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| COLORADO SUPREME COURT<br>2 East 14th Avenue<br>Denver, Colorado 80203 | |
| COURT OF APPEALS, STATE OF COLORADO,<br>Case No. 12CA1251 | |
| DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO<br>Case No. 2011 CV 2218<br>The Honorable Ann B. Frick | |
| **Petitioners-Defendants**: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION; CALFRAC WELL SERVICES CORP., and FRONTIER DRILLING LLC<br>**v.**<br>**Respondents-Plaintiffs:** WILLIAM G. STRUDLEY and BETH E. STRUDLEY, Individually, and as the Parents and Natural Guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor | ▲ COURT USE ONLY ▲<br><br>Case No. 13SC576 |

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**RESPONDENTS' ANSWER BRIEF**

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| **COLORADO SUPREME COURT**<br>2 East 14th Avenue,<br>Denver, CO 80203<br><br>COURT OF APPEALS, STATE OF COLORADO<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202<br><br>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO<br>Case Number: 2011 CV 2218<br>The Hon. Ann B. Fick<br><br>**Defendants/Petitioners:** ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION; CALFRAC WELL SERVICES CORP., AND FRONTIER DRILLING LLC<br><br>**v.**<br><br>**Plaintiffs/Respondents:** WILLIAM G. STRUDLEY and BETH E. STRUDLEY, Individually, and as the Parents and Natural Guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor<br><br>**Attorneys for Plaintiffs - Respondents:**<br>Peter W. Thomas, Atty. Reg. 27657<br>THOMAS \| GENSHAFT LLP<br>39 Boomerang Road, Suite 8130<br>Aspen, Colorado 81611<br>Telephone: 970-544-5900<br>Facsimile: 970-544-4849 | COURT USE ONLY<br><br>Case No. 2013SC576 |

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) as modified by this Court's June 26, 2014 order permitting the Answer Brief to contain up to 14,250 words.

Choose one:

☒It contains 14,203 words.

❑It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

❑For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._____, p. _____), not to an entire document, where the issue was raised and ruled on.

☒For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

*/s/ Corey T. Zurbuch*

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## TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

**Cases**

**Statutes**

Respondents William G. Strudley and Beth E. Strudley, Individually, and as the Parents and Natural Guardians of William Strudley, a minor, and Charles Strudley, a minor (collectively, "the Strudleys") respectfully submit their Answer Brief in response to Petitioners' Opening Brief and the *amici curiae* briefs permitted by this Court.

## ISSUES PRESENTED FOR REVIEW

1. Whether a district court is barred as a matter of law from entering a modified case management order requiring plaintiffs to produce evidence essential to their claims after initial disclosures but before further discovery.
2. Whether, if such modified case management orders are not prohibited as a matter of law, the district court in this case acted within its discretion in entering and enforcing such an order.

## STATEMENT OF THE CASE

This appeal arises from the granting of a motion to dismiss brought by Defendants-Petitioners Antero Resources Corporation and Antero Resources Piceance Corporation (Antero Resources), CALFRAC Well Services, LTD. (CALFRAC), and Frontier Drilling LLC's (Frontier) (collectively "the Companies") pursuant to C.R.C.P. Rule 37 by the district court, a decision which

was reversed by the Court of Appeals without dissent. The motion to dismiss was brought on the grounds that the Strudleys failed to establish a *prima facie* case of exposure and medical causation to support their personal injury and property damage claims arising from the Companies' natural gas well drilling activities undertaken proximate to their home, as had been directed by a Modified Case Management Order (hereinafter "MCMO").

The MCMO was issued by the district court following a line of non-Colorado cases where "*Lone Pine*" orders[1] were used as a means of managing complex, mass tort litigation which overwhelming involve cases pending in federal court with a significant number of parties, various toxic exposure scenarios, and developed litigation postures.

The MCMO was issued shortly after the parties' initial disclosures were made and prior to the commencement of any formal discovery upon motion of the Companies. The Strudleys exchanged some 2,000 pages of documents, including all the publically available information obtained from their Colorado Open

[1] "*Lone Pine*" orders get their name from *Lore v. Lone Pine Corporation*, 1986 WL 637507, an unpublished order by the Superior Court of New Jersey. *Lone Pine* orders require the plaintiffs to provide evidence sufficient to establish a *prima facie* case of injury and causation or run the risk of having their case dismissed. *Id.* "Lone Pine orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir.2000).

Records Act Request. R.CF, pp. #565, 980. The Companies produced no documents with their Initial disclosure. R.CF, p. #1554. The trial court determined the case was complex and believed the most efficient procedure for the case was to require the Strudleys, before allowing full fact discovery to commence, to make a *prima facie* showing through expert opinions, studies and reports of each Plaintiffs' exposure to toxic chemicals as a result of the Companies' activities and medical causation specific to those toxins, as well as identification and quantification of contamination of the Strudleys' real property attributable to the Companies' operations. R. CF, pp. #578-580. The trial court issued the MCMO, over the Strudleys' objections that they had a right to engage in discovery central to their claims under Colorado law before the merits of their claims could be tested through existing statutory procedures, that the cases where *Lone Pine* orders were issued were distinguishable, and that such an order significantly disadvantaged the Strudleys in litigating the merits of their claims.

Despite the Strudleys good faith effort to meet the trial court's conditions as set forth in the MCMO, the Companies filed a Rule 37 Motion to Dismiss or, in the Alternative, for Summary Judgment, asserting that the Strudleys failed to comply with the MCMO. The trial court granted the Rule 37 motion dismissing the Strudleys' entire action rejecting the Strudleys' showing as insufficient and their

request to be allowed an opportunity to conduct discovery relevant to support their claims.

In reversing the trial court's *Lone Pine* order and the order of dismissal pursuant to the *Lone Pine* order, and reinstating the Strudleys' claims, the Court of Appeals found that the trial court had exceed its authority as a matter of law in issuing the *Lone Pine* order, and that in any event, the trial court erred by entering the *Lone Pine* order under the circumstances presented in this action.

The Companies ask this Court to reverse the Court of Appeals and reinstate the district court's order of dismissal. The Strudleys maintain that the Court of Appeals appropriately reviewed both the authority and rationale behind the practice of issuing *Lone Pine* orders and properly relied upon Colorado's rules and existing precedent in its Opinion of November 20, 2013 and that its opinion should be affirmed.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. The Strudleys' Lawsuit.

In August 2010, the Companies commenced gas-drilling activities in and around the Fenno Ranch well site and in the following months, also worked on the Diemoz and the Three Siblings well sites, both less than one mile from the Strudleys' home. R. CF, pp. #1015-1016; 1031-1039. The Strudleys immediately

felt the impacts of the Companies' operations. R. CF, pp. #1015-1016; 1031-1039. For example, the smell of burning chemicals was overwhelming and led to the Strudleys suffering from burning eyes and throats, skin rashes, constant headaches, terrible bouts of non-stop coughing, and continual bloody noses. R. CF, pp. #1032-1039. For many hours of every day of each week, the outdoor air had a noticeable chemical burning smell, which made it extremely difficult for the Strudleys to remain outdoors for any prolonged period of time. R. CF, p. #1033.

Prior to the Companies' gas drilling-related activities around the Strudleys' home, the outdoor and indoor air quality at the property was generally good and typical of rural Colorado. R. CF, pp. #1033-1034. The Strudleys had never before noticed any chemical or burning odors. R. CF, pp. #1033-1034.

Prior to the Companies' gas drilling-related activities around the Strudleys' home, the Strudleys' residential water well never had any problems with gas, sedimentation or other contaminants. R. CF, pp. #1033, 1038. The Strudleys completely relied on their water well as their sole source of water for drinking, bathing and other daily household purposes. R. CF, p. #1033.

By October 2011, however, the Strudleys noticed significant changes to their water quality. Besides visible contamination, water drawn from the Strudleys' well was emitting a foul odor. R. CF, p. #1033. Medical professionals advised

Strudleys that they were wise to move from their home given the striking levels of hydrogen sulfide in their well water. R. CF, pp. #1038; 1045. Having suffered injuries and damages arising from the Companies' activities, the Strudleys filed a complaint alleging that the Companies committed tortious acts while drilling and completing these three natural gas wells. R. CF, pp. #30-44. They alleged that the Companies' drilling operations caused toxic hydrocarbons and combustible gases and hazardous pollutants and industrial and/or residual waste, to contaminate the air, ground and aquifer near, onto and under their home and into the air and ground water well used and relied upon as their water supply. R. CF, pp. #30-44.

The Strudleys alleged health injuries from exposure to air and water contaminated by the Companies. R. CF, p. #33. They also alleged contamination of their groundwater supply from gases and chemicals and the presence of toxic and noxious air emissions caused loss of use and enjoyment of their property, diminution in value of property, property damage, loss of quality of life, and other damages. R. CF, p. #33. The complaint set forth causes for action for negligence, nuisance, strict products liability, and trespass, with a request for establishment of a medical monitoring trust fund as to all defendants and an additional cause of action for negligence per se as against the Antero Defendants and Frontier Drilling,

LLC. R. CF, pp. #30-44. None of the Companies challenged the sufficiency of the Strudleys' complaint to state a cause of action.

**B. The Modified Case Management Order.**

On August 3, 2011, the case became at issue pursuant to Rule 16(b)(1). With a Presumptive Case Management Order then in place, all parties served their Rule 26 Initial Disclosures on September 2, 2011 and pursuant to Rule 16(b)(10) and Rule 26(a)(5) additional discovery could begin on September 14, 2011. R. CF, pp. #567; 572; 242; 232; 1549.

However, before additional discovery commenced, the Companies, on September 19, 2011, filed a Motion for Modified Case Management Order based upon the *Lore v. Lone Pine Corporation* decision. R. CF, pp. #250-268. The motion requested that the Strudleys be prohibited from conducting any discovery until they proved through expert witness affidavits and other documentary evidence that they could establish a *prima facie* case of exposure and medical causation for each plaintiff caused by the Companies' oil drilling activities. R. CF, p. #273.

The Companies argued that the instant action was akin to the *Lore* action and so complex as to entail significant discovery at substantial cost such that the burden should be placed upon the Strudleys to prove up their exposure and medical

causation case in advance to avoid such unnecessary expenditures with the anticipated dismissal of the Strudleys' action. In support, the Companies proffered their own evidence, a Colorado Oil and Gas Conservation Commission ("COGCC") report that concluded based upon data from a single sampling study that the Strudleys' water supply was not affected by oil and gas operations in the vicinity; unsubstantiated defense witness affidavits claiming their operations complied with applicable laws and regulations and statements that air emission-control equipment and prevailing wind patterns made it unlikely that the Strudleys or their property were exposed to harmful levels of chemical from the Companies' activities. R. CF, pp. #250-268. The Strudleys were never permitted the opportunity to challenge these affidavits or question the COGCC about its report including the fact that the testing samples were not promptly shipped for analysis or the sampling and testing methodologies used.[2]

[2] The Amicus Curiae Brief of the Colorado Petroleum Association advocates the propriety of the COGCC and relies upon evidence not in the record in addition to misstating the record. (CPA Amicus Brief at p.4) It also adds biased commentary and conclusions about its proffered "facts" for which it has no personal knowledge nor support to any citations in the record. Indeed, CPA goes as far to state that the COGCC determined that the Strudleys' claims in their complaint were unfounded (CPA Amicus Brief at p. 5), even though there is nothing in the record to reflect that the COGCC ever evaluated all of the Strudleys' claims in their complaint including their trespass and nuisance claims. CPA's Statement of Facts in support of its brief further states that the Strudleys "persistently refused" to produce

The Strudleys' opposed the Companies' Motion for Modified Case Management Order on the grounds that it was untimely made and such a pre-discovery order violated established Colorado policies regarding a party's opportunity to conduct discovery and fair case management, that case was not complex unlike those instances when other jurisdictions issued *Lone Pine* orders but concerned personal injury and property damage claims involving a single family of four and a few defendants operating near their home such that extraordinary judicial management in terms of issuing a *Lone Pine* order was not necessary, and that without any form of meaningful fact discovery that is essential to proving causation, exposure and injury in this action, the stage would be set for Strudleys to fail to meet a *Lone Pine* case management order. R. CF, pp. #405-421.

Concluding that the case was complex and that a deviation from the standard case management order was appropriate in light of the evidence presented with the Companies' motion and that actual litigation of the case would entail significant discovery at substantial cost to all parties, the trial court issued a *Lone Pine* MCMO. R. CF, pp. #578-580.

The MCMO required that within 105 days of the order, the Strudleys to produce the following:

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evidence during the course of the litigation, which is patently false. (CPA Amicus Brief at p. 5) As such, its brief is improper and should be given no deference.

i. Expert opinion(s) provided by way of sworn affidavit(s), with supporting data and facts in the form required by Colo. R. Civ. P 26(a)(2)(B)(I), that establish for each Plaintiff (a) the identity of each hazardous substance from Defendants' activities to which he or she was exposed and which the Plaintiff claims caused him or her injury; (b) whether any and each of these substances can cause the type(s) of disease or illness that Plaintiffs claim (general causation); (c) the dose or other quantitative measurement of the concentration, timing and duration of his/her exposure to each substance; (d) if other than the Plaintiffs' residence, the precise location of any exposure; (e) an identification, by way of reference to a medically recognized diagnosis, of the specific disease or illness from which each Plaintiff allegedly suffers or for which medical monitoring is purportedly necessary; and (f) a conclusion that such illness was in fact caused by such exposure (specific causation).

ii. Each and every study, report and analysis that contains any finding of contamination on Plaintiffs' property or at the point of each Plaintiff's claimed exposure.

iv. Identification and quantification of contamination of the Plaintiffs' real property attributable to Defendants' operations.

R. CF, pp. #578-580.

### C. The Strudleys' Production Pursuant to the Modified Case Management Order.

The Strudleys made their MCMO Production. R. CF, pp. #593-594. Without the benefit of being able to conduct factual discovery central to their claims, the Strudleys produced the Affidavit of Thomas Kurt MD, MPH ("Dr. Kurt"), a Colorado Licensed Physician with vast experience in the fields of medical toxicology and environmental health. R. CF, pp. #604-618; 620-640. Dr. Kurt

interviewed the Strudleys by telephone and reviewed the complaint, a map of the area at issue, color photographs taken of the Strudleys' injuries and Defendants' drilling and flaring activities near the Studleys' property, the Strudleys' medical records, as well as relevant environmental air and water tests. R. CF, pp. #613-614. His expert affidavit identified the Strudleys' physical complaints including headaches, nightmares, skin rashes, nose bleeds and balance and positing problems which occurred only while living at their residence during defendants' drilling operations. R. CF, pp. #613-614.

Dr. Kurt also observed that air sampling data for the property showed detectable levels of various hydrocarbons and sulfides that can result in noticeable olfactory detection as experienced by the Strudleys. He further noted that water sampled from their well was described as "cloudy" with "thumb sized bubbles" and a "strong sulfur smell," that increased levels of multiple metals were also found, and that sodium and chloride levels were increased. R. CF, pp. #614-615.

Dr. Kurt's affidavit, relying on the limited sampling data available without discovery, identified hazardous substances detected in the Strudleys' air and water. Dr. Kurt causally linked the Strudleys' symptoms of headaches, nightmares, skin rashes, nose bleeds, and cognitive problems as temporally related to defendants' gas well activities, which are in close proximity to the Strudleys' home. R. CF, pp.

#616-617. Dr. Kurt also identified substances and provided quantifiable results of the contamination of the Strudleys' property, to which the Strudleys were likely exposed to from at least October 2010 until January 2011. R. CF, pp. #616-617.

The affidavit also reflected that he could only offer preliminary exposure and causation opinions because he required additional information that was unavailable to him due to the trial court's discovery prohibition. Dr. Kurt opined that "sufficient environmental and health information exists to merit further substantive discovery" and outlined what information would be needed. R. CF, p. #616-617.

The Strudleys also produced a report by John G. Huntington, PhD, a chemist and fate and transport expert with experience in gas well contamination, that Dr. Kurt relied upon. Dr. Huntington reviewed sampling data taken of the Strudleys' groundwater, including two samples taken in October 2011 and December 2011 that confirmed the contamination the COGCC discovered but nevertheless chose to deny. His report concluded that their water was unnaturally "characterized as being dominated by sodium and chloride." He stated the sodium and chloride levels were much higher than EPA recommends for drinking water, and not at all typical of residential well water. Even without the benefit of discovery, Dr. Huntington opined that such levels are in the range expected from only a number

of very deep sources, such as may be produced from gas wells like those in very close proximity to the Strudleys' water well and at issue in this litigation. R. CF, pp. #971-973.

Dr. Huntington further stated "[a]ll of these results could be consistent with contamination from gas well chemicals or production waters, although that conclusion cannot be reached unequivocally from the chemical data alone." R. CF, pp. #971-973. Accordingly, Dr. Huntington's report also confirmed the need for additional site specific discovery in this action.

The Strudleys also produced pre and post drilling water results confirming that a number of compounds associated with gas drilling and hydraulic fracturing operations were substantially increased in the Strudleys' water supply. These concentration increases include, but are not limited to:

> Total Dissolved Solids (pre-drill 980 mg/L--post-drill 5,500 mg/L);
> Sodium (pre-drill 290 mg/L;--post-drill 2,170 mg/L);
> Lead (pre-drill non-detect;--post-drill 34.6 ug/L);
> Potassium (pre-drill 1.2 mg/L; --post-drill 10.6 mg/L);
> Chloride (pre-drill 110 mg/L-- post-drill 2,910 mg/L);
> Barium (pre-drill 38 ug/L--post-drill 766 ug/L);
> Bromide (pre-drill non-detect--post-drill 6.17 mg/L); and
> Calcium (pre-drill 33.0 mg/L--post drill 728 mg/L).

R. CF, pp. #820-843; 844-869; 869-893; 919-945; 946-976.

Additionally, the Strudleys also produced January 2011 air-sampling results that show that the outdoor air at the Strudleys' home had elevated levels of several

contaminants, known to be caused by flaring, open burning and other emissions related to gas drilling and production activities operations as depicted in the photographs considered by Dr. Kurt, including hydrogen sulfide, n-Hexane, n-Heptane, and Toluene. R. CF, pp. #785; 971-975.

In further support, Strudleys produced a March 2012 Colorado School of Public Health assessment relevant to general causation that concluded:

- Natural gas development causes the bulk of benzene, xylene, toluene, and ethylbenzene emissions in the county;
- Natural gas development sources (e.g., condensate tanks, drill rigs, venting during completions, fugitive emissions from wells and pipes, and compressor engines) contributed ten times more VOC emissions than any other source;
- Headaches and throat and eye irritation reported by residents during well completion activities occurring in Garfield County, are consistent with known health effects of many of the hydrocarbons evaluated in this analysis;
- Inhalation of trimethylbenzenes and xylenes can cause health effects ranging from eye, nose, and throat irritation to difficulty breathing and impaired lung function;
- Inhalation of trimethylbenzenes, xylenes, benzene, and alkanes can cause nervous system effects including from dizziness, headaches, and fatigue at lower exposures;
- The preliminary results of their study indicate that health effects resulting from air emissions during development of unconventional natural gas resources are most likely to occur in residents living nearest the well pads.

R. CF, pp. #1409-1430.

The Strudleys also produced evidence reflecting that the Strudleys' home is geographically situated between the Wells; all are within one (1) mile or less of Strudleys' Home and the closest, Fenno Ranch, is less than one-half (1/2) mile away and that natural gas development is the only industry in the area other than agriculture. R. CF, pp. #612-613.

### D. The Companies' Motion to Dismiss or, in the Alternative, for Summary Judgment.

After the production, the Companies filed a Rule 37 Motion to Dismiss or, in the Alternative, for Summary Judgment, asserting that Strudleys failed to comply with the MCMO by failing to produce evidence to establish the *prima facie* elements of their claims, including exposure, injury, and general and specific causation. [3] R. CF, pp. #977-992.

The Strudleys opposed the motion and renewed their objections to the MCMO based upon the *Lone Pine* decision and their need to conduct discovery to fill in evidentiary gaps necessary for full and complete expert opinions on causation and exposure. R. CF, pp. #1023; 1024; 1026. Indeed, the opposition

[3] The companies' Motion also argued that summary judgment should be granted as Plaintiffs were unable to show a genuine issue of material fact on causation. R. CF, pp. #977-992. However, the trial court did not rule on the alternative motion. R. CF, p. #1603.

explained that in the context of proving groundwater contamination and exposure from gas drilling practices, the Strudleys needed to explore and develop the different ways contamination and exposure pathways occurred through discovery of site-specific factors and chemical or fluid-specific factors (e.g., chemical and physical properties of the fluid) relative to Defendants' activities R. CF, p. #1260.

The Strudleys argued that evidence obtained during discovery would allow them to further particularize and support their central allegations of exposure and causation. R. CF, p. #1026. Such evidence included: (i) the quantity of produced water improperly injected into the Wells; (ii) the identity of all substances released into the air and water from defendants' well sites around Strudleys' home; (iii) all Material Safety Data Sheets, including the Chemical Abstract Services ("CAS") Number, for the products making up defendants' drilling and fracking fluids; (iv) ambient air sampling during and after the hydraulic fracking process at defendants' various wells; and (vi) drilling, cementing, fracturing and mug logs to evaluate well construction and mechanical integrity. R. CF, pp. #1015-1016. The Strudleys urged that they should not be denied their day in court because of an inflexible application of pretrial discovery rules. *Camp Bird Colorado, Inc. v. Board of County Com'rs of Count of X*, 215 P.3d 1277, 1292 (Div. I. Colo. App. 2009).

The Strudleys asserted that the direct and circumstantial evidence along with Dr. Kurt's opinions and Dr. Huntington's report and other supporting materials was submitted in a good faith attempt to comply with the trial court's order and that should the trial court conclude a full compliance had not been made, it was the result of the lack of any opportunity to conduct discovery due to the court's order and certainly not sanctionable conduct by the Strudleys.

**E. The Order Dismissing The Strudleys' Complaint With Prejudice.**

Following the submission of additional briefs as requested by trial court, the trial court issued an order dismissing the Strudleys' action with prejudice pursuant to Rule 3.7 without oral argument. R. CF, pp. #1597-1603.

In its order, the trial court acknowledged that the Strudleys submitted a variety of maps, photos, medical records, and air and water sample analysis reports, together with the affidavit of Thomas L. Kurt, MD, MPH in response to the MCMO. R. CF, pp. #1599-1602. Specifically it noted that Strudleys submitted reports based on an analysis of both air and water samples taken from their home, that the Strudleys' submitted an air sample that showed detectable levels of certain gasses and compounds. It noted that the Strudleys submitted Dr. Huntington's report stating that levels of hydrogen sulfide were consistent with the Strudleys' reports of a rotten egg smell, that that levels of sodium and chloride were "higher

than EPA recommends for drinking water, and are not typical of well water used as drinking water, and that such levels are in the range expected from a number of deep well sources, such as may be produced from gas wells." R. CF, pp. #16599-1602. In addition, the trial court noted that the COGCC conducted a test of the Strudleys' well water in December of 2010, just over a month *before* the Strudleys left their home and the results show elevations in total dissolved solids, sulfate, and sodium. R. CF, p. #1601.

Of specific importance, the trial court acknowledged that Dr. Kurt averred his opinion that he temporally associates the Strudleys' physical symptoms with the Wells being brought into production but that he needed additional information in order to complete his analysis and render additional opinions on exposure and causation. R. CF, p. #1601.

Nonetheless, the trial court rejected the Strudleys' request to be allowed an opportunity to conduct discovery on the very issues that their expert advised were necessary in order to obtain factual information upon which he could render additional exposure and medical causation opinions. It held that the MCMO "was entered in an effort to determine whether Plaintiff could produce admissible evidence concerning exposure and causation" and "Plaintiffs' requested march

towards discovery without some adequate proof of causation of injury is precisely what the MCMO was meant to curtail." R. CF, p. #1600.

The trial court found Strudleys' submissions insufficient on exposure and causation of Strudleys' injuries, in great part upon weighing the evidence and resolving all issues of fact in favor of the Companies as evidenced by the following: "the material relied on by Dr. Kurt seems inapposite to the COGCC's determination that Strudleys' well was not affected by oil and gas operations in the vicinity at the time Strudleys lived in their Silt home." R. CF, p. #1600. But this issue of fact was not for the trial court to decide.

The trial court discounted and disregarded Strudleys' production that evidenced the stark contrast of the pre-drilling/pre-contamination conditions on the Strudleys' property versus the conditions of their property and health and expert evidence of chemical contamination known to be created by such drilling activities including injection processes in the well water and air at their home and how such chemicals are known to cause the type of health problems the Strudleys had reported experiencing. In its summation, the trial found Dr. Kurt's was unable to draw a conclusion that Strudleys' alleged injuries or illnesses were *in fact* caused by such exposure, based upon the information he then had available to him, and concluded that Strudleys failed to make a *prima facie* claim for injuries. R. CF, p.

#1603. It then dismissed Strudleys' entire complaint including their trespass and nuisance claims solely related to the disruption of their enjoyment of their property, with prejudice as a discovery sanction presumably pursuant to Rule 37, the rule under which the motion to dismiss had been brought. R. CF, p. #1603.

**F. The Court of Appeals' Reversal of the Lower Court.**

The Strudleys timely appealed the lower court's order of dismissal and its issuance of the *Lone Pine* order. In its Opinion (July 3, 2013) the Court of Appeal reversed the lower court's order, holding that the amended Colorado Rules of Civil Procedure do not allow unlimited trial court discretion in the management of discovery so as to permit it to require a plaintiff to make a prime facie case before allowing discovery on matters central to the Strudleys' claims to commence, or risk having their case dismissed. Op.¶¶25-35. The Court of Appeal also rejected the Companies' contention that the issuance of a *Lone Pine* order under the particular circumstances of this case was appropriate even if permitted as a matter of law under the amended Rules of Civil Procedure, Op.¶¶36-40, and found that the trial court, by entering the *Lone Pine* order unduly interfered with the Strudleys' opportunity to prove their claims against Defendants. Op. ¶41.

Accordingly, the appellate court reversed the order of dismissal and the *Lone Pine* order, and reinstated the Strudleys' claims.[4] Op.¶42.

## STANDARD OF REVIEW

The Strudleys agree in part with the Companies' statement that the governing standard of review of the trial court's interpretation of the rules of civil procedure, is *de novo* review because it presents a question of law. *City & Cnty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1275 (Colo.2010). However, the court also reviews *de novo* whether the trial court applied the correct legal standard. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 897–98 (Colo.2008).

The Strudleys disagree with the Companies that the is no requirement to comply with C.A.R.28(k)(2). A basic principle of appellate jurisprudence is that arguments not advanced in the trial court and on appeal are generally deemed waived. *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012) citing *Moody v. People*, 159 P.3d 611, 614 (Colo.2007).

[4] Because the Court of Appeal reversed on these grounds, it did not consider the Strudleys' remaining contentions on appeal. Op. at fn5.

## SUMMARY OF THE ARGUMENT

In this case, the district court plainly violated the Rules of Civil of Procedure and Colorado jurisprudence when it entered a case management order that deprived the Strudleys of their right to conduct discovery on issues central to their claims and fabricated a special pre-discovery, *prima facie* liability requirement for the Strudleys to meet before being permitted to proceed with their case.

In considering the propriety of the trial court's pre-trial order that lead to the dismissal with prejudice of the Strudleys' action, the Court of Appeals properly held that the policy of active judicial management of discovery does not abrogate Colorado law so as to permit a trial court to require plaintiffs to make a *prima facie* case of liability before being permitted to engage in discovery proceedings on issues central to their claims and subjecting their case to dismissal if the trial court deems the showing inadequate. While the amended rules of civil procedure may afford trial courts more discretion in its case management role than they previously had, C.R.C.P. 1(a), C.R.C.P. 16, and C.R.C.P. 26 do not authorize unlimited discretion so as to permit judicial management of discovery by prohibiting discovery permitted as a matter of right by the rules through the issuance of *Lone Pine* orders. Nothing in this Court's holding in *DCP Midstream, LP v. Anadarko Petroleum Corp*., 303 P.3d 1187, 1195 (Colo.2013) (*DCP Midstream)* directing

that active judicial management is required when an objection is made to the scope of discovery that concerns matters related to the broader subject matter of the litigation, may be interpreted as the lynch pin supporting a judicial modification of existing Colorado jurisprudence contrary to *Direct Sales Tire Co. v. Dist. Court*, 686 P.2d 1316, 1321 (Colo.1984) (*Direct Sales*), *Curtis, Inc. v. District Court*, 526 P.2d 1335 (Colo.1974) (*Curtis)*, and the Rules of Civil Procedure with regard to discovery as a matter of right and the propriety of pre-discovery, proof of liability case management orders.

This Court has said that "[s]ound caseflow management plans are essential not only to ensure timely justice but also to provide a just process. Well-designed management plans are realistic, encourage settlement, encourage preparedness for trial by attorneys, reduce the costs of litigation, and increase the quality of the outcome of cases." *Burchett v. South Denver Windustrial Co.*, 42 P.3d 19, 21 (Colo.2002). This is not some archaic principle, outmoded by the amended rules. It serves as an appropriate benchmark for how a trial court should conduct itself in issuing pre-trial case management orders. Nothing about the *Lone Pine* order at issue in this case serves this tenant and it should be found to fall outside the permissible limits of a trial court's authority to actively manage litigation as presented in this action.

The order in this case resulted in the placement of an unjust, inappropriate burden on the Strudleys. As the Court of Appeals properly noted, no showing was made that the Strudleys' case was any more complex or cost intensive than an average toxic tort claim or that the conduct of the Strudleys necessitated extraordinary control by the trial court or that existing procedures under Colorado Rules of Civil Procedure to protect against meritless claims were insufficient, such that even if such *Lone Pine* orders are to be permitted, such an order was not appropriately imposed in this case.

Despite the unsound pre-trial order, the *Strudleys* attempted to comply in good faith. While the Strudleys contend that their production was adequate to meet the trial court's hurdle and that it was error for the trial court to weigh the Companies' own un-vetted, initial disclosure, evidence proffered in defense of the Strudleys' claims against the Strudleys' evidence in concluding that the Strudleys' production was insufficient, the fact remains that there was no showing that dismissal of the Strudleys' case in its entirety was an appropriate sanction. Although trial courts "have broad discretion in imposing sanctions for non-compliance with rules, that discretion is not without limits." *Beeghly v. Mack*, 20 P.3d 610, 614 (Colo.2001). A trial court abuses its discretion, as it did here, by imposing sanctions when its actions "substantially tip the balance in an effort to

avoid prejudice and delay and thereby unreasonably deny a party his day in court" *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 703 (Colo.2009).

The trial court exceeded its authority by issuing the *Lone Pine* order which unduly interfered with the Strudleys' ability to prove their claims. The trial court's imposition of the harshest sanction against the Strudleys as a result of this order, was appropriately reversed by the Court of Appeals.

## ARGUMENT

### A. The Trial Court Exceeded its Authority to Manage Discovery by Prohibiting the Commence of Discovery Available as a Matter of Right and Issuing a *Lone Pine* Order that Resulted in the Dismissal of the Strudleys' Action.

#### 1. A *Lone Pine* Case Management Order that precludes discovery as a matter of right is not within a District Court's Discretion.

Although the trial court has broad discretion in managing pretrial practice and issuing case-management orders, this discretion is not without its limits. In fact, appellate courts will reverse a discovery order when the trial court has erroneously denied or limited discovery. Neither the amended discovery rules nor this Court's recent decision in *DCP Midstream* abrogate existing precedent that rejected the position that trials court may require a plaintiff to establish a *prima facie* case of liability before permitting discovery central to their claims. *Direct Sale, supra*, 686 P.2d at 132; *Curtis, supra*, 526 P.2d 1335 (Colo.1974).

In *Direct Sales*, this Court considered a defendant's motion that request an order that would require the plaintiff to present *prima facie* evidence to support the unfair competition allegations in its complaint before plaintiff would be permitted to conduct discovery concerning defendant's retail prices and costs of doing business, evidence that were central to the plaintiff's claims. The Supreme Court expressly rejected the defendant's argument that the plaintiff was required to make out a *prima facie* case prior to discovery. *Id*. at 1319-1321. In doing so, this Court found that no inherent power of the trial court to manage the proceedings before it permitted it to impose such a requirement, and instead concluded that if the legislature had intended that a *prima facie* case requirement be included in the provisions authorizing the cause of action alleged, it would have done so. *Id*. at 1320. Moreover, it did not find that Rule 16(c) permitted the imposition of such a requirement by the trial court.

The Court further held that "the adoption of a *prima facie* case requirement would be contrary to the basic principles governing discovery to which the court has consistently adhered: (1) Discovery rules should be construed liberally to effectuate the full extent of their truth-seeking purpose. (2) In close cases, the balance must be struck in favor of allowing discovery. (3) The party opposing discovery bears the burden of establishing good cause exists for the entry of a

protective order. *Id*. at 1321; *Hawkins v. District Court*, 638 P.2d 1372, 1375 (Colo.1982); *Cameron v. District Court*, 565 P.2d 925, 928–29 (Colo.1977).

*Direct Sales* relied upon *Curtis, Inc., supra*. In *Curtis*, the trial court denied the plaintiff's discovery motion relating to its request under C.R.C.P. 34 for inspection and copying of logs and record keeping systems in an appropriation of trade secrets action. In reversing the trial court's ruling, the Court expressly rejected the defendant's argument that the plaintiff was required to make out a *prima facie* case prior to discovery and held:

> Our reading of the record indicates that the court desired that petitioner make out a prima facie case prior to granting discovery. This requirement is not imposed by C.R.C.P. 34 and contradicts the broader policy of the rules that all conflicts should be resolved in favor of discovery. In short, there is no basis for the imposition of such a burden and judicial discretion was therefore abused. Any burden that exists should be placed on those opposing discovery.

*Direct Sales, supra*, 686 P.2. at 233 quoting *Curtis, supra*, 526 P.2d at 1339.

In both instances, this Court looked to Colorado's Rules of Civil Procedure for authority of such an order and found that none imposed a *prima facie* requirement for discovery on issues central to the claims made and further concluded that such a requirement was inconsistent with broader policies governing discovery. Since the *Direct Sales* and *Curtis* decisions were published, the Colorado's Rules of Civil Procedure were amended. But it is undisputed that

none of the amended rules impose a *prima facie* requirement for discovery that is permitted therein as a matter of right. These amended rules continue to maintain a statutory discovery structure that provides the lower courts and litigants with the parameters for permissible discovery and securing protections from unduly oppressive or invasive discovery that does not encompass a requirement that a plaintiff make a *prima facie* showing to support the liability allegations of their complaint before obtaining discovery. C.R.C.P. Rule 26, C.R.C.P. Rule 30, C.R.C.P. Rule 31, C.R.C.P. Rule 33, C.R.C.P. Rule 34 and C.R.C.P. Rule 36.

The 2002 modifications to C.R.C.P. Rule 26 were addressed by this Court when it considered a trial court's case management authority in *DCP Midstream*. In doing so, this Court made clear that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. *Id*. at 1196. In resolving the issue of whether the granting of a motion to compel discovery concerning the subject matter of the litigation but which was not relevant to the claims or defense asserted in the litigation, this Court recognized that the amendment of Rule 26 created a two-tiered process of attorney-managed and court-managed discovery.

Under the first tier, this Court acknowledged that parties are permitted as a matter of right to seek discovery into any non-privileged matter relevant to the

claim or defense of any party and that under the second tier, the court may permit broader discovery into any matter relevant to the subject matter involved in the action for good cause. *Id*. at 1195. It was as to the latter tier, that this Court found fault in the trial court's lack of active case management in permitting the production of voluminous documents not relevant to the claims or defenses asserted in the action.[5]

This Court did not identify any change in the rule whereby authority of the trial court, to create new hurdles for plaintiffs to clear following the filing of a civil action in order to proceed to discovery permitted as a matter of right, can be found. The Strudleys' action, did not present the trial court with an issue of inappropriately broad discovery under Rule 26. No discovery had been propounded by the Strudleys on any defendant and as such, no objection to the scope of discovery was at issue before the trial court. Yet, the Companies and *amici* repeatedly rely upon *DCP Midstream* as controlling authority on the issue whether the imposition of a *prime facie* burden on a plaintiff prior to permitting discovery is permissible under Colorado law. While *DCP Midstream* held that the trial court is to take an active role managing discovery and to determine the appropriate scope

[5] *DCP Midstream* adopted the advisory committee's notes as to what relevant to the claims of defense means, there by holding that when the scope of discovery is challenged, the actual scope of discovery should be determined according to the reasonable needs of the action. *Id*. at 1197.

of discovery in light of the reasonable needs of the case, it issued this holding in relation to a situation when a scope objection to discovery was raised. *Id*. at 1193.[6] This is not the issue here. Significant to this appeal, is the Court's other pronouncement in *DCP Midstream*, that discovery is still permitted into the subject matter involved in the action under the amended rules. *Id*. at 1195.

The Strudleys disagree with the Companies' and *amici's* position that the objective of *DCP Midstream* was to pronounce a generalized new and broader role for trial courts thereby permitting them to issue case management orders at their discretion, that eliminate discovery related to issue central to a plaintiff's claim, which this Court has time and again clearly stated is a matter of right, and instead impose upon a plaintiff a pre-discovery *prime facie* showing requirement at the outset of litigation, that which the Rules do not require under the guise of ensuring the just, speedy, and inexpensive determination of every case and their truth-seeking purpose pursuant to C.R.C.P. 1.

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[6] The opinion repeats this conclusion multiple times making very clear its particular holding that "the amendments are intended to narrow the scope of permissible discovery available to parties as a matter of right and to require active judicial management *when a party objects that the discovery sought* exceeds that scope". *Id*. at 1190 (emphasis added); "C.R.C.P. 26(b) requires trial courts to take an active role managing discovery *when a scope objection is raised*". *Id* at 1191 (emphasis added); "*When faced with a scope objection*, the trial court must determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs". *Id*. at 1197.

Furthermore, in directing trial courts to fulfill their duty to actively manage the litigation when a scope of discovery dispute arises, this Court did not pronounce any radical change to the broader policy considerations regarding discovery as noted by *Direct Sales* and *Curtis*. Indeed, in 2008 well-after the discovery rule amendments, this Court reaffirmed those tenants:

> As an initial matter, we note that the rules of discovery are outlined in C.R.C.P. 26, which is patterned after its federal counterpart. *Cameron v. Dist. Ct.*, 193 Colo. 286, 289, 565 P.2d 925, 928 (1977). C.R.C.P. 26 serves to eliminate surprise at trial, to enable discovery of relevant evidence, to simplify the issues, and to promote expeditious settlement of cases. *Id*. Consistent with these purposes, the range of discovery available to each party is wide. *Id*. at 290, 565 P.2d at 928. The rules of discovery authorize the parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." C.R.C.P. 26(b)(1.

*Cardenas v. Jerath*, 180 P.3d 415, 420-421 (Colo.2008); see also *In re District Court, City and County of Denver* , 256 P.3d 687, 690 (Colo. 2011) - Colorado Rules of Civil Procedure allow for a broad scope of discovery, citing *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150, 155 (Colo.2008).

The right to discovery was also addressed following the 2002 rule change, in a case where the court of appeals considered whether workers' mechanics' liens could be "spurious liens" or "spurious documents" under the Spurious Liens and Documents statute, and, therefore, such liens could be subject to order to show cause challenge as to the merits of the claim without discovery and dismissal under

that statute, and whether the removal of such liens under the statute was harmless error. By following the expedited statutory procedure provided for by the statute, the defendant lien holders were denied discovery and a trial. *Tuscany, LLC v. Western States Excavating Pipe & Boring*, LLC, 128 P.3d 274 (Colo.App.2005) certiorari denied 2006.

After determining that the litigation was governed by the Colorado Rules of Civil Procedure, the court agreed that trial court's error in forcing the defendant to proceed without discovery was not harmless. *Id*. at 279. In so holding, the court emphasized that because discovery can significantly affect a party's ability to litigate the merits of the controversy, the discovery rules establishing that a party may obtain discovery regarding any matter that is not privileged and is relevant to their claims and defenses pursuant to C.R.C.P. 26(b)(1), are to be liberally interpreted. *Tuscany, supra*, at 279. "Failure to apply the correct legal standard to discovery determinations constitutes prejudicial error when proper discovery may have enabled a party to meet its *prima facie* showing on claims dismissed by the trial court." *Id*. The Strudleys' further note that Court did not conclude that the trial court could nevertheless require a *prima facie* showing as to the merits of the claims under the C.R.C.P., as permitted by the Spurious Liens and Documents statute, which further supports the position by the Court of Appeals in this action.

In considering the position that because the defendant could not show what evidence it might have obtained through discovery, it could not show how such evidence may have impacted the trial court's decision, it was unwilling to treat the error as harmless. *Id*. at 280. It further rejected the argument that the lack of discovery during the initial proceeding was compensated by subsequent discovery permitted on a motion for relief. *Id*.

Neither *Tuscany* nor *Cardenas* are outdated and both support a rejection of the Companies' and *amic's* position that the tide in favor of discovery as a matter of right has turned and trial courts now have the authority to dispense with long-standing discovery principles and create case management order requiring a prime facie showing of liability as a pre-requisite to discovery on matters essential to a plaintiff's claims.

The Companies try to distinguish *Curtis* and *Direct Sales* on grounds that discovery had commenced in the Strudleys' case prior to the issuance of the case management order because the parties exchanged initial disclosures. This is a distinction without significance. The Companies can cite to no rule or Colorado case that provides that after parties exchange initial disclosures, the court can then issue *Lone Pine* orders. Indeed, the Companies argument that disclosures are a primary means of discovery conveniently fails to address the C.R.C.P. 16

committee comment which acknowledges that because C.R.C.P. 8 only requires a "short, plain statement" of a party's claims, a party cannot expect full disclosure through the mandate of Rule 16(b)(5). That is why plaintiffs are permitted as a matter of right to conduct further discovery relevant to their claims as permitted by Rule 26. [7]

The Companies' disclosure of a single report of the COGCC which they and certain *amici* claim established a legitimate basis for the *Lone Pine* order falls within this category of initially disclosed, un-vetted, evidence supporting the disclosing parties defenses. It was not subject to any discovery by the Strudleys concerning the appropriateness, reliability and accuracy of the equipment or methods utilized for sampling and testing the samples utilized, the issues reported with the transportation of the samples to the lab for testing, the reporting standards utilized, the standards utilized for determining contamination levels or any conclusions therein.

Similarly, Defendants were not subject to any discovery let alone cross-examination as to their assertions regarding the gas wells and their production of

[7] Indeed, as Second Judicial District Judge Ann Frick pointed out in her review of the current Rule 26, it does not require disclosure of harmful as well as supportive documents and persons. (See "Comparison of Existing Rules and Procedures to Pilot Project" by Second Judicial District Judge Ann Frick).

contaminants. Indeed, the Strudleys were prohibited from asking Defendants about the very documents they say they produced and which they relied upon to defend against the Strudleys' claims. Defendants offer no authority for the position that a plaintiff in litigation must accept conclusions of governmental entities as valid and accurate and thus be precluded from investigating and questioning same, let alone for the proposition that a trial court may accept a plaintiff's adversary's evidence on a disputed issue and a basis for issuing a *Lone Pine* order or in determining a claim lacks merit and dismissing it. Indeed, neither Rule 16 nor 26, even as amended, permit a trial court to dismiss a civil action, such as the Strudleys, for lack of evidentiary merit based upon a plaintiff's initial disclosure. [8]

The Companies also assert that there was a need for discovery by the plaintiffs in *Curtis* and *Direct Sales* in order to secure evidence essential to their claims that lead to the holding that trial courts cannot foreclose a plaintiff from conducting discovery essential to their claims until a prima facie case is established and that there was no need for the Strudleys to conduct discovery since they

[8] This is another feature the Colorado Civil Access Pilot Project has instituted that the Colorado Rules of Procedure do not. The CCAP has adopted Rule 3.7(c) which permits dismissal motions to be brought and granted after the plaintiff's initial disclosure without permitting discovery. (See "Comparison of Existing Rules and Procedures to Pilot Project" by Second Judicial District Judge Ann Frick).

already had possession to all information they needed. Nothing in the record supports this assertion, and in fact the record contradicts it.[9] This position clearly highlights the Companies' lack of understanding as to what the *Lone Pine* order required. The order was not limited to only requiring that information which plaintiffs would have had before filing their claims, it required expert opinions specifically linking the Companies drilling activities with their injuries and a determination of how much contamination was due to defendants' drilling activities. Each plaintiff did provide some information regarding the nature of his/her injuries, the circumstances under which he/she could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries. But that is not all that the trial court required. The trial court directed that the Strudleys produce evidence establishing that what the Companies did was the cause of their harm. A showing of specific causation in this toxic tort case therefore required evidence exclusively in the Companies' possession pertaining to what the Companies were injecting into the ground, the amount of what was being injected, their soil and water testing results pertaining to

[9] The companies freely assert that they disclosed some 50,000 page of documents as part of their Initial Disclosure, however, while the companies disclosed categories of documents in their disclosure, nothing in the record shows that the documents were ever produced to plaintiffs prior to their having to respond to the court's *Lone Pine* order. Indeed, they were not.

the plume of contaminants created by the injection process, and their air testing, at a minimum. Contrary to the Companies' position, evidence essential to the Strudleys' claims, like the plaintiffs in *Curtis* and *Direct Sales,* was in the exclusive control of the Companies.

The Court of Appeals appropriately relied upon Colorado precedent and the current rules of civil procedure in reaching its holding on the Strudleys' appeal. The Companies and *amici* boldly ask this Court to disregard, distinguish and/or reject the Court of Appeals' conclusions in order to keep their improvidently issued dismissal based upon a form of case management order that is neither contemplated nor permitted by the rules of civil procedure. This Court should be reluctant to do so.

### 2. Colorado Rule 16 does not permit the issuance of *Lone Pine* Case Management Orders that create a new basis for dismissal of an action outside existing statutory parameters or which prohibit discovery available as a matter of right to litigants such as the Strudleys.

The Companies and certain *amici* also propose that C.R.C.P. Rule 16 has no relevant differences with F.R.C.P. Rule 16 such that this Court should look to the decisions rendered in other jurisdictions which construe F.R.C.P. Rule 16 as a basis for trial court authority to issue *Lone Pine* orders and find the Court of Appeals reliance upon these differences unpersuasive. "In the federal courts, such

[*Lone Pine*] orders are issued under the wide discretion afforded district judges over the management of discovery under Fed.R.Civ.P. 16." *Acuna v. Brown & Root Inc., supra*, 200 F.3d at 340.[10] They argue that even though C.R.C.P. Rule 16 does not mirror its Federal counterpart, the decision of the Colorado Legislature

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[10] Contrary to the companies' position, the Court of Appeals did not incorrectly interpret the cases where *Lone Pine* orders were considered when it assessed their general basis for their finding authority to do so. It correctly stated that "federal courts that have issued *Lone Pine* orders have consistently relied on Fed.R.Civ.P. 16 as authority. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 388 Fed.Appx. 391, 397 (5th Cir. 2010); *McMunn v. Babcock & Wilcox Generation Grp., Inc.*, 896 F.Supp.2d 347, 351 (W.D.Pa.2012); *In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 255 (S.D.W.Va. 2010); *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 385 (S.D.Ind. 2009)". Op. at ¶5.

As set forth above, *Acuna*, relied upon by the companies, clearly stated the authority comes from FRCP Rule 16. The federal district court in *In re Vioxx Products Liability Litigation*, *supra*, also relied upon by the companies, cited *Acuna* as its authority to issue a *Lone Pine* order. 557 F.Supp.2d at 743. The court's reference to Rule 26 was in consideration of the burden such an order would place upon the plaintiffs not the scope of the court's authority.

*Cottle v. Superior Court* 3 Cal.App.4th 1367 (1992), also cited by the companies, is inapposite. Relying upon the California Constitution, the court held that a trial court may use its inherent powers to manage a complex toxic tort litigation by ordering the exclusion of expert evidence if the plaintiff is unable to establish a *prima facie* case prior to the *start of trial.* As the court in *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 300–301, explained "the *Cottle* court [did not] have before it an order requiring the plaintiffs to establish a *prima facie* case of causation before discovery was complete and before a trial date had been set".) Indeed, the *Cottle* court stated that "the timing of the order [wa]s crucial to its legitimacy," emphasizing that if "the order [had] been made earlier in the proceedings, we would be more inclined to hold that the order was an abuse of the court's discretion." *Cottle, supra,* at 1380.

not to include key provisions found in F.R.C.P. Rule 16 should not be construed as having any meaning on the issues presented here. Such a position is specious.

The stated purpose of C.R.C.P. Rule 16 is "to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures" in all district court civil cases except as provided therein. The Companies' and *amici's* position on this appeal is premised on the idea that case management under this rule is meant to find all the cases that can or should be dismissed. This is not so: the purpose of case management orders, whether presumptive or modified, is to streamline litigation for an eventual just disposition. As the Court of Appeals correctly pointed out "'[t]he Committee Comment to Rule 16 provides that the rule was drafted "to emphasize and foster professionalism and to deemphasize sanctions for non-compliance.' This language suggests that the drafters did not intend for Rule 16 to allow pretrial procedures, not otherwise contemplated by the rules, which could result in the subsequent dismissal of a case with prejudice." Op. at ¶32. The authority for a *Lone Pine* case management order that creates a new basis for dismissal of an action outside existing statutory parameters of the rules is not found within the provisions of Rule 16 nor though any plausible interpretation.

An intent to grant less discretion to trial courts than that afforded by the federal rules is also properly inferred by considering the supreme court's revisions to C.R.C.P. 16 which do not include the particular language of Fed.R.Civ.P. 16(c)(2)(A) and (L) relied upon by federal courts to authorize *Lone Pine* orders which specifically allows a federal trial court to take appropriate action to formulate and simplify issues, eliminate frivolous claims or defenses, and manage complex cases. *McManaway, supra* 265 F.R.D. at 385 ("*Lone Pine* orders are permitted by Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure which provides that a court may take several actions during a pretrial conference"); *In re Digitek Prod. Liability Litig., supra*, 264 F.R.D. at 255. Nor did the court decide to include the language of subsection (f) of the federal rule which provides authority for courts to sanction parties by dismissing their actions based on their failure to obey a pretrial order. Because C.R.C.P. 16 contains no language granting trial courts the broad discretion contemplated in the rule's federal counterpart, the Court of Appeals was correct in its conclusion that "had the supreme court intended to adopt a standard similar to that in the federal rules, it could have done so by patterning C.R.C.P.16 after the federal rule, as it did with respect to the other discovery rules. See Committee Comment to C.R.C.P. 16." Op. at ¶34. Instead, the Supreme Court did not bypasses established rules of procedure for discovery

and summary judgment and did not extend the authority of the trial courts as far as Fed.R.Civ.P. 16 does.[11]

Indeed, existing procedures under the Colorado Rules of Civil Procedure sufficiently protect against meritless claims, and therefore, such a provision was not necessary on that basis. Motions to dismiss under C.R.C.P. 12(b) and motions for summary judgment under C.R.C.P. 56 provide adequate procedures for challenging claims lacking in merit.

The Companies and certain *amici* also argue that Colorado trial court have authority to issue *Lone Pine* orders under Rule 1 because the purpose of the rule is consistent with one of the factors listed in FRCP 16(c) and because trial courts are permitted under the Rule 16 to modify presumptive case management orders upon a showing of good cause. Neither position is persuasive.

C.R.C.P. Rule 1(a) provides that the rules of civil procedure "shall be liberally construed to secure the just, speedy, and inexpensive determination of

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[11] Certain *amici* argue that other procedural mechanisms are not a substitute for *Lone Pine* orders. This is not a position advanced by the companies. "The companies advanced no reason why these procedural protections were inadequate. Rather, they attempted to circumvent these procedures by moving for a *Lone Pine* order, and subsequently moving to dismiss the claims pursuant to that order." Op. at ¶9. It is well settled that the brief of an *Amicus Curiae* cannot be used as a vehicle to present additional or new evidence to the appellate court. See *Wiggins Bros., Inc. v. Department of Energy* 667 F.2d 77 (U.S. Em. Cir. Ct. App. 1981), cert. den., 456 U.S. 905 (1982).

every action." Inherent in the rule, as read in conjunction with C.R.C.P. Rule 16, is the expectation that "trial judges will assertively lead the management of cases to ensure that justice is served." Committee Comment to Rule 16. F.R.C.P. Rule 16(c)(2)(P), which the Companies assert echoes C.R.C.P. Rule 1, does not state a policy, but provides authorization to federal courts to facilitate discovery case management plans in ways not already formally articulated under 16(c) based upon the needs of the litigation. This authorization is not found in C.R.C.P. Rule 16 or Rule 1. Moreover, the provision of F.R.C.P. Rule 16(c) which has been held to permit *Lone Pine* orders is not subsection (2)(P) but subsection , (2)(L) as discussed herein.

Additionally, the stated purpose of C.R.C.P. 16, which interrelates with Colorado Rules 26, 29, 30, 31, 32, 33, 34, 36, and 37, is to achieve "early purposeful and reasonably economical management of cases by the parties with Court supervision." C.R.C.P. Rule 16, Committee Comment, Operations §B. Together, the Discovery Rules facilitate early disclosures and a differential approach to case management enabling the courts upon showings of good cause under the factors announced therein to tailor the scope of discovery related to the subject matter of the litigation as opposed to that which is relevant to the litigation and thus permissible as a matter of right (*see DCP Midstream, supra*, 303 P.3d at

1197), and adapt the amount of discovery and the timing of discovery to the needs of the case. Revised Rules 16 and 26 provide mechanisms to control potential discovery abuses and advance the litigation towards resolution on the merits, both well-established principles of Colorado law, and do not provide a vehicle for *Lone Pine* orders that require the plaintiffs to provide evidence sufficient to establish a *prima facie* case of injury and causation or run the risk of having their case dismissed.

This broader interpretation advanced on this appeal, that the trial court has been endowed with authority to evaluate initial disclosures, weigh the evidence presented therein and then prohibit plaintiffs in a personal injury and property damage action from engaging in claims based discovery until the plaintiffs makes a *prima facie* evidentiary showing as to the merits of their claims to the satisfaction of the court, and subjecting the plaintiffs to a dismissal of their complaint with prejudice upon a failure to make such a showing is not supported by the clear language of Rule 16, Rule 26, Rule 1 or the Committee's comments thereon. It is inconsistent with it.

The Companies and *amici* have looked to Colorado's rule of civil procedure to find support their position that *Lone Pine* orders are permitted as a tool at the disposal of trial court in their goal to fairly and efficiently manage their cases. The

rules and governing case law addressing the authority of the trial courts as well as their roll, however, do not substantiate their position. Their novel interpretation of the statutory scheme is one that would unduly interfere with the rights provided to litigants like the Strudleys, and it would produce consequences which, could not have been intended by the Legislature or this Court. On the other hand, by affirming the Court of Appeals, all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective remain intact.

### B. The District Court Erred in Entering and Enforcing a *Lone Pine* Order in this Case.

#### 1. The trial court unduly interfered with the Strudleys' opportunity to prove their claims against the Companies.

The Companies and certain *amici* emphasize that *Lone Pine* orders are not appropriate under all circumstances but in exceptional circumstances. Despite recognizing that nearly all cases where *Lone Pine* orders were issued, they were issued as a means of streamlining particularly complex mass tort litigation where the cases were procedurally advanced, they contend the claims of the four member Strudley family arising from contamination and disturbance at a single property, against four defendants, needed streamlining following initial disclosures by the elimination of the normal discovery process, and advancement of *prima facie* proof

by plaintiffs through expert witness affidavits. As the Court of Appeals correctly observed in its opinion:

> In their motion seeking the *Lone Pine* order, the Companies alleged that this case was complex and "would entail significant discovery at substantial cost to the parties." Notably, however, they did not specify how the case was any more complex or cost intensive than an average toxic tort claim. At most, the Companies asserted that expert testimony would be required in approximately six disciplines. This is markedly different from cases involving small numbers of parties in which *Lone Pine* orders have been issued based solely on the complexity of the issues. See, e.g., *Pinares*, 2011 WL 240512 (*Lone Pine* order allowed where plaintiff's discovery requests were massive and only tangentially related to their claims).

Op. at ¶ 37.

Nothing in the Companies' appeal before this court is different. There is no mass tort; there are no complex issues that must be worked out through such a derivation of the discovery rules even if *Lone Pine* orders were permitted.

In *Lore v. Lone Pine Corp*., 1986 WL 637507 at * 1, numerous plaintiffs brought suit against 464 separate defendants, alleging personal injuries and diminution in value of properties arising from the collective activities of defendants in the generation, transfer to and disposal of toxic materials in a landfill. Some of the properties were as far as 20 miles from the landfill. *Id*. at 3.

After a year of litigation, a case management order was entered directing plaintiffs to provide a myriad of evidence supporting causation of plaintiffs'

injuries and damages by materials from the landfill. *Id*. at *3-4. The order was issued as a means of streamlining that particularly complex mass tort litigation.

The *Acuna* decision considered the propriety of *Lone Pine* orders cases involved approximately 1,600 plaintiffs suing over 150 defendants for injuries arising from uranium mining activity. *Acuna, supra*, 200 F.3d 335. *See also In re Fosamax Prods. Liab. Litig*., 2012 WL 5877418 (S.D.N.Y. Nov. 20, 2012) (slip opinion and order) (granting a motion for a *Lone Pine* order in multidistrict litigation involving approximately one thousand cases and eleven million pages of documents). Even the recent case *Arias v. DynCorp*. 2014 WL 2219109 involving a *Lone Pine* order involved a consolidated proceeding arising from various toxic tort claims by multiple Ecuadorian provinces and individual farmers. The total number of plaintiffs is not stated but 163 individual plaintiffs' claims were dismissed for failure to provide complete responses to the court-ordered questionnaires.

Courts considering *Lone Pine* orders have typically rejected them in cases with fewer parties. *See Kamuck v. Shell Energy Holdings GP, LLC*, 2012 WL 3864954 (M.D.Pa. Sept. 5, 2012) (unpublished opinion and order) (denying motion for *Lone Pine* order in toxic tort case involving one plaintiff and three defendants); *Ramirez v. E.I. Dupont De Nemours & Co.*, 2010 WL 144866 (M.D.Fla. Jan. 8,

2010) (unpublished order) (a *Lone Pine* order is "patently unwarranted" in a case involving one plaintiff and one defendant). Even *Pinares v. United Technologies Corp*., 2011 WL 240512 (S.D.Fla. Jan. 19, 2011) (unpublished order), a two plaintiff case in which a *Lone Pine* order was granted, the case was related to a companion putatitve class action with involving the same counsel, and the prompt for the order was the plaintiffs' discovery requests included sixty years of records related to the defendant's business and evidence that responses would be expensive and time consuming, unlike in the instant action.

Many courts have declined to enter *Lone Pine* orders even in complex toxic tort cases, finding that procedural devices such as summary judgment, motions to dismiss, and similar rules are just as effective at removing groundless cases but provided the "consistency and safeguards" found in the civil procedure rules which allow for a reasonable opportunity for discovery. *Roth, et al. v. Cabot, et al.*, 2012 WL 4895345 (M.D.Pa. Oct. 15, 2012); *Hagy v. Equitable Production Co.*, 2012 WL 713778, *4 (S.D.W.V. Mar. 5, 2012); *see In re Digitek Product Liability Litigation*, 264 F.R.D. 249 (S.D.W.V. 2010); *Kirsch v. Delta Dental of New Jersey, Inc.*, 2008 WL 441860 (D. N.J. Feb. 14, 2008); *Ramirez v. E.I. Dupont De Nemours and Co.*, 2010 WL 144866 (M.D. Fl. Jan. 8, 2010); *Morgan v. Ford Motor Co.*, 2007 WL 1456154 *7 (D. N.J. 2007).

In *Digitek*, defendants in multidistrict pharmaceutical litigation moved for entry of a *Lone Pine* order requiring plaintiffs to provide expert affidavits showing that they had suffered injuries from taking defendants' medication. 264 F.R.D. at 253. In declining to grant the motion, the magistrate weighed the complexity of the case against the existing procedures available to the court under the Federal Rules of Civil Procedure. *Id*. at 259. The magistrate noted that "[r]esorting to crafting and applying a *Lone Pine* order should only occur where existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of this litigation." *Id*.

These courts, while recognizing the complexity of the case before them, have noted how *Lone Pine* Orders can be misused and "'should only occur where existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of this litigation.'" *Roth, supra*, quoting *Digitek*, 264 F.R.D. at 259.

Neither the complexity of the Strudleys' claims or the procedural history of their action is comparable to cases were *Lone Pine* orders have been utilized.

Moreover, when considering whether to issue a *Lone Pine* order, the courts understand that *Lone Pine* orders may not be suitable at every stage of the

litigation. *In re Vioxx, supra*, 557 F.Supp.2d at 744. The courts have held that in doing so they "should strive to strike a balance between efficiency and equity." *Id*.; see also *Fosamax, supra,* 2012 WL 5877418, at *3; *Roth*, 287 F.R.D. at 298; *Digitek, supra,* 264 F.R.D. at 256; *McManaway, supra*, 265 F.R.D. at 385. The Court of Appeals correctly observed:

> Accordingly, courts are more inclined to issue *Lone Pine* orders after extensive discovery has been conducted than early on in the litigation before plaintiffs are fully able to develop their case. *Compare id.* [*Acuna*] at 744 (where case had been ongoing for ten years with discovery of millions of pages of documents, hundreds of depositions, and approximately one thousand pretrial motions, "it is not too much to ask a Plaintiff to provide some kind of evidence to support [his or her] claim"), and *Fosamax*, 2012 WL 5877418 (*Lone Pine* order appropriate where targeted discovery had already resulted in eleven million pages of documents and twenty-four depositions), with *Roth*, 287 F.R.D. at 300 (denying request for a *Lone Pine* order at a "very early stage" in the litigation), and *Simeone*, 872 N.E.2d at 351–52 (trial court abused its discretion by entering a *Lone Pine* order prior to giving plaintiffs "the full range and benefit of discovery").

The circumstances presented here where the Strudleys were not given the full range and benefit of discovery weighed against entering a *Lone Pine* order as well as enforcing it with a dismissal of their case. The parties must be given an opportunity to conduct discovery and contest the reasonableness of their adversary's experts. Defendants are not entitled to file what amounts to a summary judgment motion (i.e., a sanction motion to dismiss based upon an evidentiary

production failure) without first allowing the party opposing the motion a chance to conduct discovery. *See Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 183 (3d Cir.1997) (even though it appeared "from this limited record that [plaintiff] will have a difficult road to travel," it was improper to grant defendants summary judgment where plaintiff "was not given the opportunity to test her contention by discovery"); *Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3d Cir.1988) ("The court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery.").

The trial court's justified precluding discovery in the MCMO, that at some point Plaintiffs would have to produce expert opinions on causation and exposure anyway, was illogical and did not follow precedent. Production of expert opinions must necessarily occur after the experts are able to evaluate facts and evidence, not beforehand. Further any concerns as to discovery abuses that may unduly increase the cost of litigation, harass the opponent, or that tend to delay a fair and just determination of the legal issue could have easily been resolved through motions for protective orders as proscribed by Colorado's rules. *Williams v. District Court, Second Judicial Dist., City and County of Denver*, 866 P.2d 908 (Colo. 1993). Nothing about the circumstances of this case were so extraordinary to warrant the

trial court's departure from the existing rules of civil procedure and in doing so it erred.

Moreover, the trial court's *Lone Pine* order was contrary to the established discovery principles which hold that discovery orders must not be one-sided. *See Hines v. Consol. Rail Corp*., 926 F.2d 262, 272 (3d Cir.1991) (reversing summary judgment based in part on the district court's failure to "provide [plaintiff] with the opportunity to conduct discovery on [defendant's] expert and consequently the data and techniques that [defendant's] expert used"); *In re Paoli R.R. Yard PCB Litig*., 916 F.2d 829, 854-55 (3d Cir.1990) (reversing summary judgment based in part on the skewing of discovery procedures in the defendants' favor). By entering the order, the trial court unduly interfered with the Strudleys' opportunity to prove their claims against the Companies and this constituted reversible error as well.

### 2. The Trial Court's Imposition of the "Death-Penalty" Sanction of Dismissal was Error.

The Strudleys attempted to make their *prima facie* showing, notwithstanding being denied any opportunity to conduct any discovery, by presenting a rational basis for their exposure and medical causation claims, supported by substantial, credible evidence. The Strudleys showed that their well water was observed to be of good quality and the Strudleys were healthy until the Companies undertook their

gas well drilling operations essentially across the street from their house and then their water became contaminated and unusable and they became sick.

The sampling data confirms the Strudleys' water was contaminated by comparing the clean pre-drilling and affected post-drilling records. Air sampling tests show toxic emissions at their home of toluene, n-Heptane, n-Hexane and hydrogen sulfide, all known to be associated with gas drilling. The chloride level increased 2,545% and the potassium level increased 783% in Plaintiffs water after Defendants injected 81,000 barrels of 2% potassium chloride slickwater underground in close proximity to the Strudleys' home. R. CF, p. #1441. Dr. Kurt, a certified medial toxicologist, related the Strudleys' health complaints to the Companies' releases and Dr. Huntington confirmed the levels of contamination were in excess of EPA approved levels.

While the trial court found the submission of circumstantial proof and temporally based medical causation opinion insufficient, it did so in complete rejection of the Strudleys' explanation. It disregarded the Strudleys' offer of proof that they needed an opportunity to conduct discovery concerning the Companies' drilling and injecting activities to ascertain additional information and sampling data to further substantiate the contamination of land, water and air that they

contend caused them injury and damages as articulated through the Affidavit of Dr. Kurt.

Rather than going through the process of reviewing the conduct attributable to the Strudleys, and considering the least severe sanction that would ensure there is full compliance with a court's discovery orders commensurate with the prejudice caused to the opposing party, the trial court compared the Strudleys' production with the Companies' production of the COGCC report finding their expert's conclusions inapposite and their production as flawed as that made in *Lore*. R. CF, p. #1600.

However, disputes in evidence are not grounds for sanctions, let alone a sanction of dismissal with prejudice. Moreover, there is no comparison to the Strudleys' location, one mile from Defendants' drilling activities and the *Lore Lone Pine* plaintiffs' whose properties were located upwards of 20 miles from the landfill site. *Lone Pine*, 1986 N.J.Super. LEXIS 1626, at * 6. There is also no comparison between the sixteen studies of the landfill by the EPA that indicated that the contamination in the *Lone Pine* case was confined to the landfill and its immediate vicinity and the present matter where no studies of defendants' well-drilling sites showing any confinement of the plume of contamination existing there have been produced.

The trial court further stated:

> Third, similar to the expert in *Lone Pine*, Dr. Kurt suggests, at best, a very weak circumstantial causal connection between the Wells and Plaintiffs' injuries. Id. In fact, upon review of the Plaintiffs' collective medical records, Dr. Kurt only temporally associates Plaintiff's symptoms with the Wells being brought into production.

R. CF, p. #1600-1601.

Again, the comparison is misplaced. In *Lone Pine* the only expert submission was by a realtor not a medical doctor as in the instant case. In addition, the *Lone Pine* plaintiffs admitted that none of the doctors they contacted would commit to a causal connection. In contrast, the Strudleys provided a qualified medical expert's affidavit, in which a preliminary causal connection was made. This is not the record of a party who again and again disobeyed a court order or refused to comply with a discovery order.

Indeed, the trial court's deference to how the *Lone Pine* court handled the particular case it was addressing is particularly misplaced on a Rule 37 motion to dismiss as the *Lone Pine* decision was not the result of a discovery sanction but pursuant to New Jersey's Rule 1:4-8 concerning frivolous litigation. *Lone Pine*, 1986 N.J.Super. LEXIS 1626, at * 1.

The trial court did not find sanctionable conduct by the Strudleys as governed by Rule 37, the rule under which the Companies had moved to dismiss.

Instead, the trial court concluded that Plaintiffs failed to make a *prima facie* claim for injuries issuing a dismissal sanction.. R. CF, p. #1603. The trial court order was improper.

Under Rule 37, a party may move a trial court to impose sanctions against the opposing party for failure to make disclosures or cooperate in discovery. However, the broad discretion afforded trial courts in imposing sanctions for non-compliance with rules is not a discretion without limits. *Beeghly v. Mack*, 20 P.3d 610, 614 (Colo.2001) "If the trial court's actions in imposing sanctions 'substantially tip the balance in an effort to avoid prejudice and delay and thereby unreasonably deny a party his day in court, the reviewing court must overturn the decision of the trial court.' *J.P. v. Dist. Court In and For 2nd Judicial Dist. of Denver*, 873 P.2d 745, 751 (Colo.1994)." *Pinkstaff v. Black & Decker* (U.S.) Inc., 211 P.3d 698, 702-703 (Colo.2009).

Reviewing courts "must remember that courts 'exist primarily to afford a forum to settle litigable matters between disputing parties,' (citation omitted) and that, unless enforcement of discovery rules, is essential to shield substantive rights, litigation should be determined on the merits and not on formulistic application of the rules." *Id*. If sanctions are warranted, based upon proof of discovery abuses, courts should impose the least severe sanction that will ensure

there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party. *In re People v. Lee,* 18 P.3d 192, 197 (Colo.2001).

Thus, the trial court should exercise informed discretion to impose only a sanction that is commensurate with the seriousness of the facts presented. *See, Keith v. Valdez,* 934 P.2d 897, 899 (Colo. App. 1997). Therefore, if the trial court's actions are manifestly arbitrary, unfair, or unreasonable or unreasonably deny a party his or her day in court, the Court of Appeals may overturn the decision of the trial court. *Id*.

Dismissal, the severest form of discovery sanction, is generally appropriate only for willful or deliberate disobedience of discovery rules, flagrant disregard of a party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations. *Prefer v. PharmNetRx, LLC,* 8 P.3d 844 (Colo. 2000), rehearing denied, certiorari dismissed. It has been held that the sanction of dismissal is the harshest possible sanction and should be imposed only in "extreme circumstances." *Nagy v. District Court of City and County of Denver,* 762 P.2d 158, 161 (Colo. 1988); see also *Mun. Subdistrict, N. Colorado Water Conserv. Dist. v. Oxy USA, Inc.*, 990 P.2d 701, 710 (Colo. 1999). To impose the "death-penalty" sanction of dismissal, *see In re United Markets Int'l, Inc.*, 24 F.3d 650,

650 (5th Cir. 1994) (*per curiam*), the trial court must specifically find either "[1] willful disobedience of the discovery rules, [2] bad faith consisting of a flagrant disregard of a party's discovery obligations, or [3] culpable fault consisting of at least gross negligence in failing to comply with those obligations."

Although the case of *Newell v. Engel*, 899 P.2d 273 (Div. IV. Colo. App. 1994), involved medical malpractice claims, the Colorado Supreme Court's treatment of Rule 37 litigation-ending sanctions is instructive. In *Newell*, the trial court issued an order pursuant to Col. R. Civ. P. 35 for an independent psychiatric examination of plaintiff. Plaintiff subsequently failed to appear at said psychiatric examination. Upholding the trial court's decision, the Supreme Court held that the trial court did not abuse its discretion in dismissing Plaintiffs' claims against defendant. *Newell, supra,* 899 P.2d at 278.

The trial court reasoned, and the Supreme Court agreed, that this was an appropriate sanction in light of the trial court's findings that plaintiff failed to comply with the trial court's discovery order finding that the parties agreed plaintiff would have an independent examination and that the examination was a complete failure because the plaintiff intentionally sabotaged the examination in direct violation of the court's order in a way that reflected gross negligence by a

very intelligent plaintiff who understood what was being asked and intentionally and in bad faith disregarded her discovery obligations. *Id*.

Notably, "[t]he trial court also considered alternatives to dismissing the case. However, noting that 44 months after the complaint had been filed defendant had not yet been provided the discovery to which he was entitled and that this was a psychiatric case, the trial court granted the motion to dismiss." *Id*. The Supreme Court found that "after a number of attempts to conduct basic psychological tests, defendant, in the words of the trial court, was without the 'raw data' to reach any conclusions or defend its suit." Such is not the case here.

The record before the trial court upon which it dismissed the Strudleys' case does not reflect a willful disobedience of the discovery rules, bad faith consisting of a flagrant disregard of a party's discovery obligations, or culpable fault consisting of at least gross negligence in failing to comply with those obligations. *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 677 (Colo. 1987).

The trial court's ruling as shown by the record was manifestly arbitrary, unfair, and/or unreasonable. There was no misconduct by the Strudleys at all. Any insufficiencies in their compliance with the trial court's MCMO was the result of being precluded from conducting discovery that was necessary and relevant to the issues being challenged such that any failure to comply with obligations under the

order was substantially justified. *See, Todd v. Bear Valley Village Apartments,* 980 P.2d 973, 977 (Colo.1999); *Bond v. Dist. Court,* 682 P.2d 33, 35 (Colo.1984). Moreover, the perceived failure to comply was harmless to the defense. They did not suffer any prejudice to warrant sanctions such as when a party suffers a denial of an adequate opportunity to defend against late produced evidence. *Todd, supra,* at 979.

While Plaintiffs contend no sanction should have been issued and instead the discovery moratorium should have been lifted, a lesser sanction was never considered by the court. As a result of the trial court's finding that the Strudleys could not make the evidentiary showing it demanded be made at the outset of the litigation in contradiction to established discovery law and procedure and its order dismissing the case with prejudice as a discovery sanction, the trial court misapplied the law and abused its discretion. Its order was properly reversed.

### 3. The Trial Court Erred In Dismissing Plaintiffs' Property Damage And Nuisance Claims.

The trial court also erred by dismissing all the Strudleys' claims based upon its stated conclusion made in support of its order: that "Plaintiffs have failed to make a *prima facie* claim for injuries." R. CF, p. #1603.

The Strudleys amended complaint was not limited to claims of physical injuries. The Strudleys made trespass and nuisance claims arising from noxious

fumes that invaded their property and particulate and chemicals that contaminated their well water as a result of Defendants' drilling activities. Particularly, they alleged, among other causes, that the burning or "flaring" of toxic and hazardous gases by defendants created these noxious fumes and particulate matter. These intrusions on their property interfered with their enjoyment of the use of their property and did the ground contamination.

The MCMO did not require the Strudleys to present expert witness opinion to make a *prima facie* showing as to their trespass, nuisance or property damage claims. The order required such evidence as to the exposure and physical injury claims only. Indeed, the vary nature of trespass and nuisance claims do not require expert witness support. *See Arias, supra*. The Strudleys produced evidence of the noxious smells they suffered during the Companies' fracking activities and that their well was the only source of water for the property and the well water was not drinkable. Levels of sulfate exceed the EPA's maximum contaminate level as reflected by the COGCC report and levels of total dissolved solids (TDS) exceeded the EPA's maximum contaminant level as also reflected by the COGCC report. In addition, the levels of sodium and chloride were also much higher than EPA recommendations for drinking water. The dismissal of their non-personal injury

claims based upon a finding of a failure to make a *prima facie* claim for personal injuries by the trial court was plain error.

## CONCLUSION

WHEREFORE, the Strudleys respectfully ask this Court affirm the Court of Appeals decision which is well-reasoned and well-supported.

Dated this 21st day of August 2014

Respectfully submitted:
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*This document was filed electronically pursuant to C.A.R. Rule 25and 30. The original signed pleading is on file and available for inspection at the Boulder offices of Frascona, Joiner, Goodman and Greenstein, P.C.*

## Certificate of Service

The undersigned hereby certifies that on this 21st day of August, 2014, a true and correct copy of the foregoing document was served on counsel of record by providing a copy thereof to, and requesting that service be made by *ICCES* to the following:

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