SUMMARY
September 21, 2023

2023COA85

No. 23CA0595, *South Conejos Sch. Dist. RE-10 v. Wold Architects Inc.* — Construction Law — Construction Defect Action Reform Act — Limitation of Actions Against Architects, Contractors, Builders or Builder Vendors, Engineers, Inspectors, and Others — Accrual of Claims

In this C.A.R. 4.2 interlocutory appeal, a division of the court of appeals considers as a matter of first impression whether, under Colorado law, a contract provision extending the time for accrual of construction defect claims beyond that identified in section 13-80-104(1)(b), C.R.S. 2023, is void and unenforceable. *See Highline Vill. Assocs. v. Hersh Cos.*, 996 P.2d 250, 255 (Colo. App. 1999) ("[W]e do not decide whether the parties to a construction contract may agree to extend the limitations period of the contractors' statute. Even if such an extension would be proper, the language of the express warranty here does not evidence any

intent to extend that period."), *aff'd in part and rev'd in part on other grounds*, 30 P.3d 221 (Colo. 2001). The division concludes that sophisticated contracting parties may agree to extend the accrual period without violating public policy. Because the extended contractual accrual provision here is valid and enforceable, the division affirms the district court's order and remands for further proceedings.

COLORADO COURT OF APPEALS **2023COA85**

Court of Appeals No. 23CA0595
Conejos County District Court No. 21CV30001
Honorable Crista Newmyer-Olsen, Judge

South Conejos School District RE-10,

Plaintiff-Appellee,

v.

Wold Architects Incorporated, d/b/a Wold Architects and Engineers, a foreign corporation,

Third-Party Plaintiff-Appellant.

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE FOX
Dailey and Brown, JJ., concur

Announced September 21, 2023

Wells, Anderson & Race, LLC, L. Michael Brooks, Mark A. Neider, Joel J. Fulton, Denver, Colorado, for Plaintiff-Appellee

Cardi & Schulte LLC, Timothy M. Schulte, Sharon L. Weikel, Lisa C. Zook, Daniel V. Woodward, Greenwood Village, Colorado, for Third-Party Plaintiff-Appellant

¶ 1 This C.A.R. 4.2 interlocutory appeal asks us to decide whether, under Colorado law, a contract provision extending the time for accrual of construction defect claims beyond that identified in section 13-80-104(1)(b), C.R.S. 2023, is void and unenforceable. *See Highline Vill. Assocs. v. Hersh Cos.*, 996 P.2d 250, 255 (Colo. App. 1999) ("[W]e do not decide whether the parties to a construction contract may agree to extend the limitations period of the contractors' statute. Even if such an extension would be proper, the language of the express warranty here does not evidence any intent to extend that period."), *aff'd in part and rev'd in part on other grounds*, 30 P.3d 221 (Colo. 2001). We conclude that sophisticated contracting parties may agree to extend the accrual period without violating public policy. Because the extended contractual accrual provision at issue here is valid and enforceable, we affirm the district court's order and remand for further proceedings.

I. Background

¶ 2 This case arises from the construction of a kindergarten to twelfth grade school in Antonito, Colorado, and a subsequent flood at the school. The post-flood damage led the Colorado School

District Self Insurance Pool (Self Insurance Pool) and the South Conejos School District RE-10 (the District) to believe that various elements of the construction were defective. So they sued their contractor, their architects, and various others involved in the school project.

¶ 3 They initially sued G.E. Johnson Construction Co., Inc. (the general contractor) in January 2021, and they added Wold Architects Incorporated (Wold), along with other involved parties, almost a year later. The District and the Self Insurance Pool settled with most defendants. Only the District's claims against Wold, which was hired to design the school and provide construction administration and observation services, remain.

¶ 4 Wold filed a motion for summary judgment on most of the claims asserted against it, arguing that the claims are time barred. According to Wold, the accrual of the District's claims should be governed by section 13-80-104 of the Construction Defect Action Reform Act (CDARA), not the more generous claim accrual provision in the parties' contract. The contract defines the time of accrual as when the injured party "discovered," by way of "detection or knowledge," a defect "of a substantial or significant nature." By

contrast, the statute defines the point of accrual as when the injured party discovered, or through reasonable diligence should have discovered, the physical manifestations of the defect. *See* § 13-80-104(1)(b)(I).

¶ 5 The district court granted Wold's summary judgment motion in part and denied it in part. The court found that, as to any "alleged defects concerning water resources," the District had "knowledge of the substantial nature of the defects related to water resources sometime in 2017, making the deadline for bringing an action related to said defects sometime in 2019." But the court found that, as to all other alleged defects, "genuine disputes of material fact" existed in terms of when the District "discovered" those defects.

¶ 6 In partially denying the summary judgment motion, the court agreed that the interplay between the accrual standard in the contract and the accrual standard in section 13-80-104 "is critical to the resolution of the Motion." The court also acknowledged that a Colorado appellate court has not yet addressed whether the parties could agree to something different in their contract, or whether such an agreement was void because it conflicts with

section 13-80-104. *See Highline Vill. Assocs.*, 996 P.2d at 255. The court thus "decline[d] to break new ground on this issue in the context of a summary judgment ruling."

¶ 7 Dissatisfied with the district court's ruling, Wold moved to certify for interlocutory review the summary judgment order as to the accrual issue. The District opposed certification and argued that, even if section 13-80-104 applied, "there are questions of fact as to when the District discovered manifestations of defects that would trigger the statute" and "questions of fact to resolve as to when manifestation of damages occurred."

¶ 8 Wold agreed that questions of fact remain and that granting interlocutory review will not end the litigation, but it explained that an interlocutory appeal would result in a more orderly disposition of the case because "the evidence at trial will vary depending on which accrual standard applies." For example, according to Wold,

> If the contractual standard of accrual governs, the relevant evidence would involve [the District's] actual notice of defective construction. In contrast, if the statutory accrual rules govern, the relevant evidence would involve physical manifestations of a defect.

¶ 9 Agreeing with Wold, the district court certified its order for interlocutory review.

II. Jurisdiction

¶ 10 Before addressing the merits of Wold's appeal, we explain why interlocutory review of the district court's order is appropriate.

¶ 11 Under section 13-4-102.1(1), C.R.S. 2023, and C.A.R. 4.2(b), we may grant interlocutory review of orders in a civil case when the district court certifies, and we agree, that "(1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order involves a controlling question of law; and (3) that question of law is unresolved." *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶ 12. The district court has certified this case for interlocutory appeal, so we address each requirement in turn.

¶ 12 We address factors one and two together because they are interrelated. It is undisputed that this issue presents a question of law. *See Redden v. Clear Creek Skiing Corp.*, 2020 COA 176, ¶ 36 ("Whether a private agreement violates public policy is a question of law that we review de novo."). We must then decide whether the

issue is controlling *and* may promote a more orderly disposition of the action. *Affiniti Colo.*, ¶ 16 (concluding interlocutory review is appropriate when it would "directly affect the court's resolution" of an issue in the litigation). The issue presented here satisfies both.

¶ 13 Resolution of when the District's claims began to accrue will not result in immediate termination of the litigation, *see, e.g.*, *Indep. Bank v. Pandy*, 2015 COA 3, ¶ 10 (An issue was controlling because if the "statute of limitations . . . bars the Bank's complaint, the litigation would be resolved without the need for a trial."), *aff'd*, 2016 CO 49, because questions of fact remain under either accrual standard. But resolution of this issue will guide the evidence to be presented at trial. *Adams v. Corr. Corp. of Am.*, 264 P.3d 640, 645 n.8 (Colo. App. 2011). And without interlocutory review, retrial would be certain if a division on appeal later concluded that the district court should have applied the standard in section 13-80-104, rather than the contract provision. *See Triple Crown at Observatory Vill. Ass'n v. Vill. Homes of Colo., Inc.*, 2013 COA 144, ¶ 21 ("There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have

been ordered without the ensuing district court proceedings." (quoting 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3930, at 496 (3d ed. 2012))).

¶ 14 Although interlocutory review would not be appropriate if other defendants and other claims remained in the case, *see Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011) (an interlocutory appeal would not promote a more orderly disposition when an order dismissed only one claim and another remained), because Wold is the only defendant left, the applicable accrual standard affects all of the remaining proceedings.

¶ 15 As to the third factor, no published Colorado case has addressed the issue whether a contract provision is enforceable if it provides a more generous claim accrual standard than the one in section 13-80-104. *See Highline Vill. Assocs.*, 996 P.2d at 255.

¶ 16 Accordingly, we conclude that our review of Wold's appeal is appropriate under section 13-4-102.1 and C.A.R. 4.2(b). We turn next to the merits of Wold's interlocutory appeal.

III. Analysis

A. Standard of Review and Applicable Law

¶ 17 We review a district court's order granting summary judgment de novo. *Lewis v. Taylor*, 2016 CO 48, ¶ 13; *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002). Summary judgment is a drastic remedy and is appropriate only when the pleadings and the supporting documentation show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *W. Elk Ranch, L.L.C.*, 65 P.3d at 481. In determining whether a genuine issue of material fact exists, we look at "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," C.R.C.P. 56(c), without assessing witness credibility or weighing evidence, *Anderson v. Vail Corp.*, 251 P.3d 1125, 1127 (Colo. App. 2010). "The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *W. Elk Ranch, L.L.C.*, 65 P.3d at 481. A "material fact" is one that will affect the outcome of the case or claim. *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004).

¶ 18 Additionally, contractual interpretation and statutory interpretation present questions of law that we review de novo. *Lewis*, ¶ 14 (statutory interpretation reviewed de novo); *Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1061 (Colo. 1994) (interpretation of contracts reviewed de novo).

¶ 19 "In construing a statute, our primary purpose is to ascertain and give effect to the legislature's intent." *McCoy v. People*, 2019 CO 44, ¶ 37. "To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings." *Id.* "We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage." *Id.* "We must also endeavor to effectuate the purpose of the legislative scheme." *Id.* at ¶ 38. "In doing so, we read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Id.*

B. Contractual Accrual versus Statutory Accrual

¶ 20 Section 6.17.1 of the District and Wold's contract for architectural services contains the following accrual provision:

> Unless a longer period is provided by law, any action against [Wold] brought to recover damages for deficiency in the design, planning, supervision, inspection, construction or observation of construction or for injury to person or property shall be brought within two years after the claim for relief arises and is discovered by [the District]; . . . "Discovered" as used herein means *detection and knowledge by [the District] of the defect* in the improvement that ultimately causes the injury, when such defect is of a substantial or significant nature.

(Emphasis added.)

¶ 21 CDARA provides that "a claim for relief arises . . . at the time the claimant . . . 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."[1] § 13-80-104(1)(b)(I) (emphasis added).

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[1] Relatedly, the two-year limitations period in section 13-80-102(1), C.R.S. 2023, runs from the accrual date. Additionally, section 13-80-104(1)(a), (2), C.R.S. 2023, contains a statute of repose that expires six years "after the substantial completion of the improvement to the real property," unless it is extended two years because the underlying cause of action arose "during the fifth or sixth year after substantial completion of the improvement to real property." *See also Goodman v. Heritage Builders, Inc.*, 2017 CO 13, ¶¶ 8, 11. Thus, the limitations period and the repose period are tied to the claim accrual date.

¶ 22 Wold contends the district court erred by accepting the accrual provision in the contract rather than CDARA's accrual provision. Wold reasons that the accrual provision in section 6.17.1 of the contract is void as against public policy because it violates the policies underlying statutes of limitation generally and section 13-80-104's accrual provision more specifically. The District responds that, consistent with the district court's challenged order, the contracted-for accrual provision was permissible and enforceable.

C. Discussion

¶ 23 We conclude that the district court committed no error.

¶ 24 Parties to a contract may agree on whatever terms they see fit so long as those terms do not violate statutory prohibitions or public policy. *See Fox v. I-10, Ltd.*, 957 P.2d 1018, 1021-22 (Colo. 1998); *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). As we discuss below, the operative statute does not prohibit extending the accrual date. And the public policies Wold invokes do not outweigh the parties' rights to contract freely. *Fox*, 957 P.2d at 1022.

1. Section 13-80-104 Does Not Prohibit Modifications or Waivers

¶ 25 We cannot conclude from CDARA's plain text — providing that "a claim for relief arises . . . at the time the claimant . . . 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," § 13-80-104(1)(b)(I) (emphasis added) — that the legislature unambiguously intended to prohibit a sophisticated, commercial entity such as Wold from agreeing to a different accrual period. *See McCoy*, ¶ 37. Nowhere in that section — or elsewhere within CDARA — did the legislature say that a different accrual time is invalid. *Id.*

¶ 26 If a statute of limitations can be waived or shortened, *Lewis*, ¶ 38 (time bars may be tolled by express agreement); *Est. of Ramsey v. State Dep't of Revenue*, 42 Colo. App. 163, 167, 591 P.2d 591, 595 (Colo. App. 1979) (statute of limitations is a personal bar that may be raised or waived); *Grant Fam. Farms, Inc. v. Colo. Farm Bureau Mut. Ins. Co.*, 155 P.3d 537, 538 (Colo. App. 2006) (recognizing "that contractual and statutory limitations provisions are in conflict only if contractual shortening is prohibited by

statute," which was not the case there), it is difficult to see why, absent a contrary legislative direction, it cannot be extended.

¶ 27 Where the legislature has wanted to limit rights, it has done so expressly. In fact, the Homeowner Protection Act of 2007 (HPA),[2] § 13-20-806, C.R.S. 2023, amended CDARA by providing that "any express waiver of, or limitation on, the legal rights, remedies, or damages" provided by CDARA to "claimants asserting claims arising out of residential property" are "void as against public policy." § 13-20-806(7)(a), (c); *see also Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31, ¶ 20 (interpreting the HPA); *Heights Healthcare Co. v. BCER Eng'g, Inc.*, 2023 COA 44, ¶ 3 (applying the HPA).

¶ 28 Having concluded that section 13-80-104 of CDARA does not expressly prohibit parties from contracting around, or waiving, its protections, we next consider whether the parties' agreement to

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[2] Although the title "Homeowner Protection Act of 2007" does not appear anywhere in the statute, the bill enacting it provides that "[t]his act shall be known and may be cited as the 'Homeowner Protection Act of 2007.'" Ch. 164, sec. 1, 2007 Colo. Sess. Laws 610.

abide by the terms in section 6.17.1 otherwise violates Colorado public policy.

2. The Competing Public Policies Do Not Weigh in Wold's Favor

¶ 29 Wold next posits that the contractual accrual provision at issue violates the policies that undergird CDARA. According to Wold, CDARA was enacted to (1) streamline construction defect litigation; (2) encourage timely resolution of construction disputes; (3) decrease construction defect litigation; and (4) reduce the costs of insuring construction professionals.

¶ 30 Even if the policies claimed to underlie CDARA generally also apply to the accrual provision (section 13-80-104) specifically, we must balance those policies with the freedom of contract principles deeply embedded in our jurisprudence. *See Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) ("[T]he right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation . . . ."); *see also Superior Oil Co. v. W. Slope Gas Co.*, 549 F. Supp. 463, 468 (D. Colo. 1982) (recognizing

the "essential freedoms of . . . the right to bargain and contract"), *aff'd*, 758 F.2d 500 (10th Cir. 1985). So "[u]ntil fully and solemnly convinced that an existent public policy is clearly revealed," a court need not apply that principle to void a contract. *Superior Oil Co.*, 549 F. Supp. at 468; *see also Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1267 (Colo. App. 2004).

¶ 31 Wold relies on *First National Bank v. Mock*, 70 Colo. 517, 203 P. 272 (1921), in arguing that Colorado does not allow contractual interference with limitations periods. In our view, Wold misreads *Mock*. While the court voided an agreement that permanently waived any statute of limitations — meaning claims would never be stale — the decision plainly stated that "waiver is generally held valid if it is for a reasonable time." *Id.* at 519, 203 P. at 273. *Mock* does nothing to invalidate the challenged contract provision.

¶ 32 Wold highlights that the contract here tracked the language in an earlier version of section 13-80-104. But that does not mean it contravenes current public policy and is thus unenforceable, especially where both parties had at least constructive knowledge of the current and former statutory accrual provisions when they entered into the contract and could have negotiated as they saw fit.

Wold and the District are sophisticated parties that, by contract, sought to allocate business risks in advance. *See BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004) (noting the trend in Colorado and elsewhere to protect the ability of the parties to negotiate the allocation of risk and reward associated with a construction project); *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1191 (Colo. App. 2008) (Colorado courts will uphold an exculpatory provision in a contract between two "business entities that have negotiated their agreement at arm's length."). We see no reason to disturb that risk allocation.

¶ 33 We are equally unpersuaded by the out-of-state cases Wold relies on — some of which do not even deal with accrual, *see Umpqua Bank v. Gunzel*, 483 P.3d 796, 810 (Wash. Ct. App. 2021) (addressing a statute of limitations); *W. Gate Vill. Ass'n v. Dubois*, 761 A.2d 1066, 1071 (N.H. 2000) (same); *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386-87 (Del. Super. Ct. 1978) (same); *Citizens Bank of Shelbyville v. Hutchison*, 113 S.W.2d 1148, 1148 (Ky. 1938) (same), and none of which binds us. *See Madalena v. Zurich Am. Ins. Co.*, 2023 COA 32, ¶ 33. We note that the District similarly

cites out-of-state cases to support its competing position.[3] And even where altering a limitations period has been prohibited, it does not necessarily follow that an altered accrual period will not be enforced. *See, e.g.*, *Harbor Ct. Assocs. v. Leo A. Daly Co.*, 179 F.3d 147, 151 (4th Cir. 1999) (applying Maryland law to enforce a construction contract's accrual provision); *see also Gustine Uniontown Assocs. Ltd. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 836-37 (Pa. Super. Ct. 2006); *Coll. of Notre Dame of Md., Inc. v.*

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[3] *See Schram v. Robertson*, 111 F.2d 722, 724 (9th Cir. 1940) (applying California law and holding that a contract may fix the time within which a suit may be brought); *Union Bank of Switz. v. HS Equities, Inc.*, 457 F. Supp. 515, 522 (S.D.N.Y. 1978) (six-year limitations period in contract prevailed over that imposed by common law); *Travelers Indem. Co. v. Rexnord, Inc.*, 389 A.2d 246, 249 (Pa. Commw. Ct. 1978) ("[P]arties to a lawsuit or a potential lawsuit may, by agreement, modify a statutory period of limitation."); *Quick v. Corlies*, 39 N.J.L. 11, 12 (1876) ("[W]here no principle of public policy is violated, parties are at liberty to forego the protection of the law."); *Byron Cmty. Unit Sch. Dist. No. 226 v. Dunham-Bush, Inc.*, 574 N.E.2d 1383, 1388 (Ill. App. Ct. 1991) (giving effect to a standstill agreement executed years after original agreement even where original agreement disallowed extensions of the limitations period); *Kroeger v. Farmers' Mut. Ins. Co.*, 218 N.W. 17, 17 (S.D. 1928) ("The statute of limitations is a personal defense, and the defendant by his conduct may be estopped from setting it up."); *Parchen v. Chessman*, 142 P. 631, 634 (Mont. 1914) (upholding agreement to extend or waive statutory limitations period); *Nuhome Invs., LLC v. Weller*, 81 P.3d 940, 947 (Wyo. 2003) (deeming contractual limitation period valid).

Morabito Consultants, Inc., 752 A.2d 265, 272-73 (Md. Ct. Spec. App. 2000); *Old Mason's Home of Ky., Inc. v. Mitchell*, 892 S.W.2d 304, 307 (Ky. Ct. App. 1995); *Oriskany Cent. Sch. Dist. v. Edmund J. Booth Architects, A.I.A.*, 615 N.Y.S.2d 160, 161-62 (App. Div. 1994), *aff'd*, 654 N.E.2d 1208 (N.Y. 1995); *Keiting v. Skauge*, 543 N.W.2d 565, 567 (Wis. Ct. App. 1995).

¶ 34 The public policies Wold touts to support its argument simply do not outweigh Colorado's significant interest in enforcing the agreement between two sophisticated parties. *See Fed. Deposit Ins. Corp. v. Am. Cas. Co. of Reading*, 843 P.2d 1285, 1290 (Colo. 1992) (a public policy will invalidate a contractual provision only if the policy "clearly outweigh[s]" the interest in enforcing the contract).[4] We need not decide whether contracting for a different accrual term is permissible under all circumstances. Where, as here, the operative term in section 6.17.1 of the contract does not violate any

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[4] To the extent Wold suggested in its reply brief and during oral argument that the contract provision unreasonably extends the accrual period, we decline to address that argument because it was not properly presented to the district court with supporting authority. *See In re Estate of Liebe*, 2023 COA 55, ¶ 19; *see also W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1160 (Colo. App. 2008) (declining to address issue raised for the first time in reply brief).

Colorado statute or public policy, we must respect the parties' agreement. *See Pierce v. St. Vrain Valley Sch. Dist. RE–1J*, 981 P.2d 600, 603-07 (Colo. 1999) (enforcing the confidentiality provisions of a settlement agreement after holding they did not violate the First Amendment or Colorado public policy).

IV. Disposition

¶ 35 For these reasons, we affirm the district court's order and remand the case to the district court so the District's remaining claims may be resolved.

JUDGE DAILEY and JUDGE BROWN concur.