

Court of Appeals, State of Colorado
2 East 14th Ave, Denver, CO 80203

Name & Address of Lower Court

District Court, Larimer County, Colorado
201 La Porte Avenue, Suite 100
Fort Collins, Colorado 80521

Trial Court Judge: The Honorable Gregory M.
Lammons

Case Number: 2013CV31385

DATE FILED: December 2, 2014 3:46 PM
FILING ID: DD171F77597D7
CASE NUMBER: 2014CA1991

Appellants: CITIZENS FOR A HEALTHY FORT
COLLINS, SIERRA CLUB, AND EARTHWORKS

Appellant: CITY OF FORT COLLINS, COLORADO

v.

Appellee: COLORADO OIL & GAS ASSOCIATION

COURT USE ONLY

Court of Appeals
Case Number:
2014CA1991

*Attorneys for Citizens for a Healthy Fort Collins,
Sierra Club, and Earthworks ("Measure
Proponents")*

Name: Kevin Lynch (Atty. Reg. #39873)
Brad Bartlett (Atty. Reg. #32816)
Nicholas Rising (Student Attorney)
LaRona Mondt (Student Attorney)
Christopher Brummitt (Student Attorney)

Address: 2255 E. Evans Avenue, Suite 335
Denver, CO 80208

Phone: 303.871.6140

FAX: 303.871.6847

E-mail: klynch@law.du.edu

RESPONSE TO ORDER TO SHOW CAUSE

Appellants Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks (“Measure Proponents”) respectfully submit this response to the Court’s November 18, 2014 Order to Show Cause regarding why this appeal should not be dismissed without prejudice for lack of a final, appealable order.

The Colorado Oil and Gas Association (COGA) sued in Larimer County District Court requesting two claims for relief: declaratory judgment and injunctive relief. The district court granted summary judgment in favor of COGA on the declaratory judgment claim and then granted dismissal of COGA’s second claim for relief (collectively, the “Orders”). Thus, the second claim is no longer part of this case and all that remains is the order granting summary judgment that defendants now appeal. This appeal should proceed because there are no other issues pending at the lower court, the judgment appealed is an order based on the merits, and the Defendant-Appellants rather than the plaintiffs are appealing the judgment.

First, the district court’s Orders were final judgments on all claims below; therefore, 54(b) is inapplicable for purposes of this appeal. C.R.C.P. 54(b) only applies where multiple claims for relief are involved, but not all of the claims have been decided. Here, the district court’s Orders effectuated final judgments on all of the claims below. In *Blackburn v. Skinner*, the trial court dismissed the plaintiff’s first claim for relief and denied the plaintiff’s

motion to dismiss the second claim for relief. *Blackburn v. Skinner*, 396 P.2d 968, 969 (1964). The plaintiff appealed, but because the trial court had not entered a final judgment on the plaintiff's second claim, the Colorado Supreme Court dismissed the appeal. *Id.* In *Harding Glass Co. v. Jones*, the trial court entered final judgment on a punitive damages claim, but not on an actual damages claim. *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1124 (Colo. 1982). There, the Colorado Supreme Court ruled that appeal was inappropriate because the trial court had not disposed of all the claims for relief. *Id.* at 1126. In both *Blackburn* and *Harding Glass*, application of 54(b) was proper because the trial court entered final judgment on one, but not all of the claims for relief. Those cases are distinguishable from the case at hand, where the district court entered final judgment on all of the claims below. Therefore, 54(b) does not apply to this case.

Next, Defendant-Appellants appeal an order granting summary judgment, which the district court decided on the merits. The cases cited by the Court in support of the prohibition on appealing claims dismissed without prejudice are distinguishable from the case at hand. In *District 50 Metro. Recreation Dist. v. Burnside*, the court held that dismissal of a claim without prejudice does not constitute a final judgment for the purposes of appeal because the factual and legal issues underlying the dispute have not been

resolved. *District 50 Metro. Recreation Dist. v. Burnside*, 401 P.2d 833, 835 (Colo. 1965). Additionally, the Court cites *Brody v. Bock*, another Colorado Supreme Court case where parties sought to appeal a district court's dismissal of a claim without prejudice because such claims do not constitute a final judgment for appellate review. *Brody v. Bock*, 897 P.2d 769, 777 (Colo. 1995). Here, defendant-appellants are not appealing the second claim dismissed without prejudice, but rather the first claim in which the district granted plaintiff's motion for summary judgment. Order Granting Mot. Dismiss Sep. 17, 2014. Because an order granting summary judgment resolves all factual and legal issues, there is no further action necessary from the district court.

In addition, the Defendant-Appellants are not attempting an "end run around the final judgment rule" because they did not have any remaining claims to dismiss; rather, the **plaintiff** chose to voluntarily dismiss **its** remaining claims without prejudice. The Court cites *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, a case where the court dismissed one of the plaintiff's claims with prejudice and subsequently the plaintiff moved to dismiss its remaining claims without prejudice. *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005). The court found this to be an "end run around the final judgment rule." Unlike *Mendoza*, here it is not the plaintiff but the Defendant-Appellants who are appealing a claim that was

decided on the merits, even though the plaintiff dismissed its remaining claims voluntarily without prejudice. This is not a case where a party is trying to get around the final judgment rule because the appellants are the defendants and therefore do not have any claims to dismiss like occurred in the *Mendoza*. Similarly, in *Emmitt v. Dickey* a plaintiff allowed her claim to be dismissed without prejudice, then appealed the claim in an attempt to gain an “end-around the final judgment rule” as claims dismissed without prejudice may be renewed. The cited case law is distinguishable from the case at hand where COGA, the Plaintiff-Appellee, filed the motion to dismiss its second claim without prejudice. The Defendant-Appellants do not have any claims to renew, as it was the plaintiff’s claim that the district court dismissed. Further, the appellants in this case are defendants rather than plaintiffs, and thus are not attempting an end run around the final judgment rule because they have no other claims to dismiss.

Accordingly, Measure Proponents request that the case proceed in the Colorado Court of Appeals because the Defendant-Appellants seek reversal of a final, appealable order. In the event this Court disagrees and decides to dismiss this current appeal, Measure Proponents request this Court make clear that an appeal of the summary judgment order may still be timely taken after appropriate action is taken by the district court. In addition, Measure

Proponents request this Court to specify what action by the lower court would suffice to make the summary judgment order a final, appealable order.

Dated this December 2, 2014.

By: /s/ Kevin J. Lynch

Kevin Lynch (#39873)

Brad Bartlett (#32816)

Nicholas Rising (Student Attorney)

LaRona Mondt (Student Attorney)

Christopher Brummitt (Student Attorney)

Environmental Law Clinic

University of Denver Sturm College of Law

Counsel for Appellants: Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks.

CERTIFICATE OF SERVICE

I hereby certify that on this December 2, 2014 a true and correct copy of the above and foregoing **RESPONSE TO ORDER TO SHOW CAUSE** was served via the Integrated Colorado Courts E-Filing System (ICCES), on:

Mark J. Matthews

John V. McDermott

Wayne F. Forman

Michael D. Hoke

Brownstein Hyatt Farber Schreck, LLP

410 Seventeenth Street, Suite 2200

Denver, CO 80202

Carrie Daggett

John R. Duval

City Hall West

300 La Porte Avenue
P.O. Box 580
Fort Collins, CO 80521

Barbara J.B. Green
John T. Sullivan
Sullivan Green Seavy LLC
3223 Arapahoe Avenue, Suite 300
Boulder, CO 80303

/s/ Kevin J. Lynch
Kevin J. Lynch