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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 DISTRICT COURT OF DENVER COUNTY Case No. 2019CV033124 Division 409; Judge Johnson	▲**COURT USE ONLY**▲
JOHN SURANYI and JILL SURANYI, individually and as heirs at law of PATRICIA SURANYI, deceased; and JOHN SURANYI as Personal Representative of THE ESTATE OF PATRICIA SURANYI, Plaintiffs/Respondents, v. WATERMARK HARVARD SQUARE AL, LLC, a foreign limited liability company and WATERMARK RETIREMENT COMMUNITIES, INC., a foreign corporation, both d/b/a HARVARD SQUARE, Defendants/Petitioners.	Case No. 2020SA000234
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BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS/PETITIONERS

CERTIFICATE OF COMPLIANCE

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

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,476 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

Dated: August 12, 2020

Respectfully submitted,

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IDENTITY AND INTEREST OF AMICUS CURIAE

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys, including in-house counsel, from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. The IADC regularly advocates for the interests of its members in federal and state courts throughout the country. The IADC has a strong interest in the application of the Rules of Civil Procedure as written and in ensuring that defendants are not subjected to discovery that is out of proportion to the needs of a particular case.

ISSUE PRESENTED

This amicus brief addresses a single issue raised by Defendants/Petitioners' ("Defendants") Rule 21 petition: Does Rule of Civil Procedure 26(b)(1) and this Court's own authority require a district court to thoroughly evaluate whether discovery sought by a party is proportional to the needs of a case, and did the district court comply with those requirements?

INTRODUCTION AND SUMMARY OF ARGUMENT

Colorado Rule of Civil Procedure 26 defines the scope of discovery for civil cases. In recent years, in response to lawyers' and judges' consensus that the culture of expansive discovery in civil litigation needed to change, the Colorado and federal civil rules committees and courts have worked to place reasonable limits on civil discovery.[1] In 2015, both Colorado and the federal courts changed Rule 26 to impose greater limits on civil discovery, including placing a greater emphasis on proportionality by making it a central part of the scope of permissible discovery. Limited and proportional discovery facilitates the administration of justice for all parties by ensuring the just, speedy, and inexpensive determination of cases, which is the overarching goal of the Colorado Rules of Civil Procedure. *See* C.R.C.P. 1(a); C.R.C.P. 26, 2015 Committee Comment ¶ 15 ("[T]rial judges have and must exercise discretion, on a case-by-case basis, to effectuate the purposes of these rules.").

Plaintiffs here sought discovery beyond what was proportional to the needs of this case. Their claims arise from the circumstances surrounding the transfer of their family member, Patricia Suranyi, to a different level of care in Defendants' retirement community. Yet Plaintiffs sought discovery of the confidential medical records, information, and identities of other patients. These other patients' records are highly

[1] *See* Richard P. Holme, *Proposed New Pretrial Rules for Civil Cases—Part I: A New Paradigm*, Colorado Lawyer (Apr. 2015).

confidential and will shed no light on the quality of care that Ms. Suranyi received or the decision to move her to a different level of care. Moreover, their production would be particularly burdensome, with the COVID-19 pandemic putting a massive strain on all healthcare providers, especially those caring for medically vulnerable patients. Defendants objected to the discovery on both privacy and proportionality grounds.

The district court was required to follow the limits Rule 26 places on the scope of discovery and to take an "active role" managing discovery, especially after Defendant challenged the scope of Plaintiffs' requests. *See, e.g.*, *In re Marriage of Gromicko*, 387 P.3d 58, 63 (Colo. 2017). Exercising that role, the court should have considered the scope and burden of requested discovery and the other factors enumerated in Rule 26(b) before ruling on proportionality. The district court instead appeared to give short shrift to Defendant's proportionality objection. After rejecting Defendants' privacy objections, it ruled in a single boiler-plate sentence that the discovery was proportional to the needs of the case. This was error. Rule 26 requires more than a rote recitation that proportionality was met.

In this brief, *amicus* addresses the proportionality portion of the district court's order, which was incorrect in both procedure and substance. First, the brief reviews the history of Colorado Rule of Civil Procedure 26(b) and explains how and why

proportionality became a threshold question in determining discovery's scope. Next, it addresses the district court's affirmative obligation to manage discovery, which is clear from the comments accompanying the Rule and this Court's precedent. The brief then argues that the district court here did not satisfy its obligation to determine the appropriate scope of discovery. Finally, the brief directly addresses Plaintiffs' discovery requests and concludes that, because the information Plaintiffs seek is not important to resolution of their claims, the discovery is not proportional.

ARGUMENT

I. Civil Discovery Is Limited and Must Be Proportional to the Needs of a Particular Case

Rule 26(b) provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit." C.R.C.P. 26(b)(1). Proportionality has long been part of Rule 26, but with the 2015 amendments, it "moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable." C.R.C.P. 26, 2015 Committee Comment ¶ 14. With this and other changes, the Civil Rules Committee recognized the "urgent need to make cases just,

speedy, and inexpensive." Richard P. Holme,[2] *New Pretrial Rules for Civil Cases—Part II: What Is Changed*, Colorado Lawyer (July 2015). The amended rule requires district courts to focus on "what a party . . . *needs* to prove its case," instead of "what a party . . . *wants* to know about the subject of a case." C.R.C.P. 26, 2015 Committee Comment ¶ 14 (emphasis in original).

The Civil Rules Committee placed special emphasis on proportionality:

> C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. . . . [T]rial judges have and must exercise discretion, on a case-by-case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules "shall be liberally construed, and administered, and employed by the court and the parties to secure the just, speed, and inexpensive determination of every action."

C.R.C.P. 26, 2015 Committee Comment ¶ 15 (emphasis added) (quoting C.R.C.P. 1).

To be clear, the pre-2015 rules had positioned proportionality as merely one of several factors to consider when modifying presumptive limitations on discovery. *See* Rule 26(b)(2) (2014). It instructed courts to "consider . . . [w]hether the burden or expense of the proposed discovery outweighs its likely benefit" and described the elements relevant to that analysis: "the needs of this case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the

[2] Mr. Holme chaired the Civil Rules Committee's Improving Access to Justice Subcommittee, which drafted the 2015 amendments to the Rules of Civil Procedure.

importance of the proposed discovery in resolving the issues . . . ." C.R.C.P. 26(b)(2)(F)(iii) (2014). By contrast, the 2015 amendments moved proportionality front and center as a critical part of permissible discovery and made clear the specific factors a court must consider in determining whether a discovery request meets this threshold. The courts must explain how they weight the factors depending on the facts of the case, which did not occur here.

This new emphasis on proportionality in the Colorado rules directly tracks the 2015 Amendments to Federal Rule of Civil Procedure 26. *Compare* C.R.C.P. 26(b)(1) *with* Fed. R. Civ. P. 26(b)(1). In describing the new rule, the federal Rules Advisory Committee stated that "the present amendment restores the proportionality factors to their original place in defining the scope of discovery." Fed. R. Civ. P. 26, Committee Notes on Rules—2015 Amendment.[3] With this amendment, the "common-sense concept of proportionality" has become a threshold issue that "crystalizes the concept of reasonable limits on discovery." Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary* (Dec. 31, 2015), available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (last visited Aug. 11, 2020).

[3] The Colorado Rules Committee incorporated the comments to the amended federal rule. C.R.C.P. 26, 2015 Committee Comment ¶ 14 ("This language [of new Rule 26(b)(1)] is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.)").

II. By Giving Short Shrift to Proportionality, the District Court Did Not Satisfy Its Obligations Under Rule 26

The emphasis on proportionality goes hand-in-hand with a judge's obligation to actively manage discovery. The importance of active judicial management is reflected in the state and federal rules committee's notes, the decisions of federal courts applying the federal proportionality language, and precedent from this Court. Here, by not engaging with the proportionality issues, the district court did not meet its obligation to manage the parties' discovery dispute.

A. Both Rule 26 and This Court's Precedent Require District Courts to Take an Active Role in Managing Discovery and Assessing Proportionality

As the federal rules committee explained, proportionality requires "continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management." Fed. R. Civ. P. 26, Committee Notes on Rules—2015 Amendment. When party management fails—if parties cannot resolve a discovery dispute on their own—the trial judge has a duty to step in to help resolve that conflict. *Id.*

In managing discovery disputes, judges must do more than pay lip service to proportionality. As noted above, Rule 26 "requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted." C.R.C.P. 26, 2015 Committee Comment ¶ 15. The application of the principle is case

specific. The court must consider all of the factors listed in the rule, "but individual factors may carry very different weights depending on the case and claims." Holme, *supra*.

When evaluating proportionality, a trial court "must look carefully to the complaint's allegations to determine if the requested discovery is relevant and proportional to the needs of the case." *Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203, 1210 (D.C. Cir. 2020). Resolving disputes over proportionality "require[s] the active involvement" of the trial court, which must work with the parties "to limit the expense and burden of discovery while still providing enough information" to allow parties to pursue their claims. *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 259 (3d Cir. 2016).

On multiple occasions, this Court has made clear that Colorado district courts "must take an active role in managing discovery when [a party] from whom discovery is sought objects to the scope . . . ." *In re Marriage of Gromicko*, 387 P.3d at 63; *see also DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1191 (Colo. 2013). A court facing a scope objection "must determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs." *DCP Midstream,* 303 P.3d at 1191. In *DCP Midstream*, this Court held that "to resolve a dispute regarding the proper scope of discovery in a particular case, the trial court

should, at a minimum, consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F)."[4] *Id.* With the 2015 amendments moving the proportionality factors from that location to a more prominent place in Rule 26(b)(1) and placing even more emphasis on them, the need for courts to consider these factors and explain how they weighed them is all the more important.

B. The District Court Failed to Adequately Analyze Whether Plaintiffs' Discovery Requests Were Proportional to the Needs of This Case

Turning to this action, the Court should find that the district court failed to adequately explain whether Plaintiffs' discovery requests were proportional. In its discovery order, the district court summarily stated only that "[t]he information is not out of proportion to the litigation." (Pet. Ex. 8.) With this brief statement, the court gave no indication that it considered the proportionality factors identified in Rule 26(b)(1) or any particular factors at all. The transcript of the district court's April 28, 2020, hearing provides no additional insights into the district court's analysis either. At the hearing, the court heard oral argument on the discovery requests that are the

[4] Although issued two years before the Rule 26 amendments, *DCP Midstream* "continues to apply." *Marriage of Gromicko*, 387 P.3d at 63 n.2. The Court in *Gromicko,* discussing *DCP Midstream*, referenced the "cost-benefit and proportionality factors" in Rule 26(b)(2)(F). *Id.* at 63. But the 2015 amendments applied in *Gromicko*, and proportionality had been moved to Rule 26(b)(1). *See id.* at 62-63. This case presents an opportunity to clarify that, when considering a proportionality objection, courts should look to the factors in Rule 26(b)(1).

subject of this action, but explicitly deferred commenting or ruling until the issues could be fully briefed by the parties.[5] (Pet. Ex. 10 at 12:8-14:14.)

In both *Gromicko* and *DCP Midstream*, this Court remanded a discovery order when the district court also "made no findings about the appropriate scope of discovery in light of the reasonable needs of the case" and made no "attempt to tailor discovery to those needs." *Marriage of Gromicko*, 387 P.3d at 59; *DCP Midstream*, 303 P.3d at 1197. The same situation exists here. By making only the unsubstantiated statement that the requested discovery is "not out of proportion to the litigation," the trial court sidestepped its responsibility to actively manage discovery. It provided no discussion of the proportionality factors, the competing considerations, or how it sought to balance them.

Accordingly, this Court should hold that the district court did not adequately set forth its reasoning with respect to the proportionality factors. It should make clear that, at the very least, trial courts must expressly consider the new proportionality factors, make findings about the appropriate scope of discovery, and tailor discovery

[5] In their Motion to Dismiss the Rule to Show Cause, Plaintiffs claimed the district court had ruled on proportionality. That is incorrect. Nowhere in the discussion of these requests does the district court mention—much less rule on—the proportionality of the requests that are the subject of this original action. (*See* Pet. Ex. 10 at 3:21-14:14.)

to those needs. Requiring such analysis and clarity was the purpose of the 2015 amendments that emphasized proportionality in discovery.

III. The Discovery Requests Are Not Proportional to the Reasonable Needs of this Case Because They Seek Unimportant Information

Based on the record, the Court should also determine that the requested discovery is not proportional to the needs of this case. In their Petition, Defendants ably explain the burden of the requested discovery and how the discovery does not meet the proportionality elements of Rule 26(b)(1). *Amicus* focus here on one of those elements in particular—the importance of the requested discovery to the issue in the case. Because the discovery Plaintiffs seek here is not material to resolving the issues of this case, the Court should find that it is not proportional.

Plaintiffs told the district court that these requests sought "case-central discovery." (*See* Pet. Ex. 6 at 11.) However, basic analysis of their position shows this to be incorrect. Plaintiffs argue they are entitled to wide-ranging discovery because they have a claim under the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 *et seq.* (*Id.* at 5-6.) Attempting to use the CCPA as a hook, they seek, among other things, the names and contact information of families of other patients in Defendants' long-term care facility as well as the production of those patients' confidential medical records. But the patient and family information Plaintiffs seek is not material to resolving their CCPA claim because this information is private and

specific to each patient or family; it is not the type of public, general information that can support a CCPA claim or establish a public impact. Additionally, Plaintiffs' "bait and switch" theory cannot support the discovery because it fails to meet the requirements of the CCPA for such a claim.

Specifically, Plaintiffs assert theories of "deceptive nondisclosure" and "false promises and representations concerning the quality and quantity of its service" as grounds for their CCPA claim. They contend that the discovery of the medical records and family members of other patients is necessary in order to show the presence of a public impact, which is a requirement under the CCPA. *See Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003). The law and evidence, however, do not support their position.

In a nondisclosure or misrepresentation case, public impact is commonly satisfied with evidence of public statements such as, for example, advertisements. Here, the only public-facing representations Plaintiffs identify are several anodyne statements that appear to come from Defendants' marketing materials.[6] (*See* Pet. Ex. 1 at ¶ 21.) These statements make no promises about how long a plaintiff will stay in

[6] Examples include: "Our associates do not just provide all the assistance residents need. They are trained to bring joy and a sense of family to each and every moment by staying focused on what residents can do, never what they cannot." AND "We pour our hearts and souls into creating meaningful ways for residents of the Villa to learn, grow and connect with each other, themselves, their families and our associates." (Pet. Ex. 1 at ¶ 21.)

the assisted-living unit or the circumstances under which they may be moved. Such statements provide no basis for a finding of public impact, *see Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 25 (Colo. App. 2010), *as modified on denial of reh'g* (Apr. 1, 2010) (finding no public impact from an internet position that was not "affirmatively 'untrue'"), much less a justification for discovery of private communications with other patients and their families.

The other statements Plaintiffs rely upon appear to be private statements made to them by representatives of Defendants. But private communications between Defendants and Plaintiffs or Defendants and other families or patients cannot establish a public impact for purposes of a CCPA claim. *See Rhino Linings*, 62 P.3d at 149 ("[I]f a wrong is private in nature, and does not affect the public, a claim is not actionable under the CCPA."). By seeking to discover private communications with others, Plaintiffs concede they are looking for evidence of "conduct that is unique to [a] particular transaction." *Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 528 (Colo. App. 2008). These requests seek only information unique to other patients, and that information is not material to resolving their CCPA claims. *See Rhino Linings*, 62 P.3d at 149. Because Plaintiffs seek immaterial information, their requests are not proportional to the needs of this case.

Finally, Plaintiffs also plead their CCPA claim as a case of bait-and-switch advertising, alleging Defendants enticed family members to place their loved ones in the assisted living unit with the intention of later moving them to the more expensive locked unit. (Pet. Ex. 1 at ¶¶ 120-123.) This theory is not viable as a matter of law because, under the CCPA, the "switch" in bait-and-switch advertising must occur at the time of sale, "causing the customer to walk away with something other than what he sought." *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275, 1283 (Colo. App. 2010). As the statute explains, bait-and-switch advertising is "advertising accompanied by an effort to sell . . . services . . . other than those advertised." C.R.S. § 6-1-105(1)(n). Here, in contrast, Plaintiffs have alleged that Patricia was placed in the advertised assisted living unit and moved to the more secure locked unit months later. (Pet. Ex. 1 at ¶¶ 25-33.) They have not alleged that Defendants "refus[ed] to offer" assisted living at the time of sale, which is what the law requires for this theory of recovery. *See Gen. Steel Domestic Sales*, 230 P.3d at 1283. Because the alleged "switch" occurred months after the sale and after Patricia's condition changed, the most Plaintiffs are describing is a "failure to provide" the services advertised, which is not actionable on a bait-and-switch theory. *Id.* Again, the patient records and family identities sought are not of sufficient importance under this theory for Plaintiffs' requests to be proportional under Rule 26.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' Petition for a Rule to Show Cause, the Court should hold that the District Court did not adequately evaluate the proportionality of Plaintiffs' discovery requests and that those requests are not proportional to the needs of this case.

Dated: August 12, 2020

Respectfully submitted,

s/Craig R. May

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CERTIFICATE OF SERVICE

I certify that on August 12, 2020, a true and correct copy of **BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS/PETITIONERS** was filed with the Court via Colorado Courts E-Filing System, with e-service to the following:

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