COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521 (970) 494-3500	DATE FILED: March 25, 2016 1:00 PM FILING ID: 2CB6B8FFC5893 CASE NUMBER: 2015CV30864 ▲ COURT USE ONLY ▲
Plaintiff: SHANNON LEWIS v. **Defendants**: CHARLES C. RICHARDS and THE CITY OF LOVELAND	Case Number: **2015CV30864** Div.: **5C**
Attorneys for Defendants Bradley D. Tucker, Esq., #22436 Winslow R. Taylor, Esq., #46898 TUCKER HOLMES, P.C. Quebec Centre II, Suite 300 7400 East Caley Avenue Centennial, CO 80111-6714 Phone: (303) 694-9300 Fax: (303) 694-9370 E-mail: bdt@tucker-holmes.com and wrt@tucker-holmes.com	
DEFENDANTS' OPPOSED MOTION FOR SUMMARY JUDGMENT	

The Defendants, Charles C. Richards and The City of Loveland, through their attorneys, Tucker Holmes, P.C., submit the following Motion for Summary Judgment pursuant to C.R.C.P. 12 and 56 and state the following in support:

CERTIFICATE OF CONFERRAL

Counsel for Defendant certifies that he discussed the subject matter of this Motion with counsel for Plaintiff, Mr. David Furtado. This Motion is opposed by Plaintiff.

STATEMENT OF FACTS

1. This action arises out of an automobile accident that occurred on or about December 29, 2014 in Loveland, Colorado.

2. On or about April 30, 2015, State Farm Mutual Automobile Insurance Company ("State Farm"), as subrogee of Darren L. Benter and Shannon Lewis, filed a Complaint in the County Court for Larimer County, Colorado, case number 2015C031448. **Exhibit A**.

3. The action filed by State Farm included a claim for relief to recover payments made by State Farm resulting from the December 29, 2014 accident that forms the basis of this lawsuit. **Exhibit A**.

4. The action filed by State Farm also included a claim to recover amounts expended by Darren Benter and Shannon Lewis paid to satisfy a deductible associated with their claim. **Exhibit A**.

5. Following an agreement between the parties, the action filed by State Farm was dismissed with prejudice on June 3, 2015. **Exhibit C**.

6. Plaintiff filed this action October 7, 2015 seeking to recover damages for the accident that occurred December 29, 2014 which also formed the basis of the State Farm lawsuit.

STANDARDS

As an affirmative defense, facts in support of claim preclusion must be affirmatively shown either by the evidence adduced at the trial, or by way of uncontroverted facts properly presented in a motion for summary judgment or by a motion to dismiss under Rule 12, where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under Rule 56. *Ruth v. Dep't of Highways*, 385 P.2d 410, 411-12 (Colo. 1963)

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238. (Colo. 1984). Summary judgment procedures are designed to pierce through the allegations in the pleadings and to avoid the time and expense of unnecessary trials. *Id.*; *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). Such motions are an integral part of the entire system that is designed to secure the just and speedy resolution of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

When a summary judgment motion is made and supported as provided under Rule 56, the opposing party may not rest upon the mere allegations or denials of the moving party's pleadings, but must "set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e); *see, also*, *Celotex*, 477 U.S. at 320; *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment." *FDIC v. Hulsey*, 22 F.3d 1472, 1481 (10th Cir. 1994). These facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324.

When a party moves for summary judgment on an issue upon which the party would not bear the burden of persuasion at trial, the moving party's initial burden of production may be satisfied by showing an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to establish a triable issue of fact, and

failure to meet that burden will result in summary judgment in favor of the moving party. *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 366 (Colo.App. 1996).

"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). The doctrine of claim preclusion serves important public and private concerns by "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003). "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). "Unlike issue preclusion, claim preclusion does not require actual 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.*

"When an insurer reimburses a victim for damages pursuant to a claim under the victim's insurance policy, the insurer enjoys a right to subrogation, under which he can stand in the victim's shoes and collect the reimbursed amount from the party responsible for the damages." *Ferrellgas, Inc. v. Yeiser*, 247 P.3d 1022, 1027 (Colo. 2011). Once an insurance company enjoys a right to subrogation, they "stand 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). A subrogee has the same burden of proving all elements necessary for recovery that an insured subrogor would have had to prove in the absence of subrogation. *Id.*

Claim preclusion bars a litigant from splitting claims into separate actions because once judgment is entered in an action it "extinguishes the plaintiff's claim ... includ[ing] 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 (quoting *Restatement (Second) of Judgments* § 24 (1982)). If parties to an action stipulate to dismissal with prejudice, the resulting judgment is final and the action is no longer within the jurisdiction of the court. *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo.App. 1992).

ARGUMENT

I. CLAIM PRECLUSION BARS THIS ACTION

As the alleged negligence of Charles Richards was the basis for State Farm's suit filed on April 17, 2015, all claims arising from the December 29, 2014 accident are precluded from being relitigated. Claim preclusion prohibits a party, or a party's privy, from litigating matters which were litigated as well as matters *that could have been litigated* in a prior action. *Argus*, 109 P.3d at 608. Each element necessary to support claim preclusion is satisfied, and this Court should grant judgment in favor of Defendants as matter of law.

a. The Prior Judgment is a Final Judgment

State Farm filed its action on April 17, 2015 (hereinafter, the "Prior Action") in the County Court for Larimer County, Colorado as subrogee of Darren L. Benter and Shannon Lewis. **Exhibit A**. While the claims are not specifically identified, the claim(s) for relief are negligence and/or negligence *per se* against Charles Richard and *respondeat superior* against Loveland. *Id.* The parties reached an agreement in that action, and State Farm filed a Notice of Dismissal with Prejudice. **Exhibit B**. The Court treated the Notice as a Motion to Dismiss with Prejudice, and upon granting, the matter was dismissed with prejudice. **Exhibit C**.

The dismissal entered by the Trial Court was an adjudication on the merits. *O'Done v. Shulman*, 238 P.2d 1117(Colo.1951). A dismissal with prejudice operates to resolve against the plaintiff any necessary facts pled by the plaintiff. *See, Groundwater Appropriators of South Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22 (Colo. 2003) (a voluntary dismissal with prejudice means the defendant is not confronted with the future risk of litigation) (citing *Moore's Federal Practice* § 41.40).

Clearly, by virtue of the dismissal with prejudice, the adjudication of the Prior Action was on the merits, and the first element necessary for claim preclusion is satisfied. Furthermore, all facts pled in the Prior Action are resolved against Plaintiff as the parties were in privity, as explained below.

b. The Subject Matter of Both Suits is Identical

In *Argus*, the Colorado Supreme Court considered this element, and concluded that where the litigation involved the same parcel of real property and the same agreements concerning the property, identity of subject matter was established. *Argus*, 109 P.3d 604. Here, the actions both concern the same motor vehicle accident and the same parties. All evidence necessary to adjudicate the matters arose from the accident and was available at the time State Farm filed the Prior Action. Therefore, the subject matter of the two suits is identical.

c. The Identity of the Claims for Relief Support Preclusion

The "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." *Argus*, 109 P.3d at 609. "In addition, claim 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 ... includ[ing] 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.'" *Id*. (citing Restatement (Second) of Judgments § 24 (1982)). "Thus, claim 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.

Plaintiff has identified Negligence against Charles Richards and *respondeat superior* against the City of Loveland as her claims for relief. These are the exact claims for relief State Farm alleged in the Prior Action and result from the same accident. The claims for relief, for all

intents and purposes, are identical. Any claim that is being presented here could have been brought in the Prior Action by Plaintiff or her privy. Allowing Plaintiff to continue this action would condone "splitting claims into separate actions," which the Colorado Supreme Court has explicitly prohibited. *Argus*, 109 P.3d at 609; *see also*, *Metzler v. James*, 19 P. 885, 888 (Colo. 1888) ("The law does not permit the splitting of a demand. ") ("The whole cause of action must be determined in one, and thus avoid a multiplicity of suits.").

d. Plaintiff is in Privity with State Farm

As State Farm acquired its rights to pursue litigation through subrogation, State Farm was in privity with Plaintiff when it filed the Prior Action. "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." *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1115 (Colo.App. 2008). A nonparty is sufficiently represented for preclusion purposes if the interests of the nonparty and the interests of the prior litigant are aligned. *Id.* The Court of Appeals has 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).

In the Prior Action, State Farm, as subrogee of Charles Benter and Shannon Lewis, stood in the shoes if its insureds and was permitted to attempt to recover from the responsible party. *See, Ferrellgas*, 247 P.3d 1022. The interests of Plaintiff and State Farm were sufficiently aligned; State Farm sought to recover damages from Defendants and Plaintiff Lewis is attempting the exact same action. State Farm undoubtedly had an interest in ensuring that Charles Richards and the City of Loveland be held accountable if the negligence of Charles Richards was the proximate cause of Plaintiff Lewis' damages. It cannot reasonably be argued that State Farm and Plaintiff Lewis have divergent interests; State Farm acquired its rights to pursue Defendants by and through Plaintiff Lewis and stood in her shoes in pursuing such action. Once a party obtains a cause of action from another party, through subrogation or assignment, it can be presumed that the party acquiring rights has adequate incentive to litigate the issues as they possess the same rights as the subrogor/assignor, and therefore a subrogee is in privity with the subrogor. *See, Ohio Dep't of Human Serv. v. Kozar*, 651 N.E.2d 1039, 1041 (Ohio Ct. App. 1995) ("A subrogee is in privity with its subrogor under the *res judicata* doctrine."); *DeCare v. Am. Fid. Fire Ins. Co.*, 360 N.W.2d 872 (Mich. Ct. App. 1984) (holding that subrogee was subrogor's privy for purposes of *res judicata*); 17 Couch on Insurance, § 239:36 (3d ed. 2000) (a judgment against the insured in his action is binding on the insurer and precludes it from maintaining a separate action against the tortfeasor, where the insurer paid on the insured's claims and became subrogated to the insured's claim).

The relationship between State Farm, as insurer, and Plaintiff, as insured, clearly demonstrate the parties were in privity with each other. State Farm, inarguably, had interests aligned with Plaintiff in the Prior Action. As such, the fourth element necessary for claim preclusion is satisfied.

CONCLUSION

The doctrines of claim preclusion and *res judicata* require that judgment be entered in favor of Defendants and this action be dismissed. Plaintiff's claims have previously been litigated by a party she was in a contractual relationship with and who prosecuted Plaintiff's action as subrogee. Plaintiff is impermissibly attempting to pursue the same claims that have already been litigated in the Prior Action. Allowing Plaintiff to continue this action would render the resolution in the Prior Action entirely meaningless and subject Defendants to additional litigation on the same subject matter. Defendants have resolved all issues arising out of the December 29, 2014 accident by virtue of the entry of judgment of dismissal with prejudice in the Prior Action. Defendants are entitled to judgment as a matter of law on all issues.

DATED: March 25, 2016

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

By: */s/ Winslow R. Taylor*
Bradley D. Tucker, Esq., #22436
Winslow R. Taylor, Esq., #46898
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was Filed and Served Electronically via ICCES, the duly signed original held in the file located at Tucker Holmes, P.C., on March 25, 2016, copies addressed to:

David J. Furtado, Esq.
Furtado Law, P.C.
3773 Cherry Creek North Drive, Ste. 575
Denver, CO 80209

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

/s/ Kristina Johnson
Kristina Johnson