the trial court did not have copies of the additional communications, it could not assess whether defendants met that burden.

¶ 102 Defendants next argue that (1) Gonzales's complaint did not sufficiently identify the additional communications; (2) Gonzales did not plead the additional communications as required under C.R.C.P. 8; and (3) the additional communications don't state a claim for relief. However, defendants did not raise any of those arguments prior to filing their motion for reconsideration; therefore, the trial court acted within its discretion when it declined to dismiss the complaint on those bases. *Cf. Hice v. Lott*, 223 P.3d 139, 149 (Colo. App. 2009) (trial court did not abuse its discretion by declining to reconsider summary judgment based on new theory raised in motion to reconsider).

V. Attorney Fees

¶ 103 Defendants request an award of their appellate attorney fees and costs under section 13-20-1101(4)(a). That section provides as follows: "[I]n 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).

¶ 104 We conclude that defendants aren't entitled to their appellate fees and costs in this matter because we denied virtually all of their requested relief, and the effect of our disposition is that communications 2, 4, 12, 13, and 15 — the only communications whose merits were at issue on appeal — survive defendants' anti-SLAPP motion. While we do reverse the portion of the trial court's order declining to address communications 1, 3, 5-9, and 11, that relief was equally requested by Gonzales. Moreover, our order that the trial court address those communications on remand has no bearing on whether either party will prevail (or partially prevail) when the court does so.

¶ 105 Gonzales also requested an award of appellate attorney fees; however, because he did not identify the legal and factual basis for his request, we deny it. C.A.R. 39.1 (legal and factual basis for attorney fee request required; "[m]ere citation to this rule . . . without more, does not satisfy the legal basis requirement").

VI. Disposition

¶ 106 For the reasons discussed above, we

- affirm the portion of the trial court order concluding that the Title IX proceeding is not a quasi-judicial proceeding;
- reverse the portion of the trial court order granting the special motion to dismiss as to communications 2, 4, and 12;
- affirm the portion of the trial court order denying the special motion to dismiss as to communications 13 and 15; and
- remand for proceedings consistent with this opinion.

JUDGE J. JONES and JUDGE VOGT concur.