COLORADO COURT OF APPEALS

DATE FILED: June 22, 2017
CASE NUMBER: 2016CA1210

Court of Appeals No. 16CA1210
Larimer County District Court No. 15CV30864
Honorable Thomas R. French, Judge

Shannon M. Lewis,

Plaintiff-Appellant,

v.

Charles C. Richards and City of Loveland, Colorado,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE DAILEY
Bernard and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 22, 2017

Furtado Law, P.C., David J. Furtado, Denver, Colorado, for Plaintiff-Appellant

Tucker Holmes, P.C., Bradley D. Tucker, Winslow R. Taylor, Centennial, Colorado, for Defendants-Appellees

¶ 1 Plaintiff, Shannon M. Lewis, appeals the district court's summary judgment dismissing, on claim preclusion grounds, her tort action against defendants, Charles C. Richards and the City of Loveland. We reverse and remand for further proceedings.

I. Background

¶ 2 Lewis was driving another individual's car when Richards, driving a snowplow for the City, allegedly made an illegal turn in front of her, causing her to brake abruptly, slide into a median, and hit a traffic sign.

¶ 3 Lewis's insurer, State Farm Mutual Automobile Insurance Company (State Farm), brought an action in county court against defendants, asserting a subrogation claim for reimbursement of $1,318.60 it paid to or on behalf of Lewis, and a $500 deductible paid by Lewis. State Farm's complaint does not specify whether the payments were for property damage or bodily injury. Upon the parties' stipulation, the case was dismissed with prejudice.

¶ 4 Lewis later brought this action in district court against defendants, alleging that their negligence caused her to suffer physical injuries and property damage. Defendants moved for summary judgment, asserting that Lewis's claims were barred by

the doctrine of claim preclusion.[1] The district court granted the motion, finding that the elements of claim preclusion were satisfied "because of the final judgment in the county court action, because of the same underlying injury in both cases, because [Lewis] was in privity with State Farm, and because [Lewis] had the ability to bring these claims in the first action."

II. Analysis

¶ 5 Lewis contends that the district court erred in granting summary judgment. We agree.

¶ 6 Summary judgment is appropriate only if the pleadings and supporting documents demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loveland Essential Grp., LLC v. Grommon Farms, Inc.*, 2012 COA 22, ¶ 13 (citing *Rocky Mountain Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067, 1074 (Colo. 2010)). "It is a drastic remedy, however, that may not be entered when differing material factual inferences can be drawn from even undisputed evidence." *Camus v. State Farm Mut. Auto. Ins. Co.*, 151 P.3d 678, 680 (Colo. App. 2006).

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[1] This doctrine was formerly known as res judicata. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005).

The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. *Wall v. City of Aurora*, 172 P.3d 934, 936-37 (Colo. App. 2007).

¶ 7 We review de novo the grant of a summary judgment motion on claim preclusion grounds. *Loveland*, ¶ 13 (citing *Wall*, 172 P.3d at 937).

¶ 8 Claim preclusion bars relitigation of matters that were, or could have been, decided in a prior proceeding. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). A claim in a second judicial proceeding is precluded by a previous judgment where there is (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; and (4) identity of, or privity between, the parties to the two actions. *Id.*; *see also Foster v. Plock*, 2016 COA 41, ¶ 31, *aff'd*, 2017 CO 39.

¶ 9 Lewis does not dispute the second element, identity of subject matter. She asserts, however, that the other three elements are not satisfied. We address each challenged element in turn.

A. Final Judgment

¶ 10 Lewis concedes that there was a final judgment entered in the prior litigation. But she asserts that that judgment had to be a "valid" final judgment as to her and that it was not valid as to her because (1) it was not final as to her personal injury claims; and (2) under section 10-1-135, C.R.S. 2016, it was brought prematurely by State Farm. Lewis did not, however, present these arguments to the district court;[2] consequently, reversal is not warranted on these grounds. *See O'Connell v. Biomet, Inc.*, 250 P.3d 1278, 1282 (Colo. App. 2010) ("[W]hen a party fails to assert an argument in the trial court but raises it for the first time on appeal, the assertion is deemed waived.").

B. Identity of Claims for Relief and Privity

¶ 11 Lewis contends that neither the identity of claims element nor the privity element of claim preclusion is satisfied because, unlike in the prior case, the relief sought here included a claim for bodily injury. We agree that the privity element was not met.

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[2] She raised these matters but not, as we read her filings, in conjunction with the "final judgment" element of claim preclusion.

¶ 12 Initially, we note that there is next to nothing (besides counsel's argument[3]) in the record presented to us on appeal supporting Lewis's assertion that the prior case concerned a claim only for property damage. Nothing in the complaint in the prior case (except, perhaps, an inference from the low dollar amount sought by State Farm) would indicate that the prior case concerned only property damage. Fortunately for Lewis, defendants included, as an exhibit to their supplement to the motion for summary judgment, a letter from a risk management representative for the City. In that letter, addressed to the owner of the car Lewis was driving at the time of the accident, the representative informed the owner that his claim for damage to his vehicle was denied essentially because the accident was not defendants' fault.

¶ 13 Based on this letter, it could reasonably be inferred that, in the prior action, State Farm attempted to recover from defendants money (1) it had paid the owner of the car on Lewis's behalf, as well

[3] "A genuine issue of fact cannot be raised simply by means of argument by counsel." *People in Interest of J.M.A.*, 803 P.2d 187, 193 (Colo. 1990).

as Lewis's deductible; and (2) related to property damage suffered by the car owner as a result of the accident.[4]

1. Identity of Claims

¶ 14 Identity of claims for relief exists when "the claims are tied by the same injury." *Loveland*, ¶ 15 (citation omitted). Claims involve the same injury where they concern the same transaction out of which the original action arose. *Id.* Whether claims arise from the same transaction is decided pragmatically based on "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations." *Id.* (quoting *Salazar v. State Farm Mut. Auto. Ins. Co.*, 148 P.3d 278, 281 (Colo. App. 2006)).

¶ 15 Typically, such claims are barred by claim preclusion because they could have been raised in the first action. *See Argus Real Estate*, 109 P.3d at 608; *Loveland*, ¶¶ 14, 16; *see also Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999) ("[T]he doctrine not only bars litigation of issues actually decided, but also any issues that

[4] Further supportive of this conclusion, perhaps, is the fact that defendants never disputed or attempted to dispute Lewis's assertion that the prior action involved only a claim for property damage. As parties to the prior action, defendants would have known what it encompassed and what it did not.

could have been raised in the first proceeding but were not.") (emphasis added). Thus, a plaintiff cannot split claims into separate actions. A final judgment in the first action extinguishes all claims for relief against the defendant with respect to the transaction or series of transactions out of which the first action arose. *Argus Real Estate*, 109 P.3d at 609.

¶ 16 Lewis's complaint claims "physical injuries, mental anguish, pain and suffering, permanent disability, property damage, loss of use, a loss of enjoyment of life and other economic and noneconomic damages" as a result of the accident. These claims involve injuries arising from the same accident — occurring at the same time, place, and origin — that was the subject of the prior litigation.

¶ 17 We are not persuaded by Lewis's argument distinguishing between the bodily injuries in this case and property damage in the prior case because both types of damages are tied to the same "transaction," being that they were incurred in the same accident. The fact that Lewis gives them different names does not separate

the claims. *See id.* at 608-09 (The inquiry "does not focus on the specific claim asserted or the name given to the claim.").[5]

2. Privity

¶ 18 Claim preclusion protects litigants from relitigating a claim "with the same party or his privy." *Argus Real Estate*, 109 P.3d at 608 (quoting *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003)).

¶ 19 "Privity between a party and a nonparty requires both a *substantial identity of interests* and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 668 (Colo. 2006) (emphasis added) (quoting *Cruz*, 984 P.2d at 1176). Thus, the relationship is such that the nonparty is "virtually represented." *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1115 (Colo. App. 2008) (quoting *Nat. Energy Res. Co. v. Upper Gunnison River*

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[5] Lewis's reliance on *McIntosh v. Romero*, 32 Colo. App. 435, 513 P.2d 239 (1973), is misplaced. Although *McIntosh* involved similar facts, it did not involve a claim preclusion analysis. The *McIntosh* court held that the district court's dismissal of the case for the failure to join a necessary party was improper under C.R.C.P. 21. The appellate court concluded that, rather than dismissing the case, the district court should have joined the party or allowed plaintiffs to amend their complaint. *Id.* at 436, 513 P.2d at 240.

Water Conservancy Dist., 142 P.3d 1265, 1281 (Colo. 2006)). When analyzing privity, "we look to the law governing the underlying relationship" of the party and nonparty. *Id.* at 1116 (citing *Cruz*, 984 P.2d at 1177).

¶ 20 "In the insurance context, courts generally apply the doctrine of equitable subrogation to allow an insurer, who has made payment to its insured for a loss caused by a third party, to seek recovery from the third party for such a payment." *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 833 (Colo. 2004). "Once an insurance company enjoys [subrogation] rights, [it] 'stand[s] in the shoes of the insured' for all legal purposes and may pursue any rights held by the insured subrogor." *Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 323 (Colo. 2009); *see* Dan B. Dobbs, *Law of Remedies* § 4.3(4) (2d ed. 1993) ("Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant.").

¶ 21 Consequently, a party is often held to be in privity with his or her insurer in prior proceedings, *see Reid v. Pyle*, 51 P.3d 1064, 1069 (Colo. App. 2002) ("Plaintiff's rights to the claim were

subrogated to his insurance carrier, and therefore, plaintiff was in privity with his insurer in the prior proceeding."), but not always. "[T]here are instances when an insurer and its insured are not in privity." *MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 816 (Tex. App. 2012) (citing *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 886 (Tex. App. 2001), for the proposition that "Texas law is clear that '[w]hen an insurer and its insured take conflicting positions on the issue of coverage, they are not in privity.'" (quoting *Cluett v. Med. Protective Co.*, 829 S.W.2d 822, 826 (Tex. App. 1992))) (alteration in original).

¶ 22 For two reasons, State Farm could not have raised a claim for Lewis's bodily injury in the prior litigation and, thus, should not be considered in privity with Lewis with respect to such a claim:

> (1) under section 10-1-135(3)(a)(II), State Farm was not limited from seeking "reimbursement or subrogation to recover amounts paid for property damage"; *but* only if Lewis "ha[d] not pursued a claim against a third party allegedly at fault for [her personal] injuries by the date that is sixty days prior to the date on which the statute of limitations applicable to the claim expires," could State

Farm have brought "a direct action for subrogation or reimbursement of benefits against an at-fault third party." § 10-1-135(6)(a)(II). Because State Farm filed the action against defendants outside the sixty-day period, it could not have asserted a subrogation claim for personal injuries against defendants even if wanted to; and

(2) State Farm could not proceed on a subrogation theory with respect to damages it had allegedly not yet paid (i.e., for bodily injury) but which Lewis felt were owed her. *See Mid-Century Ins. Co. v. Travelers Indem. Co. of Ill.*, 982 P.2d 310, 315-16 (Colo. 1999) ("Subrogation entails 'the restoration of the amount paid by a surety or other similar person, and *restoration of that amount only*.' Subrogation's equitable nature prohibits the subrogee from receiving any windfall.'") (citations omitted).

¶ 23 Moreover, the text of section 10-1-135(6)(a)(II) suggests that an injured party can, as here, sue for personal injury damages independently of any action taken by a "payer of benefits," leaving the "payer of benefits" with only subrogation rights as to any amount of benefits paid. *See* Christopher P. Koupal, *CRS § 10-1-*

135 and the Changing Face of Subrogation Claims in Colorado, 40 Colo. Law. 41, 44 (Feb. 2011) ("Even if a payer of benefits brings a direct action within the sixty-day window allowed under the statute, an injured party can pursue the third party until the statute expires and, in that case, the payer of benefits' right to subrogation still would be limited as set out in the statute.").

¶ 24 For these reasons, we conclude that State Farm and Lewis did not have a "substantial identity of interests" with respect to the recovery of damages for personal injuries.

¶ 25 Further, to show privity, defendants had to demonstrate more than simply a "substantial identity of interests"; they also had to show that State Farm and Lewis had "a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d at 668. The record on appeal is almost devoid of information establishing the relationship between Lewis and State Farm. There is, for example, no insurance policy in the record; nor is there any information concerning the extent, if any, to which Lewis had been consulted in connection with, or participated in, the prior litigation. Given the lack of

evidence in the record, we cannot hold that State Farm and Lewis had the type of "a working or functional relationship" that would put them, as a matter of law, in "privity" with one another.

¶ 26 Thus, we conclude that the district court erred in granting summary judgment on claim preclusion grounds with respect to Lewis's bodily injuries claim.

III. Conclusion

¶ 27 The judgment is reversed, and the case is remanded to the district court for further proceedings with respect to Lewis's claim for bodily injuries.

JUDGE BERNARD and JUDGE FOX concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

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