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COLORADO COURT OF APPEALS
Opinion by Martinez, J., Fox and Lipinsky, J.J., concurring
Case No. 2021CA1856

ARAPAHOE COUNTY DISTRICT COURT
Honorable Frederick T. Martinez, Judge
Case No. 19CV32566

Petitioners: Terra Management Group, LLC and Littleton Main Street LLC d/b/a Main Street Apartments

v.

Respondents: Kathleen Keaten and Delaney Keaten

▲COURT USE ONLY▲

Case No. 2023SC272

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BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COLORADO CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS TERRA MANAGEMENT GROUP, LLC AND LITTLETON MAIN STREET LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of Colo. App. R. 21(k), 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limit set forth in Colo. App. R. 29(d).

It contains **3,809** words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in Colo. App. R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colo. App. R. 29, 32, and 53.

Dated: January 23, 2024

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STATEMENT OF IDENTITY AND INTERESTS[1]

Amici are organizations whose members operate in Colorado and throughout the United States. The Chamber of Commerce of the United States ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Colorado Chamber of Commerce ("Colorado Chamber") is a private, non-profit, member-funded organization. Its mission is to champion a healthy business climate in Colorado. The four key objectives of that mission include: (1) maintaining and improving the cost of doing business; (2) advocating for a pro-business state government; (3) increasing the quantity of educated, skilled workers; and (4) strengthening Colorado's critical infrastructure (roads, water,

[1] No counsel for a party authored this brief in whole or in part. No entity or person, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund its preparation or submission.

telecommunications, and energy). The Colorado Chamber is the only business association that works to improve the business climate for all sizes of business from a statewide, multi-industry perspective, and in furtherance of that mission it submits *amicus curiae* briefs in cases that will make it more costly for companies to engage in business in Colorado.

Amici are committed to ensuring that Colorado law does not establish requirements that unfairly burden defendants in civil litigation, who are often businesses or professionals. The cost of preserving documents and other items that may be relevant to possible future lawsuits is often massive, and that cost is disproportionately borne by business. The U.S. Chamber has been outspoken in advocating for rules and legal standards that provide clear guidance regarding when a duty to preserve arises and the scope of its reach. Such efforts include the U.S. Chamber's Institute for Legal Reform's participation in the public comment process leading to the 2015 amendment of Federal Rule of Civil Procedure 37(e) regarding preservation of electronically stored materials and sanctions available when they are destroyed. *Amici* seek to inform the Court regarding the public-policy impacts that follow when courts impose severe spoliation sanctions using unpredictable standards.

SUMMARY

Preserving material comes at a substantial cost. Maintaining documents and storing physical items costs both money and the attention of personnel. To reduce wasteful expenses, all businesses routinely discard materials that no longer have value for their ongoing operations and make improvements to property to enhance value.

It may be tempting to overlook these very real burdens of preservation when they are considered only after litigation has actually commenced and the evidentiary value of documents or objects to the claims asserted seems apparent. But parties do not make retention decisions with the benefit of hindsight. Instead, they must choose in real time, based on circumstances as they are actually known and understood, whether to incur the burden of preserving the material or allow it to be discarded.

The Court of Appeals crafted and applied a standard that will compel businesses to over-preserve materials that have no usefulness outside of possible lawsuits that may never come. This approach to spoliation sanctions does not provide clear guidance on when a duty to preserve attaches before a lawsuit is filed, or how to differentiate between what must be retained for that case and what may be discarded. If, as the Court of Appeals opinion indicates, an external

perspective influenced by subsequent events will be used to assess the propriety of decisions to discard materials, parties will have no choice except to spend their money on preservation even where the potential for litigation is remote and the materials are only marginally relevant to anticipated claims.

To avoid burdening businesses and others who face possible litigation with the crushing cost of preserving unneeded materials, a severe spoliation sanction should be allowed for pre-lawsuit conduct only when a party actually knew that litigation was imminent at the time it destroyed material, and that the items discarded would be evidence relevant and significant to the forthcoming claims. Accordingly, the Court of Appeals should be reversed.

ARGUMENT

I. AN UNPREDICTABLE STANDARD FOR IMPOSING SEVERE SPOLIATION SANCTIONS CAUSES COSTLY OVER-PRESERVATION OF VALUELESS MATERIALS.

The signal this Court will send with the standard it adopts to determine when conduct warrants a harsh spoliation sanction will immediately influence businesses' retention practices. Courts that enter outcome-determinative sanctions after second-guessing a party's judgment about the usefulness of material to unanticipated lawsuits drive sanctions-adverse parties to over-preserve. This

carries a heavy cost and, except in unusual circumstances, creates zero real-world benefits to litigants or courts.

A. Over-Preservation Driven by Fear of Sanctions Inflicts a High Cost on Businesses.

Rules compelling preservation of materials solely because they *might* be demanded in lawsuits that could – but probably will not – be filed are a "real problem[]."[2] With respect to retention requirements and spoliation sanctions, the Court has looked to analyses from the federal system.[3] Recently, the Judicial Conference Advisory Committee on Civil Rules ("Advisory Committee") extensively studied how businesses and others respond to the threat of harsh spoliation sanctions, such as the adverse inference imposed here, during development of the 2015 amendment to Federal Rule of Civil Procedure 37(e)

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[2] Minutes – Civil Rules Advisory Committee (Apr. 10-11, 2014) at 17, *in* ADVISORY COMMITTEE ON CIVIL RULES OCTOBER 2014 AGENDA BOOK 39 (2014), available at https://www.uscourts.gov/sites/default/files/fr_import/CV2014-10.pdf

[3] *See*, *e.g.*, *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002-04 (Colo. 2006) (citing numerous federal decisions in considering "the rationales underlying the adverse inference" sanction). *See also Warembourg v. Excel Electric, Inc*., 2020 COA 103, ¶53 ("'we are persuaded by . . . more recent federal precedent,' for guidance on whether a court abuses its discretion by imposing a particular sanction.") (quoting *Pfanz v. Kmart Corp*., 85 P.3d 564, 568 (Colo. App. 2003)).

regarding electronically stored information.[4] A range of organizations, including individual corporations, business groups, and lawyers representing litigants from many perspectives, contributed to that rulemaking effort. Considering the input it received, the Advisory Committee found:

> [a]n accumulation of information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, *including litigation that is never brought*.[5]

This costly and wasteful over-preservation that the Advisory Committee identified extends in two directions. First, documents and other items are retained unnecessarily if they have no usefulness except to disputes that never develop into

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[4] Although the 2015 amendments to Federal Rule of Civil Procedure 37 have not yet been incorporated into Colorado Rule of Civil Procedure 37, the current Colorado rule has its roots in Fed.R.Civ.P. 37. *See Scott v. Matlack, Inc*., 39 P.3d 1160, 1172 (Colo. 2002) (noting that, at that time, "Rule 37 of the Federal Rules of Civil Procedure is virtually identical to Colorado's."). Given this connection, the information received by the Advisory Committee during the Fed.R.Civ.P. 37 rulemaking process and its findings provide useful insight with respect to the content of a standard used to determine if an adverse inference sanction is appropriate. *See Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 676 (Colo. 1987) (quoting as persuasive authority the Advisory Committee's Note regarding the 1970 amendment to Fed.R.Civ.P. 37 as to intended purpose of the rule change).

[5] Hon. David. G. Campbell, Report of the Advisory Committee on Civil Rules (May 2, 2014) at 35-36, *in* ADVISORY COMMITTEE ON RULES OF PRACTICE AND PROCEDURE MAY 2014 AGENDA BOOK 61 (2014) (emphasis added), available at https://www.uscourts.gov/sites/default/files/fr_import/ST2014-05.pdf.

actual litigation. Bayer Corporation described to the Advisory Committee a real-world example:

> [A]n attorney sent the company a letter attaching a federal court complaint that he said he would file if Bayer did not meet certain demands within 30 days. The company immediately issued a litigation hold notice and disabled computer auto-delete features for employees who might have relevant information. While we promptly advised the attorney that we disagreed with his demands, to our knowledge no lawsuit has yet been filed. Ten months later, 382 employees remain subject to a legal hold, and the company continues to bear the cost of preserving their information.[6]

Second, over-preservation includes materials that are retained because they are conceivably relevant to anticipated lawsuit allegations, but that turn out not to be pertinent to the actual claims and defenses eventually litigated. Microsoft's experience, described to the Advisory Committee, illustrates the magnitude of this burden:

> Microsoft Corporation reported in 2011 that for every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data – a ratio of 340,000 to 1. In terms of numbers of pages, Microsoft reported that in its average case, 48,431,250 pages are

[6] Bayer Corporation, *Public Comments on Proposed Amendments to the Federal Rules of Civil Procedure* (Oct. 25, 2013) at 7, available at https://downloads.regulations.gov/USC-RULES-CV-2013-0002-0309/attachment_1.pdf.

preserved, but only 142 are actually used. Microsoft indicates that these ratios are even more pronounced in 2012 and 2013.[7]

Preserving materials that might be needed in future litigation, but never actually are, results in huge financial outlays by American businesses.[8] According to a 2014 survey of 128 companies conducted by University of Chicago Law School professor William H.J. Hubbard, reducing required document retention by

[7] Lawyers for Civil Justice, *Public Comment to the Advisory Committee on Civil Rules, Reducing the Costs and Burdens of Modern Discovery: Why the Proposed Amendments to the Federal Rules of Civil Procedure Are Urgently Needed (with a Few Important Improvements)* (Aug. 30, 2013) at 3 (quotation omitted), available at https://downloads.regulations.gov/USC-RULES-CV-2013-0002-0267/attachment_1.pdf. *See also* Bayer Comment, *supra* n. 6, at 5 (describing that in a group of class actions eventually resolved by summary judgment, 17,388 GB of information was preserved for four years but only 31.1 GB of that information was sought in discovery).

[8] *See* Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. Rev. 537, 546 (2013) ("For all their expense, preservation activities seldom return value to the parties. . . . [L]ittle of what is preserved is ever called for in litigation, implying that either little analysis is going into preservation decisionmaking, or it is driven more by fear than by need[.]") (citation omitted).

just three percent would yield savings of more than $1 million annually for some companies.[9]

Businesses are driven to over-preserve because of "fear they will be sanctioned for missing information[.]"[10] Judge Lee Rosenthal, former Chair of the Judicial Conference's Committee on Rules of Practice and Procedure, observed that an entity's understanding that litigation opponents will seek catastrophic and outcome-determinative sanctions any time materials arguably relevant to the litigation are not retained "may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information." *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

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[9] William H.J. Hubbard, *Preservation Costs Survey: Summary of Findings* (Feb. 18, 2014), at 11**,** available at https://downloads.regulations.gov/USC-RULES-CV-2013-0002-2201/attachment_3.pdf. *See also* Nicholas M. Pace & Laura Zakaras, RAND Inst. for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 88 (2012) (finding that the resource cost of preserving just one terabyte of data exceeds $100,000).

[10] U.S. Chamber Institute for Legal Reform, *Public Comment To The Advisory Committee On Civil Rules Concerning Proposed Amendments To The Federal Rules of Civil Procedure* (Nov. 7, 2013), at 8, available at https://downloads.regulations.gov/USC-RULES-CV-2013-0002-0328/attachment_1.pdf

B. The Use of Vague Standards to Impose Severe Sanctions for Pre-Lawsuit Destruction Causes Businesses to Over-Preserve.

How courts decide whether to sanction a party for pre-lawsuit spoliation affects retention decisions. Before a lawsuit is threatened, much less filed, businesses simply cannot make reasoned decisions to discard materials if they cannot predict whether courts will later declare that retention was mandated. As Magistrate Judge Shaffer of Colorado's federal district court observed:

> [A] party's duty to preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent, particularly when that discontent does not crystalize into litigation for nearly two years. Any other conclusion would confront a putative litigant with an intractable dilemma: either preserve voluminous records for a[n] indefinite period at potentially great expense, or continue routine document management practices and risk a spoliation claim at some point in the future.

Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 623 (D. Colo. 2007). And as the Advisory Committee recognized in its development of amended Federal Rule of Civil Procedure 37(e), a business can structure its preservation actions to meet the needs of litigation it actually knows will be pursued, but when its retention choices will be assessed "with hindsight" using a spoliation standard that imposes "adverse inference instructions or other serious

sanctions" on the basis of perceived negligence, then "persons and entities over-preserve ESI out of fear that some might be lost[.]"[11]

To reduce the burden of storing valueless material while still encouraging retention of documents and items needed for lawsuits that are likely to eventually be filed, "sanctions should only be available where a party acted [to destroy materials], *knowing* that it had a duty to retain the information."[12] A standard for spoliation sanctions that examines the possessing party's contemporaneous knowledge about forthcoming lawsuits and what they will require provides actionable guidance and will alleviate the fear-based instinct to over-preserve material "just in case."[13]

This approach is consistent with the Advisory Committee's. Under the amended Federal Rule of Civil Procedure 37(e)(2), potentially case-altering sanctions, including an adverse inference instruction for the loss of electronically stored information, require a finding that "the party acted with the intent to deprive

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[11] Campbell, Report of the Advisory Committee on Civil Rules, *supra* n. 5, at 37.
[12] U.S. Chamber Institute for Legal Reform Comment, *supra* n. 10, at 11-12 (emphasis added).

[13] *See Cache La Poudre Feeds*, 244 F.R.D. at 624, n.11 ("it is neither feasible nor reasonable for organizations to take extraordinary measures to preserve documents if there is no business or regulatory need to retain such documents and there is no reasonable anticipation of litigation to which those documents may relevant") (quoting *The Sedona Principles*, at 16).

another party of the information's use in the litigation." The Rule's "intent to deprive" element implies that the possessing party must have known that a lawsuit would come, or was at least likely to, and that the destroyed items constituted evidence meaningfully relevant to the claims that it anticipated would be asserted. The federal Rule's reliance on an intent-focused standard is not reconcilable with the Court of Appeals' standard, which requires potential litigants to engage in guesswork and speculation where no person has directly threatened litigation.

II. IMPOSING AN ADVERSE INFERENCE SANCTION FOR PRE-LITIGATION CONDUCT SHOULD DEPEND ON THE PARTY'S ACTUAL KNOWLEDGE.

The adverse inference sanction in this case was entered, and affirmed, without a finding that Defendants knew a lawsuit would be filed in which the discarded materials would be relevant. The notion that a party's decision not to retain materials for possible future litigation in circumstances where that possibility is ambiguous constitutes severely sanctionable conduct under Colorado law is untenable. It will drive all parties doing businesses in Colorado to over-preservation, with all its attendant burdens, due to fear of a similar outcome.

A. The Court of Appeals' Opinion Lacks Actionable Guidance For Parties Facing Future Retention Decisions.

No specific occurrence was identified as triggering Defendants' duty to preserve materials because they would be relevant evidence in Plaintiffs' lawsuit.

Instead, circumstances such as an email from a departing employee, Plaintiffs' complaints of fumes and "severe health consequences," and the absence of communication that Plaintiffs were not going to sue, viewed collectively and in hindsight, provided sufficient signal that "litigation was reasonably foreseeable[.]" *Keaten v. Terra Mgt. Grp., LLC*, Case No. 21CA1856, ¶¶ 32-33. This vague basis for imposing an adverse inference sanction leaves businesses without the ability to identify in real time those situations in which they must take action to preserve materials.

The Opinion's justification for sanctioning these Defendants creates uncertainty for litigants and district courts when addressing retention decisions for three reasons. First, the circumstances arguably suggesting that a lawsuit would be filed were judged retrospectively to decide what Defendants "should have known," rather than what Defendants actually knew and understood about the likelihood of litigation. *Id.* ("defendants should have known that litigation was reasonably foreseeable"). Second, no particular event was pinpointed as providing an unquestionable sign triggering a duty to retain materials for future litigation. *Id*. (describing a constellation of separate occurrences). Third, communication that *did not take place* was noted as support for finding that Defendants' conduct warranted an adverse inference sanction. *Id.* at ¶32 ("At no time did plaintiffs

communicate to defendants that there was no need to preserve evidence because they would not be pursuing litigation against them, or state that the injuries they sustained had been resolved.").

Parties who seek to avoid being sanctioned under Colorado law cannot possibly look at these justifications and meaningfully monitor their daily circumstances for events that will touch off a duty to take action to preserve materials. Likewise, this standard directs district judges to engage in speculation without clear benchmarks, greatly complicating the trial court's analysis. To minimize costly over-preservation, what potential litigants and lower courts need, and what the standard applied by the Court of Appeals lacks, is "a clear, bright-line trigger that informs litigants precisely when they are under an affirmative duty to preserve information."[14]

Further, parties cannot ascertain from this ruling how far they must reach in preserving possible evidence for conceivable future lawsuits. Troublingly, the Court of Appeals suggests that even when preservation is not practical, parties seeking to avoid sanctions must consider taking affirmative steps such as

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[14] Washington Legal Foundation, *Public Comment of The Washington Legal Foundation to the Advisory Committee On Civil Rules Concerning Proposed Amendments To The Federal Rules of Civil Procedure* (Oct. 7, 2013), at 4, available at https://downloads.regulations.gov/USC-RULES-CV-2013-0002-0285/attachment_1.pdf

conducting tests, acquiring samples, and photographing aspects of physical evidence even before the specifics of a claim are known. *Id*. at ¶¶ 24-25, 35. Once again, this lack of clarity leaves sanction-adverse parties with no option except to incur the heavy cost of retaining all material that could possibly bear on future lawsuit claims:

> Without clearly defined preservation rules, parties struggle to draw the line on the scope of preservation – especially in the period prior to commencement of litigation – and are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements.[15]

Importantly, even though determined pursuant to Colorado law, a harsh spoliation sanction imposed pursuant to a vague standard will have effects beyond Colorado's borders. Even if an entity has no physical presence in Colorado, it may be sued in Colorado courts if the minimum contacts for personal jurisdiction exist. *See, e.g.*, *Align Corp. v. Boustred*, 2017 CO 103, ¶ 35 (concluding that Taiwanese corporation with no U.S. physical presence could be sued in Colorado court). Once in the Colorado judicial system, a party is subject to those courts' inherent powers, including their authority to enter an adverse inference sanction pursuant to Colorado's spoliation standard, even if the subject incident and evidentiary loss

[15] Lawyers for Civil Justice Comment, *supra* n. 7, at 3.

occurred outside the State. *See Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1000-01 (Colo. 2006). Thus, allowing this adverse inference sanction to stand can be expected to have far-reaching negative impacts, including disincentivizing companies from doing business in Colorado.[16]

B. The Spoliation Standard Applied in *Castillo v. The Chief Alternative, LLC* Strikes a More Appropriate Balance.

Specificity in identifying those circumstances that trigger the duty to retain materials for use in future litigation allows businesses to minimize unnecessary preservation. In *Castillo v. The Chief Alternative, LLC*, 140 P.3d 234 (Colo. App. 2006), the Court of Appeals took notice that courts typically will only sanction a defendant for pre-litigation destruction of evidence "where a clear showing has been made that the defendant *knew litigation would be filed*[.]" *Id*. at 236-37 (citation omitted) (emphasis added). Applying this actual knowledge test, the Court of Appeals affirmed the trial court's refusal to sanction the defendant for discarding physical evidence prior to litigation because it had not received "clear, prompt notice that a complaint would be filed." *Id*. at 237.

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[16] *See* Minutes – Civil Rules Advisory Committee, *supra* n. 2, at 16 (noting concern that "large enterprises have felt forced to over-preserve huge amounts of ESI for fear of spoliation sanctions imposed under the most demanding standards adopted by the most demanding court in the country.").

In *Warembourg v. Excel Electric, Inc*., 2020 COA 103, the Court of Appeals again looked to the spoliating party's subjective understanding of a forthcoming lawsuit. It affirmed an adverse inference jury instruction where the district court had determined that the defendant had "acquired actual knowledge that litigation was imminent" and prior to destruction "had actual knowledge that the box had potential evidentiary value[.]" *Id*. at ¶63, ¶64. The Court of Appeals observed that "[t]he record supports the district court's findings of fact[,]" and concluded that the finding of "bad faith" conduct "alone" provided a sufficient basis for the spoliation sanction. *Id*. at 65, ¶81.

The Court should maintain the focus on a party's actual knowledge of whether a lawsuit is imminent. This standard provides direction upon which a party who seeks to avoid the risk of sanctions can act, while still limiting preservation efforts and costs to what the law requires. A shift away from the "actual knowledge" standard applied in *Castillo* and *Warembourg* would undermine a party's confidence that it is acting properly in discarding material with no business value, and spur over-preservation.

CONCLUSION

Without clear retention rules based on what is known at the time of a decision to discard, businesses face a Hobson's Choice: either preserve too much

material and burden themselves with high storage costs and encumbered custodians, or preserve too little and face the risk of being second-guessed with spoliation allegations that can produce an outcome-determining sanction. The approach used to justify and affirm the sanction in this case places businesses in exactly this conundrum, and more fear-driven over-preservation with its associated burdens will be the inevitable result. Accordingly, the Court should reject the spoliation standard applied by the Court of Appeals and reverse the entry of the sanction.

Dated: January 23, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 23, 2024, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COLORADO CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS TERRA MANAGEMENT GROUP, LLC AND LITTLETON MAIN STREET LLC** was filed electronically via Colorado Courts E-filing system, and served upon all counsel of record.

/s/ Lee Mickus