DATE FILED: February 14, 2022 4:37 PM
FILING ID: B2ED48B3399CA
CASE NUMBER: 2021SC930

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Certiorari to the Colorado Court of Appeals
Case No. 2020CA0298
Opinion of December 2, 2021
Division A, per Chief Judge Bernard
Dunn and Grove, JJ., concur

Petitioners:
KILLMER, LANE & NEWMAN, LLP, MARI NEWMAN, and TOWARDS JUSTICE,

v.

Respondents:
BKP, INC., ELLA BLISS BEAUTY BAR, LLC, ELLA BLISS BEAUTY BAR 2, LLC, and ELLA BLISS BEAUTY BAR 3, LLC

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Case No. 2021 SC 930

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BRIEF OF *AMICUS CURIAE* COLORADO TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because it contains less than 4,750 words.

/*s/Esteban A. Martinez*
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QUESTION PRESENTED

Did the court of appeals err in holding that the defendant attorney's statements concerning the subject matter of active litigation were not protected from liability for defamation by the absolute litigation privilege?

SUMMARY RESPONSE OF AMICUS CURIAE

Yes.

STATEMENT OF INTEREST OF AMICUS CURIAE

The constituency, mission, and concerns related to this case for each of the *Amici* are described in their Motion for Leave to file this Brief of *Amici Curiae* filed this date ("Motion for Leave"). All share in the concerns expressed in this brief of protecting attorneys involved public interest and class action litigation who would accurately inform the public of claims *sub judice* to prompt unknown witnesses, victims, class members, and potential parties to come forward, to educate the public concerning the operation of the court and judicial remedies available through petitioning the judicial branch, and to bring to bear the beneficial effects of publicity on the integrity of the judicial system. Absent such protection, the *amici* and their attorneys not only face the distraction of retaliatory litigation but also moral and ethical conflict dilemma of the forced choice between advocating for their clients and protecting themselves.

Under the decision below, *BKP, Inc., et al. v. Killmer, Lane & Newman, LLP, et al.*, ___ P.3d ___, 2021COA144 (Dec. 2, 2021), the *Amici* face the specter of tort liability for generating accurate publicity concerning pending litigation, which, as repeatedly recognized by the courts is integral to the duties owed the clients they represent in litigation and to the judicial system itself. That "speak-at-your-own-risk" predicament limits and chills attorneys' ability to advocate for their clients in ways long recognized as a critical component of the attorneys' work and limits the role of publicity in assuring the effectiveness of the right to petition and the accountability of the court system to the parties and the public.

Amicus Colorado Trial Lawyers Association (CTLA) is an association of litigation attorneys who regularly must live with these concerns in representing their clients. *See Motion for Leave* at ¶1. So, too, the remaining associations, Civil Rights Education and Enforcement Center (CREEEC) (*Motion for Leave* at ¶2), Colorado Freedom of Information Coalition (CFOIC) (*id*. at ¶3), Colorado Cross Disability Coalition (CCRD) (*id*. at ¶4), Colorado Center on Law and Policy (CCLP) (*id*. at ¶5), Colorado Plaintiff Employment Lawyers Association (PELA) (*id*. at ¶6), Independence Institute (*id*. at ¶7), Colorado Broadcasters Association (CBA) (*id*. at ¶8), and Lawyers Civil Rights Coalition (LCRC) (*id*. at ¶9), sponsor

litigation for which they employ or engage attorneys and are dependent upon their attorneys' willingness to describe and explain, for public consumption, the substantive and procedural nuances of litigation and the facts and law in issue to serve their own efforts to investigate social injustice, identify parties willing to take their oppressors to court, identify potential witnesses and class members, and to inform the public as described above.

Finally, the CFOIC membership consists of mostly news media organizations in Colorado, who are heavily dependent on the willingness of attorneys to speak of their case to inform the news media's coverage of legal proceedings, and wish to have those concerns heard and considered by this Court.

ARGUMENT OF *AMICUS CURIAE*

I. This Court should grant *certiorari* to confirm an attorney's absolute privilege to make out-of-court statements that are a repetition or an explanation of the allegations in a pleading.

Colorado courts have long insulated attorneys from reprisal litigation (*i.e.*, claims for defamation, interference with contract, etc.) brought by adversaries for acts and communications arising from the lawyer's scope of representation on behalf of a client.[1] The courts have primarily relied on the litigation privilege, a

[1] *E.g., Glasson v. Bowen*, 84 Colo. 57, 59, 267 P. 1066, 1067 (1928); *Renner v. Chilton*, 351 P.2d 277, 277 (Colo. 1960); *McDonald v. Lakewood Country Club*,

common law doctrine, to afford lawyers immunity from such suits,[2] but they have also invoked other doctrines including the *Noerr-Pennington* Doctrine, and the strict-privity rule[3] to accomplish the same goals: to enable lawyers to zealously represent their clients without the threat of litigation from disgruntled adversaries; to ensure access to the courts; and, to preserve the core of the adversarial system which relies on the attorney's undivided loyalty to her client.

The court of appeals' opinion in *BKP, supra,* opens an attorney up to unlimited third-party claims for acts and communications arising from her representation of a client, and undermines decades of law which developed to preserve the attorney's function as a loyal and vigorous advocate.

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461 P.2d 437, 444 (Colo. 1960); *Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 714-15 (Colo. App. 2001); *Dalton v. Miller*, 984 P.2d 666, 669 (Colo. App. 1999); *Club Valencia Homeowners Assn. v. Valencia Assoc.*, 712 P.2d 1024, 1027 (Colo. App. 1985).

[2] *See, e.g., Club Valencia Homeowners Assn.*, 712 P.2d at 1027 (applying the litigation privilege as found in Restatement (Second) of Torts § 586 (Am. L. Inst. 1977)).

[3] *See Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1992 (attorney liability to third parties is strictly limited for three policy reasons: "the protection of the attorney's duty of loyalty to and effective advocacy for his or her client; the nature of the potential for adversarial relationships between the attorney and third parties; and the attorney's potential for unlimited liability if his duty of care is extended to third parties").

A. Protected out-of-court statements are a vital tool of zealous advocacy for lawyers.

The court of appeals makes the bald assertion that a statement made outside of court, such as one made in a press conference which merely repeats the allegations of a complaint, is not protected by the litigation privilege. *BKP*, ¶ 25. Amicus for the Colorado Defense Lawyers Association thoroughly reviews two other court of appeals cases that contradict this proposition. *See Roth v. DLG Law Group, LLC* (Colo. App. No. 18CA1920, Nov. 7, 2019) (not published pursuant to C.A.R. 35(e)); *Aminokit Labs., Inc. v. Reinan*, (Colo. App. No. 15CA0933, Aug. 4, 2016) (not published pursuant to C.A.R. 35(e)).

Amicus for the CTLA writes separately on this point to examine the protected status of out-of-court statements, and to endorse the policy reasons behind their protection, even if found to be defamatory and made to the public generally.

While the litigation privilege was devised originally to protect a lawyer from defamation and libel suits by adversaries arising from their communications in court,[4] the privilege has evolved to immunize lawyers from a variety of claims

[4] *Glasson*, 84 Colo. at 59, 267 P. at 1067 (first application of the litigation privilege to claims of defamation where party authored an affidavit in support of a motion to change venue on grounds that a fair trial was impossible to be had in Fremont

arising from their advocacy and communications that take place outside of a judicial proceeding. *Begley v. Ireson*, 2020 COA 157, 490 P.3d 963 ("*Begley II*") (applying litigation privilege to uphold dismissal claim for tortious interference with a contract where attorney succeeded in halting an ongoing residential construction project upon sending a stop-work demand); *Buckhannon v. U.S. W. Commc'ns, Inc.*, 928 P.2d 1331, 1335 (Colo. App. 1996) (applying privilege to statements made by attorney to a personal injury claimant's disability insurer questioning validity of disability claim); *Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1117 (Colo. 1990) (applying litigation privilege to claim for intentional interference with contract where attorney filed a notice of *lis pendens*).

The *BKP* opinion, however, narrowed the litigation privilege so much so that its application achieves an absurd result: per *BKP*, the privilege affords the most protection to lawyers for hyperbolic and defamatory out-of-court statements in the pre-litigation setting, and no protection for the same statements made in the post-litigation phase. *BKP*, ¶¶ 14, 16, 19.

The opinion accomplished this absurdity by relying on the first half of the

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County because the majority of its inhabitants, including the Sheriff, were members of the KKK, and holding "That matter published in due course of judicial proceedings and pertinent thereto is within the protection of an absolute privilege.")

Restatement (Second) of Torts §586 and ignoring its second half. The first half, relied on by the court of appeals, states:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding....

(Emphasis added). The other half of § 586 states:

> …. or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Based on this selective use of the Restatement, the privilege would have protected the Petitioners from litigation arising from their allegedly defamatory statements if made before filing their federal complaint but not after filing it – even if the statements were identical.

The court of appeals justified its exclusive protection of pre-litigation defamatory statements, in part, by assuming that "the litigation privilege does not generally apply to statements made during press conferences and in press releases." *BKP*, ¶¶ 11-12. Approaching the question this way allowed the court to ignore the place publicity has in the advancement of law in areas such as criminal

defense,[5] and civil rights,[6] among others. In fact, organizations such as the NAACP have relied on the integration of the media, community organizing, and lawsuits to challenge racial and economic injustice.[7]

As demonstrated by the NAACP's history, effective lawyering often requires the use of every available tool to advance a client's objectives and those tools should include use of the media. *See* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 Columbia L. Rev. 1811-1856 (Nov. 1995) (exploring how advocacy in the court of public opinion is a

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[5] *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1039-40, 1058 (1991) (striking down Nevada ethics rule prohibiting lawyers from making public comments about ongoing criminal or civil cases, and recognizing that an attorney's right to use extrajudicial statements to ensure jury pools have access to accurate, balanced coverage during pre-trial publicity). *See also* Max D. Stearn, *The Right of the Accused to a Public Defense*, 18 Harv. C.R.-C.L. L. Rev. 53 (1983) (arguing that a public defense can be used to protect a falsely accused minority defendant).

[6] *See, e.g.*, Mark V. Tuschnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (1987) (describing how the NAACP's comprehensive advocacy campaigns integrating the media, community organizing, and lawsuits to challenge racial and economic injustice helped launch the political lawyering movement in the last century). *See also* Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, 206 (1992) (exploring how lawyers can use the press, community empowerment, and grassroots organizing rather than lawsuits to bring attention to problems that their clients face and to bring attention to more generalized societal problems and injustices).

[7] *See The NAACP's Legal Strategy Against Segregated Education*, *supra*.

legitimate way to advance a client's interests); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 ("An attorney's duties do not begin inside the courtroom door … an attorney may take reasonable steps to defend a client's reputation … including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."). In fact, a lawyer's use of the media is consistent with the primary role of lawyer as zealous advocate.[8]

The *BKP* opinion, however, severely limits a lawyer's ability to zealously advocate for clients and gives little weight to a lawyer's ethical duty to do so. Moreover, the opinion ignores the fact that Colorado lawyers – per the Rules of Professional Conduct – may inform the media about a lawsuit's claim, offense or defense involved, the identity of the persons involved (except when prohibited by law), and, information contained in a public record. Colo. RPC 3.6(b)(1), (2). It thus makes sense that post-litigation statements made outside of court, and especially those made to the press, deserve protection that, at the very least, mirrors the permissible scope of publicity lawyers may engage in pursuant to Colorado RPC 3.6.

[8] Colo RPC 1.3, cmt [1] "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

> Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion. To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar.

Gentile, 501 U.S. at 1056-57 (quoting *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)).

Indeed, several courts have agreed that some form of absolute privilege should extend to extrajudicial statements that repeat allegations (or defenses) in a publicly filed document, and provide an explanation thereto. *See, e.g.*, *McNamara v. Koehler*, 429 P.3d 6, ¶24 (Wash. Ct. App. 2018) (holding that regardless of the medium used, whether website, or blog, a "fair report" privilege applied to an attorney's statements on the firm's website concerning a pending lawsuit as the statements were "accurate or a fair abridgement of the allegations in the wrongful death plaintiffs' complaint"); *Helena Chem. Co. v. Uribe*, 281 P.3d 237, 239–40 (N.M. 2014) (applying the litigation privilege to extrajudicial post-litigation statements made to the press and holding "that republishing, repeating, or explaining a complaint that has been filed in good faith should be absolutely privileged because [i]n the age of digital communication, it is illogical to protect allegations in a publicly filed complaint but not repetition or explanation of those

same allegations outside the courthouse" (quoting *PowerDsine, Inc. v. AMI Semiconductor, Inc.*, 591 F.Supp.2d 673, 684 (S.D.N.Y.2008)); *Dallas Independent School Dist. v. Finlan*, 27 S.W. 3d 220, 239-240 (Tex. App. 2000) (applying litigation privilege to a press release and reasoning that "advising the media that a lawsuit has been filed, including a basic description of the allegations, has no practical effect different from providing the pleadings to the media."); *Prokop v. Cannon*, 583 N.W.2d 51 (Neb. Ct. App. 1998) (granting absolute immunity to attorney for statements made to the press); *Jones v. Clinton*, 974 F. Supp. 712, 731-732 (E.D. Ark. 1997) (immunity granted to counsel and parties for extrajudicial statements that "were nothing more than mere denials of the allegations and the questioning of plaintiff's motives," and which "mirror[ed] the statements contained in the answer to the complaint.").

Given the weight of authority and absence of parity between the rules of professional conduct and the litigation privilege as expressed in *BKP*, this Court should accept the case for *certiorari* and resolve this discrepancy.

B. The court of appeals' decision below creates an ethical dilemma for attorneys, and ignores public policy that limits an attorney's liability to non-clients.

Retaliatory lawsuits against lawyers brought by disgruntled adversaries undermine the administration of justice, prevent access to the courts, and interferes

with the attorney-client relationship by inviting "attorneys to divide their interest between advocating for their client and protecting themselves from a retributive suit."[9] Immunizing attorneys from retaliatory lawsuits, whether through application of the litigation privilege, fair report privilege, or the First Amendment, promotes Colorado's long-established public policy "to afford litigants the utmost freedom of access to the courts to preserve and defend their rights and to protect attorneys during the course of their representation of clients." *Club Valencia*, 712 P.2d at 1027; *Westfield Dev. Co.*, 786 P.2d at 1117 (holding that "the litigation privilege exists to encourage and protect free access to the courts for litigants and their attorneys").

> Without the privilege, adversaries could impair colorable claims by:
>
> "disrupting access to counsel," intimidating counsel with "an almost certain retaliatory proceeding," distracting counsel by forcing counsel to "defend[] a personal countersuit" as well as the original lawsuit, and "dampening . . . the unobstructed presentation of claims."

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[9] *Taylor v McNichols*, 149 Idaho 826, 841, 243 P.3d 642 (Idaho 2010). *See also* T. Leigh Anenson, *Absolute Immunity From Civil Liability: Lessons for Litigation Lawyers*, 31 Pepp. L. Rev. 914, 922-924 (2004) (exploring three primary policy goals for the protection of litigation lawyers from retaliatory lawsuits, including protecting the rights of clients to zealous representation, full access to the courts, and preservation of the attorney-client relationship, and justifying absolute immunity on the "existence of remedies other than a cause of action for damages," that include "a variety of sanctions that can be imposed by the court." *Id.*, 925).

BKP, ¶ 15 (quoting *Rubin v. Green*, 847 P.2d 1044, 1050 (Cal. 1993)).

Indeed, the suit against the Petitioner was successful in delaying the underlying litigation against BKP and interrupting the administration of justice for the claimants.

While zealous advocacy is at the core of the Anglo-American adversarial system, it cannot exist without an attorney's undivided loyalty to the client. *See* Colo. RPC 1.7, cmt [1] ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). The mere threat of a lawsuit against one's attorney creates the potential for a conflict of interest with the client, and may cost a litigant additional fees and costs to retain new counsel should their lawyer withdraw from the case. *See Babb v. Superior Court*, 479 P.2d 379, 382-83 (Cal. 1971) (explaining that retributive litigation "may well necessitate the hiring of separate counsel to pursue the original claim," and surmising that the "additional risk and expense thus potentially entailed may deter poor plaintiffs from asserting *bona fide* claims.").[10]

These same public policy concerns regarding zealous advocacy and

[10] *See also* Anenson, *supra*, 31 Pepp. L. Rev. at 935-36 (exploring cases where the courts denied counsel the benefit of the privilege where the attorney's acts or communications were designed to "deprive a party of its chosen counsel").

undivided loyalty have guided Colorado courts in limiting an attorney's tort liability to non-clients generally. *See Accident & Inj. Med. Specialists, P.C. v. Mintz*, 2012 CO 50, ¶ 26, 279 P.3d 658, 663 ("we have refused to extend an attorney's tort liability to non-clients for various reasons, including the adversarial nature of litigation and a concern that an attorney could be liable to an unforeseeable and unlimited number of third parties"); *Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994) (attorney liability to third parties is strictly limited for three policy reasons: "the protection of the attorney's duty of loyalty to and effective advocacy for his or her client; the nature of the potential for adversarial relationships between the attorney and third parties; and the attorney's potential for unlimited liability if his duty of care is extended to third parties"). These same public policy principles apply in the context of third-party retaliatory lawsuits.

Accepting *certiorari* in this case will solidify the public policy framework that undergirds the patchwork of immunity attorneys have from certain tort actions by third parties arising from their representation of clients. Moreover, by crafting a privilege based upon well-established public policy, the Court may further the ends of preserving the attorney-client relationship and protecting it from collateral attacks by adversaries who may attempt to use such lawsuits as a means of disqualifying one's choice of counsel.

C. The court of appeals' decision creates uncertainty for what lawyers can and cannot say in public about what they do and why.

While the facts at issue in *BKP* involve a formally convened press conference, the implications of the *BKP* opinion are much broader and give rise to important questions.

For instance, if an attorney provides a summary of an active case on a professional website, or provides factual background to the press about a pending lawsuit, will the repetition of publicly filed pleadings now form the basis of a defamation and libel claim? *See, e.g., McNamara, supra*, (attorney sued by adverse litigant for statements on the law firm's website about a pending lawsuit). What would stop the adverse parties from using defamation claims to spawn further litigation against one another? At what point would such lawsuits end? And what are lawyers and the public to make of the legal absurdity that a litigant must publish allegations in the form of public pleadings in order to institute a lawsuit, but faces a defamation claim "if he lets anyone know that he has brought it." *Albertson v. Raboff*, 46 Cal.2d 375, 380, 295 P.2d 405 (Cal. 1956).[11]

[11] The *Albertson* court held that, in the context of a notice of *lis pendens*, "It would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets anyone know that he has brought it.").

Finally, as they have done in the past, existing rules and laws will operate to limit any potential abuse of the absolute privilege to make out-of-court statements that are a repetition or an explanation of the allegations in a pleading. For instance, Colorado attorneys are held accountable to nonclients for fraud and malicious conduct,[12] for attorney's fees and costs associated with violation of C.R.C.P. 11, or bringing frivolous and groundless claims in violation of § 13-17-102, C.R.S. In essence, where the actor's conduct is subject to external control, such as judicial supervision, the broadest protection for attorney speech is warranted.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Colorado Trial Lawyers Association respectfully requests that the Petition for Writ of *Certiorari* be GRANTED.

Respectfully submitted this 14th day of February, 2022,

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[12] *See Mehaffy, Rider, Windholz Wilson v. Central Bank Denver, N. A.*, 892 P.2d 230, 235 (Colo. 1995) ("an attorney is not liable to a non-client absent a finding of fraud or malicious conduct by the attorney.")

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2022, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER** was electronically filed and served via Colorado Courts E-filing to the following:

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