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Appeal from Denver District Court
Honorable David H. Goldberg, Judge
Case No. 2021CV33632

Plaintiff-Appellee:

ERIC COOMER,

v.

Defendants-Appellants:

SALEM MEDIA OF COLORADO, INC. and
RANDY CORPORON.

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Case No. 2023 CA 1235

**OPENING BRIEF OF DEFENDANT-APPELLANT
SALEM MEDIA OF COLORADO, INC.**

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

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The brief complies with the applicable word limits set forth in C.A.R. 28.1(g).

- It contains 8,963 out of 9,500 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

■ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/John R. Mann

John R. Mann, #16088

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QUESTIONS PRESENTED

Did the trial court err in denying Salem's special motion to dismiss?

Did the trial court err in holding Salem can be vicariously liable for defamatory publications made by independent contractors or employees in the absence of actual malice on Salem's part?

Did the trial court err in holding Plaintiff submitted sufficient evidence to establish a reasonable likelihood of proving actual malice on Salem's part?

Did the trial court err in holding Salem itself engaged in extreme and outrageous conduct based solely on the conduct of its talk show hosts?

Did the trial court err in holding Plaintiff submitted sufficient evidence to establish a reasonable likelihood of prevailing on his civil conspiracy claim?

STATEMENT OF THE CASE

Plaintiff Eric Coomer brought this action against Defendant Salem Media of Colorado, Inc., asserting claims for defamation, negligence, intentional infliction of emotional distress (IIED), and civil conspiracy based on statements made on various broadcasts on Salem's Denver radio station, 710 KNUS, during November 2020. Plaintiff alleged the statements about him broadcast on KNUS were false and defamatory, although all of the challenged statements were made by Salem's talk show hosts and none was made by Salem itself.

Despite alleging numerous discrete publications by Salem between November 2020 and February 2021 (CF, pp. 25-44), the Complaint did not plead each allegedly defamatory publication as a separate claim for relief as required by long-standing Colorado law, but alleged only a single claim for defamation.¹ Nor did the Complaint specifically identify which publications are the basis of his sole defamation claim. Because Plaintiff's Complaint asserted only a single claim for defamation based on "at least 128 separate statements spanning 42 separate publications," according to Plaintiff (CF, p. 183), Salem moved under C.R.C.P. 12(e) for a more definite statement that would require Plaintiff to plead each allegedly defamatory statement as a separate claim for relief. (CF, pp. 142-151). The trial court denied Salem's Rule 12(e) motion without explaining why the Colorado Supreme Court's

¹See *Lininger v. Knight*, 226 P.2d 809, 812 (Colo.1951) ("No law is better settled than that each publication of a libel is a separate and independent claim, and that each must be pleaded as a separate cause of action."); *Spears Free Clinic & Hosp. v. Maier*, 261 P.2d 489, 491 (Colo.1953) ("[E]ach publication of a libel is a separate cause of action. Being such, each should be separately pleaded."); *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1387 (Colo.App.1986) ("Each statement, as a separate publication, constitutes a distinct claim for relief"); see also *Warad West, LLC v. Sorin CRM USA Inc.*, 2016 WL 1089825, *12 (D.Colo.2016) ("[e]ach communication of a defamatory statement, even though identical in content, constitutes a separate publication, giving rise to a separate cause of action."). See generally RESTATEMENT (SECOND) OF TORTS § 577A(1), cmt. a (1977) ("It is the general rule that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises.").

decisions did not apply or were not binding. (CF, pp. 548-551).

Salem also moved to dismiss the Complaint under C.R.C.P. 12(b)(5). (CF, pp. 153-163). The trial court dismissed Plaintiff's negligence claims as barred by Article II, § 10 of the Colorado Constitution, but denied Salem's motion to dismiss Plaintiff's other claims for relief. (CF, pp. 552-564). With respect to Plaintiff's negligence claims, it held that because "Plaintiff's negligent supervision and retention claim against Salem Media is premised on the alleged defamatory statements made by Corporon and other radio hosts," it failed to state a plausible claim for relief because "a plaintiff cannot bring a negligence claim arising out of a defamatory publication that involves a matter of public concern because the actual malice standard imposes a higher burden than mere negligence." (CF, p. 563).

Pursuant to § 13-20-1101(3)(a), C.R.S., Salem then filed a special motion to dismiss Plaintiff's remaining claims for relief. (CF, pp. 642-660). After a hearing on November 29, 2022, the trial court granted Salem's motion to dismiss Plaintiff's claim for injunctive relief but denied the rest of the motion. (CF, pp. 1414-1433). The court first held the statements were protected by §§ 13-20-1101(2)(a)(III) and (IV), C.R.S., and that a special motion to dismiss under § 13-20-1101(3)(a) was proper. Citing ¶¶ 40, 43, 45-47, 50-52, 54, 57, and 60-64 of the Complaint, it nevertheless held that "at least some of the statements made by Defendants are defama-

tory” *per se* because they imputed a criminal offense to Plaintiff. (CF, pp. 1421-1422).

Turning to the issue of actual malice, the court made no finding that Plaintiff had submitted any evidence showing that Salem subjectively had a high degree of awareness that the challenged publications were probably false or entertained serious doubts about their truth prior to publication. Instead, the court relied on a vicarious liability rationale, finding that because “Salem had some level of control and authorization over the substance of its radio shows,” it could be vicariously liable for its hosts’ publications, even in the absence of any showing of actual malice on Salem’s part. (CF, p. 1428). Although the court found that whether Salem had control over its talk show hosts is a question of fact, it nonetheless found that Plaintiff had met his burden in proving actual malice based solely on Salem’s purported control over its hosts. (*Id.*).

The court also found that Plaintiff had articulated sufficient evidence to support his IIED claim, and concluded he had a reasonable likelihood of prevailing on his civil conspiracy claim. (CF, pp. 1428-1432). Salem appeals the trial court’s order denying its special motion to dismiss pursuant to § 13-20-1101(7), C.R.S.

STATEMENT OF FACTS

This case arises from the controversy surrounding the 2020 election and the uncertainty that followed in its wake, with many doubting the election's outcome and attributing it to various irregularities in voting and vote-counting processes. Most of the statements Plaintiff challenges as defamatory were made in November and December 2020, only weeks after the election when questions were still being raised about its legitimacy. As of mid-November 2020, the election controversy had not been resolved and had not subsided. Serious doubts over whether election fraud had occurred remained. Nothing approaching a definitive finding on the security of the election had been released when most of the statements were made.

Salem owns 710AM KNUS, a Colorado radio station, where Defendant Randy Corporon hosts the weekly talk-show *Wake Up with Randy Corporon*. (CF, pp. 4-8, ¶¶ 1, 12). Corporon, whose broadcast statements form the bulk of Plaintiff's defamation claim against Salem, is not an employee of Salem but an independent contractor, as established by the Independent Contractor Agreement between Salem ("Client") and Corporon ("Consultant"):

6. **Independent Contractor.** Client and Consultant acknowledge and agree that in performing the consulting services hereunder, Consultant is acting as an independent contractor and Consultant of Client. Nothing contained herein or otherwise shall be construed in such manner as to create the relationship of principal and agent between Consultant and Client or the relationship of employer/employee between Client, Consultant and/or any of

Client's employees. No party will have the authority to enter into agreements of any kind on behalf of the other or otherwise bind or obligate the other in any manner to any third party. (CF, p. 663).

The Agreement provides that Corporon "shall determine the methods, means and details of performing the Consulting Services" (defined as "host[ing] a weekly program on the Station"), and gives Corporon "creative control over the content of the Programming and in the performance of Consultant's on-air duties, subject to the reasonable approval of the General Manager and the General Manager's designee and compliance with applicable laws..." (CF, p. 664). The Agreement does not give Corporon any authority to make management decisions for Salem.

Plaintiff Eric Coomer is former Director of Product Strategy and Security at Dominion Voting Systems, an electronic voting systems company. (CF, p. 4, ¶2). Beginning in November 2020, Joe Oltmann, host of the "Conservative Daily" podcast, alleged he had infiltrated an "Antifa" conference call in September 2020, during which a man identified as "Eric ... the Dominion guy" proclaimed: "Don't worry about the election. Trump is not going to win. I made fucking sure of that. Hahaha." (CF, pp. 21-22, ¶ 34). Oltmann's Affidavit avers that after this call, he identified "Eric from Dominion" as Plaintiff, and describes certain Facebook posts Plaintiff had made, which Oltmann characterized as "Anti-Trump rhetoric" and "anti Conservative." (CF, pp. 1004-1008).

Corporon heard Oltmann's podcast and invited him on his show on November 14, 2020, where Oltmann repeated his story about Plaintiff. (CF, pp. 25-26, ¶¶ 41-42). Oltmann's story was repeated by Oltmann and other Salem talk-show hosts during other KNUS broadcasts in November and December 2020. (CF, pp. 26-42). Corporon and other Salem hosts—Deborah Flora, Peter Boyles, and George Brauchler—interviewed Oltmann on their shows eight times between his first appearance on Corporon's show on November 14, 2020, and December 19, 2020. Oltmann made four appearances on Corporon's show, two on Boyles', and one each with Flora and Brauchler. (CF, p. 1416). All in all, Plaintiff identified 123 discrete statements made by talk-show hosts and broadcast on KNUS he claims are defamatory (CF, pp.201-220). However, more than a third of these statements identified by Plaintiff as defamatory deal with allegations of election fraud and election-rigging in general and do not mention Plaintiff by name. (Nos. 1, 4, 10, 14, 17-19, 23, 29-30, 33, 35-41, 46, 60-62, 66-69, 73-75, 81, 85-88, 90, 92, 101, 115-117, 119, 125). Plaintiff did not allege, and submitted no evidence to show, that anyone in Salem's management subjectively had a high degree of awareness that Oltmann's or Salem's hosts' statements about Plaintiff were probably false or entertained serious doubts about the truth of the statements at the time of their publication.

SUMMARY OF ARGUMENT

The trial court erred in denying Salem’s Anti-SLAPP motion to dismiss because Plaintiff failed to present sufficient evidence to establish a reasonable likelihood of proving “actual malice” on Salem’s part. Salem cannot be vicariously liable for defamation by its independent contractors or employees merely because it has a right to control them, as the trial erroneously held. Because liability for defamation under the Colorado Constitution requires a showing of actual malice in a case such as this involving statements about matters of public or general concern, and because vicarious liability is imposed on a principal or employer without regard to fault, the constitutional element of actual malice cannot be established by vicarious liability without fault. Actual malice on Salem’s part must be shown by evidence that someone with managerial or decision-making responsibility was subjectively aware the statements were probably false or entertained serious doubts about their truth when they were made. But Plaintiff failed to present any evidence of actual malice on the part of Salem’s management, and his claim that Salem “ratified” the alleged defamation fails for lack of evidence. Plaintiff’s failure to show a reasonable likelihood of proving actual malice on Salem’s part is also dispositive of his IIED and conspiracy claims. Because Plaintiff failed to show a reasonable likelihood of prevailing on his claims, the trial court erred in denying Salem’s special motion to dismiss.

ARGUMENT

I. The trial court erred in denying Salem’s special motion to dismiss.

A. C.A.R. 28(a)(7)(A) statement and standard of review.

Salem’s arguments were preserved in its special motion to dismiss and reply (CF, pp. 642-660, 1192-1206), and at the hearing on the motion. (Tr. 11/29/2022:15-18, 121-135).

Under § 13-20-1101(3)(a), C.R.S., “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States constitution or the state constitution in connection with a public issue is subject to a special motion to dismiss....” To defeat the motion, the plaintiff must show there is “a reasonable likelihood that the plaintiff will prevail on the claim.” *Id.*

Review of a special motion to dismiss under § 13-20-1101(3)(a) is to determine whether the plaintiff has established “a reasonable likelihood of prevailing” on the claim. *Salazar v. Public Trust Institute*, 2022 COA 109M, ¶ 21. Under the standard of review articulated in *Salazar*, the district court must “consider first whether the motion and supporting affidavit establish a prima facie case that the plaintiff’s cause of action falls within the anti-SLAPP statute—that is, whether the claim arises from an act ‘in furtherance of the [defendant’s] right of petition or free speech ... in

connection with a public issue.” *Id.*, ¶ 21. *See Creekside Endodontics, LLC v. Sullivan*, 2022 COA 145, ¶ 25; *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 21; § 13-20-1101(3)(a); *see also Baral v. Schnitt*, 376 P.3d 604, 608 (Cal.2016) (under California’s anti-SLAPP statute, “the defendant [first] must establish that the challenged claim arises from activity protected by [the statute]”).

If a claim falls within the statute’s scope, the court turns to the second step, in which it considers the pleadings and the supporting and opposing affidavits to determine whether the plaintiff has established a reasonable likelihood of success on his claim. *Creekside*, ¶ 26; *L.S.S.*, ¶ 22; *Salazar*, ¶ 21. *See* § 13-20-1101(3)(a)-(b). Colorado courts have adopted the standard under the substantively identical California Anti-SLAPP statute, in which this second step has been described as a summary judgment-like procedure in which the court reviews the pleadings and the evidence to determine “whether the plaintiff has stated a legally sufficient claim and made a *prima facie* factual showing sufficient to sustain a favorable judgment.” *Baral*, 376 P.3d at 608. *See L.S.S.*, ¶¶ 23-24. “Once the court reaches the second prong of the analysis, it must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel.” *Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal.Rptr.3d 1, 12 (Cal.App.2015). Under this standard, “[t]he 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." *Creekside*, ¶ 26; *L.S.S.*, ¶¶ 23-24.

This Court is not bound by the trial court's factual findings. *Salazar*, ¶ 19, and reviews a ruling on a special motion to dismiss under §13-20-1101(3)(a) *de novo* to determine whether the plaintiff has established a "reasonable likelihood" of prevailing on the claim. *Creekside*, ¶ 24; *L.S.S.*, ¶ 19; *Salazar*, ¶ 19. Like the trial court, this Court must "assess whether the allegations and defenses are such that it is reasonably likely that a jury would find for the plaintiff." *Salazar*, ¶ 21. Conclusions of law are reviewed *de novo*. *E-470 Public Hwy. Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo.2000).

B. The trial court erred in finding Plaintiff had a reasonable likelihood of establishing actual malice.

1. The meaning of "actual malice" under the Colorado Constitution.

In denying Salem's special motion to dismiss, the trial court erred in finding that Plaintiff had a reasonable likelihood of prevailing on his defamation claim against Salem, because Plaintiff failed to present sufficient evidence of constitutional "actual malice" to meet the "clear and convincing" standard.

This case is governed by Article II, § 10 of the Colorado Constitution, which affords greater protection for speech than the First Amendment. *Diversified Mgt.*,

Inc. v. Denver Post, Inc., 653 P.2d 1103, 1109 (Colo.1982). See *Lewis v. Colorado Rockies Baseball Club, Inc.*, 941 P.2d 266, 271 (Colo.1997); *In re Proposed Initiative on Obscenity*, 877 P.2d 848, 850 (Colo.1994). For this reason, any other state or federal decision that may suggest limits on speech under the First Amendment is not controlling under the Anti-SLAPP statute, which expressly applies to “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under ... the state constitution...” Section 13-20-1101(3)(a). See *Bock v. Westminster Mall*, 819 P.2d 55, 59 (Colo.1991).

In *Diversified Mgt.*, 653 P.2d at 1105, the Colorado Supreme Court held that the “actual malice” standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) applies under Article II, § 10 to statements involving matters of public or general concern. As the trial court held, because this case involves a matter of public or general concern, Plaintiff must prove, by clear and convincing evidence, that Salem acted with actual malice in connection with the publications that Plaintiff has alleged are defamatory. (CF, pp. 556, 1419-1420).

Under this heightened standard, “actual malice” means a libel plaintiff must prove that the defendant either actually knew that the publication was false or published it with reckless disregard for its truth or falsity. *Diversified Mgt.*, 653 P.2d at 1109; *L.S.S.*, ¶ 40. “Actual malice” is not malice in the common law sense of “spite,”

“ill will,” or bad motive toward the plaintiff. *Fink v. Combined Communs. Corp.*, 679 P.2d 1108, 1111 (Colo.App.1984). A statement is made with “actual malice” if and only if it is published with “actual knowledge that it was false” or “with reckless disregard for whether it was true.” *Creekside*, ¶ 37. Falsity alone does not establish “reckless disregard.” *Hoeper v. Air Wisconsin Airlines Corp.*, 232 P.3d 230, 245 (Colo.App.2009), *aff’d*, 320 P.3d 830 (Colo.2012). “Reckless disregard” means that the defendant had a high degree of awareness that the statement published was probably false at the time of publication. *Diversified Mgt.*, 653 P.2d at 1109. *See Barnett v. Denver Pub. Co.*, 36 P.3d 145, 147 (Colo.App.2001) (“Actual malice can be shown if the author entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity.”); *L.S.S.*, ¶ 40.

The test for “reckless disregard” thus depends on the speaker’s own subjective awareness and belief rather than on an objective “reasonable person” standard. *See SG Interests I, Ltd. v. Kolbensschlag*, 452 P.2d 1, 10 (Colo.App.2015) (actual malice is determined by speaker’s subjective belief in truth of his statement); *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 944 P.2d 646, 652 (Colo.App.1997) (“plaintiff’s assertion that defendants ‘should have had serious doubts’ about the veracity of the harassment allegations is irrelevant because the test for actual malice is whether these defendants actually held serious doubts about the truth of the allega-

tions.”), *rev'd on other grounds*, 981 P.2d 600 (Colo.1999). Plaintiff’s allegation that Salem “should have had serious doubts about Oltmann’s claims” (CF, p. 44, ¶ 66) thus fails to plausibly allege actual malice.

Actual malice must be proved by evidence that the speaker subjectively “entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity.” *Creekside*, ¶ 38. A speaker’s failure to corroborate information that later turns out to be incorrect does not establish actual malice. *Id.* Nor does evidence that the plaintiff simply denied the veracity of the statement show actual malice. *Id.* See *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1124 (Colo.App.1992).

Under Article II, § 10, the plaintiff must prove actual malice by clear and convincing evidence. *Diversified Mgt.*, 653 P.2d at 1109; *L.S.S.*, ¶ 39. “Clear and convincing evidence is that evidence which is stronger than a ‘preponderance of the evidence, and which is unmistakable and free from serious or substantial doubt.’” *DiLeo v. Koltnow*, 613 P.2d 318, 323 (Colo.1980); *L.S.S.*, ¶ 39. The clear and convincing standard requires proof that a fact is “highly probable and free from serious or substantial doubt.” *Creekside*, ¶ 36. Accordingly, to withstand an Anti-SLAPP special motion to dismiss where a showing of actual malice will be required at trial, the plaintiff must establish a probability that he will be able to produce clear and

convincing evidence of actual malice at trial. *L.S.S.*, ¶¶ 41-44. Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. *Barnett*, 36 P.3d at 147.

Claims for IIED premised on defamatory publications are subject to the same constitutional protections for public speech as defamation claims. In *Snyder v. Phelps*, 562 U.S. 443, 451 (2011), the Supreme Court recognized the First Amendment as a defense to IIED claims. Whether the First Amendment prohibits holding a defendant liable for its speech under a theory of IIED “turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. ‘[S]peech on ‘matters of public concern’ ... is ‘at the heart of the First Amendment’s protection.’” *Id.* at 451-52. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Where an IIED claim concerns the “speech component” or “communicative impact” of the defendant’s behavior, the defendant is entitled to First Amendment protection. *Snyder*, 562 U.S. at 453; *Brooks v. Paige*, 773 P.2d 1098, 1102 (Colo. App.1988). See *Lewis*, 832 P.2d at 1124-25 (constitutional limitations on defamation claims “apply equally to ancillary tort claims which might arise from the publication of an allegedly defamatory statement”); *L.S.S.*, ¶ 53 (claim for extreme and outrageous conduct is subject to same constitutional standards as defamation claim and is

therefore ancillary to that claim).

Because Plaintiff's IIED claim is based on speech that concerned "a subject of general interest and of value and concern to the public," *Snyder* at 453, it is subject to the same constitutional limitations as his defamation claim. *Brooks*, 773 P.2d at 1102. *See Fry v. Lee*, 408 P.3d 843, 855-56 (Colo.App.2013) (alternative torts cannot be used to evade constitutional requirements for defamation actions). This specifically includes the requirement that Plaintiff prove actual malice. *Lewis*, 832 P.2d at 1124-25. Consequently, unless Defendants' statements were made with "actual malice" and thus outside constitutional protection, Plaintiff's IIED claim fails along with his defamation claim. *See id.* at 1125 (plaintiff could not recover for IIED based on false publication without showing it was made with actual malice).

As for Plaintiff's civil conspiracy claim, because the alleged conspiracy is to commit defamation, the burden to prove actual malice by clear and convincing evidence applies to this claim as well. *Lewis*, 832 P.2d at 1124-25. Each alleged conspirator must be shown to have acted with actual malice.

2. Salem cannot be vicariously liable for defamatory publications made by independent contractors or employees in the absence of actual malice on Salem's part.

Because, as shown below, Plaintiff failed to produce any evidence of actual malice of Salem's part, either direct or circumstantial, the trial court relied on a

vicarious liability theory to find that Plaintiff had a reasonable likelihood of establishing actual malice. (CF, pp. 1427-1428). In so finding, the court erred in applying agency law to improperly relieve Plaintiff of his burden to prove actual malice on the part of Salem itself.

“The general rule is that one who employs an independent contractor is not liable for torts committed by the independent contractor or its servants.” *Western Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d 1045, 1049 (Colo.1978). *See Seidl v. Greentree Mortg. Co.*, 30 F.Supp.2d 1292, 1300 (D.Colo.1998) (“Generally, a party is not liable for the torts of its independent contractors.”); *Williams v. Burns*, 463 F.Supp. 1278, 1284-87 (D.Colo.1979) (no vicarious liability for defamation committed by independent contractor). This includes intentional torts such as defamation, *see Williams, id.*, particularly because, as the trial court held in ruling on Salem’s Rule 12(b)(5) motion, Plaintiff must prove “actual malice” to prove defamation in this case. (CF, p. 558). *See Chaiken v. Village Voice Pub. Corp.*, 119 F.3d 1018, 1033-34 (2d Cir.1997) (newspaper publisher not vicariously liable for actual malice of independent contractor); *D.A.R.E v. Rolling Stone Magazine*, 101 F.Supp.2d 1270, 1278–80 (C.D.Cal.2000) (magazine publisher not vicariously liable for actual malice of independent contractor); *Market America, Inc. v. Christman-Orth*, 520 S.E.2d 570, 577 (N.C.App.1999) (employer not vicariously liable for defamation commit-

ted by independent contractor). Salem is therefore not vicariously liable for any allegedly defamatory publications attributable to Corporon or any other independent contractor.

The same rule applies to non-contractor employees. As a general rule, there is no vicarious liability of an employer for an employee's intentional torts. *Keller v. Koca*, 111 P.3d 445, 448 n.2 (Colo.2005). Under the doctrine of *respondeat superior*, an employer is liable for the torts of an employee committed in the course and scope of the employment only when they are committed with the intent of furthering the employer's business. *Moses v. Diocese of Colo.*, 863 P.2d 310, 329 n.27 (Colo. 1993). Consequently, the doctrine of *respondeat superior* does not apply in defamation cases, and a corporation is not liable for the defamatory utterances of an employee acting within the scope of employment, unless it affirmatively appears that the employee was expressly directed or authorized by the employer to defame the plaintiff. See *Kramer v. Kroger Co.*, 534 S.E.2d 446, 450 (Ga.App.2000); *Williams*, 463 F.Supp. at 1284. No such evidence was presented here.

More to the point, liability for defamation cannot be premised on vicarious liability when actual malice must be shown. Vicarious liability based on *respondeat superior* is liability without fault, and essentially a form of strict liability. See RESTATEMENT (SECOND) OF AGENCY § 219, cmt. a (1958); *Sandoval v. Archdiocese*

of Denver, 8 P.3d 598, 603 (Colo.App.2000) (“a vicarious liability claim against an employer under *respondeat superior* is based entirely on the acts or omissions of the employee, and, generally, the liability of an employee becomes the liability of the employer as well.”) (internal citations omitted). For this reason, an employer typically has no liability for intentional torts committed by an employee, or for punitive damages based on the employee’s conduct, unless the employer either approved or ratified the employee’s tort or else participated in the wrongful conduct itself. *Holland Furnace Co. v. Robson*, 402 P.2d 628, 631 (Colo.1965).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), the Supreme Court held that even where the plaintiff is a private individual, a state may not impose liability for defamation without fault; at the very least negligence must be shown. *See Denver Pub. Co. v. Bueno*, 54 P.3d 893, 899 (Colo.2002). As the trial court held in its Rule 12(b)(5) order, “a plaintiff cannot bring a negligence claim arising out of a defamatory publication that involves a matter of public concern because the actual malice standard imposes a higher burden than mere negligence.” (CF, p. 563). Consequently, more than mere negligence must be shown for Plaintiff to prevail on his defamation claim in this case; he must prove constitutional actual malice. In a defamation case where constitutional actual malice must be proved, a rule allowing a plaintiff to recover damages for defamation against an employer under the strict liability

theory of *respondeat superior*, without any showing of actual malice or other fault on the employer's part, contravenes the First Amendment and Article II, § 10.

Because liability for defamation, even in cases involving private individuals, cannot be premised on strict liability, *Gertz*, 418 U.S. at 347, and because vicarious liability does not require proof of any fault on the principal's or employer's part, Plaintiff's defamation claim cannot proceed against Salem under a theory of *respondeat superior*, especially here, where actual malice must be shown by clear and convincing evidence. To recover for defamation against Salem, Plaintiff must prove actual malice on Salem's part. *See Taranto v. North Slope Borough*, 992 P.2d 1111, 1115 (Alaska 1999) (requirement of proof of actual malice "will necessarily extend to a speaker's employer who is alleged to be vicariously liable for its employee's defamatory speech."). Plaintiff cannot rely on vicarious liability or on Salem's alleged right to control its contractors or employees to substitute for proof of actual malice. (Tr. 11/29/2022:141:19-20).

Vicarious liability for defamation under Article II, § 10 thus requires either actual malice on the part of the principal or employer, or else express and knowing ratification of the agent's defamation by the principal or employer. *See Kendall v. Lively*, 31 P.2d 343, 344 (Colo.1934); *Williams*, 463 F.Supp. at 1286. Because neither was shown here, the trial court erred in denying Salem's Anti-SLAPP motion.

3. There is no evidence that Salem published the challenged statements with actual malice.

Because Salem cannot be vicariously liable for its hosts' intentionally tortious conduct, it cannot be liable for their allegedly defamatory publications, either vicariously or under a theory of negligent supervision or retention, as the trial court held. (CF, pp. 562-563). Salem can only be liable for its *own* conduct. Plaintiff must prove by clear and convincing evidence that Salem *independently* acted with actual malice and cannot rely on a mere showing that its talk show hosts or their guest Oltmann acted with actual malice. Because Plaintiff cannot rely on Salem's hosts' independent conduct to establish Salem's actual malice, he must prove, by clear and convincing evidence, that *Salem itself* acted with actual malice in publishing the statements Plaintiff alleges are defamatory, including statements by Oltmann as well as statements by Salem's hosts. *Diversified Mgt.*, 653 P.2d at 1109. But there is no evidence that anyone at Salem subjectively had a high degree of awareness the challenged publications were probably false or entertained serious doubts about their truth before publication, and Plaintiff admitted as much at hearing. (Tr. 11/29/2022: 25:14-21, 28-93). Plaintiff's theory of Salem's liability is based on the mere fact that it broadcast the challenged statements, which cannot by itself establish actual malice.

The trial court's ruling that Plaintiff had shown actual malice on Salem's part was based solely on its conclusion that "Salem had some level of control and

authorization over the substance of its radio shows.” (CF, p. 1428). But the mere right of control does not establish actual malice, and neither does failure to exercise control. The trial court made no finding that Plaintiff had submitted sufficient evidence of actual malice on the part of anyone at Salem itself—as opposed to its hosts—or that anyone in a management or decision-making capacity at Salem was subjectively aware the challenged publications were probably false or entertained serious doubts about their truth before authorizing their publication. The court made no finding that Plaintiff had a reasonable probability of prevailing on the issue of actual malice based on any evidence of actual malice on Salem’s part, and the record discloses no evidence to support such a finding.

Like *New York Times v. Sullivan*, 376 U.S. at 287, Colorado law is clear that defamation claims require a showing that those responsible for the publication of defamatory content must have acted with actual malice. Because “a corporation can only act through its agents,” *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 47 (Colo. 1997), organizations cannot have institutional knowledge of falsity because the responsibility lies with the person or persons responsible for the defamatory publications. As the Wyoming Supreme Court explained in *Adams v. Frontier Broad. Co.*, 555 P.2d 556, 564 (Wyo.1976), “The standard of actual malice assumes in both of its aspects (publication with actual knowledge of falsity or publication while

entertaining serious doubts as to truth) an opportunity on the part of the publisher to evaluate the matter to be published and form some conclusion as to falsity or doubts as to truth.” To factually establish the actual malice required to show a violation of the constitutional standard, therefore, Plaintiff must prove that Salem itself, through its management, had the opportunity to evaluate the challenged publications in advance and form a conclusion about their falsity or a doubt with respect to their truth before their publication. *See id.* Because actual malice is determined as of the time of publication, *Willis v. Perry*, 677 P.2d 961, 964 (Colo.App.1983), Salem’s post-publication knowledge of falsity is irrelevant. *See Laserworks v. Pitney Bowes, Inc.*, 105 Fed. Appx. 657, 665 (6th Cir.2004) (“actual malice must be ascertained at the time the statements were uttered, not in hindsight.”).

Plaintiff thus cannot allege actual malice as to Salem as a corporate entity alone; he must plead and prove that the individuals at Salem responsible for broadcasting the alleged defamatory statements acted with actual malice. *See Page v. Oath, Inc.*, 270 A.3d 833, 850-51 & n.135 (Del.2022) (“Page cannot allege actual malice as to Oath alone, he must allege that the individuals at Oath responsible for publishing the alleged defamation acted with actual malice”); *US Dominion, Inc. v. Fox Corp.*, 2022 WL 2229781, *11-*12 (Del.Super.2022) (“The Complaint contains no well-pleaded factual allegations relating to Fox Broadcasting’s subjective know-

ledge or decision-making. Again, the Complaint does not even identify who at Fox Broadcasting was responsible for the publications.... Although subjective doubt can be proven through evidence demonstrating that the defendant was ‘subjectively aware that it was highly probable that [its] story was ... so inherently improbable that only a reckless person would have put [it] in circulation,’ the Complaint contains no well-pleaded factual allegations that any specific person at Fox Broadcasting was subjectively aware of anything.”).

Plaintiff’s Complaint does not contain any factual allegations sufficient to raise a right to relief against Salem above the speculative level. Although the Complaint alleges generally at ¶ 81 that Salem “published these statements with actual malice,” it does not identify who at Salem was responsible for the publications or who allegedly acted with actual malice. It contains no well-pleaded factual allegations that any specific person at Salem was subjectively aware that anything was likely false. Plaintiff nevertheless attempts to anthropomorphize Salem as though it were a natural person, falsely attributing its hosts’ independent conduct to Salem.²

²*E.g.*, Complaint, ¶ 6 (“For its part, Salem Media had knowledge that these false allegations were being widely disseminated on its airwaves and yet did nothing about it.”); ¶ 7 (“Without concern for the truth or the consequences of its reckless conduct, Salem Media branded Dr. Coomer a traitor to the United States, a terrorist, and a criminal of the highest order.”); ¶ 8 (“Salem Media knows that it has published countless outright falsehoods about Dr. Coomer.”); ¶ 39 (“Salem Media ... seized on Oltmann’s statements to promote a conspiracy of election fraud.”); ¶ 40 (“Salem

None of this conduct alleged against Salem is attributed to any specific individual with management or decision-making authority at Salem, and thus none of these allegations contains sufficient factual matter to amount to a plausible allegation of fact, as opposed to the kind of merely conclusory allegation that must be disregarded under Rule 12(b)(5). *Warne v. Hall*, 373 P.3d 588, 596 (Colo.2016).

Despite Plaintiff's effort to portray Salem as a monolithic individual acting with actual malice, *i.e.*, that Salem subjectively had "a high degree of awareness that the publication was probably false," or "in fact entertained serious doubts as to the truth" of the publications, *Lewis*, 832 P.2d at 1123, the Complaint contains no well-pleaded factual allegations that any specific person at Salem in a decision-making position or position of control was subjectively aware of anything about the truth or falsity of the statements at issue about Plaintiff.

4. There is no evidence that Salem knowingly ratified the challenged statements with actual malice.

To the extent Plaintiff alleges Salem "ratified and endorsed" the allegedly defamatory publications (CF, p. 52, ¶ 81), he must still prove by clear and convincing

Media repeatedly invited Oltmann onto its shows to spread the falsehoods about Dr. Coomer."); ¶ 48 ("Salem Media again invited Oltmann on as a guest..."); ¶ 55 ("outright falsehoods that Salem Media was relentlessly promoting on its airwaves"); ¶ 56 ("Salem Media continued with its propaganda campaign"); ¶ 77 ("Despite all of this, Salem Media ... persisted in airing the false claims against Dr. Coomer."). (CF, pp. 6-51).

evidence that Salem ratified them with actual malice, *i.e.*, with knowledge they were probably false or with reckless disregard for their falsity.³ See *National Assn. of Govt. Emp., Inc. v. Central Broad. Corp.*, 396 N.E.2d 996, 1002-03 (Mass.1979).

The evidence Plaintiff claims establishes Salem’s “ratification” of its hosts’ publications does not establish anything close to either ratification or actual malice by clear and convincing evidence. Tellingly, Plaintiff never argued ratification in his 51-page response to Salem’s Anti-SLAPP motion (CF, pp. 690-741), and only raised it for the first time at the hearing. There, Plaintiff relied on hearsay statements made by Salem’s Senior VP Phil Boyce on January 14, 2021 in the context of a discussion with host Peter Boyles about a memo that a competing broadcaster had sent about election coverage after January 6, 2021. (Tr. 11/29/2022:89:1-90:6). According to Plaintiff’s hearsay account, Boyce stated on Boyle’s program that:

³Plaintiff has never identified the evidence he claims constitutes Salem’s “endorsement” of its hosts’ statements, but “endorsement” is a meaningless concept in defamation law in any event. To establish liability for defamation, the plaintiff must show the defendant itself “published or caused to be published” a defamatory statement. *Wilson v. Meyer*, 126 P.3d 276, 281 (Colo.App.2005); *Forgacs v. Eye Care Ctr. of N. Colo.*, 2006 WL 2331084, *1 (D.Colo.2006) (Kane, J.). Defamation requires publication of a defamatory statement by the defendant, not the tacit “endorsement” of another’s. See *Wilson*, 126 P.3d at 281 (“adoption” of defamatory statement by silence not actionable in absence of separate, discrete publication); *Wayment v. Clear Channel Broad., Inc.*, 116 P.3d 271, 287 (Utah 2005) (“[A]n individual’s adopted admission of an allegedly defamatory statement does not equate to the individual’s own publication of the statement, an essential element of a defamation cause of action.”).

I'll tell you how I responded to it with my hosts. I don't ever send out a mass email to all my hosts and threaten them with firing. That would be a chilling thing. Can you imagine Dennis Prager or Sebastian Gorka or Charlie Kirk getting a memo like that from me? I don't need to because I am diligent when I hire somebody and give them that microphone. I hire smart people who are normal, who get it, who understand it, and they're not going to go off half-cocked and say something they shouldn't. (CF, p. 760).

Plaintiff contends Boyce further stated:

Fight for the right of free speech, and the right for you to let your talk radio hosts say what he or she truly believes, what they think. And if they do say something wrong, they should be dealt with. I deal with my talent all the time on a one on one basis, not on a mass threatening email. (*Id.*).

Plaintiff contends this amounts to ratification of *all* of Salem's local hosts' challenged statements because Boyce says "he takes responsibility for what his hosts say on the air and he deals with it when it's a problem." (Tr. 11/29/2022:90:4-6). But these statements suggest only that Salem does not exercise creative control over its hosts, and fails to establish *knowing* ratification of any statements they previously made. These are statements by a manager about his management style, and how some other broadcaster's management style would not be well received by Salem's hosts. This cannot be twisted or spun into a statement that Boyce *knowingly* agreed with all of the statements about Plaintiff made by Salem's local hosts and *knowingly* chose to stand behind them.

Plaintiff also relies on a vague hearsay statement by Boyce that "I trust my hosts to talk about things that they know." (CF, p. 708). Plaintiff argues that "Mr.

Boyce's statements that he stands by his reporters[sic], which is what he said, and trusts them to do the right thing after other stations were issuing warning statements about making further allegations of fraud, if anything would be ratification, it would certainly be that." (Tr. 11/29/2022:150:5-9). In reality, this is not "ratification," but just a statement by a manager stating what his expectations of his hosts are.

That Boyce said he "trusts his hosts to talk about things they know" is not even close to what ratification of an unauthorized intentional tort requires. Ratification requires, at the very least, that the principal or employer had full knowledge of all the material facts before ratification. *Nunnally v. Hilderman*, 373 P.2d 940, 942 (Colo.1962); *Siener v. Zeff*, 194 P.3d 467, 472 (Colo.App.2008), *aff'd*, 379 P.3d 278 (Colo.2016); *Williams v. Burns*, 463 F.Supp. at 1286. Moreover, "the focal point of ratification is an observable indication that the principal has exercised choice and has consented to having his or her legal relations affected." *Siener*, 194 P.3d at 471.

Not only do the alleged statements attributed to Boyce fail to show he had full knowledge of all the material facts, they are simply too vague to be considered "ratification" of all the publications alleged as defamatory in the Complaint. *See Adams v. Paine, Webber, Jackson & Curtis, Inc.*, 686 P.2d 797, 801 (Colo.App.1983) ("Absent knowledge of material facts, ratification is not possible. Implied ratification may take place only when the principal has full knowledge of all circumstances surround-

ing the transaction.”) (citation omitted), *aff’d*, 718 P.2d 508 (Colo.1986).

In *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F.Supp. 535, 547 (S.D.Tex. 1997), the plaintiff alleged the defendant newspaper ratified a defamatory article when its editor approved it for publication. The plaintiff argued the editor’s statements that “the essence and the thrust of this piece are right on” and that there “are no statements there that mislead the reader” amounted to ratification of an allegedly defamatory publication. The federal court rejected this contention, finding no evidence the editor knowingly ratified for the newspaper any malicious act of the article’s author. In particular, the editor “was not shown to have made any investigation of the underlying facts, much less of all of the evidentiary details.” *Id.* “To the contrary, [the editor] emphasized the importance of accuracy, reliable information, and precision in reporting, and he otherwise generally and predictably defended his newspaper.” *Id.*

Similarly here, Boyce’s generic statements about his management style and confidence in his hosts (“if they do say something wrong, they should be dealt with”) do not specifically mention Corporon or any specific publication about Plaintiff by Corporon or any other Salem host, and thus cannot be considered “ratification” of unspecified or unacknowledged publications. Based on the record, Plaintiff did not meet his burden to prove ratification. *See Fresquez v. Trinidad Inn, Inc.*, 521 P.3d

399, 411 (Colo.App.2022) (no ratification where claimant failed to prove principal possessed “full knowledge of all material facts”); *Fiscus v. Liberty Mortg. Corp.*, 373 P.3d 644, 652-53 (Colo.App.2014) (same), *aff’d*, 379 P.3d 278 (Colo.2016).

More to the point, Plaintiff offered nothing to even suggest that Boyce or anyone else in Salem’s management was either highly aware that any of the challenged publications were probably false or subjectively entertained serious doubts about their truth either before or at the time of the alleged ratification. Actual malice cannot be derived from the mere fact of control, since control does not presume knowledge. To hold Salem liable under Article II, § 10 based on ratification of the alleged defamation, Plaintiff must prove that Salem ratified the challenged publications with actual malice. However, Plaintiff submitted no evidence of subjective actual malice on the part of anyone at Salem—either pre- or post-publication—sufficient to establish a reasonable probability of prevailing on this most essential element of defamation.

5. Because there is no evidence that Salem acted with actual malice, the trial court erred in denying its special to dismiss.

This case is not about who won the 2020 election or whether there was fraud in the election. This is not an election fraud case, nor is it a referendum on the accuracy of voting machines or the outcome of the 2020 presidential election. The issue of actual malice in this case does not concern whether Salem knew there was no fraud in the 2020 election or that President Biden won. The allegedly defamatory

statements that Oltmann infiltrated an Antifa conference call during which he heard “Eric the Dominion guy” say “Don’t worry about the election, Trump is not gonna win. I made f-ing sure of that” do not implicate the integrity of the 2020 election generally or the absence of any proven election fraud. The gist of the challenged statements is not that election fraud actually occurred or that Plaintiff actually committed election fraud, but that he allegedly claimed he had the ability to influence the election’s outcome. Most of the evidence Plaintiff relies on to establish what he believes should have been known by Salem prior to the challenged publications is not only inadmissible hearsay under CRE 802 but simply irrelevant. Plaintiff’s main-ly hearsay evidence that there was no fraud in the 2020 election is entirely beside the point.

Plaintiff’s case for actual malice fails both parts of the test under § 13-21-1101(3)(a). Not only has Plaintiff failed to state a plausible claim for defamation against Salem itself because there is no well-pleaded factual allegation in the Com-plaint that anyone in a management capacity at Salem subjectively knew the chal-lenged publications were probably false or entertained serious doubts about their truth, but Plaintiff also failed to come forward with any evidence that, if believed, would establish a reasonable probability that he will be able to produce clear and convincing evidence at trial of actual malice on Salem’s part independent from its

hosts. A corporation can only act through its agents, and Plaintiff cannot establish that anyone with authority at Salem who subjectively knew the challenged publications were probably false or entertained serious doubts about their truth either broadcast or ratified the publications. This failure of proof requires that the trial court's order denying Salem's special motion to dismiss Plaintiff's defamation and other remaining claims be reversed. *See Creekside*, ¶¶ 43-49; *L.S.S.*, ¶¶ 46-52.

C. The trial court erred in holding Salem itself engaged in extreme and outrageous conduct based solely on the conduct of its hosts.

The trial court also erred denying Salem's motion to dismiss Plaintiff's IIED claim and in holding Salem itself engaged in extreme and outrageous conduct based solely on the conduct of its hosts. Its conclusion that Plaintiff had a reasonable probability of prevailing on his IIED claim against Salem was based on these findings:

Defendants repeatedly accused Plaintiff of conspiring to alter the results of the 2020 presidential election based on Oltmann's story without verifying his claims. *Defendants* branded Plaintiff as a traitor, impugned his personal and professional reputation, and incited threats of violence against him. *Defendants* went so far as to promote a "million-dollar bounty" for anyone that could provide irrefutable evidence that Plaintiff produced fraudulent votes during the 2020 election. [Emphasis added] (CF p. 1429).

But there is no evidence that *Salem* itself intentionally did any of these things; this is entirely the conduct of Salem's hosts, not of Salem or its management. Just as the law does not impute liability for any intentional tort to a principal or employer, there is no vicarious liability for outrageous conduct, especially when committed by

an independent contractor, such as Defendant Corporon. *See Hartwell v. Southwest Cheese Co., LLC*, 276 F.Supp.3d 1188, 1216 (D.N.M.2016) (“an employer is not liable for an employee’s intentional torts, like IIED, because an employee who intentionally injures another individual is generally considered to be acting outside the scope of the employee’s employment.”). Because there is no finding that Salem itself engaged in any outrageous conduct, and because Salem cannot be vicariously liable for the intentional torts of its hosts, the trial court erred in finding that Plaintiff established a reasonable probability of prevailing on his IIED claim against Salem.

D. The trial court erred in finding Plaintiff established a reasonable likelihood of prevailing on his civil conspiracy claim.

If Plaintiff’s other claims fail, then so does his civil conspiracy claim. *See Nunes v. WP Co.*, 513 F.Supp.3d 1, 9 (D.D.C.2020). This claim also fails because Plaintiff failed to present evidence of an agreement necessary for a conspiracy.

Civil conspiracy is a derivative cause of action that is not actionable *per se*; to establish civil conspiracy, the plaintiff must prove an agreement between two or more persons to accomplish an unlawful goal or perform unlawful acts to accomplish a lawful goal. *Double Oak Constr., LLC v. Cornerstone Dev. Intl. LLC*, 97 P.3d 140, 146 (Colo.App.2003). There must be “a conscious and deliberate decision” between them “to pursue a common plan or design.” *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1057 (Colo.1995). “A claim of conspiracy requires plaintiff demon-

strate direct or circumstantial evidence of a meeting of the minds or agreement among the defendants.” *Henson v. Bank of America*, 935 F.Supp.2d 1128, 1141 (D. Colo.2013). “Absent facts showing such meeting of the minds, the existence of a conspiracy will not be inferred.” *FDIC v. Refco Grp., Ltd.*, 989 F.Supp. 1052, 1079 (D.Colo.1997).

The sole basis for the trial court’s finding that Plaintiff established a reasonable likelihood of prevailing on his conspiracy claim was that “Corporon and other Salem Media radio hosts produced and republished the narrative against Plaintiff on numerous occasions indicating a meeting of the minds to promote Oltmann’s story.” (CF, p. 1431). That Salem’s *hosts* produced and republished the narrative on numerous occasions fails to plausibly establish that *Salem itself* entered into any agreement to defame with any other person, let alone by clear and convincing evidence. At most, it alleges independent conduct on the part of hosts that does not implicate any agreement or conduct by Salem. “[A]llegations of parallel conduct, accompanied by nothing more than a bare assertion of a conspiracy, do not plausibly suggest a conspiracy.” *Henson*, 935 F.Supp.2d at 1141.

In *Rosenblum v. Budd*, 2023 COA 72, ¶¶ 50-59, the division held the trial court erred in denying the defendants’ Anti-SLAPP special motion to dismiss a civil conspiracy claim where the plaintiff failed to present indicia of a collective

agreement between all defendants to defame him. “A shared political ideology,” it held, “is insufficient to demonstrate the type of meeting of the minds necessary to support a civil conspiracy.” *Id.*, ¶ 55. It further held mere communication between defendants is insufficient to establish agreement that will support a conspiracy claim, as are independent tortious acts of the alleged conspirators: “That Budd and Doe committed acts that, on their own, could give rise to meritorious defamation and misappropriation claims does not a conspiracy make.” *Id.*, ¶ 56. Because the plaintiff presented no indicia of an agreement between the defendants, the division held, he failed to establish a reasonable probability of prevailing on his civil conspiracy claim, and it accordingly reversed the denial of the special motion to dismiss and remanded with directions to dismiss the conspiracy claim.

Similarly here, allegations or evidence that Salem’s hosts produced and republished Oltmann’s story on numerous occasions does not sufficiently allege or establish any meeting of the minds between the hosts and Salem itself, or even between the hosts themselves. Because the trial court’s finding that Salem’s hosts “produced and republished the narrative against Plaintiff on numerous occasions” does not amount to or even suggest an agreement between Salem and anyone else to defame Plaintiff, the order denying Salem’s special motion to dismiss the conspiracy claim should be reversed and remanded with directions to dismiss it. *See Rosenblum*, ¶ 59.

CONCLUSION

The determinative issue for actual malice is not whether or not there was election fraud or whether Salem knew there was no election fraud. The determinative issue is whether Salem was likely aware the alleged statement that Plaintiff *said* he committed election fraud was false. What Oltmann allegedly said was that Plaintiff *said* he made sure Trump lost the election, not that Plaintiff actually rigged the election. Oltmann was merely repeating Plaintiff's alleged braggadocio. While falsely attributing a quotation can be actionable in defamation under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), there is a significant difference here between falsely attributing a quotation and making an accusation of fact, and this difference impacts the actual malice analysis.

Here, the challenged statements are about what Plaintiff *said* he did, not what he actually did. The gist of Plaintiff's claim that Defendants falsely attributed to him the quotation that he claimed he had the ability to influence the election, not that he actually committed election fraud. The issue for actual malice is thus whether Salem was highly aware the statement that Plaintiff *said* he rigged the election was probably false or seriously doubted its truth. Even if Salem were actually aware there was no election fraud, it does not follow that Salem likely was also aware that Plaintiff did not *say* he rigged or had the ability to rig the election. Whether or not there was

actual election fraud is irrelevant to this analysis.

There is no evidence Salem or anyone in its management likely was aware that Plaintiff did not *say* he rigged or had the ability to rig the election. Evidence that Salem may have been aware there was no election fraud does not suffice to show actual malice because saying that Plaintiff actually committed election fraud and saying that Plaintiff *said* he committed or had the ability to commit election fraud are two different things. Because there is no evidence that Salem was aware that the challenged statements that Plaintiff *said* he rigged or had the ability to rig the election were probably false or doubted their veracity, the trial court erred in holding that Plaintiff established a reasonable probability of prevailing on the issue of actual malice.

For the foregoing reasons, Defendant-Appellant Salem Media of Colorado, Inc., respectfully requests that the judgment be REVERSED and REMANDED with directions to enter judgment in its favor dismissing the Complaint, and that the Court grant such other and further relief as it deems just and proper.

REQUEST FOR ATTORNEY FEES

Pursuant to C.A.R. 39.1, Defendant-Appellant requests that it be awarded its attorney fees on appeal and in the trial court pursuant to § 13-20-1101(4)(b), C.R.S.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2023, a true and correct copy of the foregoing **OPENING BRIEF OF DEFENDANT-APPELLANT SALEM MEDIA OF COLORADO, INC.** was electronically filed and served via Colorado Courts E-Filing to the following:

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