DATE FILED: February 22, 2023 10:39 AM
FILING ID: ABA47D5679654
CASE NUMBER: 2021SC930

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Colorado Court of Appeals Case No. 20CA0298 City and County of Denver District Court No. 19CV31940	**▲ COURT USE ONLY▲**
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	Case No. 2021SC000930
For Amici Curiae Impact Fund, et al. Amy F. Robertson, Atty. Reg. No. 25890 FOX & ROBERTSON, PC 1 Broadway, Suite B205 Denver, CO 80203 (303) 951-4164 arob@foxrob.com	

BRIEF OF *AMICI CURIAE* IMPACT FUND, COLORADO CROSS-DISABILITY COALITION, DISABILITY LAW COLORADO, LEGAL AID AT WORK, PUBLIC COUNSEL, AND PUBLIC JUSTICE, IN SUPPORT OF 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 these 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 2,390 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 the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Amy F. Robertson (*original signature on file*)
Amy F. Robertson
Counsel for Amici Curiae Impact Fund, Colorado Cross-Disability Coalition, Disability Law Colorado, Legal Aid at Work, Public Counsel, and Public Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF INTEREST

Amici curiae Impact Fund, Colorado Cross-Disability Coalition, Disability Law Colorado, Legal Aid at Work, Public Counsel, and Public Justice, are nonprofit legal organizations that routinely litigate class actions in the public interest. *Amici* know first-hand the challenges of educating the public on their legal rights and the potential relevance of proposed class action lawsuits. Creating an exception to the common law litigation privilege for proposed class actions that are alleged to be "ascertainable" denies the realities of class action litigation and prevents plaintiffs' counsel from educating the public on their rights.

The individual interests of *Amici* are set forth in the accompanying Motion for Leave to File Brief of *Amici Curiae*. *See Motion for Leave* at ¶¶ 1-6.

SUMMARY OF ARGUMENT

The Court of Appeals panel erred when it concluded that attorneys' public statements at the inception of class action lawsuits are not entitled to the protections of the common law litigation privilege. *BKP, Inc. v. Killmer, Lane & Newman, LLP*, 506 P.3d 84, 94 (Colo. App. 2021), *cert. granted*, 21SC930, 2022 WL 17585946 (Colo. Dec. 12, 2022). The panel ruling relied entirely on the misapprehension that the terms "easily ascertainable" and "easily defined" mean

"that identifying the members of the class [will] be easy."[1] *Id.* As a result of this error, the panel held:

> [T]he [litigation] privilege does not apply in this case because the attorneys had a "feasible way" of figuring out who in their audience had an interest in the case: according to the complaint in the federal lawsuit, finding the nail technicians who had an interest in this case would be "easy." But they nevertheless broadly published the allegedly defamatory communications to those having no interest in the case.

Id.

To the contrary, as described in Argument Section I below, "easily ascertainable" and "easily defined" do not mean "easy to find" or "easy to contact." Instead, the terms refer to an implied requirement of class action certification that courts must be able to identify class members based on objective criteria. As described in Argument Section II below, "easily ascertainable" and "easily defined" also do not mean that attorneys possess "the identities of all the potential members of the class" at the outset of litigation. *BKP, Inc.*, 506 P.3d at 94. To the contrary, plaintiffs' attorneys often do not receive contact information

[1] Notably, the language quoted by the Court from the complaint is significantly incomplete, altering its meaning. Plaintiffs alleged that "[t]he *exact size* of the class will be easily ascertainable" and that "[t]he *contours* of the class will be easily defined[.]" *BKP, Inc.*, 506 P.3d at 94 (emphasis altered). At no point did Plaintiffs allege that *putative class members' identities and contact information* will be easily obtained.

for potential class members until after the class has been certified or through settlement administration.

In practice, attorneys representing plaintiffs in proposed mass tort and class action cases share a need to "communicate with those having the ability and desire to join the proposed litigation by publishing the statement to a wider audience, which may include unconnected individuals." *Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 26 (Tenn. 2007). As in *Strong-Tie Co.*, plaintiffs' attorneys here had no "feasible way of discerning which recipients have an interest in the case" that would warrant denying them the protections of the litigation privilege. *Id.*

Because the predicate for the Court's analysis rested on a misunderstanding of the concept of ascertainability, its ruling limiting application of the common law litigation privilege should be reversed.

ARGUMENT

I. Ascertainability Requires Only That the Proposed Class Be Defined by Reference to Objective Criteria.

"Ascertainability" is a term of art in class action litigation referring to the requirement that proposed classes be defined by objective criteria. Although this requirement is not stated in Colorado Rule of Civil Procedure 23 or Federal Rule of Civil Procedure 23, both Colorado and federal courts have considered

ascertainability as an implied prerequisite for class certification.[2] Before considering whether the requisite criteria are met, "a court must determine whether the proposed class definition . . . 'facilitate[s] a court's ability to ascertain [the class's] membership in some objective manner.'" *Jackson v. Unocal Corp.*, 262 P.3d 874, 887 (Colo. 2011) (en banc) (quoting *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 477 (S.D. Ohio 2004)).

Ascertainability requires that "[a] proposed class definition must be sufficiently definite so that it is administratively feasible to ascertain whether or not a particular individual is a member of the class" at a future point in the litigation. *BP Am. Prod. Co.*, 263 P.3d at 114. In other words, the class definition must specify a particular group that was harmed during a limited time frame such that the court could determine the class's membership "in some objective manner." *Jackson*, 262 P.3d at 887 (quoting *Bentley*, 223 F.R.D. at 477).

[2] In general, when a Colorado rule is patterned on a federal rule, courts look to federal authority for guidance in construing the Colorado rule. *Antero Resources Corporation v. Strudley*, 347 P.3d 149, 155 (Colo. 2015). Colorado Rule of Civil Procedure 23 is patterned on Federal Rule of Civil Procedure 23, and Colorado courts have looked to federal cases when assessing the ascertainability requirement. *See BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 114 (Colo. 2011) (citing *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382 (D. Colo. 1993)); *Class actions*, 5A Colo. Prac., Handbook on Civil Litigation § 3:9 (2022 ed.).

Ascertainability ensures that, after the court renders a class-wide judgment, it will be able to determine who is entitled to relief and who is bound by the judgment. *Class actions*, 5A Colo. Prac., Handbook on Civil Litigation § 3:9 (2022 ed.). In the event the class is not certified, it also allows the court to identify the individuals whose statutes of limitations have been tolled. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983) ("The filing of a class action tolls the statute of limitations 'as to all asserted members of the class[.]'" (quoting *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974))).

The federal circuits consider a class to be ascertainable when the class definition is sufficiently definite and objective. *In re Petrobras Sec.*, 862 F.3d 250, 257 (2d Cir. 2017); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58 (7th Cir. 2015); *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.4 (9th Cir. 2017); *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1301-02 (11th Cir. 2021). *See also Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329, 334 (5th Cir. 2019). They may also consider whether the process of identifying individual class members will be "administratively feasible." *See, e.g., In re Nexium Antitrust*

Litig., 777 F.3d 9, 19 (1st Cir. 2015); *Kelly v. RealPage Inc.*, 47 F.4th 202, 222 (3d Cir. 2022); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358-60 (4th Cir. 2014).

In all instances, ascertainability is an inquiry into a court's *future* ability to determine class membership. This means that a plaintiff must simply show that there are sufficiently definite criteria for a court to make a future determination about class membership. *See Seeligson*, 761 F. App'x at 334 ("[A]scertainability requires only that the court be able to identify class members at some stage of the proceeding." (quotation omitted)). Plaintiffs may also be asked to identify an administratively feasible plan for determining class membership at a future date. *See Kelly*, 47 F.4th at 224-25 (finding ascertainability satisfied because plaintiffs proposed an administratively feasible plan to confirm class membership).

Because ascertainability asks only whether a court will be able to identify the class at some future point in the litigation, plaintiffs are not called upon to identify class members at the time of filing. *See* Class actions, 5A Colo. Prac., Handbook on Civil Litigation § 3:9 (2022 ed.) ("[Ascertainability] does not require, however, that every member of the class be identifiable when the litigation is commenced."). Nor are they required to identify class members at the time of class certification. *See, e.g.*, *EQT Prod. Co.*, 764 F.3d at 358 ("The plaintiffs need not be able to identify every class member at the time of certification."). Plaintiffs

"must establish only that the proposed class members *can* be identified," and need not actually identify individual class members. *Kelly*, 47 F.4th at 222, n.19 (emphasis in original).

Ascertainability requires only that plaintiffs seeking to bring class claims objectively define the group they seek to represent, such that it will be possible to identify who is a class member and who is not. *See BP Am. Prod. Co.*, 263 P.3d at 114. This analysis bears little resemblance to the "ascertainability" that forms the foundation for the Court of Appeals's decision in this case.

II. Plaintiffs' Attorneys Have No Special Access to Class Members that Warrants an Exception to the Litigation Privilege.

Plaintiffs in proposed class actions do not have unique access to the contact information for absent class members. At the time of filing, plaintiffs generally do not possess the names, addresses, phone numbers, or other personal information for members of the proposed class. Plaintiffs often do not gain access to the contact information for their fellow class members until after class certification for two practical reasons.

First, plaintiffs do not know the precise class definition until the court issues an order granting class certification. Plaintiffs provide a proposed class definition in their complaint but may refine it in their motion for class certification; the court also retains discretion to modify the class definition further. *D.G. ex rel. Stricklin*

v. Devaughn., 594 F.3d 1188, 1201 (10th Cir. 2010) ("[The district court] possesses the discretion under Rule 23(c)(1)(C) to amend its certification order to reflect its findings . . . prior to final judgment."); *Abraham v. WPX Energy Prod., LLC*, 322 F.R.D. 592, 611 (D.N.M. 2017) ("[T]he Court and the parties need to conform the pleadings to the reality of discovery, a lengthy class certification hearing, and the judicial resources expended in analyzing all of the extensive evidence on record. Some flexibility—not more formality—is needed in crafting a class action where one is warranted."). The exact parameters of the certified class, and therefore the identities of class members, cannot be known until the court approves the class definition.

Second, plaintiffs' counsel do not represent absent class members until the class is certified and they are appointed class counsel under Rule 23(g). Restatement (Third) of the Law Governing Lawyers § 99 (2000) ("[P]rior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients."); *Fulco v. Continental Cablevision, Inc.*, 789 F. Supp. 45, 47 (D. Mass. 1992) ("[O]nce the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel.") (quoting *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D.

Wash. 1985)). Before that appointment, class counsel have no enhanced access to putative class members.

Plaintiffs' counsel often receive contact information for class members when the court orders class counsel to provide notice to class members under Rule 23(c)(2), which occurs after class certification. *See, e.g.*, *Brokop v. Farmland Partners Inc.*, No. 18-CV-02104-DME-NYW, 2022 WL 194477, at *4 (D. Colo. Jan. 21, 2022) ("Plaintiff . . . would mail the Postcard Notice by first-class mail to potential Class members identified in [Defendant's] shareholder records or 'who may otherwise be identified with reasonable effort[.]'"); *Wagner v. Air Methods Corp.*, No. 19-CV-00484-RBJ, 2020 WL 7711331, at *5 (D. Colo. Dec. 29, 2020) ("[Defendant] is directed promptly to provide a class list with contact information for the approximately 634 total members of the three classes to the maximum extent that information is available to it through payroll records or other means[.]"); *Teets v. Great-W. Life & Annuity Ins. Co.*, No. 14-CV-2330-WJM-NYW, 2016 WL 9735730, at *2 (D. Colo. Dec. 29, 2016) ("To enable Class Counsel to prepare the notice mailing, Defendant will be ordered to provide Class Counsel with a list of all class members[.]"). This may be months or years after the filing of the complaint.

In other cases, counsel may not obtain contact information for class members until settlement proceedings. *See, e.g., Shaulis v. Falcon Subsidiary LLC*, No. 18-CV-00293-CMA-NYW, 2018 WL 3037014, at *5 (D. Colo. June 19, 2018) ("Defendant to provide the Settlement Administrator with Class Member addresses and Class Member data for Class Notice to be mailed"); *In re Crocs, Inc. Securities Litig.*, 306 F.R.D. 672, 681-82 (D. Colo. 2014) ("Potential class members were identified in the following ways: The names and addresses of 163 persons or entities were provided by counsel for the Settling Defendants. . . ."); *Ashley v. Regl. Transp Dist. & Amalgamated Transit Union Div. 1001 Pension Fund Tr.*, No. 05-CV-01567-WYD-BNB, 2008 WL 384579, at *4 (D. Colo. Feb. 11, 2008) ("Here, the administrator of the Pension Plan identified 208 individuals as potential Settlement Class members. In accordance with the Court's Order . . . , Appointed Counsel timely mailed individual notices to each of them."). Again, this may be months or years into litigation.

The practicalities of class action litigation demonstrate that there is no basis for the Court of Appeals's assumption that "identifying the members of the class would be easy" for plaintiffs' counsel at the outset of a proposed class action, based solely on allegations that "[t]he exact size of the class will be *easily ascertainable*" and "[t]he contours of the class will be *easily defined*[.]" *BKP, Inc.*,

506 P.3d at 94. Certainly, there is no basis for a blanket rule denying plaintiffs' counsel the protections of the litigation privilege in proposed class action cases, based solely on an assertion of "ascertainability," a concept that is wholly unrelated to the purposes underlying the litigation privilege.

CONCLUSION

Amici respectfully request that the Court find that the common law litigation privilege for party-generated publicity in pending class action litigation include situations in which the identities of class members may be ascertainable through discovery.

Respectfully submitted this 22nd day of February, 2023.

FOX & ROBERTSON

/s/ Amy F. Robertson (*original signature on file*)
Amy F. Robertson
Counsel for Amici Curiae Impact Fund, Colorado Cross-Disability Coalition, Disability Law Colorado, Legal Aid at Work, Public Counsel, and Public Justice

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2023, the foregoing was served via CO Courts E-Filing on the following counsel of record:

Reza D. Rismani
Kathleen M. Byrne
TREECE ALFREY MUSAT P.C.
633 17th Street, Suite 2200
Denver, CO 80202
Counsel for Petitioners Killmer, Lane & Newman, LLC, and Mari Newman

Thomas Kelley
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
Counsel for Petitioners Killmer, Lane & Newman, LLC, and Mari Newman

Brian D. Gonzales
LAW OFFICES OF
BRIAN D. GONZALES, PLLC
2580 East Harmony Road
Fort Collins, CO 80528
Counsel for Petitioner Towards Justice

Brian M. Feldman
HARTER SECREST & EMERY LLP
1600 Bausch & Lomb Place
Rochester, NY 14604
Counsel for Petitioner Towards Justice

Raymond M. Deeny
Brooke A. Colaizzi
Heather F. Vickles
SHERMAN & HOWARD, LLC
675 Fifteenth Street, Suite 2300
Denver, CO 80202
Counsel for Respondents

/s/ Jordon Henderson (*original signature on file*)
Jordon Henderson
Paralegal
Fox & Robertson, PC