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| COURT OF APPEALS, STATE OF COLORADO<br>2 E. 14th Avenue<br>Denver, CO 80203 | **COURT USE ONLY**<br> |
| Larimer County District Court<br>Thomas R. French<br>Civil Case No. 15CV30864 | |
| Plaintiff-Appellant:<br>**SHANNON M. LEWIS**<br><br>v.<br><br>Defendants-Appellees:<br>**CHARLES C. RICHARDS and THE CITY OF LOVELAND** | |
| **Attorneys for Appellees**<br>Bradley D. Tucker, Esq., #22436<br>Winslow R. Taylor, Esq., #46898<br>TUCKER HOLMES, P.C.<br>Quebec Centre II, Suite 300<br>7400 East Caley Avenue<br>Centennial, CO 80111-6714<br>Phone: (303) 694-9300<br>Fax: (303) 694-9370 E-mail: bdt@tucker-holmes.com and wrt@tucker-holmes.com | Case No. **16CA1210** |
| **ANSWER BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rule. Specifically, the undersigned certifies that the brief is 6,975 words and therefore complies with C.A.R. 28(g).

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1. Whether an action by a subrogee has a preclusive effect on a subsequent action as to both subrogor and subrogee.

2. Whether the trial court properly applied the doctrine of claim preclusion.

3. Whether Colorado permits "claim splitting" between categories of damages.

## STATEMENT OF CASE

### A. Nature of the Case, Relevant Facts, and Procedural History

This is a personal injury action filed by Plaintiff, Shannon Lewis. Plaintiff alleges to have suffered injury resulting from a December 29, 2014 accident, and further alleges that Charles Richards was at fault and Richard's employer, City of Loveland ("Loveland") is vicariously liable under the doctrine of *respondeat superior*. In their Answer to Plaintiff's Complaint, Defendants asserted the doctrine of claim preclusion (also referred to as "*res judicata*") as an affirmative defense. Thereafter, Defendants filed a Motion for Summary Judgment asserting that Plaintiff's claims were barred by the doctrine of claim preclusion as the accident in question was the subject of prior litigation (the "Prior Litigation") between State Farm Mutual Automobile Insurance Company ("State Farm") and Defendants. In the Prior Litigation filed March 25, 2016, State Farm, as subrogee

of Shannon Lewis, asserted claims of negligence, negligence per se, and *respondeat superior* against Defendants. The result of the Prior Litigation was a stipulated dismissal with prejudice.

### B. Judgment or Order Presented for Review

The trial court addressed the Motion for Summary Judgment at the Case Management Conference, and heard argument from Defendants and from Plaintiff. On June 20, 2016, the trial court entered an order granting Defendant's Motion for Summary Judgment, finding that the dismissal with prejudice of the Prior Litigation was a final judgment, the subject matter of the Prior Litigation was identical to Plaintiff's litigation, the claims for relief in the Prior Litigation were identical to the instant litigation, and State Farm and Plaintiff were in privity during the Prior Litigation. CF, p. 76-87. The trial court dismissed Plaintiff's claim, and this appeal followed.

## SUMMARY OF THE ARGUMENT

The trial court properly ruled that Plaintiff's claims are barred by the common law doctrine of *res judicata*, referred to as claim preclusion in Colorado. The doctrine of claim preclusion prevents litigants from splitting claims into separate actions. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). The doctrine also protects parties, such as Defendants, from facing multiple litigations related to identical circumstances when the claims

could be presented in one action. *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003).

The trial court correctly held that each of the four elements necessary for claim preclusion was satisfied. The dismissal with prejudice in the Prior Litigation is a valid final judgment as there were no jurisdictional issues which would render the judgment void or invalid. The subject matter of the Prior Litigation and Plaintiff's claims are identical, satisfying the second element. The claims for relief are identical as State Farm pursued damages resulting from alleged negligence in the December 29, 2014 accident and Plaintiff is pursuing damages for negligence in this action. Finally, State Farm and Plaintiff were in privity with each other at the time of the Prior Litigation, satisfying the final element of claim preclusion.

Because each element of claim preclusion is satisfied in this case, this Court should affirm the order of the trial court.

## ARGUMENT

### A. Standard of Review

"Summary judgment is appropriate only when the pleadings and supporting documents demonstrate that no genuine issue exists as to any material fact and that the moving party is entitled to summary judgment as a matter of law." *Vail/Arrowhead, Inc. v. Dist. Court for the Fifth Judicial Dist., Eagle Cty.*, 954 P.2d 608, 611 (Colo. 1998). "An appellate court's review of a trial court's order

granting or denying a motion for summary judgment is de novo." *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002).

**B. Objection to Plaintiff's Statement of Preservation**

Plaintiff asserts she raised objections to the applicability 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. Plaintiff did not argue the elements of claim preclusion with any specificity, but instead, Plaintiff argued that the elements of issue preclusion (alternatively referred to as "collateral estoppel") did not apply. CF, p.78. In fact, in Plaintiff's Response, the elements of claim preclusion were never identified and Plaintiff only addressed the doctrine of issue preclusion. CF, p.44. The trial court specifically noted that Plaintiff relied on the elements of collateral estoppel, and Plaintiff only argued those elements. CF, p.78. The only common element between claim preclusion and issue preclusion is that both can only be asserted against the same party or that party's privy, and this was the only element of claim preclusion for which Plaintiff presented any substantive argument. As such, Defendants assert that Plaintiff has waived her right to challenge any remaining elements of claim preclusion as she cannot now, for the first time on appeal, present new legal theories or arguments which were not considered by the trial court. *See Timm v. Reitz*, 39 P.3d 1252, 1255 (Colo.App. 2001) ("[A]rguments and

evidence not presented to the trial court in connection with a motion for summary judgment will not be considered on appeal.").

Plaintiff's response in the trial court did not address whether the dismissal with prejudice in the Prior Litigation was a final judgment, and Plaintiff may not now collaterally attack the finality or validity of that judgment by arguing the trial court lacked jurisdiction. *See Fifth Third Bank v. Jones*, 168 P.3d 1, 5 (Colo.App. 2007) (an argument not presented to the trial court cannot be raised for the first time on appeal). Plaintiff, at no point, contested the validity of the judgment, instead, Plaintiff argued that the dismissal was unaccompanied by findings of fact, and issue preclusion did not apply. CF, p. 70. The trial court never considered whether the dismissal with prejudice obtained in the Prior Litigation was a valid judgment because Plaintiff never contested the validity. Instead, the trial court only addressed the finality of the judgment as this was the only issue raised by Plaintiff. CF, p. 83. The validity of the judgment was confessed by Plaintiff at the trial court, and the argument has not been preserved for appeal.

Plaintiff also failed to present argument regarding the identity of claims for relief in the Prior Litigation and the current matter. As above, presenting new arguments and theories for the first time on appeal is improper, and this Court should reject them. *See Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832

P.2d 718, 721 n.5 (Colo. 1992) ("Arguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal.").

As Plaintiff did not properly present argument to the trial court about the elements of claim preclusion, this Court should not consider the new arguments on appeal as the record was not sufficiently developed at the trial court level. *See Colorado Permanente Med. Grp., P.C. v. Evans*, 926 P.2d 1218, 1228 (Colo. 1996) ("At the trial court level, parties must be given an opportunity to present evidence and argue the factual as well as legal ramifications of that evidence.").

## C. Argument

### 1. The Doctrine of Claim Preclusion Bars Plaintiff's Action

Claim preclusion is an affirmative defense that can be presented to the trial court pursuant to a Rule 12 Motion to Dismiss. *Ruth v. Dep't of Highways*, 385 P.2d 410, 411-12 (Colo. 1963). If the trial court considers facts not contained in the pleadings, the motion is treated as a motion for summary judgment under Rule 56. *Id.* "Claim preclusion works to preclude the relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not." *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). "Notably, the doctrine not only bars litigation of issues actually decided, but also any issues that could have been raised in the first proceeding but were not." *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999).

Actual litigation is not required for claim preclusion to bar subsequent litigation. *Id*. In order for the doctrine to apply, four elements must be present: (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions. *Id.* Plaintiff does not dispute that there is identity of subject matter, and her Opening Brief only challenges elements 1, 3, and 4. As such, those elements will be addressed below.

**2. Finality of Prior Judgment**

Plaintiff's Opening Brief contends that the judgment obtained in the Prior Action is not a valid judgment as it did not comply with C.R.S. § 10-1-135(6)(a)(I). As stated above, Plaintiff has not preserved this argument for appeal as it was never raised with the trial court. At no point in Plaintiff's briefing of the issues did she challenge the validity of the judgment obtained in the Prior Action, or the validity of the Prior Litigation in general, and cannot now do so as neither the trial court nor Defendants were given an opportunity to address the validity of the judgment. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1188 (Colo.App. 2011) ("A party's mere opposition to its adversary's request, however, does not preserve all potential avenues for relief on appeal.").

However, assuming *arguendo* that Plaintiff successfully preserved this argument, the court had jurisdiction in the Prior Litigation, and the judgment obtained in the Prior Action was a final judgment not subject to collateral attack in

this action. *See Davidson Chevrolet, Inc. v. City & Cty. of Denver*, 330 P.2d 1116 (Colo. 1958) (irregular and erroneous judgments maintain their force and effect until modified by the original trial court, or until vacated pursuant to new trial procedures, or until reversed by a reviewing court in review proceedings; such judgments are subject only to direct attack and are not vulnerable to collateral attack). "[T]he county court shall have concurrent original jurisdiction with the district court in civil actions, suits, and proceedings in which the debt, damage, or value of the personal property claimed does not exceed fifteen thousand dollars[.]" C.R.S. § 13-6-104(1). "Under article VI, section 9, the original jurisdiction of Colorado's district courts extends to all civil, probate, and criminal cases, except as otherwise provided in the constitution." *In re Estate of Ongaro*, 998 P.2d 1097, 1103 (Colo. 2000). "While jurisdiction may be limited by the legislature, no statute will be held to so limit court power unless the limitation is explicit." *Matter of A. W.*, 637 P.2d 366, 374 (Colo. 1981).

In the present case, the statute in question contains no such language that would limit the jurisdiction of the court in the Prior Action. The applicable provision of C.R.S. § 10-1-135 provides as follows:

> (6)(a)(I) 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 or an insurer providing uninsured motorist coverage.

> (II) 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.

C.R.S. § 10-1-135

The limitations in section 10-1-135 apply **only** to a payer of benefits. There is no indication, express or implied, that the statute was intended to limit the jurisdiction of the court. While the judgment entered in the Prior Action may have been irregular or erroneous, this does not mean the judgment is invalid or void, merely voidable, and voidable judgments are not subject to collateral attack. *Winslow v. Williams*, 749 P.2d 433 (Colo.App. 1987). Collateral attack is an attempt to avoid, defeat, or evade a judgment, or to otherwise deny its force and effect, in some incidental proceeding not specifically provided by law. *See Brennan v. Grover*, 404 P.2d 544 (Colo. 1965). Plaintiff's assertions in this Court regarding the validity of the final judgment in the Prior Action are nothing more than an attempt to collaterally attack the final judgment. This is not permitted, and Plaintiff's arguments must fail.

Plaintiff urges this Court to find that Prior Action was not ripe for adjudication, and cites to *Feuquay v. Indus. Comm'n*, 111 P.2d 901 (Colo. 1941) in support of this argument. The *Feuquay* Court was addressing a statute that read in

pertinent part "No trial of an action for divorce shall be had until after the expiration of thirty days from the filing of the complaint with the clerk of the court." *Id*. at 902. The quoted language directly addressed the trial court's ability to conduct a trial by setting a statutory time period between the filing of a complaint and the commencement of trial. Because the statute in *Feuquay* directly instructed that no trial could begin before the expiration of 30 days, it explicitly limited the jurisdiction of a trial court to hear a class of matters before the expiration of the required waiting period. Section 10-1-135 contains no such language directed at a court, but instead the language is directed at payers of benefits. A statute which does not expressly contain jurisdictional language, or which does not limit jurisdiction by necessary implication, should not be read to limit jurisdiction. *See Lewis v. Taylor*, 375 P.3d 1205, 1207 n.2 (Colo. 2016) ("Under Colorado law, a statute is not jurisdictional unless it contains language expressly or by necessary implication limiting a court's jurisdiction.")

Plaintiff further argues that C.R.S. § 10-1-135(3)(a)(II) somehow creates separate and distinct causes of action for property damage and bodily injury because the statute states that it does not limit the right of an insurer to seek subrogation for property damage. Unfortunately, Plaintiff isolates selective language and fails to address subsection (3)(a)(I) which sets forth the limitation referenced in subsection (3)(a)(II). Subsection (3)(a)(I) sets forth that subrogation

is limited to cases in which the insured has been fully compensated. Section 10-1-135(3)(a)(I) and (II) read as follows:

> (3)(a)(I) 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. Any provision in a policy, contract, or benefit plan allowing or requiring reimbursement or subrogation in circumstances in which the injured party has not been fully compensated is void as against public policy.
> (II) This paragraph (a) does not limit the right of an insurer to seek reimbursement or subrogation to recover amounts paid for property damage or the right of an insurer providing uninsured or underinsured motorist coverage pursuant to section 10-4-609 to an injured party to pursue claims against an at-fault third party, and any amounts recovered by such insurer shall not be reduced pursuant to paragraph (c) of this subsection (3).

C.R.S. § 10-1-135

Quite clearly, subsection (II) refers to the limitation provided in section (I), requiring full compensation before an insurer may pursue subrogation. Read in context, there is no reasonable reading which would support an argument that the General Assembly intended to allow parties to split their causes of action. The language further does not provide any restrictions on a court's ability to enter judgment. Without language explicitly limiting a court's jurisdiction, any resulting judgment is valid, even if an erroneous or irregular judgment.

Far from limiting a court's jurisdiction to enter a judgment, section 10-1-135 instead likely creates a private tort remedy for an insurer's violation of its

provision. *See Allstate Ins. Co. v. Parfrey*, 830 P.2d 905, 911 (Colo. 1992) ("Our case law has indicated that the answer to whether a private tort remedy is available against a nongovernmental defendant for violating a statutory duty involves a consideration of three factors: whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment; whether the legislature intended to create, albeit implicitly, a private right of action; and whether an implied civil remedy would be consistent with the purposes of the legislative scheme."). Plaintiff is undisputedly within the class of persons intended to be protected. C.R.S § 10-1-135(1)(c) ("It is in the best interests of the citizens of this state to ensure that each insured injured party recovers full compensation for bodily injury caused by the act or omission of a third party[.]"). It is also apparent that the General Assembly impliedly intended to create a private civil remedy to redress an insurer's breach of their duty. In *Parfrey*, the Colorado Supreme Court addressed the following statutory language:

> Prior to the time the policy is issued or renewed, the insurer shall offer the named insured the right to obtain higher limits of uninsured motorist coverage in accordance with its rating plan and rules, but in no event shall the insurer be required to provide limits higher than the insured's bodily injury liability limits or one hundred thousand dollars per person and three hundred thousand dollars per accident, whichever is less.

*Parfrey*, 830 P.2d at 907 (citing C.R.S. § 10-4-609(2) (1987)).

The *Parfrey* Court found that the above-quoted language demonstrated a clear intent to create a private tort remedy because a private tort remedy would incentivize an insurer to comply with the statutory duty and would also further the purposes of the legislation. *Id*. at 911. The Court found the private tort remedy despite the statute in question being completely silent as to remedies for any violation by an insurer.

As it applies in this case, section 10-1-135 is similarly silent on the issue of a remedy if an insurer prematurely pursues subrogation to the detriment of their insured. However, it is clear from context of the statute that, to the extent an insurer harms their insured's ability to achieve full compensation, the insurer should bear that cost. The statute clearly sets forth a duty that an insurer "shall not bring a direct action for subrogation or reimbursement against a third party" except as provided by section 10-1-135(6)(a)(II). Foreclosing the right of the insured to seek relief from the insurer for a violation of their statutory duty would circumvent the purposes of the statute, namely, allowing an injured party to seek full compensation. *See Parfrey v. Allstate Ins. Co.*, 815 P.2d 959, 966 (Colo.App. 1991) ("To require [UM/UIM] coverage to be included in every policy unless expressly rejected by the insured, but then to foreclose the insured's right to relief for failure to provide this coverage, would, in all practicality, circumvent this statutorily imposed duty."). C.R.S. § 10-1-135 does not, at any point, place a duty

on defendants or courts to determine the exact nature of subrogation rights in a case or to verify that an insured has been fully compensated. That duty belongs to the insure/payer of benefits alone.

Finally, and contrary to Plaintiff's argument, the Prior Action was absolutely ripe for adjudication. A matter is ripe for adjudication when it does not rely on some contingent or future event. *See Bd. of Directors, Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 656 (Colo. 2005) ("Courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur."). Plaintiff's argument must be rejected as it was not adequately presented to the trial court and fails on the merits.

The judgment obtained in the Prior Action was a final judgment. The judgment was also a valid judgment as C.R.S. § 10-1-135 does not place a limit on a court's jurisdiction to hear subrogation cases. This element of claim preclusion is satisfied.

### 3. Identity of Claims for Relief

"Claim preclusion bars relitigating matters that already have been decided *as well as matters that could have been raised in a previous litigation but were not*." *Camp Bird Colorado, Inc. v. Bd. of Cty. Comm'rs of Cty. of Ouray*, 215 P.3d 1277, 1282 (Colo.App. 2009) (emphasis added). "[C]laim preclusion bars relitigation not

only of all claims actually decided, but of all claims that might have been decided if the claims are tied by the same injury." *Argus*, 109 P.3d at 609. [T]he same claim or cause of action requirement is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies." *Id.*

Plaintiff takes issue with the trial court's holding that the claims for relief in the Prior Action and the current action are identical. As with the validity of the judgment obtained in the Prior Action, Plaintiff does not cite with specificity where the argument was preserved for appeal, and the briefing at the trial court does not contain any argument challenging the identity of claims for relief. Defendants would reiterate the objections to arguments not properly preserved, as the issue was not adequately developed at the trial court level. As the issue was never presented, the trial was not given an opportunity to consider Plaintiff's arguments or Defendants' response.

Without waiving any objections, it is clear that this element of claim preclusion is satisfied. Contrary to the argument presented by Plaintiff, because Plaintiff and State Farm were in privity, she was under no restraint from asserting her additional damages in the Prior Action, and in fact, that would have been the proper forum to do so in order to avoid splitting the claim. Plaintiff argues that State Farm was limited in the damages it could request in the Prior Action, but she

fails to address Colorado's policy against splitting claims. *See Metzler v. James*, 19 P. 885, 888 (Colo. 1888) ("The law does not permit the splitting of a demand."). State Farm asserted Defendants' negligence caused them injury, and this is the exact cause of action or claim for relief asserted in the instant action. Plaintiff's focuses on the types of damages sought is improper. "[C]laim preclusion also bars a litigant from splitting claims into separate actions because once judgment is entered in an action it extinguishes the plaintiff's claim ... including all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Argus*, 109 P.3d at 609 (citing *Restatement (Second) of Judgments* § 24 (1982)). *See also Brown v. Mountain States Tel. & Tel. Co.*, 218 P.2d 1063, 1064 (Colo. 1950) ("Since the several items of damage alleged in the complaint in the instant case all resulted from, and grew out of, a single transaction or occurrence, there is in fact only one claim set out in the complaint.").

Plaintiff is correct that subrogation is rooted in principles of equity, but it can also occur pursuant to contract as a matter of law. *See Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 323 (Colo. 2009) ("Subrogation itself is a traditionally equitable remedy, which, by contract, can also occur at law."). "This type of contractual subrogation is known as conventional subrogation." *Id.* "Once an insurance company enjoys those rights, they stand in the shoes of the insured for

all legal purposes and may pursue **any** rights held by the insured subrogor." *Id.* (emphasis added). State Farm, as Plaintiff's subrogee and privy, was entitled to pursue any rights held by Plaintiff, and could have asserted the additional damages Plaintiff is claiming now.

Plaintiff's argument that she had no notice of the Prior Action is immaterial to the analysis. There is no authority holding that when a party contractually assigns part of a claim to another party, notice of litigation between the parties is required. The case of *McIntosh v. Romero* does not provide any support for this argument either. As identified by Plaintiff, *McIntosh* dealt with real party in interest issues, and did not address claim preclusion in any form. The fact that the defendant in *McIntosh* did not raise claim preclusion as an affirmative defense has no effect on the present case where claim preclusion was asserted as a defense and presented to the trial court. The holding from the *McIntosh* Court is limited; the trial court in *McIntosh* should not have dismissed the matter pursuant to C.R.C.P. 21, as nonjoinder of a party is not grounds for dismissal. *McIntosh v. Romero*, 513 P.2d 239, 240 (Colo.App. 1973). While some underlying facts from *McIntosh* are perhaps similar in some respects to facts in the present case, the legal theories addressed and the reasoning used by the *McIntosh* Court is not applicable in this case as Defendants have not filed a motion to dismiss for lack of real party in interest or for failure to join a necessary party.

The claims for relief in the Prior Action and the instant action are, in fact, identical. Negligence is the cause of action Asserted by Plaintiff, and was the cause of action asserted by State Farm in the Prior Action. The judgment obtained in the Prior Action extinguished all claims that either State Farm or Plaintiff could have asserted, and no additional remedies may be pursued for the December 29, 2014 accident.

**4. Privity**

"Privity between a party and a non-party 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." *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1115 (Colo.App. 2008). "Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is virtually represented in [the] litigation." *Id.* A nonparty is sufficiently represented for preclusion purposes if the interests of the nonparty and the interests of the prior litigant are aligned. *Id.* A division of this Court has previously held that an insured is in privity with their insurer when the insured subrogates their rights to the insurer. *See, Shelter Mut. Ins.Co. v. Vaughn*, 300 P.3d 998 (Colo.App. 2013) (citing *Reid v. Pyle*, 51 P.3d 1064 (Colo.App. 2002).

Contrary to the assertions of Plaintiff, the trial court correctly stated the requirements of privity, and found that Plaintiff's interest in establishing negligence of Defendants was sufficiently represented by State Farm. Plaintiff argues that the trial court required counsel for Defendants to obtain an affidavit from State Farm regarding Plaintiff's involvement with the Prior Action, but the affidavit was discussed when the trial court was considering whether Plaintiff had an opportunity to litigate the issues, a factor to be addressed in issue preclusion, but not for claim preclusion. R. Tr. May 16, 2016, p. 11, l. 13-16. In fact, the trial court's order admits that there was some initial confusion at the May 16, 2016 hearing. CF, p. 85. The trial court recognized that a full and fair opportunity to litigate is not an element of claim preclusion. CF, p. 85. Plaintiff asserts that this initial confusion creates a genuine issue of material fact sufficient to defeat a motion for summary judgment. However, because a full and fair opportunity to litigate is not an element of claim preclusion, any facts related to such opportunity cannot be material facts. *See Weisbart v. Agri Tech, Inc.*, 22 P.3d 954 (Colo.App. 2001) (holding that whether a fact is material or not depends upon the substantive legal basis for a claim). A material fact is a fact whose resolution will determine the outcome of a case. *See Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo.App. 1987). Because a full and fair opportunity to litigate is not an element of claim preclusion, the determination of any facts that would support it would

have no bearing on the determination of whether claim preclusion applies, and any such facts are not material facts.

Plaintiff also takes issue with the trial court's reliance on *Reid v. Pyle*, in which a division of this Court held that a subrogated insurer and the subrogor insured were in privity with each other. *Reid v. Pyle*, 51 P.3d at 1069. Plaintiff argues that the extent of the privity created by the subrogor-subrogee relationship should be limited in some manner, creating categories or classes of privity. Again, this argument was not presented to the trial court for consideration. Defendant objects to the novel argument being asserted for the first time on appeal.

As to the substance of the argument, Plaintiff seeks to define privity by the damages any given party seeks, and not to the relationship and interest of the parties in privity. No legal support is provided for this assertion as it appears that Plaintiff is arguing that claims **should** be split between multiple parties, with each party pursuing recovery in whatever forum it chooses and on its own time. This argument is nothing more than an attempt to avoid the well-settled legal principle that a party may not split its claims. "*Res judicata* bars relitigation of matters which could have been raised in the prior proceeding to prevent parties from splitting their cause of action and instituting separate suits for the same claim." *Shaoul v. Goodyear Tire & Rubber, Inc.*, 815 P.2d 953, 955 (Colo.App. 1990). "Consequently, a party may not bring a subsequent suit arising out of the same

transaction from which a previously adjudicated action arose." *Id*. The only transaction at issue is the December 29, 2014 accident, and Plaintiff and State Farm share a substantial identity of interests, even if they do not share an exact extent of interest.

The simple truth of the matter is that Plaintiff and State Farm had substantially similar interests in the Prior Action, and both Plaintiff and State Farm would need to establish the elements of negligence in order to recover damages. In order to recover damages for negligence, first it must be established that Defendant Richards breached a duty owed to Plaintiff. *See English v. Griffith*, 99 P.3d 90, 93 (Colo.App. 2004) ("The elements of a negligence claim are a legal duty, a breach of the duty, causation, and damages."). Plaintiff focuses her argument entirely on the extent of damages each party in privity may desire, but the identity of interest is not determined by the damages sought. The test for privity is whether the parties have a *substantial* identity of interests, not an *exact* identity of interests, and Plaintiff presents no argument that State Farm had anything approaching conflicting interests. In fact, Plaintiff's entire argument is that because State Farm did not pursue **all** damages Plaintiff might have desired, privity must be lacking. This argument is fundamentally incorrect as it focuses on the remedy sought as opposed to the relationship between the parties and the identity of their interest. If Plaintiff's proposal were correct, then a party would absolutely be permitted to

split up claims depending on the classification of damages sought. The lack of reference to any legal authority supporting this proposition is quite telling. Furthermore, while Plaintiff contends that an insurer can seek subrogation without collaboration with the insured under C.R.S. § 10-1-135, this argument must fail, as an insurer would have to prove the same necessary elements to recover in a subrogation claim. *Cont'l Divide Ins. Co. v. W. Skies Mgmt., Inc.*, 107 P.3d 1145, 1148 (Colo.App. 2004) (holding that a subrogee-insurer stands in the shoes of the subrogor-insured). In a subrogation action asserting negligence, this requires establishing the existence of a duty, breach of that duty, causation, and damages. *See Davenport v. Cmty. Corr. of Pikes Peak Region, Inc.*, 962 P.2d 963, 966 (Colo. 1998). In order to recover damages, the insurer would necessarily need to collaborate with their insured to establish the facts required to substantiate a claim for negligence.

Plaintiff and State Farm were absolutely in privity with each other when State Farm pursued its subrogation rights. Plaintiff does not dispute that *Reid v. Pyle*, 51 P.3d 1064 (Colo.App. 2002) explicitly held that an insured who subrogates rights to an insurer is in privity with the insurer. All elements of damage in this case arise from the same transaction or occurrence, which results in one indivisible claim for relief. *See Brown*, 218 P.2d at 1064 ("Since the several items of damage alleged in the complaint in the instant case all resulted from, and

grew out of, a single transaction or occurrence, there is in fact only one claim set out in the complaint."). The inevitable result of Plaintiff's proposal is that insurers and insureds may each pursue distinct litigation based on the same accident, wasting judicial resources, and subjecting defendants to multiple actions that may very well have differing liability determinations. The fundamental purposes of claim preclusion are to preserve judicial resources and prevent inconsistent decisions. *See Top Rail Ranch Estates, LLC v. Walker*, 327 P.3d 321, 331 (Colo.App. 2014) ("The doctrine is intended to promote judicial economy and to confirm the finality of judgments by preventing inconsistent decisions.") (internal citations omitted).

## CONCLUSION

The trial court correctly applied the doctrine of claim preclusion in this matter, and its judgment should be affirmed. Plaintiff should not be permitted to raise new legal theories on appeal that neither the trial court nor defendant had a chance to develop. The arguments not raised with the trial court should not be considered. However, even considering the new and novel theories, the arguments are insufficient to reverse the trial court's decision. Plaintiff argues that the court in the Prior Action could not have entered judgment as the matter was not ripe for adjudication, but does not provide any substantive analysis of the court's jurisdiction or what is required for a matter to be ripe for adjudication. Instead,

Plaintiff relies solely on a statute which by its own terms prohibited a court from holding a trial regarding a petition for divorce until a required number of days had passed, which is vastly different than the subrogation statute at issue here.

Plaintiff's assertion that the Prior Action and the instant action contain different claims for relief is similarly unpersuasive, and is a misapplication of case law. All damages arose from a single occurrence: the December 29, 2014 automobile accident, which is the injury for which relief is demanded. Plaintiff argues that State Farm claimed a different injury, but because a subrogor stands in the shoes of the subrogee, the claims asserted by State Farm necessarily **must** have been the same as the injury asserted here, otherwise State Farm acquired more rights than their insured possessed.

Finally, Plaintiff presents an argument against the existence of privity that directly contradicts the language of *Reid v. Pyle* and principles underlying claim preclusion. At its most fundamental level, Plaintiff's argument is that parties should be permitted to split a single cause of action, and allow multiple parties to pursue damages in separate actions. Without addressing the ramifications of multiple lawsuits based on the same occurrence, Plaintiff sets forth that an insured and an insurer do not have a substantial identity of interests, and supports this proposition with nothing more than the unsupported *ipse dixit* of counsel. Without addressing or recognizing the quasi-fiduciary relationship that can exist between

insurer and insured (*see State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 189 n.12 (Colo. 2004)), Plaintiff merely sets forth that when an insured has more damages than the insurer reimbursed, somehow the parties then have dissimilar interests. This is insufficient to abandon the doctrine of claim preclusion. "Strong public policy favors the finality of litigation." *Argus*, 97 P.3d at 218. "The function of [res judicata] is to avoid relitigation of the same claims or issues because of the cost imposed upon the parties by multiple lawsuits, the burden upon the judicial system, and the need for finality in the judicial process." *Foley Custom Homes, Inc. v. Flater*, 888 P.2d 363, 365 (Colo.App. 1994).

The purposes of claim preclusion require that Plaintiff be prohibited from splitting her single cause of action into multiple causes of action. Plaintiff's arguments fail on the merits, and she presents no compelling public policy argument which would warrant the creation of new law while ignoring foundational legal principles. The trial court correctly applied the law to the facts and arguments presented, and its order entering judgment in favor of Defendants should be affirmed.

DATED: February 6, 2017

Respectfully submitted,
*The duly signed original held in the file located at Tucker Holmes, P.C.*

By: */s/ Winslow R. Taylor*
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **ANSWER BRIEF** was Filed and Served Electronically via Colorado Courts E-Filing, the duly signed original held in the file located at Tucker Holmes, P.C., on February 6, 2017, copies addressed to:

David J. Furtado, Esq.
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*The duly signed original held in the file located at Tucker Holmes, P.C.*

*/s/ Kristina Johnson*
Kristina Johnson