8-11-2004

# CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.

COSC2004-SA-182-02

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# REPLY BRIEF (P)

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| **SUPREME COURT, STATE OF COLORADO**<br>**2 East 14th Ave.**<br>**Denver, CO 80203**<br><br>**C.A.R. 21 Petition for Original Proceeding from the Order of the**<br><br>**DISTRICT COURT, DOUGLAS COUNTY, COLORADO**<br>**Honorable Thomas J. Curry**<br>**Case No 02CV1495, Div. 1** | FILED IN THE SUPREME COURT<br>AUG 11 2004<br>OF THE STATE OF COLORADO<br>SUSAN J. FESTAG, CLERK |
| **In Re:**<br><br>**Plaintiff: CLPF-PARKRIDGE ONE, L.P., a Delaware limited partnership, f/k/a CLARION LION PROPERTIES FUND - PARKRIDGE ONE, LLC, a Delaware limited liability company**<br><br>**v.**<br><br>**Defendant-Petitioner: HARWELL INVESTMENTS, INC. f/k/a Denver Architectural Precast, a Colorado corporation**<br><br>**Defendant-Respondent: FDG, INC., a Colorado corporation** | **▲ COURT USE ONLY ▲** |
| **Attorneys for Defendant-Petitioner:**<br><br>**Michael S. Drew, #22446**<br>**Kevin P. Ahearn, #31051**<br>**Pryor, Johnson, Montoya, Carney & Karr, P.C.**<br>**5619 DTC Parkway, Suite 1200**<br>**Greenwood Village, CO 80111**<br>**Phone: (303) 773-3500**<br>**Fax: (303) 779-0740**<br>**E-mail: mdrew@pjmck.com**<br>**E-mail: kahearn@pjmck.com** | **Case No.: 04SA182** |

**DEFENDANT HARWELL INVESTMENTS, INC. f/k/a DENVER ARCHITECTURAL PRECAST'S REPLY BRIEF IN SUPPORT OF PETITION FOR RELIEF PURSUANT TO C.A.R. 21**

## I. INTRODUCTION

This Court's jurisdiction has been properly invoked to remedy an abuse of discretion by the Douglas County District Court, which incorrectly ruled that C.R.S. § 13-80-104(1)(b)(II) bars pass-through claims in construction litigation on ripeness grounds. The trial court's ruling which granted Respondent FDG, Inc.'s ("FDG" or "Respondent") Motion for Judgment on the Pleadings is erroneous, as C.R.S. § 13-80-104(1)(b)(II) plainly states and was promulgated to extend the statute of limitations in construction cases, not to bar pass-through construction claims due to ripeness. As the trial court's ruling will abrogate Colo. R. Civ. P. 13(g) and 14 in construction cases and thus have a chilling impact on the construction industry as a whole, this Court should now make its rule to show cause absolute.

## II. ARGUMENT

### A. This Court Has Properly Exercised its Jurisdiction

In its Response, FDG spends a great deal of energy arguing that this Court should not exercise jurisdiction over Harwell Investments, Inc. f/k/a Denver Architectural Precast's ("Harwell" or "Petitioner") C.A.R. 21 Petition. C.A.R. 21(a)(1) provides this Court with broad discretion to accept a C.A.R. 21 petition and exercise its original jurisdiction. Through its June 10, 2004 Order issuing the rule to show cause, this Court has already exercised its discretion to accept jurisdiction of this matter, rendering FDG's argument moot.

Moreover, FDG's jurisdictional argument is contrary to Colorado law. This Court routinely accepts C.A.R. 21 petitions to review abuses of discretion by trial courts when no adequate remedy

is available on appeal. In *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002) (en banc), this Court held "[a]n original proceeding is not a substitute for an appeal, but we may act to exercise our discretionary jurisdiction under C.A.R. 21 when an adverse procedural ruling significantly impairs a party's ability to litigate the controversy." *See also Mitchell v. Wilmore*, 981 P.2d 172, 175 (Colo. 1999) (en banc) (stating "original jurisdiction may be exercised when a pre-trial ruling will place a party at a 'significant disadvantage in litigating the merits of the controversy,' and conventional appellate remedies would prove inadequate.").

In *Benton*, the trial court denied a defendant's motion for leave to amend the pleadings to add an interpleader claim against both the plaintiff and a person not yet a party, to add affirmative defenses and to amend a third-party complaint. *Benton*, 56 P.3d at 84-85. This Court exercised its jurisdiction under C.A.R. 21 and issued a rule to show cause, ultimately making the rule absolute. *Id.* at 83. *Benton* is illustrative in light of the facts in this case. In *Benton*, this Court did not hesitate to exercise its jurisdiction to cure an erroneous procedural ruling involving the joinder of parties. Here the erroneous dismissal of a cross claim against a co-defendant is at issue and, just as in *Benton*, this Court's jurisdiction has been properly exercised to review the trial court's abuse of discretion which significantly impacts Harwell's ability to litigate this controversy.

Petitioner Harwell's C.A.R. 21 Petition is not a substitute for an appeal. Rather, the C.A.R. 21 Petition was filed because the trial court's abuse of discretion in granting FDG's Motion for Judgment on the Pleadings can most likely never be appealed without resort to a C.A.R. 21 petition. Cases cited by FDG in its Response support this position. In *Public Service Co. of Colorado v. District Court*, 638 P.2d 772, 774 (Colo. 1981) (en banc), this Court held that a C.A.R. 21 petition

"will issue only if the petitioner can demonstrate that the trial court has abused its discretion and ***that damage sustained as a result of the abuse of discretion cannot be remedied on appeal.***" (Emphasis added). *Public Service Co.* held that the because the petitioner retained the right to appeal any final judgment of the trial court, which denied a motion to file a third-party complaint, the trial court's ruling could be corrected on appeal. *Id.* at 777.[1]

However, in the case at bar, Harwell will most likely never be able to appeal the trial court's erroneous ruling, rendering the original jurisdiction of this Court appropriate. As noted in Harwell's Petition, if Harwell prevails in the underlying lawsuit with Plaintiff CLPF it will not appeal the February 26, 2004 order. Looking at the opposite scenario, if Harwell is successful in the underlying lawsuit with Plaintiff, it will only have appellate recourse against Plaintiff CLPF, not FDG. The dismissal of Harwell's cross claim against FDG at this juncture in the lawsuit assures that the trial court's erroneous ruling will otherwise evade appellate review. FDG never offers an explanation for how the trial court's order granting the Motion for Judgment on the Pleadings can be appealed without resort to a C.A.R. 21 petition.

Furthermore, the dismissal of FDG at this juncture of the case is highly prejudicial to Harwell. Harwell's cross claim against FDG asserts legitimate negligence and breach of contract claims. In order to maintain its negligence claim against FDG, a professional licensed engineer, Harwell was

[1] FDG's reliance on *Public Service Co.* contradicts later arguments made by FDG in its Response. *Public Service Co.* relates to a third-party complaint under Colo. R. Civ. P. 14. The case at bar deals with pass-through cross claims brought under Colo. R. Civ. P. 13(g). When discussing *Public Service Co.* in the jurisdiction argument of its Response, FDG argues Rule 14 presents an "analogous situation" to Rule 13(g). Yet, later in its Response FDG goes to great lengths in an attempt to distinguish Rule 13(g) and Rule 14 for purposes of analyzing C.R.S. § 13-80-104. These two arguments are inapposite.

required to obtain a certificate of review pursuant to C.R.S. § 13-20-602. Harwell's certificate of review, filed May 20, 2003, certifies that the defects with the precast panels on Plaintiff CLPF's building emanate from FDG's design of the panels. Without being able to assert its legitimate negligence and breach of contract claims against FDG in the original proceeding, Harwell will be required to defend the lawsuit without the presence of the party who, in Harwell's expert's estimation, is responsible for the alleged damages to the building. The prejudice to Harwell in this context is immeasurable.

To date, no appellate court has reviewed C.R.S. § 13-80-104(1)(b)(II). Contrary to FDG's argument, this fact is telling as it demonstrates that the procedural posture in which challenges to pass-through claims under C.R.S. § 13-80-104(1)(b)(II) arise in other cases have also evaded appellate review. As with this case, parties in other cases litigating the interpretation of C.R.S. § 13-80-104(1)(b)(II) can most likely never have this issue reviewed without resort to a C.A.R. 21 petition. As the Colorado district courts are providing fractured rulings throughout the state regarding the interpretation of C.R.S. § 13-80-104(1)(b)(II), this Court's guidance is required to resolve a conflict with wide-reaching implications.

FDG never refutes that this Court's interpretation of C.R.S. § 13-80-104(1)(b)(II) will have a significant and wide-reaching impact on the entire construction industry in Colorado. FDG cannot, as the trial court's ruling will change the course of how construction cases are litigated throughout the state. This Court's guidance is required to resolve this important and broad-reaching issue. This Court's jurisdiction is not only appropriate, but significant to the entire construction industry in Colorado.

### B. The Plain Language Demonstrates that C.R.S. § 13-80-104(1)(b)(II) is a Statute of Limitations Provision, not a Ripeness Statute

Respondent FDG is correct - C.R.S. § 13-80-104(1)(b)(II) is not ambiguous. The statute is a statute of limitations provision which extends the statute of limitations in construction cases an additional 90 days following settlement or a judgment in the underlying lawsuit. However, there is no language in the statute which bars claims due to ripeness. The Court would need to re-write the statute in order to give FDG's interpretation of C.R.S. § 13-80-104(1)(b)(II) any merit.

Harwell's claims against FDG are pass-through claims. These types of pass-through claims are specifically contemplated by Colo. R. Civ. P. 13(g) and 14. Under the plain language of C.R.S. § 13-80-104(1)(b)(II), Harwell has 90 days following the completion of the Plaintiff CLPF/Petitioner Harwell lawsuit to assert its pass-through claim against Respondent FDG. The 2001 changes to C.R.S. § 13-80-104 extended this limitations period. However, Petitioner Harwell chose to file its cross claim against FDG during the pendency of the Plaintiff/Harwell matter. By its clear language, Harwell is allowed to do so as C.R.S. § 13-80-104(1)(b)(II) does not bar this type of pass-through claim during the pendency of the underlying lawsuit.

FDG inaccurately argues that Harwell "relies exclusively" on the Summit County order in *Gore Trail* (*Exhibit J*) to support its plain language argument. The plain language of the statute itself demonstrates that C.R.S. § 13-80-104(1)(b)(II) is a statute of limitations provision. This plain language is confirmed by the logical and persuasive orders from both El Paso County in *Cypress Ridge* (*Exhibit M*) and Summit County in *Gore Trail* (*Exhibit J*).

FDG turns the plain language of C.R.S. § 13-80-104(1)(b)(II) on its head because of the word

"arise" which appears in the statute. To the contrary of FDG's argument, "the language in the statute regarding when a claim ***arises*** is set forth only for the purposes of determining ***when the 90-day statute of limitations starts***. C.R.C.P. 14 is controlling as to when a third-party complaint ***may be brought***." *Exhibit M* (emphasis added).

C.R.S. § 13-80-104(1)(b)(II) is plainly a statute of limitations provision. The statue unambiguously states that any pass-through claim brought in a construction case must be brought within 90 days of completion of the underlying lawsuit "and not thereafter".[2] This plain language is critical, as the statute does not state a pass-through claim cannot be brought ***before*** this 90 day period expires, as FDG argues. The statute plainly does not state that pass-through claims "shall" only be brought within 90 days "after" settlement or judgment of the underlying claim.

The title of C.R.S. § 13-80-104 is a relevant and significant part of the statute which FDG would have this Court ignore. "A statute is to be construed ***as a whole*** to give a consistent,

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[2] FDG incorrectly asserts that this argument should not be considered because Harwell did not include it in its Response to the Motion for Judgment on the Pleadings, but rather included this argument in its Motion for Reconsideration. FDG repeats this argument throughout the various sections of its Response. FDG's argument is contrary to Colorado law which allows review of materials, such as affidavits, in a motion for reconsideration. In *UIH-SFCC Holdings, L.P. v. Brigato*, 51 P.3d 1076, 1078 (Colo. App. 2002), the Colorado Court of Appeals held that the trial court was not prohibited from considering an affidavit attached to a motion for reconsideration. *Brigato* also held that because the motion for reconsideration did not seek a new trial, the trial court could consider information in a motion for reconsideration even though the information could have been discovered earlier. *Id.* Moreover, in *Tapley v. Golden Big O Tires*, 676 P.2d 676, 679 n.5 (Colo. 1983) (en banc), this Court held that whether or not to consider additional information such as an affidavit in a motion for reconsideration is within the discretion of the trial court. Here, the trial court did not provide any reasoning for denying Harwell's Motion for Reconsideration and did not refuse to consider the information contained in the Motion for Reconsideration. Accordingly, all of the issues and supporting documentation were properly before the trial court and are properly before this Court via this Petition.

harmonious and sensible effect to all its parts." *Martinez v. Continental Enterprises*, 730 P.2d 308, 315 (Colo. 1986) (en banc) (citations omitted) (emphasis added). "A court may consider the title of a statute as an aid in construing legislative intent." *Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1183 (Colo. 2003) (en banc). *See also People v. Zapotocky*, 869 P.2d 1234, 1239-40 (Colo. 1994) (en banc) (same ); *Shaw v. Baesemann*, 773 P.2d 609, 610-11 (Colo. App. 1989) (same). FDG's argument to the contrary flies in the face of this clear Colorado precedent.

C.R.S. § 13-80-104 is titled "Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others." As noted in *Gore Trail*, the legislature did not utilize language in the statute that would demonstrate an intent to depart from the traditional usage for a statute of limitation so as to create a ripeness bar. Had the legislature intended this radical departure, the legislature would have done so through clear and unambiguous language. *Exhibit J*, pg. 6. The plain language of C.R.S. § 13-80-104 does not include such ripeness language. However, the plain language does include "limitation of actions" language which demonstrates C.R.S. § 13-80-104(1)(b)(II) was promulgated to bar claims brought ***after*** a certain time period, not before. Respondent FDG is attempting to utilize a statute of limitations provision to dismiss a claim for ripeness, not tardiness, which departs from the traditional use for a statute of limitation provision.

FDG attacks the *Gore Trail* decision and strongly urges this Court not to consider the *Gore Trail* order. For example, FDG argues that because *Gore Trail* is unpublished, this Court should not consider the order. Respondent FDG has no choice, as it has not provided case law or other precedent (published or unpublished) supporting its erroneous argument interpreting C.R.S. § 13-80-104(1)(b)(II). *Gore Trail* specifically reviewed the plain language of C.R.S. § 13-80-104(1)(b)(II)

and came to the conclusion that the plain language of the statute does not bar claims due to ripeness. The clear language of C.R.S. § 13-80-104(1)(b)(II) "plainly serves to bar claims brought after a particular date, but does not speak specifically to claims brought earlier." *Exhibit J*, pg. 6. In the absence of any other precedent, and FDG has provided none, the reasoning behind the *Gore Trail* order is persuasive and logical. *See also* order in *Cypress Ridge*. *Exhibit M.*

FDG also argues that in interpreting a statute, the legislature is presumed to have inserted all parts thereof for a purpose and intended that all parts of a statute be given effect. *McMillan v. State*, 405 P.2d 672, 674 (Colo. 1965) (en banc). Petitioner Harwell agrees. Here, the legislature amended C.R.S. § 13-80-104 in 2001, and chose to include the amendments into a statute that is, and always has been, a statute of limitations provision. The legislature did not create a new statute with a new title. The legislature is presumed to have incorporated C.R.S. § 13-80-104(1)(b)(II) into the existing statute of limitations section of the statute for a reason - to bar claims brought after a certain point in time, not before. Yet, in the same breath, FDG argues that the title to the statute is not relevant and would have this Court ignore all parts of the statute. This argument is contrary to the long-standing principles of statutory construction outlined in *McMillan.*

The plain language of C.R.S. § 13-80-104(1)(b)(II) is clear and unambiguous, as the language constitutes a limitation of actions provision which bars pass-through claims brought 90 days after the underlying construction lawsuit is concluded by settlement or judgment. When the plain language of C.R.S. § 13-80-104(1)(b)(II) is closely reviewed, it is evident Respondent FDG's Motion for Judgment on the Pleadings was erroneously granted.

### C. The Legislative History of C.R.S. § 13-80-104(1)(b)(II) Overwhelmingly Establishes the Rule to Show Cause Should be Made Absolute

To the extent that this Court finds ambiguity in the language of C.R.S. § 13-80-104(1)(b)(II), the legislative history must be examined to determine the intent of the statute. FDG provides no specific legislative history which refutes the history that this statute was promulgated to end shot gun construction lawsuits by extending the statute of limitations.

In responding to the legislative history of C.R.S. § 13-80-104(1)(b)(II), FDG relies on old law. *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637 (Colo. 1978) has been superseded by statute as stated in *Nelson, Haley, Patterson & Quirk, Inc. v. Garney Companies, Inc.*, 781 P.2d 153, 155-56 (Colo. App. 1989). Despite this, FDG argues that the 2001 changes to C.R.S. § 13-80-104 somehow revived the law in Colorado to what it once was in *Duncan*. In support of its argument, FDG states " ***by its very own language***, the specific effect of the amendment was to return the law of Colorado with respect to when a pass-through construction claim accrues to that enunciated by the Colorado Supreme Court in *Duncan* . . . ." FDG's Response, pg. 16 (emphasis added). FDG argues that because, in its estimation, the language of C.R.S. § 13-80-104(1)(b)(II) "mimics" the law set forth in *Duncan*, the 2001 amendment was somehow meant to revive *Duncan*.

FDG's argument is not supportable by any legislative history and, admittedly, boils down to nothing more than a plain language argument. As previously established, the plain language does not provide support to FDG as C.R.S. § 13-80-104(1)(b)(II) extends the statute of limitations 90 days from the completion of the underlying construction lawsuit. Moreover, FDG does not cite any legislative history to support its erroneous analogy between *Duncan* and C.R.S. § 13-80-104(1)(b)(II). It cannot, as the transcribed legislative history fails to mention *Duncan* in any way. *See Exhibit L.*

As the plain language does not support a ripeness bar, FDG's attempt to analogize the plain language of C.R.S. § 13-80-104(1)(b)(II) to the language of *Duncan* fails.

Next, FDG turns its attention to an article written in the October 2001 Colorado Lawyer by construction defect attorney Scott Sullan for "further evidence" that the legislative history supports FDG's position. Mr. Sullan was one of the authors of C.R.S. § 13-80-104(1)(b)(II). Contrary to FDG's assertion, this article is not legislative history, it is persuasive secondary authority. However, Mr. Sullan's October 2001 article does not lend any support to FDG. Rather, Mr. Sullan indicates that C.R.S. § 13-80-104(1)(b)(II) was promulgated to defer the statute of limitations, not impose a ripeness bar to pass through type claims:

> This ninety-day period appears to constitute a remarkably short limitation period for a defendant to investigate and commence a reimbursement claim and may, at first blush, raise due process concerns. However, the extended period effectively "piggy-backs" onto the two-year limitation period afforded an owner to commence suit against the party seeking reimbursement. Furthermore, the amendment allows ***an additional ninety days*** following settlement of or a final judgment on the owner's claim for a defendant to commence a reimbursement suit.

*See* the October 2001 article attached to *Exhibit H*, pg. 122 (emphasis added). Mr. Sullan's opinions are clear - C.R.S. § 13-80-104 provides for an ***additional*** 90 day statute of limitations following settlement or judgment, which "piggy-backs" on top of the initial statute of limitations period.

The October 2001 article is consistent with Mr. Sullan's May 2004 Colorado Lawyer article, which leaves no doubt what Mr. Sullan's opinions are with respect to C.R.S. § 13-80-104(1)(b)(II): "[i]t is unlikely this change was intended to prevent a construction professional from joining a potentially liable party under C.R.C.P. 14 before such settlement or judgment." *Exhibit N*, pg. 77. The other portion of the May 2004 article quoted by FDG in its Response simply recites the statute,

which lends nothing to its argument.

Moreover, Mr. Sullan's opinions from his October 2001 and May 2004 articles are consistent with his testimony in support of House Bill 1166. Mr. Sullan testified that he agrees general contractors need to bring in their subcontractors in construction lawsuits to make sure that general contractors do not have to give up their right to indemnification claims due to the expiration of the statute of limitations. *Exhibit L*, pg. 25-27. If Mr. Sullan believes that C.R.S. § 13-80-104(1)(b)(II) is a ripeness bar, as argued by FDG, he would not agree nor advocate that general contractors need to have the right to assert claims against their subcontractors during the underlying construction lawsuit.

The legislature did change the law in Colorado by promulgating C.R.S. § 13-80-104(1)(b)(II). Before this 2001 amendment, the statute of limitations was fixed in time to the owner's statute of limitations. In 2001, the law changed to allow the extension of the statute of limitations 90 days following conclusion of the underlying claim. Now, a general contractor no longer needs to worry about suing all subcontractors in a shot gun type lawsuit without first investigating its claims just because the statute of limitations is about to expire. This change in C.R.S. § 13-80-104 is evident by both the plain language as well as the corresponding legislative history. As such, FDG's argument that Harwell's interpretation of the statute would require this Court to review C.R.S. § 13-80-104 just as it was prior to the 2001 amendment is erroneous and fails to account for the express rationale behind the change in the statute.

FDG's Response is more telling for what it does not say than what it says. FDG spends no time discussing or refuting the legislative history which demonstrates that C.R.S. § 13-80-104(1)(b)(II) was promulgated to end shot gun type lawsuits in the construction industry by extending

the statute of limitations an additional 90 days following completion of the underlying lawsuit. This intent is clear from the transcribed legislative history and as correctly interpreted in *Gore Trail*.

This Court should review and rely on Representative Stengel's affidavit. *See Exhibit K*. As a co-sponsor of House Bill 1166, Representative Stengel has intimate knowledge that C.R.S. § 13-80-104(1)(b)(II) was promulgated to end shot gun construction lawsuits by extending the statute of limitations. Again, FDG argues that because the affidavit was not attached in response to the Motion for Judgment on the Pleadings, it should not be considered. The affidavit was properly before the trial court on the Motion for Reconsideration and is properly before this Court.[3] Representative Stengel's testimony is consistent with the plain language of the statute, with the transcribed legislative history, with the orders in *Gore Trail* and *Cypress Ridge*, and with the opinions of one of the authors of the statute Mr. Sullan. FDG has failed to refute the specific testimony in Representative Stengel's affidavit in any way.

FDG's argument with respect to the legislative history boils down to 1) the plain language of the statute and 2) an article written by Scott Sullan, Esq. Neither of these sources are legislative history. The legislative history is rife with testimony that the statute was intended to end shot gun construction lawsuits and voices no intent to bar claims due to ripeness or to revive *Duncan*. Nowhere in its Response does FDG provide any legislative history to the contrary.

### D. The *Gore Trail* and *Cypress Ridge* Orders are Persuasive Authority which this Court Should Consider and Rely Upon

Petitioner Harwell attached two orders from Colorado district courts (*Gore Trail*/Summit County and *Cypress Ridge*/El Paso County) which addressed the exact argument raised by FDG in

[3] *See also* Harwell's argument raised in footnote 2.

its Motion for Judgment on the Pleadings. Both courts rejected that argument. In response, FDG has failed to identify any Colorado authority from any jurisdiction that agrees with its position. Accordingly, FDG has resorted to arguing that this Court should not consider these two orders.

Harwell has never contended that the orders in *Gore Trail* and *Cypress Ridge* are binding precedent upon this Court. However, as no other Colorado court, appellate or otherwise, has issued a detailed written opinion with respect to C.R.S. § 13-80-104(1)(b)(II), the reasoning behind *Gore Trail* and *Cypress Ridge* is logical and persuasive.

FDG asserts "none of the parties in the cases cited by Harwell even bothered to raise the judicial and legislative history of C.R.S. § 13-80-104 and its predecessors as FDG has done." This is inaccurate. The *Gore Trail* order is thirteen pages long, with a majority of the order devoted to the legislative history behind C.R.S. § 13-80-104(1)(b)(II).

When faced with the exact same argument raised by FDG, *Gore Trail* analyzed both the plain language and the legislative history behind C.R.S. § 13-80-104(1)(b)(II), and came to the opposite conclusion of the trial court in this matter. Inasmuch as the trial court here failed to offer any reasoning for its decision to grant FDG's Motion for Judgment on the Pleadings, the rationale behind the *Gore Trail* and *Cypress Ridge* orders is persuasive which this Court should consider and adopt.

**E. Colo. R. Civ. P. 13(g) and Colo. R. Civ. P. 14 are Analogous**

As a practical consideration, FDG cannot seriously argue that had Harwell's pass-through claims been brought pursuant to Colo. R. Civ. P. 14 that FDG would not have filed the exact same motion to dismiss based on C.R.S. § 13-80-104(1)(b)(II). Clearly, FDG would have, rendering its argument that Colo. R. Civ. P. 13(g) is not identical to Colo. R. Civ. P. 14 irrelevant.

Moreover, FDG's argument is merely another attempt to discredit the *Gore Trail* and *Cypress*

*Ridge* orders. As previously noted, these two orders are well-reasoned, logical and persuasive.

Petitioner Harwell's cross claim against FDG asserts two claims for relief - negligence and breach of contract. In each of the two claims for relief against FDG, Harwell has asserted that to the extent Harwell is liable to Plaintiff CLPF, FDG is liable to Harwell. The basis for Harwell's cross claim emanates from Colo. R. Civ. P. 13(g). This rule states:

> A pleading may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim ***may include a claim*** that the party against whom it is asserted ***is or may be liable to the cross claimant for all or part of a claim asserted against the cross claimant.***

(Emphasis added). As is expressly noted in Colo. R. Civ. P. 13(g), one coparty is allowed to assert cross claims against another coparty and assert a claim that the coparty "***is or may be liable*** to the cross claimant for all or part of a claim asserted in the action against the cross claimant." (Emphasis added).

FDG attempts to draw a distinction between the two rules based on the word "claim". FDG argues the word "claim" appears in Colo. R. Civ. P. 13(g), but not Colo. R. Civ. P. 14, and therefore the two rules are distinguishable. In reality, there is no distinction. Colo. R. Civ. P. 14 talks of "a summons and complaint" being served on the party who is or may be liable to the third-party plaintiff. Under Colo. R. Civ. P. 13(g), a summons and complaint cannot be served on a co-party since the party is already part of the lawsuit, so a cross claimant may file a "claim" against the party who is or may be liable to the cross claimant. The argument that a "summons and complaint" under Rule 14 and a "claim" under Rule 13(g) are distinguishable is untenable, and FDG never outlines why this is a distinction or conversely, why this distinction is relevant. There is no distinction between the two

rules in the context of C.R.S. § 13-80-104(1)(b)(II). As C.R.S. § 13-80-104(1)(b)(II) is consistent with and does not abrogate Colo. R. Civ. P. 13(g) and 14, FDG's reliance on *Berry Properties v. City of Commerce City*, 667 P.2d 247, 250 (Colo. App. 1993) is misplaced.

### F. C.R.S. § 13-20-803 Cannot be Reconciled Under FDG's Erroneous Interpretation of C.R.S. § 13-80-104(1)(b)(II)

C.R.S. § 13-20-803 was promulgated as part of the same legislation in the Construction Defect Action Reform Act ("CDARA") as was C.R.S. § 13-80-104(1)(b)(II). Colorado law is clear that courts "must read and consider the statute as a whole and give harmonious and sensible effect to all its parts, when possible." *Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1183 (Colo. 2003) (en banc). *See also Martinez v. Continental Enterprises*, 730 P.2d 308, 315 (stating "[a] statue is to be construed to further the legislative intent evidenced by the entire statutory scheme."). Respondent FDG would have the Court ignore the companion provisions of House Bill 1166, such as C.R.S. § 13-20-803, when Colorado law dictates otherwise.[4]

C.R.S. § 13-20-803 specifically contemplates the addition of subcontractors to any type of construction lawsuit, including pass-through indemnification and contribution claims. C.R.S. § 13-20-803 states "if a subcontractor or supplier is added as a party to an action under this section . . . ." C.R.S. § 13-20-802.5(1) defines an "action" as any civil action, including a claim for indemnity or contribution, such as a pass-through third-party claim or cross claim. Petitioner Harwell has not misrepresented any facet of C.R.S. § 13-20-803 to this Court as FDG summarily suggests.

As C.R.S. § 13-20-803 was promulgated as part of the same legislation as C.R.S. § 13-80-

[4] Again, FDG argues that the Court should not consider this argument since it was not specifically raised in response to the Motion for Judgment on the Pleadings. *See* Harwell's response to this argument in footnote 2.

104(1)(b)(II), both provisions must be analyzed in harmony as required by Colorado law. "[T]he legislature's intent became clear when C.R.S. § 13-80-104 is read in conjunction with C.R.S. § 13-20-803(4). To construe C.R.S. § 13-80-104 as a bar to third-party claims before they 'arise' would impermissibly render the plain language of C.R.S. C.R.S. § 13-20-803(4) meaningless." *Exhibit J*, pg. 7. This is an absurd result, and such a strained interpretation should be avoided.

**G. Public Policy Considerations Favor Making the Rule to Show Cause Absolute**

Public policy considerations strongly militate against an interpretation of C.R.S. § 13-80-104(1)(b)(II) that would prevent pass-through claims in construction lawsuits due to ripeness.[5] FDG argues that a subcontractor should not be required to litigate a matter, such as a pass-through cross-claim or third-party claim, when it may have absolutely no responsibility. This argument fails to account for Colo. R. Civ. P. 13(g) and 14, which specifically allow for and otherwise contemplate these types of pass-through claims. These pass-through claims allow a third-party plaintiff or cross claimant to deny the allegations against it, but pass-through any liability to other parties (such as subcontractors). These long-standing rules of procedure trump FDG's argument that it should not be forced to litigate when it may have no responsibility.[6]

In support of its erroneous policy arguments, FDG continues to rely on *Duncan*. As previously noted, *Duncan* has been superseded by statute and is no longer valid law in Colorado. Rather, "[o]ne of the purposes of [Rule 13] is to encourage the determination of all controversies

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[5] Again, FDG argues this Court should not consider this argument because it was not raised in response to the Motion for Judgment on the Pleadings. *See* Harwell's response in footnote 2.

[6] In addition, Harwell's certificate of review refutes FDG's argument that it has no responsibility for the construction defects at issue in this lawsuit, as Harwell's engineer expert certifies the problems with the precast panel emanate from FDG's design of the panels.

arising out of the same transaction in one lawsuit and prevent needless circuity of actions." *City of Westminster v. Phillips-Carter-Osborn, Inc.*, 435 P.2d 240, 242 (Colo. 1967) (citation omitted). *Cf Pioneer Mut. Compensation Co. v. Cosby*, 244 P.2d 1089, 1091-92 (Colo. 1952) (en banc) (stating "[t]he general purpose of Rule 14(a) . . . is to settle as many conflicting interests as possible in one proceeding and thus avoid the circuity of action, save time and expense, as well as eliminate a serious handicap to the defendant of a time difference against him and a judgment in his favor against the third-party defendant."); *McCabe v. United Bank of Boulder*, 657 P.2d 976, 978-79 (Colo. App. 1982) (same with respect to the logical relationship test for counterclaims). This public policy favors resolution of all of the claims in one suit to save judicial resources and to prevent a time difference handicap to Harwell.

Furthermore, "[a] statutory interpretation that defeats the legislative intent or leads to an absurd result will not be followed . . . . [T]he intention of the legislature prevails over a literal interpretation of the statute that would lead to an absurd result . . . ." *Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998) (en banc). Construing C.R.S. § 13-80-104(1)(b)(II)(A) to bar pass-through cross claims or third-party claims in construction cases would provide for an absurd result. Here, the owner of the building (Plaintiff CLPF) can maintain a claim against a subcontractor, Harwell. There is no contractual privity between the owner and Harwell (Plaintiff CLPF is not even the original owner, but a subsequent owner). However, under the trial court's erroneous ruling, Harwell cannot maintain its legitimate pass-through claim against its subcontractor FDG, even though Harwell is in contractual privity with FDG and has filed a certificate of review. The fact that Harwell is not a "general contractor" is irrelevant to this analysis. This is an absurd result for which no intent can be found in the legislative history to House Bill 1166.

The trial court's order also provides for an absurd result in that it abrogates Colo. R. Civ. P. 13(g) and 14 in the construction industry. However, the CDARA "specifically states that the general assembly intended to make only 'limited changes' to the law in the litigation of construction defect cases." *Exhibit J*, pg. 8; *see also* C.R.S. § 13-20-802. The abrogation of pass-through claims under Rule 13 and 14 in the construction industry does not constitute a "limited change". The legislative history to House Bill 1166 is silent with respect to abrogating these long-standing procedural rules. Had the legislature intended to abrogate cross claim and third-party practice throughout the entire construction industry in Colorado, it would have indicated this radical change with clear and unequivocal intent. This intent is found nowhere in the legislative history to House Bill 1166. *See also Exhibit J.*

## III. CONCLUSION

The interpretation of C.R.S. § 13-80-104(1)(b)(II) and the other provisions of the CDARA will have a sweeping impact on the entire construction industry in Colorado. As verified by both the plain language and the legislative history, these 2001 amendments were promulgated to extend the statute of limitations an additional 90 days from judgment or settlement of the underlying lawsuit, not bar legitimate claims properly brought under Colo. R. Civ. P. 13 and 14 on ripeness grounds. For all of the reasons set forth in Harwell's Petition and this Reply, the rule to show cause should be made absolute.

DATED: August 11, 2004

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of **DEFENDANT HARWELL INVESTMENTS, INC. f/k/a DENVER ARCHITECTURAL PRECAST'S REPLY BRIEF IN SUPPORT OF PETITION FOR RELIEF PURSUANT TO C.A.R. 21** by transmitting the same via U.S. Mail on August 11, 2004 to:

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