ADVANCE SHEET HEADNOTE
June 23, 2025

2025 CO 40

No. 23SC272, *Terra Mgmt. v. Keaten*—Sanctions—Spoliation—Adverse Inference—Causation—Duty to Preserve Evidence—Pending or Reasonably Foreseeable Litigation.

The supreme court holds that a court may sanction a party for the destruction of evidence if the party knew or should have known that (1) litigation was pending or reasonably foreseeable and (2) the destroyed evidence was relevant to that litigation. Accordingly, the court further holds that a party has a duty to preserve evidence relevant to litigation when the party knows or should know that litigation is pending or reasonably foreseeable. The court provides considerations for determining whether litigation is reasonably foreseeable and for imposing sanctions for the destruction of evidence.

The court declines to remand for application of this standard because it concludes that any error by the trial court in applying an adverse inference against the defendants for the destruction of evidence in this case was harmless. The court therefore affirms the judgment of court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 40

Supreme Court Case No. 23SC272
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 21CA1856

Petitioners:

Terra Management Group, LLC and Littleton Main Street LLC d/b/a Main Street Apartments,

v.

Respondents:

Kathleen Keaten and Delaney Keaten.

Judgment Affirmed
en banc
June 23, 2025

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CHIEF JUSTICE MÁRQUEZ delivered the Opinion of the Court, in which **JUSTICE BOATRIGHT**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

CHIEF JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 It is well-settled that a court may sanction a party for destroying evidence that is relevant to claims in litigation. Such sanctions take various forms and may include permitting the fact-finder to draw an adverse inference against the party who destroyed (or otherwise failed to preserve) the evidence. For a party's destruction of evidence to warrant sanctions, the party must have had a duty or an obligation to preserve the evidence in the first place. Such an obligation plainly arises when a lawsuit has been filed. The question here is when, *before* litigation has commenced, a party's duty to preserve evidence arises.

¶2 Plaintiffs Kathleen Keaten and her adult daughter, Delaney Keaten (together, "the Keatens"), lived in an apartment in a Section 8 housing complex owned by Littleton Main Street LLC and managed by Terra Management Group, LLC (together, "Defendants"). For months, the Keatens complained to Defendants about physical ailments they experienced from their alleged exposure to fumes coming from the apartment unit directly below theirs. The Keatens suspected that this apartment contained a methamphetamine ("meth") lab. Defendants later evicted the tenant in the lower unit for nonpayment of rent. In so doing, Defendants failed to photograph the tenant's belongings, contrary to company policy. After renovating the unit, Defendants leased it to a new tenant.

¶3 More than a year later, the Keatens filed suit against Defendants, alleging violations of the Colorado Premises Liability Act (the "PLA"), § 13-21-115, C.R.S. (2019). The complaint alleged that the Keatens sustained permanent injuries from their exposure to toxic fumes originating from the apartment below theirs.

¶4 Following a bench trial, the court entered judgment in favor of the Keatens on their PLA claims and awarded significant damages. In a written order, the court found that the chemical fumes in the Keatens' apartment came from the unit below theirs and that the Keatens' exposure to those fumes caused their permanent brain injuries. The court relied on expert testimony, the existence and relative levels of meth residue detected in samples taken from both apartments after the eviction, and the timing of the Keatens' injuries. Relevant here, the court also drew an adverse inference against Defendants based on their failure to preserve evidence from the downstairs unit that "would have established a link in the chain of evidence" against Defendants.

¶5 Defendants appealed the judgment, and a division of the court of appeals affirmed. *Keaten v. Terra Mgmt. Grp., LLC*, No. 21CA1856, ¶ 29 (Mar. 16, 2023). Defendants then petitioned this court for certiorari review. We granted the

petition to decide when a party has a duty to preserve evidence before litigation commences.[1]

¶6 We hold that a court may sanction a party for the destruction of relevant evidence if the party knew or should have known that (1) litigation was pending or reasonably foreseeable and (2) the destroyed evidence was relevant to that litigation. Thus, a duty to preserve relevant evidence arises when a party knows or should know that litigation is pending or is reasonably foreseeable. Whether litigation is "reasonably foreseeable" is an objective standard that is flexible and fact-specific. It requires more than the mere existence of a potential claim or the distant possibility of a lawsuit; rather, "reasonably foreseeable" litigation refers to litigation that is imminent, likely, or reasonably anticipated.

¶7 Here, we need not remand the case for application of this newly adopted standard. Instead, even assuming the trial court abused its discretion in sanctioning Defendants for the destruction of evidence by inferring that the missing evidence "would have established a link in the chain of evidence against [them]," we conclude that any error was harmless. The trial court ultimately relied

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[1] We granted certiorari to review the following issue:

> 1. Whether the common law requires a clear showing that a prelitigation party knew litigation would be filed or learned litigation was likely to trigger a precomplaint 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.

on evidence other than the adverse inference to find that chemical fumes from the downstairs unit caused the Keatens' injuries. Accordingly, we affirm the judgment of the court of appeals, albeit based on different reasoning.

I. Facts and Procedural History

¶8 We set forth the facts and procedural history of this case in some detail to provide the necessary context for our decision. First, we describe the Keatens' complaints to Defendants about chemical fumes emanating from the unit below them, the associated physical ailments they experienced, and the inspections that followed their complaints. Next, we recount Defendants' failure to preserve evidence during the eviction of the tenant in the unit below the Keatens. We then discuss the testing done on both apartments. Finally, we summarize the lower court proceedings.

A. The Keatens' Complaints Regarding Chemical Odors

¶9 From October 2005 to December 2019, the Keatens resided in Unit 303E at Main Street Apartments, a Section 8 housing complex[2] owned and managed by Defendants. In late 2017, the Keatens began noticing unusual chemical smells in their apartment. They theorized that these fumes were coming from a meth lab in the apartment below them, Unit 203E. On March 15, 2018, the Keatens reported

[2] Section 8 is a housing program created by the United States Housing Act of 1937, 42 U.S.C. § 1437f, to assist low-income families with the payment of rent.

these concerns to Clancy Wells, the property manager of Main Street Apartments, and Sandy Werling, the compliance and regional manager at Terra Management. The following day, Wells relayed the complaint to Terra Management's Vice President, Lydia Smith, in an incident report. Wells recommended contacting law enforcement and the local housing authority, as well as conducting an inspection of the downstairs unit. About a week later, Wells did not find "any sign of odor or foul play" in a walkthrough of Unit 203E. Wells left his position soon thereafter. Defendants did not pursue his recommended actions.

¶10 On April 5, the Keatens sent a letter to Smith detailing an array of symptoms they were experiencing due to what they suspected was exposure to meth fumes from Unit 203E. These symptoms included stinging, itchy, watery eyes; burning sensations in the nose and throat; nosebleeds; heart palpitations; difficulty breathing; shortness of breath; congestion; numbness of the gums and tongue; dizziness; headaches; difficulty concentrating; and irritability. The Keatens also reported unusual activity and loud noises at late hours coming from Unit 203E. Kathleen Keaten subsequently sent a similar letter to Werling.

¶11 On April 24, the Littleton Housing Authority inspected the Keatens' apartment and reported to Defendants a "slight chemical smell" in the living room that violated housing quality standards. On May 30, however, the Littleton

Housing Authority reinspected the Keatens' apartment. At that time, the inspector found no unusual chemical smell, and the apartment passed the inspection.

B. The Eviction of the Tenant in Unit 203E and Defendants' Failure to Preserve Evidence

¶12 On August 28, 2018, Defendants evicted the tenant in Unit 203E for failure to pay rent. Although Defendants' standard practice is to photograph items removed from an apartment during an eviction, Defendants did not do so in this instance. Instead, the property manager on site took photos of the apartment *after* the tenant's belongings had been removed. The Keatens, however, took photographs of the tenant's belongings that had been moved outside. These photographs show containers that appear to be gas canisters and a person connected with Unit 203E carrying a propane tank. Defendants did not instruct the property manager to preserve any items so they could be tested for meth. Instead, the property manager had the carpet replaced and the floor beneath sealed, the walls painted, and the unit cleaned. Defendants made no effort to preserve the carpets or other materials from Unit 203E and conducted no testing of the unit at that time. A new tenant moved into the apartment on September 27.

C. Testing of Units 203E and 303E

¶13 Over a year later on October 30, 2019, the Keatens filed suit against Defendants, seeking damages for claims under the PLA for injuries from exposure to toxic fumes in their apartment.

¶14 In October 2019, Defendants hired A.G. Wassenaar to conduct sampling in a limited area inside the Keatens' apartment and in the hallways outside Units 203E and 303E. None of the samples exceeded regulatory limits set by the Colorado Department of Public Health and Environment. In November 2019, A.G. Wassenaar took another six samples from the interior of Unit 303E; one sample from the east bathroom (including the exhaust fan) exceeded the regulatory limit.

¶15 In 2020, the trial court granted the Keatens' discovery request to test both Unit 203E and Unit 303E again. The Keatens hired Quest Environmental Services & Technologies, Inc. ("Quest") to collect samples. This testing of Unit 203E—over a year after the apartment had been cleaned and renovated—showed meth levels that exceeded regulatory limits in several areas of the apartment, including the air ducts, kitchen, and interior of the freezer. The highest concentration of meth contamination, found in the air duct of the unit's east bathroom, was forty-four times the regulatory limit. Quest's testing of the Keatens' apartment also confirmed the presence of meth, albeit in small amounts compared to the results from Unit 203E.

D. Trial Court Ruling

¶16 In August 2021, the Arapahoe County District Court held an eight-day bench trial. In a detailed written ruling, the court entered judgment for the Keatens on their PLA claims. Based on the extensive evidence presented at trial,

the court found that the Keatens had suffered permanent brain injuries caused by exposure to meth fumes that emanated from Unit 203E.

¶17 The court made a formal causation finding that Unit 203E was the likely source of the toxic fumes in the Keatens' apartment "based on the high levels of [meth] . . . found in Unit 203E and the minimal amounts found in the Keatens' apartment, Unit 303E" revealed by Quest's testing. In reaching this ruling, the court relied on expert testimony opining that higher concentrations of contaminants point to the source of contamination, and that the meth contamination originated in Unit 203E and migrated to the Keatens' apartment above. The court also noted that it was highly unlikely that both Keatens, given their thirty-year age difference and diverging medical histories, would have developed the same symptoms absent exposure to toxic fumes.

¶18 Elsewhere in its order, the trial court observed that at the time Unit 203E was being cleaned and renovated in September 2018, Defendants were aware of the "Keatens' complaints, potential injuries[,] and Defendants' potential liability," yet "made no effort to preserve any of the evidence obtained from Unit 203[E]." It found that "Defendants knowingly and willfully failed to preserve evidence and destroyed critical evidence which may have corroborated the Keatens' complaints." The court went on to observe that despite the Keatens' reports of

noxious fumes, Defendants took "no remedial, proper investigative or corrective action."

¶19 As relevant here, after formally finding causation based on the testimony and evidence of testing showing the relative meth levels in the two apartments, the court expressed "extreme[] concern[] about Defendants' failure to preserve incriminating evidence, the failure to sample or test, allowing the destruction of material evidence, and then attempting to cover up, hide or destroy evidence when they knew of the Keatens' claims and the threat of potential liability." As a sanction, the trial 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 [them]." The court did not specify what the inference purportedly established.

¶20 The court ultimately awarded the Keatens over $10.5 million in damages, including over $2.5 million in exemplary damages.

E. Court of Appeals Ruling

¶21 Defendants appealed the trial court's judgment, challenging, as relevant here, the trial court's adverse inference sanction for the spoliation of evidence.

¶22 The division affirmed the trial court's judgment. *Keaten*, ¶¶ 1, 45. It reasoned that "[a] party may be sanctioned for destroying evidence after receiving notice that it is relevant to litigation regardless of whether a complaint has been

filed, so long as the party knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation." *Id.* at ¶ 29 (citing *Warembourg v. Excel Elec., Inc.*, 2020 COA 103, ¶¶ 61–62, 471 P.3d 1213, 1225).

¶23 The division rejected Defendants' contention that the trial court erred in imposing a sanction for spoliation when Defendants had no notice that litigation was pending. *Id.* at ¶ 31. The division reasoned that the property manager submitted an incident report and that such reports are filled out, in part, to prepare for possible legal action. *Id* at ¶ 32. It noted the Keatens' vocal and persistent complaints about chemical fumes in their apartment; the Keatens' efforts to preserve evidence through photographs of the evicted tenant's belongings and testing for meth residue; and the fact that the Keatens never communicated that they would *not* be pursuing litigation or that their injuries had been resolved. *Id.* at ¶¶ 32–33. The division concluded that the trial court did not abuse its discretion in determining that Defendants "should have known of their potential liability" before the Keatens filed suit. *Id.* at ¶ 33.

¶24 The division also rejected Defendants' contention that the trial court misapplied the spoliation sanction by improperly inferring a pathway between the apartments based solely on the adverse inference. *Id.* at ¶ 34. The division observed that the trial court did not use the inference in that way. *Id.* Instead, the

trial court relied on test results demonstrating the relative levels of meth residue in each apartment, expert testimony that Unit 203E was likely the source of the toxic fumes, the fact that fumes were present as confirmed by the Keatens and the Littleton Housing Authority inspector, and the fact that the Keatens both developed brain injuries contemporaneous with their exposure to those fumes. *Id.* In other words, the trial court "did not rely on an adverse inference from spoliation, but on evidence of contamination, to find that the fumes originated in Unit 203E and impacted [the Keatens] in Unit 303E." *Id.*

¶25 The division reasoned that the trial court's adverse inference "related to the existence of a meth lab and the probability that evidence of such a lab would have been discovered" but for Defendants' destruction of evidence. *Id.* at ¶ 36. It concluded that the trial court did not abuse its discretion by imposing the spoliation sanction because the record supported a negative inference from the spoliation of evidence. *Id.* at ¶ 37. Importantly, however, this inference was used only to imply that *more* evidence regarding causation would have been discovered had Defendants preserved evidence from Unit 203E before renovating it. *Id.* at ¶¶ 34–35, 37.

¶26 We granted Defendants' petition for certiorari review and now affirm, albeit for different reasons.

II. Analysis

¶27 After identifying the standard of review, we explore when a court may sanction a party for the spoliation of evidence and when a duty to preserve evidence arises. We conclude that a party has a duty to preserve evidence relevant to litigation that they know or should know is pending or reasonably foreseeable, and we identify factors a court may consider in its determination. Ultimately, we decline to remand the case to the trial court for application of this standard because any error was harmless given that the trial court's causation finding rested on evidence independent of the adverse inference.

A. Standard of Review

¶28 We review a trial court's sanction for spoliation of evidence for an abuse of discretion. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002 (Colo. 2006). A lower court abuses its discretion when it misapplies the law or when its ruling is manifestly arbitrary, unreasonable, or unfair. *Rains v. Barber*, 2018 CO 61, ¶ 8, 420 P.3d 969, 972. In addition, "[a] trial court necessarily abuses its discretion if its ruling is based on an incorrect legal standard." *Ronquillo v. EcoClean Home Servs., Inc.*, 2021 CO 82, ¶ 12, 500 P.3d 1130, 1134 (quoting *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 7, 276 P.3d 562, 564). Whether the trial court applied the correct legal standard is a question of law we review de novo. *Id.*

B. Sanctions for Spoliation of Evidence

¶29 The foundation of the judicial process is the search for truth, which relies on the presentation of relevant evidence to the fact-finder. *Warembourg*, ¶ 1, 471 P.3d at 1217. Spoliation refers to the "intentional destruction, mutilation, alteration, or concealment of evidence." *Spoliation*, Black's Law Dictionary (12th ed. 2024). It can also refer to the failure to preserve evidence. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Warembourg*, ¶ 1, 471 P.3d at 1217.

¶30 Trial courts have inherent power and broad discretion to sanction a party for the spoliation of evidence. *Aloi*, 129 P.3d at 1002 (citing *Pena v. Dist. Ct.*, 681 P.2d 953, 956 (Colo. 1984)). This power is grounded in "the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth." *Silvestri*, 271 F.3d at 590.

¶31 Sanctions for spoliation "can range from monetary sanctions to the most drastic sanction of all—the entry of a default judgment." *Warembourg*, ¶ 2, 471 P.3d at 1217. One such sanction is an instruction permitting the fact-finder to draw an adverse inference against the party who destroys relevant evidence. *Id.* at ¶ 77, 471 P.3d at 1227; *Aloi*, 129 P.3d at 1002. Courts have recognized that adverse-inference instructions serve both punitive and remedial purposes; they deter parties from destroying evidence and seek to level the evidentiary playing field by restoring the prejudiced party to the position it would have held had there

been no spoliation. *Aloi*, 129 P.3d at 1002; *see also Shaffer v. RWP Grp., Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). When deciding whether to sanction a party for the spoliation of evidence, courts consider a variety of factors, including the culpability of the spoliator and the degree of prejudice to the other party. *Shaffer*, 169 F.R.D. at 25.

C. The Duty to Preserve Evidence

¶32 In determining whether sanctions for spoliation are warranted, a court must first determine whether the missing evidence would be relevant to an issue at trial. *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 620 (D. Colo. 2007). If not, the court's analysis stops there. *Id.* at 621. If the missing evidence would be relevant, then the court must determine whether the party who lost or destroyed the evidence was under an obligation to preserve it. *Id.*; *see also Shaffer*, 169 F.R.D. at 24; *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991); *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (observing that a party can be sanctioned for destroying evidence only if it had a duty to preserve it). Finally, if the party lost or destroyed evidence that it had a duty to preserve, the court must consider what sanction, if any, is appropriate for its destruction. *Cache La Poudre*, 244 F.R.D. at 621.

¶33 The question in this case is when the duty to preserve evidence arises before the commencement of litigation. In *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d

999, 1002 (Colo. 2006), we held that sanctions are appropriate if a party destroys evidence that it "know[s] or should know will be relevant to litigation." In that case, the defendant had both a statutory duty to preserve the records at issue and actual notice that the plaintiff intended to bring a personal injury action. *Id.* at 1000, 1003. However, our opinion did not address when a party has a pre-litigation duty to preserve evidence in other circumstances.

¶34 In the absence of further guidance from this court regarding a party's pre-litigation duty to preserve evidence, divisions of the court of appeals have concluded that a court may impose sanctions for spoliation when a party has notice that evidence is relevant to litigation, regardless of whether a complaint has been filed, and so long as the party knew or should have known that the evidence was relevant to pending, imminent, or reasonably foreseeable litigation. *Castillo v. Chief Alt., LLC*, 140 P.3d 234, 236 (Colo. App. 2006); *Warembourg*, ¶ 56, 471 P.3d at 1224. The division in this case adopted a similar approach. *Keaten* at ¶ 29 (citing *Warembourg*, ¶¶ 61–62, 471 P.3d at 1225).

¶35 Based on our review of common law principles and case law from other jurisdictions, we take the opportunity today to clarify that a court may sanction a party for the destruction of relevant evidence if the party knew or should have known that (1) litigation was pending or reasonably foreseeable and (2) the destroyed evidence was relevant to that litigation. Accordingly, a duty to preserve

relevant evidence arises when a party knows or should know that litigation is pending or is reasonably foreseeable. So, what does this mean?

¶36 First, it is clear that a duty to preserve evidence arises once litigation has commenced. *See Cache La Poudre*, 244 F.R.D. at 621 ("In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit."). Certainly the filing of a complaint or the receipt of a discovery request can put a party on notice that certain evidence is relevant to pending litigation. *Turner*, 142 F.R.D. at 73.

¶37 But a party also has a duty to preserve relevant evidence when the party knows or should know that litigation is reasonably foreseeable. *See Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1136–37 (N.D. Cal. 2012) ("The common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated."). This common law standard is an objective one that asks whether a reasonable party under the circumstances would have reasonably foreseen litigation. *Micron Tech.*, 645 F.3d at 1320; *Bistrian v. Levi*, 448 F. Supp. 3d 454, 468 (E.D. Pa. 2020). Whether litigation is "reasonably foreseeable" is both fact-specific and sufficiently flexible to afford a trial court the discretion to address the wide range of factual situations that arise in the spoliation context. *Bistrian*, 448 F. Supp. 3d at 468.

¶38 The mere existence of a potential claim or the distant possibility of litigation does not trigger a pre-litigation duty to preserve evidence. *Id.*; *see also Cache La*

Poudre, 244 F.R.D. at 621 ("[T]he duty to preserve relevant documents should require more than a mere possibility of litigation."). Rather, the duty to preserve evidence arises when the party knows or should know that litigation is "reasonably foreseeable"; this standard encompasses litigation that is imminent, likely, or reasonably anticipated.[3] *See Cache La Poudre*, 244 F.R.D. at 621 ("[T]he obligation to preserve evidence may arise even earlier [than the filing of a lawsuit] if a party has notice that future litigation is likely."); *Turner*, 142 F.R.D. at 73 ("[T]he obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced."); *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000) ("A party who has reason to anticipate litigation has an affirmative duty to preserve evidence which might be relevant to the issues in the lawsuit.").

¶39 In determining whether litigation was reasonably foreseeable for purposes of assessing the appropriateness of sanctions, a court may consider the totality of the circumstances, including the behavior of the party allegedly prejudiced by the spoliation. *Cf. Castillo*, 140 P.3d at 237 ("[T]he behavior of the party moving for sanctions is an important factor for assessing whether sanctions are appropriate."). For example, because the plaintiff controls the timing of litigation and what the

[3] We recognize that a party may also have an independent statutory or regulatory requirement to preserve evidence. *E.g.*, *Aloi*, 129 P.3d at 1000.

plaintiff communicates to the defendant, a court may consider a plaintiff's delay in reporting a concern or in filing suit and whether a plaintiff or someone on their behalf made affirmative statements suggesting an issue had been resolved or that no litigation is anticipated. *See id.* (observing that the plaintiff never asked the defendant to view or retain items that caused the plaintiff's injury, and that the plaintiff's father told the defendant that the plaintiff "was doing okay, that her bills were being paid, that she wasn't hurt that bad, and they weren't going to sue or anything."). On the other hand, a defendant's conduct may also indicate an understanding that litigation was reasonably foreseeable, including actions such as consulting with counsel or notifying an insurer. The nature and extent of the injuries at issue may also inform this analysis. A large-scale disaster, for example, may indicate that litigation is reasonably foreseeable.

¶40 Finally, if a court concludes that a party was under an obligation to preserve the evidence that was destroyed, the court must then determine what, if any, sanction is appropriate. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). In so doing, the court should consider the totality of the circumstances, including the culpability of the party responsible for the loss or destruction of evidence and the resulting prejudice to the other party. *Cache La Poudre*, 244 F.R.D. at 621. In assessing a party's culpability, the court may consider, among other relevant circumstances, the burden of preserving the evidence at issue, and

whether the party deviated from normal practices regarding preservation (including document retention policies). Finally, the court should consider the punitive and remedial purposes served by a particular sanction.[4] *See id.*; *Aloi*, 129 P.3d at 1003.

D. Any Error in This Case Was Harmless

¶41 We recognize that this opinion clarifies the standard for the duty to preserve evidence before the initiation of litigation. Typically, we would remand a case for application of the announced standard. *See*, *e.g.*, *Owners Ins. Co. v. Dakota Station II Condo. Ass'n*, 2019 CO 65, ¶ 44, 443 P.3d 47, 53. In this case, however, remand is unnecessary because any error in the imposition of the adverse inference sanction was harmless.

¶42 Although the trial court concluded that the destruction of evidence warranted a negative inference against Defendants that the missing evidence "would have established a link in the chain of evidence" against Defendants, the court did not identify what, precisely, the missing evidence would have established or how the inference factored into its causation finding. Even

[4] We recognize that Federal Rule of Civil Procedure 37(e), which addresses sanctions for the failure to preserve electronically stored information, authorizes federal courts to impose an adverse inference as a sanction only if the party responsible for the loss of such information acted with the intent to deprive another party of the information's use in the litigation. Colorado does not have a comparable rule.

assuming that the missing evidence would have bolstered the Keatens' theory that the tenant in Unit 203E was operating a meth lab, the trial court did not rely on the existence of a meth lab to infer causation. Rather, it relied on expert testimony and the results of testing that showed the relative concentrations of meth found in Unit 203E and Unit 303E, as well as the low probability that both Keatens would develop the same symptoms at the same time in the absence of toxic exposure. Put differently, the trial court's causation finding linking toxic fumes in Unit 203E to the Keatens' injuries did not rest on the negative inference the court drew from Defendants' destruction of evidence.

¶43 Because the trial court's causation finding was independent of the adverse inference, we conclude that any error in imposing the sanction was harmless.

III. Conclusion

¶44 We clarify today that a court may sanction a party for the destruction of relevant evidence if the party knew or should have known that (1) litigation was pending or reasonably foreseeable and (2) the destroyed evidence was relevant to that litigation. Thus, a duty to preserve relevant evidence arises when a party knows or should know that litigation is pending or is reasonably foreseeable. We decline to remand the case for application of this standard because here, any error in the trial court's imposition of an adverse inference sanction for the spoliation of evidence was harmless.

¶45 Accordingly, we affirm the judgment of the court of appeals.