SUMMARY
May 16, 2024

2024COA54

No. 23CA0292, *Ortiz v. Progressive Direct Insurance Co.* — Insurance — Motor Vehicles — Automobile Insurance Policies — Uninsured/Underinsured

In this case involving uninsured motorist coverage, a division of the court of appeals holds that the district court did not err by barring an automobile insurer from contesting its insured's claim that the uninsured driver was at fault for the crash that caused the insured's injuries. The division concludes that the district court correctly applied the holding of *State Farm Mutual Automobile Insurance Co. v. Brekke*, 105 P.3d 177 (Colo. 2004), when it ruled that the insurance company could not contest liability because it had not informed the court and its insured of its intent to do so as soon as was practicable. The special concurrence agrees that the

district court correctly applied Brekke, but it urges the supreme court to reconsider its holding in that case.

COLORADO COURT OF APPEALS **2024COA54**

Court of Appeals No. 23CA0292
City and County of Denver District Court No. 21CV30994
Honorable Alex C. Myers, Judge

Andrew Ortiz,

Plaintiff-Appellee,

v.

Progressive Direct Insurance Company,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE GROVE
Tow, J., concurs
Lipinsky, J., specially concurs

Announced May 16, 2024

Levin Sitcoff Waneka PC, Nelson A. Waneka, Denver, Colorado; Galperin and Associates, Jacob Galperin, Rebecca Bilello, Denver, Colorado, for Plaintiff-Appellee

Spies, Powers & Robinson, P.C., Janet R. Spies, Brendan O. Powers, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Progressive Direct Insurance Company (Progressive), appeals the district court's judgment in favor of plaintiff, Andrew Ortiz. We affirm and remand for the district court to determine Ortiz's reasonable attorney fees and costs incurred on appeal.

I. Background

¶ 2 Tania Granados Camacho injured Ortiz in a car crash when she collided with his car as Ortiz attempted to turn left into a parking lot. Camacho was unlicensed (she had only a learner's permit), unsupervised by an adult, and uninsured. Ortiz was insured by Progressive under a policy that included uninsured motorist (UM) coverage. After the crash, Progressive denied Ortiz's claim for UM benefits on the basis that Ortiz was more than 50% at fault for the collision.

A. Ortiz's Lawsuit

¶ 3 Ortiz sued Camacho for negligence and negligence per se. He included Progressive as a codefendant, asserting claims for breach of contract, common law insurance bad faith, and unreasonable delay and denial of insurance benefits under sections 10-3-1115 to -1116, C.R.S. 2023. Specifically, Ortiz's complaint accused

Progressive of unreasonably and in bad faith investigating his claim for UM benefits.

¶ 4 Camacho never responded to Ortiz's complaint, and the district court entered a clerk's default against her pursuant to C.R.C.P. 55(a) on April 28, 2021. Both Ortiz's motion requesting entry of clerk's default[1] and the district court's order granting the motion and entering default against Camacho were served on Progressive. Progressive did not file anything in response to either the motion or the corresponding order.

¶ 5 Meanwhile, Progressive filed an answer to Ortiz's complaint in which it

- admitted that Camacho "was partially at fault for the happening of the motor vehicle accident";
- responded to every one of Ortiz's allegations against Camacho by stating that the claim was "not direct[ed] to [Progressive] and therefore no response is required";

[1] Although Ortiz captioned his motion as a request for default judgment, the district court treated the motion as one requesting entry of clerk's default because "the substance of the motion requested [this relief] pursuant to C.R.C.P. 55(a)."

- asserted, in its affirmative defenses, that any damages sustained by Ortiz were due to
    - "intervening or superseding causes or circumstances" that Progressive "could not have reasonably foreseen and for which . . . Progressive is not responsible" and
    - "the acts or omissions of parties other than . . . Progressive," over whom "Progressive had no control and for whom . . . Progressive was not responsible"; and
- asserted that Ortiz's "right of recovery, if any, against . . . Progressive may be barred or diminished by his assumption of risk" and "his comparative/contributory fault."

B. Case Management Order

¶ 6 Three months later, the district court issued a case management order (CMO). The court mostly accepted the language of the parties' proposed CMO, making a few additions that are not relevant here. The court did not alter the parties' respective

descriptions of the nature of the case or their identifications of the issues to be tried.

¶ 7 In his description of the case and identification of the issues to be tried, Ortiz asserted that the "issues concern liability, causation of Plaintiff's injuries, the extent of Plaintiff's damages, [and] the bad faith conduct of Progressive Insurance and its representatives." Progressive, meanwhile, denied Ortiz's claims against it and described the case as "a simple liability dispute where Plaintiff has failed to support his claim that he was not the majority at fault for the underlying motor vehicle accident." Progressive also listed several affirmative defenses that it intended to assert. It did not, however, include comparative fault in that list.

C. Summary Judgment Order

¶ 8 Ortiz later moved for partial summary judgment against both defendants, arguing, as relevant here, that the undisputed facts showed that Camacho was "the sole proximate cause of the motor vehicle collision" and of Ortiz's injuries. Ten months after the district court's entry of the clerk's default against Camacho, and after completing discovery, Progressive timely responded to Ortiz's motion for partial summary judgment by asserting in relevant part

that it was "entitled to participate in the liability and damages components of the default-judgment hearing." The district court denied Ortiz's motion as to Camacho because summary judgment cannot be entered against a defaulted party, but the court suggested in its order and at a hearing the next day that it would consider a motion for default judgment against Camacho should Ortiz file one. More importantly for the purposes of our analysis, however, the court also declined to permit Progressive to contest Camacho's liability.

¶ 9 The district court reasoned that, although the entry of default against Camacho was not a final judgment determining rights or remedies, it nonetheless established Camacho's liability "for purposes of moving forward with default judgment." Relying on the supreme court's guidance in *State Farm Mutual Automobile Insurance Co. v. Brekke*, 105 P.3d 177, 186-93 (Colo. 2004), the court found that Progressive had failed to make the required particularized showing that its participation in determining the issue of liability was necessary to ensure a fair hearing. To the contrary, even though *Brekke* required Progressive to "specifically set forth the legitimate defenses it intend[ed] to raise," and to do so

"as soon as practicable," *id.* at 192 (footnote omitted), the district court found that Progressive presented only "general, boilerplate affirmative defenses or statements" in its answer and "did not raise any objection or even concern about its liability issues at [the] time" that default was entered.[2]

¶ 10 Despite Progressive's exclusion from participation in the liability issue, the district court explained that, just as *Brekke* contemplated, Progressive could participate in the hearing at which Ortiz would attempt to establish the damages that he suffered in the crash, and Ortiz's three claims against Progressive (breach of contract, common law insurance bad faith, and unreasonable delay and denial of insurance benefits) would proceed to trial separately.

D. Damages Hearing

¶ 11 Progressive participated in the damages hearing, which, as the district court described in its default judgment order following the hearing, "address[ed] the issues of causation and damages pertaining to Defendant Camacho." Camacho did not attend the

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[2] In its denial of Progressive's motion for reconsideration, the district court noted that Progressive knew the facts supporting its argument against Camacho's liability before Ortiz filed his lawsuit.

hearing, but Ortiz, Ortiz's counsel, and Progressive's counsel attended and participated.

¶ 12 During this hearing, Ortiz and his treating physician testified about causation and the extent of Ortiz's damages, with Progressive's counsel cross-examining both witnesses about these matters. The district court awarded Ortiz only $20,000 of the $100,000 that he requested for noneconomic damages and damages for permanent physical impairment.

¶ 13 Progressive then paid Ortiz the $86,958.66 total default judgment entered in favor of Ortiz against Camacho (which was comprised of $20,000 in noneconomic damages, approximately $48,000 in medical expenses, and prejudgment interest), and Progressive and Ortiz proceeded to trial only on the claims for common law insurance bad faith and statutory unreasonable delay and denial of insurance benefits.

E. Trial

¶ 14 At trial on the bad faith and unreasonable delay claims, causation — specifically, Progressive's position that Ortiz was primarily at fault for the crash — was the central theme. Progressive asserted Ortiz's fault during opening statements and

closing arguments, and throughout witness examinations. It conceded that Camacho had been found liable for the crash but argued that her liability was simply the result of a "technical default" and that Progressive initially refused to pay UM benefits because it reasonably determined that Ortiz was more than 50% at fault.

¶ 15 Consistent with Progressive's position, the jury instructions stated that

- the district court found Camacho at fault for the accident by default because she "did not respond or contest liability";
- Progressive "denies that it acted in bad faith or unreasonably delayed or denied [UM] benefits" because "it found through its own investigation that [Ortiz] was at fault for the accident, a decision it maintains was reasonable and a good faith basis to deny uninsured motorist benefits";
- "[w]hether or not a person has a valid driver's license is not relevant to determining whether that person was driving negligently at the time of an accident"; and

- at the time of the accident, several Colorado statutes, all of which were potentially relevant to determining fault for the accident, governed vehicles turning left, drivers passing other drivers on the right, driving on roadways laned for traffic, and careless driving that causes bodily injury.

¶ 16 The jury found in Ortiz's favor on both claims, awarding him $76,493.53 for statutory unreasonable delay and denial of insurance benefits and $140,000 for common law insurance bad faith.

F. Motion for a New Trial

¶ 17 Progressive moved for a new trial on the sole basis that there were "inherent and unaddressed inconsistencies in the Court's Orders in this case," which "alone warrant a new trial." Specifically, Progressive argued that the district court's summary judgment order barring it from contesting Camacho's liability was inconsistent with the pleadings and the CMO, which purportedly identified comparative fault as an issue to be tried in the case.

¶ 18 The district court denied Progressive's motion, reasoning that the statements in the CMO, "which were prepared by the parties not

the Court, indicate that Progressive was contesting its liability on Plaintiff's claims for breach of contract and bad faith claims," not "challenging or seeking to stand in Defendant Camacho's shoes to contest liability in this lawsuit on Plaintiff's negligence claim." But more importantly, the district court added, Progressive's statement of the issues in the CMO did not include the particularized showing required under *Brekke* regarding the basis for asserting such a defense, and Progressive did not attempt to make the required showing until nearly a year after default had already been entered against Camacho.

¶ 19 The district court subsequently entered final judgment, and this appeal followed.

II. The District Court's Adherence to *Brekke*

¶ 20 Progressive primarily takes issue with the district court's interpretation of *Brekke* and its application of that case's reasoning to Ortiz's lawsuit. We discern no error in the district court's approach.

A. Standard of Review and Applicable Law

¶ 21 The decision about the proper role of an insurance provider in tort litigation by its insured against an uninsured motorist "falls

within the sound discretion of the district court." *Brekke*, 105 P.3d at 183, 193. A district court abuses its discretion when its "failure to properly order the proceedings virtually assures prejudice to a party." *Id.* at 193. However, we review a district court's application of supreme court precedent de novo. *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 28 (Colo. 2006).

¶ 22 Because of the special nature of UM coverage, an insurance contract creates a quasi-fiduciary relationship between an insurer and its insured. *Brekke*, 105 P.3d at 188. Thus, an insurer has a duty to investigate and adjust a claim in good faith. *Id.* at 189. At the same time, an insurer may wish to participate in its insured's litigation with an uninsured motorist "to permit the insurance provider to present legitimate defenses that the uninsured motorist fails to raise" because "the interest of the insurance provider in presenting these legitimate defenses may not be sufficiently protected without some participation by the insurance provider." *Id.* at 190.

¶ 23 In determining the appropriate level of participation by an insurer in tort litigation, a district court "must take into consideration the unique relationship between the insured and

insurance provider and balance the insurance provider's duties to the insured and the insured's right to undiluted UM recovery against the interest of the insurance provider in receiving a fair hearing on its legitimate defenses." *Id.* at 181. UM coverage is diluted when an insured is prevented from obtaining a default judgment, which has the same effect as a final judgment after a formal trial and "legally entitles a plaintiff to collect money damages from an uninsured motorist." *Id.* at 185. However, "a finding of no liability or of limited damages on the part of the uninsured motorist will eliminate or limit a claim under the insurance provider's UM coverage." *Id.* at 188. Because it "creates a real and inherent conflict of interest," *id.* at 187, an insurer's participation in such litigation "must be no more extensive than necessary to preserve that balance." *Id.* at 181. A district court must determine the extent of this participation on a case-by-case basis. *Id.* at 183.

¶ 24 An insurer, meanwhile, bears the burden to show "that its interest in a fair hearing on its legitimate defenses will be unprotected without greater participation in the proceedings." *Id.* at 192. To do so, an insurer must plead "specific and particular

allegations" that "set forth the legitimate defenses it intends to raise" as soon as it is practicable to do so. *Id.* (footnote omitted).

¶ 25 An insurer may not act as a codefendant against its insured. *Id.* at 186. Instead, an insurer "will usually be allowed to fully participate in the damages phase of a default judgment hearing, but its participation in any liability determination will be more limited." *Id.* at 193. "[A] hearing on liability or causation will be granted only when it clearly appears that the legitimate defenses of the insurance provider will not be presented to the court without such an additional hearing." *Id.*

B. The Effect of Camacho's Default

¶ 26 Progressive first contends that the district court erred in its determination of the effect of Camacho's default. According to Progressive, Ortiz had the burden to prove that he was entitled to UM benefits by showing that he was legally entitled to recover damages, and that he failed to do this because Camacho's default did not establish that she was at fault for the accident. Progressive appears to assert that, because it did not participate in the liability phase of Ortiz's tort claims against Camacho, Camacho's default

cannot be used to establish Ortiz's entitlement to recover damages against her.

¶ 27 This argument finds no support in *Brekke*; indeed, *Brekke* says just the opposite. In rejecting an insurer's argument that its UM contract prohibited a default judgment against an uninsured motorist from binding the insurer, the *Brekke* court observed that "[i]nsured motorists have the right to recover compensation for loss caused by an uninsured motorist in the same manner that recovery would be permitted for a loss due to an insured motorist." *Id.* at 184. The court noted that it had "regularly reaffirmed this understanding of the extent of coverage required by the public policy behind section 10-4-609[, C.R.S. 2023]." *Id.* That statute, the *Brekke* court pointed out, "requires that an insured be 'legally entitled to recover damages from owners or operators of uninsured motor vehicles' in order to invoke UM coverage." *Id.* at 185. But "a default judgment has the same effect as final judgment after a formal trial," and "final judgment legally entitles a plaintiff to collect money damages from an uninsured motorist." *Id.* Moreover, UM coverage is impermissibly diluted when an insured is prevented from obtaining a default judgment. *Id.*

¶ 28 The *Brekke* court further explained that, in *Peterman v. State Farm Mutual Automobile Insurance Co.*, 961 P.2d 487 (Colo. 1998), it "rejected the argument that a clause in the insurance policy prevented an insured from using a default judgment against the uninsured motorist as a basis for its claim against the insurance provider" because the "failure of the defendant to appear in no way undermines the validity of the judgment or the nature of the issues resolved by the judgment." *Brekke*, 105 P.3d at 185 (quoting *Peterman*, 961 P.2d at 494).

¶ 29 Here, Progressive recycles the twice-rejected arguments from *Brekke* and *Peterman* that an insured's default judgment obtained against an uninsured motorist does not legally entitle the insured to recover damages such that UM coverage binding the insurer is invoked. *Brekke* and *Peterman* make clear, however, that Ortiz was legally entitled to recover damages against the uninsured Camacho as a result of Camacho's default. Thus, we discern no error in the district court's determination that Camacho's default invoked Ortiz's UM coverage, thereby binding Progressive.

C. The Refusal to Consider Progressive's Comparative Fault Defense

¶ 30 Progressive also contends that the district court misconstrued and misapplied *Brekke* when it barred Progressive's attempt to contest Camacho's liability via an affirmative defense of comparative fault against Ortiz. Essentially, Progressive challenges the degree of participation in this litigation that the district court permitted it to exercise.

¶ 31 In particular, Progressive asserts that the district court "improperly found that Progressive waived its comparative fault coverage defense, despite Progressive's pre-suit coverage denial letters, the denials and affirmative defenses in its Answer, and the Court's own CMO." According to Progressive, the district court's actions prejudiced it "by precluding any consideration of its coverage defense or reduction of damages based on comparative fault."

¶ 32 As an initial matter, we do not accord any weight to Progressive's "pre-suit coverage denial letters." An insurer seeking to meet its burden of showing "that its interest in a fair hearing on its legitimate defenses will be unprotected without greater

participation in the proceedings" must plead "specific and particular allegations" that "set forth the legitimate defenses it intends to raise" as soon as it is practicable to do so. *Brekke*, 105 P.3d at 192 (footnote omitted). This requirement is concerned with providing notice to the trial court as it shapes the roles of litigants — hence the mandate to *plead* specifics as early as practicable — not with providing notice to other parties to the litigation. Progressive's communications to Ortiz denying UM coverage prior to the commencement of litigation are therefore irrelevant to our review.

¶ 33 In its summary judgment order declining to permit Progressive to contest Camacho's liability, the district court detailed its understanding of *Brekke*'s requirements. It stated that, under *Brekke*, Progressive had to make a particularized showing that its participation on the issue of liability was necessary to ensure a fair hearing. Moreover, the district court explained, if it intended to contest Camacho's liability, Progressive was required to raise its comparative fault arguments "as soon as practicable," and with greater specificity than the "general, boilerplate affirmative defenses

or statements" that it provided in its answer to Ortiz's complaint.[3] The court concluded that Progressive's failure to respond to Ortiz's allegations against Camacho (by asserting in its answer that those allegations were directed only to Camacho), its general denials of responsibility, its vague assertion that comparative fault may play an unspecified role in the litigation, and its failure to adequately raise the issue of comparative fault until nearly a year after default was entered against Camacho were insufficient for Progressive to show the necessity of its participation in the liability determination. The district court also explained, however, that *Brekke* permitted Progressive to participate in the damages hearing and in a trial on Ortiz's claims against Progressive.

¶ 34 *Brekke* acknowledged that limited participation by an insurer may be required to protect the insurer's interest in presenting legitimate defenses but emphasized that the insurer bears the burden of showing the need for its greater participation. *Id.* at 190, 192. And, *Brekke* explains, an insurer seeking to meet this burden

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[3] We reject Progressive's argument that, to the extent its answer was insufficient, the burden fell on Ortiz to request a more definite statement, as Progressive cites no case law in support of this proposition.

must plead "specific and particular allegations" that "set forth the legitimate defenses it intends to raise" as soon as it is practicable to do so. *Id.* at 192 (footnote omitted). The district court's interpretation of *Brekke*'s requirements was therefore correct.

¶ 35 Above all, *Brekke* requires that a district court, on a case-by-case basis, must "take into consideration the unique relationship between the insured and insurance provider and balance the insurance provider's duties to the insured and the insured's right to undiluted UM recovery against the interest of the insurance provider in receiving a fair hearing on its legitimate defenses." *Id.* at 181, 183. The district court did exactly that. Consistent with the holding in *Brekke*, the court assessed the need for Progressive's participation in the liability determination based on the specific circumstances of this insurer-insured relationship and Progressive's insufficient pleading of its comparative fault defense. And, exactly like the *Brekke* court, the district court sought to balance the interests of the parties and compensate for Progressive's exclusion from the liability determination by permitting Progressive to participate in the damages hearing and proceed to trial on the claims that Ortiz brought against it.

¶ 36 During both the damages hearing and the trial, Progressive explored the cause of the accident and the respective fault of each driver. And its defense was partially successful. Due to Progressive's cross-examination during the damages hearing of Ortiz and his treating physician about causation and the extent of Ortiz's damages, Ortiz received just twenty percent of his requested noneconomic damages and damages for permanent physical impairment. Progressive's assertion on appeal that the district court precluded "any consideration of its coverage defense or reduction of damages based on comparative fault" is thus without merit.

¶ 37 Because we cannot say that the district court failed to properly order the proceedings, or that any such failure "virtually assure[d] prejudice to a party," *id.* at 193, we discern no abuse of discretion in the district court's decision about the proper role of Progressive in the litigation.

III. The District Court's Orders and their Consistency

¶ 38 Progressive next contends that the district court erred when it failed to reconcile alleged inconsistencies between the CMO and orders issued later in the proceedings. Progressive asserts that the

CMO "unambiguously state[d] that Ortiz'[s] comparative fault was the critical issue to be tried in the case," and that the district court's later summary judgment order declining to permit Progressive to contest Camacho's liability contradicted its approval of the CMO, in which Progressive stated its intent to contest Camacho's liability.

¶ 39 According to Ortiz, we should not address Progressive's argument that the district court's purportedly inconsistent orders amounted to reversible error because Progressive failed to timely raise the issue in the district court. We agree that Progressive did not preserve the issue for our review.

¶ 40 In civil cases, we do not review issues that are insufficiently preserved. *Rinker v. Colina-Lee*, 2019 COA 45, ¶ 22. As a general rule, to preserve an issue for appeal, a party "must make a timely and specific objection or request for relief in the district court." *Id.* at ¶ 25. "Objections to trial court rulings must be made contemporaneously with the court's actions before appellate review is afforded"; arguments first made in a post-trial motion "are too late and, consequently, are deemed waived for purposes of appeal." *Briargate at Seventeenth Ave. Owners Ass'n v. Nelson*, 2021 COA

78M, ¶ 66. And where an argument raised during earlier case proceedings differs from an argument raised in a motion for post-trial relief, the previously raised argument is insufficient to preserve the post-trial argument for appeal. *See Fid. Nat'l Title Co. v. First Am. Title Ins. Co.*, 2013 COA 80, ¶ 51.

¶ 41 Ortiz correctly points out that Progressive argued for the first time in its post-trial motion for a new trial that the district court's summary judgment order, which precluded Progressive from contesting Camacho's liability, was inconsistent with the CMO. At no point during the time between the district court's summary judgment order and the entry of final judgment following trial did Progressive argue that there was an unreconciled inconsistency among the district court's orders. To the contrary, Progressive's motion for reconsideration of the summary judgment order that purportedly created this inconsistency made no mention of inconsistent orders, arguing only that, under *Brekke*, Progressive must be permitted to contest Camacho's liability in order to avoid prejudice.

¶ 42 Progressive states on appeal that this "is not an issue that can be waived" because "the district court has an independent duty to

reconcile inconsistent orders regardless of whether any party objects to the inconsistency." Progressive cites no case law in support of this proposition, and we are aware of none. Accordingly, we conclude that this argument is unpreserved, and we decline to consider it further.

IV. Jury Instructions

¶ 43 Lastly, Progressive challenges the jury instructions, arguing that the district court incorrectly told the jury Camacho was found to be at fault for the accident and that the instructions were deficient because they did not contain an instruction on comparative fault. We disagree on both points.

A. Standard of Review

¶ 44 We review de novo whether the jury instructions as a whole accurately informed the jury of the governing law. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). As long as the instructions do so, the district court has "broad discretion to determine [their] form and style." *Id.* Thus, we review a district court's decision about whether to give a particular instruction for an abuse of discretion. *Id.* A district court abuses its discretion only when its ruling is "manifestly arbitrary, unreasonable, or unfair." *Id.*

B. Analysis

¶ 45 Reviewing the jury instructions as a whole, we conclude that they accurately informed the jury of the governing law. Because neither party argues otherwise, we review the district court's decision to give the particular instructions that it did for an abuse of discretion.

¶ 46 Revisiting the relevant facts, the jury instructions stated that

- because Camacho never responded to the lawsuit or contested liability, the district court found her at fault for the accident through the entry of a default judgment on August 18, 2022;
- Progressive "denies that it acted in bad faith or unreasonably delayed or denied [UM] benefits" because "it found through its own investigation that plaintiff was at fault for the accident, a decision it maintains was reasonable and a good faith basis to deny uninsured motorist benefits";
- "[w]hether or not a person has a valid driver's license is not relevant to determining whether that person was driving negligently at the time of an accident"; and

- at the time of the accident, several Colorado statutes, all of which were potentially relevant to determining fault for the accident, governed vehicles turning left, drivers passing other drivers on the right, driving on roadways laned for traffic, and careless driving that causes bodily injury.

¶ 47 We are unpersuaded by Progressive's contention that the jury instructions incorrectly attributed fault for the accident to Camacho and "failed to accurately and appropriately instruct the jury on the law and the limited effect of Camacho's default." Quite the opposite: the jury instructions specifically stated that, because Camacho "did not respond or contest liability, the Court granted default judgment against her . . . which found her at fault for the collision." This instruction did not blame Camacho for the accident, but correctly noted that Camacho was found at fault due only to her default judgment — a detail that accurately captured the procedural nature of Camacho's default.

¶ 48 Progressive's argument that the jury instructions were deficient because they lacked an instruction on comparative fault is also unpersuasive. The trial was held only on Ortiz's claims against

Progressive for common law insurance bad faith and statutory unreasonable delay and denial of insurance benefits. Ortiz's negligence claims against Camacho, and specifically the issue of comparative fault, were not before the jury; thus, Progressive cannot claim that the district court erred by not including a jury instruction on comparative fault.

¶ 49 We conclude that nothing in the district court's decision to proffer these instructions was manifestly arbitrary, unreasonable, or unfair. Consequently, the district court did not abuse its discretion.

V. Appellate Attorney Fees and Costs

¶ 50 The district court awarded Ortiz attorney fees under section 10-3-1116(1), C.R.S. 2023, which provides for an award of fees to an insured who prevails on a claim that a payment of benefits by an insurer has been unreasonably delayed or denied. Ortiz also requests an award of attorney fees and costs incurred in this appeal. "When a party is awarded attorney fees for a prior stage of the proceedings, it may recover reasonable attorney fees and costs for successfully defending the appeal." *Melssen v. Auto-Owners Ins. Co.*, 2012 COA 102, ¶ 75 (quoting *Kennedy v. King Soopers Inc.*, 148

P.3d 385, 390 (Colo. App. 2006)). Because Ortiz successfully defended the district court's judgment on appeal, we grant his request. We remand to the district court to determine and award the amount of reasonable attorney fees and costs that Ortiz incurred on appeal.

VI. Disposition

¶ 51 We affirm the district court's judgment and remand the case with instructions to determine the issue of appellate attorney fees and costs.

JUDGE TOW concurs.

JUDGE LIPINSKY specially concurs.

JUDGE LIPINSKY, specially concurring.

¶ 52 I agree with the majority that the supreme court's analysis in *State Farm Mutual Automobile Insurance Co. v. Brekke*, 105 P.3d 177 (Colo. 2004), compels us to affirm the district court's refusal to grant the request of appellant, Progressive Direct Insurance Company, for a trial on its contributory negligence defense. But I write separately because I believe that, for three reasons, the court's application of *Brekke* may have led to an unjust result.

¶ 53 First, consistent with the process articulated in *Brekke* for determining the circumstances under which an insurer may present a complete defense to its policyholder's coverage claims in an uninsured motorist (UM) case, the court did not allow Progressive to litigate the liability of appellee, Andrew Ortiz — specifically, whether he was more than 50% at fault for the collision.

¶ 54 As a consequence, we do not know whether Ortiz was entitled to recover UM benefits from Progressive because the court never conducted a trial to determine Ortiz's liability for the collision underlying this case. If the facts presented at such a trial established that Ortiz was more than 50% at fault for the collision,

then he would not have been entitled to UM benefits, as a matter of law. By following *Brekke* — which remains binding precedent in this state — the court denied Progressive its day in court to attempt to prove that it owed nothing to Ortiz.

¶ 55 Second, consistent with *Brekke*, the court determined that the C.R.C.P. 55(a) default entered against the uninsured motorist codefendant, Tania Granados Camacho, barred Progressive from challenging Ortiz's entitlement to UM benefits. In my view, absent the holdings of *Brekke* that I urge the supreme court to consider anew, the default should not have been binding on Progressive. Thus, I believe Progressive should have been allowed to litigate Ortiz's fault, if any, for the collision despite the entry of the C.R.C.P. 55(a) default. Further, Progressive should have been permitted to litigate the degree of Ortiz's fault before the court entered the C.R.C.P. 55(b) default judgment against Camacho.

¶ 56 Third, I believe that footnote 20 of *Brekke* effected a radical change in the law governing notice pleading by stating that an insurer named as a codefendant in a policyholder's tort case against an uninsured motorist must assert its "legitimate defenses" with particularity in its pleadings. 105 P.3d at 192 n.20. Footnote 20

can lead to unjust outcomes in UM coverage cases by resolving a policyholder's coverage claims based on a formalistic requirement that the supreme court appears to have invented in *Brekke*.

¶ 57 I encourage the supreme court to reexamine the language in *Brekke* that led the district court to deny Progressive a trial to determine whether Ortiz was more than 50% at fault for the collision and, therefore, to compel Progressive to pay UM benefits to a policyholder who may not have been entitled to them.

I. Additional Facts

¶ 58 Ortiz purchased UM coverage from Progressive. The UM provision in Ortiz's automobile policy specifies that he would be entitled to UM benefits only if he was "legally entitled to recover from the owner or operator of [the] uninsured motor vehicle."

¶ 59 Ortiz and Camacho collided as Ortiz was turning left, across a lane of traffic, into a parking lot.

¶ 60 The record shows that, after investigating the collision, Progressive concluded that Ortiz was at fault. Progressive interviewed an eyewitness who said that Camacho had been driving the speed limit in the opposite direction when Ortiz turned into her. According to Progressive, the witness said that Ortiz was at fault for

the collision because "he should have just waited for her to keep going instead of just like turning." Progressive's investigation further showed that Ortiz violated the section of the Denver Revised Municipal Code requiring the left-hand turning driver to "yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard." *See* Denver Rev. Mun. Code § 54-179.

¶ 61 For these reasons, Progressive advised Ortiz that it was denying his claim for UM benefits. (Ortiz asserts in his answer brief that evidence introduced at the trial of his coverage claims against Progressive established that he was not at fault for the collision. But this argument is mere speculation, as the court did not instruct the jury to make findings regarding fault.)

¶ 62 Ortiz then sued Camacho and Progressive in a single action, through a single complaint. I agree with the majority that, in its answer, Progressive did not plead the affirmative defense of comparative fault with the particularity that C.R.C.P. 9(b) requires for fraud and mistake. *See Brekke*, 105 P.3d at 192 n.20 (stating that, in UM cases, an insurer "must plead its legitimate defenses with particularity").

¶ 63 Ortiz filed a motion for default judgment against Camacho. The court did not grant the motion, however, and instead entered a C.R.C.P. 55(a) default against Camacho.

¶ 64 Several months later, Ortiz filed a motion for partial summary judgment against Camacho on liability and against both defendants on causation and the reasonableness of the damages that Ortiz sought to recover. Progressive opposed the motion, arguing that, under *Brekke*, "a UM insurer can participate in the liability aspect of a default-judgment hearing against the alleged uninsured motorist if there is a legitimate defense to the liability claim against the alleged uninsured motorist that would not otherwise be presented to the court." Progressive explained that "[t]his holding makes legal sense because if the UM insurer does not get to contest the liability of the uninsured motorist, the insured might receive UM benefits they are not 'legally entitled' to receive and that the UM insurer should not be required to pay." Progressive requested that the court

- set a default judgment hearing at which "the liability, causation, and damages components of Ortiz's tort claims against Camacho are determined by the Court";

- at such hearing, allow Progressive to "assert its legitimate defenses to Ortiz's liability claims against Camacho";
- permit Progressive to "fully participate in the causation and damages components of the default-judgment hearing"; and
- allow Progressive to "fully defend" Ortiz's claims against Progressive at a jury trial.

¶ 65 In its ruling on Ortiz's motion for partial summary judgment, the court gave the following reasons for refusing to allow Progressive to litigate Ortiz's liability:

1. The entry of the C.R.C.P. 55(a) default established liability "for purposes of moving forward with summary judgment," and Progressive had not "raise[d] any objection or even concern about its liability issues" at the time Ortiz obtained the default.
2. "Progressive has not met its burden to show that its participation in a default judgment hearing on the issue of liability is required to ensure a fair hearing" because Progressive did not make "the particularized showing required under *Brekke*" and should have presented its

arguments about "comparative/contributory fault . . . at the outset of the case."

3. "*Brekke* recognized that an insurance provider will usually be allowed to fully participate in the damages phase of a default judgment hearing."

4. Ortiz's coverage claims against Progressive would proceed to trial regardless of the entry of any default judgment against Camacho, although "little may be left to decide" once Camacho's "tort liability and damages have been established through default judgment."

II. The Procedure Outlined in *Brekke* for Determining Whether an Insurer Can Litigate Its Legitimate Defenses in a UM Coverage Case

¶ 66 I next turn to the procedure the supreme court prescribed in *Brekke* for determining the circumstances under which, and how, an insurer may present its "legitimate defenses" to its policyholder's coverage claims in a UM case in which the insurer and the uninsured motorist are codefendants.

A. The Language of *Brekke*

1. Policy Considerations

¶ 67 The *Brekke* court analyzed the fraught relationship between insurers and their policyholders in UM cases where the policyholder asserts claims against both his insurer and the uninsured motorist. As the court noted, "When an insurance provider participates in litigation between its insured and an uninsured motorist, the participation creates a real and inherent conflict of interest between the two parties." *Brekke*, 105 P.3d at 187. Under the Colorado contributory negligence statute, a policyholder is not entitled to recover damages from an insured motorist if the policyholder's negligence is "as great as" the negligence of the insured motorist. *See* § 13-21-111(1), C.R.S. 2023. For this reason, "a finding of no liability or of limited damages on the part of the uninsured motorist will eliminate or limit a claim under the insurance provider's UM coverage. Thus, it is to the insurance provider's advantage to advocate the interests of the uninsured motorist in the tort litigation." *Brekke*, 105 P.3d at 188.

¶ 68 If the uninsured motorist appears and defends against the policyholder's claims, the insurer's financial interests align with

those of the uninsured motorist. The insurer's conflicting duty to its policyholder and "its interest in defending the uninsured motorist creates strong tension between its legal obligations and its business interests." *Id.*

¶ 69 Accordingly, section 10-4-609, C.R.S. 2023 — the uninsured motorist statute — and "the public policy impose a high standard of conduct on an insurance provider in its interaction with its insured." *Brekke*, 105 P.3d at 187-88. "Because of the special nature of [UM] coverage, we have held the contract creates a relationship between the insurer and the insured that we have described as quasi-fiduciary." *Id.* at 188. But "section 10-4-609's coverage applies only if the insured is 'legally entitled' to damages." *Id.*

2. The Tripartite Procedure

¶ 70 *Brekke* prescribes a three-part framework for district courts to employ when deciding whether and how the insurer should be permitted to participate in its policyholder's UM litigation.

¶ 71 The *Brekke* court attempted to strike a balance between "the duties of the insurance provider and the insured's right to an undiluted UM recovery against the interest of the insurance

provider in receiving a fair hearing on its legitimate defenses." *Id.* at 191.

¶ 72 "Although the insurance provider's unique role prevents it from participating as a co-defendant that can demand a jury trial, limited participation may be required to permit the insurance provider to present legitimate defenses that the uninsured motorist fails to raise." *Id.* at 190. "In such cases, the interest of the insurance provider in presenting these legitimate defenses may not be sufficiently protected without some participation by the insurance provider." *Id.*

¶ 73 The three-part procedure for making this determination is as follows.

¶ 74 First, the insurer must show that "its interest in a fair hearing on its legitimate defenses will be unprotected without greater participation in the proceedings." *Id.* at 192. The insurer bears the burden of "specifically set[ting] forth the legitimate defenses it intends to raise" in the tort litigation "as soon as practicable." *Id.* (footnote omitted).

¶ 75 Second, "[o]nce the insurance provider has pled these specific and particular allegations, the trial court may consider whether

. . . the interests of the insurance provider in presenting legitimate defenses require limited participation of the insurance provider in the tort litigation," and it may hold a hearing to aid this determination. *Id.* (As I note in Part IV.A below, the footnote accompanying this paragraph states that the insurer "must plead its legitimate defenses with particularity." *Id.* at 192 n.20.)

¶ 76 Third, if the trial court determines the insurer "has grounds sufficient to entitle it to participation in the tort litigation," the court "should structure the role of the insurance provider in the tort litigation narrowly to . . . protect the legitimate interests of all parties." *Id.* at 192-93.

¶ 77 "[T]he decision on the proper role for the insurance provider in the litigation falls within the sound discretion of the district court." *Id.* at 193. The supreme court added the important caveat that "an abuse of discretion . . . occurs where the court's failure to properly order the proceedings virtually assures prejudice to a party." *Id.*

B. The Procedure Described in *Brekke* Should Not Limit an Insurer's Ability to Defend Itself Against Its Policyholder's Coverage Claims

¶ 78 The protections for policyholders described in *Brekke* are necessary to ensure that the insurer complies with its quasi-

fiduciary duties to its policyholder by investigating and adjusting the claim in good faith. *See id.* at 189. The procedure set forth in *Brekke* makes sense when the insurer and the uninsured motorist both actively defend against the policyholder's claims. In those UM cases, the insurer's economic interests would presumably be protected because they would be aligned with those of the uninsured motorist codefendant. The insurer can piggyback onto the uninsured motorist's defenses.

¶ 79 If the uninsured motorist codefendant successfully defends against the policyholder's claims, then the insurer would necessarily prevail on the policyholder's coverage claims. If the uninsured motorist codefendant defeats the policyholder's tort claims by establishing that the policyholder was more than 50% at fault for the collision, the insurer would owe nothing to the policyholder.

¶ 80 But the relationship between the insurer and its policyholder changes if the uninsured motorist fails to appear. When the uninsured motorist defaults, the insurer cannot turn to another party to protect its interest in avoiding paying UM benefits to a potentially undeserving policyholder. From that point forward, the

litigation is, in essence, a coverage case. The only disputed claims remaining to be litigated are the policyholder's coverage claims against the insurer.

¶ 81 Once the case focuses on coverage issues, the one-time quasi-fiduciary relationship between the insurer and its policyholder is no longer a consideration. The insurer no longer needs to protect its policyholder by assisting with the policyholder's litigation against the uninsured motorist. There are only two adverse parties in the case, and the insurer should be allowed to defend itself against the policyholder without limitation or restriction.

¶ 82 In my view, *Brekke* fails to recognize the distinction between an insurer's duties when the uninsured motorist actively defends against the policyholder's claims and when the uninsured motorist is out of the picture and the case reduces to coverage litigation. The policy considerations underlying the court's tripartite analysis do not apply if the uninsured motorist defaults and the case becomes a simple insurance coverage action with one plaintiff — the policyholder — and one defendant — the insurer. At that point in the case, the "unique nature of UM litigation" should not

"deprive[] the insurance company, as a matter of public policy, of the right to a full jury trial on the issue of damages any more than it would deprive it of such a right, as a matter of public policy, in bad faith or contract litigation." *Id.* at 198 (Kourlis, J., dissenting).

¶ 83 The *Brekke* court's concerns about diluting UM coverage do not apply when the case focuses on the policyholder's coverage claims. As Justice Kourlis perceptively noted in her dissent, an insurer does not owe its policyholder a duty to assert a half-hearted defense to the policyholder's coverage claims. *See id.*

¶ 84 In sum, I believe that the limitations *Brekke* places on an insurer's ability to defend itself against its policyholder's claims make no sense if the uninsured motorist codefendant defaults and the case becomes, essentially, a coverage dispute.

III. The Effect on the Insurer of a Default or a Default Judgment Entered Against the Uninsured Motorist Codefendant

A. The Language of *Brekke*

¶ 85 *Brekke* makes the important point that insurers in UM cases are entitled to a jury trial on the coverage claims filed against them: "Although we realize that much of the dispute in uninsured motorists litigation turns on the tort litigation with the uninsured

motorist and there is little left to litigate as part of the contract claim once the uninsured motorist's liability has been determined in the default proceeding," the insurer "nevertheless has the right to a jury trial with respect to whether, under its insurance contract, it was required to pay claims made by [its policyholder]." *Id.* at 187 (majority opinion).

¶ 86 But *Brekke* also states that, once a default judgment is entered against the uninsured motorist, the insurer can no longer litigate liability. *Brekke* says that the insurer's "participation in any liability determination will be more limited" than its participation in the damages phase of a default judgment hearing. *Id.* at 193. *Brekke* continues, "[I]n the absence of an appearance by the uninsured motorist, the procedural setting remains that of a default judgment, where liability is ordinarily established by default but damages are resolved in a hearing." *Id.*

> Because a damages hearing will be held regardless of the participation of the insurance provider, its participation in the damages hearing has a lesser impact on the dilution of UM coverage under section 10-4-609. By contrast, permitting the insurance provider to contest issues of liability or causation would require a separate hearing in circumstances where such a hearing is not otherwise

> required. Because holding an additional hearing to a greater extent impacts the dilution of UM coverage, such a hearing on liability or causation will be granted only when it clearly appears that the legitimate defenses of the insurance provider will not be presented to the court without such an additional hearing.

Id.

B. The Entry of a Default or a Default Judgment Against the Uninsured Motorist Codefendant Should Not Deprive the Insurer of the Ability to Present a Full Defense to Its Policyholder's Coverage Claims

¶ 87 In my view, *Brekke*'s holding that default judgments against uninsured motorists bind the insurer on the issue of the policyholder's liability makes sense where the insurer had the opportunity, in response to the policyholder's motion for default judgment, to litigate whether the policyholder was more than 50% at fault for the collision.

¶ 88 But under no circumstances should an insurer be bound by a C.R.C.P. 55(a) default entered against the uninsured motorist codefendant, as occurred here.

¶ 89 I believe that the C.R.C.P. 55(a) default entered against Camacho should not have barred Progressive from litigating its contributory negligence defense. A C.R.C.P. 55(a) default is not a

judgment, but merely an interlocutory order that determines no rights or remedies. *Ferraro v. Frias Drywall, LLC*, 2019 COA 123, ¶ 11, 451 P.3d 1255, 1259. "A default judgment comprises two steps: 'entry of default' by the clerk and 'entry of default judgment' by the court." *Id.* "The 'entry of default' accepts the complaint's allegations and establishes the defendant's liability, but it does not establish damages." *Id.* *Brekke*, however, says that a "default" entered against the uninsured motorist codefendant equally binds the insurer codefendant on the issue of the policyholder's liability for the collision. *See Brekke*, 105 P.3d at 187, 193. Progressive could not have opposed the entry of the C.R.C.P. 55(a) default because there was no dispute that Camacho had failed to respond to Ortiz's complaint.

¶ 90 I can find no case outside the UM coverage context holding that a C.R.C.P. 55(a) entry of default binds any party other than the party against whom the default was entered. A C.R.C.P. 55(a) default has "no res judicata or collateral estoppel effect . . . because it is not a final adjudication." *In re Uranium Antitrust Litig.*, 473 F. Supp. 382, 386 (N.D. Ill. 1979) (interpreting the federal analogue to C.R.C.P. 55(a)). It merely deprives the defaulting defendant of her

"standing in court, [her] right to receive notice of the proceedings, and [her] right to present evidence at the final hearing." *Id.* Thus, a C.R.C.P. 55(a) default is not binding on a non-defaulting defendant. *See Dvore v. Casmay*, No. 06-CV-3076, 2008 WL 4427467, at *5 (N.D. Ill. Sept. 29, 2008) (unpublished opinion).

¶ 91 Giving such a consequential effect to the C.R.C.P. 55(a) default entered against Ortiz was not necessary to protect Ortiz's "right to undiluted UM recovery" or to ensure that Progressive satisfied its quasi-fiduciary duties to Ortiz. *Brekke*, 105 P.3d at 189, 191. Ensuring that the insurer satisfies its duties to its policyholder does not require the drastic step of denying the insurer a trial on the policyholder's contributory negligence if the uninsured motorist codefendant defaults. When the uninsured motorist codefendant defaults, there is no risk that granting the insurer its day in court on liability would force the policyholder to "traverse undue procedural hurdles and re-litigate matters." *Id.* at 185. There is no need to "re-litigate" the policyholder's liability for the underlying collision if the policyholder never litigated that issue because the uninsured motorist defaulted.

¶ 92 Even though, under *Brekke*, Progressive had the right to protect its "legitimate defenses" by participating in the tort litigation, the court's interpretation of the C.R.C.P. 55(a) default entered against Camacho deprived Progressive of its right to a complete defense. *Cf. Escalante v. Lidge*, 34 F.4th 486, 495 (5th Cir. 2022) ("When a case involves multiple defendants, courts may not grant default judgment against one defendant if doing so would conflict with the position taken by another defendant.").

¶ 93 And even if the court had entered a C.R.C.P. 55(b) default *judgment* against Camacho before considering Progressive's request for an opportunity to litigate contributory negligence, binding Progressive to such a judgment would have been contrary to the case law holding that a default judgment entered against one codefendant does not deprive a non-defaulting codefendant of its right to litigate its defenses.

¶ 94 As the United States Supreme Court held more than a century and a half ago, the entry of a judgment against one defendant while the case proceeds against another defendant can result in an "absurdity" if, as a consequence, the court ultimately enters inconsistent judgments in the same case. *Frow v. De La Vega*, 82

U.S. (15 Wall.) 552, 554 (1872). In such a situation, the court should enter a default against the first defendant and "proceed with the cause upon the answers of the other defendant[]." *Id.*; *see also Salomon Smith Barney, Inc. v. Schroeder*, 43 P.3d 715, 716-17 (Colo. App. 2001) (applying *Frow* and holding that, although a defaulting defendant could not "participate further in the proceedings," such defendant "would be entitled to the benefit of any favorable judgment" entered on the plaintiff's claims against the nondefaulting defendants).

¶ 95 These cases teach that, where a plaintiff's claims against multiple defendants implicate overlapping issues of liability, a default entered against one of the defendants cannot preclude a nondefaulting defendant from fully litigating its defenses. The reasoning of these cases should apply in the UM context when, as here, the uninsured motorist codefendant defaults and the insurer codefendant requests a trial on liability. Otherwise, as occurred here, the insurer codefendant is wrongfully deprived of its right "to present legitimate defenses that the uninsured motorist fail[ed] to raise." *Brekke*, 105 P.3d at 190.

¶ 96 Accordingly, I believe that Progressive should have been entitled to a trial on the issue of Ortiz's liability for the collision, despite the entry of the C.R.C.P. 55(a) default against Camacho. The court should have allowed Progressive to litigate its contributory negligence defense between the entry of the C.R.C.P. 55(a) default and the entry of the C.R.C.P. 55(b) default judgment against Camacho.

IV. *Brekke*'s Requirement that Insurers Plead Their Legitimate Defenses with Particularity

A. The Language of *Brekke*

¶ 97 As part of its discussion of the appropriate balance between an insurer's right to protect itself from paying meritless UM claims and the insurer's duties to its policyholder, the *Brekke* court discussed the type of notice an insurer must provide in a UM case to preserve its right to "a fair hearing on its legitimate defenses":

> To permit the court to determine the extent of the insurance provider's participation, the insurance provider must specifically set forth the legitimate defenses it intends to raise. Regardless of whether the insurance provider is named in the original complaint, or is making a motion to intervene, these particular allegations must be made in the tort litigation as soon as practicable.

Id. at 192 (footnote omitted). In the next paragraph, the court said, "Once the insurance provider has pled these specific and particular allegations, the trial court may consider whether good-faith grounds exist to believe that the interests of the insurance provider in presenting legitimate defenses require limited participation of the insurance provider in the tort litigation." *Id.*

¶ 98 Footnote 20 of *Brekke* expands on this text by expressly imposing a heightened pleading standard on insurers in UM cases: "We find our holdings on pleading special matters involving fraud or mistake applicable in determining that the insurance provider *must plead its legitimate defenses with particularity*." *Id.* at 192 n.20 (emphasis added).

¶ 99 The references to "pleading" and "plead" in footnote 20, *id.*, necessarily refer to the defenses the insurer asserts in its answer. *See* C.R.C.P. 7(a) (specifying the filings, including answers, that constitute "pleadings"). "'Pleadings' are the formal allegations by the parties of their respective claims and defenses, and are intended to provide notice of what is to be expected at trial." *In re Estate of Jones*, 704 P.2d 845, 847 (Colo. 1985).

¶ 100 Thus, pursuant to footnote 20, an insurer must plead its policyholder's contributory negligence with particularity in the insurers' answer (or in another "pleading") if it wishes to participate in the policyholder's tort litigation against an uninsured motorist, *Brekke*, 105 P.3d at 192 n.20.

B. An Insurer Should Not Be Required to Plead with Particularity Its Defenses to the Policyholder's Coverage Claims

¶ 101 Requiring insurers in UM cases to plead contributory negligence with particularity cannot be squared with C.R.C.P. 8 and 9, the longstanding case law addressing the requirements of notice pleading, and the procedure for amending court rules. I further note that this requirement is not necessary to protect policyholders in UM cases. Because the language of footnote 20 is such a legal outlier, I question whether the supreme court intended to modify the pleading requirements for insurers in UM cases so significantly.

1. Footnote 20 of *Brekke* Is Contrary to C.R.C.P. 8 and 9

¶ 102 Colorado Rules of Civil Procedure 8 and 9 govern pleadings. C.R.C.P. 8(b) provides that defenses must be stated only "in short and plain terms." Similarly, C.R.C.P. 8(e)(1) says that "[e]ach

averment of a pleading shall be simple, concise, and direct." The liberal notice pleading embodied in C.R.C.P. 8 furthers the goal of focusing litigation on the merits of the claims and defenses. *See Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 14, 287 P.3d 112, 116. "No technical forms of pleading or motions are required." C.R.C.P. 8(e)(1).

¶ 103 C.R.C.P. 9(b) specifies that only two special matters must be pleaded with particularity: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Contributory negligence is, of course, a distinct affirmative defense from fraud and mistake.

¶ 104 The policy reasons underlying the requirement that fraud be pleaded with particularity do not apply to contributory negligence. "The more rigorous pleading requirement of Rule 9(b) is designed to give effect to a number of public policies. A primary purpose is to prevent injury to . . . reputations . . . from irresponsible, improvident, and cavalier allegations of fraud." *Temple v. Haft*, 73 F.R.D. 49, 52 (D. Del. 1976). Contributory negligence is not listed in C.R.C.P. 9(b) as a defense that must be pleaded with particularity because, unlike fraud, it does not suggest moral turpitude. *See*

United States ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1256 (D.C. Cir. 2004).

¶ 105 (I do not know whether the policy reasons for including mistake in C.R.C.P. 9(b) and in its federal analogue apply to pleading contributory negligence, because such reasons appear to be lost in the mists of history. *See Bankers Tr. Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992) ("[W]e can find neither judicial nor scholarly discussion of the rationale" for the requirement that mistake be pleaded with particularity. "So perhaps it is a dead letter . . . ."). Accordingly, mistake must be pleaded with particularity in Colorado state cases apparently only because C.R.C.P. 9(b) says so.)

2. Footnote 20 Is at Odds with the Case Law on Notice Pleading

¶ 106 The heightened pleading mandate in *Brekke* is an outlier in the notice pleading jurisprudence of this country. I could find only one other reported United States case holding that contributory negligence must be pleaded "specifically and with particularity," *Byars v. Hollimon*, 153 So. 748, 749 (Ala. 1934), and that ninety-year-old case was implicitly overruled when Alabama adopted

modern notice pleading standards. *See Clark v. Smith*, 299 So. 2d 226, 229 (Ala. 1974).

¶ 107 Moreover, the Colorado Supreme Court's adoption of the "plausible grounds" standards for pleading claims does not mean that a UM insurer must plead its "legitimate defenses" with particularity. In 2016, the supreme court, following the United States Supreme Court's lead in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), held that notice pleading requires plaintiffs to plead sufficient "factual allegations . . . to raise a right to relief 'above the speculative level,' and provide 'plausible grounds'" for relief. *Warne v. Hall*, 2016 CO 50, ¶ 9, 373 P.3d 588, 591 (quoting *Twombly*, 550 U.S. at 555-56). (Neither the United States Supreme Court nor the Colorado Supreme Court has decided whether the *Twombly*/*Iqbal* standards apply to pleading affirmative defenses.)

¶ 108 Assuming without deciding that the *Twombly*/*Iqbal* standards also apply to affirmative defenses in Colorado cases, those standards do not require that affirmative defenses be pleaded with particularity. As the United States Supreme Court explained:

> On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]"; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

Twombly, 550 U.S. at 569 n.14 (citations omitted).

¶ 109 Nothing in the case law suggests that an insurer's assertion of contributory negligence, like an allegation of fraud, "raise[s] a high risk of abusive litigation." Fraud is the only claim or defense that courts say presents such a risk. *See, e.g.*, *id.*; *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012); *Humana Inc. v. Medtronic Sofamor Danek USA, Inc.*, 133 F. Supp. 3d 1068, 1076 (W.D. Tenn. 2015).

¶ 110 I also note that the two authorities cited at the end of footnote 20 — C.R.C.P. 9 and *Henderson v. Gunther*, 931 P.2d 1150, 1168 (Colo. 1997) (Scott, J., dissenting) — do not support requiring insurers to plead contributory negligence with particularity. Footnote 20 fails to acknowledge that the *Henderson* citation points to a *dissent* and that, in such dissent, Justice Scott said, consistent with C.R.C.P. 9(b), that "[t]he only instance in which complaints

must be particular is when fraud or mistake are alleged." 931 P.2d at 1168. Thus, *Brekke* cites no authority in support of its radical change in the law of pleading contributory negligence.

3. The Court Did Not Follow the Proper Procedure for Amending C.R.C.P. 9(b)

¶ 111 If the supreme court indeed intended to carve out a third exception from the C.R.C.P. 8 notice pleading requirement, it needed to do so by amending C.R.C.P. 9(b). As the United States Supreme Court noted in *Twombly*, "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" 550 U.S. at 569 n.14 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002)). I believe that this assertion would also apply if the Colorado Supreme Court sought, through an opinion, to add a new category to C.R.C.P. 9(b). In any event, by leaving C.R.C.P. 9(b) untouched after deciding *Brekke*, the supreme court created a conflict between footnote 20 and the language of C.R.C.P. 9(b) stating that only fraud and mistake must be pleaded with particularity.

4. Imposing a Heightened Pleading Standard on Insurers in UM Cases Is Unnecessary to Protect the Interests of Policyholders

¶ 112 Requiring an insurer to plead contributory negligence and its other defenses with particularity in a UM case, before the parties know whether the uninsured motorist codefendant will present a defense or will default, is not necessary to protect the interest of policyholders who assert coverage claims.

¶ 113 Nothing in *Brekke* — or any other Colorado case — suggests that an *uninsured motorist* must plead contributory negligence with particularity when defending against a policyholder's tort claim. Yet under footnote 20, *the insurer* automatically loses to its policyholder in a UM case if the uninsured motorist codefendant defaults and the insurer did not plead contributory negligence with particularity. *See Brekke*, 105 P.3d at 192 n.20.

¶ 114 It makes no sense to me that an insurer can be compelled to pay UM benefits to a policyholder who is not entitled to them because of a heightened pleading requirement that the supreme court appears to have invented in *Brekke* and the fortuity that the uninsured motorist codefendant defaulted. The insurer's quasi-fiduciary duties to the policyholder are fully protected even if

the insurer only pleads contributory negligence consistently with the principles of notice pleading reflected in C.R.C.P. 8. And, as I note in Part IV.B.2 above, I am aware of no case holding that pleading contributory negligence creates a "high risk of abusive litigation." *Twombly*, 550 U.S. at 569 n.14. Moreover, *Brekke* does not explain how requiring an insurer to plead contributory negligence with particularity furthers the goal of protecting policyholders from dilution of their UM coverage or a breach of their insurers' quasi-fiduciary duties.

5. What the Supreme Court May Have Meant to Say in Footnote 20

¶ 115 I question whether the supreme court intended for footnote 20 in *Brekke* to effect such a radical change in Colorado civil procedure law. I suspect that the court may not have meant to say that, in a UM case, the insurer must assert its contributory negligence defense with particularity in its answer. The court may have intended to say that a UM insurer must clearly indicate, early in the litigation, that it seeks a trial on its policyholder's liability, particularly if the uninsured motorist codefendant were to default. Such a rule would make sense; it would protect the interests of

both the insurer and the policyholder. (*Brekke* repeatedly refers to a "hearing" on the insurer's legitimate defenses. But adjudication of contributory negligence requires more than a hearing; it requires a trial.)

¶ 116 But at least for now, we are stuck with footnote 20's references to "pleadings" and "plead." Thus, adhering to *Brekke*, courts must reject insurers' requests for a trial on contributory negligence in UM cases if the insurer did not plead that affirmative defense with particularity in its answer.

V. Progressive Was Entitled to Its Day in Court on Its Legitimate Defenses

¶ 117 Progressive may well have won this case if the court had permitted it to present a full defense to Ortiz's coverage claims. There is no logic to *Brekke*'s holding that insurers, despite asserting a defense of contributory negligence from the inception of the case — albeit without particularity — can be forced to pay UM benefits to policyholders who are not entitled to them, if the uninsured driver defaults. Such a holding is contrary to the state's public policy that persons who are more than 50% at fault may not recover damages for negligence, *see* § 13-21-111(1), and it would create an incentive

for policyholders to obtain collusive default judgments against uninsured (and judgment-proof) drivers. (I do not mean to suggest that Ortiz obtained a collusive default judgment against Camacho.)

¶ 118 As I explain above, I believe the district court faithfully followed *Brekke* by ruling against Progressive on liability because of the C.R.C.P. 55(a) default entered against Camacho and because Progressive did not plead comparative negligence with particularity. But, as I also note above, I believe the language of *Brekke* on which the district court relied represented an unsupported deviation from prior law governing defaults and pleading standards.

¶ 119 Progressive put Ortiz and the court on notice of its comparative negligence defense early in the case. Not only did Progressive plead contributory negligence in its answer, which it filed in the first weeks of the litigation, but it consistently argued that it should be allowed to present evidence that Ortiz was more than 50% at fault for the collision and, therefore, was not entitled to recover UM benefits from Progressive. Progressive reiterated this point in, among other filings, its section of the case management order, its motion for summary judgment, its response to Ortiz's motion for partial summary judgment (as noted, a motion for entry

of a default judgment against Camacho), and its motion for a new trial. The record shows that Progressive urged the court "as soon as practicable" in the case to allow it to litigate its contributory negligence defense.

¶ 120 Had *Brekke* correctly applied prior law, once Ortiz filed his motion for partial summary judgment against Camacho and Progressive responded to that motion, Progressive should have been granted a hearing to determine what procedures were necessary to protect Progressive's "legitimate interests." *Brekke*, 105 P.3d at 193. If Progressive demonstrated at such a hearing that its economic interests would not be protected unless it were permitted to litigate contributory negligence, the court should have set a trial on Ortiz's liability for the collision.

¶ 121 For these reasons, in my view, Progressive should have been granted a trial to determine whether Ortiz was more than 50% at fault for the collision. He may have had no liability for the collision. We simply do not know because the court ruled against Progressive on liability based solely on the entry of the C.R.C.P. 55(a) default against Camacho. By relying on *Brekke*, the court may have

compelled Progressive to pay UM benefits to a policyholder who was not entitled to them.

VI. Conclusion

¶ 122 I urge the supreme court to reconsider *Brekke*'s restrictions on an insurer's ability to defend itself against its policyholder's coverage claims in UM litigation.