COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203 COLORADO COURT OF APPEALS Case No. 2012CA1251 Opinion by Judge Taubman (Román J. and Kapelke J. concurring) DISTRICT COURT FOR CITY AND COUNTY OF DENVER Case No. 2011cv2218 The Honorable Ann B. Frick Petitioner/Appellees: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION, CALFRAC WELL SERVICES, CORP., and FRONTIER DRILLING LLC v. Respondents/Appellants: 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 Supreme Court Case No. 2013SC576

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AMICUS CURIAE BRIEF OF COLORADO CIVIL JUSTICE LEAGUE URGING GRANT OF *CERTIORARI* IN THIS CASE

Certificate of Compliance

Undersigned counsel certifies that this brief complies with C.A.R. 53(a) in that it contains 3,417 words as measured by the word-count function of Microsoft Word, inclusive of footnotes, headings and quotations, and exclusive of the portions delineated at C.A.R. 53(a).

/s Jessica E. Yates
Jessica E. Yates

Pursuant to C.A.R. 29, the Colorado Civil Justice League ("CCJL") respectfully presents its *amicus curiae* brief in support of the Petition for this Court to grant *certiorari* review over this matter.

I. ADVISORY ISSUES ADDRESSED BY CCJL

The CCJL's brief herein addresses why *certiorari* should be granted in this case. Specifically, CCJL requests this Court to consider:

1. Whether Colorado's Rules of Civil Procedure allow courts to exercise their inherent powers to manage their dockets and cases, including the authority to require a foundational evidentiary showing prior to full discovery, so as to reduce burdens on litigants and the courts.

2. Whether the Court of Appeals' decision that *Lone Pine* orders are unavailable as a matter of law in Colorado state courts will have a chilling effect on district courts' efforts to manage their dockets and cases efficiently and effectively.

II. INTEREST OF *AMICUS CURIAE* CCJL

CCJL is a voluntary non-profit organization dedicated to improving Colorado's civil justice system through a combination of public education and outreach, legal advocacy and legislative initiative. It is a diverse coalition of large and small businesses, trade associations, individual citizens and private attorneys.

Founded in 2000, CCJL has been actively involved in legislative reform of Colorado's civil liability system and has submitted *amicus curiae* briefs to this Court on several occasions.

III. ADOPTION OF STATEMENT OF THE CASE

CCJL adopts the statement of the case set forth by Petitioners.

IV. SUMMARY OF ARGUMENT

This petition concerns case management orders that many jurisdictions term "*Lone Pine*" orders, given their genesis in *Lore v. Lone Pine Corp*., No. L-33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. 1986). While *Lone Pine* orders can be used in a variety of contexts, generally they are invoked in cases with the potential for significant discovery burdens, where there are technical or scientific issues that form the basis of the plaintiff's proof of causation. Such orders require a plaintiff to produce evidence, such as expert affidavits, for certain details of a plaintiff's claim to make a baseline evidentiary showing, *i.e.*, establish a *prima facie* case. Typically a court will enter a *Lone Pine* order early enough to avoid unwarranted discovery.

While no Colorado appellate court in a published opinion has, until now, opined on the availability of *Lone Pine* orders in state courts, they are certainly not foreign conceptually. Instead, they are consistent with this Court's precedent, the

commentary to C.R.C.P. 16, and civil justice reforms that this Court has embraced, including active case management by district courts. The Court of Appeals' *Strudley* opinion will chill any efforts by trial courts to actually exercise such active case management, and effectively reverse the positive trend toward proportionality in discovery. This Court should grant *certiorari* here to provide direction and supervision to state courts regarding the availability of *Lone Pine* orders, and guidance about how to use them appropriately.

V. ARGUMENTS FOR WHY *CERTIORARI* SHOULD BE GRANTED IN THIS CASE

A. The Court Of Appeals' Wholesale Prohibition Of *Lone Pine* Orders In Colorado Is Not In Accord With Applicable Decisions Of The Supreme Court, Nor Colorado Rules Of Civil Procedure

Lone Pine orders can be entered in a variety of contexts, but occur most often in product liability cases and toxic exposure cases. For example, in the toxic tort context, the U.S. Court of Appeals for the Fifth Circuit has held that "[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries." *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). A *Lone Pine* order typically requires a plaintiff to present sufficient evidence prior to full discovery to establish a foundational evidentiary showing of one or more

critical elements of the claims, or to risk possible dismissal. This Court has not passed on whether *Lone Pine* orders are permitted in Colorado courts, and as a question of first impression with state-wide implications, *certiorari* is appropriate for that reason alone. *See Office of the State Court Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 426 (Colo. 1999) (citing C.A.R. 49, "the court has announced its intent to grant *certiorari* on important cases"); *see also Chambers v. Nation*, 497 P.2d 5, 6 (Colo. 1972) (*certiorari* appropriate "[b]ecause this Court has not heretofore specifically addressed itself to the important questions raised by this action").

But it is important to note that this Court has signaled on recent occasions a strong interest in curtailing excessive discovery, and sensitivity to the interplay between the high cost of litigation and access to justice. The Court of Appeals' *Strudley* decision is in strong tension with those decisions, and efforts by this Court to ensure that trial courts have the authority and tools to manage their cases and dockets efficiently. Accordingly, *certiorari* also can be granted under C.A.R. 49(a)(2).

In *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36 (Colo. 2013), the Supreme Court announced that "to resolve a dispute regarding the proper scope of discovery in a particular case, the trial court should, at a minimum,

consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F)." 2013 CO 36, *P9. The trial court needs to take "an active role" in "managing discovery," which includes "determin[ing] the appropriate scope of discovery in light of the reasonable needs of the case" and "attempt[] to tailor discovery to those needs." *Id.* *P10. This responsibility of the trial court derives in part from the Colorado Rules of Civil Procedure, which "reflect a growing effort to require active judicial management of pretrial matters to reduce delay and the increased costs associated with it." *Id.* *P27. Rule 16 in particular requires trial courts to implement effective caseflow management plans. *Id.* (citing *Burchett v. South Denver Windustrial Co*., 42 P.3d 19, 21 (Colo. 2002)).

DCP Midstream was issued in the wake of *In re Marriage of Schelp*, 228 P.3d 151, 155 (Colo. 2010), in which this Court expressly approved active case management under the amended Rule 16.2 for domestic relations cases. "This new case management system, designed to provide the parties with a just, timely and cost effective process, establishes a more active and flexible case management system," giving "the trial court, attorneys, and parties the ability to tailor a case management order to meet the specific needs of each case." *Id.* (citations omitted).

This Court has made it clear that trial courts have the authority to actively manage the cases before them to ensure discovery is appropriate and avoid

inflicting unnecessary burdens on the parties. The Committee Comments to revised C.R.C.P. 16 underscore these goals:

> The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. … Colorado Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, and 37 were developed to interrelate with each other ***to provide a differential case management/early disclosure/limited discovery system*** designed to resolve difficulties experienced with prior approaches. . . . In developing these rules, the Committee paid particular attention to the 1993 revisions of the Federal Rules of Civil Procedure and the work of the Colorado Bar Association regarding professionalism. . . .
>
> New Rule 16 and revisions of Rule[] 26. . . are designed to accomplish early purposeful and reasonably economical management of cases by the parties with Court supervision. The system is based on communication, including required ***early disclosure*** of persons with knowledge and documents relevant to the case, which disclosure should lead in many cases to early evaluation and settlement efforts, and/or preparation of a workable Case Management Order. . . . ***The Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted*** and to carefully plan for and conduct an efficient and expeditious trial.
>
> Rules 16 and 26 should work well in most cases filed in Colorado District Courts. ***However, where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure.*** . . .
>
> The Committee acknowledges the greater length of the Rules comprising this reformed system. However, these Rules have been developed to describe and to eliminate "hide-the-ball" and "hardball" tactics under previous Disclosure Certificate and Discovery Rules. ***It is expected that trial judges will assertively lead the management of cases to ensure that justice is served***. In the view of the Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into

> submission, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.

Cmt. Comment, C.R.C.P. 16 (emphasis added).

A *Lone Pine* order effectuates that same goal of reasonable management in cases that may involve technical or scientific explanations of causation and likely will be very discovery-intensive. *See, e.g., Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011) (in rejecting plaintiff's request to bar *Lone Pine* orders as a matter of law, noting that district courts have discretion in fashioning an appropriate case management order); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) ("*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation"); *Adinolfe v. United Techs. Corp.*, No. 10-80840, 2011 U.S. Dist. LEXIS 9648, *7 (S.D. Fla. Jan. 18, 2011) ("This case will be the classic expansive, time-consuming, and highly expert dependent case that gave birth to the *Lone Pine* case management method. It is neither efficient nor fair to require Defendant to proceed on the issues implicated by Plaintiffs' discovery until after Plaintiffs have adequately demonstrated a prima facie basis for the allegations in their complaint."). Or as one court succinctly put it:

> The order proposed by the defendant would require the plaintiffs to produce some evidence linking each named plaintiff's alleged exposure to a particular substance with an identified injury, illness,

> damage or other loss. If a plaintiff is unable to do this, then the court should be concerned with the viability of that plaintiff's claims. The use of a *Lone Pine* order in this case should result in the production of relevant, discoverable information in a manner which reduces costs and saves time. Proceeding with ordinary discovery methods will likely be more expensive and take more time to complete than obtaining much of the same information through the use of a *Lone Pine* order.

In re 1994 Exxon Chem. Plant Fire Litig., No. 94-1668 et al., 2005 U.S. Dist. LEXIS 48092, *35-36 (M.D. La. Apr. 7, 2005).

It is hardly a hammer that is arbitrarily or routinely invoked. Instead, courts sometimes decide that a *Lone Pine* order is not warranted, or that it would be more appropriate to impose a modified order. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008) ("In crafting a *Lone Pine* order, a court should strive to strike a balance between efficiency and equity. *Lone Pine* orders may not be appropriate in every case and, even when appropriate, they may not be suitable at every stage of the litigation."); *Morgan v. Ford Motor Co.*, No. 06-1080, 2007 WL 1456154, *9 (D.N.J. 2007) (rejecting a pre-discovery *Lone Pine* order in favor of immediate discovery regarding causation for five bellwether plaintiffs); *In re 1994 Exxon Chem. Plant Fire Litig.*, 2005 U.S. Dist. LEXIS 48092, *36-37 (declining to order, prior to plaintiffs' submission of the *prima facie* evidence, the anticipated penalty of dismissal for non-compliance).

A *Lone Pine* order also is not a substitute for summary judgment, and constitutes a significantly lower bar than what a plaintiff will face at trial. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. at 744 ("the Court is not requiring that Plaintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial. Rather, the Court is requiring Plaintiffs to make a minimal showing consistent with Rule 26 that there is some kind of scientific basis that Vioxx could cause the alleged injury.").

There is no sound basis for a wholesale exclusion of *Lone Pine* orders on a state-wide basis, and such a prohibition is inconsistent with the intent of revised C.R.C.P. 16 and this Court's current reflections on discovery. Granting *certiorari* here provides an opportunity for this Court to consider *Lone Pine* orders as a case management tool and provide guidance to lower courts on their use.

B. The Court Of Appeals' Decision To Preclude An Appropriate Use Of Trial Court Case Management Discretion Will Chill Case Management Reforms, Requiring This Court's Supervision

Colorado courts have embarked on a concerted effort to reduce the cost of litigation, thereby enhancing access to courts and jury trials for all litigants, in part by requiring trial courts to play an active role in case management, and ensure that discovery is no more burdensome than needed. Ironically, the district court judge who was reversed by the Court of Appeals – the Honorable Ann B. Frick – was

one of the individuals who spearheaded the reforms ultimately adopted through the Civil Access Pilot Project ("CAPP") and Chief Justice Directive 11-02.[1] *See A History And Overview Of The Colorado Civil Access Pilot Project Applicable To Business Actions In District Court* (hereafter "*CAPP History*") at 2.[2] Although the CAPP rules did not apply to this case, the message to district court judges from the Court of Appeals' decision in *Strudley* is loud and clear: courts should do nothing that might be perceived as "active case management" if a plaintiff can later claim to be prejudiced by the court's action. Which effectively means that a trial court can do little or nothing in the face of burdensome discovery being imposed upon a defendant, even if a plaintiff cannot articulate his or her injury or theory of causation.

CAPP is still a pilot project and does not apply to personal injury cases yet, but it has two goals that are highly relevant to whether Colorado courts should be permitted to issue *Lone Pine* orders. One is to avoid protracted discovery and motion practice that delays trial, or effectively forces an unwanted settlement, and CAPP aims to address that goal by limiting discovery and requiring

[1] Available at the Colorado Courts web site at: http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended%206-26-13.pdf and attached as Addendum 1.

"proportionality." *See CAPP History* at 1, 3. Another is to require both sides to quickly start addressing the merits of the case, through vigorous pleading requirements, early and full initial disclosures, and reduction or elimination of motion-practice related delays. *See id.* The key ingredient of success is authorizing – and indeed requiring – trial judges to exercise active case management. *See* CAPP Rule 8.

The reforms embodied in CAPP were drawn from many jurisdictions, and reflect nationwide trends and thinking about civil justice reform. For example, the creators of CAPP looked to Oregon and Arizona, and considered studies done by the American College of Trial Lawyers ("ACTL"). Here in Colorado, the University of Denver's Institute for the Advancement of American Legal System ("IAALS") partnered with an ACTL task force that included plaintiff's attorneys, defense counsel and judges to develop some consensus about civil justice reforms.[3]

The concepts behind CAPP are not limited to business cases in the pilot project districts. *DCP Midstream*, for example, applied proportionality in discovery even though the case was not a CAPP case. *See* 2013 CO 36, *P5

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[2] Available at the Colorado Courts web site at http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%207-11-13.pdf, and attached hereto as Addendum 2.

("C.R.C.P. 26(b)(2) imposes limits on the number of depositions, interrogatories, and requests for production, and these limits can also be modified for 'good cause'—a standard that requires the trial court to consider the cost-benefit and proportionality factors listed in subsection (b)(2)(F)"). Of course, discovery burdens are not just measured by gigabytes or reams of paper. Businesses often experience significant disruptions while documents are being located; deposition witnesses must take time out for preparation; and costly attorney's fees are incurred to manage the whole process. Predictably, the expenses of discovery become a significant leverage to force settlement instead of encouraging a trial on the merits.

While there may still be a healthy discussion and even disagreement about specific CAPP rules, the need for reform is appreciated by plaintiffs and defendants alike. *DCP Midstream* represented a positive step forward in that regard. The Court of Appeals' *Strudley* opinion represents a major step backward.

[3] IAALS has promoted reforms to provide "greater access, efficiency and accountability" within the civil court system. *See* http://iaals.du.edu/initiatives/rule-one-initiative/why-rule-one-matters/.

C. Rules 12 And 56 Are Not Adequate Procedural Safeguards, And This Court May Wish To Consider This Issue Together With A Pending *Certiorari* Petition Regarding C.R.C.P. 12(b)(5) Standards

The Court of Appeals in *Strudley* deemed the availability of dismissal under C.R.C.P. 12(b)(5) and C.R.C.P. 56 to provide sufficient procedural safeguards to a defendant who is concerned that a plaintiff's claim lacks merit. But C.R.C.P. 56 is largely inadequate for this purpose, since generally a motion for summary judgment cannot be litigated until discovery is nearly or completely finished. One of the main purposes of a *Lone Pine* order is to not subject a defendant to full discovery without a foundational evidentiary showing by the plaintiff, so C.R.C.P. 56 provides very little comparable assistance to reduce unjustified discovery.

C.R.C.P. 12(b)(5) also is historically a weak mechanism for weeding out an unmeritorious claim. The traditional standard is that a "motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that no set of facts can prove that the plaintiff is entitled to relief." *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 271 P.3d 496, 499 (Colo. 2012). "Motions to dismiss for failure to state a claim are disfavored and should not be granted if relief is available under any theory of law." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). Rule 12(b)(5) is a

very low pleading bar that can easily be surmounted without any actual evidence whatsoever.

Currently pending before this Court is a petition requesting *certiorari* on whether Colorado's Rule 12 pleading standard should be modified to more closely resemble the federal pleading standard of "plausibility" that was announced in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See Allstate Insurance Co. v. Medical Lien Management, Inc.*, Case No. 13SC000556.

There is an obvious nexus between the Rule 12(b)(5) standard and the Court of Appeals' rationale in this case, because the "no set of facts" regime provides little comfort to a defendant that suspects a plaintiff has no evidence to support his or her claim. The Rule 12(b)(5) standard also dovetails with the issue of breadth of discovery, which becomes open-ended if a plaintiff does not specify the facts underlying his or her claim to relief:

> On its face, *Conley*'s "no set of facts" standard did not appear to require the recitation of any facts at the pleading stage; it would be enough that plaintiff could prove some set of facts prior to summary judgment or trial that would support his claim. But such a standard creates an impossibly circular relationship between pleadings and discovery. The scope of discovery is determined by the pleadings; parties may obtain non-privileged material that is relevant to any party's claim or defense. If a claimant can proceed to discovery without any legally relevant allegations at all . . . the pleading sets no standard whatsoever for what constitutes relevant discovery.

> Accordingly, under *Conley*, an opposing party and the court can ascertain the limits on what is being sought in discovery only by ascertaining what is being sought in discovery.

Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Judges View: Reinvigorating Pleadings*, 87 Den. U.L. Rev. 245, 252 (2010) (citations omitted). The specter of overly-broad discovery – which this Court sought to curtail in *DCP Midstream* – again raises its ugly head if the Rule 12 standard is not reviewed.

Given the relationship between the issue of the availability of *Lone Pine* orders and the C.R.C.P. 12(b)(5) standards, this Court may wish to consider both this *Strudley* petition and the *Allstate* petition together. At a minimum, the Court should consider the adverse impact of denying the *Allstate* petition on the urgency of the issue presented here.

Accordingly, the CCJL respectfully requests that this Court grant *certiorari* in this case.

Dated this 29th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2013, a true and correct copy of the above ***AMICUS CURIAE*** **BRIEF OF COLORADO CIVIL JUSTICE LEAGUE URGING GRANT OF *CERTIORARI* IN THIS CASE** was served via ICESS to the following:

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