

COUNTY COURT, LARIMER COUNTY, COLORADO  Court Address: 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521 (970) 494-3500	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<b>Plaintiff:</b> SHANNON LEWIS  v.  <b>Defendants:</b> CHARLES C. RICHARDS and THE CITY OF LOVELAND	Case Number: <b>2015CV30864</b>  Div.: <b>5C</b>
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: <a href="mailto:bdt@tucker-holmes.com">bdt@tucker-holmes.com</a> and <a href="mailto:wrt@tucker-holmes.com">wrt@tucker-holmes.com</a>	
<p style="text-align: center;"><b>SUPPLEMENT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</b></p>	

The Defendants, Charles C. Richards and The City of Loveland, through their attorneys, Tucker Holmes, P.C., submit this Supplement to Defendants' Motion for Summary Judgment and state the following:

1. At the Case Management Conference on May 16, 2016, the Court inquired as to Plaintiff Lewis' involvement in the lawsuit filed by State Farm, as Plaintiff's subrogee, on April 18, 2015. Undersigned counsel had no knowledge of Ms. Lewis' involvement in the prior action. The Court invited undersigned counsel to submit an affidavit from State Farm showing the extent of Ms. Lewis' knowledge or involvement in the prior action, and gave a deadline of one week to supplement the previously filed Motion for Summary Judgment.

2. Undersigned has been unable to secure State Farm's cooperation in any regard, and no affidavit will be forthcoming absent a subpoena. Compliance with the Court's deadline, therefore, will not be possible under the time provided by C.R.C.P. 45 for deposition testimony or production of documents.

3. Aside from Ms. Lewis' knowledge or involvement in the prior action, the Court also raised questions about the privity issue between State Farm, as subrogee, and Ms. Lewis, as subrogor. This issue was addressed in Defendants' Reply in Support of the Motion for Summary Judgment, which is hereby incorporated by reference. Additionally, Defendants would refer to *Reid v. Pyle*, in which the Court of Appeals stated "Plaintiff's rights to the claim were subrogated to his insurance carrier, and therefore, plaintiff was in privity with his insurer in the prior proceeding." *Reid v. Pyle*, 51 P.3d 1064, 1069 (Colo.App. 2002). Therefore, as to whether privity exists between subrogee and subrogor, Defendants' believe the Court of Appeals reasoning in *Reid* is applicable and controlling in this case.

4. The Court also inquired into State Farm or Ms. Lewis' full and fair opportunity to litigate the issues. Defendants have previously not addressed the issue as the Colorado Supreme Court has held it is not an element of claim preclusion (*res judicata*). "Preclusion occurs under two theories: collateral estoppel (issue preclusion) and *res judicata* (claim preclusion)." *Carpenter v. Young By & Through Young*, 773 P.2d 561, n.5 565 (Colo. 1989). "Issue preclusion prevents relitigation of a factual or legal matter that was previously litigated and decided." *Id.* (citing *Wright v. People*, 690 P.2d 1257 (Colo.1984)). "Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit between the same parties or their privies." *Id.* (citing *CF & I Steel Corp. v. Charnes*, 637 P.2d 324 (Colo.1981)). As Ms. Lewis' claims could have been joined in the prior action, claim preclusion would bar relitigation even if the claims were not actually addressed. Ms. Lewis' full and fair opportunity to litigate is not an element of claim preclusion, and Defendants do not believe it is necessary to consider in the determination of whether claim preclusion applies.

5. The Court also inquired as to Ms. Lewis' ability to bring her action with the State Farm action. In support of Defendants' position that Ms. Lewis could have brought her claims in the State Farm action, C.R.S. § 10-1-135(6)(a)(II) provides that "[n]othing in this subparagraph (II) precludes an injured party from pursuing a claim against the at-fault third party after the payer of benefits brings a direct action pursuant to this subparagraph (II), and the payer of benefits' right to reimbursement or subrogation is limited by subsection (3) of this section." By statute, Ms. Lewis was permitted to join her action with the action filed by State Farm.

6. C.R.S. § 10-1-135(6)(a)(I) provides that an insurer may not bring a direct action for subrogation, except as provided in subsection (a)(II). Subsection (a)(II) provides that "[i]f 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." As stated in Defendants' Reply, State Farm's improper behavior does not negate the determination that State Farm and Ms. Lewis were in privity. Instead, the actions of State Farm may allow Ms. Lewis to pursue recovery from State Farm due to their impairment of her recovery rights.

7. Given that Ms. Lewis was in privity with State Farm, her claims could have, and should have, been brought in the action filed by State Farm. Ms. Lewis was specifically permitted by statute to bring her claims as part of the State Farm action. Furthermore, any impropriety by State Farm in bringing their action prior to 60 days before the statute of

limitations was set to run is attributable to State Farm alone. Defendants should not bear the costs of defending another action due to State Farm's litigation choices. As such, Defendants respectfully request this Court enter an order GRANTING the Motion for Summary Judgment, and entering judgment in favor of Defendants on all claims, and allow Ms. Lewis to pursue recovery from State Farm.

DATED: May 23, 2016

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

By: /s/ Winslow R. Taylor, III  
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 **SUPPLEMENT TO 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 May 23, 2016, copies addressed to:

David J. Furtado, Esq.  
Margaret S. O'Neill, 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/ Cheryll A. Paull  
Cheryll A. Paull, Legal Assistant