

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

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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

**Attorneys for Amicus Curiae Colorado Trial Lawyers
Association:**

Anna N. Martinez - Martinez Law Colorado, LLC
146 W 11th Ave, Denver, CO 80204
303-529-3711
anna@martinezlawcolorado.com

Esteban A. Martinez - Martinez Law, LLC
353 Main Street, Longmont, CO 80501
303-872-9117
esteban@estebanlaw.com

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Case No. 2021 SC 930

**MOTION OF COLORADO TRIAL LAWYERS ASSOCIATION
AND AMICI FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE**

The COLORADO TRIAL LAWYERS ASSOCIATION, along with *amici* CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, COLORADO FREEDOM OF INFORMATION COALITION, COLORADO CROSS-DISABILITY COALITION, COLORADO CENTER ON LAW AND POLICY, COLORADO PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION, and INDEPENDENCE INSTITUTE, by and through counsel, Anna N. Martinez of Martinez Law Colorado, LLC, and Esteban Martinez of Martinez Law, LLC, pursuant to C.A.R. 29, moves for leave to file a brief of *amici curiae* in support of the Petitioners Mari Newman, individually, Killmer, Lane & Newman LLP, and Towards Justice:

1. The Colorado Trial Lawyers Association (hereinafter “CTLA”) is a not-for-profit corporation composed of over 1,100 attorney members practicing throughout the state. CTLA’s mission is to promote and protect individual rights through the judicial process, to advance trial advocacy skills, and to promote high ethical standards and professionalism in an ongoing effort to preserve and improve the justice system. CTLA members regularly represent individuals who have sustained injuries, losses, and damages due to the malfeasance of other individuals, corporations and governmental entities. Many of CTLA’s attorney members represent clients in and out of the courtroom, and are often on the forefront of

educating the public about their legal rights and responsibilities. Therefore, as an organization, CTLA's attention is naturally directed to issues before this Court concerning the liability of lawyers who make out-of-court statements about pending litigation. It is CTLA's intention to convey to the Court its perspective concerning attorney speech, and the current law that protects an attorney's acts and communications while representing their client.

Retaliatory lawsuits brought against counsel by adversaries in litigation creates the highest form of risk, not only to the adversarial legal system in which we are engaged, but to the attorney-client relationship itself. Indeed, retaliatory lawsuits arising from lawyer communications to the public – about prospective and ongoing litigation – create conflicts between lawyers and their clients, discourage vigorous advocacy, encourage unnecessary litigation and unnecessarily burdens our judicial system. The opinion in *BKP, Inc. v. Killmer, Lane & Newman, LLP*, 2021 COA 144, 1 (Colo. App. 2021) opens the door to such litigation.

2. The Civil rights Education and Enforcement Center (CREEC)¹ is a national nonprofit membership organization headquartered in Denver, Colorado. CREEC's mission is to defend human and civil rights secured by law to ensure that

¹ Petitioner Mari Newman, and her counsel Thomas Kelley, are on the Board of Directors at CREEC.

everyone can fully and independently participate in our nation’s civic life without discrimination based on race, gender, disability, religion, national origin, age, sexual orientation, or gender identity. CREEC’s work currently focuses on the rights of people with disabilities and the rights of detained immigrants.

In support of our mission, CREEC regularly engages in education and impact litigation, including class actions. Both before and after the commencement of litigation, the right to engage in publicity concerning civil rights and remedies to educate the public and identify people (including potential class members) who have experienced discrimination is essential for the fulfillment of CREEC’s mission. CREEC routinely shares information about its activities including lawsuits on its website (<https://creeclaw.org/>), in press releases, and on social media.

CREEC strongly supports the arguments set forth in this amicus brief and in the Petition for Writ of *Certiorari*.

3. Colorado Freedom of Information Coalition (CFOIC)² is a 501(c)(3) non-profit headquartered in Denver, Colorado which commenced operations in 1987. CFOIC is a coalition of news media organizations, professional associations,

² Petitioner Mari Newman’s counsel, Thomas Kelley, is on the Board of Directors at CFOIC.

citizen groups, and individuals dedicated to (1) educating the public on their rights to access information relevant to the informed participation as citizens and to speak out on public issues, and 2) sponsoring litigation to enforce those rights. The organizational members of CFOIC are listed at <https://coloradofoic.org/about/>

CFOIC believes the Court of Appeals' ruling in this case chills litigation attorneys from discussing their cases with members of the press, for fear that doing so will create financial exposure. Moreover, by chilling otherwise "willing speakers," the ruling inevitably will "limit[] the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti* , 435 U.S. 765, 783 (1978). The First Amendment protects not only the rights of speakers, but also of those who would receive the information they impart. *See, e.g., Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 756-57 (1976).

CFOIC maintains a website, <https://www.cfoic.org>, that reports the status of public interest litigation to the public. For that information, CFOIC and its media members who would also report it are necessarily dependent upon the willingness of involved attorneys to advise and explain the nature and status of newsworthy litigation. Because the Court of Appeals' ruling dramatically limits the rights of the People of this state to receive informed and accurate information about legal claims being adjudicated in the courts, CFOIC desires that its views be heard by

this Court and believes the proposed Brief of *Amici Curiae* would assist this Court in determining whether to issue a writ of *certiorari* to the Court of Appeals.

4. The Colorado Cross-Disability Coalition (“CCDC”) is a 501(c)(3) non-profit organization -- primarily led and staffed by people with disabilities -- dedicated to promoting social justice and combining individual and systemic advocacy as effective agents for change that can benefit people with all types of disabilities. CCDC has developed a powerful reputation for empowering people with all disabilities to advocate for themselves and for others.

Many people with disabilities and their advocates are not aware of the civil rights laws that protect them and how to go about seeking out those who can assist with protecting their civil rights. CCDC uses its Civil Rights Legal Program (“CRLP”) to address civil rights violations against people with disabilities protected by federal and state laws.³ An important way CRLP has been able to

³ The Americans with Disabilities Act (particularly Title II, 42 U.S.C. §§ 12131-12165, prohibiting discrimination by public entities, and Title III, 42 U.S.C. §§ 12181-12189, prohibiting discrimination by places of public accommodation), the Fair Housing Amendments Act pertaining to people with disabilities, Pub. Law No. 100-430, 102 Stat. 28 (1988) (codified throughout the Fair Housing Act, 42 U.S.C. §§ 3601-3631), Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794-794a and Colorado’s state antidiscrimination law that has come to be known as the Colorado Anti-Discrimination Act (“CADA”), Colo. Rev. Stat. §§ 24-34-301-805. CCDC and the CRLP have worked and continue to work for many years with the state General Assembly and in courts over years to ensure the CADA allows for greater civil rights protections for people with disabilities.

conduct outreach and provide information about the class action litigation in which it has been involved is to use press releases and speak to the media when requested to do so. As a result, the litigation privilege as well as the public's right to know and be informed about such litigation is essential to CCDC and the CRLP attorneys knowledgeable about those cases.

CCDC and its CRLP strongly support the positions taken by *amici* for the following reasons: (1) Colorado courts have taken the opposite approach with respect to defamation lawsuits under the circumstances in past decisions; (2) as a result, lawyers who have a good reason for discussing cases with the media do not know what they can and cannot say without being faced with a lawsuit even when nothing about the lawsuit allegations has been shown to be frivolous; (3) CCDC's mission and purpose would be undermined severely if the CRLP was were no longer permitted to discuss allegations in class action lawsuits to educate the public about the laws at issue and what the alleged violations; and (3) stifling the freedom of speech of those who do the type of work the CRLP lawyers do is likely to prevent people with disabilities from obtaining representation. Certainly, the threat of protracted defamation litigation in the middle of determining the outcome of the civil rights case is likely to have the same effect.

5. The Colorado Center on Law and Policy (“CCLP”), established in 1998, is an unrestricted legal services provider dedicated to ensuring every Colorado has what they need to succeed through research, legislation, and legal advocacy. CCLP’s four focus areas – housing, health, income, and food security – touch the lives of millions of Coloradans across the state. CCLP’s work, including its legal advocacy, thus innately requires engagement with the community and public outreach to create more systemic change.

6. Colorado Plaintiff Employment Lawyers Association (“PELA”) is Colorado’s largest professional organization of lawyers who represent employees in cases involving employment law violations. Founded in 1985, PELA is a nonprofit organization created to increase awareness of the rights of employees and workplace fairness. PELA and its members fight to protect vulnerable and historically disadvantaged workers from unfair employment practices and unlawful discrimination.

In this case, PELA seeks to ensure that all Colorado employees will continue to have access to effective and high-quality counsel. Employment litigation often attracts attention in the news media. Without clear and consistent standards to protect attorneys against reprisal litigation, advocates for employees will likely be dissuaded from taking on many important cases that vindicate the public interest.

7. Independence Institute is a 501(c)(3) non-profit organization based in Colorado. Among its activities, the Institute routinely engages in litigation focused on protecting state and federal constitutional rights and liberties. Protecting rights under the First Amendment is of paramount importance.

As part of its litigation efforts, the Institute educates members of the public and elected officials often through media commentary. This commentary often involves media statements by its attorneys, including in press conferences.

The Independence Institute agrees with statements of others filed on behalf of the Petitioner's counsel noting that the Court of Appeals opinion in this matter would result in chilling the ability of the Institute and its attorneys to comment on constitutional litigation for fear of financial liability and groundless litigation.

8. Formed in 1949 as a non-profit trade organization, the Colorado Broadcasters Association ("CBA") has a long history of service to broadcasters and citizens of the State. There are currently 271 dues-paying members of the association, all of whom hold licenses issued by the Federal Communications Commission to operate broadcasting facilities utilizing the public's airwaves. Over the years, the CBA has provided thousands of dollars for college scholarships, worked to provide public media access to the courts and fought to open public records. Representing broadcasters, both public and

private, the Association interacts with state and national officials and trade groups to further the business of broadcasting. The Association urges the Supreme Court to accept *certiorari* and correct the Court of Appeals' decision that operates to chill attorney speech, and limits public access to information about our courts and the law.

9. The Lawyers' Civil Rights Coalition ("LCRC") is a group of civil rights lawyers in Colorado. LCRC was formed to bring like-minded attorneys together to use their combined experience and expertise to fight for and defend civil rights of all kinds in Colorado. LCRC allows civil rights attorneys a forum and support to share information quickly so that patterns of civil rights abuses can be rapidly identified and responded to with immediate court action.

LCRC has an interest in this Court's decision to accept *certiorari* in this matter to determine whether an attorney has immunity from retaliatory litigation arising from extra-judicial statements made about a pending case. This Court's decision will impact not only LCRC's members and their clients, but also our State's commitment to fundamental First Amendment rights.

CTLA, along with amici CREEC, CFOIC, CCDC, CCLP, PELA, Independence Institute, CBA, and LCRC seek permission to file its *amici curiae* brief in support of Petitioners Mari Newman, individually, Killmer, Lane &

Newman LLP, and Towards Justice. If this Court grants CTLA's motion to file a brief of *amici curiae*, CTLA requests that its brief, attached as Exhibit 1, be accepted.

WHEREFORE, for the foregoing reasons, the Colorado Trial Lawyers Association requests that this Court grant this Motion and Order accepting its brief of *amici curiae*, attached as Exhibit 1.

Respectfully submitted this 14th day of February, 2022,

Attorneys for *Amicus Curiae* Colorado Trial Lawyers Association:

/s/Anna N. Martinez - Martinez Law Colorado, LLC, Bar No. 37756

/s/Esteban A. Martinez - Martinez Law, LLC, Bar No. 30921

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2022, a true and correct copy of the foregoing **MOTION OF COLORADO TRIAL LAWYERS ASSOCIATION AND AMICI FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE** was electronically filed and served via Colorado Courts E-filing to the following:

Reza D. Rismani, Esq.
Treece Alfrey Musat P.C.
633 17th Street, Suite 2200
Denver, CO 80202

Thomas Kelley, Esq.
Killmer, Lane & Newman, LLP
1543 Champa Street, Suite 400
Denver, CO 80202

Brian D. Gonzales, Esq.
2580 E. Harmony Road, Suite 201
Fort Collins, CO 80528

Brian M. Feldman, Esq.
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place
Rochester, NY 14604

Raymond M. Deeny, Esq.
Brooke A. Colaizzi, Esq.
Heather F. Vickles, Esq.
Sherman & Howard, LLC
633 17th Street, Suite 3000
Denver, CO 80202

/s/ Anna N. Martinez