

Colorado Court Grants News Anchor's Anti-SLAPP Motion

Dismisses Libel Case Premised on Report About Plaintiff's Involvement in the Events of January 6, 2021

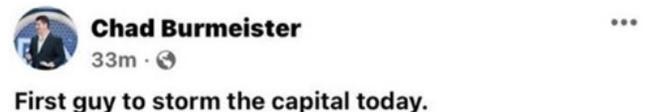
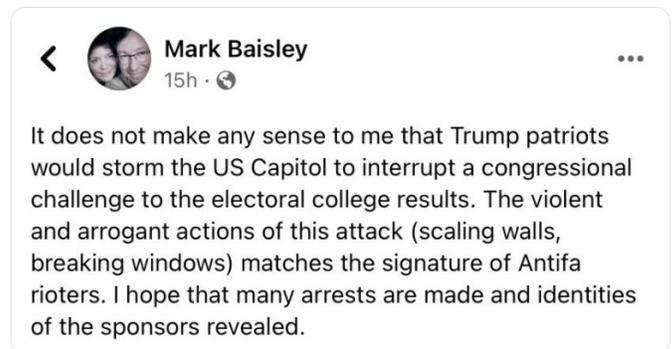
By Steven D. Zansberg

In only the second case to date to apply Colorado's anti-SLAPP Act (passed into law in 2019) to a news outlet, a trial court judge tossed a defamation case against Kyle Clark, the nightly news anchor at KUSA-TV/9News, the TEGNA-owned NBC affiliate in Denver. The court found the challenged news report, and its online counterpart (as well as Clark's tweets promoting the television report) were substantially true and, alternatively, plaintiff had not demonstrated a "reasonable likelihood" that he could prove actual malice.

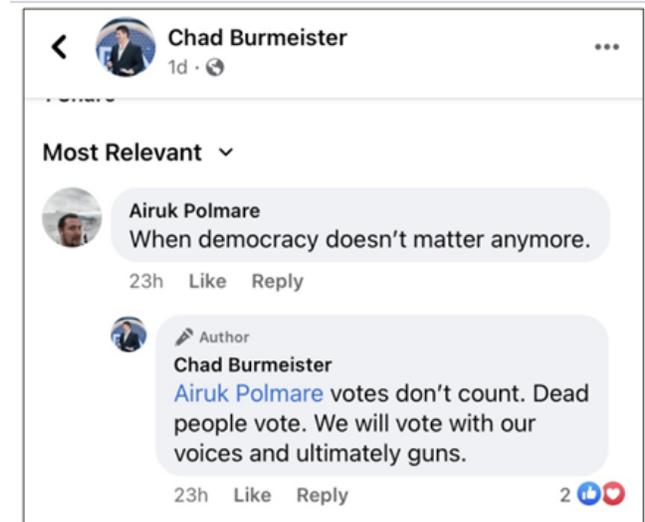
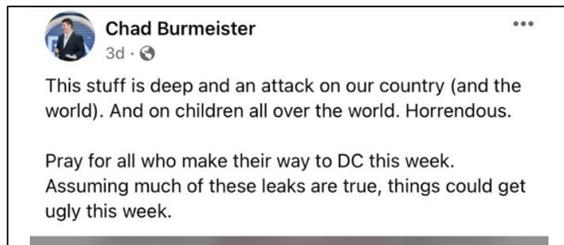
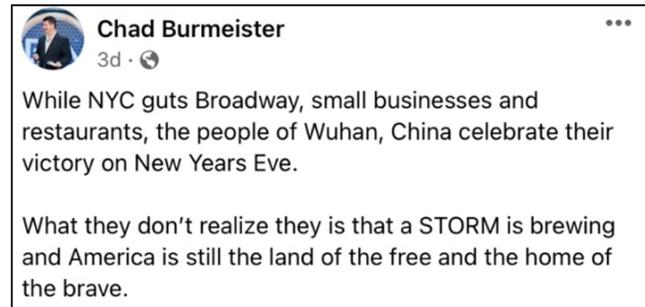
What Prompted the Publication At Issue

The news report that gave rise to the suit aired at 6:00 p.m. on January 7, 2021, the night after the insurrection at the U.S. Capitol. Earlier that day, a member of Colorado's state House of Representatives, Mark Baisley, tweeted that those who had violently assaulted police officers and infiltrated the U.S. Congress shouting "Hang Mike Pence!" were not actual supporters of then-President Trump, but likely were Antifa operatives.

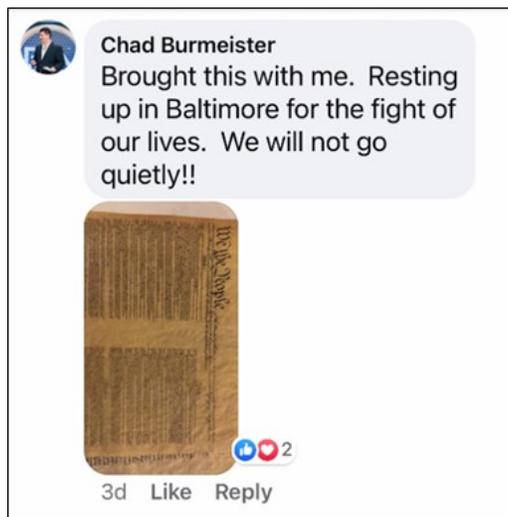
Shocked to see this comment, Clark set out to debunk that claim for his broadcast that evening. He came upon (or was tipped off to) the Facebook page of one Chad Burmeister, a Colorado resident, and CEO of an artificial intelligence-based marketing firm in Littleton, Colorado, who had posted (and boasted) that he'd been on the Capitol Mall on January 6. In fact, Burmeister had posted the "selfie" on the right showing himself standing beside a younger man who claimed he was "the first guy to storm the capital [sic] today."



After dozens of people took to Twitter to denounce Burmeister, calling for his immediate firing and arrest, long before that evening’s news report on KUSA-TV, Burmeister changed the caption of the photo to read “Peaceful march to the capital [sic].” Clark looked into Burmeister’s prior Facebook postings and found he’d espoused several views supportive of those who violently assaulted the Capitol building on January 6. Among the things he had posted were:



And, once he’d flown to the nation’s capitol to participate in the “Stop the Steal” rally, he posted:



Prior to airing his commentary debunking Representative Baisley’s tweet by using Burmeister’s presence at the Capitol (and his espoused beliefs above) as “exhibit A,” he reached out to Burmeister for comment. Burmeister responded by email, saying he did not breach the Capitol during the riot, and he was only in Washington D.C. to participate in a peaceful march. Later in the day, in response to Clark’s follow-up question about Burmeister’s having used “STORM” as a noun – the term QAnon followers used to describe the day when Trump’s supporters would vanquish (and execute) his “enemies” – Burmeister stated:

Thank you for highlighting my peaceful march to the Capitol yesterday. It was an honor to live my First Amendment. Just to clarify, “storm” for me was to march to the Capitol and be on the grounds. As I mentioned in my posts, I was there for a peaceful march, always respecting the laws of our land.

Defendants’ Publication, and the Resulting Lawsuit

The news segment/commentary, broadcast at 6:00 p.m. on January 7, 2021, [can be viewed here](#).

Burmeister, who is represented by Steven Biss of Virginia (notorious for having filed numerous frivolous libel suits on behalf of former U.S. Representative Devin Nunes (R. Cal)), filed suit against Clark and KUSA-TV in Denver District Court. The Complaint asserts a single claim for defamation per se, premised on the broadcast report, an online print story accompanying the broadcast piece, and Clark’s tweets touting the broadcast report. (Burmeister/Biss have also filed two other libel cases, in federal courts in Boston and San Francisco, against business associates of Burmeister’s who posted links to the 9News broadcast piece on Facebook, Twitter, and LinkedIn. Those two suits seek a combined \$13.5 million in damages and are still pending).

In the Denver lawsuit, Burmeister claimed that Clark defamed him by (1) falsely stating that he had “stormed” (violently entered) the Capitol, when it was the other fellow in the selfie photo above who claimed to have done so, or that Burmeister had “claimed” to do so; (2) that he “bragged” about having done so, (3) that he “boasted” about being at the anti-government rally, and (4) that he was falsely portrayed as a member of radical and violent conspiracy organizations like QAnon and the Three Percenters. (Burmeister had conspicuously donned a battle fatigue sweatshirt bearing the Three Percenter’s logo on the Capitol Mall on January 5, 2021).

Anti-SLAPP Motion and the Court’s Ruling

Clark and his station, KUSA-TV, filed a Special Motion to Dismiss the complaint under Colorado’s anti-SLAPP Act. That statute, copied practically verbatim from California’s Anti-SLAPP Act, immunizes publications in public fora on matters of public concern (“prong 1”), unless the plaintiff can demonstrate a “reasonable probability of prevailing” on his claims (“prong 2”). It was uncontested that Clark’s commentary addressed a legitimate matter of public concern and was published in a public forum.

Turning to prong two, the defendants' Special Motion to Dismiss argued that Burmeister could not show a likelihood of prevailing because he could not satisfy two elements of his libel. First, material falsity (or lack of substantial truth): Clark's broadcast statements describing Burmeister's social media postings characterizing them as showing Burmeister having boasted about his being on the grounds of the Capitol during the insurrection, and "bragging" about standing beside the fellow who claims to have been the first one to gain entry to the Capitol were substantially true. The fact that the broadcast and online reports included Burmeister's statement declaring he'd not personally entered the Capitol building, and had broken no laws, made it impossible for him to show that he was falsely accused of having done so. Lastly, Clark's actual statement, that Burmeister's "Facebook page is full of QAnon conspiracies about 'the storm,'" was also substantially true (and did not necessarily imply that he was a member of those organizations).

Second, actual malice (required under Colorado law even for a private figure plaintiff when suing on a publication addressing a matter of legitimate public concern): accompanying the Special Motion to Dismiss was Clark's sworn declaration attesting to the steps he had taken to prepare his report, including having reviewed Burmeister's postings above on Facebook, Twitter and LinkedIn, as well as exchanging communications with Burmeister eliciting his statements that were *included in the broadcast* report. Accordingly, defendants argued, Burmeister could not present competent "clear and convincing evidence" of actual malice.

On March 9, 2022 Judge Ross Buchanan of the Denver District Court [granted the defendants' Special Motion to Dismiss](#), finding that Burmeister had not met his burden under Colorado's anti-SLAPP Act of establishing a reasonable likelihood that he could prevail on his claim for defamation. Buchanan essentially adopted the arguments that had been presented in the defendant's Special Motion to Dismiss, but also distinguished between stating the Burmeister had actually entered the Capitol and the erroneous statement (in the online version, not uttered by Clark) that Burmeister had "claimed" to have done so.

As noted above, the trial judge's ruling marks only the second time to date in which a member of the "mainstream"/legacy news media has invoked Colorado's anti-SLAPP statute, resulting in dismissal both times. Mr. Burmeister, through his attorney Steven Biss, has announced their intention to appeal the District Court's order granting the special motion to dismiss.

Steve Zansberg of The Law Office of Steven D. Zansberg, L.L.C. in Denver, Colorado represented Kyle Clark and TEGNA Inc. d/b/a KUSA-TV. Chad Burmeister was represented by Steven S. Biss of Charlottesville, Virginia.

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