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COLORADO SUPREME COURT 2 East 14th Avenue, Fourth Floor Denver, Colorado 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 Keaten and Delaney Keaten.	
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Opening Brief	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **8,376** words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/ Julian R. Ellis, Jr.
Julian R. Ellis, Jr.

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

Littleton Police: Littleton Police Department

PLA: Colorado Premises Liability Act, Colo. Rev. Stat. § 13-21-115 (2021)[1]

Plaintiffs: Kathleen Keaten and Delaney Keaten

South Metro Housing: South Metro Housing Options or Littleton Housing Authority

Tri-County Health: Tri-County Health Department

Main Street: Main Street Apartments

[1] The PLA was amended on April 7, 2022. *See* S.B. 22-115, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022). In this brief, Defendants cite the version of the PLA before it was amended.

ISSUE PRESENTED FOR REVIEW

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.

STATEMENT OF THE CASE

Defendants challenge a $10.5 million premises-liability judgment arising from a never-proven methamphetamine (or meth) operation in a downstairs apartment. Leveraging test results that revealed trace amounts of meth residue in two discrete locations in their unit—both in out-of-reach places and in amounts 250 times lower than doses used to treat children with ADHD—Plaintiffs theorized their downstairs neighbor was operating a clandestine meth lab. Plaintiffs then tied this theory to Defendants by claiming they failed to protect Plaintiffs from the alleged fumes emitted from this hypothetical operation.

From the start, Plaintiffs' (the upstairs neighbors) theory of liability proved problematic. No one ever discovered a meth lab or operation in the downstairs unit despite multiple inspections; not the police, not the local health and housing authorities, not Defendants, and not Plaintiffs' own experts.

To be sure, the judgment came after a mountain of evidence: an eight-day bench trial that included 31 witnesses and over 100 exhibits. Yet, despite all this evidence, the judgment turned on the *lack* of evidence. To fill insurmountable gaps in Plaintiffs' causation case, the district court imposed an adverse inference (which functioned as an irrebuttable presumption) as a sanction for conduct that occurred 14 months before Plaintiffs first notified Defendants that they intended to file a lawsuit. Defendants' wrong? They cleaned, repaired, and relet the downstairs unit—a low-income apartment—after evicting the downstairs neighbor for nonpayment of rent.

For Defendants, the results of this case are devastating. They stand to lose an apartment building, and potentially a property-management business, owned and operated for decades because they did not divine Plaintiffs' grievances about their downstairs neighbor as an unexpressed intent to initiate litigation. This is not the standard. For the reasons outlined below, Defendants ask the Court to reverse the district court's order[2] and direct judgment in their favor.

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[2] The district court's order is attached as **Appendix A** and cited as "Order _." The court of appeals's opinion is attached as **Appendix B** and cited as "Op. _."

I. Factual Background.

A. Plaintiffs lived on the third floor of Main Street's apartment complex.

Defendant Main Street Apartments is one of the few affordable-housing options in Littleton, Colorado. (*See* Op. ¶ 2.) Tenant housing units are located on the second and third floors of the complex, with the first floor dedicated to tenant parking and street-facing storefronts on Littleton's Main Street. (*See* EX (trial), pp 4110–12.) Plaintiffs, mother and adult daughter, lived in a unit on Main Street's third floor from October 2005 to December 2019. (Op. ¶ 2.)

B. Between March and May 2018, Plaintiffs complained about their downstairs neighbor.

In early 2018, Plaintiffs became suspicious of their downstairs neighbor. They reported loud noises, chemical odors, unauthorized guests, parking violations, and domestic disturbances. (EX (trial), pp 489–94.) They raised these grievances through multiple channels, including reports to Defendants, Littleton Police, South Metro Housing, and Tri-County Health. (EX (trial), pp 489–94, 721, 2006.) The sequence of Plaintiffs' reports, and the contents of the reports, are critical to understanding what Defendants knew in August 2018—the date the district court found Defendants spoliated evidence.

February 28, 2018 and March 6, 2018. Plaintiffs first reported their downstairs neighbor's activity to law enforcement on February 28 and March 6, through Littleton Police's emergency line. Plaintiffs reported smelling "chemical fumes" and hearing a domestic dispute downstairs. (*Id.* at 1978, 1988.) At least on March 6, Littleton Police reported to the downstairs unit. The police entered the unit at 1:35 in the morning and contacted both occupants; no signs of meth use or production were noted. (*See id.* at 1977–85.) Defendants learned of Plaintiffs' calls to police nine days later. (*Id.* at 1988.)

March 15, 2018. Plaintiffs first reported their issues to Defendants when meeting with Defendants' then-property manager, Clancy Wells. They met on March 15, the day before Wells's planned departure from Main Street. (*Id.*; TR (8/2/2021), p 66:9–17.) In the meeting, Plaintiffs reported they had smelled "chemical fumes," which they attributed to the unit below them. (EX (trial), p 1988.) Wells speculated the downstairs neighbor might be using or producing meth (*id.* at 491), and Plaintiffs noted they called the police (*id.* at 1988). The next day—Wells's last with Defendants—Wells emailed management a

summary of the meeting.[3] (*Id.*) Wells reported the police were involved and suggested that Defendants try to confirm Plaintiffs' odor reports and call the police again if Defendants confirmed the odors. (*See id.*) Wells also suggested more intrusive responses to Plaintiffs' initial report, like fabricating an "emergency" as an excuse to force entry into the downstairs unit and contacting lawyers. (*Id.*)

March 26, 2018. Defendants chose a measured response to Plaintiffs' initial report: an unannounced inspection of the downstairs unit, in which they walked every room in the unit. (*Id.* at 1989–90; TR (8/23/2021), pp 212:10–215:4.) Other than signs of ongoing furniture repair with "wood lacquer or stain," which the neighbor stopped immediately at Defendants' request, Defendants did not observe any unusual activity in the unit. (TR (8/23/2021), pp 214:4–215:4; *see also* EX (trial), p 1990.) On the same day, Defendants' employees walked the second- and third-floor hallways but did not observe any odors. (TR (8/23/2021), pp 210:8–211:2; EX (trial), p 1990.)

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[3] Wells used the words "incident report" in the subject line of his email. (*Id.*; *see also* Op. ¶ 32.) But this was not a formal incident report. That report, reflected on Defendants' "Incident Report Form," was created on October 14, 2019, days after Plaintiffs sent Defendants a demand letter threatening litigation. (EX (trial), pp 2087–88.)

April 5, 2018. Plaintiffs sent Defendants a follow-up letter on April 5. Plaintiffs again reported construction, loud noises, unauthorized guests, parking violations, and domestic disturbances. (EX (trial), pp 489–92.) Plaintiffs reemphasized smelling "chemical fumes" in their unit but were uncertain as to the source. (*Id.* at 491 (noting Wells asked if "I thought there was a meth lab [and] I told him I didn't know for sure … they could be making bombs for all I knew").) Plaintiffs requested a response from Defendants on the status of the "situation as soon as possible." (*Id.* at 492.)

April 12, 2018. A week later, Plaintiffs called Defendants to follow up on their April 5 letter, report "unauthorized" guests living in the downstairs unit, and ask about Defendants' inspection of the downstairs unit. (TR (8/3/2021), pp 164:23–168:15; *id.* at 172:10–175:8.)

April 17 and 24, 2018. Days later, on April 17, Plaintiffs contacted South Metro Housing about their neighbor and the chemical odors they thought were "coming from the unit below." (EX (trial), pp 2002, 2004–05.) On April 24, South Metro Housing inspected Plaintiffs' unit. Because of a "slight chemical smell" in the unit (*id.* at 2002), the inspector failed the unit (*id.* at 2004–05).

April 18, 2018. Littleton Police returned to the downstairs unit on April 18, after Plaintiffs reported a domestic disturbance. (*See id.* at 724.) The police entered the unit but did not believe a crime had been committed; nor did they note meth use or production. (*See id.* at 725.)

May 4, 2018. Defendants received notice of South Metro's April 24 inspection on May 4. (*Id.* at 2004–05.)

May 8, 2018. In response to the notice, Defendants again inspected the downstairs unit. (TR (8/3/2021), pp 257:23–258:5.) Defendants also followed up with South Metro Housing about its April 24 inspection. (EX (trial), p 3965.)

May 22, 2018. Plaintiffs sent Defendants a second letter on May 22, raising the same chemical-odor, noise, and domestic-disturbance grievances from their April 5 letter. (*Id.* at 493–94.) Plaintiffs expressed frustration with Defendants' inability to confirm their prior reports and said the problems persisted. (*Id.*) Like with their previous letter, Plaintiffs closed by asking Defendants for "any type of information" about "these issues." (*Id.* at 494.)

May 30, 2018. South Metro Housing returned to Plaintiffs' unit on May 30, to reinspect it. The same person inspected the unit; this time, he cleared the unit for service. (*Id.* at 2002.)

After South Metro Housing cleared Plaintiffs' unit on May 30, other than a passing reference to Defendants' office staff in mid-to-late July 2018 (TR (8/2/2021), p 133:4–17), Plaintiffs' grievances about their downstairs neighbor stopped.

C. The downstairs neighbor was evicted in late August 2018, for failure to pay rent.

On August 28, 2018, Defendants evicted the downstairs neighbor for failure to pay rent. (TR (8/2/2021), p 102:9–11.) Before the eviction, law enforcement inspected and precleared the unit. (TR (8/23/2021), pp 218:4–219:3.) While Defendants did not photograph the eviction (TR (8/2/2021), p 110:17–20), Plaintiffs did. The photographs include pictures of their neighbor's possessions as Defendants moved them from the unit to the parking lot. (TR (8/23/2021), p 52:15–20; EX (trial), pp 2041–65.) At no point during the eviction (which was open and obvious), did Plaintiffs ask Defendants, or the downstairs neighbor, to preserve items removed from the downstairs unit. Nor did Plaintiffs ask to inspect, or for Defendants to preserve, the interior of the unit.

Like it does with all other tenant transitions, Defendants cleaned, repaired, and relet the highly sought-after, affordable-housing unit to a new tenant. As to what Defendants understood at that time, the evidence is uncontroverted. Defendants' employee, Lydia Smith,

testified that, after South Metro Housing cleared Plaintiffs' unit on May 30, 2018, Defendants thought Plaintiffs' concerns were resolved. (TR (8/4/2021), p 7:18–21 (Smith responding to questioning from the district court).) That remained Defendants' understanding for 14 months after the August 2018 tenant transition.[4]

D. Plaintiffs first threatened litigation in a demand letter 14 months after Defendants transitioned the downstairs unit.

The first time Plaintiffs disclosed their intent to file suit was on October 11, 2019. Plaintiffs' lawyer sent Defendants a demand letter and attached a draft complaint. (EX (trial) pp 4898–4903.) The demand letter and draft complaint included specific information about Plaintiffs' facts and theories supporting liability (*id.* at 4898–4900); Plaintiffs' alleged injuries and damages (*id.* at 4902–03); and Plaintiffs' opening

[4] During this time, Plaintiffs did complain about their new downstairs neighbor. They complained about loud noises, parking, and marijuana smoke. (EX (trial), 497–503.) Like before, they sought nonlitigation resolutions to their grievances. (*See id.* 499 ("We are hopeful that you will address these issues and assist us in a peaceful resolution to our complaint."); *id.* at 500 ("I am hopeful the issue regarding the marijuana smoke coming in our apartment … will be resolved as soon as possible."); *id.* at 503 ("Please keep us informed as to the actions you are taking to resolve this issue.").)

settlement demand (*id.* at 4903). This is the first time Plaintiffs communicated these specifics to Defendants.

II. Procedural Background.

A. Plaintiffs' Premises Liability Act lawsuit.

Plaintiffs filed their complaint pursuing premises-liability claims on October 30, 2019. (CF, p 3.) The parties tried the case in an eight-day bench trial, with Plaintiffs' case-in-chief occurring August 2–6, 2021, and Defendants' case-in-chief occurring August 23–25, 2021.

B. The first time Plaintiffs mentioned spoliation was in their trial brief.

Despite two years of discovery and motions practice, Plaintiffs first introduced the idea of sanctions for the spoliation of evidence in their trial brief. (CF, p 1498.) Plaintiffs complained of "a heap of spoliation violations." (*Id.* (listing the failure to conduct an air-quality test, failure to take pictures of the eviction, and the alleged failure to keep inspection paperwork and meeting notes).) Notably, the district court did not credit Plaintiffs' complained-of spoliation "violations." Rather, as explained below, the court went a different direction.

That Defendants' trial brief was silent on spoliation is unsurprising. (*See id.* at 1502–13.) Defendants' brief was submitted simultaneously with Plaintiffs' and, before Plaintiffs' brief, neither

party had raised the issue. For its part, the district court first referenced spoliation in the middle of trial. In response to Defendants' Rule 50 motion at halftime, the court sua sponte raised spoliation. (*See* TR (8/23/2021), pp 254:19–258:3.) When Defendants responded with argument, the court implored counsel to "make short shrift of [the issue]" because, while the issue "may be appropriate for closing," it is "not appropriate for halftime." (*Id.* at 256:15–17.)

The district court then denied Defendants' Rule 50 motion (*id.* at 259:19–21), and concluded, "What we have is the destruction of evidence. Whether it's the adverse evidence instruction or inference, we still have the destruction of evidence … ." (*Id.* at 258:23–25.)

During closings, despite the district court intimating that spoliation was more appropriate for closing, Plaintiffs never mentioned spoliation. Nor did the court ask any spoliation-related questions.

C. The district court's final order and $10.5-million judgment.

The district court's final order—issued 48 hours after closing arguments—awarded Plaintiffs $10.5 million in damages under the PLA. (*See* Order 13–14.) Despite Plaintiffs' liability case turning on the existence of a clandestine meth operation in the downstairs unit, the court made no finding there was such an operation, nor could it based

on the evidence. Even though the police, local housing authority, and Defendants investigated the unit, no one ever discovered a meth lab.

The district court also struggled with how unproven meth fumes could have traveled from the downstairs unit to Plaintiffs' upstairs unit, conceding the pathway for the alleged fumes was unknown. (*Id.* at 6.) The same was true for the experts at trial, who could not identify a pathway between the units, which are structurally separated by layers of self-sealing concrete. (TR (8/24/2021), pp 152:22–153:12.)

The lack of evidence of a meth lab in the downstairs unit was a critical shortcoming in Plaintiffs' causation theory. Without a meth lab, there could be no "toxic fumes" in sufficient quantity to migrate from downstairs to upstairs and cause the claimed harm.

Frustrated with its inability to confirm the *presence* of a meth lab, the district court turned to the *lack* of evidence and entered a sanction against Defendants for spoliation. (*See id.* at 5.) In its analysis, the court cited no legal standard for determining when a person must preserve evidence before litigation is filed. This is understandable; Plaintiffs barely mentioned spoliation sanctions in briefing, and, at trial, the court swiftly deflected Defendants' argument on the point.

Yet the district court found that, at the time the downstairs unit was cleaned, repaired, and relet on August 28, 2018, Defendants apparently had to preserve "the evidence obtained from [the downstairs unit]," including the downstairs neighbor's possessions.[5] (*Id.*) The court also faulted Defendants for not "mak[ing] the unit available for later inspection or testing" (*id.*), which in context meant Defendants were obligated to hold the unit open for at least 14 months.

Without citation, the district court found that Defendants' preservation obligation triggered when Defendants' employee, Lydia Smith, "was aware of [Plaintiffs'] complaints, potential injuries and Defendants' potential liability." (*Id.*) And, because the cleaning, repairing, and reletting of the downstairs unit was "knowing[] and willful[]," the court imposed an adverse inference (*id.*), which was effectively an irrebuttable presumption of the existence of a meth lab.

The district court then used the adverse inference to overcome critical gaps in Plaintiffs' causation case. Even though no evidence established the existence of a meth lab in the downstairs unit, that

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[5] The district court cited three subsets of items: (1) the carpets removed from the downstairs unit; (2) the uncleaned and unrepaired "surfaces" in the downstairs unit; and (3) the downstairs neighbor's oxygen and propane canisters. (*Id.* at 4, 5.)

meth fumes from a hypothetical lab traveled to the upstairs unit, and that Plaintiffs were exposed to such fumes, the court inferred each causal element. The court was express in stating that the adverse inference "established" the necessary causal link against Defendants under the PLA. (*Id.* at 9–10.)

The burden of the $10.5-million judgment forced Defendants into bankruptcy shortly after the Order. (CF, p 2463–65.)

D. The court of appeals's affirmance.

The court of appeals affirmed the district court's Order, including the court's adverse inference as a spoliation sanction. (*See* Op. ¶¶ 31–37.) The court disagreed that Defendants lacked notice sufficient to trigger a duty to preserve evidence 14 months before litigation was first mentioned. (*Id.* ¶ 31.) Departing from the standard adopted by another division of the court of appeals for triggering precomplaint preservation—requiring a party know that litigation will be filed—the court ignored Defendants' knowledge of impending litigation altogether and affirmed because Defendants "should have known" of Plaintiffs' potential damages and Defendants' potential liability. (*Id.* ¶¶ 31–32.)

To the court, this solved the notice issue. Constructive knowledge of potential liability and potential damages was good enough to impute

notice of "reasonably foreseeable" litigation. (*Id.* ¶ 32.) Rather than require Plaintiffs to communicate any unstated intent to sue, the court flipped the standard and held, "At no time did plaintiffs communicate to defendants that there was no need to preserve evidence because they would not be pursuing litigation against them[.]" (*Id.*)

Next, the court of appeals affirmed the district court's use of the adverse inference to bridge causation gaps and establish necessary elements of liability. (*Id.* ¶¶ 35–37.) The court held that the district court "used" the adverse inference to show "that the evidence destroyed would have shown what defendants did not want it to show": the existence of a meth lab in the downstairs unit. (*Id.* ¶ 36.) The court also concluded it was proper 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.* ¶ 35.)

SUMMARY OF THE ARGUMENT

Disputes and adversarial communications during the normal course of business are commonplace. While a routine dispute *could* end up in court, because litigation is an ever-present possibility in society, that result is (and should remain) the exception.

The focal point of this case is if and when a prelitigation party must alter its normal practices before a case is filed and undertake what could be burdensome steps to preserve information. This inquiry is guided by two questions: (1) *when* the duty to preserve attaches; and (2) *what* information must be preserved. The first concerns whether a party has a duty to preserve in the first instance, and the second concerns the scope of any attendant duty.

The issue here centers on the first inquiry. In its most distilled form, the question is: must a custodial party know that litigation will be filed or is imminent before it shoulders a duty to preserve would-be evidence, or must it only know of a generalized dispute or grievance that makes a claim of injury and potential liability. The answer to this question is paramount. Case-deciding sanctions could be imposed on defendants—or plaintiffs—for not interpreting a routine communication or disagreement as an unstated intent to sue.

I. This Court has never recognized a general duty to preserve evidence before litigation. The obvious starting point therefore is whether Defendants were under a duty to preserve, and, if so, the source of that duty. Here, the only available source is the court's "inherent power," which includes the power to sanction. But, critically,

there is a difference between using the court's inherent power to sanction and using inherent power to impose an otherwise-absent duty, the violation of which may be subject to sanctions in court. Other courts have recognized this limit, finding that because of constitutional limits on the court's inherent power, they are unable to impose broadly applicable duties subject to sanctions before a case is commenced and before the court's jurisdiction is invoked.

II. If, however, the Court finds that limits on its inherent power do not bar it from recognizing prelitigation duties, those limits must check what prelitigation conduct may be sanctioned.

II.A. Among the relevant limits are constitutional notice and due process concerns, and that the exercise of the court's inherent power is limited to matters necessary to protect the core judicial function. Both limits counsel in favor of a preservation standard that turns on the custodial party's actual knowledge or notice of imminent litigation. Indeed, this is the standard the court of appeals adopted in *Castillo v. Chief Alternative, LLC*, 140 P.3d 234 (Colo. App. 2006), which is the only standard that could have applied to Defendants' actions in 2018. Such a standard encourages the person contemplating legal action to make its intent known; it ensures routine grievances, disputes, and

other nonlitigation communications do not impose burdensome preservation measures; and it promotes certainty and fairness through a clear standard. The *Castillo* standard also comes the closest to overcoming jurisdictional obstacles, by activating preservation obligations only when a party knows it will need the court's help, or knows the courts will be used, to decide a dispute.

Of course, neither lower court contended with the *Castillo* standard. For this reason alone, the courts erred. Further, the facts of this case prove the need for a narrow standard. By looking to Defendants' knowledge of "potential damages" and "potential liability," the lower courts bypassed whether Defendants were on notice of imminent litigation. Rather, notice of generalized grievances with a neighbor, which all sought nonlitigation resolutions, raised an "aware[ness] of [Plaintiffs'] complaints, potential injuries and Defendants' potential liability." And *this* was good enough to require preservation even though Plaintiffs waited another 14 months to first threaten litigation. Simply, burdensome preservation duties, subject to the court's sanctioning power, must be based on something more substantial and forward telling of litigation.

II.B. Compounding its error, the district court also failed to consider what Defendants knew at the time the downstairs unit was cleaned, repaired, and relet to a new tenant. Instead of examining Plaintiffs' and Defendants' communications as a whole and zeroing in on what Defendants knew on August 28, 2018, the court vaguely considered Defendants' awareness of potential injuries and potential liability during a six-month window in 2018.

Once the court's timing error is corrected, the evidence is uncontroverted: when the downstairs unit was transitioned on August 28, 2018, Defendants thought "there w[ere no] more issues." Plaintiffs did not reveal their intent to sue until 14 months later.

III. Whether the Court holds there is no general duty to preserve information before litigation, or that Defendants had no duty applying the correct standard, the district court's judgment cannot stand. The court made clear that the adverse inference as a spoliation sanction "established" causation based on the assumption there was a meth operation in the downstairs unit. Without the adverse inference, Plaintiffs cannot prove causation. And failure to prove causation requires the entry of judgment in Defendants' favor.

STANDARD OF REVIEW AND PRESERVATION

Standard of review. The Court reviews the district court's sanction for spoliation of evidence for abuse of discretion. *See, e.g.*, *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*, 420 P.3d 969, 972 (Colo. 2018); *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008) ("[A]buse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. A misapplication of the law … also constitute[s] an abuse of discretion." (citations omitted)).

On appeal, Defendants argued, and continue to argue, that the district court misstated and misapplied the law, which the court of appeals affirmed. The lower courts applied the wrong precomplaint notice standard and sidestepped whether Defendants knew litigation would be filed at the time of the alleged spoliation.

Preservation. Plaintiffs raised spoliation sanctions in their trial brief. (CF, p 1498.) Defendants argued against spoliation sanctions at trial (TR (8/23/2021), pp 255:20–256:8), and the district court ruled on the issue in its order (Order 4–5, 9–10).

ARGUMENT

Precomplaint preservation[6] turns on two questions: (1) *when* the duty to preserve attaches (the trigger); and (2) *what* information must be preserved (the scope). Distinguishing between trigger and scope questions is critical because different notice standards apply. For scope questions, once a precomplaint duty to preserve attaches, the custodial party must preserve the evidence it knows or should know is relevant to the anticipated litigation. For trigger questions, notwithstanding the district court's Order, a precomplaint duty can, at most, attach only if the party's subjective state shows it knew litigation would be filed or was imminent. The issue presented here concerns the first inquiry: if and when a duty to preserve attaches before litigation is filed.

I. This Court Has Never Recognized a General Duty to Preserve Before Litigation Is Filed, and It Should Not Do So Here.

The district court sanctioned Defendants for not preserving the contents of a working apartment and a former tenant's possessions 14 months before Plaintiffs first mentioned litigation. Implicit in the

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[6] Colorado Rule of Civil Procedure 3 provides that "a civil action is commenced … by filing a complaint with the court or … by service of a summons and complaint." Defendants' reference to *precomplaint* preservation refers to obligations arising before an action is commenced.

court's sanction finding is the conclusion that Defendants were under a precomplaint duty to preserve would-be evidence. *See Homeworks Constr., Inc. v. Wells*, 138 P.3d 654, 658 (Wash. Ct. App. 2006) ("A party's actions are 'improper' and constitute spoliation where the party has a duty to preserve the evidence in the first place.").

The existence of a duty is a "question of law to be determined by the court," *cf. Vigil v. Franklin*, 103 P.3d 322, 325 (Colo. 2004), and this Court has never recognized a duty to preserve before litigation. This is *the* threshold question. *See Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 527 P.3d 134, 137, 148 (Wash. Ct. App. 2023) (duty is a "threshold legal issue" and "clearly … the party accused of spoliating evidence must have a duty to preserve that evidence").

The starting point is identifying the source of any precomplaint duty. Identification of the source not only answers *if* the law imposes on a custodial party a duty to act or refrain from acting before litigation but also defines (or limits) the attachment of the duty—when it might be triggered. Without question, a duty to preserve evidence may be imposed by positive law, whether it be the constitution, *People v. Greathouse*, 742 P.2d 334, 338 (Colo. 1987) (discussing the state's constitutional duty to preserve evidence in criminal cases), statute,

Colo. Rev. Stat. § 18-1-414(2)(a) (defining law enforcement's duty to preserve biological evidence for DNA testing), or regulation, *see Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1000–01 (Colo. 2006) (discussing a railroad company's duty to preserve evidence under federal railroad regulations). Likewise, a duty also may be imposed by agreement or contract, a court order, or by special or fiduciary relationship. *See Seattle Tunnel Partners*, 527 P.3d at 149.

But none of these potential sources imposed a duty on Defendants here, and neither the district court nor Plaintiffs suggested otherwise. Thus, the relevant question is whether *the courts* through their inherent power can impose a common law duty to preserve over a year before a custodial party is first notified of impending litigation.

There's consensus that there is no general duty to preserve evidence before litigation. *Cook v. Tarbert Logging, Inc.*, 360 P.3d 855, 864 (Wash. Ct. App. 2015) (stating Washington courts have "reject[ed] … a general duty to preserve evidence"); *Martin v. Keeley & Sons, Inc.*, 979 N.E.2d 22, 28 (Ill. 2012) ("The general rule in Illinois is that there is no duty to preserve evidence."); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 191 (N.M. 1995) ("We hold that in the absence of [a contract, statute and regulation, or other special circumstances] a property owner

has no duty to preserve or safeguard his or her property for the benefit of other individuals in a potential lawsuit."), *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001).

Likewise, this Court has never recognized a general duty to preserve evidence. True, shortly after the Court's *Aloi* decision, a division of the court of appeals in *Castillo v. Chief Alternative, LLC*, 140 P.3d 234 (Colo. App. 2006), endorsed a duty to preserve before litigation. The court found support in *Aloi*. *Id.* at 236. But *Aloi* did not approve of a general duty to preserve evidence. There, the source of the duty was a federal railroad regulation that required the preservation of daily locomotive inspection reports, 129 P.3d at 1000–01 (citing 49 C.F.R. § 229.21(b) (2005)), and the duty was admitted, *id*. Rather, the issue in *Aloi* was whether an adverse inference, as a spoliation sanction, requires a finding of "bad faith" in failing to preserve evidence as required by regulation. *See id.* at 1002–03. In that context, the Court "discern[ed] no useful distinction between destroying evidence in bad faith and destroying evidence willfully." *Id.* at 1003. And, because the railroad "had notice" the "inspection and repair documents would be relevant to litigation well before" the documents were discarded, the

district court acted within its discretion by imposing an adverse inference as a sanction for the willful destruction of evidence. *Id.*

Subsequent court of appeals decisions are also silent on the duty question. *See Warembourg v. Excel Elec., Inc.*, 471 P.3d 1213, 1217 (Colo. App. 2020) (stating a party "has a legal duty to preserve [evidence]" but not identifying the source of the duty).

While unstated, it is apparent lower courts are using their "inherent power" to require precomplaint preservation, as both lower courts did here. (*See* Order 10, n.5 ("Trial courts enjoy broad discretion to impose sanction[s] for the spoliation of evidence, even if the evidence was not subject to a discovery order permitting sanctions under the Colorado Rules of Civil Procedure." (citing *Aloi*, 129 P.3d at 999)); *see also* Op. ¶ 28 ("Even where a party destroys evidence negligently or intentionally, the trial court retains the inherent power to impose sanctions for the spoliation of evidence.").) Reliance on the court's inherent power comes from *Aloi*: "The ability to provide the jury with an adverse inference instruction as a sanction for spoliation of evidence derives from the trial court's inherent powers." 129 P.3d at 1002.

But there is a critical difference between using the court's inherent power to *sanction* and using the court's inherent power to

construct a precomplaint *duty* subject to sanction. Of course, courts have the inherent power to remedy abuses of the judicial process. But creating a legal norm (a general precomplaint duty to preserve) and ordering sanctions based on violation of that norm is a matter of substantive law beyond the court's inherent power. Put directly, the court's inherent power does not permit it to impose general obligations on the populus that may apply years before the court's jurisdiction is invoked and no matter if litigation ever materializes.

This Court has warned that courts "must proceed 'cautiously' when invoking the inherent authority doctrine." *Laleh v. Johnson*, 403 P.3d 207, 211–12 (Colo. 2017) (quoting *Peña v. Dist. Ct.*, 681 P.2d 953, 957 (Colo. 1984)). This caution is well placed. Separation of powers prevent courts from usurping or intruding upon executive and legislative powers and limit the use to matters that are "reasonably necessary for the proper functioning of the judiciary." *Bd. of Cnty. Comm'rs v. Nineteenth Jud. Dist.*, 895 P.2d 545, 548 (Colo. 1995). In practice, courts exercise their limited inherent power to administer the judiciary's function by issuing contempt citations against litigation parties that violate court orders, *see In re J.E.S.*, 817 P.2d 508, 511–12 (Colo. 1991), sanctioning parties for spoliation that occurred *during* a

case while under the court's jurisdiction, *see Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 203–05 (Colo. App. 1998), and ordering coordinate branches of government to fund core judicial activities, *see Peña*, 681 P.2d at 956; *In re Ct. Facilities for Routt Cnty.*, 107 P.3d 981, 984 (Colo. App. 2004).

These applications are in keeping with known and well-rooted constitutional principles. To that end, in exercising their inherent power, courts are necessarily constrained by due process and notice requirements, *see In re K.J.B.*, 342 P.3d 597, 600–01 (Colo. App. 2014), subject-matter jurisdiction requirements, *City of Englewood v. Parkinson*, 703 P.2d 626, 628 (Colo. App. 1985), and existing statutes and rules, *see People v. Justice*, 524 P.3d 1178, 1185–86 (Colo. 2023).

Taken together, these principles counsel against using the court's inherent power to impose new precomplaint duties. The court's inherent power does not give courts license to reach beyond its jurisdiction to supplant legislative and rulemaking powers by creating new (sanctionable) obligations broadly applicable to parties before a case is commenced. This aligns with democratic tenets as well. The court's inherent power is immune from most democratic protections. Because of separation of powers, the general assembly cannot abrogate a general

obligation sourced in the court's inherent power. *Cf.* Colo. Const. art. III ("[N]o person or collection of persons charged with the exercise of powers properly belonging to [the three] departments shall exercise any power properly belonging to either of the others ... ."); *Bd. of Cnty. Comm'rs*, 895 P.2d at 548 (collecting cases). Nor would regulated parties have notice of new obligations imposed by reference to the court's inherent power, as they would in a rulemaking.[7]

At bottom, the only way Defendants had a precomplaint duty to preserve items from the downstairs unit is if the Court creates, through its inherent power, a general duty to preserve evidence. The Court should decline. The better path is to follow the restraint of other state courts that have held courts cannot expand their inherent power to recognize new general precomplaint obligations. *See Cook*, 360 P.3d at 867; *Seattle Tunnel Partners*, 527 P.3d at 149.

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[7] Unlike federal courts, this Court enjoys *constitutional* rulemaking power to "govern[] practice and procedure in civil … cases." Colo. Const. art. VI, § 21. But the exercise of that rulemaking power is subject to notice and due process protections.

II. The Standard the District Court Used to Impose Preservation Obligations on Defendants Is Wrong and Irreconcilable With the Court's Inherent Power.

If the Court decides its inherent power allows courts to impose preservation obligations before litigation is filed and their jurisdiction invoked, and sanction noncompliance, the Court must state when a precomplaint duty arises and applies. Limits on the court's inherent power necessarily limit what precomplaint conduct is sanctionable.

A. For a precomplaint preservation duty to attach, the custodial party must have actual knowledge that litigation will be filed or is imminent.

1. Any workable standard must be anchored by well-defined limits on the Court's inherent power. Chief among them is strict adherence to constitutional notice and due process protections. *See In re K.J.B.*, 342 P.3d 597, 601 (Colo. App. 2014); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process … ."). At the time of the alleged spoliation and the district court's Order, the court of appeals decision in *Castillo*[8]—and a lesser degree, *Warembourg*[9]—provided the rule of decision. The division in

[8] *Castillo v. Chief Alt., LLC*, 140 P.3d 234 (Colo. App. 2006).

[9] *Warembourg v. Excel Elec., Inc.*, 471 P.3d 1213 (Colo. App. 2020).

Castillo, guided by a treatise on the destruction of evidence, stated that preservation duties trigger upon "a clear showing" that the custodial party "knew litigation would be filed." 140 P.3d at 236–37 (collecting cases and other authorities). *Castillo* thus held that precomplaint preservation obligations attach only if the custodial party has actual knowledge or notice of imminent litigation.

This is a sensible standard. *First*, the party in the best position to anticipate litigation is the person contemplating legal action. Thus, it is reasonable to put some onus on that party to provide clear notice that litigation is imminent before activating what otherwise could be burdensome preservation obligations. This is how the actual knowledge standard works; it gives the noncustodial party appropriate incentive to make reasonably clear that litigation in forthcoming. While prospective parties need not go as far as hire a lawyer to draft a demand letter, clear communication of forthcoming litigation has been the norm in Colorado for decades. *See, e.g.*, *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1000 (Colo. 2006) (affirming sanction finding after plaintiff notified defendant "[w]ithin a week of the accident" that a personal-injury action would be filed); *Warembourg v. Excel Elec., Inc.*, 471 P.3d 1213, 1218, 1225 (Colo. App. 2020) (affirming sanction finding after plaintiff sent

defendant a prelitigation letter referencing his claim and requesting preservation of the subject electrical box); *Pfantz v. Kmart Corp.*, 85 P.3d 564, 567 (Colo. App. 2003) (affirming sanction finding after plaintiff notified defendant "shortly after the accident" that the subject "bench should be preserved as evidence" for imminent litigation).

Second, focusing on the imminence of litigation ensures that routine grievances, disputes, and other nonlitigation communications do not impose burdensome preservation measures (such as the retention of vast amounts of electronic data, on-again, off-again litigation holds, and the forgoing normal business practices) in the absence of a known litigation threat. In that way, the *Castillo* standard accounts for the "reality … that litigation 'is an ever-present possibility'" in society and that "[w]hile a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation." *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007).

Third, the *Castillo* standard promotes certainty and fairness; it ensures prospective litigants, deciphering incomplete and evolving information, understand when they have a duty to preserve evidence

before litigation. Parties surveying the circumstances before litigation must be able to predict with a reasonable degree of certainty if they have a duty to preserve evidence. To this point, a clear standard defining when the duty attaches promotes compliance.

Next came *Warembourg*. At first, *Warembourg* followed *Castillo* in approving an actual knowledge standard. There, the division said that "a legal duty to preserve" activates "upon *learning* that litigation … [i]s likely." 471 P.3d at 1225 (emphasis added). "Learning" means "[t]he act of acquiring knowledge." Learning, Black's Law Dictionary (11th ed. 2019). Thus, the division hewed to *Castillo*'s focus on what the custodial party knew at the time the evidence was discarded.

Where the division in *Warembourg* equivocated, however, was on what there must be actual knowledge of. Whereas *Castillo* required actual knowledge that litigation would be filed or was imminent, *Warembourg* listed several alternatives: knowledge that litigation is "likely," "imminent," or "reasonably foreseeable." 471 P.3d at 1225, 1226. This imprecision is of no moment. The duty question in *Warembourg* was neither briefed nor argued because the district court had found that the custodial party had "actual knowledge" litigation was "imminent" before destroying evidence. *See id.* at 1218, 1225. This

finding tracks *Castillo*. That said, *Warembourg* does reflect a consistency in the standard that the custodial party's subjective awareness at the time evidence is discarded is the keystone.

So, here, when the district court sua sponte imposed an adverse inference as a spoliation sanction, the standard recognized by the courts for deciding whether Defendants had a duty to preserve was a clear showing that Defendants knew litigation would be filed or was imminent. Yet the district court did not cite this standard, or any trigger-question standard for that matter. This was reversible error.

2. The *Castillo* standard is also closer in line with other limits on the court's inherent power. "A court's inherent authority is generally limited to matters that are reasonably necessary for the proper functioning of the judiciary." *Bd. of Cnty. Comm'rs v. Nineteenth Jud. Dist.*, 895 P.2d 545, 548 (Colo. 1995). No doubt then, the Court, through its inherent power, lacks the authority to impose on a particular class of persons (e.g., railroads, electricians, or landowners) a general duty to preserve documents or things. It also lacks the authority, through its inherent power, to adopt a fixed time period to preserve documents or things (e.g., 90 or 120 days). Nor could it impose general duties without direct reference to protecting the judicial process. To do so would be to

legislate. And while the court has the authority "to police itself" and to "vindicat[e] judicial authority," *Chambers*, 501 U.S. at 46 (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)), the court's inherent power must yield to structural limits in the constitution, *Bd. of Cnty. Comm'rs*, 895 P.2d at 548 (stating use of the court's inherent powers must respect the "balancing of the three branches of government, which is necessary to further the public interest of a cooperative and harmonious governmental structure").

Indeed, Defendants led by arguing that constraints on the court's inherent power counsel against using that power to create general preservation obligations and imposing them on prelitigation parties. (*See* Argument, I, *supra*.) But even if the Court disagrees, limits on the court's inherent power require that any standard triggering a duty to preserve before the courts' jurisdiction is invoked be tightly connected to exercise of the judicial function.

Again, *Castillo*'s standard comes the closest. It cues on whether the custodial party believes litigation will be filed or is imminent. As is, the standard activates preservation obligations when a party knows it will need the court's help, or knows the courts will be used, to decide a

particular dispute. But to be clear, this is the outer limit of the court's inherent power over precomplaint preservation conduct.

3. In imposing on Defendants an obligation to preserve the contents of the downstairs unit and the former tenant's possessions 14 months before litigation was mentioned, the district court concluded that a precomplaint duty to preserve triggered when Defendants' employee "was aware of [Plaintiffs'] complaints, potential injuries and Defendants' potential liability." (Order 5.) The court of appeals varied the standard even more: the duty triggered when Defendants employee "should have known" of Plaintiffs' potential damages and Defendants' potential liability. (Op. ¶¶ 32, 33.)

Castillo's standard is missing from both decisions. To be sure, footnoted in a different section of the Order is a cite to *Castillo*'s scope-question standard—although it is misattributed to *Aloi*. (*See* Order 10 n.5 (purporting to quote *Aloi* and stating a custodial party must preserve evidence it "knew or should have known … was relevant to pending, imminent, or reasonably foreseeable litigation").) The actual language from *Aloi* is: "Imposing an adverse inference where a party willfully destroys evidence will deter parties from destroying evidence that they know or should know will be relevant to litigation." 129 P.3d

at 1003. At any rate, the standard defining the scope of a preservation obligation (scope question) is separate and immaterial to whether a custodial party was on notice in the first place (trigger question).

The district court's use of its inherent powers to apply a new standard activating precomplaint preservation allowed it to bypass *the* critical duty question: Were Defendants on notice that Plaintiffs intended to sue? (*See* TR (8/23/2021), pp 255:20–21, 256:6–8 (trial counsel arguing that "spoliation requires … a belief that there is litigation pending" or there is a "threat of litigation").) Instead, it was sufficient that Defendants were "aware of [Plaintiffs'] complaints, potential injuries and Defendants' potential liability" (Order 5; *see also* TR (8/23/2021), p 256:9–14), even though Plaintiffs' grievances sought nonlitigation resolutions to disputes with a neighbor. The absence of a credible threat of litigation is made apparent by the fact that Plaintiffs waited 14 months after the downstairs unit was turned over to threaten litigation. (*See* Statement of the Case, I.D, *supra*.)

Simply, a duty to preserve evidence before litigation is filed must be based on something more substantial and forward telling of litigation than tenant grievances seeking lease enforcement against a neighboring tenant. This is precisely why the *Castillo* standard,

focusing on whether the custodial party knew litigation would be filed or was imminent, is the appropriate and correct standard.

B. The relevant knowledge is the custodial party's knowledge at the time of discarding evidence.

The district court's duty analysis fails for other reasons the Court should clarify. Missing from the district court's Order is a discernable finding of what Defendants knew at the time the downstairs unit was cleaned, repaired, and relet to a new tenant. This is understandable. Spoliation was only mentioned in passing in Plaintiffs' trial brief, Defendants had no opportunity to brief spoliation or sanctions, and, except for limited mention at halftime, the court heard no argument on the issue. (*See* Statement of the Case, II.B, *supra*.)

Again, for spoliation sanctions, the correct focus is on what Defendants knew or understood on August 28, 2018. That is, whether Defendants had a precomplaint duty to preserve turned on what Defendants knew at the time the subject evidence was discarded. The district court only found that "during this time" (from March 2018 to September 2018), Defendants were "aware of [Plaintiffs'] complaints, potential injuries and Defendants' potential liability." (Order 5.) But Defendants' awareness of "potential injuries" and "potential liability"

sometime during a six-month window in 2018 says nothing of Defendants' knowledge on August 28, 2018.

The chronology of Plaintiffs' and Defendants' dialogue during that time clarifies what Defendants knew on August 28, 2018.

> **(1)** Between March and May 2018, Plaintiffs raised with Defendants issues about their downstairs neighbor. Plaintiffs' four grievances to Defendants reported loud noises, unauthorized guests, parking issues, chemical odors, and domestic disturbances. Each sought a nonlitigation resolution—enforcement of perceived lease violations by Plaintiffs' downstairs neighbor.
>
> **(2)** Also between March and May 2018, Defendants and Littleton Police inspected or entered the downstairs unit at least four times. Defendants also walked the halls trying to confirm Plaintiffs' odor reports to no avail.
>
> **(3)** On April 24, 2018, South Metro Housing inspected Plaintiffs' upstairs unit, failed the unit because of a slight chemical smell, and reinspected the unit on May 30, 2018, clearing it for service.
>
> **(4)** Plaintiffs' reports dissipated during the three months between the May 30, 2018 reinspection and the August 28, 2018 eviction.
>
> **(5)** On the morning of August 28, 2018, law enforcement walked the downstairs unit and precleared it for the eviction.

(*See* Statement of the Case, I.B, *supra*.) Far from proving that litigation was imminent (or even remotely foreseeable) on August 28, 2018, when the downstairs unit was transitioned, "[Defendants] didn't know that there w[ere] any more issues." (TR (8/4/2021), p 7:18–21 (Smith's testimony).) Plaintiffs did not reveal their intent to sue until 14 months

later, when they sent a demand letter attaching a draft complaint. (*See* (EX (trial) pp 4898–4903.)

The district court's timing error in determining whether Defendants had a precomplaint duty to preserve evidence warrants further clarification by the Court. Based on the credible, uncontroverted facts, it is clear Defendants were not on notice of impending litigation with Plaintiffs on August 28, 2018.

III. Application of the Correct Standard Requires Reversal and Judgment in Defendants' Favor.

Whether the Court holds there is no general duty to preserve before litigation (I, *supra*), or, applying the correct standard, that Defendants had no precomplaint duty to preserve the items in question (II, *supra*), the result is the same: the judgment cannot stand.

To prevail under the PLA, Plaintiffs had to prove both factual and legal causation. *See Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287, 292 (Colo. 2020), *abrogated on other grounds in part by statute,* Colo. Rev. Stat. § 13-21-115(2)(e). Plaintiffs had to show "but for the alleged negligence, the harm would not have occurred" (factual causation), *id.* (quoting *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996)), and that

Defendants' negligence was a "substantial factor" in producing foreseeable harm (legal causation), *N. Colo. Med. Ctr.*, 914 P.2d at 908.

Plaintiffs' causation case turned on the existence of a clandestine meth lab in the downstairs unit, which caused fumes to travel through an unproven pathway to the upstairs unit and cause harm. Even though no evidence established the existence of a meth lab in the downstairs unit, that fumes from a hypothetical lab traveled to Plaintiffs' unit, and that Plaintiffs were exposed to such fumes, the district court inferred each causal element. As a spoliation sanction, the court inferred that Plaintiffs were exposed to meth fumes; it inferred that the source of the fumes was from a meth lab in the downstairs unit; and it inferred that exposure to fumes caused Plaintiffs' injuries. (Order 9–10.) Each factual link was necessary to prove causation—and each link rested on the adverse inference the court imposed because of its erroneous spoliation sanction.

In sum, the adverse inference imposed as a spoliation sanction was issued in error. Because the adverse inference was necessary to the district court's causation finding, reversal is required. Further, because Plaintiffs cannot prove causation without the adverse inference, the Court should direct judgment in Defendants' favor on Plaintiffs' claims.

CONCLUSION

Defendants ask the Court to REVERSE the district court's order and DIRECT the court to enter judgment in their favor. *First*, the district court's adverse inference as a spoliation sanction for precomplaint destruction of evidence cannot stand. Defendants had no duty to preserve the contents of the working apartment 14 months before litigation was first mentioned by Plaintiffs. And, absent a duty to preserve, there can be no sanction for violating that duty. *Second*, because the adverse inference was necessary to Plaintiffs' causation case, and because Plaintiffs did not prove the existence of a meth lab in the downstairs unit, Plaintiffs cannot prove a necessary element of their claim. Thus, reversal of the spoliation sanction requires both reversal of the judgment and an order directing judgment in Defendants' favor.

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CERTIFICATE OF SERVICE

I certify that on January 23, 2024, a true and correct copy of the Opening Brief was filed with the Court and served via the Colorado Courts E-Filing System upon all counsel of record.

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