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<tr><td>COURT OF APPEALS, STATE OF COLORADO
2 E. 14th Avenue
Denver, CO 80203

Appeal from:
DISTRICT COURT, CITY AND COUNTY OF EL PASO, COLORADO
The Honorable Thomas Kelly Kane
2021CV31761</td><td>DATE FILED: June 29, 2023 11:26 AM
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CASE NUMBER: 2022CA2086

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<tr><td>Appellant: Adam Strange,

v.

Appellee: GA HC Reit Liberty CRCC, LLC</td><td rowspan="2">Court of Appeals
Case Number: 2022CA2086</td></tr>
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<tr><td colspan="2">APPELLEE GA HC REIT LIBERTY CRCC, LLC’S OPENING-ANSWER BRIEF AND CROSS-APPEAL OPENING BRIEF</td></tr>
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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 the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 3843 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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 appellant, 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.

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2. On Cross-Appeal: Whether the Trial Court erred in permitting Appellant Strange to recover damages for physical impairment and disfigurement, resulting in a double recovery.

STATEMENT OF THE CASE - APPEAL

This is a personal injury case brought by Adam Strange. Mr. Strange was employed by Johnson Controls at the time of the alleged incident. He alleged that he slipped on ice on Defendant's premises while in the course of his employment and sustained a broken ankle.

Prior to commencing this action, Adam Strange elected workers' compensation remedies from his employer and its carrier, Old Republic Insurance Company. He sought damages for the injuries he had sustained and received substantial compensation in the form of medical expenses, lost wages, and permanent impairment and disfigurement damages, all paid under workers' compensation by his employer's carrier.

As a result of paying the workers compensation benefits, Colorado law provides that Old Republic was assigned/subrogated[2] the cause of action against the third party causing the injury [‘‘tortfeasor”]. In this case, that is the Appellee Liberty Heights.

Old Republic is not a party to this suit and did not file its own civil action to recover amounts it paid. It also did not enter into any agreement with Mr. Strange agreeing to share in the costs of litigation and attorney’s fees incurred in pursuing this civil action.

Mr. Strange filed a claim against Liberty Heights to recover damages that for which he was not compensated by worker’s compensation. Mr. Strange did not assert a wage loss claim at all in this case until a month before trial. (CF, pp # 159-164).

Later in the proceedings, Mr. Strange amended his claim to add a wage loss component (which did not include the worker’s compensation benefit amount), Liberty Heights filed a Motion to Strike Mr. Strange’s wage loss claim (CF, pp # 154-158). It also concurrently filed a Motion in Limine re Damages Paid by Workers

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[2] Although legally subrogation, in case law and the statute the transfer of the civil action is interchangeably called a subrogation, an assignment and a ‘partial assignment.’ ***Chavez v. Kelley Trucking, Inc.,*** 275 P.3d 737, 740 (Colo. App. 2011)

Compensation Carrier (CF, pp # 91-95) in which it sought an Order from the Court precluding the introduction of or reference to any evidence of the medical expenses, lost wages, and permanent impairment or disability compensation paid by the worker's compensation carrier Old Republic.

On the same day as Liberty Heights filed these motions, Mr. Strange filed his own Motion in which he sought, among other relief, an Order to preclude any mention of what benefits were provided to Mr. Strange by Workers' Compensation. (CF, pp # 70-77).

The Court granted Liberty Heights' Motion and held the Mr. Strange would not be allowed to introduce the amounts paid by the worker's compensation carrier. (CF, p # 788).

A few days after this ruling, Mr. Strange, for the first time, made the argument that he raises in this appeal. The argument was made in a Motion to Reconsider filed less than three weeks before trial. (CF, pp # 362-375). This pleading was the first time that Mr. Strange indicated that he would be seeking to pursue the claim assigned by statute to Old Republic and that he would seek as damages amounts paid to him by the worker's compensation carrier. There was no representation that his counsel had reached an agreement with Old Republic to participate in the civil action. There was no assignment back of the claim that statutorily was Old Republic's cause of

action. There was no supplemental disclosure per C.R.C.P Rule 26.

The Trial Court, in addressing the substance of this Motion held:

> The workers' compensation carrier, having paid the benefits, is subrogated to the rights of the injured employee. The insurer may wait and see whether the employee pursues a claim. If the employee does pursue a claim, the insurer may choose to intervene but is not required to intervene. Delta Air Lines, Inc. v. Scholle 21 CO 20.

(CF, p # 577).

SUMMARY OF THE ARGUMENT

Mr. Strange, by electing worker's compensation, received statutorily required benefits, including wage loss, medical benefits and physical impairment and disfigurement benefits. By statute, the civil action to recover those damages from the tortfeasor are assigned to the worker's compensation carrier. The trial court correctly held that the worker's compensation carrier's election to neither seek recovery from Liberty Heights nor to participate in Mr. Strange's claim resolved Old Republic's claim and extinguished the claim. Mr. Strange is not entitled to pursue Old Republic's claim and thereby obtain a double recovery.

ARGUMENT

Appellant is not entitled to pursue recovery of benefits he received from the workers compensation carrier.

A. Standard of Review. The standard for reviewing a question of law is

abuse of discretion. ***Ehrlich Feedlot, Inc. v. Oldenburg***, 140 P.3d 265, 272 (Colo. App. 2006).

B. Argument. The General Assembly has enacted specific legislation that governs workers' compensation benefits "to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation, recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike." *See* Legislative declaration at C.R.S. §8-40-102.

Title 8 of the Colorado statutes includes the Workers Compensation Act which controls the resolution of any claims made by an employee for injuries sustained during the course and scope of their employment, if, as is the case here, the injured employee elects those benefits.

Under the unique statutory provisions of the Workers Compensation Act, upon paying statutorily required benefits, the insurance carrier is assigned the civil action to recover all medical payments, disability payments, and other benefits paid it made to the employee for injuries caused by a third-party tortfeasor. C.R.S. §8-41-203(1)(b). The statute specifically says that paying compensation pursuant to articles 40 to 47 Title 8, shall operate as and be an assignment of the cause of action against

such other person to … the insurance carrier …" C.R.S. §8-41-203(1)(b).

This framework promotes the long-established prohibition of double recoveries by injured parties, as Mr. Strange may not receive a double recovery for the same injuries or losses arising from the same conduct. ***Quist v. Specialties Supply Co.,*** 12 P.3d 863, 866 (Colo. App. 2000). Old Republic paid for Adam Strange's medical expenses, lost wages and compensation for permanent impairment or disability as provided for in §8-41-203(d)(I)(A)-(B) and (II). C.R.S. However, the injured employee is entitled to bring a claim for compensation for damages he has sustained any damages in excess of the compensation available under the worker's compensation statute - [i.e., carrier] provides coverage. C.R.S. §8-41-203(1)(a). Of note is that the statute does not authorize the injured employee to pursue suit on behalf of the carrier who provided the employee compensation under the statute. This was a judicially created cause of action. ***Harms v. Williamson,*** 956 P.2d 649 (Colo. App. 1998).

In this case, however, Mr. Strange was not initially pursuing the Old Republic claim. Instead, he was only pursuing damages not provided for or in excess of compensation that he was provided by Old Republic. In ***Delta Air Lines, Inc. v. Scholle,*** 21 CO 20, *P16-21 the Colorado Supreme Court made clear that *an insurer* who pays benefits to an injured worker is subrogated to the claim against the

tortfeasor. If the injured employee pursued a claim, the insurer is entitled, though not required, to intervene in the suit. *Id.* at ¶ 19. Similarly, the insurer may pursue a claim before the injured worker has filed any claim. *Id.* Thus, a worker's compensation insurer may settle its subrogation claim with a third-party tortfeasor before the employee seeks or receives any compensation from the same tortfeasor. *Id.*

There is no evidence or indication that Mr. Strange or his counsel had reached an agreement with Old Republic to jointly pursue Old Republic's claim with that of Mr. Strange. In fact, the file reflects to the contrary. In the Mr. Strange's Initial Disclosures computation of economic damages, which is required by C.R.C.P. 26(a)(1)(C), no wage loss claim was asserted. *See,* Mr. Strange's Initial Disclosures (CF, pp # 159-165). In responses to written discovery served on April 19, 2022, Mr. Strange asserted under oath that he was not claiming any lost wages. *See*, Mr. Strange's Responses to Interrogatories Nos. 12 and 13 (CF, pp # 169-170). In his deposition taken on June 7, 2022, Mr. Strange again asserted under oath that he was not making a wage loss claim. *See*, Deposition of Adam Strange at CF p 183, lines 10-12. The conclusion is indisputable that Mr. Strange never asserted a wage loss claim.

Old Republic has not assigned its claim for recovery of the workers

compensation benefits paid to Mr. Strange, nor is it pursuing reimbursement from Mr. Strange. See, emails from Doug Kotarek, attached as Exhibit A. (CF, pp # 223-226). Mr. Strange received wage compensation, medical treatment and he also received $10,274.73 in TTD [Temporary Total Disability] benefits and $7,342.19 in PPD [Permanent Partial Disability] benefits. See, Final Admission of Liability, attached as Exhibit C. (CF, pp # 357).

Based on case law and the record before it, the trial court was correct in precluding Mr. Strange from recovering the medical expenses and lost wages compensation already paid by Sedgwick. Evidence of those damages was and is irrelevant and Mr. Strange was properly not permitted to introduce, seek to introduce or reference any evidence of those amounts paid pursuant the workers' compensation act as damages.

Nonetheless, Mr. Strange asserts that the trial court erred and that he was entitled to pursue the claim of Old Republic. To reach this conclusion, Mr. Strange argues that Old Republic had to – i.e., was required to - either file suit or it had to settle the claim. Mr. Strange continues that failure to do so results in the civil action assigned by statute to Old Republic would revert to him and permit him to seek double recovery.

There is no statutory authority for this novel theory and Liberty Heights'

counsel could find no case law authority for the argument either. Mr. Strange, too, cites no case law on this point. There is no authority in statute or case law that holds the assignment/subrogation was contingent on the insurer pursuing the claim. Old Republic's claims, though belonging to it, are derivative of Mr. Strange's. A "court may not second-guess a company's business judgment in deciding not to pursue the derivative litigation." ***Day v. Parachute Investment Holdings, LLC***, 251 P.3d 1225 (Colo. App. 2010). Old Republic is entitled to do with its claim what is believes is in its best interest.

Similarly, Mr. Strange had no obligation to pursue a claim against Liberty Heights, as there is no requirement of an injured employee to 'pay the worker's compensation carrier back.'

Mr. Strange heavily relies on ***Tate v. Industrial Claim Appeals Office,*** 815 P.2d 15 (Colo. 1991) in support of his argument. In that case, the Supreme Court stated that when there is an employment-related injury caused by a third-party tortfeasor, an injured employee has several alternatives. 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. Second, the employee may elect to pursue an action against the tortfeasor. In that event, the workers compensation

insurer is liable for only any deficiency between the recovery from the tortfeasor and the worker's compensation benefits to which the employee is entitled. Third, 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. In this case, too, 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.

Thus, the practical effect of the *Tate* holding is as follows. Presume that the injured worker sustained $100 in benefits recoverable under the worker's compensation statute, and $50 in damages not covered by worker's compensation. In Example 1 from above, the injured party recovers $100, but does not seek to recover the $50 in damages not covered by worker's comp. The worker's compensation carrier is subrogated to the $100 in damages. The injured employee has elected not to pursue a claim and has no claim.

In example 2, the injured party foregoes recovery of worker's compensation benefits and pursues the tortfeasor for $150. The worker's compensation carrier is liable to the injured party only to the extent that the injured party does not recover the $100 in benefits it might otherwise owe, and the carrier has no subrogation rights against the tortfeasor.

In example 3 [which is the one before the court], the injured party recovers $100 in worker's compensation benefits, and files a civil action to recover the $50 in damages and the $100 in benefits already received. The worker's compensation carrier, however, is subrogated to the $100 in damages which it may seek to recover from the tortfeasor, either separately or in conjunction with the injured worker's suit. If it agrees the injured worker can pursue recovery on its behalf, it has a 'lien' on the proceeds. ***United Fire & Casualty Company v. Armantrout,*** 904 P.2d 1375 (Colo. App. 2000).

Mr. Strange errs in his analysis because of a hybrid of example 3 – a situation where the employee, with the consent of the insurance carrier, brings an action jointly on the employee's and the carrier's behalf. In such a situation, the injured worker may have to repay the carrier out of his recovery for the compensation paid by the carrier, but all amounts in excess thereof belong to the injured worker. ***Kirkham v. Hickerson Bros. Truck Co.,*** 485 P.2d 513 (Colo. App. 1971). Importantly, though, none of these 'hybrid suits' involve a fact pattern where the carrier does not acquiesce in the joint claim, or, as here, where the worker's compensation carrier has waived its right to a lien. (CF, p. 226). As a result, *Tate* and other similar suits are not authority for the proposition asserted by Mr. Strange.

From a carrier's perspective, a carrier has three separate options in pursuing

recovery of the benefits paid under workers' compensation. One, the carrier can file a cause of action in its own name, either before or after the injured employee's suit, and seek the payments that it has paid against the tortfeasor pursuant to the assignment under the statute. Second, the carrier can join in the claimant's suit. Third, the carrier can decide not to file any action and disclaim any right to a lien – which, in essence, is a decision not to pursue the tortfeasor and, simultaneously, not to pursue the injured employee to recover benefits it has previously paid to the employee (its 'lien'). While the reasoning of Old Republic to not pursue recovery from Liberty Heights and/or Mr. Strange is unknown, this is precisely the course of action it undertook.

Mr. Strange's argument logically means that he can compel the carrier to litigate or compromise an action. However, a carrier may not compel the employee to abandon or compromise his cause of action. ***Kirkham v. Hickerson Bros. Truck Co.,*** 485 P.2d 513 at 518 (Colo. App. 1971). There is a logical symmetry that the carrier cannot be compelled to litigate or settle either.[3]

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[3] Given that Mr. Strange will not be entitled to any proceeds from a civil action including Old Republic's assigned claim, the question arises but is not addressed in this appeal as to the reason why he has filed this appeal.

Mr. Strange also focuses on the language in *Tate*, *Scholle* and other cases that state that the insured is no longer entitled to recover the amount received from the employee's carrier once the subrogated carrier has resolved its claim. He argues that the by using the word 'resolved', the appellate courts envision that the case must be either settled or litigated. In making this argument, Mr. Strange ignores various other methods of dispute resolution. These include voluntary dismissal and election not to pursue a claim short of litigation. As the standard dictionary holds, resolve means to reach a firm decision. In short, resolve does not have the constrictive meaning in this context that Mr. Strange would suggest.

This case is an example of that. The decision not to pursue the claim may be based on multiple reasons, including the fact that per the agreement of the parties, Liberty Heights was an additional insured of Old Republic under the policy covering Mr. Strange. See, Certificate of Insurance with subrogation waiver (CF, pp # 227). As such, Old Republic could have resolved that it would not be entitled to recover from Liberty Heights as it could not sue its own insured. ***Continental Divide Insurance Company V. Western Skies Management, Inc.,*** 107 P.3d 1145 (Colo. App. 2004).

In any event, Old Republic did inform the parties it would not be pursuing a claim against either party – Liberty Heights as a subrogee or Mr. Strange for any

damages he might recover for which he had received compensation from Old Republic – i.e., a lien. See, Emails from Doug Kotarek, (CF, pp # 225-226).

The Trial Court understood this to be the case. (CF, pp # 280, 788). Its ruling was correct. The claim for past medical expenses and wage compensation paid by the workers' compensation carrier Old Republic has been extinguished and Mr. Strange is not entitled to pursue or recover the civil action belonging to Old Republic so as to accomplish a double recovery.

CROSS APPEAL

FURTHER STATEMENT OF THE CASE

On September 30, the Trial Court entered an Order re: Defendant's Motion for Clarification. In that Order the Court stated that the Plaintiff Strange would be allowed to pursue damages that 'are not extinguished by the subrogation rights of the workers' compensation carrier, including noneconomic damages and economic damages not fully covered by workers' compensation such as lost wages, physical impairment, disfigurement…" (CF, pp # 577). This Order was contrary to statute. Section 8-41-203(1)(d) (I)(B) states that the assigned and subrogated cause of action [the work comp carrier's claim] includes the right to recover future benefits extends to all money collected from the tortfeasor for all ***physical impairment and disfigurement damages***. However, Section (B)(II) states that the carrier's

subrogation right does not extend to noneconomic damages awarded for pain and suffering, inconvenience, emotional stress, or ***impairment of quality of life.***

STATEMENT OF THE ISSUES FOR CROSS-APPEAL

1. Whether the Trial Court erred in permitting Appellant Strange to recover damages for physical impairment and disfigurement, resulting in a double recovery.

CROSS-APPEAL ARGUMENT

1. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANT WAS ENTITLED TO SEEK DAMAGES FOR IMPAIRMENT AND DISFIGUREMENT.

A. Standard of Review. The interpretation of a statute is a question of law that an appellate court reviews *de novo*. *State Ex Rel. Salazar v. the Cash Now Store,* 31 P.3d 161, 164 (Colo.2001)

B. The record was preserved. The issue was preserved by the filing by Liberty Heights filing of its Motion In Limine Re Damages Paid By Workers Compensation Carrier (CF, pp # 91-95) and post-trial in filing Motion To Amend Judgment (CF, pp # 741-746).

C. Argument. In its ruling on allowable damages, the Court instructed the jury and permitted Mr. Strange to seek – and recover – any physical impairment or

disfigurement damages. Jury Instruction (CF, p # 600).[4] This statement mirrored the holding of the Supreme Court in ***Delta Air Lines, Inc. v. Scholle,*** 21 CO 20.

Defendant asserts that it was error to allow Mr. Strange to pursue the damages for physical impairment and disfigurement, as he had received compensation for his permanent physical impairment as part of his workers' compensation benefits. According to the final admission of liability produced by the Colorado Division of Labor, Mr. Strange received PPD benefits for the 11% lower extremity rating and 4% whole person impairment rating provided by Dr. Shank on 9/14/21. See, Final Admission of Liability, attached as Exhibit A. (CF, p # 357).

The jury instruction given (CF, pp # 597-598) set forth separate lines for the jury to award the damages for non-economic damages, including impairment of the quality of life; and a separate line for any physical impairment or disfigurement. The entry for damages for physical impairment or disfigurement, however, under statute,

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[4] Admittedly, Defendant did not object to this jury instruction, in light of the Court Order stating that Mr. Strange would be entitled to pursue these damages. However, objection to the instruction is not fatal to the argument of Liberty Heights, as it raised the issue with the Court in a Motion for Judgment Notwithstanding the Verdict. (CF, pp # 741-746). ***Hendriks v. Allied Waste Transportation, Inc.,*** 282 P.3d 520 (Colo. App. 2012). Further, the jury verdict form separated the two types of damages thus providing for an easy resolution of the issue.

is not an element of damages which Mr. Strange could pursue. Those damages were assigned by statute to the insurance carrier, Old Republic. The damages that were not extended (assigned) to the carrier by statute were those that were listed on a separate line of the verdict form for noneconomic damages.

The Trial Court, misinterpreting the imprecise language of the Supreme Court decision in *Scholle,* permitted the jury to enter damages belonged to Mr. Strange, as well as those damages which, under statute, are assigned and belong to the non-party carrier. This was error.

This error, however, can be easily remedied by reversing the impairment and disfigurement portion of the award and remanding to the trial court to enter judgment on the remaining portion of the verdict.

CONCLUSION

The Trial Court correctly denied Appellant Strange's attempt to belatedly assert the civil action assigned to the worker's compensation carrier without any indication that he had the permission or authority to do so. In so doing, the Trial Court adhered to the long-standing common law principle that a party is not entitled to a double recovery for damages that the party may have sustained.

The Trial Court erred, however, in permitting Appellant Strange to pursue a claim for impairment and disability damages which is, by statute, assigned to the

worker's compensation carrier just as are claims for wages and medical benefits. While it was proper to allow Appellant Strange to seek non-economic damages, including damages for impairment to his quality of life, Mr. Strange had already been compensated under the worker's compensation statute for impairment and disability damages, a claim for which had been assigned to the worker's compensation carrier. It was error to permit him to seek those damages.

DATED this 29th day of June, 2023.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing APPELLEE GA HC REIT LIBERTY CRCC, LLC'S OPENING-ANSWER BRIEF AND CROSS-APPEAL OPENING BRIEF was [X] E-Served by the Court-authorized E-System provider to the following on this 29th day of June, 2023:

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