SUMMARY
February 15, 2024

2024COA16

No. 23CA0431, *Thomas v. Childhelp, Inc.* — Colorado Rules of Civil Procedure — Class Actions; Consumers — Colorado Consumer Protection Act

A division of the court of appeals concludes, for the first time in a published Colorado case, that when a complaint contains a claim requesting the certification of a class but certification is not granted, the plaintiff may still pursue the claim to recover their individual losses.

COLORADO COURT OF APPEALS **2024COA16**

Court of Appeals No. 23CA0431
City and County of Denver District Court No. 22CV30760
Honorable A. Bruce Jones, Judge

Christopher Thomas,

Plaintiff-Appellant,

v.

Childhelp, Inc.,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division B
Opinion by JUDGE SCHUTZ
Tow and Grove, JJ., concur

Announced February 15, 2024

The Thomas Law Group, LLP, C. Jordan Thomas, Denver, Colorado, for Plaintiff-Appellant

Gordon, Rees, Scully, Mansukhani, LLP, John R. Mann, Tamara Seelman, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, Christopher Thomas, appeals the district court's order granting summary judgment in favor of defendant, Childhelp, Inc., on his claim under the Colorado Consumer Protection Act (CCPA). *See* §§ 6-1-101 to -116, C.R.S. 2023.

¶ 2 A private claim under the CCPA may be pursued individually or on behalf of a class. But what happens if a plaintiff asserts only one claim under the CCPA, that claim requests certification of a class, and the class ultimately is not certified? In such circumstances, we conclude that the plaintiff may still pursue an individual claim under the CCPA. We also conclude that disputed issues of material fact exist regarding whether Thomas suffered individual losses. These two conclusions require us to reverse the summary judgment entered by the district court against Thomas and in favor of Childhelp.

I. Factual and Procedural Background

¶ 3 Childhelp is a nonprofit California corporation that, among other services, provides children who are fleeing neglectful or abusive environments with backpacks containing essential items. Childhelp raises revenue, in part, by soliciting members of the public to make donations.

¶ 4 Thomas, an attorney, filed a complaint against Childhelp alleging the following facts. A Childhelp solicitor approached him in downtown Denver. In response to the solicitation, Thomas made what he believed to be a one-time $10 donation to Childhelp. Thomas paid with his credit card. Thomas did not authorize any additional payments to Childhelp. Nonetheless, Childhelp subsequently used his credit card information to convert his one-time contribution into a recurring monthly charge of $10.

¶ 5 Thomas alleged that Childhelp made two such charges before he was able to stop the recurring charges. Thomas states his credit card company reimbursed him for these two withdrawals "under a cardholder benefit."

¶ 6 Thomas's complaint contained a "sole claim for relief" for violation of the CCPA. Thomas alleged that Childhelp failed to adequately disclose that the donation would be treated as a recurring monthly charge. He also asserted that Childhelp subjected many other individuals to unauthorized recurring charges after making what the donor thought was a single donation.

¶ 7 Thomas sought certification of two classes under C.R.C.P. 23. He claimed that he was an appropriate class representative for the classes on the following grounds:

> a. [Thomas] donated to [Childhelp].
>
> b. [Childhelp] did not inform [Thomas] of the recurring nature of such donation.
>
> c. [Childhelp] converted the donation into a recurring charge.
>
> d. [Thomas] did not agree to such recurring charge.
>
> e. [Thomas] was initially unaware of such recurring charge.
>
> f. [Thomas] became aware of such recurring charge after the recurring charge appeared on [his] financial statements . . . .

¶ 8 Thomas sought monetary relief for the greater of the amount of actual damages sustained by the class members or $500 per class member, plus enhanced damages for Childhelp's allegedly bad faith conduct.

¶ 9 Childhelp moved to dismiss the complaint, arguing that Thomas could not serve both as a class representative and counsel and therefore lacked standing to bring the claim. Alternatively, Childhelp argued that the complaint failed to allege a plausible

claim for relief. The district court denied the motion, concluding that the complaint articulated a viable claim for violation of the CCPA and that it was premature to determine whether Thomas could serve as an appropriate class representative.

¶ 10 Childhelp then filed an answer denying the material allegations of the complaint. Shortly thereafter, the court held a case management conference at which the parties discussed discovery issues and potential motions. In addressing Thomas's anticipated motion to certify one or more classes and Childhelp's contemplated dispositive motion, the district court stated as follows:

> [B]asically the end of February is what you're looking at for your dispositive motion deadline. . . .
>
> [I]f you guys get this class action thing teed up for me, I'll address that, but there's no reason that those two can't be pursued simultaneously. In other words, you don't need to sit back and not do any of your discovery that would go to a dispositive motion because you're trying to figure out what's happening with your class action.
>
> They may have a relationship. Certainly, if the class action or class certification was denied, it's much more of a rifle shot of a dispositive motion as it relates to Mr. Thomas's claim.

¶ 11 The court set a deadline for Thomas to file a class certification motion, but Thomas did not move for certification. Shortly before the deadline, Childhelp filed a motion to dismiss, arguing that Thomas could not establish that he or any class member suffered damages and that he lacked standing to pursue the claim.

¶ 12 The district court treated the motion to dismiss as one for summary judgment. After briefing from the parties, the district court granted the motion on two grounds: Thomas had not pursued a claim in his individual capacity, and Thomas suffered no damages because his credit card company reimbursed him for the two allegedly unauthorized charges. Thomas contends both rulings were erroneous. We address his arguments in turn.

II. Analysis

A. Standard of Review and Applicable Law

¶ 13 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). "The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party." *Churchey v. Adolph Coors Co.*, 759 P.2d

1336, 1340 (Colo. 1988). "The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts . . . ." *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002). We review a district court's grant of summary judgment de novo. *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 657 (Colo. 2011). On review, our task is to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law in granting Childhelp's motion. *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28, ¶ 9.

B. Individual Claim

¶ 14 In its order granting summary judgment, the district court noted that Thomas had failed to move for certification of either proposed class and that the deadline for doing so had passed. In addition, the court emphasized that Thomas's complaint asserted only one claim for relief, alleging that Childhelp engaged in deceptive trade practices. In his complaint, Thomas identified two potential classes that he believed were entitled to relief on the

deceptive trade practices claim,[1] and he nominated himself as the class representative of each. And, as mentioned, Thomas's prayer for relief requested damages of at least $500 for "each class member."

¶ 15 Given Thomas's failure to obtain class certification, the district court properly concluded that the damage element of the deceptive trade practices claim could not be satisfied by any alleged damages attributed to individual class members. The district court's order then focused on Thomas's inability to demonstrate actual damages.

¶ 16 The court noted that the case was originally contemplated as a class action and then evolved into a claim focused on Thomas's alleged individual losses. The court observed that the original complaint focused on the economic losses of individual class

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[1] In its order, the district court referred to Thomas's claim as a "class action claim," which the parties have repeated in their briefs. However, a class action is not a substantive claim for relief, but rather a procedural device for bringing a substantive claim on behalf of multiple parties. *See Jackson v. Unocal Corp.*, 262 P.3d 874, 886 (Colo. 2011); *see also* 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 1:1, Westlaw (6th ed. database updated Nov. 2023) (A class action is "fundamentally a *procedural* device: it cannot ordinarily be construed to . . . abridge, modify, or enlarge any substantive right.").

members or, alternatively, the statutory penalties,[2] but did not expressly allege noneconomic damages, whether suffered by Thomas or any other potential class member. The court acknowledged that Thomas had attached an affidavit to his response to the motion for summary judgment that described his alleged noneconomic damages, but the court dismissed that evidence because it concluded that Thomas had not alleged noneconomic losses in his complaint.

¶ 17 The district court did not directly address whether Thomas could individually pursue the deceptive trade practices claim. But on appeal, Childhelp argues that the district court's judgment should be affirmed because Thomas failed to assert a separate claim in his individual name. If that argument is correct, Thomas's individual claim fails as a matter of law. Therefore, we must resolve whether an individual who asserts a claim in which he proposes to represent the class can maintain an individual claim for such relief

[2] The district court correctly concluded that, in a class action, plaintiffs may not recover the statutory alternative damage award of $500. § 6-1-113(2), C.R.S. 2023.

if the class is not certified. We conclude such an individual claim remains viable notwithstanding the absence of class certification.

¶ 18 A class action claim is made by an individual who alleges that they suffered injuries caused by a defendant's wrongful conduct, and that other persons similarly situated to the individual have suffered similar injuries. Thus, the individual seeks to pursue losses on behalf of themself and those similarly situated. Considering this structure, the United States Supreme Court has counseled: "An order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *see also Doe v. Adams*, 53 N.E.3d 483, 491 (Ind. Ct. App. 2016) (Interpreting Ind. R. Trial P. 23, which is substantially similar to C.R.C.P. 23, the court concluded that "[b]efore certification, a purported class action is essentially an individual action in which the plaintiff wishes to assert claims as a class representative." (quoting 11 Stephen E. Arthur & Jerome L. Withered, *Indiana Practice Series, Civil Trial Practice* § 18.4 (2015))).

¶ 19 These same principles apply here. Thomas's sole claim alleged Childhelp's deceptive trade practices had injured him and the other putative class members in a similar way. Ultimately, Thomas failed to obtain certification and the class action aspect of his claim fails. But his individual claim for deceptive trade practices remains unadjudicated. *See Coopers & Lybrand*, 437 U.S. at 467. The district court therefore erred as a matter of law by concluding that Thomas failed to assert a claim for his individual losses.

C. Credit Card Reimbursement

¶ 20 We turn now to the district court's alternative basis for dismissal — that Thomas suffered no individual losses because he was reimbursed by his credit card company for Childhelp's allegedly unauthorized withdrawals.

¶ 21 To pursue a private right of action under the CCPA, a plaintiff must prove the following:

> (1)that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the

> challenged practice caused the plaintiff's injury.

Hall v. Walter, 969 P.2d 224, 235 (Colo. 1998).

¶ 22 Like the district court, Childhelp focuses on the fourth element, arguing that because of the credit card reimbursement, which occurred before he filed suit, Thomas had no losses at the time he initiated the case. Thus, Childhelp argues, Thomas lacked standing[3] to bring the CCPA claim in his individual capacity. Childhelp cites several federal cases from the District of Colorado in support of its contention. *See, e.g.*, *U.S. W., Inc. v. Bus. Disc. Plan, Inc.*, 196 F.R.D. 576, 592 (D. Colo. 2000) (plaintiffs could not establish damages after the defendant's "re-rating" of them resulted in a refund of any damages allegedly caused by the defendant's deceptive trade practices); *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, 227 F. Supp. 3d 1192, 1202-03 (D. Colo. 2017) (plaintiff could not

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[3] While Childhelp argues this as an issue of standing, it arguably presents a question of mootness. *See, e.g.*, *Gresh v. Balink*, 148 P.3d 419, 421 (Colo. App. 2006) ("A case is moot when the relief sought, if granted, would have no practical legal effect on the controversy."). But the distinction between these doctrines does not impact our resolution of the appeal, so we need not address it further.

establish damages because he was refunded the disputed charges attributed to the deceptive trade practice).

¶ 23 Thomas counters by arguing that he was reimbursed for his losses by his credit card company pursuant to his contract agreement with that company. Relying on Colorado's collateral source rule, Thomas argues that Childhelp may not avoid the damage claim by relying on the reimbursement paid to him by his credit card company.

¶ 24 At common law, Colorado precluded a tortfeasor from offsetting payments made by a third party to reduce an injured party's damages. *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1084 (Colo. 2010). Thus, the rule permitted an injured party to effectively be compensated twice for the same injury — both through the collateral source payments and the damage award. *Id.* In 1986, the Colorado General Assembly modified the common law rule. *Id.*; *see also* Ch. 107, sec. 3, § 13-21-111.6, 1986 Colo. Sess. Laws 679.

¶ 25 Colorado's current collateral source rule is set forth in section 13-21-111.6, C.R.S. 2023, which provides as follows:

> In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; *except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person*. The court shall enter judgment on such reduced amount.

Id. (emphasis added). The statute has two substantive effects: the first clause of the first sentence, coupled with the last sentence, precludes a jury from being informed that some or all of a plaintiff's economic losses may have been paid by a third party, but it requires the court to offset such collateral source payments from any damages awarded at the completion of the trial. In this manner, the statute is intended to require the jury to make a damage award without being influenced by the fact that a plaintiff may have been compensated for some of those losses prior to trial,

but it also prevents a double recovery for benefits paid to a plaintiff by third parties.

¶ 26 The highlighted second clause of the first sentence, however, creates an exception to the collateral source rule, referred to as the "contract exception" or the "contract clause." *Gardenswartz*, 242 P.3d at 1084. It precludes any reduction of a damage award based on payments from a collateral source that were made pursuant to a contract paid for by, or on behalf of, the injured party. *Id.* The classic illustration of the rule is payments or reimbursements made to a plaintiff by their insurance company. *Id.*

¶ 27 The purpose of the contract exception is to prevent a defendant from receiving a windfall based on a collateral source making contracted-for payments or reimbursements to the injured party. As the supreme court said, it is "repugnant to shift the benefits of the plaintiff's insurance contract to the tortfeasor in the form of reduced liability when the tortfeasor paid nothing toward the . . . insurance benefits." *Id.* at 1088.

¶ 28 Although it typically arises in the context of payments made to an injured party by their insurance company, the contract

exception extends to benefits received pursuant to any contract paid for by the injured party or on their behalf. § 13-21-111.6.

¶ 29 Thomas argues that the contract exception applies here. In his affidavit submitted in opposition to Childhelp's motion, Thomas alleged as follows:

> The credit card issuer eventually credited my account for the two unauthorized transactions which took place on December 30, 2021, and January 30, 2022.
>
> I have no reason to believe that the Defendant provided these funds to me.
>
> Rather, the credit card issuer provided these funds to me under a cardholder benefit.

In its reply, Childhelp stated that it "disagrees" with Thomas's averment but did not offer any evidence in support of its disagreement. Instead, Childhelp argued that for purposes of its motion, "it does not matter who provided the refunds because it is undisputed that Plaintiff received refunds and thus has suffered no damages."

¶ 30 The district court sided with Childhelp, reasoning that "[t]he documents before the Court . . . establish that Plaintiff has not incurred any economic damages, regardless of whether the

additional, unauthorized payments were refunded by [Childhelp] or reimbursed by [Thomas's] credit card provider." The court did not cite or discuss the collateral source doctrine.

¶ 31 Contrary to the district court's reasoning, whether the reimbursement was made by Thomas's credit card company as opposed to Childhelp is a material fact: if Thomas was "indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of [Thomas]," it falls within the contract exception to the collateral source rule. § 13-21-111.6. And if the contract exception applies, it precludes any deduction of such payment from Thomas's damages.

¶ 32 Childhelp presented no evidence to contradict Thomas's statements that the credit card company reimbursed him as a cardholder benefit. Because Thomas's allegation has not been countered by contrary evidence, it must be taken as true for purpose of evaluating the summary judgment motion. This evidence precludes the entry of summary judgment in favor of Childhelp because Childhelp has not established, as a matter of law, that the payment does not fall within the contract exception to the collateral source rule. C.R.C.P. 56(c); *see also Stiff v. BilDen*

Homes, Inc., 88 P.3d 639, 640 (Colo. App. 2003) (reversing summary judgment order because material facts remained in dispute).

¶ 33 The federal cases Childhelp cites do not lead us to a different conclusion. In *U.S. West*, the reimbursement was made by the defendant accused of the deceptive trade practices. 196 F.R.D. at 192. Such circumstances do not trigger the contract exception to the collateral source rule. The decision in *Friedman* does not reveal whether the reimbursement was made by the defendant or on behalf of the defendant. 227 F. Supp. 3d at 1197 (noting the plaintiff received a refund "in the form of a credit on his credit card" after disputing the charge and "has never asked [defendant] for more money back than what he was refunded"). In any event, like *U.S. West*, the *Friedman* decision does not address the impact of the

contract exception. Thus, the cases have limited relevance to this dispute.[4]

¶ 34 Applying these principles, Thomas has alleged a sufficient injury to provide him standing to pursue the CCPA claim in his individual name. Accordingly, the district court erred by entering summary judgment against him on his CCPA claim.

III. Conclusion

¶ 35 The judgment of the district court is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

JUDGE TOW and JUDGE GROVE concur.

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[4] Because of the disputed issues of fact regarding the economic harm allegedly suffered by Thomas, we need not decide whether a plaintiff may have standing to pursue a claim for statutory damages notwithstanding the absence of direct economic harm. *Cf. Frias v. Chris the Crazy Trader, Inc.*, 604 Fed. App'x 638, 641 (10th Cir. 2015) (The court considered a reimbursement made by the defendant after suit was filed and concluded that, "[e]ven if [plaintiffs] could no longer prove that they suffered actual damages, because defendant repaid their down payment in full, all of the statutes under which they sued [which included the CCPA] provide for statutory damages as well.").