SUMMARY
August 8, 2024

2024COA87

No. 23CA1141, *Trudgian v. LM General Insurance Co.* — Insurance — Motor Vehicles — Automobile Insurance Policies — Claims Practices for Property Damage; Remedies — Implied Private Right of Action

A division of the court of appeals considers whether there is an implied private right of action to enforce section 10-4-639(1), C.R.S. 2023. The division concludes there is not by applying the test set out in *Allstate Insurance Co. v. Parfrey*, 830 P.2d 905 (Colo. 1992). The division therefore affirms the grant of summary judgment to defendant.

COLORADO COURT OF APPEALS **2024COA87**

Court of Appeals No. 23CA1141
City and County of Denver District Court No. 19CV30732
Honorable Shelley I. Gilman, Judge

Barbara Trudgian,

Plaintiff-Appellant and Cross-Appellee,

v.

LM General Insurance Company,

Defendant-Appellee and Cross-Appellant.

JUDGMENT AFFIRMED AND
CROSS-APPEAL DISMISSED

Division IV
Opinion by JUDGE PAWAR
Navarro and Johnson, JJ., concur

Announced August 8, 2024

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¶ 1 The total loss statute, section 10-4-639(1), C.R.S. 2023, imposes an affirmative duty on motor vehicle insurers: they "shall pay" to the insured the title and registration fees "associated with the total loss of [the insured's] motor vehicle." The question we must decide in this appeal is whether there is an implied private right of action to enforce this statutory duty. After applying the factors articulated in *Allstate Insurance Co. v. Parfrey*, 830 P.2d 905 (Colo. 1992), we conclude there is no implied right of action to enforce section 10-4-639(1). We therefore affirm the district court's grant of summary judgment and dismiss the cross-appeal.

I. Background

¶ 2 Plaintiff, Barbara Trudgian, owned a motor vehicle that was insured by defendant, LM General Insurance Company (LM). The insurance policy included coverage for the total loss of the vehicle.

¶ 3 Trudgian renewed her vehicle registration in June 2017, paying the fees for the following twelve months, until June 2018. But in September 2017, approximately three months into the twelve-month registration period, the vehicle was involved in an accident and LM determined that the vehicle was a total loss.

¶ 4 According to Trudgian, LM failed to reimburse her for the amount of registration fees she had paid that were applicable to the time period after the car was totaled (September 2017 to June 2018). Ultimately, Trudgian brought this class action lawsuit against LM. Each claim in the action alleged that LM violated section 10-4-639(1) by failing to pay the total loss fees. There were four claims: (1) a statutorily authorized claim under section 10-3-1116(1), C.R.S. 2023; (2) a breach of contract claim;[1] (3) a bad faith breach of contract claim; and (4) a declaratory judgment claim.

¶ 5 LM moved for summary judgment, arguing that all the claims were barred by the doctrine of accord and satisfaction because Trudgian had accepted a payment from LM that purportedly satisfied its total obligations to her, including those under section 10-4-639(1). The district court denied this motion.

¶ 6 LM then moved for summary judgment a second time on a different ground. This time, LM argued that section 10-4-639(1) could not be enforced through a private civil action. The district

[1] As the district court suggested in denying LM's motion to dismiss, Trudgian's breach of contract theory was that the section 10-4-639(1), C.R.S. 2023, obligation was an implied term of the contract and by violating section 10-4-639(1), LM breached the contract.

court agreed. In applying *Parfrey*, the court noted that section 10-4-601.5, C.R.S. 2023, provides that the Colorado Insurance Commissioner "shall administer and enforce the provisions of this part 6." The court reasoned that this provision manifested the legislature's intent to entrust enforcement of all of part 6, including section 10-4-639(1), to the commissioner, thereby precluding private civil actions to enforce the statute. The court therefore granted LM summary judgment on all of Trudgian's claims because they all attempted to enforce section 10-4-639(1).

¶ 7 Trudgian appeals, arguing that section 10-4-639(1) can be enforced through a private civil action. LM cross-appeals, arguing that the district court erred by denying its first summary judgment motion.

¶ 8 We first agree with the district court's conclusion that section 10-4-639(1) cannot be enforced through a private action — though we do so on slightly different grounds. We then dismiss LM's cross-appeal for lack of jurisdiction.

II. Appeal

¶ 9 We review a grant of summary judgment de novo. *Ryser v. Shelter Mut. Ins. Co.*, 2021 CO 11, ¶ 13. Summary judgment is

appropriate if the material facts are undisputed and the moving party is entitled to judgment as a matter of law. *Id.*

¶ 10 Where, as here, our review of a summary judgment ruling requires us to interpret statutes, we do so de novo. *Mullen v. Metro. Cas. Ins. Co.*, 2021 COA 149, ¶ 15. Our aim is to ascertain and give effect to the legislature's intent. *See Elder v. Williams*, 2020 CO 88, ¶ 18. We do this by examining the language of the statute and giving the words the legislature chose their plain and ordinary meanings. *Id.* We read the words the legislature chose in the context of the entire statutory scheme. *Id.* And we "avoid constructions that would render any words or phrases superfluous." *Id.*

¶ 11 If a statute "does not expressly provide for a private civil remedy," courts apply the test articulated in *Parfrey* to determine whether a private right of action is implied. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 923 (Colo. 1997). Section 10-4-639(1) is such a statute. It sets out a motor vehicle insurer's obligation but says nothing about a private civil remedy. We must therefore determine whether the right to one is implied by applying *Parfrey*.

A. *Parfrey*

¶ 12 The question in *Parfrey* was similar to the one here. The supreme court addressed whether a statute that imposed an affirmative duty on motor vehicle insurers but was silent as to whether that duty could be enforced by a private civil action. *Parfrey*, 830 P.2d at 910.

¶ 13 The statute at issue required motor vehicle insurers to notify their insureds of the right to purchase uninsured/underinsured motorist (UM/UIM) coverage at the same level as their bodily injury liability coverage. § 10-4-609, C.R.S. 1987; *Parfrey*, 830 P.2d at 907. But because the statute did not expressly provide for a private civil remedy, the court had to resolve whether a right to one was implied. *Parfrey*, 830 P.2d at 907.

¶ 14 To answer this question, the court considered three factors: (1) whether the plaintiff was within the class of people the statute was intended to benefit; (2) whether the legislature intended to imply a private right of action; and (3) whether a private right of action was consistent with the purposes of the legislative scheme. *Id.* at 911.

¶ 15 Applying the first factor, the court held that the statute was intended to benefit insureds and the plaintiffs were insureds. *Id.*

¶ 16 Then, in effect, the court collapsed the second and third factors. The court explained that the legislature intended to imply a private right of action (factor two) because doing so would further the purpose of the legislative scheme (factor three):

> We are also convinced that the General Assembly, in enacting section 10-4-609(2), impliedly intended to create a private civil remedy to redress an insurer's breach of its statutory duty. We say this because the availability of a civil tort remedy not only furnishes an effective incentive for an insurer to discharge its statutory duty but, more importantly, furthers the salutary goal of providing the driving public with a meaningful opportunity to protect themselves against the risk of inadequate compensation for injuries sustained in an accident with an uninsured or underinsured motorist. That goal would be substantially frustrated if an insured is without a private civil remedy to redress the injuries and damages caused by an insurer's failure to discharge its statutory responsibility. It follows from these observations that providing a private civil remedy to an insured is entirely consistent with the legislative purpose underlying UM/UIM coverage.

Id. The court concluded with the observation that imposing a duty on motor vehicle insurers for the benefit of insureds but preventing

those insureds from suing the insurers for breaching that duty "would, in all practicality, circumvent this statutorily imposed duty." *Id.* (quoting *Parfrey v. Allstate Ins. Co.*, 815 P.2d 959, 966 (Colo. App. 1991)).

¶ 17 In subsequent opinions, the supreme court has expressed "reluctance" to find implied private rights of action in the face of legislative silence. *City of Arvada ex rel. Arvada Police Dep't v. Denver Health & Hosp. Auth.*, 2017 CO 97, ¶ 21. And the court has explained, somewhat paradoxically, that an implied private right of action requires a "'*clear expression*' of legislative intent" to *imply* one. *Id.* at ¶ 22 (emphasis added) (quoting *State v. Moldovan*, 842 P.2d 220, 227 (Colo. 1992)).

¶ 18 With this guidance in mind, we now turn to whether there is an implied private right of action to enforce section 10-4-639(1).

B. Section 10-4-639(1)

¶ 19 Like the statute at issue in *Parfrey*, section 10-4-639(1) imposes a duty on motor vehicle insurers and says nothing about a private right of action. But the statutory scheme has changed in two significant ways since *Parfrey*. First, the legislature has enacted section 10-3-1116, which authorizes private actions by

insureds for the unreasonable delay or denial of their insurance benefits. Ch. 422, sec. 5, § 10-3-1116, 2008 Colo. Sess. Laws 2173-74.

¶ 20 Second, the legislature has enacted section 10-4-601.5, which says that the "commissioner shall administer and enforce the provisions of this part 6 [and] may make rules necessary for the administration of this part 6." Ch. 234, sec. 3, § 10-4-601.5, 2003 Colo. Sess. Laws 1560. Section 10-4-639(1) is within part 6 (of article 4 of title 10). Although section 10-4-601.5 requires the commissioner to enforce all of part 6, the statutory scheme does not expressly provide for a private civil remedy for section 10-4-639(1), and we therefore must apply the *Parfrey* factors. *See Gerrity Oil*, 946 P.2d at 923.

¶ 21 As to the first factor, LM does not contest that Trudgian and the class members are within the group of people that section 10-4-639(1) is meant to benefit. We agree. Section 10-4-639(1) is meant to protect insureds whose vehicles have been deemed a total loss by shifting certain fees associated with those vehicles onto the motor vehicle insurer.

¶ 22 Under the second factor (whether the legislature intended to imply a private right of action), we do not see section 10-4-601.5 as determinative of the legislature's intent. It is true that section 10-4-601.5 directs the commissioner to enforce all provisions of part 6, including section 10-4-639(1). But it does not give the commissioner the exclusive authority to do so. As Trudgian points out, the legislature knows how to confer exclusive enforcement authority, and it did not do so here. *Cf.* § 6-1-1403(1)(a), C.R.S. 2023 ("The attorney general and district attorneys have exclusive authority to enforce this part 14 . . . .").

¶ 23 It is also true that the legislature's decision "to enact a particular administrative remedy to redress a statutory violation" is consistent with an intent to preclude a private right of action based on the same violation. *Parfrey*, 830 P.2d at 910. The statutes governing the insurance industry grant the commissioner power to regulate insurance companies in various ways. *See, e.g.*, §§ 10-1-201 to -218, C.R.S. 2023 (financial examinations of insurance companies); §§ 10-1-301 to -308, C.R.S. 2023 (market conduct examinations of insurance companies); § 10-3-105(4)(a), C.R.S. 2023 (the commissioner can order an insurance company to pay

restitution to an insured after a hearing and finding the insurer is "financially responsible for the unfair business practices of an insurance producer"); § 10-3-1108, C.R.S. 2023 (the commissioner can issue orders against persons, including insurance companies, who commit unfair trade practices as set forth in section 10-3-1104, C.R.S. 2023). It may be true that the commissioner can, in his or her discretion, use some of these powers to enforce section 10-4-639(1). But it is not clear to us that the legislature's grant of these enforcement powers to the commissioner constitutes, for purposes of a *Parfrey* analysis, a particular administrative remedy for section 10-4-639(1) violations. We therefore cannot discern from the grant of these powers any legislative intent to *preclude* a private right of action (though nothing about the grant of these powers suggests a legislative intent to imply a private right either).

¶ 24 Section 10-3-1116 does not help clarify the legislature's intent. As we understand it, it provides an insured a statutory right of action to enforce violations of section 10-4-639(1). § 10-3-1116(1) (allowing suits for "payment of benefits" that have been "unreasonably delayed or denied"). The authorization of a particular remedy for an entire statutory scheme can manifest an

intent to preclude implied remedies. *See Gerrity Oil*, 946 P.2d at 925. But there is more in section 10-3-1116. Section 10-3-1116(4) provides that the statutorily authorized action "is in addition to, and does not limit or affect, other actions available by statute or common law, now or in the future." So, on the one hand, the legislature's explicit authorization of a section 10-3-1116(1) claim might evince its intent to preclude an implied right of action to enforce section 10-4-639(1). But on the other hand, in section 10-3-1116(4), the legislature explicitly tells us not to draw this conclusion.

¶ 25 It might be possible to reconcile these provisions and divine the legislature's intent from them. But whatever intent can be divined is certainly not clear. And clear legislative intent is what we must have before finding an implied private right of action. *See City of Arvada*, ¶ 21. Indeed, we are mindful of the supreme court's post-*Parfrey* opinions expressing "reluctance to speak over legislative silence." *Id.* Because nothing about any legislative intent to imply a private right of action in section 10-4-639(1) is clear or clearly expressed, we conclude that the second factor cuts against finding an implied private right of action.

¶ 26 Turning to factor three (whether an implied private right of action would be consistent with the statutory scheme), we come to a similar conclusion. Finding an implied private right of action to enforce section 10-4-639(1) would have a negligible effect on the purposes of the statutory scheme. That is, an implied right might be consistent with the statutory scheme, but the absence of an implied right would not frustrate the scheme. Neither party disputes that an insured could bring a claim under section 10-3-1116(1) to remedy a section 10-4-639(1) violation. Our situation is therefore markedly different than *Parfrey*, where the court found an implied private right of action because the absence of one would "substantially frustrate[]" the purpose of the statutory scheme.[2] 830 P.2d at 911. An implied private right of action here would be redundant of a statutory action under section 10-3-1116(1). Even if there is no implied private right, insurers would still not be able to "circumvent th[e] statutorily imposed duty" and thereby thwart the

[2] Indeed, because the statutory duty at issue in *Parfrey* was the duty to *offer* a particular coverage, the only available enforcement mechanism was the implied private right of action.

purposes of the statutory scheme. *Id.* (quoting *Parfrey*, 815 P.2d at 966).

¶ 27 In sum, we conclude that under the *Parfrey* test there is no implied private right of action to enforce section 10-4-639(1). Trudgian and the class members are within the group of people section 10-4-639(1) is intended to benefit. But we can discern no clear legislative intent to imply a private right of action. Moreover, such an implied right would be redundant in light of section 10-3-1116(1), meaning that the existence of an implied right would have no effect on vindicating the purposes of the statutory scheme. We therefore agree, albeit based on slightly different reasoning, with the district court's ruling that no implied private right of action exists to enforce section 10-4-639(1).

C. Consequences of Our Holding and Other Issues

¶ 28 Having concluded that no implied private right of action exists, the question becomes what that means for the claims in this case. As mentioned above, Trudgian's claims included one under section 10-3-1116(1), a breach of contract claim, a bad faith breach of contract claim, and a declaratory judgment claim seeking a

declaration that LM violated section 10-4-639(1). The district court dismissed all of them on summary judgment.

¶ 29 The only claim that directly relied on the implied private right of action for its validity was the declaratory judgment claim. We therefore affirm the dismissal of that claim.

¶ 30 In contrast, our conclusion that no implied private right of action exists seems to have no impact on the validity of Trudgian's section 10-3-1116 claim. On appeal, however, Trudgian has neither explained how the implied right issue impacts the dismissal of her section 10-3-1116 claim nor presented any other argument about why the district court improperly dismissed that claim. Indeed, she never even mentions that she brought a section 10-3-1116 claim. We therefore conclude that no challenge to the dismissal of that claim has been raised on appeal, and we express no opinion about it.[3]

¶ 31 That leaves the breach of contract and bad faith breach of contract claims. In her opening brief, Trudgian argues that the statutory obligation in section 10-4-639(1) was an implied term of

[3] The district court did not explain why it dismissed the section 10-3-1116(1), C.R.S. 2023, claim.

the contract *because there existed an implied private right of action*. But crucially, Trudgian omits why — she fails to explain why an implied private right of action would mean that section 10-4-639(1) is an implied contract term. Because this argument is skeletal and conclusory, we do not address it. *See Taylor v. Taylor*, 2016 COA 100, ¶ 13 (declining to address a conclusory and skeletal contention unsupported by substantial argument).

¶ 32 Trudgian also fails to substantially explain why section 10-4-639(1) is an implied contract term *regardless* of whether there is an implied private right of action to enforce it. Even if Trudgian had properly explained why this is so, she presents no argument, conclusory or otherwise, connecting the assertion that section 10-4-639(1) is an implied contract term to the propriety of dismissing the breach of contract and bad faith breach of contract claims.

¶ 33 In short, we perceive no nonconclusory argument in Trudgian's opening brief explaining why the court erred by dismissing the breach of contract and bad faith breach of contract claims. We therefore conclude that no challenge to the dismissal of those claims is properly before us and express no opinion about any such challenge.

¶ 34 For all these reasons, we affirm the district court's dismissal of the declaratory judgment claim and express no opinion about the dismissal of the additional claims.

III. Cross-Appeal

¶ 35 In the cross-appeal, LM argues that the district court erred by denying its first motion for summary judgment based on the doctrine of accord and satisfaction. We dismiss the cross-appeal for lack of jurisdiction for two separate reasons.

¶ 36 First, in the appeal, we reject Trudgian's challenge to the final order dismissing her claims. This renders LM's challenge to the denial of its first summary judgment motion moot — any relief granted would have no practical effect upon an existing controversy. *See Anderson v. Applewood Water Ass'n*, 2016 COA 162, ¶ 26. And we lack jurisdiction to address a moot appeal. *See Diehl v. Weiser*, 2019 CO 70, ¶ 9.

¶ 37 Second, even if we had granted Trudgian some relief in the appeal, we would nevertheless lack jurisdiction to address LM's cross-appeal. Subject to exceptions not relevant here, we have jurisdiction to review only final judgments. *See* § 13-4-102(1), C.R.S. 2023. Summary judgment denials are not final judgments.

See Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114, 1116 (Colo. 1981). We therefore lack jurisdiction over LM's cross-appeal challenging the denial of its first summary judgment motion and dismiss it.[4]

IV. Disposition

¶ 38 The judgment is affirmed, and LM's cross-appeal is dismissed for lack of jurisdiction.

JUDGE NAVARRO and JUDGE JOHNSON concur.

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[4] LM argues otherwise based on *Udis v. Universal Communications Co.*, 56 P.3d 1177 (Colo. App. 2002). In *Udis*, the division effectively reversed a denial of summary judgment (not a final judgment) only because that result was compelled by its reversal of a final judgment it *did* have jurisdiction to review. *Id.* at 1179. This case is different. The only final judgment we have jurisdiction to review is the grant of summary judgment to LM on the ground that there is no private right of action to enforce section 10-4-639(1). Our resolution of the challenge to that ruling has no bearing on whether LM's first summary judgment motion was properly denied. We therefore have no jurisdiction to review the denial of LM's first summary judgment motion.