The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
November 25, 2026

2026 COA 87

No. 24CA1456, *Howard v. Howard* — Torts — Defamation; Courts and Court Procedure — Action Involving Exercise of Constitutional Rights — Anti-SLAPP

A division of the court of appeals addresses a number of issues concerning the anti-SLAPP statute, § 13-20-1101, C.R.S. 2026, including whether the "sham exception" to absolute immunity for constitutionally protected petitioning activity recognized in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1366-69 (Colo. 1984), applies to a defamation claim based on statements made in the context of such activity. The division holds that it does not.

COLORADO COURT OF APPEALS **2026 COA 87**

Court of Appeals No. 24CA1456
Jefferson County District Court No. 23CV30901
Honorable Russell Klein, Judge

Muhammad Howard,

Plaintiff-Appellant,

v.

Jessica Katherine Howard a/k/a Jessica Katherine Knepp,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE J. JONES
Grove and Schutz, JJ., concur

Prior Opinion Announced August 27, 2026, WITHDRAWN
Petition for Rehearing GRANTED

Opinion Previously Announced as "**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)"** on August 27, 2026, is now Designated for Publication

Announced November 25, 2026

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

Killmer Lane, LLP, Darold W. Killmer, Thomas B. Kelley, Denver, Colorado; Law Office of Steven D. Zansberg, L.L.C., Steven D. Zansberg, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, Muhammad Howard (Howard), appeals the district court's judgment dismissing his complaint against defendant, Jessica Katherine Howard a/k/a Jessica Katherine Knepp (Knepp). We reverse the judgment and remand the case for further proceedings.[1]

I. Background

¶ 2 Howard and Knepp were married in January 2014. Seven years later, in January 2021, they jointly filed for dissolution of their marriage. By Knepp's account, "[t]he dissolution proceeding was drawn out and highly contentious."

¶ 3 On March 29, 2022, while the dissolution case remained ongoing, Knepp telephoned the Arvada Police Department to report that Howard had engaged in various acts of fraud. As now most relevant, she told an officer that Howard had opened credit card accounts in her name with Citibank, Vectra Bank, American Express, Capital One, and U.S. Bank without her knowledge or permission. She claimed that she had only learned of those credit

[1] This opinion was originally issued as unpublished. Knepp filed a petition for rehearing and a request to publish the opinion. We grant both Knepp's petition for rehearing and request to publish, and we do so with some modifications to the original opinion.

cards in December 2020, when she obtained a credit report showing the accounts. Following an investigation and consultation with the First Judicial District Attorney's Office, the Arvada police "determined that there was not enough evidence to continue a criminal investigation into this specific allegation."[2]

¶ 4 In June 2023, Howard filed a complaint against Knepp asserting a claim of defamation and defamation per se. Therein, he alleged that Knepp had made the following false and defamatory statements in her report to the police:

- Howard "had fraudulently opened numerous credit cards in [Knepp's] name."
- "[T]he first [Knepp] knew of these cards was in December of 2020."
- "[Howard] was under criminal investigation for financial fraud of over $1 million in Denver County."
- "[Knepp's] signature had been forged by [Howard]."

With respect to the credit cards, Howard also alleged in the complaint that (1) Knepp knew about them all along because she

[2] The police department told Knepp that, in addition to a lack of sufficient proof, there was a statute of limitations problem.

had opened the accounts herself; (2) various communications showed that Knepp knew about the cards "well before December 2020"; and (3) Knepp knew that Howard hadn't forged her signatures because "she was the one who signed the relevant contracts."

¶ 5 Knepp filed a motion to dismiss the complaint under Colorado's anti-SLAPP statute, section 13-20-1101, C.R.S. 2026.[3] She attached documents and her affidavit in support. Howard filed a brief in opposition to the motion, attaching documents and his own affidavit. Howard's counsel requested a hearing on the motion.

¶ 6 The district court denied Howard's counsel's request for a hearing and granted Knepp's motion to dismiss. The court first concluded that Knepp's police report was subject to the anti-SLAPP statute because (1) Knepp hadn't "recanted her statements and they have not been demonstrated to be false"; and, (2) absent such recantation or refutation, a complaint to law enforcement is an act in furtherance of a person's "right of petition or free speech in

[3] "SLAPP" is an acronym for "strategic lawsuit against public participation." *Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, ¶ 2 n.1 (citation omitted).

connection with a public issue." *See* § 13-20-1101(2)(a). The court then determined that Howard hadn't established a reasonable likelihood of success on his claim. *See* § 13-20-1101(3)(a). It therefore dismissed Howard's complaint under the statute. *See id.*

¶ 7 Though the district court ruled that none of Knepp's statements are actionable, on appeal, Howard only challenges the district court's judgment with respect to Knepp's statements that Howard obtained the credit cards without Knepp's knowledge or consent and that she only learned about the cards' existence in December 2020 (the credit card allegations).[4] We therefore deem any challenge regarding any of the other allegedly defamatory statements abandoned and limit our analysis to Knepp's credit card allegations. *See CenCor, Inc. v. Tolman*, 868 P.2d 396, 397 n.1 (Colo. 1994); *Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 38.

II. Discussion

¶ 8 Howard contends that the district court erred by (1) granting Knepp's motion with respect to the credit card allegations and

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[4] Because Knepp's credit card allegations accused Howard of committing a crime (or crimes), they are defamatory per se. *See Wilburn v. Guthrie*, 2026 COA 13, ¶¶ 1-2; *Arrington v. Palmer*, 971 P.2d 669, 671 (Colo. App. 1998).

(2) denying his attorney's request for leave either to offer evidence at a hearing or, in the alternative, to file a surreply. We agree with Howard's first contention and therefore don't need to address the second.

A. Applicable Law and Standard of Review

¶ 9 The anti-SLAPP statute's purpose "is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b). It allows for the filing of a "special motion to dismiss" and sets forth a process for determining whether such a motion should be granted. § 13-20-1101(3)(a).

¶ 10 The court must first determine whether the statute applies. It applies if the plaintiff's claim arises from an act "in furtherance of a person's right of petition or free speech under the United States [C]onstitution or the state constitution in connection with a public issue." *Id.* To qualify as such an act, it must fall within at least one of the following four categories:

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

§ 13-20-1101(2)(a)(I)-(IV).

¶ 11 If the act falls within one of these categories, the court must then determine whether "the plaintiff has established that there is a reasonable likelihood that the plaintiff will prevail on the claim." § 13-20-1101(3)(a). "If the plaintiff makes this showing, the case proceeds; if [he does] not, the case is dismissed." *Lind-Barnett v. Tender Care Veterinary Ctr., Inc.*, 2025 CO 62, ¶ 23; *see also Coomer v. Donald J. Trump for President, Inc.*, 2024 COA 35, ¶ 62

(noting that the movant has the burden as to the first inquiry and that the burden shifts to the plaintiff as to the second inquiry).

¶ 12 "We review an order granting . . . a special motion to dismiss de novo, applying the same two-step analysis as the district court." *Coomer*, ¶ 64.

B. Analysis

1. Applicability of the Statute

¶ 13 The district court didn't explicitly identify which of the four categories of statements covered by section 13-20-1101(2)(a) Knepp's report fell into. But, citing *L.S.S. v. S.A.P.*, 2022 COA 123, the court said that, because Knepp hadn't recanted her allegations and Howard hadn't conclusively demonstrated that her statements were false, the anti-SLAPP statute necessarily applied.

¶ 14 The district court's reliance on *L.S.S.* in this regard is problematic because the division in that case "assume[d], without deciding," that the defendant's reports about child abuse to investigatory authorities and a therapist fell within subparagraph (I) because the plaintiff had conceded the point. *Id.* at ¶ 28.

¶ 15 And on appeal, Knepp doesn't argue that the credit card allegations fall within subparagraph (I). Rather, she argues only

that they fall within subparagraph (IV) — "[a]ny other conduct or communication in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[5] § 13-20-1101(2)(a)(IV). This, too, is problematic. In *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156 (Cal. 2019), the California Supreme Court, interpreting California's virtually identical counterpart to subparagraph (IV), held that the identity of the recipient of the statement at issue isn't dispositive; the statement itself must be about a public issue or an issue of public interest. *Id.* at 1158-59, 1161. The Colorado Supreme Court, relying largely on *FilmOn*, recently adopted that approach in *Lind-Barnett*, ultimately holding that the court must consider first "whether an objective observer could reasonably understand that the speech or conduct, considered in light of its content and context, [was] made in connection with a public issue or issue of public interest, even if

[5] At oral argument, when asked whether Knepp was limiting her argument to subparagraph (IV), counsel said that subparagraph (IV) seemed like an "easy fit." Counsel said subparagraph (I) was a "fallback" but didn't argue how the statements could fit under subparagraphs (I)-(III).

it also implicates a private dispute," and if it does, second, "whether the challenged activity contributed to public discussion or debate regarding that issue." *Lind-Barnett*, ¶¶ 24-35.

¶ 16 Applying the two-step test articulated in *Lind-Barnett*, it is difficult to see how the credit card allegations concerned an issue of public interest. (Knepp doesn't argue that her statements were made in connection with a public issue.) At bottom, the credit card allegations concerned her private dispute with her husband over who was responsible for any balances on the subject credit cards. They neither concerned "a person or entity in the public eye"; nor "conduct that could directly affect a large number of people beyond" Knepp and Howard; nor "a topic of widespread, public interest." *Id.* at ¶ 33 (quoting *Geiser v. Kuhns*, 515 P.3d 623, 629-30 (Cal. 2022)). Though Knepp asserts that, broadly speaking, credit card fraud is an issue of public interest, "[i]t is not enough that [a] statement refer to a subject of widespread public interest; [it] must in some manner itself contribute to the public debate." *Id.* at ¶ 28 (quoting *FilmOn*, 439 P.3d at 1166). Knepp doesn't explain how the credit

card allegations meet that test.[6] And Knepp also doesn't explain how her reports contributed to public discussion or debate about an issue.

¶ 17 For his part, Howard argues that police reports don't necessarily fit within any of subparagraphs (I)-(IV), and that the credit card allegations don't because they don't concern a public issue. Yet, he concedes that California courts have held that police reports fall within the anti-SLAPP statute unless recanted or proved demonstrably false. His effort to distinguish those cases only gets him so far. In our view, some of the cases aren't distinguishable in principle, though most were decided before *FilmOn* and *Geiser*, and contain little or no analysis. *See, e.g.*, *Kenne v. Stennis*, 179 Cal. Rptr. 3d 198 (Ct. App. 2014); *Comstock v. Aber*, 151 Cal. Rptr. 3d 589 (Ct. App. 2012); *Chabak v. Monroy*, 65 Cal. Rptr. 3d 641 (Ct. App. 2007); *accord Mouktabis v. Clackamas County*, 536 P.3d 1037 (Or. Ct. App. 2023).

¶ 18 Despite the uncertainty regarding whether the credit card allegations to the police fall within the anti-SLAPP statute, and

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[6] At oral argument, Knepp's counsel conceded that some police reports may concern purely private disputes.

given the relatively muddled state of the law in this area pertaining to police reports, we will assume that they fall within subparagraph (IV) and therefore move to the second inquiry — whether Howard has shown a reasonable likelihood of prevailing.

2. Reasonable Likelihood of Prevailing

¶ 19 At the second part of the analysis, "the court must consider the pleadings and supporting and opposing affidavits to determine 'whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.'" *Coomer*, ¶ 63 (quoting *L.S.S.*, ¶ 23). Importantly, the court "may not weigh the evidence or resolve factual conflicts" in making this determination. *Id.* The court "must accept the plaintiff's evidence as true." *Id.* at ¶ 66. And it must assess only whether the plaintiff's evidence asserts facts that, if true, would make out a prima facie case, taking into account the applicable burden of proof. *L.S.S.*, ¶ 42; *Coomer*, ¶ 63. If the plaintiff meets this burden of showing at least "minimal merit," *Navellier v. Sletten*, 52 P.3d 703, 713 (Cal. 2002), the court must allow the case to proceed unless the defendant's evidence "defeats the plaintiff's

claim as a matter of law." *L.S.S.*, ¶ 23; *accord Coomer*, ¶ 72; *Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016).[7]

¶ 20 Evidence in this context includes affidavits. § 13-20-1101(3)(b); *Coomer*, ¶ 68 ("[O]nce affirmed in an affidavit, the plaintiff's assertions are no longer mere allegations; they are evidence. And that evidence must be accepted as true."). What other types of evidence may be submitted in this context isn't clear, but Knepp doesn't argue that the other evidence Howard submitted in opposition to her motion can't be considered. (And we note that Howard verified that evidence in his affidavit.) *See Coomer*, ¶ 79.

¶ 21 To prevail on a defamation claim, a plaintiff must prove the following elements: "(1) a defamatory statement concerning the plaintiff; (2) publication; (3) fault amounting to at least negligence; and (4) either actionability of the statement irrespective of special

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[7] Knepp urges us to reject the analytical framework set forth in *L.S.S. v. S.A.P.*, 2022 COA 123, and applied in *Coomer* and instead apply the framework set forth in *Salazar v. Public Trust Institute*, 2022 COA 109M, which, she argues, allows a court more leeway in assessing the relative strength of the parties' evidence. But even if *L.S.S.* and *Salazar* are inconsistent with each other, we are persuaded that *L.S.S.* is more consistent with the statutory language and California decisions construing that state's nearly identical statute, on which Colorado's anti-SLAPP statute was modeled.

damages or the existence of special damages." *Id.* at ¶ 85. In addition, if, as we assume in this case, the statement involves a matter of public concern, the plaintiff must also prove the falsity of the statement by clear and convincing evidence (rather than by a preponderance of the evidence) and must prove, again by clear and convincing evidence, that the defendant acted with actual malice. *Id.* at ¶ 86. The plaintiff must also prove actual damages, even if the statement is defamatory per se. *Id.*[8]

¶ 22 Knepp argued in her motion that Howard couldn't establish a likelihood of prevailing as to these elements because (1) the credit card allegations were materially true (and therefore not defamatory) and (2) there is no evidence of malice. In addition, however, she argued that Howard must, but cannot, prove that the police report was a "sham." She repeats these arguments on appeal. We therefore limit our analysis to those issues.

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[8] Howard doesn't contest the applicability of the clear and convincing evidence standard or that he must show actual malice. We therefore assume that those requirements apply. But we agree with Howard that, at this stage of the case, he doesn't have to produce clear and convincing evidence; rather, he "must establish a probability that [he] will be able to produce clear and convincing evidence . . . at trial." *L.S.S.*, ¶ 41; *accord Coomer*, ¶ 77.

¶ 23 Turning to the last issue first, we disagree with Knepp that *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (*POME*), a pre-anti-SLAPP-statute case, requires Howard to prove — in addition to the elements of his defamation claim (including actual malice) — that her report was "devoid of reasonable factual support" and that the "primary purpose" of the report was to harass Howard "or to effectuate some other improper objective." *Id.* at 1369.

¶ 24 *POME* addressed the legal requirements for proof of the tort of abuse of process in the particular context of the defendants filing litigation in an effort to overturn a board of county commissioners' rezoning decision. *Id.* at 1363. Recognizing that the defendants' lawsuit was activity protected by the Petition Clause of the First Amendment to the United States Constitution,[9] the court considered what a party must prove to prevail on an abuse of process claim arising out of such petitioning activity. *Id.* at 1364-65.

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[9] The Petition Clause provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I; *see* Colo. Const. art. II, § 24.

¶ 25 Leaning primarily on two United States Supreme Court cases involving federal antitrust law — *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) — the Colorado Supreme Court held that persons engaging in such petitioning activity are generally immune from legal liability for doing so. *POME*, 677 P.2d at 1365-66. But the court also held that this immunity — commonly referred to as the *Noerr-Pennington* doctrine — is, as the Supreme Court itself has recognized, not absolute: "[B]aseless litigation is not immunized by the First Amendment right to petition." *Id.* at 1366 (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983)); *see also BKP, Inc. v. Killmer, Lane & Newman, LLP*, 2021 COA 144, ¶¶ 46-63 (discussing the development of the *Noerr-Pennington* doctrine and its applicability to the use of the courts), *rev'd on other grounds*, 2023 CO 47. In *Noerr*, the Court held that petitioning activity that was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" defeats immunity for that activity. 365 U.S. at 144.

¶ 26 In *POME*, the Colorado Supreme Court held that this "sham exception" also applies to claims for abuse of process based on "alleged misuse or abuse of the administrative or judicial processes of government." 677 P.2d at 1366-69; *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (holding that the right of access to the courts is an aspect of the right to petition). To prove that this exception applies, a plaintiff must prove that the petitioning activity was (1) "devoid of reasonable factual support" or, alternatively, "lacked any cognizable basis in law"; (2) used for the "primary purpose" of harassing the plaintiff or "effectuat[ing] some other improper objective"; and (3) capable of "adversely affect[ing] a legal interest of the plaintiff." *POME*, 677 P.2d at 1369.

¶ 27 Though Knepp asserts that Howard must show that the sham exception applies to her police reports to maintain his defamation claims,[10] she doesn't cite any Colorado case applying the sham exception to a defamation claim, despite the fact that *POME* has been on the books for forty-two years. And we haven't found one.

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[10] We will assume for purposes of argument that Knepp is right that, at this step of the anti-SLAPP analysis, Howard must show a prima facie case as to any constitutional defense.

Indeed, Colorado cases have declined to apply the exception to defamation claims.

¶ 28 In *Concerned Members of Intermountain Rural Electric Ass'n v. District Court*, 713 P.2d 923 (Colo. 1986), the Colorado Supreme Court held that, in light of *POME*, a libel claim arising out of the filing of a lawsuit under C.R.C.P. 106 and related releases of information to the press had to be "scrutinized under a heightened standard." *Id.* at 924. But that heightened standard wasn't the sham exception; rather, it was whether "the allegations in the complaint were false or were made with reckless disregard of whether they were false" — in other words, with "actual malice," the very same requirement that typically applies to defamation claims like the one in this case. *Id.* (citing *McDonald v. Smith*, 472 U.S. 479 (1985)). Though Knepp asserts that the court did so only because "the alleged libel — circulating the [complaint] to the media — was not protected petition activity," that is simply false. The court said that the actual malice requirement applied to "the C.R.C.P. 106 complaint" and "the allegations in [that] complaint." *Id.* And in *POME*, the court held that the filing of a lawsuit is petitioning activity. 677 P.2d at 1365-67.

¶ 29 Many years later, in *BKP, Inc.*, a division of this court held that the *Noerr-Pennington* doctrine and the related sham exception don't apply to defamation claims. *BKP, Inc.*, ¶¶ 55-62.[11] The division based its holding largely on the United States Supreme Court's decision in *McDonald*. In that case, which involved a party sending letters to the President and other government officials, the Court held that a person doesn't enjoy absolute immunity for defamatory statements made in the context of petitioning activity. *McDonald*, 472 U.S. at 480-85. The Court first reaffirmed that "petitions . . . that contain intentional and reckless falsehoods 'do not enjoy constitutional protection,'" *id.* at 484 (quoting *Garrison v. Louisiana*,

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[11] Although the defendants in *BKP, Inc.*, petitioned the supreme court for certiorari review of the sham exception issue, the supreme court granted certiorari review only on a question pertaining to the application of the litigation privilege and denied certiorari review of the sham exception issue. *Killmer, Lane & Newman LLP v. BKP, Inc.*, (Colo. No. 21SC930, Dec. 12, 2022) (unpublished order). The supreme court subsequently reversed the division's judgment based on the litigation privilege issue. *Killmer, Lane & Newman, LLP v. BKP, Inc.*, 2023 CO 47, ¶¶ 1-4, 49-50. But it didn't vacate the division's opinion, meaning that the division's holding as to the sham exception arguably remains good law. At the very least, it remains persuasive authority. *See Johnson v. Brown*, 567 F. Supp. 3d 1230, 1265 n.37 (D. Or. 2021) ("[C]ases that have been reversed on other grounds may be persuasive, but are not controlling, authority.").

379 U.S. 64, 75 (1964)), "and may . . . be reached by the law of libel." *Id.* (citation omitted). It then concluded that "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions. . . . The right to petition is guaranteed; the right to commit libel with impunity is not." *Id.* at 485. It further held that the claimant would have to prove actual malice instead. *Id.*; *see also id.* at 490 (Brennan, J., concurring) ("There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co. v. Sullivan*[, 376 U.S. 254 (1964)], is not shielded by an absolute privilege.").

¶ 30 As noted above, in *Concerned Members*, 713 P.2d at 924, the Colorado Supreme Court cited *McDonald* in support of its holding that proof of actual malice — not proof of the sham exception —

applied to a defamation claim arising out of petitioning activity. And in the many years since *Noerr* and *Pennington*, the vast majority of courts that have considered the question have likewise concluded, often (but not always) relying on *McDonald*, that the sham exception doesn't apply to defamation claims, even those claims arising out of petitioning activity. *See, e.g.*, *Kinsman v. Winston*, No. 6:15-cv-696-Orl-22GJK, 2015 WL 12839267, at *7 (M.D. Fla. Sep. 15, 2015) (involving reports to law enforcement); *BKP, Inc.*, ¶¶ 55-62 (collecting cases); *Boren v. Gadwa*, 578 P.3d 861, 876-77 (Idaho 2024) (collecting cases); *Miner v. Novotny*, 498 A.2d 269, 272 (Md. 1985) (overruling a pre-*McDonald* case holding to the contrary); *Sturgeon v. Retherford Publ'ns, Inc.*, 1999 OK CIV APP 78, ¶ 22, 987 P.2d 1218, 1225-26; *Clark v. Jenkins*, 248 S.W.3d 418, 433-34 (Tex. App. 2008); *Harris v. Adkins*, 432 S.E.2d 549, 552 (W. Va. 1993) (overruling a pre-*McDonald* case holding to the contrary).

¶ 31 Against all this, Knepp cites only one case that she asserts holds that the sham exception applies to defamation claims — *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980). Assuming Knepp correctly characterizes the holding of the

case,[12] the case predates *McDonald*. And, as discussed, *McDonald*, we believe, dictates a different conclusion.

¶ 32 We have found two other cases arguably applying the sham exception to a defamation claim. In *Neurelis, Inc. v. Aquestive Therapeutics, Inc.*, 286 Cal. Rptr. 3d 631, 650-52 (Ct. App. 2021), the court merely assumed that the sham exception applied: it didn't even cite *McDonald* or acknowledge any of the numerous cases holding to the contrary. We therefore don't find it persuasive. In *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 752-53 (R.I. 2004), the court relied on language in Rhode Island's anti-SLAPP statute expressly incorporating the sham exception, which Colorado's anti-SLAPP statute doesn't have. Though we concede the possibility that there are cases holding similarly to *Neurelis* and *Alves*, if there are, they are few and far between.[13]

¶ 33 *L.S.S.* and *Salazar v. Public Trust Institute*, 2022 COA 109M, on which Knepp does rely, also don't support her argument.

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[12] The discussion on which Knepp relies focuses on the plaintiff's 42 U.S.C. § 1983 claim.

[13] Knepp argues broadly that the sham exception has been applied to a range of tort claims by some courts. That's true as far as it goes. The question in this case, though, is whether it applies to a defamation claim.

¶ 34 In *L.S.S.*, a defamation case, the division noted only how *POME* had created a framework that was, in certain respects, similar to the one created in crafting the anti-SLAPP statute. *L.S.S.*, ¶¶ 16-17. It didn't hold that the statute adopted all aspects of *POME*. And the division didn't analyze the sham exception at all in determining whether the plaintiff's defamation claim was barred by the anti-SLAPP statute.

¶ 35 *Salazar* held only that the plaintiff had to "satisfy the *POME* standard to prevail on his malicious prosecution claim," which it deemed similar to the abuse of process claim at issue in *POME*. *Salazar*, ¶¶ 39-41. Again, the division wasn't addressing the plaintiff's burden on a defamation claim.

¶ 36 In sum, we conclude that the sham exception recognized in *POME* doesn't apply to Howard's defamation claim. We turn, then, to the issues of falsity and malice.

¶ 37 With respect to those issues, Howard's affidavit made the following allegations:

- Knepp knew the falsity of the allegations that he had taken out credit cards in her name without her

knowledge and that she had only learned of those credit cards in December 2020.

- Knepp "knew that [Howard] had not forged her signature on credit card applications[] because she knew that she was the one who signed the relevant contracts."
- He and Knepp didn't keep "separate finances" as alleged in Knepp's motion.
- Knepp signed the Vectra Bank credit card application, contrary to the allegation in her motion.
- Knepp's primary purpose in making the police report was to gain an advantage in the dissolution of marriage case, contrary to the allegation in her motion.
- Knepp didn't believe that the information she gave to the police was "completely true," contrary to the allegation in her motion.
- Knepp was told by credit card representatives that, to be relieved of the debts, she would need to file a police report. (Knepp expressly alleged this in her motion and supplementary affidavit.)

- Knepp and Howard regularly discussed credit reports, and Knepp printed them for reference during their discussions.
- Knepp and Howard both went to U.S. Bank and Vectra Bank to execute documents and verify identifications so that the credit cards would be issued.
- Knepp used the allegations of the police report "to make misrepresentations to the [c]ourt in [the] divorce proceedings" and to other entities.
- Knepp was the primary contact on all the credit card accounts.

¶ 38 In addition, Howard submitted a number of documents, including (1) various emails from Knepp to Howard acknowledging the existence of and approving the accounts as far back as January 2014, and, in at least one case, referring to the card as "my card"; (2) text messages from Knepp to Howard acknowledging and requesting action on the accounts; (3) emails and pictures in text messages sent by Knepp to Howard showing that the account statements were addressed to Knepp; and (4) voicemail transcriptions of messages left by Knepp about messages she had

received from American Express and U.S. Bank representatives, which themselves were transcribed.[14]

¶ 39 Based on all this, we conclude that Howard met his burden of establishing a prima facie case as to both falsity and malice or, put another way, that there is a probability that he will be able to produce clear and convincing evidence of falsity and malice at trial. *See Coomer*, ¶¶ 63, 77; *L.S.S.*, ¶¶ 23, 41.

¶ 40 In dismissing Howard's complaint, the district court said that "many of the refutations provided for in Mr. Howard's affidavit are not supported by *direct* documentation, or do not provide sufficient context to find that the evidence relates *directly* to what Ms. Knepp told law enforcement in her complaints." (Emphasis added.) The court went on to take issue with many of Howard's allegations, saying, as now relevant, that it couldn't tell whether the credit cards Howard referred to were the same ones Knepp had mentioned to the police. The court also noted that some of the emails Howard presented predated 2018, which was before the period Knepp had

[14] As well, the police reports and follow-up internal police documentation show that the police had a very difficult time obtaining additional information from Knepp.

told police she believed the credit cards had been issued. The district court thereby erred in several respects.

¶ 41 First, Howard's affidavit was evidence: other "direct" evidence wasn't required. *See Coomer*, ¶ 68. And the court was required to accept that evidence as true. *See id.*

¶ 42 Second, and relatedly, the court drew inferences from the evidence against Howard. It was, however, required to draw all reasonable inferences in his favor. It was reasonable to infer from Howard's evidence, for example, that the credit cards about which Howard spoke in his affidavit were the same credit cards Knepp had told the police about. Indeed, there was no evidence of any different credit cards, and, with the possible exception of the Vectra Bank credit card account, Knepp didn't even claim that there were other accounts to which Howard's evidence could be attributed.

¶ 43 Third, though Knepp initially told the police that she believed Howard had opened the accounts within the four years prior to March 2022, she later told the police that "most of the accounts appear to have been opened back in either 2014 or up to 2017." That time period coincides with the evidence Howard submitted in opposition to Knepp's motion.

¶ 44 To be sure, Knepp (via her own affidavit) denied much of what Howard alleged. But her denials and limited supporting documentation don't "defeat[] [Howard's] claim as a matter of law." *L.S.S.*, ¶ 23 (quoting *Baral*, 376 P.3d at 608); *accord Coomer*, ¶ 72.[15] At most, Knepp casts doubt on the veracity of Howard's evidence. At this stage of the case, that isn't enough to warrant dismissal of Howard's claim.

¶ 45 We also aren't persuaded to reach a contrary conclusion by Knepp's argument that even if the credit card allegations were inaccurate in some respects, the "substance," "gist," or "sting" of the allegations was nevertheless materially true.

¶ 46 Under Colorado law, a statement isn't actionable defamation if the substance, gist, or sting of the statement is true, even if the statement isn't literally true in every detail. *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1972); *Barnett v. Denv. Publ'g Co.*, 36 P.3d 145, 147 (Colo. App. 2001) ("A party asserting truth as a defense in a defamation action is not required to justify every word of the alleged defamatory matter. It is sufficient if 'the substance, the gist,

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[15] As discussed above, Knepp asks us to reject the "defeats as a matter of law test" as adopted in *L.S.S.*, but we refuse her request.

the sting[] of the matter is true.'" (quoting *Gomba*, 504 P.2d at 339)). The test is "whether there is a substantial difference between the allegedly libelous statement and the truth; or[,] stated differently[,] whether the statement produces a different effect upon the [one to whom the statement was made] than that which would be produced by the literal truth of the matter." *Gomba*, 504 P.2d at 339; *accord SG Ints. I, Ltd. v. Kolbenschlag*, 2019 COA 115, ¶ 21; *Fry v. Lee*, 2013 COA 100, ¶ 23. And contrary to Knepp's assertion, this question is "a factual one." *Gomba*, 504 P.2d at 339; *see also McIntyre v. Jones*, 194 P.3d 519, 528 (Colo. App. 2008) (issue whether a statement is true for defamation purposes is one of fact).[16]

¶ 47 Knepp argues that the credit card allegations were substantially true because she proved that (1) they were true as to at least three accounts (two Vectra Bank accounts and one American Express account), so any "mere errors of quantity, degree, or timing" are immaterial; (2) accounts were opened without her

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[16] We also observe that substantial truth is an affirmative defense as to which the defendant bears the burden of proof. *Barnett v. Denv. Publ'g Co.*, 36 P.3d 145, 147 (Colo. App. 2001).

permission; and (3) Howard forged her signatures on certain documents. But we have already concluded that Knepp's evidence in this regard wasn't sufficient to refute Howard's contrary evidence as a matter of law.

¶ 48 To the extent Knepp argues that other statements she made were true, and therefore the credit card allegations were substantially true, that argument also fails. In determining substantial truth, we look to whether some inaccurate detail in the statement at issue would cause a reasonable listener to think less of the person about whom the statement was made than if that listener knew only the accurate parts of the statement.

¶ 49 *Gomba* is illustrative. In that case, the plaintiff claimed that the defendant defamed him by falsely accusing him of assaulting an "elderly gentleman" "in Cheyenne." 504 P.2d at 338. As it turns out, there was no evidence that the plaintiff assaulted an elderly gentleman in Cheyenne, but there was some evidence that he assaulted a gentleman "from Cheyenne" in Brighton, Colorado. *Id.* The court held that this evidence created a *triable issue* of substantial truth — that if the defendant proved that the plaintiff had assaulted a gentleman in Brighton, the statement wouldn't be

actionable because the gist or sting of the statement wasn't impacted by the location of the assault. *Cf. Interstate Med. Licensure Compact Comm'n v. Bowling*, 113 F.4th 1266, 1285-86 (10th Cir. 2024) (applying Colorado law and concluding that, although details of certain statements may not have been true, their gist was); *Bustos v. A & E Television Networks*, 646 F.3d 762, 762-68 (10th Cir. 2011) (applying Colorado law and concluding that a statement asserting that the plaintiff was a "member" of a white supremacist organization was substantially true in light of evidence that he conspired with that organization); *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo. 2004) (documents showing that the plaintiff had been arrested for assault and disturbing the peace "based upon domestic violence" supported a finding that the statement that the plaintiff had previous "problems" with domestic violence was substantially true); *Barnett*, 36 P.3d at 146-48 (statement that the plaintiff had been convicted of stalking was substantially true because he had been convicted of an offense involving conduct similar to stalking that the sentencing judge had referred to as "almost stalking").

¶ 50 But Knepp doesn't explain how, if the credit card allegations are false — that is, that she knew of and consented to the opening

of the credit card accounts, knew of them before December 2020, and in fact signed the documents necessary to obtain those accounts — they are rendered substantially true if, say, Howard defrauded others (in some unspecified way) and was under investigation for such fraud. As a logical matter, those facts don't render the gist of the credit card allegations true; indeed, they wouldn't render any part of the credit card allegations true. *See Bustos*, 646 F.3d at 766 ("[T]he material falsehood requirement narrows our comparison to statements on the same subject matter . . . . [It] focuses judicial attention on the comparatively narrow question [of] whether the *particular* challenged statement is true or false on its *own terms* . . . .").

¶ 51 In effect, Knepp contends that if other statements — if true — show that Howard engaged in other criminal activity, any false statement about other criminal activity — the credit card allegations — are substantially true even if entirely false. But this approach, aside from its problematic logic, characterizes the gist of the credit card allegations at too high a level of generality. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) ("We must be careful, however, that we are not construing the gist

of the allegedly defamatory statements so broadly as to invite [the] defendants to commit, in effect, a further but privileged libel, by bringing to light every discreditable act that the plaintiff may have committed, in an effort to show that he is as 'bad' as the defamatory statements depict him."); *Bustos*, 646 F.3d at 766 (the material falsity of the challenged statement must be assessed on its own terms).[17]

¶ 52 Along the same lines, Knepp argues, relying on *Tonnessen v. Denver Publishing Co.*, 5 P.3d 959 (Colo. App. 2000), that even if the credit card allegations are false, they aren't actionable because any "incremental harm" to Howard's reputation resulting from those false statements is minimal when compared to the harm resulting from her other statements, which she asserts are unquestionably true. This argument also fails, for several reasons.

¶ 53 First, the "incremental harm" rule has been criticized as both "too narrow and too broad." *Bustos*, 646 F.3d at 765-67 (discussing

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[17] On appeal, Knepp doesn't clearly articulate what she believes the gist of the credit card allegations is. In the district court, she argued that the gist is that Howard "acted in a criminal manner." That is simply too broad for purposes of determining material falsity.

those criticisms). And, as *Bustos* pointed out, the Colorado Supreme Court hasn't yet been adopted it.

¶ 54 Second, even if the "incremental harm" rule is viable in Colorado, Knepp hasn't shown that the other statements are "unassailable truth." *Id.* at 766. As with the credit card allegations, Howard has sworn that those other statements are false: He swears that he hasn't defrauded anyone and that Knepp made up the allegation that he was under investigation for financial fraud "out of whole cloth."

¶ 55 Third, Knepp's allegation that Howard "has defrauded numerous people" was utterly devoid of any relevant detail — such as who was defrauded, when, and how — which a court or jury could use to compare that alleged fraud to the credit card allegations. And she later provided only minimal information regarding two other possible instances of fraud. As for Knepp's allegation that Howard was "under investigation for financial fraud of over $1 million in Denver County," it too is devoid of detail. Just as importantly, it is one thing to be investigated and quite another to be charged or convicted. And Knepp presented no evidence that any such investigation even resulted in charges.

¶ 56 In sum, Knepp didn't meet her burden of proving — to the extent required at this stage of the case — that Howard actually engaged in the conduct of which she accused him.

¶ 57 We, of course, don't express any opinion on the ultimate merit of Howard's defamation claim. We hold only that the district court erred by dismissing the portion of that claim pertaining to the credit card allegations under the anti-SLAPP statute.

III. Disposition

¶ 58 The judgment is reversed, and the case is remanded to the district court for further proceedings.[18]

JUDGE GROVE and JUDGE SCHUTZ concur.

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[18] Because we reverse the judgment, we deny Knepp's request for an award of appellate attorney fees under section 13-20-1101(4)(a), C.R.S. 2026.