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| Colorado Court of Appeals<br>2 East 14th Avenue<br>Denver, CO 80203 | |
| Appeal from:<br>Larimer County District Court<br>The Hon. Tom R. French<br>Civil Case No. 15CV30864 | |
| In the Case of:<br>Plaintiff/Petitioner: **SHANNON M. LEWIS,**<br>☒ Appellant or ☐ Appellee<br>&.<br>Defendant/Respondent: **CHARLES C. RICHARDS and THE CITY OF LOVELAND**<br>☐ Appellant or ☒ Appellee | ▲ FOR COURT USE ▲ |
| **Attorney for Appellant**<br>David J. Furtado, Atty. Reg. No. 28002<br>Furtado Law PC<br>3773 Cherry Creek North Drive, Suite 575<br>Denver, Colorado 80209<br>Phone: (303) 755-2929<br>Facsimile: (303) 309-6463<br>E-Mail: dfurtado@furtadolaw.com | Case No. **2016CA1210** |
| **Reply Brief** | |

1010-019

## Certificate of Compliance

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32. Including:

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Signature of the Attorney for Appellant

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## Argument

There are two recurring themes throughout Defendants-Appellees' ("Richards") Answer Brief that will be addressed first in this Reply Brief. Foremost is a procedural issue of whether Plaintiff-Appellant ("Lewis") adequately preserved the arguments made on appeal at the trial court level. The second is substantive and deals with whether the general rule against claim splitting precludes Lewis' opposition to the application of claim preclusion in the current action. As discussed in Part I of this Reply Brief, both arguments fail and should be rejected. In Part II of this Reply Brief, Lewis addresses the remainder of Richards' arguments in turn and concludes that they fail as well.

**PART I.**

***Objections to Lewis' Preservation of the Issue***

Richards objects to some of the arguments made by Lewis on the grounds that the arguments were inadequately preserved at the trial court level. Richards asserts that Lewis is barred on appeal from presenting any new legal theories or arguments not considered by the trial court.

Lewis maintains that (1) the legal issue of whether claim preclusion bars the present action was adequately preserved at the trial level; and (2) even if every argument was not brought before the District Court, this Court may still consider all the arguments presented in the Opening Brief.

This appeal arises from the District Court's granting of Richards' motion for summary judgment. The Colorado Supreme Court in *Roberts v. Am. Family Mut. Ins. Co.*, acknowledged that "[b]ecause a grant of summary judgment denies the party opposing the motion a right to trial, it is appropriate *only* where there is no role for the fact finder to play *and* where the controlling law entitles one party or the other to a judgment in its favor." 144 P.3d 546, 548 (Colo. 2006) (en banc) (emphases in original). Thus, even though summary judgment may be inappropriate where there remain genuine disputed issues of material fact, "it may also be the case that an order granting summary judgment is improper simply because undisputed facts demonstrate that the moving party is not entitled to a judgment in its favor at all." *Id.*

The Supreme Court noted that, generally, issues not presented to or raised in the trial court will not be considered on appeal. *Id.* at 549. But that "broad proposition derives from a number of specific policies and court rules," all of which are not at issue here. *Id.* Moreover, the "former rule of procedure, mandating that all appellate issues be preserved by presenting them to the trial court in a motion for new trial has long been abolished." *Id.* "Similarly, our extant rule replacing formal exceptions with an obligation to make known to the court, at the time of its ruling or order, any desired action or objection and the grounds therefore, applies only to court rulings as to which formal exception was formerly required." *Id.* at 550. As the Supreme Court noted,

formal exceptions were not required for summary judgments at the time of the abolition of the exception requirement. *Id.*

Therefore, "Appellate courts are…not limited to the constructions of controlling law relied upon by the lower courts or offered by the parties." *Id.* at 550-51. In cases "where a misreading of the controlling law leads a trial court to grant summary judgment in the face of undisputed facts to the contrary, a reviewing court cannot be constrained by the failure of a party to specifically identify the misreading and bring it to the trial court's attention." *Id.* at 551. Ultimately, this Court has the discretion to notice any error appearing of record, whether or not a party preserved its right to raise or discuss the error on appeal. *See Id.* at 550 (citing C.A.R. 1(d)). The issue in this case involves a question whether the previous litigation (the "Prior Action") between State Farm and Richards precludes Lewis from bringing the present action, a matter of law as to which no deference is to be shown by reviewing courts.

***Rule against claim splitting does not preclude Lewis' action for personal injuries***

Throughout its Answer Brief, Richards contends that Lewis attempts to impermissibly split her claims between the property damage subrogation claim brought by State Farm in the Prior Action and her personal injury damages sought in the present action. Specifically, Richards disputes the notion that section 10-1-135(3)(a), C.R.S.,

allows the two claims to be brought separately since both arise out of the same incident. Answer at 10.

The Restatement (Second) of Judgments § 26(d) provides an exception to the general rule concerning splitting where "the judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim." Since the statute may accurately be read as allowing the property damage subrogation to occur prior to a subsequent action on a personal injuries claim, Richards' concern over "claim splitting" is unfounded and should be disregarded.

The statute states 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 (emphasis added). The Supreme Court of Colorado has interpreted this subsection (II) as exempting insurers from the proscription in subsection (I). *See*

*Ferrellgas, Inc. v. Yeiser*, 247 P.3d 1022 n. 3 (Colo. 2011) ("We acknowledge that section 10-1-135(a), C.R.S. (2010) generally bars the settlement of subrogation claims before an injured party has been fully reimbursed by a tortfeasor…however, section 10-1-135(3)(a)(II) exempts property damage…from the bar on pre-reimbursement subrogation settlements"). Therefore, the statute can accurately be read as allowing the "splitting" of claims between an insured's personal injury and property damages, as is the case here.

In the Prior Action, State Farm brought its subrogation action for reimbursement of a property damage claim. Subsequently, in the present action, Lewis brought her personal injury claims. Under 10-1-135(3)(a), C.R.S. the "splitting" of these claims is allowed and the District Court erred in holding that State Farm's subrogation action precludes the present action.

**PART II.**

**1. Finality of the Judgment**

Richards misunderstands Lewis' argument regarding the finality of the first judgment. First, Richards argues that Lewis is collaterally attacking the validity of the judgment of the Prior Action—i.e., attempting to evade the force and effect of the judgment in an incidental proceeding. Answer at 8-9. Rather, Lewis stated that "[w]hile the judgment may [be] 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." Opening at 10-11. Lewis argued *hypothetically* that if the Prior Action *had been* final as to Lewis' personal injury claims, then it *would be* invalid. Lewis argued that it may well be the case that a valid final judgment was entered against State Farm in the Prior Action, as "State Farm may have appropriately brought its subrogation action against Richards for reimbursement." Opening at 12. However, the Prior Action did not concern, nor did that court consider, Lewis' personal injury claims when it dismissed the case with prejudice. Lewis' position is that the Prior Action could not, as a matter of law, have been brought in the first place because it would have violated section 10-1-135, C.R.S. and therefore would be invalid. Therefore, there is no "collateral attack" but rather a direct attack on the District Court's holding that interpreted the Prior Action as having precluded the present action.

Richards also argues that "the Prior Action was absolutely ripe for adjudication," as "it [did] not rely on some contingent or future event." Answer at 14. Here, when an insured has not pursued a claim against a tortfeasor, section 10-1-135(6)(a)(II), C.R.S. permits an insurer to bring a subrogation action within sixty days prior to the date on which the statute of limitations for that claim. Colo. Rev. Stat. Ann. § 10-1-135(6)(a)(II). Clearly, State Farm's subrogation action in which it (hypothetically) should have brought Lewis' personal injury claim, was contingent on a future event—i.e., State

Farm's (hypothetical personal injury claim reimbursement) case was contingent on either Lewis bringing suit first, or the passing of time until sixty days prior to the expiration of the statute of limitations. Here, State Farm's subrogation action was brought before Lewis brought suit and before sixty days prior to the statute of limitations' expiration. Therefore, the Prior Action could not have been ripe as to Lewis' personal injuries and the District Court erred in holding that the Prior Action precluded Lewis' claims in the present action.

**2. Identity of Claims for Relief**

Richards contends that "Plaintiff's focus[] on the types of damages sought is improper." Answer at 16. Richards first recites the correct legal authority, which states: "[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." Answer at 15 (citing *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 609 (Colo. 2005)). Richards fails, however, in its attempt to apply the facts to the rule. Richards states that "[t]he 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." Answer at 18. In sum, Richards, quite literally, cited the rule that the injury for which relief is demanded is what matters and not the legal theory, then took issue with Lewis' argument for

focusing on the injury for which relief is demanded, and concluded by saying the claims for relief between Lewis and State Farm are identical because both asserted the same legal theory—negligence. Richards' application of the rule to the facts is misguided and should be rejected.

### 3. Privity

Richards properly recites the rule that privity requires both a "substantial identity of interests" and a "working or functional relationship" in which the interest of the non-party are presented and protected by the party in the litigation. However, Richards improperly applies that rule to the facts at hand. Richards first argues that evidence of a "working or functional relationship" is immaterial because a "full and fair opportunity to litigate" is an element of issue preclusion. Lewis is not asking the Court to conflate those two elements as Richards does in its argument, though the two elements do appear to share some similarities. Rather, the issue is whether Lewis and State Farm had a working and functional relationship such that Lewis' interests were presented and protected. No substantive argument is made by Richards on this point and the Court should determine that in the absence of said relationship, no privity existed between State Farm and Lewis in the Prior Action with respect to the personal injury claim. Therefore, claim preclusion does not bar the present action for Lewis' personal injuries.

Regarding the "substantial identity of interests" element of privity, Richards argues that the damages sought do not define the interests of the parties. Answer at 20. Rather, Richards appears to believe that since State Farm and Lewis did not have "conflicting interests," their interests are substantially identical. Answer at 21. This argument is nonsensical. The damages are arguably the *only* measure of their respective interests in the lawsuits. Since State Farm could not, as a matter of law, have properly brought Lewis' personal injury claim in the Prior Action, there was no substantial identity of interests. Further, Richards cites no authority supporting its claim that when interests are not in conflict, the interests must be substantially identical.

For parties to share a substantial identity of interests, the non-party's interests must be so aligned with the prior litigant that the non-party is virtually represented in the litigation. *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1115 (Colo. App. 2008). Since State Farm did not, and could not, bring Lewis' personal injury claim in the Prior Action, Lewis was clearly not "virtually represented" in the Prior Action. Therefore, Lewis and State Farm did not share a substantial identity of interests in the Prior Action and claim preclusion does not bar the present action.

## Conclusion

For the reasons stated above and in Lewis' Opening Brief, the Court of Appeals should reverse the District Court's holding that the present action is barred under the doctrine of claim preclusion.

Dated: February 15, 2017

Respectfully submitted,

Signature: _____
Attorney for Appellant

## Certificate of Service

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF** was filed and electronically served via ICCES, on February 15, 2017 to the following:

Bradley D. Tucker, Esq.
Winslow R. Taylor, Esq.
Tucker Holmes, P.C.
Quebec Centre II, Suite 300
7400 Easy Caley Avenue
Centennial, Colorado 80111
Attorneys for Defendants-Appellees

Signature: _____
Attorney for Appellant