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: September 7, 2023 11:49 AM FILING ID: BF8AE4956DE79 CASE NUMBER: 2022CA2086
ADAM STRANGE **Plaintiff-Appellant,** v. GA HC REIT LIBERTY CRCC, LLC **Defendant-Appellee.**	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiff-Appellant: Chad P. Hemmat, Esq., No. 20845 Cameron O. Hunter, Esq., No. 50095 ANDERSON HEMMAT, L.L.C. 5613 DTC Parkway, Suite 150 Greenwood Village, CO 80111 Telephone: (303) 782-9999	Case No.: 2022CA002086

PLAINTIFF-APPELLANT'S ANSWER-REPLY 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) and C.A.R. 28.1(g).

This brief contains 6,148 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 cross-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.

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

I. ARGUMENT FOR APPEAL

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

In its Answer Brief, Defendant contends that the standard of review applicable to questions of law is the abuse of discretion standard. (Ans. Br., pp. 4-5.) In support of this contention, Defendant cites the case of *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265, 272 (Colo. 2006). (Ans. Br., p. 5.) However, the *Ehrlich* case says no such thing, and merely applied an abuse of discretion standard to the trial court's rulings on a request for a change of venue, on whether good cause existed to extend the period of time in which to file a certificate of review, and motions in limine. *See id.* at 269, 271, 272.

The relief presently sought by Plaintiff was in part addressed by the trial court in motions in limine, and Plaintiff himself cited to the *Ehrlich* case in his Opening Brief, acknowledging that that case indicates that motions in limine are generally subject to the abuse of discretion standard of review. (Op. Br., p. 6.) However, Plaintiff then cited to authorities standing for the proposition that questions of law are subject to de novo review, even when presented as motions in limine. (Op. Br., pp. 6-7.) *See Klingsheim v. Cordell*, 379 P.3d 270, 273 (Colo. 2016)(holding that

questions of law are generally reviewed de novo); *State ex. rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 12-13 (Colo. App. 2009)(holding that "[t]he substance rather than the name or denomination given a pleading determines its character and sufficiency" and applying de novo review to motion in limine that sought to dismiss claim).

Additionally, Plaintiff noted that questions of statutory interpretation and interpretation of Colorado case law are reviewed de novo. *See 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).

Defendant does not address these cases, and merely asserts, without support, that questions of law are subject to an abuse of discretion review. However, in addition to being without support, this assertion is undermined by the standard of review Defendant offers in its cross-appeal. There, Defendant contends that "the interpretation of a statute is a question of law that an appellate court reviews de novo." (Ans. Br., p. 15.) Defendant offers no explanation for why the standard of review is abuse of discretion for the issues Plaintiff appeals but is de novo for the issues Defendant appeals when both concern interpretation of Colorado statutes and case law regarding the rights of injured parties and Workers' Compensation carriers when claims are made against third parties.

As Defendant concedes in its cross-appeal, the applicable standard of review is de novo.

2. Preservation for Appeal

Defendant does not appear to contest that Plaintiff preserved this issue for appeal.

3. Employee's Right to Recovery

Plaintiff's first argument on this issue in his Opening Brief was the straightforward proposition that an employee is entitled to pursue a full recovery against a negligent tortfeasor unless a Workers' Compensation carrier has already settled with or sued the tortfeasor. Plaintiff further explained that when a Workers' Compensation carrier has not settled with or sued the tortfeasor, the injured employee has three options: he may elect to simply receive Workers' Compensation benefits and not pursue the tortfeasor, he may receive Workers' Compensation benefits and then pursue the tortfeasor only for those damages not covered by Workers' Compensation benefits, or he may receive Workers' Compensation benefits and then pursue the tortfeasor for the full amount of his damages, after which the Workers' Compensation carrier will have a right of subrogation against

amounts recovered by the employee.[1] Plaintiff concluded in his Opening Brief that the trial court therefore erred in precluding Plaintiff from seeking to recover damages for his medical expenses and wage loss at trial.

In response, Defendant first contends that there is a public policy against injured parties receiving double recovery for their losses. (Op.-Ans. Br., p. 6.) The relevance of this point is unclear. The purposes of this public policy are served by the Workers' Compensation statutes, which allow the carrier to seek subrogation against an injured employee for any recovery that overlaps with those amounts paid by the carrier.[2] And because the carrier in this case, Old Republic,[3] could still pursue subrogation against Plaintiff should Plaintiff be awarded damages for the categories of damages covered by Old Republic, any worries about double recovery constitute mere speculation at this point.

---

[1] In a footnote, Defendant questions why Plaintiff would bring a claim against it if he would not be entitled to those proceeds in light of Old Republic's right of subrogation. (Op.-Ans. Br., p. 12 n.3.) This objection misses the point, which is that Plaintiff is permitted to bring this claim, and that the allocation of those proceeds is then a matter of dispute between Plaintiff and Old Republic, not Defendant.

[2] *See Harms v. Williamson*, 956 P.2d 649, 650 (Colo. App. 1998)(upholding the trial court's determination that the Workers' Compensation statute in question was "merely intended to prevent a double recovery—not to prevent a full recovery").

[3] In Plaintiff's Opening Brief, Plaintiff referred to the Workers' Compensation carrier as Sedgwick. However, in its Brief, Defendant lists Old Republic as the Workers' Compensation carrier. Upon information and belief, Sedgwick manages claims for Old Republic Insurance Company. For ease of reference, Plaintiff adopts Defendant's practice of referring to the Workers' Compensation carrier as Old Republic rather than Sedgwick.

Additionally, Defendant neglects the policy rationale underlying Workers' Compensation statutory scheme, which "shifts ultimate liability to the tortfeasor, the party responsible for the employee's injuries." *Tate v. Indus. Claim Appeals Office*, 815 P.2d 15, 17-18 (Colo. 1991). While the policy against double recovery has a built-in safeguard under Plaintiff's construal of the Workers' Compensation statutes, Defendant's interpretation would shift liability away from negligent tortfeasors. For if only the Workers' Compensation carrier can assert claims for its benefits against a tortfeasor, as opposed to both the carrier and the employee being permitted to bring such claims, the foreseeable result will be a decrease in the frequency with which these claims are brought against the tortfeasors, which in turn would shift the financial burden of these claims to the Workers' Compensation carrier, rather than the tortfeasor.

Defendant's next argument consists of allegations that Plaintiff did not meet criteria which are not present anywhere in the Workers' Compensation statutes or in Colorado case law. For instance, Defendant protests that there is no evidence that Plaintiff "reached an agreement" with Old Republic to "jointly pursue" a claim, that Old Republic did not "consent" to the claim, and that Old Republic did not "acquiesce" to the claim. (Op.-Ans. Br., pp. 7, 11.) Defendant does not identify any Colorado statute or case in support of these additional requirements.

As thoroughly explained in Plaintiff's Opening Brief, an injured party remains perfectly within his rights to claim the "full amount" of his damages from the tortfeasor, as long as the Workers' Compensation carrier has not settled with or sued the tortfeasor. *Tate*, 815 P.2d at 17. No other conditions are imposed upon an injured employee before he can pursue these damages, and the additional hurdles Defendant invents have no basis in Colorado law.[4]

4. Assignment of Rights

In his Opening Brief, Plaintiff demonstrated that numerous Colorado cases have explained that the Workers' Compensation Act does not result in a literal assignment of rights to Workers' Compensation carrier for the benefits it provides to an injured worker. This of course means that a carrier need not assign those benefits back to an injured employee in order for the employee to seek those damages from a negligent tortfeasor. Undeterred, Defendant continues to assert

[4] One additional argument raised by Defendant, seemingly as an aside, is its claim that Plaintiff never validly advanced a wage loss claim, as he initially testified in his deposition and in his answers to interrogatories that he was not planning to make such a claim. (Op.-Ans. Br., p. 7.) Defendant ignores the fact that Plaintiff later amended his answers to the interrogatories, and clarified that he was in fact making a wage loss claim. Following this amendment, Defendant filed a Motion requesting that the wage loss claim in these amended discovery responses be stricken as untimely. (CF, pp. 154-158.) The trial court denied this request, holding that the timing of Plaintiff's clarification was harmless and that preclusion would be a disproportionate sanction. (CF, p. 276.) Defendant has not challenged this ruling on appeal, and therefore the trial court's determination that Plaintiff's wage loss claim was properly claimed must stand.

throughout its Brief that such an assignment was required, but fails to provide support for this claim. (Op.-Ans. Br., pp. 3-4, 5-6, 7-8.)

Instead, while it concedes that the assignment contemplated by the Workers' Compensation statutes is "legally subrogation," Defendant asserts that the terms "subrogation" and "assignment" are used "interchangeably." (Op.-Ans. Br., p. 2 n.2.) While it might be true that these terms are sometimes used interchangeably, this sheds no light on what is meant by the use of these terms, and Defendant provides no authority to support its position that though both terms are used, they both refer to an assignment. And Defendant fails to meaningfully engage with the cases cited by Plaintiff on the subject.

In his Brief, Plaintiff cited the case of *Kirkham v. Hickerson Bros. Truck Co.*, 485 P.2d 513, 515-17 (Colo. App. 1971), which explains the difference between assignments and rights of subrogation, and held that the rights contemplated with the Workers' Compensation statutes are rights of subrogation, not assignment.

In its Brief, Defendant cites the case of *Harms v. Williamson*, 956 P.2d 649 (Colo. App. 1998), which lends even greater weight to Plaintiff's position. (Op.-Ans. Br., p. 6.) The *Harms* court addressed a question identical to that presented here, considering the issue of whether, in a governmental immunity case, the Workers' Compensation carrier was required to file a separate notice for those claims that had been "assigned" to it. 956 P.2d at 650.

Summarizing the position of the defendants in the case before it, which largely mirrors the position of Defendant in this case, the *Harms* court explains:

> Defendants' argument that [the Workers' Compensation carrier] was required to file its own notice of claim relies in part on the literal language in § 8-41-203(1), which provides that payment of compensation benefits "shall operate as and be an assignment of the cause of action." It also relies on the observation in *Sneath v. Express Messenger Service*, 931 P.2d 565, 568 (Colo. App. 1996), that the statutory "assignment" of the "cause of action" results in "the creation of two claims—one 'owned' by the employee and one 'owned' by the carrier."

Id. at pp. 650-51. Rejecting this argument, the court held:

> Defendants' argument, that the statute should be read literally to create an outright assignment upon payment of compensation benefits, ignores that such an assignment would leave the injured employee with no rights remaining to which the insurer could become subrogated. To the contrary, the supreme court has construed the statute to permit an injured employee, as one alternative remedy, to sue for *the entire amount of damages sustained*, even though the employee has elected to receive, and been paid, workers' compensation benefits. If the employee recovers from the tortfeasor, the insurer as the statutory subrogee is entitled to reimbursement from the employee of the benefits paid. Hence, the statute cannot be construed literally.

Id. at 651 (emphasis added).

Relying on the statements of the Colorado Supreme Court in the *Tate* case, the *Harms* court concludes that "the supreme court has…construed the reference in § 8-41-203(1) to an 'assignment' as creating merely another right of 'subrogation' as one of the alternatives available to the employer's insurer." *Id.* at 652. The *Harms*

court adds that this is also "consistent with the ordinary understanding of the terms." *Id.*

Further explaining its ruling, the *Harms* court reasons:

> The tortfeasor responsible for the employee's injuries…does not escape any part of the liability for damages caused merely because the injured employee has received workers' compensation benefits. Having facilitated the recovery of funds from the tortfeasor, the statute then provides for their division between the injured employee and the employer's insurer.

Id. at 652-53. Finally, the *Harms* court clarifies the ruling of the *Sneath* court, stating:

> In characterizing a claim against a tortfeasor as partially "owned" both by the injured employee and by the employer's carrier, the division in *Sneath* was merely explaining that § 8-41-203 grants the employer's insurer only limited rights. As the court there held, *those rights do not include authority to control the prosecution of the injured employee's claim*. Likewise, they do not include any immediate and outright assignment of any part of an injured employee's cause of action to the employer's insurer.

Id. at 653 (emphasis added).

The courts in *Kirkham*, *Harms*, and *Tate* are perfectly clear that the "assignment" contemplated in the Workers' Compensation statutes creates a right of subrogation, not a literal assignment. Defendant has cited no authority to the contrary, and thus its continued insistence that Plaintiff did not have the right to pursue damages for medical expenses and wage loss because those rights were not assigned to Plaintiff by Old Republic is without merit and must be rejected.

5. Resolution

Finally, Plaintiff explained in his Opening Brief that Defendant's argument to the trial court that Old Republic had "resolved" its claims against Defendant meant that Plaintiff could not pursue those claims was unpersuasive. Plaintiff explained that the term "resolve" is absent from the Workers' Compensation statutes, and that while it appears in the *Scholle* case, the *Scholle* court explicitly clarifies that the meaning of the term "resolve," as employed in that case, meant resolution "either through litigation or settlement." *Delta Air Lines, Inc. v. Scholle*, 484 P.3d 695, 701 (Colo. 2021). Because Old Republic neither litigated nor settled its claims against Defendant in this case, the claims were not "resolved" in the manner contemplated by the *Scholle* court.[5]

Defendant argues that Plaintiff assigns the term "resolve" too "constrictive" of a meaning, and that Plaintiff's argument "ignores various other methods of dispute resolution," including "voluntary dismissal and election not to pursue a

[5] Defendant protests that this means that Plaintiff's position is that Old Republic was "required to" file suit or settle the claim, contrary to the repeated statements of Colorado courts that a Workers' Compensation carrier may, but need not, file suit against a negligent tortfeasor. (Op.-Ans. Br., pp. 8-9, 12.) But of course Plaintiff has not made this argument. Rather, Plaintiff has asserted, consistent with Colorado law, that Old Republic remained free to file suit against Defendant, or to reach a settlement on its own with Defendant, and that one of these two alternatives would have been required *to extinguish Plaintiff's own ability to recover* for the damages covered by Old Republic. Nothing about this argument suggests that Old Republic did not also remain free to do nothing, and to simply wait to assert a right of subrogation against the recovery received by Plaintiff.

claim." (Op.-Ans. Br., p. 13.) First, it is not Plaintiff who has rejected these other methods of dispute resolution as extinguishing an injured parties' rights, but the *Scholle* court. Second, the reasoning behind the *Scholle* holding is clear: only through full litigation or a binding settlement would a Workers' Compensation carrier become prohibited from pressing its subrogation claim against an injured employee who successfully brought a claim against the tortfeasor. A bare statement from the carrier to the tortfeasor, unsupported by consideration, that a Workers' Compensation carrier does not intend to pursue a claim, would not form a binding contract that stopped the carrier from making a subrogation claim against the injured employee.

Defendant's final argument on this issue is to claim that Old Republic waived its rights to pursue any claims it had against Defendant. (Op.-Ans. Br. pp. 11-12.) Defendant uses the term "waived" only once in its Brief, and provides no legal analysis as to how or why the concept of waiver applies here. (Op.-Ans. Br., p. 11.) For this reason alone, this underdeveloped and cursory assertion should be rejected.

However, even if Defendant had properly raised this argument, which it advances now for the first time on appeal, the doctrine of waiver would be inapplicable to the present case. "Waiver is the voluntary abandonment or surrender by competent persons of a right known by them to exist, with the intent that such right shall be surrendered and such persons be forever deprived of its benefits."

Colorado Bank & Trust Co. v. Western Slope Investments, Inc., 539 P.2d 501, 503 (Colo. App. 1975). The finding of a waiver requires at least two things. First, "[f]or a waiver there must be a clear, unequivocal, and decisive act of the party showing such a purpose." *Id.* Second, "[a] waiver…requires full knowledge of all the relevant facts." *Johnson v. Indus. Comm'n of State of Colo.*, 761 P.2d 1140, 1147 (Colo. 1988). Defendant has established neither here.

First, the statement relied upon so heavily by Defendant does not constitute "a clear, unequivocal, and decisive act" on the part of Old Republic to waive its rights to subrogation in this matter. The entirety of the August 29, 2022 email states: "My name is Doug Kotarek. I've reached out to my client and they've instructed me to not pursue this. So, we will not be assigning the lien to anyone, or taking part in pursuing this lien. Thanks so much." (CF, p. 226.) Other than a subject line which references Plaintiff, there is no other context, as Defendant furtively removed the emails to which Mr. Kotarek was responding in the emails provided to the trial court, which are now contained in the Court File. (CF, pp. 223-26.)

On its face, this statement by Mr. Kotarek is not a clear, unequivocal, and decisive declaration that Old Republic would not be seeking subrogation against Plaintiff. First, it is simply unclear what was meant when Mr. Kotarek when he stated that he was not planning on "pursuing this lien." This statement could be interpreted as indicating that Old Republic was not planning on pursuing a direct claim against

Defendant, or that it was not planning on pursuing subrogation against Plaintiff, or both.

And once the context of the email is understood, Defendant's urged interpretation, that Old Republic was here disclaiming any interest in subrogation against Plaintiff, is revealed to be without merit. Crucially, this email was sent to counsel for *Defendant*, not counsel for Plaintiff. Accordingly, the most obvious interpretation is that Mr. Kotarek was informing defense counsel that Old Republic would not be making a claim directly against Defendant. It is unclear why Defendant believes that an email to *defense counsel* would constitute a waiver of a claim Old Republic had against *Plaintiff*.

Furthermore, the fact that even Defendant realized this statement by Mr. Kotarek was unclear and equivocal is demonstrated by the fact that another email from Mr. Kotarek has been included in the record, this one sent on August 30, 2022. (CF, p. 225.) Though Defendant placed this email before the email referenced above in its ordering of emails to the trial court, the dates of the two emails reveal that this email came the day after the email above on which Defendant so heavily relies. In this email, the more recent email sent on August 30th, Mr. Kotarek states: "I've been authorized by my client to let you know that the lien has not been assigned to anyone, including the plaintiff. I hope this helps." (CF, p. 225.)

Again, Defendant removed its own emails from what it shared with the trial court, which is what has been preserved for this Court on appeal. Therefore, it is unknown precisely what defense counsel wrote to Mr. Kotarek following the first August 29th email referenced above. However, it is clear that defense counsel sought additional clarification, prompting this second email from Mr. Kotarek, dated August 30th. This reveals that even Defendant knew that the first email was ambiguous, and would not constitute a valid waiver. And because Mr. Kotarek's second email sheds no additional light on what Defendant now claims Old Republic waived, Old Republic has yet to make a "a clear, unequivocal, and decisive" statement that it was waiving any and all rights of subrogation against Plaintiff.

Yet another reason to doubt that this statement by Mr. Kotarek constitutes a clear and decisive waiver is that it is unclear whether Mr. Kotarek represents Sedgwick, Old Republic, or both. The only evidence on this is contained in another email from an individual named Taylor Blas, evidently an associate working with Mr. Kotarek, who states: "We are still working on review with Sedgwick." (CF, p. 224.) The "we" in this email could mean that Ms. Blas and Mr. Kotarek were working "with Sedgwick" in their capacity as attorneys for the law firm of Hall & Evans, or it could mean that they were working in their capacity as attorneys who represented Old Republic. Because it is unclear whether these attorneys represented Old Republic or Sedgwick, or both, and because, if it was Sedgwick, it is unclear the

extent to which Sedgwick was authorized to speak on behalf of Old Republic, this constitutes a further showing that Mr. Kotarek's statement was not a clear, unequivocal, or decisive waiver of *Old Republic's* right to subrogation.

Additionally, Defendant has made no showing, nor even argued, that either Old Republic or Mr. Kotarek had a "full knowledge of all the relevant facts" in order to legally waive its rights to subrogation. Indeed, by simply repeating a part of his answer from his first email in his second email, Mr. Kotarek appears to have been confused about just what he was being asked by defense counsel. And if defense counsel ever clarified further, these efforts have not been preserved as part of the record for this appeal.

Moreover, in this case it is clear that Old Republic did not have a full knowledge of all the relevant facts, as the parties had not yet proceeded to trial, and Plaintiff had not yet been prohibited by the trial court from claiming those damages for which he had received benefits from Workers' Compensation. As noted above, the two emails from Mr. Kotarek were received on August 29th and August 30th of 2022. The trial court did not issue its Orders limiting what Plaintiff could claim at trial until September 20, 2022 (CF, pp. 276, 280, 301, 403, 577) and the parties did not proceed to trial until October 10, 2022.

Before (and during) trial, Defendant contested not only the extent of Plaintiff's damages but also liability. Thus, before Plaintiff was successful at trial,

no one, including Old Republic, knew if there would be any recovery to which Old Republic would have a subrogation interest, or what the amount of that recovery would be. Therefore, the facts of this case reveal that Old Republic absolutely lacked a full knowledge of all the relevant facts it would need before waiving a right to its subrogation interest against Plaintiff.

Thus, even if waiver constituted a valid manner of resolution, though this is contemplated neither in the Workers' Compensation statutes nor in Colorado case law, Defendant's brief and underdeveloped claim that Old Republic waived its rights of subrogation in this case is without merit.[6]

II. STATEMENT OF THE ISSUES FOR CROSS-APPEAL

A. Whether the trial court erred in holding that Plaintiff was permitted to claim damages for physical impairment and disfigurement at trial.

III. STATEMENT OF THE CASE FOR CROSS-APPEAL

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.

[6] Defendant's speculation about reasons Old Republic would have or might have had for waiving its claims may be disregarded. Defendant postulates that Old Republic might have been motivated not to pursue this matter because Old Republic also insured Defendant, and an insurer cannot sue its own insured. (Op.-Ans. Br., p. 13.) This point is inapposite. Nothing about this would preclude Old Republic from asserting a claim for subrogation against *Plaintiff*.

(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, including past medical expenses, wage loss, permanent impairment, and disability, 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.)

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.

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 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.)

IV. SUMMARY OF THE ARGUMENT FOR CROSS-APPEAL

This Court should affirm the ruling of the trial court permitting Plaintiff to claim damages for physical impairment and disfigurement at trial. The reasons the trial court's determination on this subject was correct parallel the reasons why its determination prohibiting Plaintiff from claiming wage loss and past medical expenses was erroneous. Because Old Republic did not settle with or file its own suit against Defendant, and therefore did not "resolve" its claims against Defendant, Plaintiff was not prohibited from seeking the full amount of his damages from Defendant at trial. Under Colorado law, there was no requirement for Old Republic

to assign any rights to Plaintiff before Plaintiff was able to advance these claims against Defendant. Therefore, the trial court correctly concluded that Plaintiff was permitted to assert claims for physical impairment and disfigurement at trial, and merely erred in concluding that Plaintiff was not also permitted to claim damages for wage loss and medical expenses.

Additionally, Defendant has waived its argument on this matter. The jury was asked to determine the value of Plaintiff's damages for "physical impairment or disfigurement." (CF, p. 650.) Defendant now challenges the propriety of the award to Plaintiff for physical impairment but not the propriety of the damage for disfigurement. But at no point during trial did Defendant object to combining these two damages into one on the jury verdict, and at no point did Defendant seek clarification from the trial court or the jury on this matter. Worse, Defendant's *own* proposed verdict form combined these two damages. Accordingly, Defendant has waived its right to argue on appeal that Plaintiff should have been awarded damages for disfigurement but should not for physical impairment.

V. ARGUMENT FOR CROSS-APPEAL

A. The Trial Court Correctly Determined that Plaintiff was Allowed to Pursue Damages for Physical Impairment and Disfigurement at Trial.

1. Standard of Review

Plaintiff agrees with Defendant that questions of statutory interpretation are subject to de novo review. *Welch*, 19 P.3d at 677.

2. Preservation for Appeal

Plaintiff disputes that Defendant preserved this issue for appeal. As discussed further below, Defendant failed to object to the trial court's combining of damages for physical impairment and damages for disfigurement on the jury verdict form, and failed to seek clarification from the trial court or the jury after the jury returned a verdict awarding Plaintiff damages for physical impairment and disfigurement. Indeed, Defendant's own proposed verdict form combined these two forms of damages. Defendant's failure to raise these matters constitutes a waiver of those issues, and therefore a failure to preserve them on appeal. *See Carlberg v. Willmott*, 287 P. 863, 378-79 (Colo. 1930); *North v. Cummings*, 355 Fed.Appx. 133, 141 (10th Cir. 2009); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1468-69 (10th Cir. 1992).

3. Employee's Right to Recovery

For the same reasons the trial court's decision to preclude Plaintiff from claiming damages for medical expenses and wage loss at trial was in error, the trial court's decision to permit Plaintiff to pursue damages for physical impairment and disfigurement was correct.

As Plaintiff argued in his Opening Brief, and in the prior sections of the present Brief, which arguments are incorporated by reference herein, an injured employee is permitted to claim the full amount of his damages at trial against a negligent tortfeasor as long as the Workers' Compensation carrier does not resolve

its claims by settling with or independently suing the tortfeasor. And there is no basis in Colorado law for the proposition that a Workers' Compensation carrier must assign rights to an injured employee for that employee is permitted to bring those claims.

Here, because it is undisputed that Old Republic did not settle with or sue Defendant, and therefore did not resolve its claim against Defendant, and because Old Republic was not required to assign any rights to Plaintiff, the trial court correctly determined that Plaintiff was fully within his rights to pursue damages for physical impairment and disability at trial.

4. Waiver

Even if it were true that an injured worker is not permitted to claim damages for those losses for which a Workers' Compensation carrier provides benefits, Defendant has waived this argument by failing to raise it to the trial court.

In this case, at the conclusion of trial, the jury awarded Plaintiff $100,000.00 for "physical impairment or disfigurement." (CF, p. 650.) Defendant now contends that "it was error to allow Mr. Strange to pursue the damages for physical impairment and disfigurement." (Op.-Ans. Br., p. 16.) However, Defendant's reasoning for this is that Plaintiff "received compensation for his permanent physical impairment as part of his workers' compensation benefits." (Op.-Ans. Br., p. 16.) Defendant nowhere addresses the propriety of the disfigurement portion of the jury's award.

And Defendant would in fact have no basis for such an argument. As the Final Admission of Liability cited by Defendant reveals, Plaintiff was awarded no benefits by Old Republic for disfigurement. (CF, p. 747.)

However, the evidence at trial most certainly supported a claim for disfigurement in Plaintiff's claim against Defendant. Plaintiff introduced at trial, as page seven of Exhibit 7, a photograph of the large scar he has on his leg as a result of the surgery he underwent following his fall. (TR 10/11/22, pp. 173:14-25 – 174:1-13; CF, p. 536.) While Defendant claims that Plaintiff should not have been awarded damages for physical impairment and disfigurement, Defendant offers absolutely no basis for its contention that any amounts for disfigurement were in error. Worse, this distinction was not preserved by Defendant on appeal.

"As a general rule, issues not presented in the trial court are deemed waived and cannot be raised on appeal." *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986). More specifically, the failure to assert error in submitting different categories of damages as one to the jury renders the claimed error unreviewable. *Carlberg*, 287 P. at 378-79. Cases in the Tenth Circuit have concurred with this analysis. In the case of *North v. Cummings*, where the appellant claimed his property damage was not properly considered by the jury, the court explained:

> [W]e note the jury could have included the stipulated damages in [the appellant's] personal injury award. However, because the verdict was a

> general verdict, we do not know specifically which damages were or were not included. But that uncertainty would not have occurred had [the appellant] requested a separate property damage line on the verdict form or sought clarification of the verdict before the jury was dismissed. By failing to do so, [the appellant] waived the argument that the jury did not award the stipulated property damages.

355 Fed.Appx. at 141. *See also Kenworthy,* 979 F.2d at 1468-69 (holding that the appellant "did not object either the jury instruction or the special verdict form, nor did it seek clarification of the verdict before the jury was dismissed," and that "[a] party who fails to bring to the trial court's attention ambiguities created by jury instructions or special verdict forms may not seek to take advantage of such ambiguities on appeal").

Here, Defendant failed to object to the portion of the jury verdict form where physical impairment and disfigurement were included together as one line item. Worse, Defendant's *own* proposed jury verdict form combined these two into one. (CF, p. 598.) As in the *Cummings* case, it is not known how much of the $100,000.00 awarded by the jury was for physical impairment, if any, and how much was for disfigurement. And just as in the *Cummings* case, this uncertainty might not have occurred had Defendant requested that these two areas of damages be separated, or sought clarification from the jury before it was dismissed. While it is true that these two forms of damages are standardly listed together, the fact that the two are nevertheless conceptually distinct was shown by the case of *Preston v. Dupont*,

which reviewed the common law foundations of each. 35 P.3d 433, 441 (Colo. 2001).

While Defendant offers an argument for the reversal of the award for physical impairment (which argument Plaintiff maintains is without merit), Defendant gives *no* argument for reversal of the award for disfigurement. Because Defendant took no action to separate these damages at trial, Defendant has waived any argument that they should be considered separately. Because the award for physical impairment cannot be reversed without also reversing the award for disfigurement, which difficulty is a product of Defendant's own inaction, Defendant has waived its ability to challenge the jury's decision on this matter, and Defendant's request for reversal must be denied.

VI. 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 his medical expenses and wage loss, 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, and that this Court affirm the trial court's decision permitting Plaintiff to assert claims for physical impairment and disfigurement at trial.

Respectfully submitted this 7th day of September, 2023.

ANDERSON HEMMAT, LLC
s/ Cameron O. Hunter

Chad P. Hemmat, No. 20845
Jason G. Alleman, No. 42570
Cameron O. Hunter, No. 50095
5613 DTC Parkway, Suite 150
Greenwood Village, CO 80111
303-782-9999
Attorneys for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of September, 2023, a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S ANSWER-REPLY BRIEF** was served via ICCES and/or first class mail, postage prepaid, addressed to the following:

Jeffrey Ruebel, Esq.
RUEBEL & QUILLEN, LLC
8461 Turnpike Drive, Ste. 206
Westminster, CO 80031
Attorney for Defendant-Appellee

s/ Stephani Cruz

Stephani Cruz