7-12-2004

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

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT JUL 12 2004 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
District Court, Douglas County, Case No. 02CV1495 The Honorable Thomas J. Curry	**COURT USE ONLY**
In re: 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 v. Defendant-Petitioner: HARWELL INVESTMENTS, INC. f/k/a Denver Architectural Precast, a Colorado corporation Defendant-Respondent: FDG, INC., a Colorado corporation	Case Number: 04SA182
Attorneys for Defendant-Respondent FDG, Inc.: Ira J. Bornstein, #32529 Mark C. Willis, #31025 KUTAK ROCK LLP 1801 California Street, Suite 3100 Denver, Colorado 80202 Telephone: (303) 297-2400 Facsimile: (303) 292-7799 E-mail: ira.bornstein@kutakrock.com mark.willis@kutakrock.com	

FDG, INC.'S RESPONSE TO RULE TO SHOW CAUSE

NOW COMES Respondent FDG, Inc. ("FDG"), by its attorneys, Kutak Rock LLP, and for its response to the rule to show cause why the relief requested in the C.A.R. 21 petition filed

by Defendant Harwell Investments, Inc. f/k/a Denver Architectural Precast ("Harwell") should not be granted states:

I. THE COURT SHOULD NOT EXERCISE JURISDICTION OVER THIS MATTER

While Harwell's petition is brought pursuant to C.A.R. 21, the petition spends very little time discussing the appropriate standard under Rule 21 and its application to the case at hand. The reason for this is that Harwell's petition cannot withstand such scrutiny, requiring the rule to be discharged.

In its very own words, C.A.R. 21 unequivocally proclaims that, "[r]elief under this rule is extraordinary in nature." This was confirmed by the court in *White v. District Court*, 695 P.2d 1133, 1135 (Colo. 1984), which stated that, "Relief in the nature of prohibition provided by C.A.R. 21 is an extraordinary remedy limited in purpose and in availability." Harwell's petition fails to evidence any basis whatsoever for such an extraordinary remedy.

In fact, Harwell's petition admits that it merely seeks to act as a substitute for appeal. The petition merely seeks to have this Court vacate the February 26, 2004 order of the district court of Douglas County granting FDG's Motion for Judgment on the Pleadings and dismissing the remaining claims in Harwell's Amended Cross Claim without prejudice. Harwell made no effort whatsoever to have the order rendered final and appealable. Regardless, rather than wait for a final and appealable order to be entered by the district court, at which time Harwell could appeal the granting of FDG's Motion for Judgment on the Pleadings, Harwell seeks to avoid the applicable procedural rules and have the matter immediately appealed to this Court. According to C.A.R. 21, relief under that provision "shall be granted only when no other adequate remedy, including relief available by appeal or under C.R.C.P. 106, is available."

Moreover, the cases are legion affirming this language from C.A.R. 21. As stated by the court in *White v. District Court*, 695 P.2d at 1135, rule 21 "is not a substitute for an appeal." The court in *Fitzgerald v. District Court*, 493 P.2d 27, 29 (Colo. 1972), held that:

> Prohibition is not available where the party seeking it has adequate remedies at law, or where it will supersede the functions of an appeal....
> ... Petitioners made no attempt to appeal that judgment, but have rather sought to substitute a writ of prohibition for an appeal. The law in Colorado is clear that this may not be done.

Harwell fails to make any compelling arguments that an appeal would fail to provide it with an adequate remedy, especially considering that its remaining cross-claims were dismissed without prejudice. Harwell admits that in the event that it is successful in defending the underlying lawsuit brought by the plaintiff, it will have no reason to appeal the February 26, 2004 order and obviously will have suffered no harm. (Petition, p.6) However, without any supporting arguments, Harwell incorrectly concludes that "should Harwell be unsuccessful in the underlying lawsuit with Plaintiff, it will only have appellate recourse against Plaintiff CLPF, not Respondent FDG (who is no longer a party), and would likely only have the option of appealing the substantive issues raised in the Plaintiff-Petitioner lawsuit." (Petition, p.6)

Completely grasping at straws while a the same time backing away from its previous argument, Harwell then makes the completely unconvincing argument that, "if Harwell is not successful in the underlying suit any appeal of C.R.S. § 13-80-104 issues may well be combined with other issues arising out of the underlying case, and the appeal may be decided on other grounds." (Petition, p.6) This is true of any appeal, but certainly is not sufficient grounds to provide this Court with reason to exercise jurisdiction. Furthermore, Harwell fails to explain how it is prejudiced if the appeal is decided on other grounds. If Harwell is successful in its

appeal of any adverse ruling in the underlying case, it should not matter to Harwell if the appellate court chooses not to decide any issues surrounding the granting of FDG's Motion for Judgment on the Pleadings—especially inasmuch as Harwell would not be entitled to any relief from FDG under that scenario.

The Court must keep in mind that the order granting FDG's Motion for Judgment on the Pleadings only dismissed Harwell's remaining claims without prejudice. Thus, the order does not preclude Harwell from subsequently bringing those claims as long as it does so in a timely manner. Despite this fact, Harwell contends that "it will be prejudiced by having to suspend its cross claim until its litigation with Plaintiff CLPF is concluded." (Petition, p.6) Harwell's petition, however, fails to delineate how it is prejudiced, except to state that it "must defend the lawsuit without having the benefit of being able to assert legitimate claims against FDG." (Petition, p.6) Interestingly, Harwell does not claim that it will be prejudiced in its defense of the underlying lawsuit, since it obviously will not be. The only prejudice which Harwell claims it will suffer is in not being able to bring its cross-claim against FDG in the same lawsuit. As this Court has already ruled, that is not a basis for it to exercise jurisdiction under Rule 21.

Thus, this Court in *Public Service Company of Colorado v. District Court*, 638 P.2d 772, 777 (Colo. 1981), was faced with an analogous situation involving the district court's denial of a motion for leave to file third-party complaints. Equally applicable here is this court's holding in *Public Service Company*:

> Nonetheless, we conclude that there has been no abuse of discretion below. The petitioner retains the right to appeal any final judgment of the trial court; and error, if any, in the ruling of the trial court can be corrected on appeal. The mere fact that a new trial may be necessary to correct an improper denial of a third-party complaint does not in itself render an appeal inadequate as a remedy for the petitioner.

Harwell's petition ignores the obvious fact that the crux of its argument is simply that it believes that the district court committed error in ruling against it and in granting FDG's Motion for Judgment on the Pleadings, which it then seeks to characterize as an abuse of discretion. Unfortunately for Harwell, it is well established that that is not grounds for the granting of a Rule 21 petition:

> Petitioner's primary assertions are in reality assertions that respondent erred as a matter of law in granting the prosecution's motion. As previously noted, that issue is generally not appropriate for determination in the context of a C.A.R. 21 proceeding.

White v. District Court, 695 P.2d at 1136.

Faced with a Rule 21 petition seeking to vacate the district court's denial of petitioner's motion to set aside a default judgment as an abuse of discretion, the court in *Stiger v. District Court*, 535 P.2d 508, 509 (Colo. 1975), held as follows in discharging the rule:

> Prohibition is generally a preventive remedy and usually issues only to prevent the commission of a future act, rather than undo an act already performed. In most cases, correction of error is the function of appeal, a trial court having the jurisdiction to render a wrong as well as a right decision.

See also Vaughn v. District Court, 559 P.2d 222, 223 (Colo. 1977)("[A writ of prohibition] is designed to restrain rather than remedy an abuse of discretion. (citations omitted) It does not correct mere error or provide a substitute for appeal.").

This court in *Prinster v. District Court*, 325 P.2d 938, 940 (Colo. 1958) similarly stated that:

> Plaintiffs here, all of whom were defendants before Judge Hughes, are in no position to question, and do not question, Judge Hughes' jurisdiction to rule on their motions, provided he rule correctly as they view the matter. In any event, he did rule; he did grant the

parties time to answer; that ruling remains in full force and effect. This court has not undertaken to vacate the ruling and in this proceeding should not order Judge Hughes to vacate the order or take any affirmative action.

> "The remedy by prohibition is primarily preventive or restraining, not corrective, and only incidentally remedial in the sense of giving relief to parties.
> "* * * Its principal purpose at the present time is to prevent an encroachment, excess, usurpation, or assumption of jurisdiction on the part of an inferior court or tribunal, or, it has been said, to prevent some great outrage upon the settled principles of law and procedure, in cases where wrong, damage, and injustice are likely to follow from such action. * * *" 42 Am.Jur. 140-141 § 5.

(emphasis added)

In further discussing the use of a Rule 21 petition to restrain a court from committing an error in ruling on an issue properly before it, such as Harwell seeks to do here, the *Prinster* court held that:

> Nor may [prohibition] be used to restrain a trial court from committing error in deciding a question properly before it; it may not be used in lieu of a writ of error.
> In 42 Am.Jur. 165, § 30, we find the following language:
>
> > "It is the universal rule that mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, and that a writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it; or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review to undo what already has been done. * * * Thus, when jurisdiction is clear, an erroneous decision in ruling on the sufficiency of the petition or complaint, or on a motion to dismiss, * * * is not ground for a writ of prohibition. * * *"

Id. at 941.

This court in *Alspaugh v. District Court*, 545 P.2d 1362, 1364-1365 (Colo. 1976), similarly held as follows in discharging the rule to show cause:

> This extraordinary writ does not include the correction of error made by the trial court. Prohibition may not "be used to restrain a trial court from committing error in deciding a question properly before it; it may not be used in lieu of a writ of error." Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958)
>
> Right or wrong, the trial court has ruled that the parties have waived their rights to arbitration. It cannot be denied that the court had jurisdiction to pass on the question of waiver. If it is right in this ruling, it has jurisdiction to proceed. This is not a proper case for this court to inject itself at this juncture into the ruling on waiver. If in fact the district court erred, the error may be corrected on appeal. (citation omitted)
>
> The petitioners urge that the right to arbitrate will be lost if the trial court proceeds with the case before it, and that the unnecessary delay and expense of the trial is sufficient grounds to invoke the jurisdiction of this court. In Prinster, supra, the court stated that "(t)he delay and expense of a trial may not be urged as grounds for prohibition."

Finally, this court in *Leonhart v. District Court*, 329 P.2d 781, 783-784 (Colo. 1958), held that:

> Corrective measures are not within the sweep and coverage of prohibition; correction of error is the function of a writ of error. A trial court has the power to render a right as well as a wrong decision. . . .
>
> . . .
>
> A superior court should exercise great caution and circumspection before issuing a rule to show cause to an inferior tribunal, and then only when such court is satisfied that the ordinary remedies provided by law are not applicable or are inadequate. Only in exceptional cases or classes of cases should applications of this character be allowed.
>
> . . .
>
> The fact that proceedings here may be expensive and may result in ultimate reversal of the trial court for error affords insufficient basis for a resort to proceedings in the nature of prohibition.

Despite the aforementioned precedent, and despite acknowledging the fact that the February 26, 2004 order granting FDG's Motion for Judgment on the Pleadings "is normally interlocutory and not immediately appealable," Harwell still contends that this Court should exercise its original jurisdiction under Rule 21. Of course, this flies in the face of this Court's holding in *Groendyke Transport, Inc. v. District Court*, 343 P.2d 535, 537 (Colo. 1959):

> The rule may not be utilized to avoid the requirements of finality of judgments and orders set forth in Rule 111. Counsel, by the simple step of re-labeling the procedure by which review is sought, generally may not make a judicial order that is interlocutory in nature reviewable before final judgment is entered in the case.

The cases cited by Harwell in support of its argument are all inapposite inasmuch as they all involved discovery disputes, which are not at issue in the present cause.

In further support of its argument, Harwell contends that, "to date, no Colorado appellate court has reviewed the issue presented to this Court. In addition, the Colorado district courts are in disagreement with respect to the interpretation of C.R.S. § 13-80-104(1)(b)(II)." (Petition, p.7) The mere fact that no Colorado appellate court has reviewed the underlying issue at hand is not grounds for this Court to exercise its original jurisdiction. The number of issues yet to be reviewed by the appellate courts of this state is boundless, but certainly does not mean that this Court should take up each and every such issue. That is the purpose of the appellate courts. Moreover, the mere fact that there are unpublished district court opinions taking different positions is not a basis for this Court to exercise original jurisdiction. There are most likely innumerable instances of district courts in this state taking differing positions on issues in unpublished opinions. If this Court were to exercise jurisdiction under Rule 21 in each such

instance, this Court would be inundated with cases, while leaving very little for the appellate courts to review.

It is well established that, "In an original proceeding pursuant to C.A.R. 21, the burden is on the petitioner to clearly establish that the respondent trial court is proceeding without or in excess of its jurisdiction, or has seriously abused its discretion." *Brewer v. District Court*, 655 P.2d 819, 820 (Colo. 1982). *See also White v. District Court*, 695 P.2d at 1135 ("In view of the limited function of C.A.R. 21 proceedings, we have recognized that one who seeks the extraordinary relief authorized by the rule assumes the burden of clearly establishing that the respondent district court is proceeding without or in excess of its jurisdiction.") Harwell has failed to meet its burden and so this Court should decline to exercise jurisdiction over this matter.

II. THE DISTRICT COURT RULED CORRECTLY

A. The Statute's Unambiguous Language Required Dismissal Without Resort to Principles of Statutory Construction.

As Harwell acknowledges, C.R.S. §13-80-104(1)(b)(II)(A) lacks any ambiguity. Of course, Harwell has no choice for the language could not be clearer. C.R.S. §13-80-104(1)(b)(II)(A) unequivocally states that, "all claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person: Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first." Harwell admitted the applicability of C.R.S. §13-80-104(1)(b)(II)(A) to its claim by finally conceding in the district court that, "The nature of Harwell's Amended Cross Claim is a pass-through type claim stating that if Harwell is found liable to Plaintiff, FDG is liable to Harwell." (Ex. G, Objection, p.7) This falls squarely within

the coverage of the statute. Thus, by its clear and unambiguous language, C.R.S. §13-80-104(1)(b)(II)(A) applies and acts as a current bar to Harwell's Amended Cross-Claim.

Harwell continues to conveniently ignore the meaning of the word "arise" in the statute. The court in *Matter of Estate of DiAndrea*, 847 P.2d 249, 251 (Colo.App. 1993), citing Webster's New Collegiate Dictionary, stated that, "'Arise' is defined as 'to originate from a source' and 'to come into being or to attention.'" The court in *DiAndrea* went on to state that "the date a claim arises is the date it 'accrues.'" *Id.* This Court has held that, "'Accrue' means 'to come into existence as an enforceable claim: vest as a right.'" *Estate of Huey v. J.C. Trucking, Inc.*, 837 P.2d 1218 (Colo. 1992). Thus, under C.R.S. §13-80-104(1)(b)(II)(A), Harwell's claim against FDG is not ripe inasmuch as it does not come into existence as an enforceable claim until "the time the third person's [Clarion] claim against the claimant [Harwell] is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first." As stated by the court in *Vaughn v. McMinn*, 945 P.2d 404, 409 (Colo. 1997), "We will not strain to give language other than its plain meaning." Giving the statute its plain meaning, the district court was correct in holding that Harwell's claim has not yet accrued.

Nevertheless, while purporting to base its argument upon the "plain meaning" of C.R.S. §13-80-104, Harwell in fact distorts the very language of the statute, as the above confirms. Harwell continues to seek to rewrite the clear language of the statute to say something more palatable to it, while ignoring the statute's concise wording and, in fact, all of C.R.S. §13-80-104(1)(b)(II)(A). How else to explain Harwell's argument in the district court that, "The plain meaning of C.R.S. §13-80-104 . . . in no way provides a bar as to when pass-through type claims

may be brought under well established Colorado Rules of Civil Procedure." (Ex. G, Objection, p.3) This argument is repeated nearly verbatim in Harwell's petition. (Petition, p.9)

Harwell, in its Rule 21 petition, reprises the argument, first raised in its Motion for Reconsideration (Ex. H), that "under section (II)(B) of this statute, a claim must be brought within 90 days 'and not thereafter'. This statute plainly does not state 'and not before'." (Petition, p.9) Inasmuch as this argument was not raised in Harwell's Objection (Ex. G) it was barred from being raised in the Motion for Reconsideration and should similarly be barred from being raised in the current petition. Moreover, Harwell ignores the fact that § 13-80-104(1)(b)(II)(B) does not merely state that "a claim must be brought within 90 days" as Harwell incorrectly represents. Rather, the statute states that claims "[s]hall be brought within ninety days after the claims arise." (emphasis added) Under C.R.S. § 13-80-104(1)(b)(II)(A), claims "Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first." Thus, contrary to Harwell's assertion, the statute plainly provides that claims shall only be brought within ninety days after "the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first."

Just as it did in the district court, Harwell relies exclusively upon the Summit County district court's unpublished order in *Gore Trail at Wildernest Assoc. v. Gore Trail at Wildernest LLC*, in arguing that C.R.S. §13-80-104 must solely be a statute of limitations because it is titled "Limitation of actions against architects, contractors, builders or builder vendors, engineers,

inspectors, and others." Both Harwell and the Summit County district court simply ignored the law on this subject.

As an initial matter, C.R.S. §2-5-113(4) provides as follows:

> The classification and arrangement by title, article, and numbering system of sections of Colorado Revised Statutes, as well as the section headings, source notes, annotations, revisor's notes, and other editorial material, shall be construed to form no part of the legislative text but to be only for the purpose of convenience, orderly arrangement, and information; therefore, no implication or presumption of a legislative construction is to be drawn therefrom.

In accordance with this directive, the court in *People v. Burns*, 593 P.2d 351, 354 (Colo. 1979), in discussing a statutory interpretation, held that, "The title is only a title and has no definitional significance."

As stated by the court in *Van Dinh v. Reno*, 197 F.3d 427, 432 (10th Cir. 1999), citing *Brotherhood of R.R. v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-529 (1947):

> The general rule, however, is that [w]here the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless.... [T]he heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Thus, Harwell's continued reliance upon the fact that the title of C.R.S. §13-80-104 reads "limitation of actions" is misplaced and cannot limit the plain meaning of the statute.

While purporting to apply rules of statutory construction, Harwell continues to ignore the most important of such rules. Thus, this Court in *Smith v. Zufelt*, 880 P.2d 1178, 1183 (Colo. 1994), reiterated that, "In an effort to effectuate the legislative intent, we first look to the

statutory language and give words and phrases their plain and ordinary meaning." Following up on that, this Court in *People v. J.J.H.*, 17 P.3d 159, 162 (Colo. 2001), held that, "The plain language of the statute is the best indication of legislative intent, and clear and unambiguous language eliminates the need to resort to other principles of statutory construction such as legislative history or external circumstances at the time the statute was enacted." *See also Vaughn v. McMinn*, 945 P.2d at 408 ("When the plain language of a statute is clear and unambiguous, we will not resort to interpretive rules of statutory construction and we will apply the statute as written."); *McMillin v. State*, 405 P.2d 672, 674 (Colo. 1965)("It is well to keep certain fundamental rules in mind here. For example, a statute that is clear and unambiguous is not subject to interpretation. Such an act is held to mean what it clearly says.").

Choosing to completely ignore the plain meaning of C.R.S. §13-80-104, Harwell incorrectly stated in the district court that "C.R.S. §13-80-104(1)(b)(II) does not bar pass-through type claims until after settlement and/or judgment of the underlying lawsuit." (Ex. G, Objection, p.5) Harwell continues to rely upon this argument in its petition. (Petition, p.9) Such a construction renders C.R.S. §13-80-104(1)(b)(II)(A) a nullity, as well as the opening clause of C.R.S. §13-80-104(1)(b)(I) which states "Except as otherwise provided in subparagraph (II) of this paragraph (b)." This flies in the face of the fact that, "Courts should not presume that the legislature used language 'idly and with no intent that meaning should be given to its language.'" *People v. J.J.H.*, 17 P.3d at 162. Moreover, "in the 'interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose, and to have intended that every part of a statute should be carried into effect.'" *McMillin v. State*, 405 P.2d at188.

Harwell's interpretation would completely write out C.R.S. §13-80-104(1)(b)(II)(A) from the statute.

As was true of the district court, this Court "need look no further than the plain meaning of the statutory words." *McKinney v. Kautzky*, 801 P.2d 508, 509 (Colo. 1990). Inasmuch as the language of C.R.S. §13-80-104(1)(b)(II)(A) is clear and unambiguous, and Harwell concedes that its Amended Cross-Claim is merely a pass-through claim, this Court should decline Harwell's offer to resort to principles of statutory construction. Consistent therewith, Harwell's arguments relying upon rules of statutory construction are irrelevant and should be ignored by the Court. Rather, the Court should be driven by the plain language of the statute. Under that language, FDG's Motion for Judgment on the Pleadings was correctly granted.

B. <u>The Statute's Judicial and Legislative History Mandated Dismissal.</u>

As the aforementioned establishes, there is no need for this Court, as there was no need for the district court, to go beyond the language of C.R.S. §13-80-104(1)(b)(II)(A). However, if the Court decides to go beyond the plain language of the statute, the judicial history behind the statute provides incontrovertible proof of its meaning.

Thus, "Another important source of legislative intent is the context in which the legislation was adopted. We presume that, when the General Assembly adopts legislation, it is cognizant of judicial precedent relating to the subject matter under inquiry." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550, 554 (Colo. 1998). In this instance, that precedent is both enlightening and determinative.

Harwell disingenuously asserted in the district court that, "No Colorado appellate court has provided an opinion with respect to the issues raised by FDG." (Ex. G, Objection, p.3)

Conveniently ignored by Harwell in the district court was the fact that in 1978, this Court issued its opinion in *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637, 641 (Colo. 1978), in which it faced the issue of when an indemnity claim began to run under the existing version of C.R.S. §13-80-127, which was the predecessor to the statute at issue before this Court--C.R.S. §13-80-104. Harwell simply dismisses this argument in footnote 3 on page 14 of its petition. In construing the statute, the court in *Duncan* held that:

> We have not previously addressed this specific question. (citations omitted) The virtually universal rule is that a claim for indemnity does not accrue, and therefore the limitations period does not begin to run, until the indemnitee's liability is fixed i.e., when he pays the underlying claim, or a judgment on it. (citation omitted) We adopt this general rule as the law of Colorado. Since an indemnity action is separate and distinct from the injured person's claim for relief, it remains inchoate until judgment becomes final or the claim is settled. Only then can the indemnitee be said to have a claim for relief, and therefore, it is at that point that the statute of limitations begins to run.

However, following this Court's issuance of its decision in *Duncan*, the Colorado General Assembly amended C.R.S. §13-80-127 (the predecessor to C.R.S. §13-80-104), which was the statute construed in *Duncan*, to read as follows:

> (b) A claim for relief arises under this section at the time the damaged party discovers or in the exercise of reasonable diligence should have discovered the defect . . . which ultimately caused the injury.

In 1989, the court in *Nelson, Haley, Patterson & Quirk, Inc. v. Garney Companies, Inc.*, 781 P.2d 153 (Colo.App. 1989), construed what was by then C.R.S. §13-80-104, but at the start of the litigation had still been C.R.S. §13-80-127. In 1989, C.R.S. §13-80-104 remained basically unchanged from the above quoted amended C.R.S. §13-80-127 (which is quite different from the current C.R.S. §13-80-104(1)(b)(II)(A)) :

> (b) A claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury.

In holding that the then current version of C.R.S. §13-80-104 had abrogated the *Duncan* decision, the court in *Nelson* stated:

> Thus, we conclude that the general assembly intended to abolish the *Duncan v. Schuster-Graham* distinction between the time of accrual for underlying claims involving construction defects, and claims for indemnification arising therefrom. And, we further conclude that the statute requires that an indemnity claim must be brought within the same period of time as is required for the underlying claims.

In 2001, the Colorado General Assembly amended C.R.S. §13-80-104(1)(b) to its current language. C.R.S. §13-80-104(1)(b)(1) states the law as it was at the time of *Nelson* "[e]xcept as otherwise provided in subparagraph (II) of this paragraph (b)." C.R.S. § 13-80-104(1)(b)(I). That exception-C.R.S. §13-80-104(1)(b)(II)(A)-changes the law as it applies to all claims "by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person." Thus, 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*—at the time the claim is settled or at the time final judgment is entered, whichever comes first. Once again closing its eyes to the clear and unambiguous language of C.R.S. § 13-80-104(1)(b)(II)(A), which mimics the holding in *Duncan*, Harwell prefers to argue that "nowhere in the transcribed legislative history for House Bill 1166 does the General Assembly note an intention to return the law in Colorado to that of *Duncan*." (Petition, fn.3, p.15)

Amazingly, both Harwell and the order upon which it still relies, that of the Summit County District Court in *Gore Trail at Wildernest Assoc. v. Gore Trail at Wildernest, LLC*, managed to ignore these cases and the various statutory permutations related to them.

What is clear and undeniable is that the current version of C.R.S. §13-80-104(1)(b)(II)(A) was intended to return the law in Colorado to where it stood at the time of *Duncan*. This is evidenced by the plain language of the 2001 amendment to C.R.S. §13-80-104. Further evidence of this is found in a 2001 article entitled *The Construction Defect Action Reform Act*, written by Ronald Sandgrund, Scott Sullan and Marci Achenbach and found in 30-OCT Colo.Law 121. Messrs. Sandgrund and Sullan participated with the sponsoring legislators in drafting the Construction Defect Action Reform Act, part of which consists of C.R.S. §13-80-104—Mr. Sullan is mentioned on page 25 of Exhibit B to Harwell's Objection (Ex. G). Discussing the rationale behind the amendment to C.R.S. §13-80-104, the authors state:

> Builder-developers often deemed it prudent to implead all subcontractors as early as possible because of uncertainty as to which aspects of construction were the subject of the plaintiff's claims. This was because Colorado's real property improvement statute of limitations had been construed to negate the common rule that a cause of action for contribution, indemnity, and reimbursement arising from construction defects did not accrue until settlement of or judgment on the underlying claim. [FN15- citing *Nelson, Haley, Patterson & Quirk, Inc. v. Ganey Cos., Inc.*] The provision of an initial list of defects early in the case should help narrow the universe of potentially liable third-party defendants.
>
> The amendment to the statute of limitations provides that with regard to all claims by a claimant against a person who may be liable to the claimant for any part of the claimant's liability to a third person, including indemnity and contribution claims, the claim for relief arises at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first.

Id. at 122. (emphasis added)

This same article also responds to Harwell's unsubstantiated claim in the district court that "FDG's reading of the statute would provide an absurd result-only providing a 90 day statute of limitations window within which every pass-through type of construction claim could be made. The plain meaning of the statute does not support such a radical result." (Ex. G, Objection, p.3) As established by the authors, Harwell's argument ignored the statutory scheme in its entirety:

> The amendment further provides that such reimbursement claims shall be brought within ninety days after the claims arise and not thereafter.
>
> 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. The defendant seeking reimbursement presumably has control over when such a settlement will become effective and should have plenty of advance knowledge of the impending entry of a final judgment. Thus, from a practical standpoint, the ninety-day limitation period should afford a reasonable time for a party to analyze and commence a reimbursement lawsuit.

Id. at 122. (emphasis added) Accordingly, it is clear that the General Assembly intended to reinstate the law with respect to the accrual of pass-through construction claims to that expressed in *Duncan*.

In an attempt at undermining the aforementioned citation, Harwell's petition references a recent article by Messrs. Sandgrund and Sullan found in 04-MAY Colo. Law 73. (Petition, p.18)

However, as it is wont to do, Harwell selectively edits its quote from the article. Thus, left out of its quote is the following language from the article:

> The amendment provides that a claim against a person who is or may be liable to the claimant for all or part of the claimant's liability to another person arises at the time of the settlement of or entry of a final judgment on the claimant's liability to the other person.

Id. at 77. Furthermore, the language quoted by Harwell only pertains to joining a potentially liable party under C.R.C.P. 14 which, as will be discussed later, is irrelevant since this cause only deals with C.R.C.P. 13(g).

As stated by the court in *Southwest Capital Investments, Inc. v. Pioneer General Insurance Co.*, 924 P.2d 1205, 1207 (Colo.App. 1996), "As a general rule, when a statute is amended, there exists a presumption that the General Assembly intends to change the law." Similarly, "when a statute is amended, the previous judicial construction stands only to the extent that it remains unaffected by the amendment." *People v. O'Donnell*, 926 P.2d 114, 115 (Colo.App. 1996). That is exactly what the General Assembly did in amending C.R.S. §13-80-104(1)(b)(II)(A) to its current language. Harwell's interpretation of the statute would require the Court to interpret C.R.S. §13-80-104 just as it was prior to its 2001 amendment. It is presumed that that was not the General Assembly's intention. The very language of C.R.S. §13-80-104(1)(b)(II)(A) demonstrates that to be the case.

Finally, there is nothing in the testimony before the General Assembly regarding the Construction Defect Action Reform Act which is to the contrary. Additionally, both Harwell and the Summit County court cite from said testimony as if C.R.S. §13-80-104(1)(b)(II)(A) was the sole provision of the Act. Nothing could be further from the truth. In fact, the Act consisted of

C.R.S. §§13-20-801, 13-20-802, 13-20-803, 13-20-804, 13-80-104 and 38-33.3-303.5. A review of the testimony evidences that the vast majority of quotes taken out of context by both Harwell and the Summit County court had absolutely nothing to do with C.R.S. §13-80-104(1)(b)(II)(A).

Harwell's petition also relies upon an affidavit of Representative Joseph Stengel, who "provided an affidavit which Petitioner attached to its Motion for Reconsideration." (Petition, p.13) As FDG argued in its Response to Motion for Reconsideration (Ex. H, Response), Harwell egregiously flaunted the Rules of Civil Procedure in attaching Stengel's affidavit as an exhibit to its Motion for Reconsideration. This was especially true in light of the fact that the order at issue entered by the district court granted FDG's Motion for Judgment on the Pleadings. Pursuant to C.R.C.P. 12(c), such a motion is limited to the pleadings. By adding the affidavit of Mr. Stengel, Harwell was, and is still, attempting to, after the fact, improperly convert FDG's Motion for Judgment on the Pleadings into a motion for summary judgment. Neither this Court nor the district court should countenance such behavior. Additionally, Mr. Stengel does not speak for the Colorado General Assembly. His statements, in an affidavit clearly drafted by counsel for Harwell, are irrelevant where the language of C.R.S. § 13-80-104(1)(b)(II)(A) is clear and unambiguous.

The judicial history of C.R.S. §13-80-104 and its related legislative amendments, together with the statute's plain language, required that the district court dismiss Harwell's Amended Cross-Claim.

C. <u>The Unpublished Orders Cited by Harwell Are Not Precedent.</u>

Just as it did in the district court ("Colorado precedent, and precedent of this Court mandates that FDG's Motion for Judgment on the Pleadings be denied") (Ex. G, Objection, p.2),

Harwell persists in arguing that the opinions issued in *Gore Trail at Wildernest Assoc. v. Gore Trail at Wildernest, LLC* and *Cypress Ridge Homeowners Assoc., Inc. v. Colorado Homes & Lifestyles, Inc.* were somehow precedent binding upon the district court. Contrary to Harwell's assertion, the two unpublished orders cited by it-one from Summit County and one from El Paso County-have no precedential value and most certainly are not the precedent of the district court. Ironically, the sole case that can be considered to be precedent is the Colorado Supreme Court's decision in *Duncan*.

An order of one district court does not act as precedent over another district court inasmuch as they are courts of coordinate jurisdiction. In discussing the relationship between district courts, this Court in *State v. Pena*, 911 P.2d 48, 57 (Colo. 1996) stated:

> Denver fails to recognize that a district court is without supervisory power over courts of coordinate jurisdiction; all district courts are equal in the judicial hierarchy. The jurisdiction of the trial court does not extend to a review of the decisions and judgment of a court of coordinate jurisdiction. (citations omitted) As stated by the court in *Hart v. Best*, 119 Colo. 569, 580-581, 205 P.2d 787, 793 (1949):
>
> > Here we are presented with a situation where the district court of Fremont county and that court in Prowers county are courts of equal authority and dignity; they are coordinate; neither has the power or authority to consider the validity or set aside the judicial acts of the other. Neither has, as related to the other, appellate jurisdiction; that jurisdiction is vested in our court.
>
> A district court may not assume the authority or power to superintend or review the propriety of or supervise the judgment of another district court.

In an analogous situation, this Court, in discussing the precedential effect of lower federal courts, stated that, "Lower federal courts do not have appellate jurisdiction over state courts and their decisions are not conclusive on state courts, even on questions of federal law." *People v. Barber*, 799 P.2d 936, 940 (Colo. 1990). The court proceeded to point out that, "The decision of

one federal district court judge that a statute is unconstitutional does not even bind another federal judge in the same district." *Id.* at fn.3. As similarly stated by the court in *U.S. v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987), "A single district court decision, however (especially one that cannot be appealed) has little precedential effect. It is not binding on the circuit, or even on other district judges in the same district."

As previously stated, neither of the orders relied upon by Harwell were published decisions. Again analogizing to the federal courts, it has been held that, "Another district court's decision, particularly an unpublished ruling, is not binding upon this court." *Mantz v. St. Paul Fire and Marine Ins. Co.*, 2003 WL 23109773 (S.D.W.Va. July 18, 2003).

Therefore, neither of the orders entered by the district courts of Summit and El Paso Counties, upon which Harwell relies, had any precedential effect upon the district court herein. The Douglas County district court was not bound by those orders and should not have had its judicial role usurped by them. Otherwise, both the district court and the parties hereto would be beholden to a court and litigants without knowing the arguments they made and their quality. However, what we do know is that apparently 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 Court should, as it appears the district court did, ignore the unpublished orders from Summit and El Paso Counties and rule based upon the plain language of C.R.S. §13-80-104(1)(b)(II)(A). If anything, this Court should be guided by its decision in *Duncan*.

D. C.R.C.P. 13(g) Is Not Identical to C.R.C.P. 14

Not surprising, considering that Harwell's argument continues to be primarily predicated upon the unpublished orders issued by the district courts of Summit County and El Paso County, is Harwell's incorrect contention that the language of C.R.C.P 14 "is nearly identical to the language in Colo.R.Civ.P. 13(g)." (Ex. G, Objection, p.6) This is repeated in Harwell's petition, in which Harwell admits that both district court opinions upon which it relies were decided under Rule 14 but then incorrectly claims that the same "reasoning equally applies to this case, which deals with similar pass-through claims under" Rule 13(g). (Petition, pp. 14-15) Amazingly, Harwell makes this assertion despite citing, in its Objection, the language from both rules which demonstrates to the contrary. Harwell ignores the differing language of the two rules in order to bolster its reliance on the two unpublished orders, despite the fact that it is uncontroverted that both orders are solely predicated upon C.R.C.P. 14. Unfortunately for Harwell, C.R.C.P. 14 is not at issue in the case at hand.

Both the Summit County District Court and the El Paso County District Court cited the same exact language from C.R.C.P. 14:

> At any time after commencement of the action a defending party, as third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

There is no mention of the word "claim." Quite differently, C.R.C.P. 13(g) provides that:

> 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 in the action against the cross claimant.

(emphasis added)

Thus, C.R.C.P. 13(g), unlike C.R.C.P. 14, talks specifically in terms of a "claim." However, under C.R.S. §13-80-104(1)(b)(II)(A), Harwell's claim has not arisen, or accrued, until "the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first." Harwell avoids this distinction by focusing on a red herring—the use of the words "may be liable" in both rules. No claim having yet accrued under C.R.S. §13-80-104(1)(b)(II)(A), C.R.C.P. 13(g) has yet to come into play since there is no "claim" to be included in a cross claim.

As can be seen, C.R.S. §13-80-104(1)(b)(II)(A) and C.R.C.P. 13(g) can easily be reconciled. Contrary to Harwell's assertion in the district court, the statute does not "abrogate the well-established law which allows parties to bring cross claims pursuant to Colo.R.Civ.P. 13(g)." (Ex. G, Objection, p.6) The same charge is made in Harwell's petition. (Petition, p.14) Instead, C.R.S. § 13-80-104(1)(b)(II)(A) simply provides, in the area of construction defects, when a claim "by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person" accrues. Until the claim accrues it goes without saying that there is no claim to be brought as a cross claim.

Regardless, the Colorado Revised Statutes trumps the Colorado Rules of Civil Procedure as stated by the court in *Berry Properties v. City of Commerce City*, 667 P.2d 247, 250 (Colo.App. 1983):

> Section 31-12-116(1)(a), C.R.S.1973 (1977 Repl.Vol. 12) creates a substantive legal status for review of annexation proceedings and

> preempts the Rules of Civil Procedure insofar as they are inconsistent with the statute.

This is especially so considering that C.R.C.P. 13(g) was in existence at the time C.R.S. §13-80-104(1)(b) was amended in 2001.

Contrary to Harwell's assertion, C.R.C.P. 13(g), by its very language, is not only not identical to, but is quite different from C.R.C.P. 14. Thus, the reliance of the two unpublished district court orders cited by Harwell upon C.R.C.P. 14 in fact provides Harwell with neither support nor solace.

E. C.R.S. § 13-20-803 Is Inapposite.

Just as it did in its Motion for Reconsideration (Ex. H), Harwell's petition seeks to rely upon the language of C.R.S. § 13-20-803. Inasmuch as C.R.S. § 13-80-104(1)(b)(II)(A) is clear and unambiguous, there was no reason for the district court, nor is there for this Court, to resort to a review of C.R.S. § 13-20-803. Harwell never raised C.R.S. § 13-20-803 in its Objection to Motion for Judgment on the Pleadings (Ex. G), and therefore the arguments predicated upon that section were improperly raised in the Motion for Reconsideration and are not properly before this Court. Moreover, in presenting its argument based upon § 13-20-803, Harwell again ignores the plain language of § 13-80-104(1)(b)(II)(A). That section, by its very language, only applies to claims "by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person." It does not apply to non-pass through claims. Such claims could still be brought under C.R.S. § 13-20-803(4). However, C.R.S. § 13-20-803(4) makes no mention at all of pass through claims covered by C.R.S. § 13-80-104(1)(b)(II)(A). That being the case, Harwell misrepresented first to the district court, and now to this Court, in stating that, "Section (4) of C.R.S. § 13-20-803 unambiguously allows for addition of pass-

through type claims against subcontractors in an underlying construction defect action." (Ex. H, Motion for Reconsideration, p.3; Petition, p.17)

In relying upon the provisions of C.R.S. § 13-20-803, Harwell is simply attempting to divert the Court's attention from the clear and unambiguous language of C.R.S. § 13-80-104(1)(b)(II)(A). That very language requires the rejection of Harwell's argument.

F. Public Policy Supports the District Court's Ruling.

Harwell, in its Motion for Reconsideration (Ex. H), for the first time raised what it characterized as the practical implications of the district court's ruling. That argument has now been reprised in its petition. Not having been raised in Harwell's Objection to Motion for Judgment on the Pleadings (Ex. G), this argument was improperly raised in Harwell's Motion for Reconsideration as well as in its current petition.

Even the argument itself has changed from the Motion for Reconsideration to the petition. In the Motion for Reconsideration, Harwell incorrectly and overly broadly stated that a general contractor would be "precluded from suing subcontractors in third-party claims or cross claims." (Ex. H, Motion, p.6) This again ignores the plain language of C.R.S. § 13-80-104(1)(b)(II)(A), which provides that it only applies to claims "by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person." Thus, the statute does not preclude a general contractor from bringing non-pass through claims against subcontractors.

Moreover, the public policy argument actually supports the district court's ruling. Why should a subcontractor be required to incur the time and expense in litigating a matter for which it may have absolutely no responsibility? This is especially true of construction litigation which

can be extremely expensive and time consuming. In fact, this is consistent with the rationale behind the common law rule as enunciated by this Court in *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d at 641:

> We have not previously addressed this specific question. (citations omitted) The virtually universal rule is that a claim for indemnity does not accrue, and therefore the limitations period does not begin to run, until the indemnitee's liability is fixed i.e., when he pays the underlying claim, or a judgment on it. (citation omitted) We adopt this general rule as the law of Colorado. Since an indemnitee action is separate and distinct from the injured person's claim for relief, it remains inchoate until judgment becomes final or the claim is settled. Only then can the indemnitee be said to have a claim for relief, and therefore, it is at that point that the statute of limitations begins to run.

This Court's holding in *Duncan* also refutes Harwell's fallacious contention that the consequences of the district court's order will be to mandate two separate actions which "would litigate the exact issues." (Petition, p.18) As *Duncan* makes clear, "an indemnity action is separate and distinct from the injured person's claim for relief." *Id.* Thus, contrary to Harwell's assertion, issues in a plaintiff's suit against a general contractor are not identical to the issues in the general contractor's indemnity action against a third party. Additionally, contrary to Harwell's claim, two separate actions are not "mandated." In fact, a second lawsuit is anything but automatic. Rather, it is predicated upon the outcome of the initial action. If the defendant in that action is successful, then there is no second lawsuit.

Harwell finally contends, using more hyperbole, that the district court's order "would provide absurd results." In support thereof, Harwell conjures up a scenario whereby an owner can assert a direct claim against a subcontractor yet a general contractor "cannot bring a claim against its subcontractors." (Petition, p.19) Contrary to Harwell's assertion, that is not the

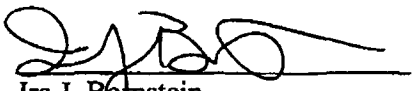
scenario currently before this Court, inasmuch as Harwell is not a "general contractor." Even more importantly, Harwell's argument is a complete misstatement and misrepresentation of the district court's order. The February 26, 2004 order specifically provides that the "first and second claims for relief in Harwell's amended cross-claim as they concern FDG are dismissed without prejudice." (emphasis added) Since the first and second claims were dismissed without prejudice, Harwell is not barred from bringing a claim against Harwell. Thus, Harwell's argument is in no way pertinent.

CONCLUSION

For the aforesaid reasons, the Court should deny Harwell's C.A.R. 21 petition and so FDG prays that the Court discharge the Rule to Show Cause.

Respectfully submitted this 12th day July, 2004.

KUTAK ROCK LLP

By: 
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CERTIFICATE OF SERVICE

This is to certify that on this 12th day of July 2004, true and correct copies of the foregoing **FDG, INC.'S RESPONSE TO RULE TO SHOW CAUSE** were deposited in the U.S. Mail, postage prepaid to the following:

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