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COLORADO SUPREME COURT 2 East 14th Avenue, Fourth Floor Denver, CO 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals Case No.: 2021CA1856 Hons. Fox, Lipinsky, and Martinez	
Petitioners: **TERRA MANAGEMENT GROUP, LLC**, and **LITTLETON MAIN STREET LLC d/b/a MAIN STREET APARTMENTS** v. Respondents: **KATHLEEN AND DELANEY KEATEN**	▲ COURT USE ONLY▲
Attorneys for Respondents: Jason B. Wesoky, #34241 Kylie Schmidt, #49478 Ogborn Mihm, LLP 1700 Lincoln St., Suite 2700 Denver, CO 80203 Phone: 303-592-5900 Email: jason.wesoky@omtrial.com kylie.schmidt@omtrial.com Ross Ziev #43181 ROSS ZIEV, P.C. 8480 E. Orchard Rd., #2400 Greenwood Village, CO 80111 Phone: (303) 351-2567 Email: ross@helpincolorado.com	Case Number: 2023SC272

ANSWER BRIEF

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 contains 9,488 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Jason B. Wesoky

Jason B. Wesoky #34241
Kylie M. Schmidt #49478
OGBORN MIHM, LLP
1700 Lincoln St., Suite 2700
Denver, CO 80203
Phone: (303) 592-5900
Email: jason.wesoky@omtrial.com
kylie.schmidt@omtrial.com

Ross Ziev #43181
ROSS ZIEV, P.C.
8480 E. Orchard Rd., #2400
Greenwood Village, CO 80111
Phone: (303) 351-2567
Email: ross@helpincolorado.com
Attorneys for Respondents

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I. ISSUES PRESENTED FOR REVIEW

Whether common law requires a clear showing that a prelitigation party knew litigation would be filed or learned litigation was likely to trigger a pre-complaint duty to preserve evidence, or only requires that a prelitigation party should have known of the other party's potential damage and its potential liability.

The district court did not utilize an adverse inference to find causation, thus certiorari was improvidently granted or any error was harmless.

II. STATEMENT OF THE CASE

Colorado's spoliation standard stems from a great respect for the country's civil justice system. Our adversarial civil justice system is built upon a basic assumption that the trier of the fact will have access to relevant, factual information. Without access to the factual underpinnings of a dispute, the trier of the fact cannot seek the truth or provide justice.

Through that lens, this case about preserving evidence presents a more fundamental question about preserving the justice system broadly and ensuring the continued viability of trial itself.

A. Nature of the Case

Respondents, Kathleen and Delaney Keaten (the "Keatens"), proved at trial that Petitioners, Terra Management Group, LLC and Littleton Main Street LLC ("Landlord"), ignored a known danger that caused them permanent toxic brain injuries in violation of the Premises Liability Act ("PLA"), C.R.S. § 13-21-115(3)(c). The Hon. Frederick Martinez (ret.) presided over the eight-day bench trial in August 2021, weighed and considered the evidence, and made myriad credibility findings. In his 13-page opinion, the judge found Landlord: liable under the PLA; liable for exemplary damages (which required proof of willful and wanton conduct beyond a reasonable doubt); and engaged in willful and knowing spoliation. *See generally* Order.[1]

[1] Record citations are as follows: Court File = "CF"; Exhibits = "EX"; Transcripts = date of transcript (e.g. 8/3/21); District Court Order (Opening Br. Appx. A) = "Order"; Court of Appeals' opinion (Opening Br. Appx. B) = "Op."

From the extensive trial evidence (30-plus witnesses and 100-plus exhibits), it was clear the Keatens suffered toxic brain injuries caused by Landlord's willful and wanton conduct and breach of the PLA. Lay and expert witnesses testified about meth residue and fumes found in the apartment directly below the Keatens' unit that was 44-times higher than the allowed limit, even after Landlord extensively cleaned, painted, and replaced the carpet. Uncontroverted, objective medical testing, supported by expert testimony, proved both Keatens suffered contemporaneous and nearly identical toxic brain injuries despite their 30-year age difference. The downstairs tenant was arrested just days after eviction in possession of meth and her live-in boyfriend was previously convicted of manufacturing meth, facts conspicuously absent from the Opening Brief.

The trial court found causation independent of a spoliation-related inference. To the extent spoliation played any role in the findings, the trial court merely concluded Landlord "knowingly and willfully failed to preserve evidence and destroyed critical evidence which ***may have*** corroborated the Keatens' complaints."

Landlord seeks to not just reverse the judgment, but also establish a new legal regime that incentivizes evidence destruction and mandates everyone immediately hire an attorney. Landlord's proposal allows defendants to freely destroy evidence without consequence unless a lawsuit is filed, or a specific preservation letter is sent.

This topsy-turvey view of spoliation advocated for by Landlord and its amici would undo decades of settled law that takes a conservative, fact-specific, and case-by-case approach to evidence preservation.

The Court should affirm because the trial court correctly concluded the duty to preserve evidence was triggered when litigation was reasonably anticipated after the Keatens repeatedly told Landlord they had suffered injuries caused by a danger in the apartment Landlord knew about.

B. Facts[2]

Landlord owned and managed the Main Street Apartments where the Keatens resided since 2005. Order pp.2, 3. The Keatens lived in apartment 303E; directly below them was apartment 203E. *Id.* p.7.

1. Landlord had previously identified and remediated a meth lab.

In 2004, Landlord sent its employees to a class to learn how to spot meth use and labs since they are difficult to detect. 8/3/21, 149:4-151:1; CF p.2359. Just a week after training, employees identified a meth lab in the building. 8/3/21, 148:24-150:7; CF p.2161. Though no tenants had complained about chemical fumes, when the lab was discovered, Landlord's owner described the smell inside the meth apartment as "burn-your-eyes strong." 8/3/21, 35:9-14, 81:24-85:2; EX p.1849. Landlord paid for and performed air quality testing to detect toxic vapors associated with solvents used in meth production. 8/3/21, 145:9-146:7; EX p.1891. Propane tanks were also found. EX p.1889.

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[2] At this stage, facts may be less important than legal principles. Given the breadth of the trial court's decision and the case-specific nature of spoliation sanctions, and, as argued *infra*, because Respondents assert certiorari was improvidently granted and any error was harmless, the Court should thoroughly consider the facts presented at trial.

2. In 2018, the Keatens inform Landlord about dangerous chemical fumes from 203E and their injuries caused by the fumes.

In late 2017, the Keatens noticed chemical fumes coming from 203E below them, occupied by Melissa Lopez ("Lopez"). CF pp.1988, 2162. The Keatens called 911, but police couldn't get into 203E to investigate. EX p.1988. The Keatens repeatedly advised Landlord of chemical fumes and strange happenings coming from 203E. During this time frame, Landlord's critical employees knew about meth labs based on the 2004 experience. 8/3/21, 27:13-28:3 (owner J. Marc Hendricks), 132:12-25 (VP Debi Robertson).

March 2018

On March 15, the Keatens met with Property Manager Clancy Wells and Compliance/Asset Manager Sandy Werling to inform them about the fumes and other suspicious activity; they asked Landlord to do something. 8/2/21, 70:18-71:25. Delaney Keaten requested an air quality test. EX p.1993. Mr. Wells asked the Keatens if they "thought there was a meth lab." *Id.*

Unbeknownst to the Keatens, Wells was leaving his job the next day. Nonetheless, he created an "Incident Report" for management about

a suspected meth lab and included recommended steps Landlord should take, including: call 911, consult with Landlord's law firm (THS – Tschetter, Hamrick and Sulzer), and use its emergency powers to enter 203E during off hours.[3] 8/2/21, 66:5-12; EX p.1988. Landlord admitted that incident reports are used to prepare for a lawsuit and "protect" the Landlord in litigation. 8/4/21, 309:15-311:2.[4]

Expert testimony showed Wells' recommendations were "essentially…the standard of care" and "a plan that [Landlord] should undertake to conduct an investigation." 8/6/21, 140:25-141:25.[5] Landlord did not follow Mr. Wells' recommendations, educate employees on identifying meth labs, or inform the new property manager about the

[3] Management left each day at noon. 8/2/21, 106:16-107:8.

[4] Landlord camouflages this admission by claiming Mr. Well's email titled "Incident Report" was not a "formal" incident report. Opening Br. p.5, n.3. But Landlord admitted the only reason a "formal" Incident Report wasn't created was internal management issues. 8/4/21, 310:19-311:2.

[5] The trial court credited this expert testimony and found Landlord's property management expert's testimony to be "incredible and emblematic of Defendants' response to tenants' complaints," which the court characterized as "dismissive." Order p.5.

issue. CF p.2162; 8/3/21, 150:19-151:5, 186:18-189:21, 192:1-4; 8/4/21, 37:5-12, 246:16-22. Landlord breached the standard of care. 8/6/21, 140:25-141:25; Order pp.5, 9.

The Keatens repeatedly followed up with Landlord after the initial meeting as detailed in their subsequent letter. *See* EX pp.1993-94.[6]

April 2018

Hearing nothing more from Landlord, on April 5, Kathleen sent Landlord a detailed letter recounting her attempts to get the Landlord to do something. EX p.1991-94. She told Landlord:

> Chemical fumes rising from apartment 203…and entering our apartment through our windows and walls have been affecting our health….We are experiencing stinging, itchy, watery eyes, burning in our noses and throats, bloody noses, heart palpitations, difficulty breathing, shortness of breath, congestion, numbness on our gums and tongues, dizziness, headaches, difficulty concentrating, and irritability. **These symptoms are due to exposure to these chemical fumes and have been confirmed by a healthcare professional**.

[6] The letter also identified phone calls between the Keatens and Landlord. The audio captures Landlord's derision of and condescension towards the Keatens.

Id. p.1991 (emphasis added). Thus, in April **2018**, the Keatens informed Landlord of the source and pathway of the fumes, the cause of the Keatens' injuries, and details about the injuries.[7] The letter also told Landlord when the fumes were happening (between 9pm and 3am) and that they were accompanied by other bizarre and suspicious activity. *See* EX pp.1991-94 ("Jerry" was living with Lopez; a "heavy object or container" was moved "from the master bedroom to the master bath area"; "noise in or on the walls in the master bedroom that sounds like a hose or cable"; and "pounding, hammering, and tapping that sounds like something is being broken up on the counter."). All are "telltale signs" of meth lab activity. 8/6/21, 152:10-153:7. Still Landlord did nothing. 8/2/21, 195:8-205:8.

On April 12, Kathleen Keaten spoke with Landlord's employee Lydia Smith. EX p.1391. Ms. Smith claimed there was nothing more they could do, and they couldn't "pursue something that is not there." *Id*. Ms.

[7] Landlord claims, counter-factually, that the first time it learned about the Keatens' injuries, damages, and the cause was a demand in October 2019. Opening Br. pp.9-10.

Keaten spoke with Compliance/Asset Manager Ms. Werling the same day and asked about details of the inspection of 203E. *Id.*[8]

The Keatens contacted South Metro Housing Authority about odors coming from 203E; inspectors came to their home on April 24. EX p.3619-20; 8/3/21, 43:4-13. The Keatens' unit failed inspection due to a chemical odor from 203E. *Id.*; Order p.4.

May 2018

On May 8, Landlord requested police reports for 203E. Police reports showed that non-tenant "Jerry" Gibson used illicit narcotics, had been drunk and high in front of police, and lived in 203E. EX pp.1946-1949; 1954-1961. A March 6, 2018 police report revealed Gibson was present in the apartment with a chemical smell; Gibson unbelievably claimed he was cleaning the microwave with bleach at 1:30am. EX pp.1977-1985, 1988. Gibson had spent five years in prison for felony meth manufacturing. EX pp.1807-1823.

[8] Landlord claim it repeatedly inspected 203E. In violation of its policies, however, records of communications and inspections were never created or thrown away. *See* 8/2/21 100:5-15; 8/3/21 180:15-181:22, 229:24-230:12.

On May 22, Keatens sent another letter to Landlord complaining about fumes and noises coming from 203E. EX p.2016-17. Their symptoms were getting "increasingly worse," and they continued to "fear for their welfare." EX p.2016. They also pushed back on Landlord's view that nothing was going on and nothing needed to be done. EX p.2016-17.[9]

July 2018

In July, the Keatens again said they were concerned a meth lab was in operation. 8/2/21, 132:18-133:12. In late July 2018, Landlord sent a warning to Lopez in 203E for "conduct[ing] a business" because Landlord found solvents (acetone) in her apartment that Lopez claimed weree used for "furniture repair." EX p.2029; 8/2/21, 104:16-105:14. Solvents are frequently used in meth production. 8/3/21, 42:10-21; 253:25-254:9.

3. Landlord evicts 203E in August 2018 for failure to pay rent but fails to preserve any evidence.

Lopez was evicted on August 28, 2018 for failure to pay rent. 8/2/21, 102:9-11. At that point, Landlord knew about the Keatens' injuries; that

[9] Keatens' neighbor across the hall, Ms. Austin, testified that in 2018 she smelled odd, metallic fumes and wondered if it was meth. 8/6/21, 117:6-120:19.

203E was a source of chemical fumes; that the Keatens' injuries were caused by exposure to the fumes; that Landlord should consult its lawyers; that an Incident Report was created, which is used to "protect" the Landlord in litigation; and that Keatens' exposure to chemical fumes could give rise to legal claims. EX pp.1977-85, 1988, 1991; 8/2/21 104:16-105:14; 8/4/21, 307:5-21, 309:15-311:25 (questioning by Judge Martinez)). In fact, as Landlord admitted, "[w]hen the Keatens notified [Landlord] that they were injured, [Landlord] knew that there was a risk of a lawsuit." 8/4/21, 307:5-21.

Upon eviction, 203E "smelled" like "ammonia," a smell commonly found in meth labs, and the smell was so bad it "burn[ed] your eyes," just like the 2004 meth lab. 8/2/21, 109:2-8; 8/3/21, 81:24-85:1, 219:15-24; 8/6/21, 153:8-15.

Violating its own policy, Landlord did not take photos during 203E's eviction. 8/4/21, 300:21-303:1. The Keatens took photos from a far distance of some items removed from 203E. EX pp.2041-2065. None of the apartments have a patio/deck and Lopez was not on supplemental oxygen, but the photos show propane and gas tanks, which are frequently

found in meth labs. EX pp.1889, 2041, 2060; 8/2/21, 95:10-18; 8/3/21, 38:20-39:2. The bathtub in 203E was also heavily stained and there was a "clean cut" hole in the drywall that connected the master bedroom and the bathroom. 8/2/21, 114:2-115:1; 8/3/21, 220:4-12.

Landlord quickly fixed up 203E to re-rent it – replacing carpet and repainting the entire unit. 8/2/21, 115:8-20. Despite Landlord having access to advice from a law firm and an industrial hygienist, it consulted neither. 8/2/21, 137:9-22; 8/4/21, 18:22-20:2.

Landlord failed to preserve evidence at the eviction and failed to test 203E for meth at any time. 8/3/21, 49:16-51:1, 221:4-12. Landlord's refusal to test contradicted its policy of testing when there were claims of unsafe conditions by tenants. 8/3/21, 49:6-11. Owner J. Marc Hendricks assumed Landlord would have tested the apartment based on the Keatens' allegations. 8/3/21, 50:15-51:1. Still, Landlord claimed that not testing was reasonable. 8/4/21, 12:21-14:25.

4. Exposure to chemical fumes causes Keatens significant permanent brain injuries.

Landlord regularly worked with an industrial hygienist for over a decade whom it knew could test for meth. *Id.* 18:22-20:2. After Keatens

testing 303E in 2019, Landlord hired this industrial hygienist, but did not test 203E. 8/3/21, 288:11-20; 8/4/21, 9:24-11:15. The district court had to order Landlord to test 203E, which occurred in September 2020. CF pp.389, 2069. All tests showed meth contamination in both units – in some cases at extreme levels. *See, e.g.* 8/4/21, 78:21-81:10.

Delaney Keaten's psychiatrist, Dr. Theodore Henderson, had been treating her for about 15 years. 8/4/21, 240:24-241:4. He saw Delaney in November 2017 and she was doing very well. 8/5/21, 99:25-19. When he next saw her in October 2018, he noticed dramatic changes – she had memory problems, was slow, delayed, and stumbling speech, dizziness/balance issues, and respiratory symptoms. 8/4/21, 15:8-21, 256:7-257:20; 8/5/21, 15:18-16:2. He ordered neuropsychological testing for both Delaney and Kathleen. 8/4/21, 257:17-20. Testing showed both had cognitive impairment akin to an elderly dementia patient, yet Delaney was only 28 years old. *Id.* 259:18-260:1, 260:22-262:12; 8/5/21, 17:3-17. Kathleen also had dizziness, memory issues, and respiratory problems. *Id.*

Both occupants of the same residence developing the same significant cognitive problems with the same diagnosis of toxic brain injuries pointed towards a common cause or event. 8/5/21, 13:3-11, 20:24-21:12, 24:19-21, 120:11-22, 137:8-19. Dr. Henderson's toxic brain injury diagnosis was confirmed by SPECT brain imaging, which he and nuclear medicine specialist Dr. Michael Uszler both read. *Id.* 21:25-23:22, 134:6-136:15. These brain injuries are difficult to treat and are permanent. *Id.* 27:22-28:4, 123:14-124:10.[10]

Additional, objective ocular testing that cannot be faked showed dysfunctional and involuntary eye movements. 8/6/21, 26:17-28:14. That both Kathleen's and Delaney's testing results were similar not only demonstrated brain injury, but also that the "mechanism of the brain injury was the same for both of them." *Id.* 26:2-16.

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[10] Landlord callously says how "devastating" this case is for it. Opening Br. p.2. Landlord's worst outcome is that a single-asset real estate entity, which is part of a larger low/moderate income real estate empire owned by J. Marc Hendricks, has filed bankruptcy and will never pay the full amount owed. The Keatens are **permanently brain damaged with functioning akin to dementia** – a problem bankruptcy cannot solve.

C. Procedural History

Landlord received the Keatens' demand letter in October 2019. EX p.4898. Landlord did not preserve evidence or test 203E at that time. Order p.6. The first time Landlord tested inside 203E (the source) was September 29, 2020, about 10 months after the Complaint was filed. CF p.4691. And that only happened because the court ordered it over Landlord's objection. Order p.6; CF pp.382-86.

Landlord claims it couldn't stop Lopez and Gibson without the police or South Metro Housing, but Landlord chose not to name Lopez, Gibson, the police, or South Metro Housing as non-parties at fault. Landlord did, however, assert counterclaims against the Keatens; claimed they were comparatively negligent, assumed the risk, and/or failed to mitigate because they did not move out of their apartment; and alleged they were the source of meth. *See* CF pp.1171-1176, 1385. The court flatly rejected each assertion. *See* Order pp.6, 10, 11, 13.

After the bench trial,[11] the court issued findings of fact and conclusions of law on August 27, 2021. CF pp.2159-2172. The court cited direct and circumstantial evidence in its detailed order to support its causation finding. The court found Keatens' expert's "fundamental premise credible: Higher concentrations of contaminants point to the source…. In other words, the source of the methamphetamine residue began in Unit 203E and migrated to the Keatens' apartment immediately above….The Court **FINDS** that the source of the methamphetamine fumes in the Keatens' apartment (Unit 303E) came from Unit 203E." Order p.6.

The district court's causation findings did not rely on spoliation or an adverse inference. The court found that "Defendants knowingly and willfully failed to preserve evidence and destroyed critical evidence which **may have** corroborated the Keatens' complaints." Order p.5 (emphasis added). Independent of any spoliation, the district court found the source of fumes was 203E and that the fumes caused Keatens' injuries. Order

[11] The court enforced the jury waiver provision in the Keatens' lease over objection that it was unconscionable.

pp.6, 7, 9.[12] The court not only found that, under the PLA, Landlord knew of a danger, failed to take reasonable steps to protect against the danger, and that the Landlord's acts and omissions caused the Keatens' damages, but also found **beyond a reasonable doubt**, the Landlord's "acts and omissions were committed purposefully and recklessly" and that Landlord "consciously disregarded the known risk of ongoing harm to Plaintiffs." Order p.12.

The district court's adverse inference findings consist of a single sentence in the 13-page order: "This Court draws a negative inference regarding Defendants' conduct and the destruction of evidence which would have established a link in the chain of evidence against it." Order pp.9-10.

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[12] Landlord falsely claims the district court "struggled with how unproven meth fumes could have traveled from the downstairs unit to Plaintiff's upstairs unit." Opening Br. p.12. The court merely stated the "exact pathway" was unclear, but it was clear that the downstairs unit was the "source of the" meth fumes and that they "migrated to the Keatens' apartment immediately above." Order p.6. Multiple witnesses testified fumes and smells easily migrated between apartments and that lower meth concentrations were found in the Keatens' apartment while higher concentrations were found in the unit below. *See e.g.,* 8/2/23, 126:19-127:6, 136:4-19; 8/4/21, 127:13-128:8.

The Court of Appeals affirmed on all grounds in a unanimous, unpublished opinion authored by Justice Alex Martinez (ret.). The court rejected Landlord's argument that an adverse inference was the lynchpin to the district court's causation findings. Op. ¶34 ("[T]he district court cited to multiple **factual findings** that supported its holding that a meth lab existed in Unit 203E, and the toxic fumes caused plaintiffs' injuries." (emphasis added)). The court pointed to the district court's reliance on experts, testing, the housing inspector, and the contemporaneous brain injuries both Keatens suffered. *Id*. The court determined such evidence "**established causation without relying upon the adverse inference** to establish a pathway between the apartments." *Id*. (emphasis added).

The court also rejected Landlord's assertion that an adverse inference was required to find a pathway for the meth fumes. *Id.* ¶35 (the district court "inferred a pathway for the fumes based on conflicting evidence."). The court reaffirmed the district court's conclusion that additional evidence may have been found absent spoliation: "it is not an abuse of discretion for the district court to imply that **more evidence on**

the causation issue would have been discovered if defendants had not failed to preserve" evidence. *Id.* (emphasis added).

After the Court of Appeals issued its decision, Landlord moved to have the opinion published, which the court denied.

III. SUMMARY OF THE ARGUMENT

The Court should reaffirm existing law establishing that the duty to preserve evidence is triggered when a reasonable party in similar circumstances would reasonably foresee litigation. Enforcing the duty to preserve evidence in potential litigation is a centuries-old tradition and indisputably part of the courts' inherent powers.

Although the tests for spoliation vary, all American courts recognize spoliation sanctions. And, treating the moment of reasonable foreseeability as the trigger for preservation has been consistently reaffirmed in Colorado. This test is objective and prospective. Meanwhile, changing the law to import a subjective and retrospective test will result in chaos, require everyone to call a lawyer as soon as there might be a claim to help trigger preservation duties, and incentivize evidence destruction. Thus, the Court should reaffirm the sound holdings of

Castillo v. Chief Alternative, LLC, 140 P.3d 234, 236 (Colo. App.2006) and *Warembourg v. Excel Elec., Inc.*, 471 P.3d 1213, 1225 (Colo. App.2020) – the duty to preserve evidence begins when a reasonable party in similar circumstances would reasonably foresee litigation.

Alternatively, the Court should find the petition was improvidently granted or any error finding spoliation was harmless. The district court's decision and causation findings were grounded by record evidence, not an adverse inference. Because factual issues decided by the trial court are not at issue, the Court should not use this case to issue a sweeping decision on the duties of evidence preservation. The district court's conclusion that Landlord willfully and knowingly destroyed evidence is uncontroversial, well founded in evidence, and Landlord cannot point to any case where willful and knowing spoliation has not been sanctioned. Any opinion this Court renders on spoliation would be advisory and would not "affect the matter in issue before it." *Tippett v. Johnson*, 742 P.2d 314, 315 (Colo. 1987).

IV. STANDARD OF REVIEW

A trial court's imposition of an adverse inference is reviewed for abuse of discretion and will not be overturned "unless the sanction is manifestly arbitrary, unreasonable, or unfair." *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002 (Colo.2006).

V. ARGUMENT

A. Courts Have the Power to Impose Pre-Litigation Duties to Preserve Evidence and Have Done So For Centuries.

A bedrock principal of Anglo-American law is that courts are empowered to require potential litigants to preserve evidence. Spoliation is an ancient concept. "In Rome, where businessmen were obliged to keep a written record of their affairs **for a particular period of time**, the maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the wrongdoer) was applied with much harshness and a claimant could be denied his claim, or found to have committed fraud, if he did not produce the documents when required." *McDougall v. Black & Decker Canada, Inc.*, 2008 Alberta Court of Appeal 353 at ¶15 (emphasis

added).[13] *See also Mead v. Papa Razzi*, 899 A.2d 437, 446 (R.I. 2006) (Suttell, J., dissenting). In this country, the same doctrine and power has been recognized for over 200 years.

"[O]ur courts no doubt possess powers not immediately derived from statute." *United States v. Hudson*, 11 U.S. 32, 34 (1812). "Certain implied powers must necessarily result to our courts of justice from the nature of their institution. …To fine for contempt…are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others." *Id.*[14]

In Colorado, at least as far back as 1888, courts have recognized the inherent power to prevent someone who destroys evidence from

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[13] https://www.canlii.org/en/ab/abca/doc/2008/2008abca353/2008abca353.html#par15 (visited March 15, 2024).

[14] *Pena v. District Court*, 681 P.2d 953, 956 (Colo.1984), articulates a modern version of this idea: courts' inherent powers "consist of: [A]ll 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. These powers are inherent in the sense that they exist because the court exists; the court **is**, therefore it has the powers reasonably required to act as an efficient court." (quoting Jim R. Carrigan, Inherent Powers and Finance, 7 Trial 22 (Nov.-Dec. 1971)).

capitalizing on it. *See Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 223, 235 (1888) ("the wrong-doer must suffer from the confusion he has created, or the want of evidence which he has made it impossible for his victim to produce. … [N]o man shall take advantage of his own wrong"). And, since at least 1936, Colorado has recognized that the "willful spoliation or destruction of papers which might contain adverse evidence gives rise to a presumption unfavorable to the one responsible therefor, since his conduct may properly be attributed to his supposed knowledge that the truth would operate against him." *In re Holmes' Est.*, 56 P.2d 1333, 1335 (Colo.1936). Miss Holmes destroyed papers before suit was filed. *Id.* Thus, longstanding Colorado precedent has put all potential litigants on notice that destroying evidence may result in an adverse inference.

Further, the rules of evidence explicitly contemplate pre-litigation duties to preserve documents before a lawsuit. Under C.R.E. 1004(3), the original of a document is required unless, *inter alia*, "At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings **or otherwise**, that the contents would be

a subject of proof at the hearing, and he does not produce the original at the hearing." (emphasis added).

This "best evidence rule" traces its roots back to at least the 1800's, long before codification, where courts discussed spoliation alongside production of original documents; at no point was the power of a court to preclude evidence or allow the non-spoliating party to prove documents through parol evidence questioned. *See, e.g. Askew v. Odenheimer,* 2 F. Cas. 31, 35 (C.C.D. Pa.1831) (discussing proof required of documents that have been destroyed and noting that spoliation is akin to fraud); *Life & Fire Ins. Co. v. Mech. Fire Ins. Co.*, 1831 WL 3029 (N.Y. Sup. Ct.1831) (once a party establishes opponent possessed the original, the party can present parol proof of the contents and make an "inference or intendment on account of their non-production").

In *Count Joannes v. Bennett*, 87 Mass. 169 (1862), the defendant wrote a letter defaming the plaintiff, the plaintiff's intended wife gave him the letter, and the plaintiff purposely burned the letter before filing suit. At trial, plaintiff testified to the contents of the letter, but the appellate court reversed, finding:

> the inference is that the purpose of the party in destroying it was fraudulent, and he is excluded from offering secondary evidence to prove the contents of the document…. If such were not the rule,…great opportunities would be afforded for the commission of the grossest frauds. A person who has wilfully [sic] destroyed the higher and better evidence ought not to be permitted to enjoy the benefit of the rule admitting secondary evidence. He must first rebut the inference of fraud which arises from the act of a voluntarily destruction of a written paper, before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case.

Id. at 172-73.

Requiring potential litigants to preserve evidence protects the integrity of the justice system. *See Rodriguez v. Schutt,* 896 P.2d 881, 883 (Colo. App.1994), *aff'd in part, rev'd in part,* 914 P.2d 921 (Colo.1996) (discussing adverse inferences for destruction of evidence as established in Colorado); *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 204 (Colo. App.1998) ("denying the court the inherent power to award sanctions…where evidence has been intentionally destroyed—would only encourage unscrupulous parties to destroy damaging evidence before a court order has been issued."). Thus, courts' longstanding ability to ensure pre-litigation wrongdoing doesn't undermine the judicial process is not only valid when accompanied by a rule or statute – it is an inherent

power of the judiciary. Enforcing the duty to preserve evidence absolutely falls within the ambit of occasions upon which courts must act to preserve the integrity of the system.

With that understanding, there is no legitimate distinction between inherent powers to impose sanctions (e.g., Rule 37 sanctions) and prelitigation duties to preserve evidence. *See* Opening Br. pp.25-26. A core purpose of any sanction is to deter others, including potential litigants, from engaging in conduct determinantal to justice. *See* C.R.C.P. 37 (civil discovery sanctions) *and Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643 (1976) (purpose of Rule 37 sanctions includes to "deter those who might be tempted to such conduct in the absence of such a deterrent"); C.R.Crim.P. 16 (criminal discovery sanctions) *and People v. Tippet,* 2023 CO 61, ¶36 (sanctions "serve the dual purposes of protecting the integrity of the truth-finding process and deterring discovery-related misconduct); C.R.S. § 13-21-107 (exemplary damages) *and Blood v. Qwest Servs. Corp.*, 224 P.3d 301, 316 (Colo. App.2009), *as modified on denial of reh'g* (June 20, 2011) (exemplary damages "deter and punish"). It follows that sanctions for conduct that is

offensive and damaging to the system – whether it occurs before after litigation – are an integral court function.

And, of course, there are a variety of circumstances in which courts can control legal proceedings before a complaint is filed. For example, C.R.C.P. 27 permits pre-litigation depositions, and Rule 11 permits courts to sanction failures to investigate a claim prior to filing suit. The notion that a court's power begins only the moment suit is filed (or when a party subjectively thinks a lawsuit is "imminent"), and all conduct before that moment is out of the court's reach, is simply untrue.

Potential parties, like Landlord, have been on notice for centuries that they have the duty to retain and produce relevant evidence. If that duty is breached, sanctions can be imposed. This Court should reject Landlord's argument that this Court lacks the power to impose pre-litigation preservation duties.[15]

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[15] The very concept of common law is a corollary. A court deciding a common law tort case establishes duties that apply to everyone. And common law torts exist to "deter wrongful conduct" by others. *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002). Those duties do not arise from a statute or rule. Landlord surely is not contending courts lack the power to issue decisions that create common law duties.

B. The District Court Applied the Correct Spoliation Standard to Impose An Adverse Inference Because the Duty to Preserve Evidence Begins When Litigation is Reasonably Foreseeable.

This Court should not overlook the fact that the district court found Landlord "knowingly and willfully failed to preserve evidence and destroyed critical evidence" in this case. Order p.5.[16] Landlord has not cited any case standing for the idea that willful and knowing spoliation is not sanctionable.

Landlord cites a few inapposite cases to confuse the issues by asserting this Court has never recognized a "general duty" to preserve evidence and that there's a "consensus" no general duty exists. Opening Br. pp.23-24. But a "general duty" to preserve evidence is only relevant in the context of whether there is an independent tort or claim for spoliation, as the cases Landlord relies upon show. *Id.* p.23.

In Washington, courts have not imposed a general duty to preserve evidence in the context of "negligent destruction of evidence," which it found could not "support an adverse inference," but said that case law

[16] Willful spoliation, almost by definition, shows Landlord destroyed the evidence because it knew it would adversely impact it during litigation.

supported an adverse inference if there was bad faith or gross negligence. *Cook v. Tarbert Logging, Inc.*, 360 P.3d 855, 867 (Wash. App.2015). *But see id.* ("it might be time for Washington to reexamine whether it should recognize the existence of a general duty to preserve evidence."); *J.K. by Wolf v. Bellevue Sch. Dist. No. 405*, 500 P.3d 138, 150 (Wash. App.2021) (duty to preserve when destruction was intentional, defendant knew importance of evidence, and had internal policy to preserve video).

Illinois has said no general duty exists in the context of whether a separate claim for spoliation can be brought, but preservation is required when there is, *inter alia*, a "special circumstance" and it was foreseeable "that the evidence was material to a potential civil action." *Martin v. Keeley & Son, Inc.*, 979 N.E. 2d 22, 28, 31-33 (Ill.2012).

New Mexico cases are likewise inapt because New Mexico recognizes an independent tort for intentional spoliation, which eliminates the need for sanctions. *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 189 (N.M. 1995).

1. Colorado courts have consistently and correctly imposed a prelitigation duty to preserve evidence when litigation is reasonably foreseeable.

In addition to the centuries of law discussed supra, in *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 1000 (Colo.2006), this Court affirmed sanctions when the railroad destroyed critical documents it was obligated to retain for at least 92 days.[17] Subsequent cases implemented the same approach outlined by scores of state and federal courts, which requires potential litigants to preserve evidence once litigation becomes reasonably foreseeable. *See, e.g., Castillo*, 140 P.3d at 236; *Warembourg*, 471 P.3d at 1225; *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir.2011); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir.2001); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999); *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir.2009); *Kippenhan v. Chaulk Servs., Inc.*, 697 N.E.2d 527 (Mass.1998).

[17] Landlord uses *Aloi* to claim preservation is only triggered when litigation is imminent because the plaintiff there, a train conductor in a highly regulated industry, had an attorney notify the railroad of a potential suit a week after injury. *Id.* at p.1000-1001. Not everyone has attorneys so quickly available. But the world Landlord wants where the duty to preserve only attaches once litigation is filed or "imminent" would require everyone to immediately hire a lawyer and/or file suit. *See* Section V.D *infra*.

The reasonable foreseeability standard is flexible and allows courts to evaluate spoliation and sanctions on a case-by-case basis. *See Warembourg*, 471 P.3d at 1225.[18] The reasonable foreseeability standard "does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation," though Landlord fears otherwise. *Micron Tech., Inc.*, 645 F.3d at 1320. Moreover, this standard does not require "that litigation be imminent." *Id.* (noting that appellant misread opinions cited in his brief that discussed imminent litigation, finding those cases "merely noted that imminent litigation was sufficient, not that it was necessary for spoliation"). This Court should "decline[] to sully the flexible reasonably foreseeable standard" by requiring imminent litigation and avoid the "unnecessary generosity that such a gloss would extend to alleged spoliators." *Id.*

Requiring imminent or actual litigation is the sort of line-drawing that courts typically avoid. After all, Landlord knew in early 2018 it should consult its lawyers and that Keatens were "afraid for their

[18] Judge Lipinsky authored *Warembourg*. He was also on the Court of Appeals panel in this case and concurred in the Opinion.

welfare" and that "this was a dangerous situation." EX pp.1988, 1991-1994. Despite this knowledge, on August 28, 2018, Landlord evicted Lopez but failed to take photos or preserve any evidence contrary to its own policy. 8/3/21 110:13-20, 115:21-116:3; 8/4/21, 300:21-303:1.

At each moment, litigation could be deemed "imminent" if a lawsuit was filed within a week or a month. But because the Keatens sought a thorough investigation and tried to avoid litigation, the lawsuit wasn't filed within a week or a month. So, Landlord claims it had no preservation duty.

This shows the folly of Landlord's "imminent" standard – it is a **retrospective and subjective** evaluation. Retrospective because determining whether evidentiary destruction was wrongful is dependent on looking back from the date suit was filed. Subjective because it is based on what the spoliating party believed to be "imminent." If a year passes between threat of suit and filing, would destroying evidence two months after the threat, but 10 months before suit, be acceptable? What if suit is filed three months after the threat? Landlord's proposed

brightline spoliation scheme dims as its real implications are illuminated.

The reasonably foreseeable standard, on the other hand, is **objective and prospective**. Objective because it is based on a reasonable person in similar circumstances. Prospective because it is based on the when the wrongful conduct occurred and not an arbitrary filing date.

2. The lower courts got it right – a reasonable party in the same factual circumstances would have reasonably foreseen litigation.

The district court correctly found Landlord had to preserve evidence because a reasonable party in these circumstances would have easily foreseen litigation. Landlord's employee, Sandra Werling, admitted during trial that "[w]hen the Keatens notified [Landlord] that they were injured, [Landlord] knew that there was a risk of a lawsuit." 8/4/21, 307:5-21. Under questioning by Judge Martinez, Ms. Werling agreed that an Incident Report, which would have been created based on the Keatens' reports "had there not been [a] shuffling of managers," is used "to protect

yourself in any event of further litigation." *Id.* 310:19-311:2. *See* fn.4 *supra*.

After evicting 203E, Landlord repaired drywall, replaced carpets, sealed the floor, painted, repaired a large hole in the drywall (which is another pathway for contamination) and cleaned. 8/2/21, 114:2-115:20; 138:4-6. These efforts destroyed evidence that "may have corroborated" the Keatens' claims by, *inter alia*, reducing methamphetamine concentrations and prevented discovery of direct contamination pathways. 8/4/21 75:7-77:24.

The evidence Landlord destroyed prevented Keatens from assessing the full extent of contamination in 203E. The greater the contamination, the more likely it would infiltrate Keatens' apartment via infiltration/migration.[19]

Landlord doesn't contest that the evidence it destroyed was relevant and material. Landlord only claims the lower courts misapplied

[19] Since meth residue was found at 44-times the allowed limit two years and multiple acts of spoliation later, one can reasonably infer how toxic the air, walls, and carpet would have been had testing occurred much earlier.

decades, if not centuries of law, such that its duty to preserve evidence was never triggered. But Landlord's manager suggested it should contact counsel and the police and created an Incident Report documenting Keatens' complaints and injuries in order to protect itself in the event of litigation. 8/4/21, 310:19-311:2; Ex. 1988.

If that weren't enough, Landlord was also given specific and detailed information from independent third parties – including the Housing Authority and the police – which indicated a meth lab in 203E (chemical smells and a suspect story about cleaning the microwave in the early hours of the morning). EX pp.1977-1985, 1988, 2004, 2006. And, Landlord found solvents in Lopez's apartment, which it knew were used to make meth. 8/3/21, 139:17-140:22

A reasonable party would have at least performed some testing while Lopez lived in 203E to preserve evidence, which was simple and easily done. *See e.g.* 8/4/21, 12:5-13:8, 18:22-20:2. The district court's finding that Landlord failed to act reasonably was well-founded in both law and fact. The Court of Appeals' unanimous, unpublished affirmance

applied the correct standard and came to the correct conclusion. This Court should affirm.

C. Landlord's Proposed Rule is Dangerous and Will Create Chaos.

Gathering factual information is at the "core of our civil discovery system." *United Medical Supply Co. v. U.S.*, 77 Fed. Cl. 257, 259 (2007). Allowing Landlord's spoliation regime would destroy that core.

Despite knowing Keatens' injures were caused by chemical fumes in 203E, they requested air quality testing, and keep Landlord informed of their worsening medical conditions Landlord conducted no air quality tests while fumes were present, violated its own policy to photograph during an eviction, failed to save any carpet samples, and painted the entire unit multiple times. Landlord's spoliation came after several detailed complaints by the Keatens about injurious toxic fumes in 203E and their resulting injuries.

Under these facts, which constituted willful and knowing destruction, Landlord asks this Court to degrade courts' ability to hold wrongdoers accountable. Its proposed system would both turn a blind eye to spoliation and encourage it. The Court should reject Landlord's unique

view of spoliation and reaffirm the well-established standard: when a reasonable party in the same or similar circumstances would reasonably foresee litigation, the party must preserve relevant evidence. *See Castillo, LLC*, 140 P.3d at 236; *Warembourg*, 471 P.3d at 1225.

Under Landlord's spoliation scheme, a potential litigant need not preserve evidence until it knows a lawsuit is filed or a lawyer sends a letter requesting specific items be preserved – a general letter will not do. *See* Opening Br. p.30; Brief of Amicus Curiae Colorado Defense Lawyers at p.17 (preservation letters "should be enforced by the court **only** upon a showing that the evidence subject to preservation was **specifically identified**, and **only** upon showing that the evidence was relevant to and would be admitted into the future litigation." (emphasis added)). Particularly in tort cases and employment cases,[20] this puts the potential defendant, who often controls nearly all relevant evidence, in the cat bird's seat and incentivizes immediate evidence destruction before a potential plaintiff even knows what hit them.

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[20] *See generally*, Plaintiff Employment Lawyers Association Amicus Brief submitted in this case.

Take, for example, a hospital that decides to save few bucks by not adequately sterilizing its surgical instruments, causing death and permanent injury to hundreds, if not thousands, of patients. Under the scheme Landlord proposes, once the hospital found out its money-saving anti-sterilization policy was causing harm, it could create a strict destruction policy that requires destruction of all documents and other items associated with the scheme. Thus, before a patient wakes from a spine surgery where a dirty scalpel caused her a near-lethal infection, evidence critical to a lawsuit is destroyed. The hospital could easily rely on Landlord's spoliation regime to claim innocence; no lawsuit was imminent and no "specific" spoliation letter was received before destruction.[21]

Landlord's spoliation regime requires everyone to lawyer-up immediately and even encourages lawsuits. This would overwhelm the courts and cause defense and preservation costs to skyrocket – the very

[21] This Court is familiar with *Camp et al. v. Adventist Health System Sunbelt Health Corporation et al.*, 2020 SA 331, having heard arguments and reviewed briefing on Porter Hospital's attempt to suppress documents obtained pursuant to the Colorado Open Records Act.

thing Landlord's amici claim to be concerned about. Every car crash, slip-and-fall, malpractice, construction defect, act of discrimination, or breach of contract would all immediately require lawyers to send letters or lawsuits be filed to ensure the defendants preserved evidence. This would basically invert the typical process that leads to civil lawsuits.

Often, it takes years for potential plaintiffs to determine whether they have a viable claim. Once they do, most try and resolve it without litigation. An injury may not be that bad at first, but ultimately requires surgery. The injured person calls the insurance company and tries to settle. A fired employee later learns they were fired because of a disability or their race. She sends a letter to the former employer and tries to work out a resolution. A supplier contracts with a delivery company but the delivery company terminates the contract. The supplier scrambles to find another delivery service (at a higher price) and tries to work it out with the original delivery company. A loved one dies at the hospital, but the family learns later that it might be due to medical negligence. They meet with hospital administrators and the doctor to try and resolve things. In these everyday situations, people often do not hire an attorney until very

late in the process and may not file a lawsuit until there is no other option. Adopting Landlord's worldview, though, means filing suit is the first and only option.

Once filed (likely prematurely), there would be motions to dismiss, claims of Rule 11 violations, and demands for attorneys' fees pursuant to C.R.S. § 13-17-201. Courts would have thousands more cases to handle on their already over-burdened dockets.

Beyond this obvious problem, Landlord's spoliation regime creates absurd results relative to the work product doctrine. The work product doctrine protects discovery of documents prepared in anticipation of litigation. But if a party anticipates litigation, though litigation isn't "imminent," the party could simultaneously destroy evidence while protecting everything else.

Landlord's proposed spoliation scheme is untenable and should be rejected. Any decision on spoliation duties this Court issues should reaffirm the near-universal standard: the duty to preserve evidence for any party begins when a reasonable party in similar circumstances would reasonably foresee litigation.

D. The District Court Did Not Rely on the Adverse Inference To Find Causation. Thus, Certiorari Was Improvidently Granted Or Any Error Was Harmless.

A writ of certiorari may be dismissed as improvidently granted even after oral argument on the merits. *Larson v. Goodman*, 493 P.2d 365 (Colo. 1972); *The Monrosa, etc., et al v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959) ("Examination of a case on the merits, on oral argument, may bring into 'proper focus' a consideration which, though present in the record at the time of granting of the writ, only later indicates that the grant was improvident."); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78 (1955) (noting that there is nothing unique about dismissal (of writ of cert) even after full argument). As relevant here, the reason for dismissing this writ as improvidently granted is that the case involved only a factual issue. *See Erickson v. City and County of Denver*, 500 P.2d 1183 (Colo. 1972).

Error in a civil case is harmless if it did not affect a substantial right of a party. C.R.C.P. 61. An error affects a substantial right only if "it can be said with fair assurance that the error substantially influenced

the outcome of the case or impaired the basic fairness of the trial itself." *Banek v. Thomas*, 733 P.2d 1171, 1178 (Colo. 1986).

During oral arguments in a recent case (*Scholle v. Ehrichs*, 2022 SC 639), Justice Gabriel questioned petitioners about an issue that strikes at the heart of the issue here. Looking at the trial court's order, he commented:

> This is a well-respected judge — my memory is he was an insurance defense lawyer — who gave six reasons for good cause here. Five of them are not contested. So, your argument is that that sixth one, even assuming he got it wrong, so overrode all the other five that we need to look at it again. I have some difficulty accepting that.

Argued November 14, 2023.[22]

That same concept applies here, but even more starkly. The trial Court devoted **13 pages** to facts and findings. **One sentence** mentioned the adverse inference that could be made from spoliation.

Meanwhile, the independent bases for the court's conclusions were overwhelming. This was a PLA case, and the court extensively considered the relevant questions, including whether 1) Landlord knew or should

[22] https://cojudicial.ompnetwork.org/embed/sessions/280019/22sc639-22sc450 (at 47:12-47:40) (visited March 20, 2024).

have known of a danger; 2) Landlord unreasonably failed to protect against the danger; 3) Keatens suffered injuries and damages; and 4) Landlord's failure to exercise reasonable care was a cause of their injuries. *See* CJI 12:3. The district court's factual findings on these four items were all supported by evidence free from any adverse inference.

1. *Landlord knew or should have known of a danger – toxic fumes from meth.*

Overwhelming evidence showed Landlord knew Keatens were exposed to chemical fumes created by meth use or manufacturing coming from 203E. Op. ¶14; Order pp.4, 8; EX pp.1988, 1991-94. It was Landlord who asked Keatens if they "thought there was a meth lab." EX p.1993. A housing inspector also found a chemical smell was coming from Unit 203E. Order p.8; 8/4/21, 92:15-93:7. Expert testing found meth residue in Unit 203E and the Keatens' apartment with significantly higher concentrations in Unit 203E indicating it was the source. 8/4/21, 78:21-81:10, 118:15-119:14, 121:18-122:23; Order p.6.[23] Landlord admitted that

[23] *See* fn.18 supra.

fumes are dangerous and no one should be exposed to them for even one day. Order p.9; 8/4/21 21:14-25.

Landlord's employee, Debi Robertson, testified that when she was told about the Keaten's complaints, it reminded her of the 2004 meth lab. 8/3/21, 134:16-25. Unit 203E had telltale signs of being a meth lab: the ammonia smell burned your eyes (8/2/21, 108:6-109:8; 8/3/21 81:24-85:1, 84:8-13, 219:10-24); there were various gas and propane tanks in Unit 203E (EX pp. 1889, 2041, 2060; 8/3/21, 38:20-39:2); Lopez's live-in boyfriend spent five years in prison for meth manufacturing and Lopez was arrested with meth days after eviction (EX pp.1807-1823; EX p.2066 (arrest on 9/4/2018 – eviction 8/28/2018)); and Landlord found solvents/acetone in the apartment (8/4/21, 67:14-19; 8/5/21, 214:15-22; 8/24/21, 282:14-18).[24]

[24] Landlord confuses an adverse inference with reasonable inferences that can be drawn from evidence. *See* CJI 3:8. Since there is no distinction between direct and circumstantial evidence, CJI 3:9, it was reasonable for the court to infer a meth lab from the circumstantial evidence. No adverse inference was needed.

Thus, no adverse inference was used or needed to decide the factual issue of whether Landlord knew or should have known of the specific danger or that there was a meth lab.

2. Landlord unreasonably failed to protect against the danger.

Landlord admitted it could have, but did not, determine if there was meth in 203E. Landlord could have conducted an air quality test as the Keatens requested, but refused despite having conducted them in 2004. EX p.1993; 8/3/21, 145:24-146:7, 277:13-278:9. Mr. Wells gave Landlord a blueprint to investigate Keatens' concerns and protect the residents, but the Landlord did not follow it, which was unreasonable and breached its duty of care. EX 1988; Order p.5; 8/6/21, 140:25-141:25. Again, neither spoliation nor any adverse interest were part of the district court's factual finding that Landlord acted unreasonably. *See* Order pp.5-6.

3. Keatens suffered injuries and damages.

No adverse inference was necessary to find Keatens suffered injuries and damages. Multiple medical experts testified to the cause, nature, and extent of their toxic brain injuries. 8/5/21, 21:25-23:22, 134:6-136:15; 8/6/21, 26:17-28:14; Order p.8, fn.4.

4. Landlord's failure to exercise reasonable care was a cause of the injuries and damages.

It was clear that Landlord's failure to exercise reasonable care was a cause of the injuries and damages. The district court found that the "source of the methamphetamine fumes in the Keatens' apartment (Unit 303E) came from Unit 203 E." Order p.6. The court correctly relied on the expert whose testimony it found the most credible, Keatens' industrial hygienist. *Id.* at p.6, 9. As the Court of Appeals held,

> In making its causation finding, the district court referred to the **testing results** that demonstrated a presence of meth above the regulatory limits in Unit 203E and a lower concentration in Unit 303E, the **testimony** of an industrial hygienist at trial that Unit 203E was likely the source of the toxic fumes, and the **fact** that the fumes were clearly present and identifiable by both plaintiffs and the LHA inspector in unit 303E on multiple occasions. Additionally, the district court cited to the **fact** that both plaintiffs, despite their age difference, developed contemporaneous brain injuries due to fume exposure at the same time. The district court found, by a preponderance of the evidence, that these **facts** established causation **without relying on the adverse inference** to establish a pathway between the apartments.

Op. ¶34 (emphasis added). Landlord's assertion on page 19 of the Opening Brief that the "court made clear that the adverse inference as a spoliation sanction 'established' causation" is simply false. Landlord cites

nothing from the Order stating as much and no such statement exists. And the facts were so overwhelming that the district court found beyond a reasonable doubt that Landlord "consciously disregarded the known risk of ongoing harm to Plaintiffs' health." Order p.12.

The trial court clearly stated its causation findings were "based on Defendants failure to act reasonably when they were made aware of the alleged toxic exposure, aware of the potent harm to the tenants, failure to implement reasonable investigative actions, and take reasonable remedial measures." Order p.11.[25] The Court of Appeals agreed, finding the district court "cited other evidence of causation" and did not "use the inference" to infer a pathway for the fumes. Op. ¶37.

[25] Perhaps Landlord never tested because once testing confirms meth, remediation is expensive, time consuming, and cuts into profits since apartments can't be rented. *See* C.R.S. § 25-18.5-102; 6 C.C.R. 1014-3. Landlord failed to test or remediate 203E even after Lisa Oliveto from the Tri-County Health Department told Landlord it should test inside 203E since it could be contaminated, and meth fumes travel between floors in apartment buildings. 8/24/21, 14:12-18, 15:11-17, 20:12-21:13, 24:20-25:14.

5. A decision by this Court on spoliation would be an improper advisory opinion and any error was harmless.

The court acknowledged that any spoliation sanction "should be commensurate with the seriousness of the disobedient party's conduct." Order p.11, fn.5. The district court then referred to Landlord's spoliation as follows:

> Defendants made no effort to preserve any of the evidence obtained from Unit 203, they effectively concealed or cleaned surfaces which **may have** provided critical evidence to corroborate **or dispel** the Keatens' complaints. The Court **FINDS** that Defendants knowingly and willfully failed to preserve evidence and destroyed critical evidence **which may have corroborated** the Keatens' complaints.

Order p.6 (emphasis added). The court drew a "negative inference regarding Defendants' conduct and the destruction of evidence which would have established a link in the chain of evidence against it." *Id.* pp.9-10. Thus, causation was found without the adverse inference because the spoliated evidence only **may have corroborated** any finding. But, of course, potential corroboration is far different than being necessary to finding causation (or as Landlord falsely states, "established" causation). Indeed, "may have corroborated" is speculative.

The adverse inference, thus, was very narrowly drawn, and, at best, might have bolstered the court's already well-founded causation findings.

Yet, Landlord asks this Court to wade into a philosophical debate on the power of courts, duties that can and cannot be imposed, and the impact on behaviors based on negative or positive incentivization. The Court should decline Landlord's invitation because the trial court's decisions did not rest on an adverse inference. Thus, a decision on spoliation in this case would be an improper advisory opinion.[26]

"A court should avoid an advisory opinion on an abstract proposition of law." *City and County of Denver v. Consolidated Ditches Co. of Dist. No. 2*, 807 P.2d 23, 38 (Colo. 1991). "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by which a judgment can be carried into effect, and not to…declare principles of rules of law which cannot **affect the matter in issue before it**." *Tippett v. Johnson*, 742 P.2d 314, 315 (Colo. 1987) (emphasis

[26] Indeed, even after a lawsuit was "imminent," Landlord did not do any testing of 203E until ordered to do so by the Court, further demonstrating the petition was improvidently granted because a decision will not impact the parties or the merits.

added). Landlord assumes that a decision in its favor will materially affect the outcome of the case by eliminating the element of causation. *See* Opening Br. p.19. However, no finding will be affected because the district court relied on evidence to support and find causation, not the adverse inference. Thus, even if the district court erred in finding spoliation, it does not affect the matter before this Court and was thus harmless error.[27]

Landlord's entire argument is premised on the supposition that without the adverse inference there can be no finding of causation. That is plainly wrong. Accordingly, the Court should dismiss the petition as improvidently granted or find any error was harmless.

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[27] Landlord asserts spoliation was not briefed, discussed, or explored "despite two years of discovery and motions practice." Opening Br. p.10. This weighs against issuing a sweeping decision at this late stage on the complex and impactful issue of spoliation in such an abstract setting, especially where the facts of the present case do not necessitate it. *See In re Phillips*, 139 P.3d 639, 647 (Colo. 2006) (Eid, J. dissenting). The Court should thus exercise judicial restraint. *See Slade v. Shearson, Hammill & Co.*, 517 F.2d 398, 400 (2d Cir. 1974); *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("Resolution here…can await a day when the issue is posed less abstractly."). Indeed, Landlord asks this Court to opine on all aspects of spoliation when this case uncontroversially only dealt with willful spoliation.

VI. CONCLUSION

The Court has the power and authority to impose prelitigation duties to preserve evidence. The Court should affirm the district and appellate court and reaffirm that the duty to preserve evidence begins when a reasonable party in similar circumstances would reasonably foresee litigation.

Alternatively, the Court should find that because the district court's causation findings were fully grounded in evidence and did not rely on an adverse inference, the petition for certiorari was improvidently granted or any error was harmless.

Dated: March 21, 2024

Respectfully submitted,

/s/ Jason B. Wesoky
Jason B. Wesoky
Kylie M. Schmidt
OGBORN MIHM LLP

Ross Ziev #43181
ROSS ZIEV, P.C.

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2024, a true and correct copy of the foregoing **ANSWER BRIEF** was filed and served via the Colorado Courts E-Filing System upon the following:

Attorneys for Defendants-Appellants:
Christopher O. Murray, #39340
Julian R. Ellis, Jr., #47571
First & Fourteenth PLLC
2 N. Cascade Ave., Suite 1430
Colorado Springs, Colorado 80903
Phone: 719-286-2492
Email: chris@first-fourteenth.com
julian@first-fourteenth.com

/s/Jason Wesoky
Jason Wesoky

Pursuant to C.R.C.P. 121, §1-26(9), the original of this document with original signature(s) will be maintained in the offices of Ogborn Mihm, LLP, 1700 Lincoln Street, Suite 2700, Denver, Colorado, 80203, and will be made available for inspection by other parties or the Court upon request.