COUNTY COURT, LARIMER COUNTY, COLORADO Court Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521 (970) 494-3500	▲ **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	
REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	

The Defendants, Charles C. Richards and The City of Loveland, through their attorneys, Tucker Holmes, P.C., submit the Reply in Support of Defendants' Motion for Summary Judgment, and state the following in support:

SUMMARY JUDGMENT STANDARDS

Whenever summary judgment is sought, the moving party bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he nonmoving party is entitled to all favorable inferences that reasonably may be drawn from the evidence, *unless the file and the affidavits accompanying the motion clearly disclose that there is no genuine issue of a material fact*." *Schold v. Sawyer*, 944 P.2d 683, 684 (Colo.App. 1997) (emphasis added).

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *See Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242 (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. The evidentiary materials in 56(c) include pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.

Council cannot raise genuine issue of material fact such as will preclude summary judgment simply by means of argument; contentions must be supported. *Bauer v. Sw. Denver Mental Health Ctr., Inc.*, 701 P.2d 114, 117 (Colo.App. 1985). Once the moving party makes a convincing showing that genuine issues are lacking, the opposing party must adduce specific facts, through affidavit or otherwise, demonstrating that a real controversy exists. *Victorio Realty Grp., Inc. v. Ironwood IX*, 713 P.2d 424, 425 (Colo.App. 1985). Statements contained in a party's brief that are not supported by an affidavit or otherwise attested under oath are not sufficient to satisfy this requirement. *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957 (Colo.App. 2015).

ARGUMENT

A. Claim Preclusion Bars Re-litigation of this Action

Plaintiff's Response to Defendants' Motion for Summary Judgment ("Response") identifies the doctrine of collateral estoppel as the legal theory upon which Defendants' Motion for Summary Judgment rests. While the terms collateral estoppel, issue preclusion, claim preclusion, and res judicata have been used interchangeably by Colorado courts, the Colorado Supreme Court analyzed the differences between the terms in *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.* Fearing potential confusion by litigants, the Supreme Court provided a detailed analysis of claim preclusion. *Argus*, 109 P.3d 604, 608 (Colo. 2005) ("In prior opinions, we have used the phrases interchangeably, however, as noted by the United States Supreme Court in *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, … use of the phrases 'res judicata' and 'collateral estoppel' can lead to confusion because 'res judicata' is commonly used as an overarching label for both claim and issue preclusion.").

In her Response, Plaintiff analyzes collateral estoppel and concludes the doctrine does not apply. However, collateral estoppel and claim preclusion are not interchangeable terms, and collateral estoppel is not the basis of Defendants' Motion for Summary Judgment. In *Migra*, the United States Supreme Court addressed some of this confusion:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers

> to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. **Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.** Claim preclusion therefore encompasses the law of merger and bar. This Court on more than one occasion has used the term "res judicata" in a narrow sense, so as to exclude issue preclusion or collateral estoppel. See *e.g., Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *Brown v. Felsen,* 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). When using that formulation, "res judicata" becomes virtually synonymous with "claim preclusion."

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n. 1 (1984) (internal citations omitted) (emphasis added)

The Colorado Supreme Court has similarly addressed the confusion. *See, Bebo Const. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 81 (Colo. 1999) ("Collateral estoppel is also, and more modernly, known as issue preclusion; *res judicata is referred to as claim preclusion*."). The differences between collateral estoppel and claim preclusion are further exemplified by the respective requirements. The doctrine of claim preclusion (res judicata) requires the presence of four elements: (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. *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999).

Collateral estoppel (issue preclusion) requires the presence of the following elements: (1) the issue is identical to an issue actually and necessarily adjudicated at a prior proceeding; (2) the party against whom estoppel is asserted is a party or in privity with a party in the prior 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 issue in the prior proceeding. *Cent. Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson*, 940 P.2d 1097, 1101 (Colo.App. 1997).

Plaintiff has not addressed all of the elements of claim preclusion identified in Defendants' Motion for Summary Judgment. Specifically, and most importantly, Plaintiff has failed to refute that this current action could have been raised in the prior action filed on April 17, 2015 ("Prior Action"). As the Colorado Supreme Court stated in *Cruz*, "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*, 984 P.2d at 1176. It is undeniable that this action could have been brought in the Prior Action as the underlying conduct, the December 29, 2014 accident, formed the basis of the Prior Action as well as this current action. The doctrine of collateral estoppel is not at issue currently as Defendants have not presented collateral estoppel as the basis for summary judgment. Defendants have not argued that the issues in the Prior Action and the current action are identical, and an analysis of collateral estoppel is unnecessary when judgment in favor of Defendants is proper under the doctrine of claim preclusion.

In an effort to avoid inundating the Court with repetitive arguments that have previously been presented, Defendants would respectfully request that the law and arguments presented in the Motion for Summary Judgment be incorporated by reference into this Reply.

B. Plaintiff's Privity with State Farm

Plaintiff has taken the position that she was not in privity with State Farm. This argument is presented without support or analysis, and merely consists of the arguments of counsel. A nonparty is sufficiently represented for preclusion purposes if the interests of the nonparty and the interests of the prior litigant are aligned. *Goldsworthy v. Am. Family Mut. Ins. Co.*, 209 P.3d 1108, 1115 (Colo.App. 2008). State Farm and Plaintiff have interests that are aligned; both parties have an interest in establishing Charles Richards was negligent and caused damages. Additionally, the Colorado Court of Appeals has explicitly held that subrogation by an insurer establishes privity. *Shelter Mut. Ins. Co. v. Vaughn*, 300 P.3d 998, 1002 (Colo.App. 2013) ("In *Reid,* a division of this court found that the plaintiff was in privity with his insurer because he subrogated his rights to his insurer."). Plaintiff has offered no authority disagreeing with the position that a subrogated insurer and its insured are in privity with one another. Plaintiff's reference to California authority does not alter existing Colorado case law on the subject of privity. The Court of Appeals has addressed the issue and determined that a subrogated insurer and its insured are in privity with each other, which is the exact situation Plaintiff and State Farm occupy.

State Farm's failure to request Plaintiff's participation in the Prior Action does not mean the parties were not in privity with each other, and any improper conduct by State Farm gives rise to a contractual or quasi-contractual action by Plaintiff against State Farm as her insurer. Much as an insured is not to impair the subrogation rights of the insurer, an insurer may not impair the ability of its insured to seek compensation. *See*, *e.g., Terranova v. State Farm Mut. Auto. Ins. Co.*, 800 P.2d 58, 62 (Colo. 1990) (holding that provisions of insurance policy enforceable only to the extent they do not impair ability of insured to gain compensation). Plaintiff may have a cause of action against State Farm for their conduct, but it cannot be argued that they were not in privity.

C. Issues Litigated in the Prior Action

As discussed above, the identity of the issues litigated in the Prior Action is not determinative in applying the doctrine of claim preclusion. Instead, "[c]laim 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). For Plaintiff to argue that she was unable to present her claims in the Prior Action is self-serving, without merit, and without reference to legal authority supporting the argument. Rule 56(c) requires evidence in the form of pleadings, depositions, answers to interrogatories, admissions on file, or affidavits. There is no acceptable evidence that Plaintiff was precluded from entering into the Prior Action, given that her cause of action accrued on the date of the accident and she believed Defendant Richards to be at fault in causing the accident. *See, Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo.App. 2007) ("Generally, personal injury claims…accrue on the date a person becomes aware of the injury and its cause, which is on the date of the accident."). Furthermore, Plaintiff was under no legal restraint from pursuing her claims, and Colorado law and policy requires that a cause of action not be split. *See, e.g., City of Pueblo v. Dye*, 96 P. 969, 971 (Colo. 1908) ("A creditor cannot split up his cause of action by assigning parts of it without the concurrence of the

debtor…"); *see also, Hernandez v. Woodard*, 873 P.2d 20, 21 (Colo.App. 1993) (holding the doctrine of *res judicata* will not apply if a party was under a legal restraint). Any failure to join all claims is attributable to Plaintiff and her privy, State Farm.

Plaintiff's position that she was not afforded a full and fair opportunity to litigate her case, while not being admitted by Defendants, is not an element of claim preclusion. One of the key differences between issue preclusion and claim preclusion is this very issue. "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra*, 465 U.S. at 77 n. 1. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Id.* While Plaintiff relies on the fact that she never litigated her case, it is not a relevant consideration; her case could have been advanced in the Prior Action.

The issues in this case could have been included with the Prior Action. Plaintiff's current claims were not under any legal restraint preventing her from joining the Prior Action. As Plaintiff could have joined in the prior action with her privy, the current matter could have been raised in previous litigation, and claim preclusion dictates judgment be entered in favor of Defendants.

D. The Dismissal with Prejudice is a Final Judgment

Plaintiff states, in ¶ 8 of her Response, that there was no final judgment on the merits in the Prior Action. Plaintiff's conclusion is contrary to well settled Colorado law. "Under Rule 41(b)(1), R.C.P.Colo., unless the order for dismissal otherwise specifies, a dismissal other than for lack of jurisdiction or for improper venue operates as an adjudication upon the merits." *O'Done v. Shulman*, 238 P.2d 1117, 1118 (Colo. 1951). Defendants would also reincorporate the analysis of this issue as presented in the Motion for Summary Judgment. Plaintiff has not presented any law arguing a contrary position, but has instead only put forth the *ipse dixit* of counsel. The Prior Action resulted in a dismissal with prejudice against all Defendants and "[s]uch a dismissal is considered an adjudication on the merits." *Brock v. Weidner*, 93 P.3d 576, 579 (Colo.App. 2004).

CONCLUSION

Plaintiff's claims are barred by application of the doctrine of claim preclusion. Plaintiff's Response is premised upon the doctrine of issue preclusion, identified as collateral estoppel, which is a separate and distinct doctrine under Colorado law and United States Supreme Court law. While collateral estoppel may arguably apply in this case, Defendants' Motion for Summary Judgment set forth claim preclusion as the basis for judgment in Defendants' favor. Defendants' have shown that each of the four elements necessary for claim preclusion are present: (1) the Prior Action resulted in a final judgment via dismissal with prejudice; (2) the subject matter of the two litigations is the same motor vehicle accident and damages stemming from said accident; (3) both the Prior Action and the current action are premised on a claim for negligence against Defendant Richards and vicarious liability against Defendant City of Loveland; and (4) State Farm and Plaintiff are in privity with each other as subrogor/subrogee

and insurer/insured. Plaintiff has not refuted the factual circumstances as presented by Defendants, and thus the issue before the Court is a matter of law. Defendants' have presented sufficient evidence to demonstrate they are entitled to judgment as a matter of law, and respectfully request the Court enter judgment in their favor.

WHEREFORE, Defendants' respectfully request this Court GRANT the Motion to Dismiss and enter judgment in favor of Defendants on all claims, and for any further relief as this Court may deem just and proper.

DATED: April 20, 2016

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **REPLY IN SUPPORT OF 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 April 20, 2016, 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/ Cheryll A. Paull
Cheryll A. Paull, Legal Assistant