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 THE COLORADO PETROLEUM ASSOCIATION URGING GRANT OF *CERTIORARI* IN THIS CASE

Certificate of Compliance

Undersigned counsel certifies that this brief complies with C.A.R. 28 and 32, and with C.A.R. 53(a) in that it contains 3,795 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/ Christopher J. Neumann
Christopher J. Neumann

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

I. INTEREST OF *AMICUS CURIAE* CPA

CPA is a non-profit organization representing Colorado's oil and gas industry before state, regional, and federal governmental entities and in Colorado courts. CPA supports every sector of the industry, including production, processing, and transportation and, through the economic and charitable activity of its members, works continuously to promote a strong, sustainable, and thriving energy industry and the wellbeing of communities across Colorado.

This industry is vital to the wellbeing of many of the citizens of Colorado and plays a crucial role in the economy of our state. Just last week the Denver Post reported that employment on oil and gas fields in Colorado is more than 30,000 and increasing rapidly in spite of the weak economy. Mark Jaffe, *Jobs in Colorado's oil and gas fields swell to nearly 30,000*, The Denver Post, August 19, 2013, at 10A. Direct employment in the whole oil and gas industry in this state at 51,000, and public revenues from the industry are up to $1.6 billion. *Id.*

This industry, like all industries, cannot thrive without a strong court system that provides a just and equitable forum to resolve disputes in a manner that avoids

needless delay and expense. CPA believes that case management orders such as the one issued in this case are useful tools for courts in managing their dockets and can significantly control the costs of groundless litigation in toxic torts and other litigation involving complex scientific and technical issues without placing any significant burden on meritorious claims. This is particularly true for claims similar to the alleged gas well leak in dispute here, where the public enjoys the protection of an expert regulatory agency with extensive technical expertise and broad investigative and remedial powers, guaranteeing both sides a neutral assessment of the situation by experienced specialists before they begin the slow process of litigation.

II. STATEMENT OF THE CASE

A few months after Antero Resources Piceance Corporation and the other defendants began drilling three natural gas wells in Silt, Colorado, their neighbors, the Strudley family, complained that these activities were contaminating their drinking water wells. The Colorado Oil and Gas Conservation Commission ("COGCC") came to investigate, tested the well water, and concluded that there was no contamination. The Strudleys then filed suit, alleging personal injury, trespass, nuisance, and related claims.

The trial court, noting that the allegations had already been investigated and dismissed by the COGCC, and that the plaintiffs' complaint lacked significant details that might substantiate the allegations, issued an order requiring the plaintiffs to produce evidence establishing that they had a colorable ground for bringing their claim. The court required this evidence within 105 days, before discovery beyond the defendants' extensive initial disclosure would begin. The plaintiffs failed to satisfy the court's requirement, producing only fragmentary evidence. In particular, the plaintiffs persistently refused to produce evidence from a doctor who had actually examined or diagnosed them. After the deadline passed, the court ordered the case dismissed.

The Court of Appeals reversed, finding as a matter of law that the Colorado Rules of Civil Procedure forbid the use of case management orders to require plaintiffs to substantiate their claims prior to open discovery. "[A] trial court may not require a showing of a prima [facie] case before allowing discovery on matters central to a plaintiff's case – as opposed to punitive damages or other secondary matters." *Strudley v. Antero Resources Corp.*, No. 12CA1251, 2013 WL 3427901, *4 (Colo. Ct. App. July 3, 2013).

This Court should grant *certiorari* to clarify that there are situations where a modified case management order such as the one at issue here falls within the sound discretion of the trial court.

III. REASONS FOR GRANTING *CERTIORARI*

A. The decision below deprives Colorado courts of a valuable case management tool that has been used successfully in numerous other jurisdictions.

The Court of Appeals held that, as a matter of law, a case management order requiring plaintiffs to produce evidence supporting the grounds for their claim after initial disclosures and prior to the start of other discovery is not allowed. In doing so, the court parted company with the Third Circuit, the Fifth Circuit, the Ninth Circuit, the Eleventh Circuit, the Southern District of New York, the Southern District of Alabama, the Southern District of Florida, the Eastern District of Missouri, the District of Nebraska, the Southern District of Ohio, the Eastern District of Arkansas, the Western District of Texas, the Southern District of Texas, the District of Montana, the Western District of Louisiana, the Middle District of Louisiana, the Eastern District of North Carolina, the Western District of North Carolina, the Southern District of West Virginia, the Eastern District of

Pennsylvania, the District of Minnesota, and the Northern District of California,[1] along with the states of Texas, Illinois, Florida, Pennsylvania, California, and New

[1] *See In re Paoli, R.R. Yard PCB Litig.*, 916 F.2d 829 (3rd Cir. 1990); *Acuna v. Brown & Root Inc*., 200 F.3d 335 (5th Cir. 2000); *Abuan v. Gen Elec. Co*., 3 F.3d 329 (9th Cir. 1993); *Cox v. Am. Cast Iron Pipe Co*., 784 F.2d 1546 (11th Cir. 1986); *Abbatiello v. Monsanto Co*., 569 F. Supp. 2d 351 (S.D.N.Y. 2008); *Adinolfe v. United Techn. Corp.*, No. 10-80840-CIV, 2011 WL 240504 (S.D. Fla. Jan. 18, 2011); *Asarco, LLC v. NL Indus., Inc.*, No. 4:11-CV-00864-JAR, 2013 WL 943614 (E.D. Mo. Mar. 11, 2013); *Avila v. CNH Am., LLC.*, Nos. 4:04CV3384, 4:07CV3170, 2009 WL 151600 (D. Neb. Jan 2, 2009); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2006 WL 2251821 (S.D. Ohio Aug. 4, 2006); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 WL 315346 (S.D. Ohio Jan. 30, 2007); *Burns v. Universal Corp. Protection Alliance*, No. 4:07CV00535 SWW, 2007 WL 2811533 (E.D. Ark. Sept. 25, 2007); *Cano v. Everest Minerals Corp.*, No. Civ. A. SA-01-CA-610XR, 2004 WL 502628 (W.D. Tex. Mar. 10, 2004); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005); *Eggar v. Burlington N. R.R. Co.*, Nos. CV 89-159-BLG-JFB, CV 89-170-BLG-JFB, CV 89-179-BLG-JFB, CV 89-181-BLG-JFB, CV 89-236-BLG-JFB and CV 89-291-BLG-JFB, 1991 WL 315487 (D. Mont. Dec. 18, 1991), affirmed *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499 (9th Cir. 1994); *Diamond v. Immunex Corp.*, No. 2:03 CV 564, Order (W.D. La. Aug. 15, 2003); *In re 1994 Chem. Plant Fire*, No. 94-MS-3-C-1, 2005 WL 6252290 (M.D. La. July 15, 2005); *Grant v. E.I. Dupont De Nemours & Co.*, Civ. A. No. 91-55-CIV-4H, 1993 WL 146634 (E.D.N.C. Feb. 17, 1993); *Hembree v. Litton Indus., Inc.*, No. 2:90-cv-00006-LHT (W.D.N.C. Aug. 16, 1990); *Hagy v. Equitable Prod. Co.*, No. 2:10-cv-01372, 2012 WL 713778 (S.D. W. Va. Mar. 5, 2012); *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2:07-md-01871 (E.D. Pa. Nov. 15, 2010); *In re Baycol Prods. Liab. Litig.*, No. MDL 1431(MJD/JGL), 131, 2004 WL 626866 (D. Minn. Mar. 18, 2004) (entering *Lone Pine* order); *In re Baycol Prods. Liab. Litig.*, No. MDL 1431 MJD/JGL, 2004 WL 2578976 (D. Minn. Nov. 1, 2004) (enforcing additional compliance with *Lone Pine* order); *In re Bextra & Celebrex Marketing Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, 2009 WL 1226976 (N.D. Cal. Apr. 30, 2009).

York.[2] The sheer number of these orders, and their nationwide breadth, suggest the importance and scope of the problem they seek to address, and the importance of the issue before this Court.

A toxic tort claim, or a claim that involves similar intensive evidence collection, with a poor scientific or evidentiary foundation can take many years to reach trial and consume vast resources, including judicial resources, the financial resources of the parties, and the time and attention of numerous scientific experts.

Although it is difficult to obtain accurate empirical data about litigation costs, which are often confidential, a 2010 survey of Fortune 200 companies revealed that the companies spent an average of $115 million on litigation in 2008, a 73 percent increase from 2000, and that the companies' average discovery costs per case ranged from $621,880 to $2,993,567. Litigation Cost Survey of Major Companies, for presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States (May 10-11, 2010), at 4.

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[2] *See Adjemian v. Am. Smelting and Ref. Co.*, No. 08-00-00336-CV, 2002 WL 358829 (Tex. Ct. App. Mar. 7, 2002); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032 (Ill. App. Ct. 1992); *Bessie Kennon Bender v. KC Indus., LLC*, Case No. 53-2007 CA-006859-0000-00, Case Management Order (Fla. 10th Cir. Ct. Dec. 1, 2010); *Cecil Gill v. Airco Prods.*, No. 2005-538 (Pa. Ct. Com. Pleas Mercer Co., June 28, 2006); *Cottle v. Superior Court*, 3 Cal. App. 4th 1367 (Cal. Ct. App. 1992); *In re Love Canal Actions*, 547 N.Y.S. 2d 174 (N.Y. Sup. Ct. 1989).

In this case, a ruling that denies a trial court the opportunity to make use of a docket control tool with proven value to require the plaintiffs to make a threshold showing of exposure and causation after initial disclosures and before other discovery will likely mean that defendants will have to expend enormous litigation resources before they or the court know whether any doctor or other expert is willing to opine that plaintiffs' injuries were caused by defendants' operations. Engineers and specialists will be required visit the well sites to duplicate testing that has already been conducted. Scientific experts will then need to review these reports and prepare reports of their own, and then attend depositions. Defendants may be required to divert resources that would otherwise be available for work that would generate jobs and value for the Colorado economy in order to make witnesses available for depositions and respond to written discovery related to these and possibly other wells—all before the plaintiffs provide any diagnosis from a doctor, an essential element of a plaintiffs' case. District courts should not be barred from managing their cases more efficiently.

Perhaps the most vivid illustration of the potential value of *Lone Pine* orders in promoting civil justice and judicial economy comes from the nationwide silicosis litigation epidemic. This litigation trend was brought to an abrupt end when a state court judge in Texas with a medical background ordered each plaintiff

to produce a signed fact sheet with medical and diagnostic information. Mark Behrens, *RAND Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the 'Phantom' Silica Epidemic that may Deter Litigation Screening Abuse*, 73 Alb. L. Rev. 521, 524-25 (2003). Reviewing the information, the court found that the experts had "utilized shockingly relaxed standards of diagnosing that they would never have employed on themselves, their families or their patients in their clinical practices." *In re Silica Products Liab. Litig*., 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005). The court went on to observe that the litigation had already cost the defendants millions of dollars and put the plaintiffs through the terror of being wrongly diagnosed with a very serious condition. *Id*. By demanding this evidence from the plaintiffs at an early stage, this court prevented enormously expensive litigation, and nationwide silicosis claims dropped a hundredfold almost immediately. Behrens, *supra*, at 529.

Unsurprisingly, these costs often drive defendants to settle on bases that do not reflect the true merits of the case, a result inconsistent with the objectives of a civil justice system; a result this Court has recently recognized should not be fostered or endorsed by Colorado courts. "The increased costs associated with protracted litigation may force a party into an unwarranted settlement or may deter

a party from bringing a viable claim." *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1194 (Colo. 2013). CPA submits it would be reasonable for a court to require a *prima facie* showing of some nexus between plaintiffs' injuries and defendants' oil and gas operations before the parties engage in discovery beyond the initial disclosures—especially when the state's oil and gas experts have concluded no such nexus exists.

As oil and gas activity continues to grow rapidly, and with the continued development of hydraulic fracturing, the industry is facing a very similar new litigation trend. *See generally* R. Schick et al., Shale Related Litigation and Regulatory Developments, TSUX05 ALI-ABA 1 (Jan. 23, 2013). The *Lone Pine* order provides an effective method for courts to manage their expanding dockets of oil and gas cases so they can focus resources on ensuring valid claims receive full and careful consideration, and businesses can spend their money hiring engineers and technicians, not lawyers and expert witnesses. *Certiorari* is merited to clarify that reasonable, non-prejudicial case management orders are an appropriate tool to focus litigation on the key issues at the outset of the case.

B. Other procedural mechanisms are not a substitute for these orders.

Motions to dismiss, summary judgment motions, and motions for sanctions are not adequate substitutes for a *Lone Pine* case management order. When

rejecting the validity of *Lone Pine* orders, the Court of Appeals believed that its decision would not prejudice the litigants because "[m]otions 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." *Strudley*, 2013 WL 3427901, *8. Although there are some superficial similarities between a *Lone Pine* order and these other procedural mechanisms, a closer review of the ways courts have used *Lone Pine* orders shows that they serve a different purpose than these other motions and, in practice, are often used in conjunction with them.

A motion to dismiss is a very efficient mechanism for challenging claims where there is no jurisdiction, or where the complaint is so poorly written that it fails to state a claim, but it cannot, and should not, be used for claims that are well-crafted but fundamentally works of fiction. C.R.C.P 12(b).

A summary judgment motion is more analogous to the *Lone Pine* order, as employed here, but it is not a clear substitute. A defendant cannot file a motion for summary judgment asserting that the plaintiff has failed to produce evidence that the plaintiff suffered pre-existing injuries, or that the plaintiff's property was previously contaminated, or that this contamination came from other sources, until after the point when the plaintiff is required to produce evidence regarding his injuries and property damage. The purpose of a *Lone Pine* order is to move that

moment to an earlier stage in the litigation, and to require a mere *prima facie* showing of the information before both parties incur large expenses conducting discovery.

Rather than a substitute for a summary judgment motion, a *Lone Pine* order is frequently used in conjunction with a summary judgment motion. In cases where the plaintiff attempts to comply with the court's order but fails to provide evidence supporting a nexus between defendants' activities and his claim, the defendant can respond by moving for summary judgment. *See, e.g.*, *In re Paoli, R.R. Yard PCB Litig.*, 916 F.2d 829, 836 n.4 (3rd Cir. 1990); *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (addressing the sufficiency of the plaintiffs' response to a *Lone Pine* order after the defendants filed for summary judgment). When the case progresses this way, it eliminates the Court of Appeals' concern that the *Lone Pine* order shifts not only the burden of production, but also the burden of proof.

The Court of Appeals treats this mechanism as a substitute for summary judgment, when really it is better viewed as a species of discovery order. Instead of allowing open ended discovery on every issue simultaneously, the trial court used an effective docket control procedure to focus on the critical fact in dispute—the fact made doubtful by the administrative investigation the plaintiffs had

instituted—and ordered the party best situated to produce evidence on that point to go first. The dismissal of the case, then, was a result of plaintiffs' failure to obey the court's discovery order, not for failure to allege and support an adequate case. If the court had found that the plaintiffs' response was sufficient to be in compliance with the case management order, the defendants might then have had grounds for a summary judgment motions and would have born the burden of showing that they were entitled to summary judgment.

A recent case from the Southern District of New York demonstrates the nature of *Lone Pine* orders as discovery tools. The court determined that the case would progress more efficiently if the parties conducted discovery on one potentially dispositive issue at a time and asked both parties to suggest "modified *Lone Pine* style orders, requiring Plaintiffs to come forward with proof of their *prima facie* claims at a reasonably early phase of the proceedings." *Abbatiello v. Monsanto Co*., 569 F. Supp. 2d 351, 353 (S.D.N.Y. 2008). After the court issued the order, requiring the plaintiffs to provide individualized evidence of exposure, injury, and causation, the plaintiffs filed a motion asking the court to vacate this *Lone Pine* order and instead issue an order requiring the parties to focus all their discovery efforts on the issue of whether the defendants were aware of the health risks of their product at the time they were producing it. *Id*. The court observed

the plaintiffs' alternative plan would "involve[] hundreds of thousands of documents, and . . . comprised of complicated factual and legal issues that occurred over the course of more than forty years within a period which possibly ended over thirty years ago," and that "[g]ranting th[e] motion would certainly delay the resolution of all numerous claims outstanding against [defendant] and possibly other defendants in this action." *Id*. The court found that requiring discovery on these issues before the defendant had completed some discovery on the basic questions of injury and causation was highly prejudicial. The court thus used its case management powers to require the plaintiffs to produce evidence that was in their sole control, that should already have been collected before the suit was brought,[3] and that would eventually need to be produced before they went on a multi-million document fishing expedition—or, more likely, settled for some fraction of the litigation costs.

A motion for sanctions likewise is not a substitute for a *Lone Pine* order. Motions for sanctions punish parties for abusing the system, but they do not restore spent resources to the parties or the courts. Sanctions may be an effective deterrent

[3] A year later the defendants moved for Rule 11 sanctions after learning that the plaintiffs had not done any individualized investigation before filing suit, but the court found that they had not demonstrated "circumstances sufficiently extraordinary to satisfy the rigorous test defining the type and degree of

against repeat players and wealthy parties, but they are unlikely to prevent people who are strongly opposed to oil and gas development near their properties from filing suit. A good example of how these two procedural mechanisms work together is *Baker v. Chevron* where, at the outset of a suit over a chemical plume from a refinery, the district court required all the personal injury plaintiffs to submit the names of their diagnosing physician and required the property damage plaintiffs to submit the full street address of their properties. *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2006 WL 2251821, *1 (S.D. Ohio Aug. 4, 2006). The adults who refused to comply were dismissed from the litigation. *Id.* at *2. This dismissal eventually proved to be a blessing for these plaintiffs and their attorneys because years later, when the case was finally dismissed, the court imposed Rule 11 sanctions for the remaining claims. *Baker v. Chevron U.S.A. Inc.*, No. 11-4369, 2013 WL 3968783, *17-*18 (6th Cir. Aug. 2, 2013) (unpublished).

C. The decision below includes contradictory language that may confuse courts and parties in a future proceeding.

The Court of Appeals adopted two different theories for rejecting the trial court order: first, that those orders are not allowed under Colorado law, and,

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misconduct that warrants Rule 11 sanctions." *Corlew v. Gen. Elec. Co*., 06 Civ. 0266 (VM), 2009 WL 130214 (S.D.N.Y. Jan. 14, 2009).

second, that the particular case before the court was not of sufficient difficulty and complexity to justify the order. In describing these two theories, the Court of Appeals in places implies that a *Lone Pine* order could be appropriate, while squarely holding in other sections of the opinion, or sometimes even in the same paragraph, that this procedural tool is never appropriate. This inconsistency holds the prospect of generating unnecessary litigation in future cases as parties selectively quote different sections of the decision in support of their positions, wasting the limited resources of the courts. The decision below does not bind other appellate panels, C.R.S. § 13-4-106, but as the first appellate ruling on this question it is certain to have a strong influence on parties and courts, particularly given this is an issue of first impression in Colorado.

For example, paragraph 18 of the decision below opens by saying "[w]e read these cases to stand for the proposition that a trial court *may not require* a showing of a *prima facie* case before allowing discovery on matters central to a plaintiff's claims." *Strudley*, 2013 WL 3427901, *4 (emphasis added). This appears quite definitive; the court has no discretion to issue these orders. The same paragraph ends, however, with the statement "although in some extraordinary circumstances a showing of a *prima facie* case may be required prior to discovery, such a requirement is generally disfavored." *Id*. There is a significant difference between

a "disfavored" procedure and one that is entirely unavailable, particularly in the eyes of a highly motivated litigant.

Because the *Lone Pine* order is such a useful procedural tool, defendants facing dubious claims and huge discovery costs will be strongly motivated to argue that this decision does not foreclose its use, and trial courts with potentially frivolous cases and crowded dockets will wonder whether this case management device is still available, and under what circumstances. Given these incentives, a strong, clear statement from this Court may be the only way to prevent extensive future motions practice on the question of whether these orders are available and under what conditions.

IV. CONCLUSION

This case presents an issue of great importance to the people of Colorado and the businesses that drive our economy. The decision below unnecessarily deprives the courts of a procedural mechanism that can help to organize cases, focus litigation on the critical issues, weed out meritless claims, and save time and resources, for litigants as well as the judiciary.

For these reasons, CPA respectfully supports Defendants' Petition for a Writ of *Certiorari*.

Dated this 30th day of August 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2013, a true and correct copy of the above ***AMICUS CURIAE*** **BRIEF OF COLORADO PETROLEUM ASSOCIATION URGING GRANT OF *CERTIORARI* IN THIS CASE** was served via ICESS to the following:

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