COLORADO COURT OF APPEALS 2 East 14th Ave. Denver, Colorado 80203 APPEAL FROM: Trial Court: El Paso County District Court Trial Judge: The Honorable Thomas Kane Trial Court Case: No. 2021CV31761	DATE FILED: May 11, 2023 5:02 PM FILING ID: D66848CDBFCED CASE NUMBER: 2022CA2086
ADAM STRANGE **Plaintiff-Appellant,** v. GA HC REIT LIBERTY CRCC, LLC **Defendant-Appellee.**	▲ **COURT USE ONLY** ▲
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PLAINTIFF-APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

This brief contains 4,168 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellants, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ *Cameron O. Hunter*
Signature of attorney or party

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I. STATEMENT OF THE ISSUES

A. Whether the trial court erred in holding that Plaintiff was not permitted to claim damages for areas covered by Workers' Compensation when no actual settlement agreement was reached between Defendant and the Workers' Compensation carrier.

II. STATEMENT OF THE CASE

A. Statement of the Facts

This case concerns an underlying October 31, 2019 incident in which Plaintiff was carrying a ladder for Defendant into a building located on Defendant's premises. (CF, p. 3.) As Plaintiff was approaching the building, and was crossing through the loading dock area, he slipped and fell on a patch of ice, sustaining injuries, damages, and losses. (CF, p. 3.)

Plaintiff ultimately filed suit against Defendant in this matter on October 29, 2021, alleging premises liability. (CF, pp. 1-5.)

B. Procedural History

After Plaintiff filed suit in this matter, Plaintiff and Defendant each filed pretrial motions in limine addressing the Workers' Compensation benefits that Plaintiff had received as a result of his on-the-job injuries stemming from his fall.

On September 2, 2022, Defendant filed its Motion in Limine Re: Damages Paid by Workers' Compensation Carrier. (CF, pp. 91-95.) In that Motion, Defendant

argued that Plaintiff should be barred from claiming those benefits covered by Workers' Compensation at trial in this matter, such as past medical expenses or wage loss, because Workers' Compensation had not assigned the rights to those claims to Plaintiff. (CF, pp. 91-95.)

That same day, Plaintiff filed his Motion in Limine Re: Workers' Compensation Coverage, arguing that while he was planning to claim those damages that had been covered by Workers' Compensation at trial in this matter, the benefits Workers' Compensation paid out, and any posttrial ramifications of those benefits, should be precluded at trial. (CF, pp. 70-77.)

On September 13, 2022, Defendant also filed its Motion to Strike Plaintiff's Wage Loss Claim, arguing that Plaintiff's claim was untimely, and reasserting its arguing that Plaintiff should not be permitted to claim those damages at trial because Workers' Compensation had not assigned the right to that claim to Plaintiff. (CF, pp. 154-158.)

After both sides had filed Responses to these Motions, on September 20, 2022 the trial court issued its rulings. (CF, pp. 276, 280, 301.) Somewhat confusingly, the Court's Order on Defendant's Motion indicated that the Motion was granted, and stated that "Plaintiff will not be allowed to introduce the amounts paid by the workers' compensation carrier." (CF, p. 301.) However, Defendant's request was not simply that Plaintiff be prohibited from introducing the amounts paid by the

Workers' Compensation carrier at trial, but more broadly that Plaintiff be prohibited from claiming those matters covered by Workers' Compensation, such as medical expenses and wage loss, at trial at all.

The Court's Order on Plaintiff's Motion was also confusing, as the Court ruled that Plaintiff's Motion was to be granted in part, and that "Plaintiff will not be allowed to submit a claim for reimbursement of those expenses because he does not own the claim and apparently any claim from the worker's compensation carrier has been made and resolved." (CF, p. 280.) This analysis was of course confusing because it was analysis that would have made more sense in the Order on Defendant's Motion.

The Court's Order on Defendant's Motion to Strike Plaintiff's Wage Loss Claim indicated that the Motion was denied, as the timing of the claim was harmless. (CF, p. 276.) However, the Order did not address the Workers' Compensation argument. (CF, p. 276.)

Seeing the discrepancy of these Orders, on September 21, 2022 Defendant filed its Motion for Clarification, arguing that there was an "inconsistency" between these rulings. (CF, pp. 353-356.)

And on September 22, 2022, Plaintiff filed his Motion for Reconsideration of Court Orders Re: Workers' Compensation Coverage, urging the trial court to review its erroneous rulings. (CF, pp. 362-375.)

Just four days later, on September 26, 2022, before Defendant could file a response to Plaintiff's Motion for Reconsideration, the trial court issued an Order simply indicating that Plaintiff's Motion was denied. (CF, p. 403.)

And after Plaintiff had filed a Response to Defendant's Motion for Clarification, on September 30, 2022 the trial court ruled on that Motion, holding that Plaintiff was allowed to seek only those damages at trial that had not been "extinguished by the subrogation rights of the workers' compensation carrier," and thus that Plaintiff was only permitted to claim "noneconomic damages and economic damages not fully covered by workers' compensation such as lost wages, physical impairment, disfigurement and noncovered medical services." (CF, p. 577.)

Following these rulings, the parties proceeded to trial on October 10, 2022, after which the jury found in Plaintiff's favor, awarding him $40,000 in noneconomic damages and $100,000 in physical impairment and disfigurement. (CF, pp. 649-650.)

III. SUMMARY OF THE ARGUMENT

This Court should reverse the ruling of the trial court prohibiting Plaintiff from claiming at trial the damages covered by Workers' Compensation for three reasons. First, if a Workers' Compensation carrier does not intervene in an injured employee's action against a negligent third party, or otherwise independently resolve its claims with the negligent third party, the injured employee remains free to pursue

the full amount of his damages from the negligent third party at trial. Because the Workers' Compensation carrier in this case did not intervene or otherwise resolve its claims with Defendant in this case, Plaintiff should have been permitted to claim his full damages at trial.

Second, the "assignment" contemplated in the Workers' Compensation Act does not function as an assignment normally does, but instead grants a Workers' Compensation carrier the rights of a subrogee. There is no legal authority that states that a Workers' Compensation carrier must assign rights back to an injured employee before that employee can assert his full damages against a negligent third party at trial. Because the Workers' Compensation carrier in this case was not required to assign any rights to Plaintiff, Plaintiff should have been permitted to claim his full damages at trial.

And third, while a Workers' Compensation carrier may "extinguish" the rights of an injured employee to pursue those damages the carrier covered by intervening in an action or by otherwise resolving its claims with the negligent third party, the term "resolve," in this context, means either litigation or settlement. Because a settlement agreement is a contract, there can be no settlement unless there has been an offer, acceptance of that offer, and consideration in support of that agreement. Because here there was no litigation between the Workers' Compensation carrier, and no binding settlement agreement, the claims of the Workers' Compensation

carrier were not resolved between it and Defendant, and Plaintiff should have been permitted to claim his full damages at trial.

IV. ARGUMENT

A. The Trial Court Erred in Determining that Plaintiff was Not Permitted to Claim Damages for Areas Covered by Workers' Compensation When No Actual Settlement Agreement was Reached Between Defendant and the Workers' Compensation Carrier.

1. Standard of Review

Generally, appellate courts review rulings on motions in limine under an abuse of discretion standard. *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265, 272 (Colo. App. 2006). However, "[t]he substance rather than the name or denomination given a pleading determines its character and sufficiency." *State ex. rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 12-13 (Colo. App. 2009)(applying de novo review to motion in limine that sought to dismiss claim). And questions of law are generally reviewed de novo. *Klingsheim v. Cordell*, 379 P.3d 270, 273 (Colo. 2016).

More specifically, questions of statutory interpretation and interpretation of Colorado case law are reviewed de novo. *Welch v. George*, 19 P.3d 675, 677 (Colo. 2000)(statutes); *Lindauer v. Williams Prod. RMT Co.*, 381 P.3d 378, 381 (Colo. App. 2016)(case law). Because the present appeal concerns the interpretation of Colorado statutes and case law, the applicable standard of review is that of de novo review.

2. Preservation for Appeal

Plaintiff raised the arguments contained herein in his Response to Defendant's Motion in Limine Re: Damages Paid by Workers' Compensation Carrier and in his Motion for Reconsideration of Court Orders Re: Workers' Compensation Coverage. (CF, pp. 228-235, 362-375.)

3. Employee's Right to Recovery

The law has long been that an injured employee retains the full right to pursue all of his damages against a negligent third party, as long as the Workers' Compensation carrier does not initiate its own cause of action against the third party. In the case of *Tate v. Indus. Claim Appeals Office*, the Colorado Supreme Court explained that "[w]hen the employment-related injury is caused by a third party tortfeasor, the injured employee has several alternatives." 815 P.2d 15, 17 (Colo. 1991).

Beginning with the first of these, the court states: "First, the employee may elect to receive workers' compensation benefits. The workers' compensation insurer then is subrogated to the employee's rights against the tortfeasor for the amount of the compensation for which the insurer is liable." *Id.* In other words, if an injured employee elects to receive Workers' Compensation benefits, he may simply elect to receive those benefits, and opt not to pursue the negligent third party, leaving that to

the Workers' Compensation carrier, which may initiate its own action against the third party.

"Second, the employee may elect to receive workers' compensation benefits and also sue the tortfeasor for damages in excess of the amount of compensation benefits for which the insurer is liable. Again, the insurer is subrogated to the employee's rights against the tortfeasor for the amount of the insurer's workers' compensation liability, so both the employee and the insurer have claims against the tortfeasor." *Id.* In other words, an injured employee may, after electing to receive Workers' Compensation benefits, then choose to bring an action against the negligent third party, but to only seek those damages "in excess" of those covered by Workers' Compensation (which would include noneconomic damages, for example). Under this scenario, the injured worker would pursue the negligent third party only for those damages not covered by Workers' Compensation, and Workers' Compensation would then have the opportunity to initiate its own action against the negligent third party for those damages it did cover on behalf of the injured worker.

"Third, the employee may elect to pursue an action against the tortfeasor." *Id.* The Supreme Court then states: "In general practice, these remedies have been combined by allowing the injured employee to file for workers' compensation benefits and sue the tortfeasor *for the full amount of damages allowable in court*. If the employee recovers from the tortfeasor, the employee must *reimburse the insurer*

for any benefits paid." *Id.* (emphasis added). The court summarizes: "Under this approach the employee receives interim workers' compensation benefits, recovers from the tortfeasor, reimburses the insurer for the interim benefits…, and keeps the remainder as excess damages." *Id.*

In other words, the injured party may elect to pursue the negligent third party for the full amount of his damages, after which, Workers' Compensation may enforce its right of subrogation against the injured worker directly, and the employee is required to honor that right of subrogation by reimbursing the Workers' Compensation carrier.

The *Tate* court explains that under this system, "[t]he employee has an incentive to recover *the entire damages* from the tortfeasor," and that "[t]his system shifts ultimate liability to the tortfeasor, the party responsible for the employee's injuries." *Id.* at 17-18 (emphasis added). This is analogous to reasoning underlying the collateral source rule in Colorado, which allows an injured plaintiff to seek the full amount of his billed medical expenses, even though his health insurance company retains rights of subrogation for those amounts it paid. The rationale for this rule is that:

> If either party is to receive a windfall, the rule awards it to the injured plaintiff who was wise enough or fortunate enough to secure compensation from an independent source, and not to the tortfeasor, who has done nothing to provide the compensation and seeks only to take advantage of third-party benefits obtained by the plaintiff.

Volunteers of America Colorado Branch v. Gardenswartz, 242 P.3d 1080, 1083 (Colo. 2010); *see also Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo. 1992)(holding that "[t]he purpose of the collateral source rule was to prevent the defendant from receiving credit for such compensation and thereby reduce the amount payable as damages to the injured party").

Echoing the options enumerated by the *Tate* court, the Colorado Supreme Court in *Delta Air Lines, Inc. v. Scholle* explains the options available to the Workers' Compensation carrier, stating:

> An insurer's subrogation right gives it several options when an on-the-job injury was caused by a third party and the insurer has paid workers' compensation benefits. The insurer may choose to wait and see whether the employee pursues tort claims against the third party for the injury. If the employee does pursue a claim, the insurer is entitled (though not required) to intervene in the suit. The insurer may also choose to go ahead and pursue its subrogation claim against the third party before the injured employee has filed any claim.

484 P.3d 695, 700 (Colo. 2021).

Here too the court explains that the right to claim the full damages rests with the injured worker, and that these rights are extinguished only if the Workers' Compensation carrier elects to pursue its rights independently. Defendant's offered interpretation on this matter simply makes no sense. If a plaintiff was immediately divested of the right to make a claim for the damages covered by Workers' Compensation, how could the plaintiff ever bring an action for those damages into which the Workers' Compensation carrier could intervene? Such a scenario could

never occur. Yet this situation is explicitly contemplated by the Workers' Compensation statutes, which expressly permit a Workers' Compensation carrier to intervene in an injured employee's claim against a negligent third party. C.R.S. § 8-41-203(1)(e)(II). Such intervention would only be possible if the injured employee were permitted to claim the damages covered by Workers' Compensation in the first place.

Moreover, the primary holding of *Scholle* is that an injured employee may not seek damages for benefits furnished by the Workers' Compensation carrier where the carrier has already made, and resolved, a claim against the negligent third party, and therefore the injured employee's rights to those damages are "extinguished." 484 P.3d at 702. Again, it would make little sense to say that these rights were "extinguished" unless they existed in the first place.

Additionally, Colorado courts have repeatedly held that "our Workmen's Compensation Act is not to shield third-party tort-feasors from liability for damages resulting from their negligence." *Frohlick Crane Service, Inc. v. Mack*, 510 P.2d 891, 893 (Colo. 1973) *citing Wilson v. Smith*, 130 P.2d 1053 (Colo. 1942). *See also Kirkham v. Hickerson Bros. Truck Co.*, 485 P.2d 513 (Colo. App. 1971) *citing Riss & Co. v. Anderson*, 114 P.2d 278 (Colo. 1941)("[t]he statute…is not designed to relieve a third party from the consequences of injuries to another negligently

inflicted)". However this is precisely how Defendant now attempts to exploit the Workers' Compensation Act.

The law simply could not be clearer. If the Workers' Compensation carrier elects not to pursue its own claim against the negligent third party, the injured plaintiff is permitted to claim the "full amount of damages," after which the plaintiff owes reimbursement to the Workers' Compensation carrier.

Thus, because the Workers' Compensation carrier in this matter, Sedgwick, did not pursue its own claim against the negligent third party, Plaintiff retained the complete right to seek his "entire damages" from Defendant, and then would have been required simply to answer to the Workers' Compensation carrier following any recovery he received, and the trial court erred in ruling to the contrary.

4. Assignment of Rights

In the underlying matter, Defendant argued to the trial court that the Workers' Compensation carrier did not "assign" the rights to this claim to Plaintiff and therefore that Plaintiff could not claim damages for medical expenses and wage loss at trial. (CF, pp. 92-94.)

While the Workers' Compensation Act does state that "the payment of compensation pursuant to [the WCA] shall operate as and be an assignment of the cause of action against such other person to [the Workers' Compensation carrier]" (C.R.S. § 8-41-203(b)), nowhere in the Workers' Compensation Act do the statutes

indicate that a Workers' Compensation carrier must assign the rights back to the injured plaintiff in order for the plaintiff to pursue the negligent third party for these damages. This is similarly absent from all the cases that address this subject.

Defendant is trading on multiple possible meanings of the term "assignment." While that term can refer to "[t]he transfer of rights or property" (ASSIGNMENT, Black's Law Dictionary (11th ed. 2019)), that is not what it means in this context. The *Scholle* court explains:

> Under the [Workers' Compensation Act], if an employee injured by a third party elects to receive workers' compensation benefits, the workers' compensation insurer receives an "assignment" of the "cause of action" that the injured employee might have against the third party. *This "assignment," however, is not an outright ownership interest in the injury employee's claim. Instead, the WCA is clear that an insurer, having paid benefits, is subrogated to the underlying claims the employee would have against a third-party tortfeasor*.

484 P.3d 695, 699-700 (Colo. 2021)(emphasis added) *citing* C.R.S. § 8-41-203(1)(b), (c), (f).

The *Scholle* court thus explains that an "assignment" in this context does not carry with it the typical connotations of that term; rather, the rights conferred on Workers' Compensation function as rights of "subrogation." *Id.* The *Scholle* court elaborates that "[s]ubrogation is the substitution of one person for another; that is, one person is *allowed* to stand in the shoes of another and assert that person's rights against the defendant." *Id.* at 700 (emphasis added).

This distinction is drawn even more clearly in the case of *Kirkham v. Hickerson Bros. Truck Co.* The court in that case states that courts are to "give effect, if possible, to every word phrase and clause" in a statute. *Kirkham*, 485 P.2d at 515. However, the court explains:

> [T]he principal problem [with the Workers' Compensation Act] arises from the two sentences in the…statute which provide on one hand that[] the awarding of compensation shall operate as and be an assignment of the cause of that action, against a third party, to the commission or the insurance carrier liable for the payment, and on the other hand, that the carrier shall be subrogated to the rights of the injured employee against said third party to the extent of the compensation awarded.

Id. As the *Kirkham* court then succinctly notes: "Assignment and subrogation are not one and the same." *Id.* at 516. The court distinguishes between the two by quoting 6 C.J.S. Assignments § 2b(12), which states:

> Assignment is distinguished from subrogation in that subrogation is an act of the law predicated on payment of the debt or claim, and operates only to secure contribution and indemnity, whereas assignment is an act of the parties depending generally on intention, and contemplates a continuation of and transfers the whole claim or debt.

Id. The court then cites the holding of the Colorado Supreme court case of *Riss & Co. v. Anderson*:

> The statute…is not designed to relieve a third party from the consequences of injuries to another negligently inflicted, but merely affords a means of adjusting rights as between the injured employee and his employer. The purpose of the statute is merely to prescribe how a fund resulting from the payment of damages by one who negligently caused them shall be divided between the employee and his employer.

Id.

The *Kirkham* court clarifies that "the statute in question does not deprive the employee of his cause of action but *only limits his right to retain* so much of the recovery as may exceed the compensation paid to him or for which his employer or the employer's insurance carrier is liable." *Id.* (emphasis added). Finally, the court concludes that the rights of the Workers' Compensation carrier are rights of subrogation, not assignment, holding:

> The 'assignment,' being purely statutory is subject to the limitations imposed by the statute creating it. The statute expressly limits the rights of the carrier to those of a subrogee and indemnifies it only to the extent of the compensation for which it is liable as defined in the act. In order to protect the rights of the subrogee, the employee is prohibited from settling his claim against the third party for less than the compensation due without the consent of the carrier…. No other limitations are imposed on the employee by the statute, and this being so, the courts cannot insert them.

Id. at 517.

Thus, the application of the Workers' Compensation Act does not result in a full transfer of rights from the injured party to the Workers' Compensation carrier upon the injured party's receipt of Workers' Compensation benefits, which transfer could only be reversed by Workers' Compensation assigning the rights back to the injured party. Rather, the Act results in a subrogation right on the part of the Workers' Compensation carrier, which, as the *Scholle* court explained, means that the Workers' Compensation carrier is "allowed" to step into the shoes of the injured party, but is "not required" to do so. And where, as here, the Workers' Compensation

carrier elects not to do so, the rights to "full damages" of the plaintiff remain with the plaintiff, and the trial court erred in ruling to the contrary.

5. Resolution

Defendant also argued to the trial court that the attorney representing Workers' Compensation in the underlying case indicated that Workers' Compensation would not be pursuing the matter and that this meant that Workers' Compensation had "resolved" its claim in a manner that extinguishes Plaintiff's claims. (CF, pp. 219-220.) The trial court evidently agreed, indicating that Plaintiff could not claim the damages covered by Workers' Compensation at trial because those claims had been "resolved." (CF, p. 280.)

The term "resolve" appears nowhere in C.R.S. § 8-41-203. The term does appear in the *Scholle* case, however the language of that court establishes that the present case has not been "resolved" in the way that Defendant claims. The *Scholle* court explains: "once a subrogated insurer has resolved the claim, *either through litigation or settlement*, the insured is no longer entitled to recover the amount she received through her insurer from the responsible party." 484 P.3d at 701 (emphasis added). Thus, to be "resolved" in the manner contemplated by the *Scholle* court, the claim must have been either fully litigated or settled.

It is undisputed that no litigation occurred between Defendant and the Workers' Compensation carrier in this case. Defendant argues instead that the

carrier's attorney's indication that the carrier would likely not be pursuing the matter further is sufficient. (CF, pp. 219-220.) However, this is not a settlement. "A settlement is effectively a contract to end judicial proceedings." *Seiner v. Zeff*, 194 P.3d 467, 471 (Colo. App. 2008). And "[a] contract is formed when an offer is made and accepted, and the agreement is supported by consideration." *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008).

Here, Defendant has presented no evidence that the Workers' Compensation carrier's attorney's representation here created a binding contract because it has not showed that that representation was the result of any offer or acceptance. Moreover, such an agreement would utterly lack consideration. *See International Paper Co. v. Cohen*, 126 P.3d 222, 225 (Colo. App. 2005)("Consideration is defined as something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee"); *Faucett v. Foreman*, 146 P. 239, 239-40 (Colo. 1915)(holding that contracts require "mutual consideration"). Because the Workers' Compensation carrier would have received no consideration for its alleged representation that it is not planning on further pursuing this matter, there can have been no contract, and thus no settlement.

Therefore, because Workers' Compensation did not resolve, "either through litigation or settlement," its claim against Defendant, the claim has not been "resolved" in the manner contemplated by the *Scholle* court. Moreover, because the

Workers' Compensation carrier would not be contractually bound to its representation that it was not planning on pursuing this matter, it would still be free to seek reimbursement from Plaintiff following trial in this matter.

Accordingly, the Workers' Compensation carrier did not "resolve" its claims with Defendant in the manner contemplated by the *Scholle* court, and Plaintiff should have been permitted to advance those claims at trial, and the trial court erred in reaching the opposite conclusion.

V. CONCLUSION

Wherefore, for the reasons advanced herein, Plaintiff requests that this Court reverse the ruling of the trial court prohibiting Plaintiff from claiming his full damages at trial, including those covered by Workers' Compensation, and Order that this case be remanded for a second jury trial for the sole purpose of allowing a jury to determine the value of those damages Plaintiff was precluded from claiming at the first trial in this matter.

Respectfully submitted this 11th day of May, 2023.

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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of May, 2023, a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S OPENING BRIEF** was served via ICCES and/or first class mail, postage prepaid, addressed to the following:

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