District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: June 20, 2016 12:30 PM CASE NUMBER: 2015CV30864
Plaintiff: Shannon M. Lewis v. **Defendant:** Charles C. Richards and The City of Loveland	**▲ COURT USE ONLY ▲**
	Case No.: 2015CV30864 Courtroom: 5C

Order Granting Defendants' Motion for Summary Judgment

This matter comes before the Court on Defendants', Charles C. Richards and The City of Loveland ("Defendants"), Opposed Motion for Summary Judgment filed on March 25, 2016. Plaintiff, Shannon Lewis ("Plaintiff'), filed her Response to Defendants' Motion for Summary Judgment on April 14, 2016. Defendants filed their Reply in Support of Defendants' Motion for Summary Judgment on April 20, 2016. Defendants then filed a Supplement to Defendants' Motion for Summary Judgment filed on May 23, 2016, apparently predicated on questions and requests concerning the motion for summary judgment which were made by the Court at the Case Management Conference on May 16, 2016. Plaintiff then filed a Response to Defendants' Supplement to Its Motion for Summary Judgment on May 31, 2016. The Court, having

reviewed the pleadings, the file, and applicable authorities, hereby finds and enters the following **ORDER**:

I. Background

This action involves a motor vehicle accident which took place on December 29, 2014, on East Eisenhower Boulevard in Loveland, Colorado. In her Complaint, Plaintiff states Defendant, Richard Charles, ("Defendant Charles") attempted to make an illegal right turn onto North Madison Avenue from the middle lane of East Eisenhower and struck Plaintiff's vehicle. As a result, Plaintiff's vehicle was forced onto the curb and struck a stationary pole. Plaintiff asserts a claim of negligence against Defendant Charles for his action in causing the motor vehicle accident and a claim of respondeat superior against the City of Loveland ("the City") because Defendant Charles was employed by the City and acting in the course of his employment when the accident occurred.

Following the motor vehicle accident, State Farm Mutual Automobile Insurance Company ("State Farm") made payments to Plaintiff for claims arising from the accident. Additionally, Plaintiff was required to pay a deductible to State Farm as a result of these claims. On April 30, 2015, State Farm filed a Complaint in the County Court for Larimer County against Richard Charles and the City of Loveland. The Complaint included a subrogation claim for relief to recover payments made by State Farm and a claim to recover the amounts expended by Plaintiff and Darren Benter to pay their deductibles. More specifically, State Farm brought a claim, as subrogee for Darren L. Benter and

Plaintiff, against Defendants to recover payments made by State Farm resulting from the December 29, 2014 collision, which collision is also the basis of this lawsuit. The county court action included a claim to recover deductibles paid by Darren Benter and Plaintiff associated with the collision. On June 3, 2015, the parties agreed to dismiss the county court action with prejudice, and the county court subsequently dismissed that action with prejudice. Plaintiff then filed this action on October 7, 2015, seeking damages from the motor vehicle collision that occurred in December, 2014.

In their Opposed Motion for Summary Judgment ("Motion"), Defendants argue Plaintiff's suit is barred on the basis of res judicata or 'claim preclusion'. Defendants assert that the county court's order dismissing that case with prejudice was a final judgment in the previous action, the subject matter of both actions is identical, the identity of the claims for relief in both actions are identical, and that Plaintiff is in privity with State Farm. Based on these assertions, Defendants argue summary judgment is appropriate because of claim preclusion.

In response, Plaintiff relies on the doctrine of collateral estoppel or 'issue preclusion' to oppose summary judgment. Plaintiff states that summary judgment should not be granted under issue preclusion because Plaintiff was not in privity with State Farm in the first action, the issues presented here were not litigated in the first action, there was no final judgment on the merits, and Plaintiff did not have a full and fair opportunity to litigate her case in the county court action.

II. Standard of Review

A. Summary Judgment

Summary judgment is permitted when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984). The initial burden to show that there is no genuine issue of material fact lies with the moving party. *Mancuso v. United Bank of Pueblo*, 818 P.2d732, 736 (Colo. 1991). The burden then shifts to the nonmoving party who must, "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The inferences drawn from the underlying facts, "must be viewed in the light most favorable to the party opposing the motion." *Id*.

B. Claim Preclusion

Claim preclusion is an affirmative defense and operates as a bar to a second action on the same claims litigated in a prior proceeding in Colorado, pursuant to Colorado Rule of Civil Procedure 8(c). *Ruth v. Department of Highways*, 385 P.2d 410, 411 (Colo. 1963). "To sustain the defense, facts in support of it 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…" *Id*. In order to establish claim

preclusion, the moving party must prove 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). 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. *See Block 173 Assocs.,* 814 P.2d at 830; *Pomeroy,* 183 Colo. at 350, 517 P.2d at 399. Unlike issue preclusion, claim preclusion does not require actual litigation. *See S.O.V.,* 914 P.2d at 358-59.

III. Law and Analysis

A. Claim Preclusion or Issue Preclusion?

Determining whether claim preclusion or issue preclusion should apply to any given case can be a confusing endeavor; trial courts and appellate courts have struggled with the differences and struggled with articulating the differences. The Colorado Supreme Court has noted that is has used the terms collateral estoppel and res judicata interchangeably. *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604 (Colo. 2005). However, the Court began using the terms claim preclusion and issue preclusion to clarify the meaning intended as, "'res judicata,' which is commonly used as an overarching label for both claim and issue preclusion." *Id*. Prior to the use of the terms claim preclusion and issue preclusion, the United States Supreme Court noted that, "[r]es judicata is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.'" *Migra v. Warren City School District*

Board of Education, 465 U.S. 75, 77 n. 1 (1984). The Supreme Court then defined the two terms:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided….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*.

"The doctrine of issue preclusion bars relitigation of an issue that was already litigated and decided in a previous proceeding." *Goldsworthy v. American Family Mut. Ins. Co.*, 209 P.3d 1108, 1113 (Colo. App. 2008). Issue preclusion applies if the issues presented in a previous case are identical to those in the subsequent action. *See Goldsworthy*, 209 P.3d at 1114. An issue is considered to have been actually litigated when "it is properly raised, submitted for determination, and determined." *Id*. at 1115. An issue is legally raised when one of the parties, "by appropriate pleading, asserts a claim or cause of action against the other." *Michaelson v. Michaelson*, 884 P.2d 695, 701 (Colo. 1994). As the issue must be actually litigated, "issue preclusion does not apply to matters that could have been, but were not, litigated in a prior proceeding." *Goldsworthy*, 209 P.3d at 1115.

In contrast, "[c]laim 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 Public Highway Authority*, 109 P.3d 604,608 (Colo. 2005). . Claim preclusion "protects litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy." *Id.* In determining if claim preclusion applies, courts consider whether the

same injury for which relief is requested is the basis of each action, rather than the legal theory asserted by a party. *See Argus Real Estate, Inc.*, 109 P.2d at 609. The application of claim preclusion also prevents a litigant from "splitting claims into separate actions." *Id*. Thus, claim preclusion not only bars relitigation of claims actually decided, but also of claims that might have been brought in an earlier action. *Id*.

In this case, Plaintiff brings claims of negligence and respondeat superior based on the same injuries that were the subject of the earlier county court suit brought by State Farm. State Farm, in the county court case, and Plaintiff, in this case, sought relief for the injuries and damages suffered as the result of the motor vehicle accident on December 29, 2014, and to that extent, they had similar interests. The identity of interests is further shown by the fact that Plaintiff could have brought her claims either through State Farm or on her own accord in the previous action. Based on the fact that Plaintiff's claims in this case arose from the same injury as the county court suit, the fact that Plaintiff and State Farm had similar interests in both cases, and Plaintiff's ability to bring these claims in the prior action, the Court finds that the doctrine of claim preclusion governs this motion for summary judgment.

The Court finds that issue preclusion is not applicable here. The question raised by Defendant is not whether an issue, actually adjudicated in the county court case is precluded here, or whether Plaintiff had a full and fair opportunity to litigate the issues in the county court case. Rather, the issue is whether the final judgment in the county

court case should preclude re-litigation of claims in this case which have an identity of subject matter, and the parties are identical or are in privity.

B. Factors of Claim Preclusion

For claim preclusion to apply, four elements must be established: "(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*, 984 P.2d at 1176.

Regarding the first element, "claim preclusion does not require actual litigation." *Id*. The county court case resulted in an agreed upon dismissal with prejudice. An agreed upon dismissal is considered to be a final judgment, "[i]f…the parties to an action stipulate to entry of judgment of dismissal with prejudice, the resulting judgment is final…" *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992). In fact, upon entry of the dismissal with prejudice, "neither the action nor the parties remain within the jurisdiction of the court." *Id*. Further, "[a] dismissal with prejudice does not circumvent the limitations of res judicata…The plaintiff is barred from future litigation of the same issues to the same extent as would be the case if he had proceeded to adverse judgment." *Groundwater Appropriators of South Platte River Basin, Inc. v. City of Boulder*, 73 P.2d 22, 25 (Colo. 2003). In this case, State Farm and Defendants entered into an agreed upon dismissal with prejudice of the previous action. This was a final judgment and, therefore, the first element of claim preclusion is satisfied.

As to the second element to establish claim preclusion, i.e., the identity of subject matter, the claims asserted by Plaintiff in the current action involve the same December

29, 2014 motor vehicle accident as involved in the county court action. Therefore, the identity of the subject matter is identical and the second element is satisfied.

The third element for showing claim preclusion is identity of claims for relief. The determination of whether the same claims for relief is satisfied 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 Real Estate, Inc.*, 109 P.3d at 609 As previously stated, the injury forming the basis for each cause of action is the December 29, 2014 accident. The relief sought in both actions is a judgment against Defendants for the amounts paid out by State Farm and the deductible paid by Plaintiff as a result of Plaintiff's damages from the accident. Plaintiff is seeking the same relief (judgment for costs of injuries suffered) and the same redress for the same alleged injury (damages caused by the accident). Thus, the third element of claim preclusion is satisfied.

The final element to consider is whether Plaintiff was in privity with State Farm during the first 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*, 209 P.3d at 1115. When dealing with a subrogation relationship, the Colorado Court of Appeals has previously held that a plaintiff was in privity with his insurer when he subrogated his rights to his insurer. *Reid v. Pyle*, 51 P.3d 1064, 1069 (Colo. App. 2002); In that case, the Court of Appeals considered whether a plaintiff was in privity with an insurance carrier in a prior proceeding for purposes of determining claim preclusion in a subsequent action. The Court of Appeals

found “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.”

In the subrogation relationship, the subrogated insurance company “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). In Exhibit A attached to Defendants’ Motion, the caption in the county court action reads, “State Farm Mutual Automobile Insurance Company a/s/o Darren L Benter and Shannon Lewis.” State Farm’s use of “a/s/o” denotes State Farm was functioning as the subrogee of Plaintiff and Darren Benter. As the subrogee, State Farm stood in the shoes of Plaintiff, asserted her claims, and recovered damages resulting from the December 29, 2014 accident. The Court finds that Plaintiff was in privity with State Farm in the county court case, so Plaintiff is no longer entitled to recover the reimbursed portion of her losses from Defendants.

This Court asked questions of counsel for Defendant at the May 16, 2016 case management conference that conflated the elements of issue preclusion and claim preclusion. The Court apologizes for that confusion, and finds that Plaintiff’s full and fair opportunity to litigate in the county court action is not an element of claim preclusion. As such, those questions are not relevant to the determination of the Motion.

The Court’s concern with whether Plaintiff had a fair opportunity to litigate her claims in the county court action is addressed by C.R.S. 10-1-135(6)(a)(I) and (II). Those provisions limit the ability of an insurer to bring a direct action for subrogation to

situations where an injured party has not brought an action against a third party allegedly at fault until 60 days prior to the date that the applicable statute of limitations for the claim expires. These provisions protect the ability of an injured insured to bring claims before its insurance company seeks subrogation. Plus, 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." This provision also protects the ability of Plaintiff to obtain full compensation before the insurer brings a subrogation claim.

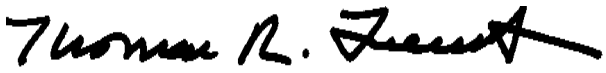
This Court does not determine whether State Farm acted improperly, as to Plaintiff, in bringing a subrogation action against Defendants when it did. The Court refers to the provisions in C.R.S. 10-1-135 to illustrate that, as an equitable consideration, Plaintiff has statutory protections which insure her right to full recovery, and to illustrate that a finding of privity does not mean that Plaintiff was or is without recourse in her efforts to obtain full and fair compensation here. Plaintiff may contend that State Farm impaired her rights to recovery under the statutes above detailed.

Because the four elements of claim preclusion are satisfied, there is no genuine issue of material fact to be determined and Plaintiff cannot properly proceed on her claims against Defendants.

IV. Conclusion

Claim preclusion is the applicable doctrine because of the final judgment in the county court action, because of the same underlying injury in both cases, because Plaintiff was in privity with State Farm, and because Plaintiff had the ability to bring these claims in the first action. And, all of the elements of claim preclusion are satisfied, such that summary judgment is proper, and Plaintiff cannot properly proceed on her claims against Defendants. Thus, Defendants' Opposed Motion for Summary Judgment is GRANTED, and this action is dismissed as to both Defendants.

SO ORDERED: June 20, 2016.



Thomas R. French
District Court Judge