SUPREME COURT, STATE OF COLORADO 2 E. 14th Ave., Denver, CO 80203 Telephone: 303-837-3785	
District Court, Adams County, Colorado The Hon. Thomas R. Ensor Case Number: 04CV1073, Div. A	
Petitioners: Ruth E. Jessee, Plaintiff below, and Irwin & Boesen, P.C. v **Respondents:** Farmers Insurance Exchange, and Farmers Group, Inc., Defendants below.	▲ COURT USE ONLY ▲ Case Number: 05 SA 370
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BRIEF OF AMICUS CURIAE DEFENSE RESEARCH INSTITUTE (DRI)

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QUESTION ADDRESSED BY AMICUS

May a trial court enter a blanket protective order[1] regarding confidential discovery material whose production was compelled, without a protective order, by another trial court, in another state, applying different law?

SUMMARY RESPONSE OF AMICUS CURIAE

Amicus Curiae Defense Research Institute (DRI) supports the position of the defendants in this case, and urges the Court to discharge the rule to show cause and affirm the trial court's November 17, 2005, protective order. If Colorado courts are to enforce the privacy rights which Colorado law recognizes, they must be permitted to independently fashion protective orders, even when courts in other

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[1]The term 'blanket protective order' is defined in *Gillard v. Boulder Valley School Dist. Re.-2,* 196 F.R.D. 382, 386 (D.Colo. 2000):

> Blanket protective orders place upon the parties themselves . . . the initial burden of determining what information is entitled to protection. Normally, a blanket protective order requires that counsel for a producing party review the information to be disclosed and designate the information it believes, in good faith, is confidential or otherwise entitled to protection. The designated information is thereafter entitled to the protections afforded by the blanket protective order unless the designation is objected to by an opposing party. Judicial review of a party's designation as confidential occurs only when there is such an objection which the parties cannot resolve by agreement.

Id.

states have compelled the production of confidential material without protective orders. Otherwise, Colorado confidentiality and privacy rights would not apply to litigants who operate in more than one state, and their rights would be reduced to the lowest common denominator recognized by any state.

STATEMENT OF INTEREST OF AMICUS CURIAE

DRI is a national organization of over 22,000 defense trial lawyers and corporate counsel involved in the defense of civil litigation. Among its goals is anticipating and addressing issues germane to defense lawyers and the civil justice system.

This case presents an issue of particular concern to the clients of DRI members who are defendants in civil cases in more than one state. DRI is interested in the issue of whether one trial court's refusal in one state to issue a protective order regarding the circulation of compulsory discovery material prevents another trial court, operating under different law in another state, from doing so.

Unless Colorado courts can independently fashion protective orders to restrict the circulation of confidential or proprietary discovery material whose production was compelled in civil litigation in another state, Colorado courts will

be unable to enforce the privacy rights under Colorado law of litigants who have been subject to discovery requests in other states.

ARGUMENT OF AMICUS CURIAE

I. THE PROTECTIVE ORDER BELOW COMPORTS WITH *IN RE REQUEST FOR INVESTIGATION OF ATTORNEY E* AND *SEATTLE TIMES CO. V. RHINEHART.*

The tenets of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 27 (1984), provide a starting point for analyzing this case. In *Seattle Times,* the U.S. Supreme Court recognized that because pretrial discovery is not a traditionally public source of information, trial courts may constitutionally restrict a litigant's use of it. The *Seattle Times* court explained that a trial court's ability to fashion confidentiality orders tempers the extraordinary reach which pre-trial discovery permits:

> . . . The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. . . .

467 U.S. 28. *See, also, Bowlen v. District Court*, 733 P.2d 1179, 1182 (Colo. 1987). The Supreme Court concluded that, "The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders." 467 U.S. 28. *Seattle Times* did not, however, directly address the issue which this case presents: whether protective orders in one case can restrict the use of material obtained through compulsory pretrial discovery in another case.

This Court's opinion in *In re Requests for Investigation of Attorney E,* 78 P.3d 300 (Colo. 2003), suggests that, consistent with *Seattle Times*, a court in one case may properly restrict the use of discovery material obtained without a protective order in another case. And the facts in *Attorney E* show why this should be so.

Attorney E was a disciplinary proceeding in which Attorney Regulation Counsel (ARC) subpoenaed material from the FBI and provided copies of the subpoenaed material to Attorney E, the subject of the investigation. The materials were not subject to a protective order when Attorney E received them, and, upon receipt, Attorney E publicly disclosed the materials by filing them in various courts of record. 78 P.3d 303-304. (Significantly, this Court held that Attorney E was within his rights in doing so. 78 P.3d 306.).

Nevertheless, and notwithstanding Attorney E's public dissemination of the material, the Presiding Disciplinary Judge issued a protective order restricting the circulation of the documents and, in an original proceeding, this Court affirmed the issuance of the protective order, although it disapproved certain aspects of it. 78 P.3d 312.

The circumstances here are very much like those in *Attorney E.* As in *Attorney E.*, when plaintiff obtained the confidential material here, it had been produced through compulsory pre-trial discovery; it had not been used in any public component of a trial; it was not subject to any protective order; and it had been publicly disclosed in other forums. And, just as circumstances warranted a protective order in *Attorney E*, circumstances may warrant a protective order here.[2] After all, at issue here is the private and confidential financial affairs of the respondents which was made available in the first place only through court-sanctioned discovery. *See Bowlen*, 733 P.2d 1183.

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[2]It is important to note that the trial court has not yet restricted the use of any material produced pursuant to the protective order. The confidentiality designation of material whose confidentiality is disputed depends on the trial court's approval of the designation. Here, the trial court has not finally designated any material as confidential.

II. COLORADO LAW, NOT SOUTH DAKOTA LAW, SHOULD GOVERN THE TREATMENT OF CONFIDENTIAL MATERIAL IN COLORADO CASES.

Petitioner's argument assumes that, because Respondents were compelled to produce much of this material without a protective order in South Dakota litigation, they cannot now argue that the material should be subject to a protective order now. But there is no reason under either *Seattle Times* or *Attorney E* why this should be so. In those cases, as here, the material was produced under compulsion in civil proceedings; in those cases, as here, the material would not have been produced at all but for the civil proceedings; and, in *Attorney E*, as here, the information had been publicly disclosed before its use had been restricted.

Furthermore, Farmers Insurance Exchange ("FIE") has not waived its argument that the materials it produced are confidential or proprietary. To the contrary, the record shows that FIE consistently protected its rights. FIE produced the material in the South Dakota litigation only after the South Dakota trial court compelled FIE to. It is beside the point that FIE did not appeal the orders compelling production. The decision not to appeal an interlocutory order in a case that was resolved short of trial cannot in itself constitute a waiver. *See, e.g., Stone v. Satriana,* 41 P.3d 705, 712 (Colo. 2002) (a party has no duty to appeal to mitigate its damages).

The facts of this case show why each state's own trial courts should determine for themselves how to treat arguably confidential material, even when that material has been produced in litigation in another state without a protective order.

Part of the material FIE was compelled to produce in the South Dakota litigation involved personnel files. *Petition for Rule to Show Cause, Ex. 5, ¶7; Response to Petition,* p. 10. Petitioner seeks personnel files and employee information in the instant case. *Protective Order, ¶2; Petition for Rule to Show Cause, Ex. 15, ¶¶9-10.*

In Colorado, *Martinelli v. District Court In and For City and County of Denver,* 612 P.2d 1083, 1091 (Colo. 1980), governs the determination of whether personnel files are discoverable. *Martinelli* requires a trial court to conduct an *in camera* review of the personnel material to determine whether the material sought is subject to a legitimate expectation of nondisclosure; whether the state's interest in facilitating the ascertainment of truth overrides that any legitimate expectation of privacy; and whether the same ends can be reached through less intrusive means. 612 P.2d 1092. And, in an appropriate case, the trial court may limit the type of discovery undertaken or otherwise fashion an order to protect the asserted privacy interests. *See, e.g., Williams v. District Court, Second Judicial Dist., City*

and County of Denver, 866 P.2d 908, 912 (Colo. 1993) (remanding discovery dispute to trial court for consideration of whether a protective order may permit discovery but protect the privacy right of nonparties); *City and County of Denver v. District Court for Second Judicial Dist.,* 607 P.2d 984, 985 (Colo. 1980) (same).

It is not, however, clear from the record how the South Dakota trial court determined that personnel materials were discoverable in the South Dakota case, nor is it clear from South Dakota case law whether South Dakota courts ordinarily take an approach similar to *Martinelli*'s. *See, e.g., Maynard v. Heeren*, 563 N.W.2d 830, 836 (S.D. 1997) (requiring that an in camera inspection be held in the presence of both parties).

The same analysis holds true for commercial information. In Colorado, courts routinely enter protective orders to protect a litigant's trade secrets:

> It is customary, in cases involving the disclosure of confidential commercial information, for the court to enter orders protecting the confidentiality of this information by safeguards as *in camera* inspection of documents and the limitation of access to and the permissible use of the documents by the opponents.

Direct Sales Tire Co. v. District Court, 686 P.2d 1316, 1321 (Colo. 1984).[3] It is not clear from the record what standards the South Dakota court applied in determining that FIE's proprietary material was discoverable without a protective order.

Thus, the South Dakota trial court may have permitted the unrestricted disclosure of information whose circulation a Colorado trial court would have restricted – whether because the information was protected by an employee's privacy rights or because it constituted a trade secret because of its commercial value. *See Bowlen*, 773 P.2d 1181 (recognizing need to protect trade secrets).

Petitioners argue at bottom that a Colorado trial court cannot issue a protective order to litigants and expert witnesses regarding discovery material whose production was compelled without a protective order by another state's court in another case. As to litigants who operate in more than one state, this would have the effect of reducing their right and ability to protect proprietary and confidential information – and to protect the privacy rights of their employees – to the lowest common denominator.

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[3]This is codified in C.R.C.P. 121, §1-5 (permitting a court to seal a file). *See, also, Anderson v. Home Ins. Co.*, 924 P.2d 1123 (Colo.App. 1996) (access to court file may be limited when a party's right to privacy outweighs the public's right to know).

If Colorado courts are to enforce the privacy rights recognized by Colorado law, they must be permitted to independently fashion protective orders, even when courts in other states have compelled the production of confidential material without protective orders.

III. THE NOVEMBER 2005 PROTECTIVE ORDER COMPLIED WITH COLORADO LAW.

Petitioners protest that the protective order requires them to disclose all pertinent public domain documents in their possession. *Petition, p. 9.* This is not, however, a fair reading of the protective order. The protective order expressly permits the use of outside material and requires disclosure of only those documents which petitioners intend to use at trial or in discovery. *Protective Order, ¶¶11-12.* Such disclosure is significantly narrower than the disclosure required by C.R.C.P. 26(a)(1), which requires disclosure of all documents relevant to disputed facts alleged with particularity in the pleadings.

Petitioners contend that the protective order entered without a showing of good cause. *Petition, p. 18.* The record does not support petitioners' contention. FIE provided the trial court with affidavit showing that the material involved was proprietary. *Ex. E to Attachment B to Response to Petition.* And petitioners' own attachments show that the material sought included personnel files of FIE

employees and other protected material. *Petition, Attachment. 5, ¶7; August 25, 2003, Order, ¶3, Ex. 1 to Attachment 5; June 9, 2004, Order, Ex. 1 to Attachment 5.*

Plaintiffs argue that the protective order is an impermissible prior restraint. *Petition, pp. 14-15.* But "an order prohibiting parties to a case from disseminating discovered information before it is revealed at a public proceeding is not the kind of 'classic prior restraint' that triggers exacting First Amendment scrutiny." *In re Attorney E.,* 78 P.3d 309. Nor have petitioners been prejudiced by the Order. The trial court has not yet determined the status of the material which respondents have designated.

Furthermore, the protective order allows petitioners to object to defendants' designation of material and sets forth a procedure by which they may do so. *Protective Order, ¶12.* In this respect, the protective order at issue here is no different than the blanket protective order which this Court approved in *Bowlen,* 733 P.2d 1183, and which "routinely are approved by courts in civil cases." *Gillard v. Boulder Valley School District Re-2,* 196 F.R.D. 382, 386 (D. Colo. 2000).

Indeed, blanket protective orders are indispensable to the functioning of modern courts, especially where, as here, the litigation involves litigants whose activity generates voluminous documents and spans many states:

> Blanket protective orders serve the interests of a just, speedy, and less expensive determination of complex disputes by alleviating the need for and delay occasioned by extensive and repeated judicial intervention. In view of increasingly complex cases and the existing workload of the trial courts, blanket protective orders are essential to the functioning of civil discovery. Absent [such orders], discovery would come to a virtual standstill....

Gillard, 196 F.R.D. 386 (internal citations and quotation marks omitted).

"The trial court is in the best position to weigh fairly the competing needs of litigants and third parties affected by discovery and thus must have substantial latitude to fashion protective orders when the need arises." *Attorney E,* 78 P.3d 300, 311 (Colo. 2003), *citing Seattle Times*, 467 U.S. 36. Here, by entering the blanket protective order, the trial court appropriately balanced the respondents' privacy interests against the petitioners' need for the documentation. Any other outcome would dilute the ability of Colorado courts to implement and enforce Colorado privacy rights.

CONCLUSION

For the foregoing reasons, the rule to show cause should be DISCHARGED and the trial court's protective order of November 17, 2005, should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned certifies that on this 9th day of February, a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE was mailed in the U.S. mail, postage prepaid, and addressed as follows:

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