DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO 201 La Porte Avenue, Ste. 100 Fort Collins, CO 80521 Telephone: (970) 494-3500	`
Plaintiffs: SHANNON M. LEWIS, **v.** **Defendants: CHARLES C. RICHARDS and THE CITY OF LOVELAND.**	▲ Court Use Only ▲
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	Case No.: 2015CV30864 Courtroom/Div.: 5C

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PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANTS' SUPPLEMENT TO ITS MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

1. The issue Defendants are raising is whether or not an insurer, in pursuing its subrogation claim against a Defendant, must ensure that its insured's interests are also protected by advising its insured to join in the lawsuit for his/her bodily injury claim, or by litigating its insured's bodily injury claim at the time its subrogation claim is filed.

2. In this case State Farm Mutual Automobile Insurance Company filed a lawsuit on April 16, 2015 against the identical Defendants named in this case for payment of $1,818.60 for collision benefits it paid to its insureds, Darren L. Benter and Shannon Lewis. State Farm Mutual Automobile Insurance Company voluntarily dismissed its lawsuit against these same Defendants on June 3, 2015. There was no hearing or trial regarding the merits of State Farm Automobile Insurance Company's case against these Defendants.

3. During the Case Management Conference that occurred on May 16, 2016 this Court requested that Defendants submit an affidavit from State Farm Mutual Automobile Insurance Company showing the extent of Ms. Lewis' knowledge or involvement in the subrogation action. There was no affidavit attached to Defendants' motion.

4. The vehicle involved that was the subject to the subrogation for property damage paid by State Farm Mutual Automobile Insurance Company was owed by Darren Benter, not Shannon Lewis. Beverly Perry of the risk management company assigned to this case sent a letter to Darren Benter dated January 14, 2015 stating in the second paragraph as follows: "I have completed the investigation on the above mentioned loss. Based upon the information provided, I determined our member is not responsible for the damage to your vehicle." Please see Plaintiff's Exhibit 1 the letter from Beverly Perry addressed to Darren Benter dated January 14, 2015 attached hereto.

LEGAL ANALYSIS

5. 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) Each of these elements must be satisfied in order for collateral estoppels to apply. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001)

6. Issue preclusion is inapplicable to an issue dismissed in earlier litigation without factual findings or conclusions of law. *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 327 (1955)

7. A dismissal of an action unaccompanied by findings does not preclude subsequent litigation involving a different cause of action. *See Connaghan v. Maxus Exploration Co*., 5 F.3d 1363 (10th Cir. 1993)

8. 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)

9. In order for the doctrine of res judicata to apply a party is required to be a party in a prior action or be in privity with or in control of the litigation so as to be considered a party under the doctrine of res judicata. *See Murphy v. Northern Colorado Grain Co., Inc*., 30 Colo. App. 21, 488 P.2d 103 (1971)

10. The Defendants in this case seem to be confused as to the term privity and

how one is said to be in privity with someone. The issue of privity within the doctrine of res judicata was addressed in the Colorado Court of opinion case *Murphy v. Northern Colorado Grain Co.*, 488 P.2d 103 (Colo.,App.1971) In *Murphy*, the plaintiff contended that the doctrine of res judicata was not available as a defense because Northern Colorado Grain Company, the party asserting the plea, was not a *party* to the initial case, nor in privity with a party to that action. The Colorado Court of Appeals stated that "although support is found in older cases for this contention that res judicata is available only to parties to the prior action and their privies, and that the estoppel of the judgment must be mutual, the more modern cases do not so limit the estoppel created by a final judgment. "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.

11. The Colorado Court of Appeals stated in that an explanation of the rule regarding privity announced in these cases is found in *Bernhard v. Bank of America National Trust & Savings Ass'n., supra*: *Murphy at 23* The court went on to quote from *Bernhard* as follows:

"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]

"The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. [citing cases] He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. . . . There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. [citation] Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. [citing cases] The commentators are almost unanimously in accord. [citing law journals]"

12. The actual language in *Bernhard* to include the citations the California Supreme Court relied on is as follows:

"The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. (See cases cited in 2 Freeman, Judgments (5th ed.) sec. 627; 2 Black, Judgments (2d ed.), sec. 504; 34 C. J. 742 et seq.; 15 Cal. Jur. 97.) The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. (See cases cited in 38 Yale L. J. 299; 2 Freeman, Judgments (5th ed.), sec. 626; 15 Cal. Jur. 98.) The doctrine also serves to protect persons from being twice vexed for the same cause. (*Ibid*.) It must, however, conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard. (*Coca Cola Co.* v. *Pepsi Cola Co*., 36 Del. 124 [172 Atl. 260]. See cases cited in 24 Am. and Eng. Encyc. (2d ed.), 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872.)"

"Many courts have stated the facile formula that the plea of res judicata is available only when there is privity and mutuality of estoppel. (See cases cited in 2 Black, Judgments (2d. ed.), secs. 534, 548, 549; 1 Freeman, Judgments (5th ed.), secs. 407, 428; 35 Yale L. J. 607, 608; 34 C. J. 973, 988.) Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. (*Ibid*.) 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." (1 Greenleaf, Evidence (15th ed.), sec. 523. See cases cited in 2 Black, Judgments (2d ed.), sec. 534; 15 R. C. L. 1009; 9 Va. L. Reg. (N.S.) 241, 242; 15 Cal. Jur. 190; 34 C. J. 992.) 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. (See cases cited in 2 Black, Judgments (2d ed.), sec. 549; 35 Yale L. J. 607, 608; 34 C. J. 973, 1010, 1012; 15 R. C. L. 1016.) The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. (See cases cited in 2 Black, Judgments (2d ed.), sec. 534, 548; 1 Freeman, Judgments (5th ed.), sec. 428; 35 Yale L. J. 607, 608; 34 C. J. 988; 15 R. C. L. 956.)"

13. The case cited as controlling by Defendants in their supplemental brief, *Reid v. Pyle*, 51 P. 3d 1064 (Colo.App. 2002) is not controlling as that case only analyzes and addresses the doctrine of collateral estoppel. It does not analyze privity and what the term actually means and requires regarding claim preclusion as in the cases cited above.

14. Furthermore, a Colorado statute, C.R.S. § 10-1-135, entitled Reimbursement for benefits – limitations – notice – definitions - legislative declaration (1)(c) states that it is in the best interests of the citizens of this state to ensure that each insured injured party recovers full compensation for bodily injury caused by the act or omission of a third party, and that such compensation is not diminished by repayment, reimbursement, or subrogation rights of the payer of benefits. This statute codifies the fact that the state legislature wishes to ensure citizens' bodily injury claims are not affected by subrogation from insurers.

15. C.R.S. § 10-1-135(2)(b) defines injured party as a person who has sustained bodily injury as the result of the cat or omission of a third party, has pursued a personal injury or similar claim against the third party and has received benefits as a policyholder.

16. Benefits are defined in C.R.S. § 10-1-135(2)(a) to include benefits of any kind provided to or on behalf on an injured party.

17. C.R.S. § 10-1-135(3)(a)(I) states that "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" and further states in subparagraph (II) that "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)."

18. C.R.S. § 10-1-135(6)(a)(I) states that "Except as provided in subparagraph (II) of this paragraph (a), a payer of benefits shall not bring a direct action for subrogation or reimbursement of benefits against a third party allegedly at fault for the injury to the injured party or an insurer providing uninsured motorist coverage". Subparagraph (II) of paragraph (a) states "If 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. Nothing 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".

19. Although State Farm Mutual Automobile Insurance Company filed its lawsuit against the Defendants in its action prior to the sixty day period discussed in C.R.S. § 10-1-135(6)(a)(II), the remedy counsel for the Defendants is seeking for as they characterize it "State Farm's improper behavior" is contrary to the public policy reasons C.R.S. § 10-1-135 was enacted, to protect injured parties, such as Shannon Lewis, the plaintiff in this matter.

ARGUMENT

20. Defendants knew of Ms. Lewis bodily injury claim on January 6, 2015 and knew that Ms. Lewis was represented by her own counsel. Please see a copy of the letter sent to Beverly Perry of CIRSA dated January 6, 2015 attached as Exhibit 2 hereto.

21. Although State Farm Mutual Automobile Insurance Company filed its lawsuit to collect what it had paid in property damage, Ms. Lewis did not own the vehicle on which a property damage claim was paid.

22. Ms. Lewis was not involved in the litigation in which State Farm Mutual Automobile Insurance Company wished to be reimbursed for property damage it paid for Darren Benter's property damage, was not interested in the subject matter as she was not going to derive a benefit from State Farm's litigation with Defendants, had no right to control the proceeding, had no right to appeal from a judgment if there was one, and would not have acquired an interest in the judgment if there was a judgment, therefore, the doctrine of res judicata would not preclude this litigation of her case against the Defendants.

23. As there was no final judgment in the prior proceeding, an analysis of doctrine of collateral estoppels is not necessary, but Plaintiff contends that none of the four factors is determining whether or not the doctrine of collateral estoppels applies are met.

24. The Defendants argument that State Farm filed its subrogation case too early and that there improper behavior negates C.R.S. § 10-1-135(6)(a)(II) which directly states that "nothing in this subparagraph (II) precludes an injured party from pursuing a claim against the at-fault third party after the payer of benefits brings an action pursuant to this subparagraph (II)…" is without merit as the purpose of C.R.S. § 10-1-135 was to protect injured persons so that they could be compensated for bodily injury.

25. Furthermore, the affidavit the Court specifically requested from State Farm was not attached to Defendant's supplemental response that would have addressed what the court thought was important, whether or not Ms. Lewis had a full and fair opportunity to litigate her claims in the litigation that State Farm initiated was not attached. Furthermore, State Farm was subrogating against Defendants for property damage paid on a vehicle Ms. Lewis did not own.

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

Respectfully submitted this 31st day of May 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 May 31, 2016 a true and accurate copy of foregoing was served on the other party by E-filing:

To: Bradley D. Tucker, Esq.
Winslow R. Taylor, Esq.
TUCKER HOLMES, P.C.
Quebec Centre II, Suite 300
7400 East Caley Avenue
Centennial, CO 80111

/s/ David J. Furtado
David J. Furtado