COURT OF APPEALS, STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80203	
Larimer County District Court Hon. Thomas R. French Civil Case No. 15CV30864	
Plaintiff-Appellant: **SHANNON M. LEWIS** v. Defendants-Appellees: **CHARLES C. RICHARDS and THE CITY OF LOVELAND**	**▲COURT USE ONLY▲**
Attorney for Appellant David J. Furtado, Atty. Reg. No. 28002 Furtado Law PC 3773 Cherry Creek North Suite 575 Denver, Colorado 80209 Phone: (303) 755-2929 Facsimile: (303) 309-6463 E-Mail: dfurtado@furtadolaw.com	Case No. **2016CA1210**
OPENING BRIEF	

1010-019

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David J. Furtado, Esq.

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Issue On Appeal

Under the doctrine of claim preclusion, does an insurer's subrogation action, brought for reimbursement of a payment it allegedly paid to its insured on a property damage claim, bar a subsequent action brought by the insured against the same defendants for damages related to her personal injuries?

Statement of the Case

This appeal arises from an order on summary judgment where the District Court dismissed the present action, finding that the doctrine of claim preclusion bars her claims against Defendants-Appellees Charles C. Richards and the City of Loveland (hereinafter, "Richards"). Plaintiff-Appellant Lewis (hereinafter, "Lewis") was in an automobile accident where it is alleged that Charles Richards, acting within the course and scope of his employment with the City of Loveland, made an illegal turn, forcing Lewis to brake abruptly and slide onto the median and struck a traffic sign. Lewis suffered significant bodily injuries and property damage.

Without consulting or giving notice to Lewis, State Farm Mutual Automobile Insurance Company (hereinafter, "State Farm") brought suit "as

subrogee of" Lewis, against Richards, for the reimbursement of the property damage claim it paid to Lewis in the amount of $1,318.60 and for recovery of Lewis' $500.00 deductible. R. CF, pgs. 31-32. However, for unclear reasons State Farm and Richards stipulated to dismissal of the first action with prejudice. R. CF, pgs. 33-35. Lewis then brought suit for damages against Richards for her bodily injuries resulting from the accident.

Richards filed a motion for summary judgment, arguing that Lewis' claim is barred by the doctrine of claim preclusion. R. CF, p. 36-41. After considering the arguments made by both parties, the District Court entered summary judgment for Richards, holding all of the elements of claim preclusion are satisfied, such that summary judgment is proper, and Lewis could not properly proceed on her claim. R. CF, p. 76, 87.

Argument Summary

Lewis' claim for damages resulting from her bodily injuries are not barred under the doctrine of claim preclusion because her cause of action does not satisfy all of the elements of claim preclusion. The first element, finality of the first judgment, is not met because State Farm's subrogation action was brought only for

reimbursement of a property damage claim it paid. The first action had nothing to do with Lewis' bodily injuries. Under the relevant statute, insurers are barred from bringing suit to recovery on bodily injury claims of its insured until sixty days prior to the expiration of the statute of limitations for the claim. State Farm filed suit before the sixty-day bar was extinguished and the claim was therefore not ripe for adjudication. Since the first action was not ripe with respect to Lewis' bodily injuries, any judgment pertaining to that claim in the first action was not valid and does not have a preclusive effect on the present action.

The third element of claim preclusion, identity of the claims for relief, is not met. State Farm in the first action sought different relief than Lewis seeks in the present action. State Farm sought reimbursement for damages arising out of a property damage claim. Lewis seeks damages arising from her bodily injuries. State Farm, as subrogee, could not have brought Lewis' bodily injury claim in the first action because, as subrogee, State Farm's relief is inherently limited to that which it paid Lewis. Since State Farm did not pay Lewis for her bodily injuries, State Farm could not have sought the same claim for relief that Lewis now seeks.

The final element of claim preclusion requires that State Farm and Lewis were in privity with each other in the first action. Privity requires (1) a substantial

identity of interests such that the non-party is virtually represented in the action; and (2) a working or functional relationship. Neither privity requirement is met in this case. As to the first, State Farm and Lewis had different interests in the first action such that Lewis' bodily injury claim was not represented. As to the second, there was no evidence before the District Court demonstrating that State Farm and Lewis had a working or functional relationship. Moreover, it cannot be the case that privity exists as a matter of law between an insurer-subrogee and its insured-subrogor when the insurer subrogee does not have a stake in the full scope of the insured's claims. Since State Farm could not have brought Lewis' personal injury claims, and does not otherwise have an interest in whether Lewis prevails on that claim, the two parties were not in privity with each other in the first action so as to preclude Lewis' present action for damages for her bodily injuries.

Argument

A. Standard of Review

An appellate court reviews a summary judgment on the basis of claim preclusion de novo. *Camus v. State Farm Mut. Auto Ins. Co.*, 151 P.3d 678, 680 (Colo. App. 2006).

B. Preservation on Appeal

Lewis raised her objections to the applicability of the doctrine of claim preclusion in her Response to Defendants' Motion for Summary Judgment and in her Supplemental Response to Defendants' Supplement to its Motion for Summary Judgment. R. CF, p. 42; R. CF, p. 69. The District Court ruled on this issue in its Order Granting Defendants' Motion for Summary Judgment. R. CF, p. 76.

C. Discussion

The doctrine of claim preclusion bars a second action on the same claims litigated in a prior proceeding. *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999). In order for claim preclusion to bar a second action, four elements must be met: (1) finality of the first judgment; (2) identity of the subject matter; (3) identity of claims for relief; and (4) identity or privity between parties to the actions. *Id.* Here, elements (1), (3), and (4) are disputed by Lewis and are discussed in turn below.

1. Finality of Judgment

The District Court found there was finality of the first judgment, fulfilling the first element of claim preclusion. While the judgment may final as against State Farm, insofar as reimbursement for the amount it allegedly paid to Lewis for a property damage claim, the prior action was not final so as to preclude Lewis on

her personal injury claims against Richards. The District Court found, and Lewis concedes, that claim preclusion does not require actual litigation (*Cruz*, 984 P.2d at 1176), and that stipulation between parties for entry of judgment of dismissal with prejudice is a final judgment (*Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992)). R. CF, p. 83. However, Lewis contends that in order for a prior judgment to have preclusive effect, it must be a *valid* judgment.

In *Byrd v. People*, the Colorado Supreme Court stated "[c]laim preclusion bars a subsequent action when parties or parties in privity have previously litigated the claim to a valid, final judgment." *Byrd v. People*, 58 P.3d 50, fn. 4 (Colo. 2002) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876)) (emphasis added). This reference to a judgment's validity also appears in the Restatement (Second) of Judgments § 24, which states: "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar...." (emphasis added).

Lewis contends that a judgment made in an action that was not ripe for adjudication is not a valid judgment. In *Feuquay v. Indus. Comm'n*, the Colorado Supreme Court analyzed the validity of a nunc pro tunc order issued by the district court in violation of a statute which gave an express timeframe for when the action

could commence. *Feuquay v. Indus. Comm'n*, 111 P.2d 901 (Colo. 1941). The Court held that since the order was based on a hearing that occurred the statute, "no valid judgment could have been entered at that time. Only in cases where the cause is ripe for judgment may the power to enter a nunc pro order be exercised." *Id.* 902.

As it pertains to this case, Colorado Revised Statute § 10-1-135 provides the appropriate timing for actions brought by insurers for subrogation actions. In regards to property damage claims, section 10-1-135(3)(a)(I) states that "Reimbursement or subrogation pursuant to a provision in an insurance policy, contract, or benefit plan is permitted only if the injured party has first been fully compensated for all damages arising out of the claim." Yet, section 10-1-135(a)(II) further states that this "does not limit the right of an insurer to seek reimbursement or subrogation to recover amounts paid for property damage … against an at-fault third party." Thus, in the first action, State Farm may have appropriately brought its subrogation action against Richards for reimbursement of the payment it allegedly made to Lewis on the property damage claim.

However, in regards to bodily injury claims, C.R.S. § 10-1-135(6)(a)(I) provides that "Except as provided in subparagraph (II) of this paragraph (a), a

payer of benefits shall not bring a direct action for subrogation or reimbursement of benefits against a third party allegedly at fault for the injury to the injured party." An "injured party" is defined in the statute as "a person who has sustained bodily injury as the result of the act or omission of a third party...." Colo. Rev. Stat. Ann. § 10-1-135(2)(b). Subparagraph (II) of paragraph (a) states "If an injured party has not pursued a claim against a third party allegedly at fault for the injured party's injuries by the date that is sixty days prior to the date on which the statute of limitations applicable to the claim expires, a payer of benefits may bring a direct action for subrogation or reimbursement of benefits against an at-fault third party." Colo. Rev. Stat. Ann. § 10-1-135(6)(a)(II).

In comparing subsections (3) and (6) of the above statute, it is clear that the Colorado Legislature considered subrogation actions for property damage claims as distinct from bodily injury claims. The former being permissible at any time after the insured has been compensated, and the latter being permissible only within sixty days before the statute of limitations expires for the claim that the insured has not brought.

Here, even though State Farm did not seek damages for Lewis' personal injuries in the first action, the District Court treated State Farm's prior action

against Richards as having had to include both claims for relief. R. CF, p. 84. However, if the two claims were brought together in the first action, State Farm would have impermissibly brought the personal injury claim because the first action was filed before sixty days prior to the expiration of the statute of limitations. In fact, both Lewis and Richards raised the point that State Farm's first action violated Colorado Revised Statutes (C.R.S.) § 10-1-135(6)(a). R. CF, p. 64; R. CF, p. 73-74. Nevertheless, the District Court declined to examine whether State Farm had acted improperly and instead interpreted C.R.S. § 10-1-135 as providing "statutory protections which insure [Lewis'] right to full recovery." R. CF, p. 86. Further, "[Lewis] may contend that State Farm impaired her rights recovery under the statutes." *Id.*

However, the issue here is not whether Lewis can bring suit against State Farm under C.R.S. § 10-1-135 for impeding her ability to pursue her claim against Richards. Lewis does not interpret the statute as affording her such relief against State Farm. Rather, the violation of § 10-1-135(6), as it pertains to State Farm bringing suit for Lewis' bodily injuries, invalidates the judgment as that cause of action was not yet ripe for adjudication because it was brought before sixty days prior to the expiration of the statute of limitations. Since a subrogation action by

State Farm for Lewis' bodily injury claim was not ripe for adjudication, the dismissal with prejudice was not a valid judgment and cannot preclude the present action for damages resulting from Lewis' bodily injuries. Therefore, the District Court erred in holding that the first element of claim preclusion was fulfilled.

2. Identity of Claims for Relief

For a claim to be precluded by a previous judgment, there must exist an identity of claims for relief. *Cruz*, 984 P.2d at 1176. To determine whether parties share an identity of claims for relief, courts should look not to the specific claim asserted or "the legal theory on which the person asserting the claim relies," but to the "injury for which relief is demanded." *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 609 (Colo. 2005). Claim preclusion works to bar a litigant from splitting claims into separate actions. *Id.* Thus, "claim preclusion bars re-litigation not only of all claims actually decided, but of all claims that might have been decided if the claims are tied to the same injury." *Id.*

Here, the District Court found that the "relief sought in both [the first action and the present action] is a judgment against Defendants for the amounts paid out by State Farm and the deductible paid by Plaintiff as a result of Plaintiff's damages from the accident." R. CF, p. 84. Since "Plaintiff is seeking the same relief

(judgment for costs of injuries suffered) and the same redress for the same alleged injury (damages caused by the accident)," the District Court held that the first action and the present action share an identity of claims for relief. *Id.*

The District Court erred in two respects. First, the relief sought in the present action is not a judgment against Richards for the amounts paid out by State Farm. The present action seeks damages for her bodily injuries. State Farm had allegedly paid Lewis only with respect to a property damage claim. In fact, State Farm did not pay Lewis any amount pertaining to her personal bodily injuries. Thus, the "relief sought" is markedly different.

Second, the holding in *Argus* makes clear that the focus of the identity of claims for relief inquiry is not the legal theories on which they are brought, but the injury for which relief is demanded. *Argus*, 109 P.3d at 609. Here, the legal theories of liability brought by State Farm in the first action are identical to those brought by Lewis in the present action, i.e., negligence and vicarious liability. However, the injuries for which relief is demanded are different. Again, State Farm's injury was its alleged payment to Lewis on a property damage claim and the relief it sought was reimbursement. Lewis, on the other hand, suffered bodily

injuries for which she seeks damages, and in which State Farm does not have any interest or stake in the matter.

Moreover, the *Argus* ruling states that claim preclusion bars re-litigation of claims tied to the same injury, which might have been brought in the first action but were not. The District Court held the same in its Order, but found that "Plaintiff could have brought her claims either through State Farm or on her own accord in the previous action." R. CF, p. 82. Not only is this untrue, but it is also an incorrect application of the holding in *Argus*. The issue is not whether Lewis could have brought the claims in the first action, but whether State Farm, as the Plaintiff, could have. Here, Lewis incorporates the argument made above regarding the invalidity of the judgment, so as to demonstrate further that State Farm could not have brought Lewis' bodily injury claim in the first action because that would violate C.R.S. § 10-1-135(6)(a). Nevertheless, as a subrogee of Lewis' alleged property damage claim, the scope of its possible recovery was inherently limited to only the amount it allegedly paid to Lewis on the property damage claim. Since State Farm never paid Lewis for any of her bodily injury claims, State Farm, as a matter of law, could not have brought a subrogation action to recover for Lewis' bodily injury damages.

Subrogation is rooted in principles of equity. *Mid-Century Ins. Co. v. Travelers Indem. Co. of Illinois*, 982 P.2d 310, 315 (Colo. 1999); See also, *N. Inv. Co. v. Frey Real Estate & Inv. Co.*, 33 Colo. 480, 481, 81 P. 300 (1905) ("subrogation … '…is a mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience ought to pay it'"). "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 payment." *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 834 (Colo. 2004), as modified on denial of reh'g (June 7, 2004). Likewise, "[u]nder equitable subrogation, a party secondarily liable who has paid the debt of the party who is primarily liable may institute a recovery action in order to be made whole." *Mid-Century*, 982 P.2d at 315. Thus, "[s]ubrogation 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." *Id.* at 315-16 (emphasis in original).

Therefore, the District Court erred in holding that State Farm and Lewis shared an identity of interests because not only were their respective claims for

relief not identical, as a matter of law, State Farm, as subrogee, could not have brought suit to recover for Lewis' bodily injury claims for which she has not been compensated. State Farm's claim for relief was limited to only reimbursement for the amount allegedly paid to Lewis on the subrogated property damage claim.

Furthermore, and as a practical matter, Lewis could not have brought her claims in the first action because she had no notice or involvement with it. The District Court presumes that as her apparent subrogee, State Farm included Lewis and all of her claims in the prior action. But since State Farm as subrogee lacked the ability to bring the personal injury claims, the only way the claims could have been brought would be if she was joined as a party. Obviously, without being joined as a party in the first action, she could not have brought her personal injury claims.

In *McIntosh v. Romero*, a case with facts nearly identical to the ones in the present action, a plaintiff sought damages for her personal injuries arising from an automobile accident. *McIntosh v. Romero*, 513 P.2d 239 (Colo. App. 1973). The defendant moved to dismiss the case, albeit on grounds that the plaintiff was not the correct party in interest, because the plaintiff's insurer had previously brought suit against the same defendant to recover the amount it had paid to plaintiff on its

claim. There too, the prior case had been dismissed with "no showing as to why or under what circumstances the dismissal occurred." *Id.* at 240. Notably, the Court of Appeals acknowledged that the plaintiff there had contended that "the alleged subrogation was only partial, extending only to the amount paid plaintiffs, and did not fully compensate the plaintiff for the injuries sued on in the [subsequent] action." *McIntosh*, 513 P.2d at 240. Thus, that action presented "a contested issue of fact and, at most, established the existence of a third party who might be a necessary party to [the] action." *Id.* Further, the court held that the plaintiffs "cannot be deprived of their day in court solely on an allegation of a third party, made in an action to which plaintiffs were not parties." *Id.*

In sum, the District Court erred in finding that State Farm and Lewis shared an identity of claims for relief because the alleged injuries were different. State Farm's subrogation action sought reimbursement for the payment it allegedly made to Lewis for a property damage claim, while Lewis presently seeks recovery of damages incurred as a result of her personal injuries. The third element of claim preclusion has not been met.

Privity Between Parties

The doctrine of claim preclusion applies to the actual parties of a first action, but also to those "in privity" with the actual parties. Since the parties here are clearly different than those in the first action, claim preclusion can only be appropriate if State Farm and Lewis were in privity in the first action.

The Colorado Supreme Court has recognized that for purposes of claim preclusion, privity exists between a party and a non-party if there is (1) a substantial identity of interests; and (2) a "'working or functional relationship ... in which the interest of the non-party are presented and protected by the party in the litigation.'" *S.O.V. v. People in Interest of M.C.*, 914 P.2d 355, 360 (Colo. 1996) (quoting *Public Serv. Co. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 787 (Colo. App. 1991); See also *Cruz*, 984 P.2d at 1176-77 (Colo. 1999).

Here, the District Court erred when it found that privity existed between State Farm and Lewis in the first action because neither of the elements of privity are met in this case as they pertain to Lewis' personal injury claims.

As an initial matter, the District Court misstated the rule in its Order Granting Defendant's Motion for Summary Judgment by stating only the first part of the privity test—that a substantial identity of interests exist between the parties.

R. CF, p. 84. Noticeably absent is the second part of the test, that the parties have a working or functional relationship. In *Public Serv. Co.*, a division of this Court held that a "functional relationship may be found if a non-party substantially participates in controlling the presentation of issues as if it were a party." 813 P.2d at 788.

Here, the District Court had requested that Richards submit an affidavit from State Farm showing the extent of Lewis' knowledge or involvement in the prior action, but Richards was unable to secure State Farm's cooperation and thus failed to produce any evidence that Lewis had any involvement in the prior action. R. CF, p. 63. Therefore, the District Court erred in finding that privity existed between State Farm and Lewis because without the facts necessary to show Lewis' involvement in the first action, the second element of the privity was not, and could not have been properly determined. At the least, there was a genuine issue of material fact that the District Court should have resolved before entering summary judgment for Richards.

It might be inferred, however, that the District Court intended to hold that the subrogation relationship by its very nature entails a substantial identity of interests and a working or functional relationship between the subrogor and

subrogee. R. CF, pgs. 84-85. The District Court relied solely on *Reid v. Pyle*, 51 P.3d 1064 (Colo. App. 2002), which held that the "[p]laintiff's right to the claim were subrogated to his insurance carrier, and therefore, plaintiff was in privity with his insurer in the prior proceeding." *Reid*, 51 P.3d at 1069. Thus, the District Court stated "[w]hen dealing with a subrogation relationship, the Colorado Court of Appeals has previously held that a plaintiff was in privity with his insurer when he subrogated his rights to his insurer." *Id.* at 9. Since State Farm had used "a/s/o" (as subrogee of) in the case caption to denote that it was functioning as subrogee of Lewis, the District Court concluded that State Farm and Lewis were in privity in the first action. R. CF, p. 85.

Lewis contends that, to the extent the subrogation relationship necessarily entails privity, the privity between the parties is confined to the boundaries of the subrogation relationship. Since the bodily injury claim that Lewis asserts in the present action are outside the parameters of the subrogation relationship, the parties were not in privity as to that claim in the first action.

To determine privity between parties for purposes of claim preclusion, the court must first examine the type of underlying legal relationship between the parties. *Cruz*, 984 P.2d at 1177; See also *S.O.V.*, 913 P.2d at 360. Here, Lewis is in

agreement with the District Court that the underlying type of legal relationship is one of subrogation. R. CF, pgs. 84-85. That is, the relationship between subrogor (Lewis) and subrogee (State Farm). Thus, the course of this privity analysis of whether a substantial identity of interests and a working or functional relationship existed must be framed in terms of the subrogation relationship.

As described above, subrogation is rooted in principles of equity. *Mid-Century Ins. Co. v. Travelers Indem. Co. of Illinois*, 982 P.2d 310, 315 (Colo. 1999). The subrogee can, subject to the provisions in C.R.S. § 10-1-135, "stand in the victim's shoes and collect the reimbursed amount from the party responsible for the damages." *Ferrellas, Inc. v. Yeiser*, 247 P.3d 1022, 1027 (Colo. 2011). However, the amount a subrogated insurer can recover is limited to only that amount it paid to its insured. *Mid-Century*, 982 P.2d at 315.

Keeping these equitable principles in mind, it may the case that the subrogation relationship inherently entails a substantial identity of interests and a working or functional relationship, but only in regards to the subrogation claim itself. For example, if an insurer compensates its insured and then initiates a subrogation action against the at-fault third party, one can infer the insurer and insured share the same interest—compensation for the subrogated damages. Also,

one can infer that there exists a working or functional relationship, as the insurer had presumably paid the insured to compensate for the insured's damages per an insurance policy.

However, when a subrogated insurer seeks compensation for the amount it paid, but there are additional damages arising out of the claim for which the insurer did not compensate its insured, there exists a substantial dissimilarity of interests. On one hand, the insurer seeks reimbursement for the amount it compensated its insured. On the other, the insured seeks recovery of damages for which it has not been compensated by the insurer. In that scenario, the insured is disinterested in a legal context as to whether the insured prevails on its claims that are unrelated to the subrogation. Thus it cannot be the case that the parties share "a substantial identity of interests … such that the non-party virtually represented in [the] litigation," *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1115 (Colo. App. 2008).

Likewise, a working or functioning relationship between an insurer and its insured is lacking in such cases where claims arise outside the subrogation relationship. Lewis contends that a subrogated insurer can assert its right to reimbursement against the party primarily liable for the loss, subject to the

provisions of C.R.S. § 10-1-135, without having to collaborate with the insured. Thus, when an insurer has not compensated its insured for bodily injury damages, there must be some other way in which a "working or functional relationship" exists such that the parties can be considered in privity with each other. This can occur when, for example, "a non-party substantially participates in controlling the presentation of issues as if it were a party." *Public Serv. Co.*, 813 P.2d at 788. Here, Lewis was unaware of, and had no involvement with, State Farm's subrogation action against Richards. While State Farm may have acted within its rights to pursue reimbursement by "standing in her shoes" to collect the amount it paid in property damage claims from Richards, her relationship with State Farm in that action did not ensure that her personal injury claims were "presented and protected" by State Farm, as required by the second element of privity.

Conclusion

For the reasons state above, the Court of Appeals should reverse the District Court's holding that the present action is barred under the doctrine of claim preclusion.

Dated: 1/2/2017

Respectfully submitted,

Signature: 

David J. Furtado

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Opening Brief** was served, via ICCES e-filing, this 2nd day of January, 2017 to the following:

To: Bradley D. Tucker, Esq.
Winslow R. Taylor, Esq.
TUCKER HOLMES, P.C.
Quebec Centre II, Suite 300
7400 East Caley Avenue
Centennial, CO 80111
Attorneys for Defendants

David J. Furtado