

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO 201 La Porte Avenue, Ste. 100 Fort Collins, CO 80521 Telephone: (970) 494-3500</p>	
<p>Plaintiffs: SHANNON M. LEWIS,</p> <p>v.</p> <p>Defendants: CHARLES C. RICHARDS and THE CITY OF LOVELAND.</p>	◆ Court Use Only ◆
<p>David J. Furtado, Esq. Furtado Law PC 3773 Cherry Creek North Drive, Ste. 575 Denver, CO 80209 Phone Number: (303) 755-2929 Fax Number: (303) 309-6463 Email: dfurtado@furtadolaw.com Attorney Reg. #28002 Attorney for Plaintiff</p>	<p>Case No.: 2015CV30864 Courtroom/Div.: 5C</p>
<p>PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</p>	

COMES NOW, Plaintiff, by and through her attorney, David J. Furtado of Furtado Law PC, submits her response to Defendants' Motion for Summary and states the following in support:

1. Plaintiff does not dispute the statements made in paragraphs 1 through 6 of Defendant's Opposed Motion for Summary Judgment nor does she dispute the standard regarding the standard allowing for a case to be decided on a motion for summary judgment as discussed in page 2 of Defendant's Opposed Motion for Summary Judgment.

2. 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. *Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 323 (Colo. 2009) The right can arise pursuant to an express provision in the insurance policy -- a "conventional" subrogation right -- or under principals of equity -- an "equitable" subrogation right. *Id.* Regardless, once the subrogated insurer has resolved the claim, either through litigation or settlement, the insured is no longer entitled to recover the reimbursed portion of the loss from the responsible party. *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 subrogator. *Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 323 (Colo. 2009)

3. The doctrine of collateral estoppel (issue preclusion), mandates that the

final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. *City of Denver v. Consolidated Ditches Co.*, 807 P.2d 23, 32 (Colo. 1991) Collateral estoppel bars relitigation of an issue if: (1) the issue is identical to that actually and necessarily adjudicated in a prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity with a party in the proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *City & County of Denver v. Block 173 Assocs.*, 814 P.2d 824, 831 (Colo. 1991)

4. The doctrine of res judicata holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. *State Engineer v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989); *Pomeroy v. Waitkus*, 183 Colo. 344, 350, 517 P.2d 396, 399 (1974). Res judicata constitutes an absolute bar to subsequent actions only when both the prior and subsequent suits have "identity of subject matter, identity of cause of action, and identity of capacity in the persons for which or against whom the claim is made." *Smith Cattle, Inc.*, 780 P.2d at 549; *City of Westminster v. Church*, 167 Colo. 1, 9, 445 P.2d 52, 55 (1968) The "same claim or cause of action" requirement is determined by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claims relies. *Michaelson v. Michaelson*, 884 P.2d 695, 699 (Colo. 1994)

5. Defendants in this case contend that the doctrine of res judicata is available as a defense as Plaintiff was in privity with its insured in the subrogation case attached to Defendant's Opposed Motion for Summary Judgment as Exhibits A. The estoppel of a prior judgment may not be asserted against a party to a subsequent action unless he was a party, or in privity with a party to the prior litigation. However, it is not required that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation which finally determined the identical issue sought to be relitigated. *Brennan v. Grover*, 158 Colo. 66, 404 P.2d 544; *see also, Bernhard v. Bank of America National Trust & Savings Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892; *Coca-Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 172 A. 260; and *Annot.*, 31 A.L.R.3d 1044.

An explanation of the rule announced in these cases is found in *Bernhard v. Bank of America National Trust & Savings Ass'n.*, *supra* at 811:

"Many courts have stated the facile formula that the plea of res judicata is available only when there is privity and mutuality of estoppel. [citing cases] Under the requirement of privity, only the parties to the former judgment or their privies may take advantage of or be bound by it. A party in this connection is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment.' [citing cases] A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. [citing cases] The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. [citing cases]

6. The importance of privity is Defendants are attempting to argue to this Court that Plaintiff was in privity with her insurer in the case in which State Farm Mutual Automobile Insurance Company sued Defendants for the property damage payment it made to the plaintiff in this case. The plaintiff in this case was not directly interested in the subject matter of that litigation as she was already paid for her property damage loss

by her insurer, she had no rights to make her claims then that she is making in this case, she had no control of that proceeding, and she had no right to appeal the final outcome in that proceeding. Therefore, the doctrine of res judicata would not preclude this litigation of her case against the Defendants.

7. Furthermore, the doctrine of collateral estoppel bars re-litigation of an issue if: (1) the issue is identical to that actually and necessarily adjudicated in a prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity with a party in the proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. The plaintiff's causes of action and claims in this case meets none of these four factors and for collateral estoppel to apply the defendants would be required to demonstrate that all four factors are met.

8. As Plaintiff did not have (1) privity with State Farm Mutual Automobile Insurance Company; (2) is not litigating the issues adjudicated in the prior proceeding, (3) there was no final judgment on the merits; and (4) this plaintiff did not have a full and fair opportunity to litigate her case in the prior proceeding Defendants motion must be denied.

WHEREFORE, Plaintiff requests this Court deny Defendants' Opposed Motion for Summary Judgment.

Respectfully submitted this 14th day of April 2016.

FURTADO LAW PC

*This document was filed electronically pursuant to
C.R.C.P. 121 §1-26. The original signed document
is at Furtado Law PC.*

/s/David J. Furtado

David J. Furtado
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that on April 14, 2016 a true and accurate copy of foregoing was served on the other party by E-filing:

To: Bradley D. Tucker, Esq.
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/s/ David J. Furtado
David J. Furtado