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	▲ COURT USE ONLY ▲
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	Case No. 2013SC576
Lee Mickus, No. 23310 Jessica E. Yates, No. 38003 Snell & Wilmer L.L.P. 1200 17th Street, Suite 1900 Denver, CO 80202 Telephone: (303) 634-2000 Facsimile: (303) 634-2020 E-mail: lmickus@swlaw.com; jyates@swlaw.com Attorneys for Amici Curiae Colorado Civil Justice League, Denver Metro Chamber of Commerce, Chamber of Commerce of the United States of America, Coalition For Litigation Justice, Inc., and American Tort Reform Association	

AMICI CURIAE BRIEF OF COLORADO CIVIL JUSTICE LEAGUE, DENVER METRO CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AND AMERICAN TORT REFORM ASSOCIATION URGING REVERSAL

Certificate of Compliance

Undersigned counsel certifies that this brief complies with C.A.R. 28 in that it contains 5,479 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. 28(g).

/s Jessica E. Yates
Jessica E. Yates

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Pursuant to C.A.R. 29, the Colorado Civil Justice League, Denver Metro Chamber of Commerce, Chamber of Commerce of the United States of America, Coalition For Litigation Justice, Inc., and American Tort Reform Association, (collectively referred to herein as "*Amici*"), through undersigned counsel, respectfully present their *amici curiae* brief in support of the Petitioners' position in this matter.

I. ISSUE ADDRESSED BY AMICI

The *Amici*'s brief addresses the first issue upon which *certiorari* was granted: 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.

II. INTEREST OF *AMICI CURIAE*

A. Colorado Civil Justice League

The Colorado Civil Justice League ("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.

B. Denver Metro Chamber of Commerce

Denver Metro Chamber of Commerce is a leading voice for over 3,000 Denver-area businesses and their 300,000 employees, providing advocacy for more than 150 years at the federal, state and local levels and helping shape Colorado's economic and public policy. An important function of the Denver Metro Chamber is to represent the interests of its members in matters before the Colorado Legislature, the Administration and State Agencies, and federal and state courts. To that end, the Denver Chamber occasionally files *amicus curiae* briefs in cases that raise issues of vital concern to the state's business community.

C. U.S. Chamber of Commerce

The Chamber of Commerce of the United States of America ("the U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the executive branch, and federal and state courts. To that end, the U.S. Chamber

regularly files *amicus curiae* briefs in – or it initiates – cases that raise issues of vital concern to the nation's business community.

D. Coalition for Litigation Justice

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for toxic tort claims. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the toxic tort litigation environment. The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; Fireman's Fund Insurance Company; Liberty Mutual Insurance Group; Great American Insurance Company; and Nationwide Indemnity Company.

E. American Tort Reform Association

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

III. ADOPTION OF STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by Petitioners.

IV. SUMMARY OF ARGUMENT

Lone Pine orders are frequently invoked in federal court in complex toxic tort and product liability cases. The Colorado Court of Appeals concluded that there was no basis for issuing them in this state. But *Lone Pine* orders are simply a natural extension of civil procedure reforms adopted in federal courts and upon which Colorado patterned its C.R.C.P. amendments two decades ago. These amendments, effective for cases filed on or after January 1, 1995, required for the first time mandatory disclosures before any discovery requests, and revamped case management to ask courts to play a more active role in shaping discovery. Proponents heralded the twin set of changes as a way to finally turn the tide on out-of-control litigation.

Until the decision below, no Colorado decisions published since the 1995 C.R.C.P. amendments had concluded that a court is prohibited from requiring plaintiffs to make a prima facie showing after the exchange of initial disclosures has occurred. Reversal of the Court of Appeals is needed to give effect to the intentions contemplated by the drafters of the 1995 rule amendments and advance the goals of Colorado's civil justice system. Asking plaintiffs in cases with

complex causation issues – especially those tied to specific physical injuries – to demonstrate the viability of their theory before massive discovery also reinforces this Court's recent precedent in *DCP Midstream.* If the Court of Appeals' opinion stands, it will chill active case management, and undermine the mandate for proportionality in discovery. *Amici curiae* support reversal in this case.

V. ARGUMENTS FOR WHY THE COURT OF APPEALS' DECISION SHOULD BE REVERSED

A. The Appropriate Use Of *Lone Pine* Orders Is Consistent With And Permitted By Colorado Law

The Court of Appeals stated that under Colorado law "a trial court may not require a showing of a prima case [*sic*] before allowing discovery on matters central to a plaintiff's claims." (COA Op. at 11.) However, the Colorado cases resisting pre-discovery termination of a plaintiff's claims were decided before Colorado rules required initial disclosures, which now offer a plaintiff the benefit of defendants' disclosures near the outset of a case. And while no rule ***expressly*** permits such modified case management orders, the drafters of the 1995 rule amendments, which included a new C.R.C.P. 16, did not intend to preclude that result either.

1. *Lone Pine* Orders Are Consistent With This Court's Pronouncements On The Need For Courts To Tailor Case Management And The Scope Of Discovery

Modified case management orders that require plaintiffs to make a *prima facie* showing before full-blown discovery are often called "*Lone Pine*" orders, based on the namesake case of *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 where there are technical or scientific issues that form the basis of the plaintiff's proof of causation and also have the potential for significant discovery burdens. They have been issued in both federal and state courts.[1]

Courts issuing *Lone Pine* orders have not relied on an express statute or rule allowing a court to require a prima facie case prior to full discovery. Instead, courts have invoked their case management discretion, including discretion to shape the outer boundaries of discovery, recognized by rule or court practice. Critically, exercise of that discretion depends heavily on the circumstances of the

[1] While state trial court decisions can be difficult to locate given their inconsistent availability in legal research databases, *amici* has identified *Lone Pine* orders entered by Texas and Wisconsin courts. *See In re Jobe Concrete Products, Inc*., 08-01-00351-CV, 2001 WL 1555656 (Tex. App. Dec. 6, 2001) (affirming where trial court entered a *Lone Pine* order based on the complexity of the case); *Kinnick v. Schierl, Inc*., 541 N.W.2d 803, 806 (Wis. App. 1995) (trial courts have discretion to enter *Lone Pine* orders).

case. Courts do not issue *Lone Pine* orders in routine civil litigation, nor do they do so at the outset of a case. Instead, they recognize that complex product liability cases and toxic exposure cases can become immensely burdensome, unreasonably expensive and utterly unwieldy if plaintiffs pursue full discovery without baseline evidence supporting their theory of the case.

For example, in *Acuna v. Brown & Root, Inc.*, the Fifth Circuit affirmed a trial court's decision to require pre-discovery affidavits from the more than 1,000 plaintiffs who had brought uranium mining injury claims. 200 F.3d 335, 340 (5th Cir. 2000). The court had "discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require," and the affidavits were not unfair given that they merely demanded "information which plaintiffs should have had before filing their claims" under Rule 11, specifically "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." *Id.* Plaintiffs submitted these affidavits as "forms" supplied by a single expert without any plaintiff-specific assessment, and so the court gave the plaintiffs an opportunity to supplement. *Id.* at 338. Even the supplemental affidavits were fatally deficient. *Id.* These plaintiffs clearly did not even have the necessary

evidence within their control to support their claims, so it would make no sense to burden a defendant with discovery at that point. By dismissing the case, the district court no doubt saved the parties involved millions of dollars in litigation expenses, and avoided clogging the court with inevitable discovery-related motions.

The Fifth Circuit – like most federal courts invoking a *Lone Pine* order – relied on the "wide discretion afforded district judges over the management of discovery" under F.R.C.P. 16. *Id.* at 340. Colorado courts have similar discretion. In *DCP Midstream, LP v. Anadarko Petroleum Corp*., this Court held that trial courts are ***obligated*** to consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F) in deciding the scope of discovery. 303 P.3d 1187, 1190 (Colo. 2013). *DCP Midstream* was a breach of contract rather than a toxic tort case, but the plaintiff had sent the defendant "fifty-eight requests for production seeking millions of pages of paper and electronic documents." *Id.* The district court had entered an order compelling the defendant's compliance. This Court made it clear that discovery was not an entitlement, but instead something to be managed by the trial court:

> The civil rules, and our cases interpreting them, reflect an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs. See C.R.C.P. 16 committee comment ("It is expected that trial judges will

> assertively lead the management of cases to ensure that justice is served.").

Id.

DCP Midstream was not decided in a vacuum. Three years earlier, 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." *In re Marriage of Schelp*, 228 P.3d 151, 155 (Colo. 2010) (citations omitted).

Further, in *Burchett v. S. Denver Windustrial Co.*, this Court held 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." 42 P.3d 19, 21 (Colo. 2002) (emphasis added). While this Court applauded the district court in *Burchett* for attempting to quickly move cases in its docket, it held that the court erred by not being flexible enough to accommodate an airplane crash case that needed additional time for investigation by a federal agency. "Because

each case is unique and deserves unique treatment, the trial court should make a reasonable effort to distinguish from the outset between cases according to the amount and type of discovery, number of parties, and the amount of attention needed by the judge." *Id.* at 21-22 (emphasis added). "This case demonstrates that it should have been treated differently than many others." *Id.* at 22.

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 provide plaintiff an opportunity to make its case while avoiding unnecessary burdens on the parties. Likewise, with each case being "unique," trial courts are empowered to tailor case management to individual case needs.

2. C.R.C.P. 16 Includes The Flexibility To Authorize *Lone Pine* Orders, So No Express Rule Provision Is Needed

The Court of Appeals in this case acknowledged *DCP Midstream*, but was troubled that C.R.C.P. 16 did not have the same language as its federal counterpart, F.R.C.P. 16. The federal rule expressly permits a district court to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." F.R.C.P. 16(c)(2)(L). C.R.C.P. 16(c) does not have any similar language addressing the use of "special procedures" for certain types of cases.

The variation between the Colorado and federal rules is a distinction without a difference. After all, the federal rule also identifies 15 other discrete actions a district court can take on a pre-trial basis, such as allowing amended pleadings, avoiding cumulative evidence, obtaining stipulations about facts, setting pre-trial deadlines, severing actions, and using alternative dispute resolution. *See* F.R.C.P. 16(c)(2). C.R.C.P. 16(c) does not itemize the possible modification actions within the scope of a trial court's authority, but it expressly permits modified case management orders. Acting on the broad authority granted by C.R.C.P. 16(c), Colorado's trial courts routinely enter case management and pre-trial orders that incorporate the types of actions itemized in F.R.C.P. 16(c)(2). Until now, the simplicity of C.R.C.P. 16's approach to seeking a modified case management order has never been construed as a limitation on the ways a case management order can be modified.

While the Court of Appeals acknowledged *DCP Midstream,* the Court concluded that the discretion afforded trial courts was not so broad as to allow for *Lone Pine* orders. Focusing on a Committee Comment to Rule 16 that referenced the desire to "foster professionalism," the Court concluded that "[t]his language suggests 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." (COA Op. at 23.)

The Committee that drafted the new Rule 16 as part of the 1995 amendments, however, did not have so limited an agenda. In fact, the four preceding paragraphs in the Committee Comments herald a sea change in case management and discovery that focuses on streamlining litigation:

> The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. … Rule 16 and revisions of Rules 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.*** … [T]hese 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***. …

C.R.C.P. Committee Comments to Rule 16 (emphasis added).

Accordingly, the driving force behind the Rule 16 amendments sought to provide trial courts with the tools for active case management, while also allowing sufficient flexibility to address the requirements of complex cases. One of the members of the Committee said "[t]he aim of new Rule 16 is to create 'effective differential case management,' under which pretrial discovery, motion practice and trial preparation should be substantially more tailored to the needs and idiosyncracies of each case than has been the practice previously in Colorado state courts." Richard P. Holme, *Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure*, 23 Colo. Law. 11, p. 2469 (Nov. 1994) .

The advent of mandatory disclosures was part-and-parcel of the new case management system. "Without doubt, the most startling innovation of new Rule 26 (as well as new Federal Rule 26) is the requirement in new Rule 26(a)(1) that all parties make mandatory, automatic disclosure of certain key information to their opponents early in the handling of the case and without request by the opponent." *Id.* at 2473. The new disclosure process would provide each party an early look at the strength of each other's positions, reduce the need to pursue discovery, and facilitate settlement. As one practice guide notes, "[t]he 1995 amendments imposed mandatory disclosure obligations under Rule 26 that are designed to reduce the time, expense, and to some degree the hostility associated

with the litigation process." 5A Colo. Prac., *Handbook On Civil Litigation* § 6:1 (2013 ed.).

Holme noted that the proposal to require such disclosures was controversial, but "the required automatic disclosures are not much different than the information which would have to be revealed in response to any competently drafted first set of interrogatories and request for production of documents under today's practice." 23 Colo. Law. 11, p. 2474. "The drafters of the new Rule felt that automatic disclosure of relevant material, without requiring the opposing party to fire the shotgun blast of its overly word-processed 'standard set' of numerous interrogatories, might cause opposing counsel to serve their clients better … [and] the parties can get immediately to the brass tacks." *Id.*

The impetus for the 1995 amendments is not merely an intriguing bit of legal history. The intent of these amendments demonstrates the fatal flaw of the Court of Appeals' reasoning: the very purpose of creating the new Rule 16 and requiring initial disclosures under Rule 26 in Colorado was to reinforce trial courts' case management discretion while ensuring fairness through early mandatory document productions. Under this regime, it is not inherently problematic for a district court to require a prima facie showing before full-blown discovery, when a plaintiff has

received a defendant's disclosures but cannot yet demonstrate a viable theory of causation or damages.

3. *Curtis* And *Direct Sales Tire* Did Not Prohibit *Lone Pine* Orders After The 1995 Rule Amendments

The Court of Appeals was concerned about two earlier cases that seemingly precluded a trial court from requiring plaintiffs to make a prima facie showing before discovery. But both were decided before the 1995 amendments to Colorado's civil rules. That means the district courts in those cases were requiring a prima facie case before the exchange of initial disclosures – and without the encouragement of active case management. In the pre-1995 rules, these cases likely were rightly decided.

In *Curtis, Inc. v. District Court*, this Court reversed a trial court's decision to not allow discovery where the list of documents to be inspected supposedly was "not sufficiently detailed." 526 P.2d 1335, 1339 (Colo. 1974). The Court stated that "[o]ur reading of the record indicates that the court desired that petitioner make out a prima facie case prior to granting discovery." *Id.* Not only was a prima facie showing not required by Rule 34, but it "contradict[ed] the broader policy of the rules that all conflicts should be resolved in favor of discovery." *Id.* This statement was exaggerated dictum even in 1974, as parties seeking discovery in Colorado were not always entitled to it. The 1995 rule amendments that

implemented presumptive discovery limits, plus *DCP Midstream*'s requirement of proportionality, makes this statement in *Curtis* unenforceable today.

In any event, the Court's concern in *Curtis* – a trade secret case – was that the defendant ostensibly had not produced ***any*** documents at all, because the concept of initial disclosures had not yet been implemented in Colorado. Further, the defendant resisted discovery not because the requests for production were unduly burdensome and threatened to undermine justice, but because the defendant thought certain requests were not sufficiently specific. This Court disagreed. "This was not a fishing expedition, and the petitioner has designated those items sought to be discovered with sufficient specificity." *Id.* at 1339.

The Court of Appeals also looked to *Direct Sales Tire Co. v. District Court* as barring a pre-discovery *prima facie* case requirement. *See* 686 P.2d 1316 (Colo. 1984). *Direct Sales* featured an unfair competition claim for which the plaintiff necessarily required financial information from the defendant to show that the defendant was selling unbranded gasoline at a retail price below cost in violation of the Colorado Unfair Practices Act. *See id*. at 1317-18. This Court observed that the plaintiff had alleged that the defendant was in sole control of the critical information, and that the Unfair Practices Act contemplated that a plaintiff be able to access such information in order to pursue a claim. *Id*. at 1318, 1320.

In both *Curtis* and *Direct Sales Tire*, the district courts' denials of certain discovery requests were not based in an attempt to manage discovery in a complex case. And because they were litigated before the 1995 rule amendments, the plaintiffs did not have the benefit of mandatory disclosures. It is likely that at least some of (if not all of) the demanded documents in those cases would have been automatically disclosed and produced by the defendants as a matter of course.

The Court of Appeals' reliance on *Curtis* and *Direct Sales Tire* is misplaced for another reason: *Lone Pine* orders would be inappropriate in those two cases anyway. *Lone Pine* orders typically are issued when there are scientific or technical issues that will need to be proven by the plaintiffs, and the court believes the plaintiffs may be on the proverbial fishing expedition without having a legal theory adequately tethered to the scientific foundation needed to advance the case. Neither *Curtis* nor *Direct Sales Tire* involved the type of claims where courts employ a *Lone Pine* order.

Further, courts willing to issue *Lone Pine* orders would not enter one in a case where the defendant has sole control over key parts of the plaintiff's *prima facie* case. By the time a *Lone Pine* order is enforced, there generally has been plenty of time for plaintiffs to investigate their claims, and/or ample opportunity to produce the requested evidence. *See, e.g., Arias v. DynCorp,* No. 13-7044, __ F.3d

___, 2014 WL 2219109, *1, 5 (D.C. Cir. May 30, 2014) (in a herbicide exposure case, court reasonably required plaintiffs to complete questionnaires "setting forth some basic information regarding their alleged exposure and injury," and dismissal was appropriate after they did not answer); *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011) (in toxic tort case claiming injury from manufacturer chemical release, district court could require in discovery "written statements setting forth 'all facts' supporting non-resident and post-1988 resident plaintiffs' claimed exposure," together with expert statement on injury, exposure and causation); *Acuna*, 200 F.3d at 340 (as discussed *supra, Lone Pine* order issued after plaintiffs failed to identify their injuries or likely sources of exposure); *Adinolfe v. United Technologies Corp.*, No. 10-80840-CIV, 2011 WL 240504, *1 (S.D. Fla. Jan. 18, 2011) (justifying *Lone Pine* order where plaintiffs had not even stated whether their own properties were contaminated and yet served "massive discovery requests seeking essentially every environmental record for Defendant's Florida facility for the last 60 years;" "Plaintiffs do not need discovery to be able to state whether their own properties are contaminated" or "to state the factual basis on which they filed this action."); *In re 1994 Exxon Chem. Plant Fire*, No. 94-1668, 2005 WL 6252312 (M.D. La. Apr. 7, 2005) (*Lone Pine* order appropriate where plaintiffs still had no "concrete, factual basis to support their claims" long

after filing their complaints, and had not identified treating health care providers, medical records and evidence, or their financial losses).

4. The Possibility Of Relief Under C.R.C.P. 12(b)(5) And C.R.C.P. 56 Should Not Foreclose The Availability Of *Lone Pine* Orders

The Court of Appeals believed that C.R.C.P. 12(b)(5) and C.R.C.P. 56 could provide adequate procedural safeguards to a defendant who is concerned that a plaintiff's claim lacks merit. But in complex toxic tort or product liability cases, those rules do not provide any meaningful opportunity for a defendant to avoid unnecessary, expensive and burdensome discovery: one procedure comes too early, and the other too late.

A motion to dismiss under C.R.C.P. 12(b)(5) generally must be filed before an answer and challenges the sufficiency of a plaintiff's complaint.[2] But as applied in Colorado courts, Rule 12(b)(5) does not address any of the evidentiary issues of concern in the types of cases suitable for *Lone Pine* orders. 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). Rule 12(b)(5)

motions "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). Thus, Rule 12(b)(5) sets a very low pleading bar that can easily be surmounted without a plaintiff having in-hand any evidence to support key elements of a claim.

C.R.C.P. 56 suffers from the opposite timing problem – it comes too late. Generally a motion for summary judgment cannot be litigated until discovery is nearly or completely finished, because a plaintiff can resist summary judgment under Rule 56(f) by requesting additional time for discovery. C.R.C.P. 56 provides very little assistance to reduce unjustified discovery.

A *Lone Pine* order can strike the right balance in an appropriate case, both in terms of timing and also the evidentiary burden imposed on the plaintiffs. It typically is issued sometime after initial disclosures but before discovery is complete. And presenting a *prima facie* case constitutes a significantly lower bar than what a plaintiff will face at trial. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E. D. La. 2008) ("the Court is not requiring that Plaintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an

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[2] In Civil Access Pilot Project ("CAPP") cases, the filing of a motion to dismiss does not effectively stop the case. But personal injury cases such as those at issue here are not covered by CAPP.

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 prohibition of *Lone Pine* orders in Colorado's courts, and such a prohibition would be inconsistent with the intent of revised C.R.C.P. 16 and this Court's current views on discovery. This Court should reverse the Court of Appeal's refusal to permit *Lone Pine* orders as a case management tool and instead provide guidance to lower courts on their use.

B. Supporting A Trial Court's Reasonable Exercise Of Case Management Discretion, Even Where That Results In Dismissal Of A Party, Is Necessary To Advance the Goals of Colorado's Civil Justice System

It is clear from *DCP Midstream*, *Burchett* and other cases – as well as the 1995 C.R.C.P. amendments – that the Colorado legal system is committed to reducing the cost of litigation while ensuring that appropriate discovery takes place. The two-pronged approach of requiring active case management by the court and early comprehensive disclosures by the parties is designed in part to enhance access to courts and jury trials for all litigants. Presumptive discovery limits, combined with a trial court's authority to curtail "fishing expeditions," likewise has promoted fairness and efficiency in Colorado's civil justice system.

Fortunately, Colorado did not stop with the 1995 C.R.C.P. amendments. Through refinements to the rules and case law, Colorado's legal system has benefited from the judiciary's abiding interest in achieving improvement. *DCP Midstream*, in which this Court held that district courts were not just authorized – but ***obligated*** – to consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F), capped years of progress in giving litigants and courts guidance about avoiding certain problematic discovery. *See* 303 P.3d at 1190; *see also In re Dist. Court, City & Cnty. of Denver*, 256 P.3d 687, 691 (Colo. 2011) (implementing a "comprehensive framework" for deciding when privacy rights allow a litigant to withhold documents); *Wenz v. Nat'l Westminster Bank, PLC*, 91 P.3d 467, 470 (Colo. App. 2004) (in a first impression issue for Colorado, holding that "[i]t is not manifestly arbitrary, unreasonable, or unfair, and thus not an abuse of discretion, to require a plaintiff to assert facts sufficient to satisfy the trial court that discovery might reveal evidence showing personal jurisdiction before requiring a defendant to bear the cost and burden of responding to discovery."); *Donelson v. Fritz*, 70 P.3d 539, 546 (Colo. App. 2002) (no abuse of discretion for trial court to disallow discovery of expert's income – specifically the percentage derived from various enumerated sources – as C.R.C.P. 26's provision for expert

disclosures "reflects a balancing of the need for discovery and the need for protection from unduly burdensome discovery requests").

These cases reflect the Court's appreciation of the importance of striking the right balance in discovery. Discovery in toxic tort and product liability cases can easily run into seven or eight digits. *See, e.g.,* Nicholas M. Pace and Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, Rand Inst. For Civil Justice (2012) at 17-18 (studying a sample of 45 civil cases and identifying costs of $4.4, $21 and $27 million for three product liability cases).[3] And the cost of discovery is not just reflected in out-of-pocket bills. 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. These additional costs ultimately are passed on to consumers. Predictably, the expenses of discovery become significant leverage to force settlement due to the high cost of continuing the litigation, rather than encouraging a trial on the merits.

In part to address those issues, this Court announced the Civil Access Pilot Project ("CAPP") in January 2012 through Chief Justice Directive 11-02, which

[3] Available at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

was the result of a concerted effort to further streamline litigation by imposing even more discovery limitations on certain types of cases on an experimental basis.[4] The key ingredient to achieving the goals of CAPP is authorizing – and indeed requiring – trial judges to exercise active case management. *See* CAPP Rule 8.

CAPP recognizes that offering trial court judges flexibility and discretion in case management is necessary to avoid protracted discovery and motion practice that delays trial, or effectively forces an unwanted settlement. CAPP strives toward this aim by limiting discovery and requiring "proportionality." *See A History And Overview Of The Colorado Civil Access Pilot Project Applicable To Business Actions In District Court* (hereafter "*CAPP History*") at 1, 3.[5] Active case management also supports the goal of requiring 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-related delays. *See id.*

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[4] 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.

[5] 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.

While litigants in Colorado are still adjusting to CAPP and some of the rules arguably need refinement, the need for reform is appreciated by plaintiffs and defendants alike. But CAPP will not accomplish its objectives if district courts believe their attempts at active case management are likely to be reversed.

The Court of Appeals' decision here ignores the efforts that have been and are being made to encourage trial courts to exercise their ample case management discretion in a manner tailored to the needs of a particular case. The reality is that in "active case management," parties cannot sit back and fail to develop the legal and factual theories to support their claims. That is the only fair way for a civil justice system to exist. The availability of *Lone Pine* orders in Colorado will promote the goals of Colorado's civil justice system in complex cases.

VI. CONCLUSION

Accordingly, the Colorado Civil Justice League, Denver Metro Chamber of Commerce, Chamber of Commerce of the United States of America, Coalition For

Litigation Justice, Inc., and American Tort Reform Association respectfully urge this Court to reverse the Court of Appeals in this matter.

Dated this 18th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2014, a true and correct copy of the above ***AMICI CURIAE*** **BRIEF OF COLORADO CIVIL JUSTICE LEAGUE, DENVER METRO CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AND AMERICAN TORT REFORM ASSOCIATION URGING REVERSAL** was served via ICESS or E-mail on the following:

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