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SUMMARY
October 1, 2026

2026 COA 73

No. 25CA1605, *Summers v. Summers* — Courts and Court Procedure — Action Involving Exercise of Constitutional Rights — Anti-SLAPP — Special Motion to Dismiss; Civil Procedure — Failure to State a Claim Upon Which Relief Can be Granted

A division of the court of appeals considers the appropriate legal standard for reviewing the dismissal of a complaint under C.R.C.P. 12(b)(5) for failure to state a claim when the record includes affidavits filed with a separate anti-SLAPP special motion to dismiss. The division concludes that the well-established C.R.C.P. 12(b)(5) standard applies, which prohibits consideration of matters outside the pleadings, including the anti-SLAPP affidavits. Applying this rule, the division affirms the dismissal of one claim and reverses the dismissal of another claim.

Court of Appeals No. 25CA1605
Montrose County District Court No. 25CV30014
Honorable D. Cory Jackson, Judge

Craig Summers,

Plaintiff-Appellant,

v.

Colin Summers,

Defendant-Appellee.

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

Division VII
Opinion by JUDGE TAUBMAN*
Sullivan and Meirink, JJ., concur

Announced October 1, 2026

Ernst Legal Group, LLC, Dan Ernst, Denver, Colorado, for Plaintiff-Appellant

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for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2026.

¶ 1 Plaintiff, Craig Summers, appeals the district court’s C.R.C.P. 12(b)(5) dismissal of his complaint against defendant, his son, Colin Summers. Craig also appeals the district court’s order failing to award him attorney fees and costs for successfully defending Colin’s anti-SLAPP special motion to dismiss.¹ We affirm in part and reverse in part the C.R.C.P. 12(b)(5) dismissal, applying the well-established C.R.C.P. 12(b)(5) framework under which we may not consider matters outside the complaint, including affidavits filed with the anti-SLAPP special motion to dismiss. We do not address the merits of the anti-SLAPP fees and costs ruling.

¶ 2 Because this case presents the unusual circumstance in which the district court addressed two motions to dismiss — one under the anti-SLAPP statute, section 13-20-1101, C.R.S. 2026, and the other under C.R.C.P. 12(b)(5) — we will address their procedural differences after recounting the relevant facts. That

¹ We refer to Craig and Colin by their first names to avoid confusion because they share the same last name. We mean no disrespect by doing so. Also, “SLAPP” is an acronym for “strategic lawsuit against public participation.” *Hinds v. Foreman*, 2026 CO 9, ¶ 1, 583 P.3d 118, 120.

explanation will facilitate understanding the district court’s ruling and our analysis of the issues raised on appeal.

I. Background

¶ 3 Craig and his adult son, Colin, lived in different states. In the middle of the night in December 2024, Colin sent two text messages to both his father and adult sister criticizing his father’s past conduct. Craig’s complaint alleged that in the first text, Colin threatened to physically abuse Craig by force-feeding him bars of soap and whipping him. The complaint alleged that the second text accused Craig of having raped Colin’s mother many years ago.

¶ 4 Craig sued Colin for defamation based on the second text and for intentional infliction of emotional distress (IIED) based on both texts. Colin moved to dismiss the complaint on two alternative bases: under Colorado’s anti-SLAPP statute for failure to meet its standards and under C.R.C.P. 12(b)(5) for failure to state a claim. In his response to Colin’s motion, Craig requested an award of his reasonable attorney fees and costs under the anti-SLAPP statute. *See* § 13-20-1101(4)(a).

¶ 5 The district court denied the anti-SLAPP special motion to dismiss. In doing so, the court did not award Craig attorney fees

and costs incurred in successfully defending the anti-SLAPP motion.

¶ 6 However, the court granted Colin’s motion to dismiss under C.R.C.P. 12(b)(5). The court ruled that the complaint failed to state a defamation claim because it did not sufficiently allege facts that would negate an affirmative defense (the conditional privilege that attaches to communications between nonspouse family members). The court then explained that the IIED claim necessarily failed because it was “ancillary” to the failed defamation claim. In the same order, the court also denied Craig’s request for leave to amend the complaint.

¶ 7 Craig appeals. He argues that the court erred by (1) dismissing his complaint under C.R.C.P. 12(b)(5); (2) denying him leave to amend the complaint; and (3) not awarding him attorney fees and costs for successfully defending the anti-SLAPP motion. We agree with Craig that the court erred by dismissing the defamation claim but affirm the dismissal of the IIED claim. We need not address the denial of Craig’s motion for leave to amend the complaint because we are partially reversing the court’s dismissal and remanding for further proceedings. Similarly, we do not

address the merits of Craig's fees and costs challenge because he did not preserve it.

II. Criteria for Motions to Dismiss Under C.R.C.P. 12(b)(5) and the Anti-SLAPP Statute

¶ 8 We review de novo a court's dismissal under C.R.C.P. 12(b)(5) for failure to state a claim. *Marks v. Gessler*, 2013 COA 115, ¶ 94, 350 P.3d 883, 901. In doing so, we typically consider only the matters stated in the complaint itself and may not consider additional allegations. *Jenner v. Ortiz*, 155 P.3d 563, 564 (Colo. App. 2006). We accept the factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Marks*, ¶ 94, 350 P.3d at 901. Accordingly, we consider whether the allegations, viewed in this light, suggest plausible grounds to support a claim for relief. *Coyle v. State*, 2021 COA 54, ¶ 25, 492 P.3d 366, 371.

¶ 9 However, an anti-SLAPP special motion to dismiss involves application of a different legal standard that allows courts to consider matters beyond the allegations of the complaint. Specifically, when resolving an anti-SLAPP special motion to dismiss, courts ask whether the allegations in the complaint *and*

affidavits filed by both parties support a legally sufficient claim and a prima facie factual showing that will sustain a favorable judgment. *Rosenblum v. Budd*, 2023 COA 72, ¶ 26, 538 P.3d 354, 362.

¶ 10 The record here includes the anti-SLAPP affidavits. However, only the court's C.R.C.P. 12(b)(5) ruling is before us; the ruling on the anti-SLAPP special motion to dismiss is not challenged on appeal. Therefore, we conclude that the well-established C.R.C.P. 12(b)(5) legal standards apply, which means that we may not consider the anti-SLAPP affidavits when reviewing the C.R.C.P. 12(b)(5) dismissal. *See Polay v. McMahon*, 10 N.E.3d 1122, 1129 n.6 (Mass. 2014).

¶ 11 This well-established C.R.C.P. 12(b)(5) framework also includes the rule that, typically, affirmative defenses must be raised in an answer, not a motion to dismiss. C.R.C.P. 8(c); *Bristol Bay Prods., LLC v. Lampack*, 2013 CO 60, ¶ 41, 312 P.3d 1155, 1163. This rule prevents a plaintiff from having to anticipate affirmative defenses that a defendant might raise and plead facts that negate them. *Bristol Bay*, ¶ 41, 312 P.3d at 1163-64. However, a court can dismiss a claim under C.R.C.P. 12(b)(5) based on an affirmative

defense if the plaintiff's complaint establishes that the affirmative defense bars the claim. See *id.* at ¶ 44, 312 P.3d at 1164; *Prospect Dev. Co. v. Holland & Knight, LLP*, 2018 COA 107, ¶ 14, 433 P.3d 146, 150. In other words, a plaintiff can “plead [himself] out of court by alleging (and thus admitting) the ingredients of a defense.” *Bristol Bay*, ¶ 44, 312 P.3d at 1164 (quoting *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003)).

¶ 12 With this law in mind, we turn to the dismissal of Craig's claims.

III. Dismissal of Craig's Claims Under C.R.C.P. 12(b)(5)

A. Defamation Claim

¶ 13 The district court dismissed Craig's defamation claim based on an affirmative defense. The court did so because the complaint failed to allege facts that negated the affirmative defense, not because the complaint affirmatively established that the defense barred the claim. We conclude that the court erred by dismissing the defamation claim on this ground.

¶ 14 A defamation claim requires proof of (1) a defamatory statement concerning another; (2) publication to a third party; (3) at least negligence on the part of the publisher; and (4) special

damages from the publication or actionability irrespective of special damages. *Lawson v. Stow*, 2014 COA 26, ¶ 15, 327 P.3d 340, 345.

¶ 15 However, a conditional privilege (an affirmative defense) may apply to communications between nonspouse family members. A communication between siblings, such as between Colin and his sister, is conditionally privileged if (1) the publisher reasonably believes that the communication affects the well-being of a family member and (2) the recipient’s knowledge of the defamatory matter will help protect the well-being of that family member. Restatement (Second) of Torts § 597 cmt. d (A.L.I. 1977); see CJI-Civ. 22:18 notes on use 3 (2026) (discussing the conditional privilege for communications between nonspouse family members as an affirmative defense).

¶ 16 If this conditional privilege attaches, it serves as an affirmative defense “unless the privilege is abused.” CJI-Civ. 22:18 notes on use 3. One way the privilege can be abused, and the affirmative defense lost, is if the publisher knew the statement was false or acted with reckless disregard for whether it was false (i.e., acted with actual malice). CJI-Civ. 22:18.

¶ 17 In sum, this affirmative defense could bar Craig’s defamation claim if (1) Colin’s rape accusation affected the well-being of a family member (his sister); (2) Colin’s sister’s knowledge of the accusation would help protect her well-being; and (3) Colin neither knew the statement was false nor acted with reckless disregard for whether it was false. Accordingly, the district court could have properly dismissed Craig’s defamation claim based on this affirmative defense if it determined that the complaint alleged facts that established these three elements.

¶ 18 Nevertheless, that is not what the court did. Instead, the court dismissed the defamation claim because the complaint *failed to allege* that Colin knew the rape accusation was false or acted with reckless disregard for whether it was false: “Again, because the qualified privilege attaches, Craig must prove that the statement was made with actual malice Craig Summers has not made any factual allegation to support the conclusion that the statements were made with the understanding they were false, or with reckless disregard for their truth.” In other words, the court dismissed the claim because, in its estimation, the complaint failed to allege that Colin lost the affirmative defense. However, a plaintiff need not

plead the inapplicability of an affirmative defense to survive a C.R.C.P. 12(b)(5) motion to dismiss. *See Bristol Bay*, ¶ 41, 312 P.3d at 1163-64.

¶ 19 Had the district court applied the correct C.R.C.P. 12(b)(5) standard, it should have denied the motion to dismiss the defamation claim for at least two reasons. First, we do not view the allegations in the complaint as triggering the conditional privilege. The district court ruled that the conditional privilege applied because the rape accusation “affects the well-being of Colin’s immediate family member, and is in service of protecting that well-being (awareness and prevention of sexual assault within the family).” However, the factual allegations in the complaint do not support this conclusion, especially when we view those allegations in the light most favorable to Craig, as we must. *See Marks*, ¶ 94, 350 P.3d at 901. The complaint included no explanation of how or why the rape accusation could have served to protect Colin’s sister’s well-being. Instead, the complaint alleged only that Colin sent the accusation to harm Craig’s reputation and discourage others from associating with him.

¶ 20 Second, even if the conditional privilege applied, the complaint alleged that Colin had acted with actual malice: “Colin Summers (‘Defendant’) falsely alleged [Craig] ‘raped my mother.’ Defendant knew this statement was false.”²

¶ 21 We therefore conclude that the court erred by dismissing the defamation claim under C.R.C.P. 12(b)(5).

B. IIED Claim

¶ 22 The district court dismissed the IIED claim based solely on its dismissal of the defamation claim, reasoning that a statement that cannot support a defamation claim also cannot support an IIED claim. Given our conclusion that the court erred by dismissing the defamation claim, this ground for dismissing the IIED claim is necessarily infirm.

¶ 23 Nevertheless, Colin argues that the court properly dismissed Craig’s IIED claim because the conduct alleged does not qualify as extreme and outrageous as a matter of law. We address this

² We recognize that the anti-SLAPP special motion to dismiss included affidavits suggesting that Colin did not act with actual malice. However, as discussed above, we cannot consider those affidavits when reviewing a C.R.C.P. 12(b)(5) dismissal. *See Polay v. McMahon*, 10 N.E.3d 1122, 1129 n.6 (Mass. 2014).

argument because we may affirm a district court’s ruling on any ground supported by the record. *See Taylor v. Taylor*, 2016 COA 100, ¶ 31, 381 P.3d 428, 434. We agree with Colin that his text messages do not qualify as outrageous conduct as a matter of law.

¶ 24 To give rise to an IIED claim, the conduct alleged must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999) (quoting Restatement (Second) of Torts § 46 cmt. d (A.L.I. 1965)). The level of outrageousness required “is extremely high.” *Id.*

¶ 25 We consider the totality of the circumstances when determining whether a defendant’s conduct is outrageous. *Green v. Qwest Servs. Corp.*, 155 P.3d 383, 385 (Colo. App. 2006).

¶ 26 As noted, the complaint alleged that Colin’s two text messages constituted outrageous conduct — one message supposedly threatened Craig with physical violence, and the other accused him of rape. We address each in turn.

¶ 27 This is the allegedly threatening text message as reproduced in the complaint:

If I ever see you again, . . . if you ever so much as mention my name, I will find you. And when I do, I am going to force feed you bars of soap until there are tears streaming down your face and you vomit. I am going to pin your frail body to the ground and whip you until you're red and laugh the whole time while doing it.

The complaint argued that this message was outrageous because it threatened physical violence against an elderly man.

¶ 28 A threat may constitute outrageous conduct. *See Archer v. Farmer Bros. Co.*, 70 P.3d 495, 499 (Colo. App. 2002), *aff'd*, 90 P.3d 228 (Colo. 2004). Even so, we conclude that the statement reproduced in the complaint was not outrageous conduct because, when considered in the context of the full text message rather than just the portion excerpted in the complaint, it was not even a threat.

¶ 29 If a document is referred to in a complaint and is central to the plaintiff's claim, it is not a matter outside the pleading for purposes of ruling on a C.R.C.P. 12(b)(5) motion to dismiss. *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). This means that courts may rely on such documents when ruling on a C.R.C.P. 12(b)(5) motion without converting the motion to one for summary judgment. *Id.*

¶ 30 Here, both parties included substantively identical screenshots of the relevant text messages in the anti-SLAPP filings, and there is no doubt that the text messages were both referred to in the complaint and central to Craig’s claim. Moreover, neither party disputes the authenticity of the substantively identical screenshots. Accordingly, unlike the affidavits, the screenshots are not matters outside the pleading and we can rely on them when reviewing the court’s C.R.C.P. 12(b)(5) dismissal. *See Yadon*, 126 P.3d at 336; *see also McNellis v. Douglas Cnty. Sch. Dist.*, 116 F.4th 1122, 1128 n.3 (10th Cir. 2024) (relying on the full text of an email chain in reviewing a motion to dismiss for failure to state a claim even though the complaint did not quote the whole chain but rather described the chain and several of the individual emails); *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (explaining that under similar circumstances as those here, “we examine the document itself, rather than the complaint’s description of it”).

¶ 31 Both screenshots revealed that right after the alleged threat, in the same text message, Colin wrote, “At least that’s what I would do if I was anything like you.” Less than forty-eight hours later, Colin

texted Craig again to explain that his previous message was not a threat. Colin wrote that the “pivot” from the alleged threat to “At least that’s what I would do” indicated that Colin “never had any intent of committing such acts violence [sic] because I am not a Bad Person like Craig, who actually did commit [the] aforementioned acts.” Considering the screenshots with the allegations in the complaint, we conclude that Colin’s allegedly threatening text message was not actually threatening and was therefore not outrageous.

¶ 32 Next, we consider whether the rape accusation was outrageous. Colin wrote the following to Craig and his sister: “You guys should talk about the . . . times Craig raped my mother during your next father-daughter date. I’m sure Craig can fill you in on all the details you were spared from.” As above, we conclude that this accusation did not meet the extremely high threshold for outrageous conduct.

¶ 33 False criminal accusations may constitute outrageous conduct, but often do not. *See, e.g., Gordon v. Boyles*, 99 P.3d 75, 78, 82 (Colo. App. 2004) (radio host’s repeated on-air accusations that the plaintiff committed multiple crimes, including stabbing a

fellow police officer, were not outrageous); *see also Bodett v. CoxCom, Inc.*, 366 F.3d 736, 747 (9th Cir. 2004) (“Arizona courts have typically found false accusations alone not enough to constitute an intentional infliction of emotional distress.”). Courts in other jurisdictions that have found false accusations to be outrageous have done so in situations where the accusation was made to law enforcement officials, not merely to another private party. *See, e.g., Carter v. Hahn*, 821 A.2d 890, 894-95 (D.C. 2003). Even where the false accusation has been made to the police and family members of the falsely accused and the accusation has led to an arrest, courts have still found the false accusation not outrageous. *See Slatkin v. Lancer Litho Packaging Corp.*, 822 N.Y.S.2d 507, 508-09 (App. Div. 2006) (“[F]axes and phone calls, including to the individual plaintiff’s parents, threatening his arrest and criminal prosecution[, and] instigation of the individual plaintiff’s arrest by means of false statements to the police concerning [the] plaintiffs’ indebtedness to [the] defendants . . . [were] not so outrageous as to be utterly intolerable.”).

¶ 34 We conclude that no reasonable person could find that Colin’s rape accusation was outrageous conduct. Colin made his allegation

in a private text message sent only to his sister and father. There was no allegation in the complaint that Colin spread or had plans to spread the accusation more widely, let alone to law enforcement officials.

¶ 35 Moreover, significant conflict between family members often happens. It is not uncommon for children who feel wronged by a parent to say very hurtful things to that parent. *See In re Grandparent Visitation of A.P.*, 743 S.E.2d 346, 351 n.12 (W. Va. 2013) (“[C]onflicts do occasionally arise among family members.”); *cf. E.S. v. H.A.*, 167 A.3d 685, 691 (N.J. Super. Ct. App. Div. 2017) (“[T]here are clearly cases of imagined or even fabricated charges against a parent, especially when raised during the pendency of divorce proceedings.” (quoting *P.T. v. M.S.*, 738 A.2d 385, 387 (N.J. Super. Ct. App. Div. 1999))); *S.C. Dep’t of Soc. Servs. v. Lisa C.*, 669 S.E.2d 647, 651 (S.C. Ct. App. 2008) (explaining that the purpose of the statutory provision at issue is to “protect a parent from potentially false accusations instigated by the other parent as part of a contentious divorce or custody battle”). We have no doubt that Colin’s accusation was painful and offensive to Craig. Even so, no reasonable person could conclude that it went beyond all possible

bounds of decency so as to be utterly intolerable in a civilized community.

¶ 36 We are not persuaded otherwise by Craig’s reliance on *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957 (Colo. App. 2009). In that case, a Korean language newspaper that was “widely distributed to the local Korean community” published a column about a recent murder trial in which one of the defendants was found not guilty. *Id.* at 964. The column criticized the slain victim’s wife, a member of the Korean community and eyewitness to the murder, for failing to appear and testify at the trial, blaming her for effectively letting one of her husband’s killers go free. *Id.* at 960. The wife complained to the newspaper, which then published a retraction that merely implied she had testified at the trial and admitted that the column was based on rumors the newspaper had falsely attributed to another newspaper. *Id.* The division held that the newspaper’s conduct could reasonably be seen as outrageous because it published unsubstantiated yet easily verifiable rumors that impugned the integrity of the wife, who had recently witnessed her husband’s murder. *Id.* at 964-65.

¶ 37 The facts here are distinguishable. While Colin's accusation may have been more offensive than the newspaper's accusation in *Han Ye Lee*, he did not accuse Craig publicly. Moreover, the victim's wife in *Han Ye Lee* was particularly vulnerable to the newspaper's accusation because she had recently witnessed her husband's murder. In contrast, nothing in the complaint suggested that Craig was more vulnerable to the rape accusation than any other parent might have been.

¶ 38 In sum, we recognize that Colin's accusation was likely hurtful and offensive, but he made it only once to his sister and father in a private text message. We cannot conclude that a reasonable person would deem such a communication between nuclear family members so reprehensible as to constitute outrageous conduct giving rise to legal liability. We therefore conclude that the district court properly dismissed Craig's IIED claim for failure to state a claim. *See Taylor*, ¶ 31, 381 P.3d at 434.

IV. Leave to Amend the Complaint

¶ 39 Craig also challenges the court's denial of his request for leave to amend his complaint. Although we question whether Craig properly requested leave to amend in the district court, we conclude

that this issue is preserved because the court explicitly denied Craig leave to amend in its dismissal order. *See Rinker v. Colina-Lee*, 2019 COA 45, ¶ 26, 452 P.3d 161, 168 (a trial court’s ruling on an issue preserves it for our review regardless of whether the parties raised it below). Despite it being preserved, we conclude this issue is moot because the relief sought, if granted, would have no practical effect on an existing controversy. *See Stor-N-Lock Partners #15, LLC v. City of Thornton*, 2018 COA 65, ¶ 38, 488 P.3d 352, 359 (defining mootness).

¶ 40 A party has the right to amend a complaint at any time before a responsive pleading is filed. C.R.C.P. 15(a). A motion to dismiss is not a responsive pleading for purposes of C.R.C.P. 15(a). *Schulz v. Laszlo & Assocs., LLC*, 2025 COA 24, ¶ 15, 568 P.3d 458, 462. Because we are reinstating Craig’s defamation claim and Colin has yet to file a responsive pleading, Craig still has the right to amend his complaint, regardless of whether the court denied discretionary leave to amend. *See Patterson v. James*, 2018 COA 173, ¶ 8, 454 P.3d 345, 349. Consequently, any relief we might grant from the court’s denial of discretionary leave to amend would place Craig in the same position — able to amend his complaint as a matter of

right. This issue is therefore moot, and we do not address it further. *See Stor-N-Lock*, ¶ 38, 488 P.3d at 359.

V. Anti-SLAPP Fees and Costs

¶ 41 Finally, we conclude that Craig failed to preserve his argument that he was entitled to attorney fees and costs for successfully defending Colin’s anti-SLAPP special motion to dismiss.

¶ 42 C.R.C.P. 121, section 1-15(1)(d), says, “A motion shall not be included in a response or reply to the original motion.” Craig requested anti-SLAPP attorney fees and costs only in his response to Colin’s motion to dismiss. Therefore, Craig did not properly request fees and costs. *See Patterson*, ¶¶ 9-10, 454 P.3d at 349 (appellant’s request in the district court did not preserve issue for appeal because appellant raised the request in her response to her opponent’s motion).

¶ 43 The district court did not address Craig’s improperly made fees and costs request in its order. Instead, at the end of the order, the court wrote, “Any request for attorney’s fees shall be separately filed.” At that point, Craig could have accepted the court’s invitation to reassert his fees and costs request by filing a motion. He did not.

¶ 44 Under these circumstances, we conclude that Craig failed to preserve his anti-SLAPP fees and costs request. *See Patterson*, ¶ 11, 454 P.3d at 349 (“[I]t is incumbent on the moving party to see to it that the court rules on the matter [he] urges,’ and if the party fails to do so, [he] waives or abandons that argument on appeal.” (quoting *Feldstein v. People*, 410 P.2d 188, 191 (Colo. 1966))). We therefore do not address it. *See Wilburn v. Guthrie*, 2026 COA 13, ¶ 32, 589 P.3d 947, 956 (“We generally do not consider unpreserved arguments in civil cases.”).

VI. Disposition

¶ 45 We reverse the court’s dismissal of Craig’s defamation claim and affirm the dismissal of his IIED claim. We remand the case to the district court for further proceedings consistent with this opinion.

JUDGE SULLIVAN and JUDGE MEIRINK concur.