UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 15-1006 & 15-1007

GLADYS JONES (Appellant/Cross-Appellee)

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
(Defendant - Appellee/Cross-
Appellant)

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Richard P. Matsch
D.C. No. 13-CV-00577-RPM

STATE FARM'S PRINCIPAL AND RESPONSE BRIEF

Respectfully submitted,

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Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED
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PRIOR OR RELATED APPEAL

This cross-appeal, Case No. 15-1006, is consolidated with Appellate Case No. 15-1007. Plaintiff Gladys Jones ("Jones") filed an appeal from the Final Judgment entered on December 12, 2014, Doc. No. 58, and the Order on Summary Judgment, Doc. No. 51, as dismissing Jones' claims against Defendant State Farm Mutual Automobile Insurance Company ("State Farm") for bad faith and unreasonable delay on the same day State Farm filed its appeal. Pursuant to Fed. R. App. P. 28.1(b), the plaintiff in the proceeding below (*i.e.*, Jones) is the appellant/cross-appellee because the parties filed their notices of appeal on the same day, and State Farm is the appellee/cross-appellant.

The Office of Frank Patterson & Associates, P.C., by undersigned counsel, on behalf of State Farm Mutual Automobile Insurance Company, defendant-appellee/cross-appellant (herein "State Farm"), for their Principal Brief states[1]:

STATEMENT OF JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this matter pursuant to 28 U.S.C. § 1332. Jones filed a lawsuit for uninsured motorist ("UM") benefits against State Farm on February 11, 2013. Pursuant to order of the court, on May 27, 2014, State Farm filed a Motion for Summary Judgment based upon the statute of limitations for UM actions, C.R.S. § 13-80-107.5. [Rec. Vol. 1. at 36, Doc. No. 43]. On November 10, 2014, the district court in its Order on Summary Judgment [*Aplt. App*. Vol. II. at 267-271, Doc. No. 51], denied State Farm's motion The district court entered its final judgment on December 12, 2014 [*Aplt. App*. Vol. II. at 283, Doc. No. 58]. The notice of appeal was timely filed in accordance with Rule 4(a)(1)(A), F.R.A.P. on January 9, 2015. This appellate court's jurisdiction derives from 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

THE DISTRICT COURT ERRED IN DETERMINING THAT THE INSURED MUST KNOW, WITH ABSOLUTE CERTAINTY THAT THERE IS NO LIABILITY INSURANCE TO TRIGGER THE STATUTE OF LIMITATIONS UNDER C.R.S. § 13-80-107.5(1)(a); AND IN NOT REQUIRING ANY DUE DILIGENCE BY JONES AS TO WHETHER THE VEHICLE WAS UNINSURED.

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[1] State Farm hereby incorporates Jones' Appendix dated 07/08/15, Vols. I-IV. Jones' Appendix is referenced as "*Aplt.. App*." herein to be consistent with Jones' Opening Brief. State Farm also submits its own Appendix to complete the record. State Farm's Appendix is referred to as "Rec." herein.

THE DISTRICT COURT ERRED IN ENCOURAGING AND ALLOWING JONES' RENEWED EXTRA-CONTRACTUAL CLAIMS WHICH HAD BEEN DISMISSED WITH PREJUDICE; AND IN ALLOWING THOSE CLAIMS TO BE BASED SOLELY UPON STATE FARM'S LITIGATION CONDUCT OF ITS DEFENSE BASED UPON THE STATUTE OF LIMITATIONS.

THE DISTRICT COURT ERRED IN TAKING AWAY THE DEFENDANTS 7TH AMENDMENT RIGHT TO A CIVIL JURY TRIAL

STATEMENT OF THE CASE

On July 7, 2008, Jones was hit by a 13 year-old driver, Karen Barrios, with no proof of insurance in the vehicle. Jones concedes she knew from the police report that the driver had no proof of insurance; there was no proof of any insurance in the vehicle; the driver's Aunt, Ms. Cordero-Gomez with whom she was staying said the car was owned by Luis Rivera; and a Gilberto Garcia had "at some time" owned the car. Ms. Barrios appeared in municipal court and pled guilty to careless driving and failure to provide proof of insurance. The owner of this vehicle was and is unknown. [2] Jones through three turns of counsel claimed this was an uninsured motorist claim, and it was accepted as such by State Farm which had done its own investigation shortly after the accident and found no insurance. Jones admitted in a deposition for another accident, taken within six

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[2] See *Plaintiff's Response to Defendant's Motion for Summary Judgment*, dated 06/17/14. [*Aplt. App*. Vol. II. at 198-222, Doc. No. 44 at 2.] The police report noted that there was only "prior owner" paperwork in the vehicle. [*Aplt. App*. Vol. II. at 362-365, Doc. No. 44-1]. See also, *Opening Brief of Appellant Gladys Jones*, dated 06/30/15 ("*Opening Brief*") at 3-4, and 24. Plaintiff claims she put "State Farm on notice of her claim and the circumstances of the accident – that the accident involved a 13-year old driver who was using a car with an unidentified owner – within the month [of the accident]." *Opening Brief* at 24.

months after this accident, that her claim was a UM claim. She also admitted to State Farm she knew her statute of limitations on any UM action would run in 2011. Yet, Jones did not timely file a UM action—but rather on July 5, 2011, filed a bodily injury lawsuit against the driver, her parents, Mr. Garcia and Mr. Rivera.[3] At this late date, based on the information Jones had since the day of the accident, she was able to serve all the parties but Mr. Garcia who was dismissed. After Jones obtained a default, Mr. Rivera appeared at the damages hearing on June 25, 2012, and at that time testified he did not own the car. Jones argued her suit preserved the UM statute of limitations. She also argued Mr. Rivera's testimony finally triggered the UM statute of limitations running, giving her two more years to sue State Farm as she knew at that point the vehicle was uninsured. Jones filed her UM action against State Farm on February 11, 2013. The district court found the UM action statute of limitations would not be triggered until it could be said "with certainty that there was no liability insurance." [See *Aplt. App*. Vol. II. at 267-271, Doc. No. 51 at 4.]

This is a case of Jones failing to file her action for UM benefits within the time allotted by the applicable statute of limitations—three years after she knew, or reasonably should have known in the exercise of due diligence, that there was no applicable insurance. This is *not* a case where State Farm argued the Jones did not have an uninsured motorist claim—this is Jones' argument alone, that there

[3] The advantage to the insured plaintiff in proceeding in this manner is the insurer is limited in its participation, and has no right to a jury trial. See *State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 190 (Colo. 2004).

could be some remote possibility of liability insurance that preserved the statute of limitation. Jones has turned the purpose behind the statute of limitations on its head by arguing even though it was undisputed by State Farm that this was an uninsured motorist claim; all the facts and circumstances showed this was an uninsured driver and vehicle, and she had put State Farm on notice within a month of the accident this was an uninsured driver and an unidentified owner, she could simply wait three years, without any investigation; while pursuing her UM claim; and then claim she had to prove with an absolute certainty there was no liability insurance before her UM action began to accrue. Jones was allowed to impermissibly extend the UM statute of limitations by suing the alleged tortfeasors long after she knew or should have known there was no insurance. Contrary to Jones' contentions that her knowledge there was no liability insurance occurred on June 25, 2012, knowledge that there is no liability insurance under the UM statute of limitations is what a reasonable person would have believed with the exercise of due diligence. The Colorado courts have flatly rejected that an insured can claim they do not "know" that there is no insurance until they have "documented proof." See, *Sulca v. Allstate Ins. Co*., 77 P.3d 897, 900 (Colo. App. 2003). Moreover, the court in *Sulca* rejected the exact argument of Jones here, that timely commencing suit against the alleged tortfeasors gives an insured at least another two years to sue the insurer, even if the insured knew of the lack of applicable insurance prior to suing the other driver. *Id*. The court

furthered Jones' untenable position finding in effect that any possibility of liability insurance existing preserved the statute of limitations indefinitely.

The district court also erred in encouraging and allowing extra-contractual claims which had been dismissed with prejudice; and allowing those claims to be based solely upon State Farm's litigation conduct of the defense of the statute of limitations. The district court also erred in finding State Farm had waived its demand for a jury trial because defense counsel did not notice Jones' counsel had changed it to trial to the court in the proposed scheduling order.

THE PROCEDURAL HISTORY

A. The erroneous finding by the district court that the insured must know, with absolute certainty that there is no liability insurance to trigger the statute of limitations under C.R.S. § 13-80-107.5(1)(a); and failure to require due diligence of Jones:

On February 11, 2013, Jones first filed suit for UM benefits against State Farm in the District Court of Denver County. State Farm filed an Answer and Jury Demand and removed to the U.S. District Court on March 6, 2013. [See *Aplt. App*. Vol. I. at 64-68, Doc. No. 1 (*Notice of Removal*), at 69-76, Doc. No. 2 (*Answer and Jury Demand*), and at 59-63, Doc. No. 4 (*Complaint*).] A Pretrial Conference was held on April 25, 2014 [*Aplt. App*. Vol. II. at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45], at which the Court concluded trial was unnecessary and instructed the parties to file cross-motions for summary judgment regarding the UM breach of contract claim. *Id*., Doc. No. 45 at 11. Defendant State Farm filed *Defendant's Motion for Summary Judgment*, dated

05/27/14, [Rec. Vol. 1 at 36, Doc. No. 43], arguing the Court should dismiss Jones' claims as barred by the applicable statute of limitations. Citing Colorado State law directly on point, State Farm argued the statute of limitations was triggered when Jones knew or by reasonable diligence should have known there was no applicable liability insurance. State Farm argued that the suit against the underlying tortfeasors and possible owners of the vehicle did not lengthen the time for Jones to have commenced suit against State Farm because she had or should have had knowledge long before that there was no insurance. State Farm argued the requirement that Jones use due diligence in discovering the circumstances imposes an objective standard and does not reward denial or self-induced ignorance. *Plaintiff's Response to Defendant's Motion for Summary Judgment,* dated 06/17/14, [*Aplt. App*. Vol. II. at 198-222, Doc. No. 44], responded that Jones' filing suit against the minor driver, her parents and the possible owners of the vehicle, Luis A. Rivera and Gilberto Garcia, within the three-year statute of limitations afforded under C.R.S. § 13-80-101(n), preserved the statute of limitations. *Defendant's Reply in Support of Motion for Summary Judgment*, dated 06/20/14, [*Aplt. App*. Vol. II. at 223-238, Doc. No. 46], replied that Jones had failed to supply any admissible evidence of reasonable diligence to investigate whether there was insurance. State Farm argued the accrual date for Jones' UM claim was when Jones, with the exercise of reasonable diligence, knew or should have known that the driver and vehicle were uninsured. State Farm argued that following Jones' logic the statute of limitation would never be triggered because

an owner could not be found. In its *Order on Summary Judgment*, dated 11/10/14, [*Aplt. App*. Vol. II. at 267-271, Doc. No. 51], the court found the issue to be whether Jones' claim for UM benefits was barred by C.R.S. § 13-80-107.5(1)(a). See also, *Jones v. State Farm Mut. Aut. Ins. Co*., 2014 U.S. Dist. LEXIS 159206, *1-2 (D. Colo. 2014) The court found that State Farm made diligent efforts but could not find an owner of the vehicle; and that *if* Jones' first two counsels had made the effort to find "facts of ownership" the result would have been the same. *Id.* at *3 and 5. The court found both of Jones' prior counsels had notified State Farm this was a claim for uninsured motorist benefits, as did Jones' current counsel on March 26, 2010. *Id*. at *2-3. The court found Jones was able to serve the driver and her parents, as well as Mr. Rivera in August 2011. *Id*. at *3-4. The court concluded as Jones had filed a tort action within three years of the accident, she had two more years after the June 25, 2012 default damages hearing to file this action. *Id*. at *6-7. The district court found it would be unjust to grant summary judgment "when it cannot be said with certainty that there was no liability insurance." *Id.* at *6. The court also dismissed Jones' amended claims for bad faith and unreasonable delay. *Id*. at *7. The district court issued a *Final Judgment* on December 12, 2014, [*Aplt. App*. Vol. II. at 283, Doc. No. 58].

<u>Pertinent procedural history at the hearings and conferences before the Motion for Summary Judgment was decided:</u>

The court had found it did not matter when Jones knew the 13-year old driver was uninsured, but only Jones' knowledge as to whether there was liability

insurance on the vehicle. [See *Aplt. App*. Vol. I. at 146-159, Transcript of 08/21/13, Motion Hearing, Doc. No. 35, at 4, ll. 1-6.] Jones maintained throughout the district court proceedings it was due diligence for her to bring a lawsuit three years after the accident against "the tortfeasor and possible owners," and that it was not until the damages hearing when Mr. Rivera testified he did not own the car, that 'it was clear it was an uninsured vehicle." *Id.*, Doc. No. 35 at 8, ll. 8-25. This long delayed investigation three years after the accident by Jones' counsel for the liability lawsuit was based on the police report which was available from the date of the accident. *Id.* at. 9, ll. 22-25. The court in the proceedings inquired into what the prior attorneys had done to investigate, and found, "Nothing, right?" [*Aplt. App*. Vol. II. at 240-264, Transcript of 10/23/14, Motions Hearing, at 14, ll. 18-25; 15, ll. 11-24.] The court found there was nothing in the record showing prior counsel had conducted any investigation whatsoever. *Id.*, and at 21, ll. 12-21. The court determined that Jones' counsels had maintained to State Farm that the claim was an uninsured motorist claim. *Id.* at 10, ll. 22-25. It was clear as stated by the court, "the Jones never thought there was insurance." *Id.* at 11, ll. 10-12. However, the court did not think the Jones herself "ought to be penalized here," by the statute of limitations. *Id.* ll. 14-16.

B. The district court's error in encouraging and allowing claims for statutory delay and common law bad faith when such claims had been dismissed with prejudice; and in basing such claims solely upon State Farm's litigation conduct of asserting the statute of limitations as a defense:

At the Scheduling Conference held September 6, 2013, the court improperly, and with patent bias, declared it was in the court's opinion improper for State Farm to dispute the statute of limitations for this claim because no one knew who owned the vehicle or might have insurance. [*Aplt. App*. Vol. I. at 116-124, Transcript of 09/06/13, Scheduling Conference, at 3, ll. 9-17.] The court declared it would not sign the scheduling order because it ordered Jones to amend the complaint to bring a bad faith claim for State Farm's conduct in defending based on the statute of limitations. *Id.* at 8, ll. 1-7.[4] As a result of the court's encouragement of a bad faith claim based upon litigation conduct, previous counsel for State Farm filed an Unopposed Motion to Withdraw on September 23, 2013 [Rec. Vol. 1 at 12, Doc. No. 25] which was granted September 25, 2013. [Rec. Vol. 1 at 15, Doc. No. 26]. New counsel entered for State Farm. On September 27, 2013, Jones filed *Plaintiff's Motion to Amend to Add Bad Faith Claims Pursuant to the Court's Order*. [*Aplt. App*. Vol. I. at 125-127, Doc. No.

[4] Plaintiff's Complaint filed February 11, 2013, contained a Third Claim for Relief – Violation of C.R.S. § 10-3-1115(1)(A) & 1116(1). [*Aplt. App*. Vol. I. at 49-53]. On March 20, 2013, the parties stipulated to dismiss with prejudice those claims in the Third Claim for Relief. [*Aplt. App*. Vol. I. at 77-78, Doc. No. 8]. On March 21, 2013, the trial court dismissed those claims with prejudice. [*Aplt. App*. Vol. I. at 79, Doc. No. 9]. On April 2, 2013, the parties filed a *Stipulated Motion to Strike Allegations from Complaint* [[*Aplt. App*. Vol. I. at 80-81, Doc. No. 11] wherein Jones specifically incorporating her prior stipulation for dismissal with prejudice added any allegations that could be construed as a bad faith breach of contract claim and stated: "Plaintiff intends to pursue only a breach of contract claim for uninsured motorist benefits and stipulates and agrees to strike allegations in paragraph 26 of Plaintiff's Complaint." The trial court granted the Motion the next day, April 3, 2013, striking Plaintiff's allegations of bad faith. [*Aplt. App*. Vol. I. at 82, Doc. No. 12].

27]. The Court granted the Motion the same day [*Aplt. App*. Vol. I. at 136, Doc. No. 28] and accepted for filing the Amended Complaint. [*Aplt. App*. Vol. I. at 128-135, Doc. No. 29]. The Amended Complaint once again made claims under C.R.S. § 10-3-1115(1)(A) & 1116(1) and alleged Bad Faith Breach of Contract. This issue was again addressed at the Further Scheduling Conference held November 25, 2013. [Rec. Vol. 1 at 28, Transcript of 11/25/13, Further Scheduling Conference, Doc. No. 36.] It was brought to the court's attention that under Colorado law the courts are very reluctant to allow litigation conduct to be the basis of a bad faith claim. *Id.,* Doc. No. 36 at 2, ll. 18-25; 3, ll. 1-2. Thereafter at the Pretrial Conference held April 25, 2014, the court stated State Farm having done its own investigation and finding no insurance, and relying on Jones' various attorneys all saying within a short time after the accident that this was an uninsured motorist claim, was not bad faith. [*Aplt. App*. Vol. II. at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45 at 9, ll. 4-11. Thus (as there was no basis for the extra-contractual claims) the court found trial was not necessary and ordered the parties to proceed by a motion for summary judgment as to the statute of limitations issue. *Id*., Doc. No. 45 at 9-10. The court reiterated, "I don't see the bad faith claim anyway." *Id.* at 11, ll. 8-9.[5] In its *Order on Summary Judgment*, [*Aplt. App*. Vol. II. at 267-271, Doc. No. 51], the court

[5] The court also improperly took issue with State Farm's clear right to intervene and present evidence of prior injuries in Plaintiff's damages case. [*Aplt. App*. Vol. II. at 240-264, Transcript of 10/23/14, Motions Hearing at 3-5.]

dismissed Jones' extra-contractual claims finding State Farm had an "arguable defense." See also *Jones v. State Farm Mut. Aut. Ins. Co*., 2014 U.S. Dist. LEXIS 159206, *7 (D.Colo. 2014).

C. The district court's error in taking away State Farm's 7th Amendment right to a civil jury trial:

State Farm's *Answer and Jury Demand* filed March 6, 2013 demanded a civil jury trial [*Aplt. App*., Vol. I. at 69-76, Doc. No. 2), as did State Farm's *Answer to Amended Complaint and Jury Demand* [*Aplt. App*. Vol. I. at 137-145]. A Scheduling Conference was held November 25, 2013. The parties had submitted a proposed Scheduling Order dated 11/25/13, in which Jones had changed the jury proceeding to trial to the court. [Rec. Vol. 1. at 17, Doc. No. 33 at 5.] At the hearing, the court was advised by defense counsel of the error in the proposed Order regarding the jury demand. Despite being informed Defendant did not waive a jury trial, the court ruled that Defendant had waived a jury. [Rec. Vol. 1 at 28, Transcript of 11/25/13, Scheduling Conference, Doc. No. 36 at 5, ll. 19-25; 6, ll. 1-23]; and *Courtroom Minutes*, dated 11/26/13, [Rec. Vol. 1 at 16, Doc. No. 32).

STATEMENT OF THE PERTINENT FACTS

Jones was involved in a motor vehicle accident on July 7, 2008. She was a pedestrian when she was struck by a car. The July 7, 2008 State of Colorado Traffic Accident Report [*Aplt. App*. Vol. II. at 362-365, Doc. No. 44-1] documented:

- The driver of the car, Karen Barrios, was 13 years old on the date of the accident, and she and her parents resided in Lincoln, Nebraska;
- Ms. Barrios was operating a vehicle at some time registered to Gilberto Garcia;
- Ms. Barrios was cited for careless driving and failure to provide proof of insurance;
- There was no proof of insurance with the vehicle;
- All paperwork in the car was from "prior owners;"
- Ms. Barrios' aunt, Ms. Condero-Gomez, stated that Luis Rivera owned the vehicle and lived at 15503 E. Evans Avenue[6]

At the time of the accident, Jones was covered under a State Farm automobile policy which included uninsured motorist coverage ("UM") in the amount of $100,000. [Rec. Vol. 2 at 165, Doc. No. 43-19, Exhibit S to *Defendant's Motion for Summary Judgment*, dated 05/27/14]. On July 23, 2008, Jones informed State Farm she was struck by an uninsured motorist. [Rec. Vol. 1

[6] As conceded by Plaintiff it was her knowledge shortly after the accident that: "Following the accident, the Aurora Police Department were called to the scene. During the investigation, Luis A. Rivera was identified by Ms. Condero-Gomez as the owner of the vehicle. Gilberto Garcia, an unknown individual, was at some time the registered owner of the vehicle; thus, he was also listed as an owner of the vehicle in police report. There was no proof of insurance in the vehicle. Ms. Barrios was cited for careless driving and failure to provide proof of insurance. She was ordered to appear in Aurora Municipal Court on August 7, 2008. Ms. Barrios plead guilty to careless driving and failure to provide proof of insurance. The Aurora Police Department did not note any other automobile insurance." See *Plaintiff's Response to Defendant's Motion for Summary Judgment*, dated 06/17/14, [*Aplt. App.* Vol. II. at 198-222, Doc. No. 44, at 2.] See also, *Opening Brief of Appellant Gladys Jones*, dated 06/30/15 ("*Opening Brief*") at 3-4.

at 60, Doc. No. 43-2, Exhibit B, Activity Log Number 3.] On July 30, 2008, Claim Representative Maria Taylor of State Farm sent a letter to Jones advising her she may be entitled to uninsured motorist benefits as a result of the subject accident. [Rec. Vol. 1 at 72, Doc. No. 43-3, Exhibit C.] Jones and her counsels had the following knowledge:

- On August 1, 2008, attorney Darrell S. Elliott notified State Farm that he was representing Jones in connection with uninsured motorist benefits. [Rec. Vol. 1 at 75, Doc. No. 43-4, Exhibit D.]
- On August 5, 2008, State Farm acknowledged this letter and Jones' uninsured motorist claim. [Rec. Vol. 1 at 86, Doc. No. 43-6, Exhibit F.]
- The Darrell S. Elliott firm represented Jones until July 3, 2009. Teri Dalbec, an attorney from Mr. Elliott's firm handling the Jones matter, testified in a deposition that during the time her firm represented Jones they never found any liability insurance for the potentially liable parties. [Rec. Vol. 1 at 77, Doc. No. 43-5, Exhibit E, *Deposition of Teri Dalbec, Esq*., dated 01/24/14, at 14, ll. 18-25; 26, ll. 22-25; 27, l.1; 32. l. 25; 33, ll. 1-12.]
- Within six months of the subject accident, Ms. Jones was deposed for a separate lawsuit she had pending in Texas. At that time, Jones testified she had an uninsured motorist claim against State Farm for the subject July 7, 2008 accident. [Rec. Vol. 2 at 127, Doc. No. 43-11, Exhibit K, *Deposition of Gladys Jones,* dated 12/19/08, at 15:14-17; 21:11-20.]

- On June 24, 2009, attorney Jerome Malman sent a letter to State Farm advising he had been retained by Jones "for injuries and damages sustained in an uninsured motorist collision on July 7, 2008." [Rec. Vol. 2 at 133, Doc. No. 43-12, Exhibit L.]
- State Farm never argued there was some possible liability coverage precluding Jones' UM claim. Through January 2009, State Farm conducted its own investigation into possible liability coverage. None of its various investigative actions uncovered any liability insurance coverage. [Rec. Vols. 1 and 2 at 87-105, Doc. Nos. 43-7 through 43-10, Exhibits G-J.
- Jones admits: "Following its investigation, State Farm concluded that no applicable liability insurance existed." See *Plaintiff's Response to Defendant's Motion for Summary Judgment*, dated 06/17/14, [*Aplt. App*. Vol. II. at 198-222, Doc. No. 44, at 2.][7]
- The court found Jones and her attorneys had done nothing up until Jones' current attorneys served the subject individuals in August 2011. [*Aplt. App*. Vol. II. at 240-264, Transcript of 10/23/14, Motions Hearing, at 14, ll. 18-25; 15, ll. 11-24.]

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[7] Plaintiff acknowledges State Farm (not Plaintiff) did an extensive investigation in the six months following that accident and was not able to find any insurance. See *id.*, Doc. No. 44, at 5-6 (Undisputed Facts ¶¶ 15-17). She also concedes that by September 19, 2009 when Plaintiff's second attorneys withdrew, they had not been "able to determine any information about insurance for potentially liable parties." *Id*. at ¶ 21. (Nor had Plaintiff's first attorney found any insurance). *Id*. at 5-6.

- The court found that State Farm made diligent efforts but could not find an owner of the vehicle; and that *if* Jones' first two counsels had made the effort to find "facts of ownership" the result would have been the same. *Jones v. State Farm Mut. Aut. Ins. Co*., 2014 U.S. Dist. LEXIS 159206, *3 and 5 (D. Colo. 2014).
- Mr. Malman represented Jones for approximately 3 months, his representation terminating in September, 2009. During the 3 months he represented Jones, he was not able to determine any information about insurance for potentially liable parties. [Rec. Vol. 2 at 135, Doc. No. 43-13, Exhibit M, *Deposition of Jerome Malman*, Esq., dated 01/09/14, at 38, ll. 2-10, 23-25; 39, ll. 1-2.]
- State Farm's claim log notes document on March 8, 2010, Jones acknowledged the statute of limitations was 2011 and she had until then to resolve her claim or take some sort of action. [Rec. Vol. 1 at 60, Doc. No. 43-2, Exhibit B, Activity Log Number 282.]
- On March 26, 2010, Jones' present counsel, Amy Gaiennie, sent a letter to State Farm stating her firm now represented Jones and that: "It has come to my attention that the at-fault party was uninsured for this claim. Please set up an uninsured motorist claim for this accident." [Rec. Vol. 2 at 142, Doc. No. 43-14, Exhibit N.]
- On July 5, 2011, Jones filed suit in the District Court of Adams County against Karen Barrios, a minor; John Doe and Jane Doe, parents or

guardian of minor Karen Barrios; Gilberto Garcia; and Luis A. Rivera, but did not file suit against State Farm. [Rec. Vol. 2 at 143, Doc. No. 43-15, Exhibit O.]

- Jones speculated Ms. Barrios' parents had control or use of the vehicle and were negligent under the family car doctrine; and that Barrios had used the car with their permission. [Rec. Vol. 2 at 143, Complaint, Doc. No. 43-15, at ¶ 7.] Jones alleged either Mr. Garcia or Mr. Rivera had possession of the vehicle and had left the vehicle unattended without stopping the ignition. *Id.* Doc. No. 43-15 at ¶¶ 28-29; or negligently entrusted the vehicle to Ms. Barrios. *Id.* at ¶¶ 33-42.
- Jones' attorneys stated for purposes of her personal injury lawsuit they hired private investigators in Colorado and Nebraska to find the driver, her parents, and the possible owners, Gilberto Garcia and Luis Rivera. [*Aplt. App.* Vol. II. at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45 at 4, ll. 1-9.]
- Jones through counsel admits it was assumed the 13-year old driver and her parents had no insurance. *Id.,* Doc. No. 45 at 20, ll. 15-25; 21, ll. 1-2.
- Service was completed on the named defendants with the exception of Mr. Garcia. Service on Ms. Barrios and her parents was accomplished in Lincoln, Nebraska as on the police report, and Mr. Rivera was served at the address in Aurora, Colorado listed on the police report. [Rec. Vol. 1 at 56, Doc. Nos. 43-1 (police report); [Rec. Vol. 3 at 173-176, 50-1 (Karen

Barrios by her mother Rosalina Garcia served 08/12/11); 50-2 (mother Rosalina Garcia served 08/12/11); 50-3 (John Doe (father) by wife Rosalina Garcia served 08/12/11); and 50-4 (Luis Rivera served 08/11/11).] The served defendants failed to Answer and Jones filed for default.

- On July 11, 2011, at Jones' deposition for her case against the underlying tortfeasors, Jones testified when she realized she had been injured in an accident caused by an uninsured motorist she retained an attorney to represent her and Mr. Elliott informed her of the fact that the 13-year old driver was uninsured. [Rec. Vol. 2 at 151, Doc. No. 43-16, Exhibit P, *Deposition of Gladys Jones*, dated 06/11/12, at 43:15-44:1.] [8]
- It was clear as stated by the court, "the Jones never thought there was insurance." [*Aplt. App*. Vol. II. at 240-264, Transcript of 10/23/14, Motions Hearing at 11, ll. 10-12.]

State Farm intervened in the bodily injury action while reserving its right to defend that Jones' claim was barred by the statute of limitations. [*Aplt. App*. Vol. I. at 15-18, Doc. No. 49-1.] State Farm consistently advised Jones that her UM claim had expired pursuant to the statute of limitations. [Rec. Vol. 2 at 167, Doc.

[8] Also at her deposition, Plaintiff testified that she was sure her lawyers had "filed something" and "did what they needed to do according to the statute of limitations." Doc. 43-16, at 54:16-55:5. She also testified that she thought her current attorneys had filed a lawsuit against State Farm and was unaware that State Farm was not a defendant in the case against the underlying tortfeasors. Doc. 43-16, at 55:9-25. In response to whether she knew that no action had been commenced against State Farm, Plaintiff testified "No I didn't." Doc. 43-16, at 56:11-17.

No. 43-20, Exhibit T.] The trial court entered a default against Karen Barrios, her parents and Luis A. Rivera for failure to Answer (Mr. Garcia was never located, and was dismissed from the lawsuit). On June 25, 2012 a two-day damages hearing took place. Defaulting defendant Luis A. Rivera attended the hearing and provided testimony that there was no liability insurance on the subject vehicle, and he did not own it. On August 17, 2012 an Order was entered against Luis A. Rivera, Karen Barrios, and her parents for $74,651.78, plus costs and interest, which was reduced to judgment. [*Aplt. App*. Vol. I. at 49-53, Doc. No. 4, *Complaint*, dated 02/11/13; and *Order: Default Judgment*, Vol. I. at 34-45].

SUMMARY OF THE ARGUMENTS

The court erroneously found a plaintiff must have knowledge that the driver and vehicle that hit her were uninsured, with absolute certainty, for her uninsured motorist insurance claim to ever accrue. [*Aplt. App*. Vol. II. at 267-271, Doc. No. 51.] The first issue on appeal is when did Jones' uninsured motorist insurance claim accrue, *i.e.*, when was she aware, or when would a reasonable person in the exercise of due diligence have been aware, that the driver and vehicle that hit her were uninsured. This necessarily included the analysis of whether the driver and vehicle would be presumed or deemed uninsured (as they were by State Farm). Defendant's position is that the undisputed facts clearly show that the Jones had, or should have had the requisite information, with the exercise of due diligence, to know the driver and vehicle that hit her were uninsured as of numerous dates shortly after the accident, all of which bar suit against State Farm filed February

11, 2013, and thus the Court may decide this issue as a matter of law. See *Sulca v. Allstate Ins. Co*., 77 P.3d 897, 898 (Colo. App. 2003) . As a matter of law Jones did not exercise due diligence in investigating the facts and circumstances, and the court did not require her to exercise due diligence as required. Further, State Farm was not contesting that there was no applicable insurance. Jones could not preserve the statute of limitations by suing the alleged tortfeasors when she knew or should have reasonably known through the exercise of due diligence that the driver and vehicle were uninsured. See *Sulca, supra*, at 900. The District Court's ruling is directly contrary to the rule of law in Colorado. If the Court accepts this premise, that the knowledge required must be an absolute "certainty," uninsured motorist insurance claim causes of action could be tolled or fail to accrue for decades due to denial or self-induced ignorance, which it is the very purpose of statutes of limitation to prevent. Even sympathetic plaintiffs must lose their claims if they do not timely file a cause of action. Sympathy in individual cases does not overrule the public policy of statutes of limitation. As shown above, the court clearly sympathized with Jones, and even stated it did not want her to be "penalized" by the statute of limitation.

The court also committed error in encouraging and allowing amended extra-contractual claims when those claims had been dismissed with prejudice and were further based solely on State Farm's defense based upon the statute of limitations. The district court expressed its personal feelings that it was bad faith for State Farm's attorney to raise the defense. This forced State Farm's counsel to

withdraw, and Jones was allowed to amend her claims to once again allege violation of the unreasonable delay or denial of benefits owed statute and bad faith. The court also erroneously took away the Defendants fundamental 7th Amendment right to a civil jury trial as State Farm requested in its Answer and Jury Demand based on a proposed Scheduling Order where Jones' counsel changed the jury demand to trial to the court. Although informed at the Scheduling Conference this was an error and State Farm did not waive its rights, the district court ruled that State Farm had now waived its right to a trial by jury.

ARGUMENTS

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE INSURED MUST KNOW, WITH CERTAINTY THAT THERE IS NO LIABILITY INSURANCE TO TRIGGER THE STATUTE OF LIMITATIONS UNDER C.R.S. § 13-80-107.5(1)(a); AND IN NOT REQUIRING ANY DUE DILIGENCE BY JONES AS TO WHETHER THE VEHICLE WAS UNINSURED.

A. The purposes behind the statute of limitations would be upended by rewarding a plaintiff's denial or self-induced ignorance--especially when the plaintiff's failure to investigate is so she can claim she does not have the requisite knowledge so the statute fails to accrue.

The plaintiff cannot ignore her duties or obligations to investigate the facts and circumstances surrounding her claim, or she could claim the statute of limitations never begins to run. As held by the Colorado appellate court in *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099, 1101 (Colo. App. 2005) (internal citations omitted):

> Statutes of limitations are enacted to promote justice, prevent unnecessary delay, and preclude stale claims. Whether a statute of limitations bars a particular claim is a question of fact. However, if

> undisputed facts demonstrate that the plaintiff had the requisite information as of a particular date, then the issue of whether the statute of limitations bars a particular claim may be decided as a matter of law.

In accord see *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996) ; *United States* v. *Kubrick,* 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) ; *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) ; *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420; 182 L. Ed. 2d 446, 452 (U.S. 2012) (The potential for such endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the action is out of step with the purpose of limitations periods in general). Here the court let sympathy sway its decision, and did not want to "penalize" Jones with the statute of limitations. However, statutes of limitations reflect a balancing of the interest favoring the vindication of valid claims and the interest barring the prosecution of stale ones. See *Sun Oil Co. v. Wortman,* 486 U.S. 717, 736, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988) . "[T]here comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious." *Bd. of Regents v. Tomanio,* 446 U.S. 478, 487, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980) , *abrogation on other grounds*. See also *Ohio v. Peterson, Lowry, Rall, Barber & Ross,* 651 F.2d 687, 694 (10th Cir. 1981) ; *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) . Thus, "statutes of

limitations are not mere technicalities, but are instead cornerstones of a well-ordered judicial system," and they must take priority over other considerations, and without respect as to whether the claim is meritorious (or the plaintiff is sympathetic).See *Gargano v. Owners Ins. Co*., 2014 U.S. Dist. LEXIS 35296, *8 (D. Colo. 2014); *Bd. of Regents v. Tomanio,* 446 U.S. 478, 487, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980).

B. The three year statute of limitations for a UM action begins to run when a plaintiff knows, or would have known, in the exercise of due diligence, that there was no applicable liability insurance that would cover the alleged tortfeasor. The timely commencing of suit against the alleged tortfeasors(s) does not give an insured another two years to sue the UM insurer where the insured knew, or should have known there was a lack of applicable insurance, prior to suing the alleged tortfeasor(s).

At issue in this case is application of Colorado Revised Statute §13-80-107.5 which provides in pertinent part as follows:

> (a) An action or arbitration of an "uninsured motorist" insurance claim, as defined in sections 10-4-609 and 10-4-610, C.R.S. , shall be commenced or demanded by arbitration demand within three years after the cause of action accrues; except that, if the underlying bodily injury liability claim against the uninsured motorist is preserved by commencing an action against the uninsured motorist within the time limit specified in sections 13-80-101 (1) (n) and 13-80-102 (1) (d), then an action or arbitration of an uninsured motorist claim shall be timely if such action is commenced or such arbitration is demanded within two years after the insured knows that the particular tortfeasor is not covered by any applicable insurance. In no event shall the insured have less than three years after the cause of action accrues within which to commence such action or demand arbitration.

C.R.S. §13-80-107.5(1)(a).[9]

The three year statute of limitations under C.R.S. §13-80-107.5(1)(a) begins to run when Jones knows, or a reasonable person would have known, in the exercise of due diligence, that there was no applicable liability insurance that would cover the alleged tortfeasor, here Ms. Barrios. See *Sulca v. Allstate Ins. Co*., 77 P.3d

[9] The UM statute, C.R.S. § 10-4-609, does not define "uninsured motor vehicle" or "uninsured motorist." However, in *State Farm Mut. Aut. Ins. Co. v. Nissen*, 835 P.2d 537, 539 (Colo. App. 1992), *aff'd*, 851 P.2d 165 (Colo. 1992), the court determined that an "uninsured automobile" is one that has no applicable insurance *under the facts and circumstances* in which the claim was made. There are many instances, such as here, where although it is not known with absolute certainty that liability insurance is unavailable, it is reasonable the tortfeasor and vehicle should be deemed to be uninsured based on the facts and circumstances. See *Morgan v. Farmers Insurance Exchange*, 511 P.2d 902 (Colo. 1973) (if liability insurer becomes insolvent, motorist deemed to be uninsured); *White v. Farmers Insurance Exchange*, 946 P.2d 598 (Colo. App. 1997) (when an uninsured driver allegedly prevents the insured from obtaining information concerning his or her identification, uninsured motorist benefits are available); *State Farm Mut. Aut. Ins. Co. v. Nissen, supra* (denial of coverage by tortfeasor's liability insurer makes uninsured motorist coverage available); *Farmers Ins. Exchange v. McDermott*, 527 P.2d 918 (Colo. App. 1974) (uninsured motorist coverage available for hit and run accident where no physical impact occurred and driver's identity unknown). In *McDermott* the Colorado appellate court determined an "uninsured motor vehicle" found in the statute included motor vehicles whose drivers cannot be identified. 527 P.2d at 920. Here, an "uninsured motor vehicle"' would include motor vehicles whose owner(s) cannot be identified. The court in *McDermott* specifically found the argument unpersuasive "that there is no presumption of a lack of insurance where the negligent party remains unidentified and that therefore, those drivers should not be included within the definition of uninsured motorists under the statute." 527 P.2d at 920. "We find this reasoning unpersuasive. Instead, we conclude that the key to the application of the uninsured motorist statute is the inability of the innocent injured party to recover for a loss caused by another's negligence, whether that person is known or unknown." *Id.* Here, the owner could not be identified. Under *McDermott's* reasoning there would be a legal presumption of lack of insurance. This presumption would be from the earliest stages of Plaintiff's claim. Plaintiff knew the driver was uninsured and the owner of the vehicle was unidentified on the date of the accident and put State Farm on notice "within the month" of the same.

897, 898 (Colo. App. 2003); *Trigg v. State Farm Mut. Auto. Ins. Co*., 129 P.3d 1099, 1101 (Colo. App. 2005); *Olson v. State Farm Mut. Auto. Ins. Co*., 174 P.3d 849 (Colo. App. 2007). Jones agrees due diligence is the standard but argues she met the standard by bringing suit against the tortfeasor, her parents, and possible owners three years after the accident. [*Aplt. App*. Vol. II. at 198-222, Doc. 44 at 12-14.] Jones' argument is that "Plaintiff, nor her counsel knew or should have known whether the owner, maintainer, or user of the vehicle was uninsured until the day Luis Rivera testified on June 25, 2012." *Id.*, Doc. No. 44. at 14. Not until three years after the accident, based on the same information Jones had the day of the accident from the Police Report, and at all times representing to State Farm this was a UM claim, and it being accepted and agreed to by State Farm as a UM claim,[10] did Jones and her current attorneys attempt to locate the driver and her parents, and the possible owners.[11] Jones' argument that it is at the conclusion of any investigation she eventually pursues that the "clock begins," is unfounded and contrary to the legal standard. *Id*., Doc. No. 44 at 15. The investigation must be

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[10] Respectfully, State Farm would be found to have waived any such argument this was not a UM action.

[11] Plaintiff admits it was not until trying to serve her Complaint in July 2011, that counsel for Plaintiff tried to locate the "at some time" owner, Mr. Gilberto Garcia, including hiring a private investigator. *Id*., Doc. No. 44 at 19-20. He could not be found and was dismissed. *Id*. Plaintiff argues Mr. Rivera also possibly had liability coverage for the accident (assuming he turned out to even own the car and further had given a 13-year old permission to drive it; left it running unattended or negligently entrusted it to Ms. Barrios). Plaintiff was indeed successful in serving the driver and her parents and Luis Rivera, indeed Mr. Rivera lived in Aurora, Colorado at the address on the police report, was served on August 11, 2011, and testified he did not own the car on June 25, 2012.

one of a reasonable person exercising due diligence.[12] The transparency of Jones' claims regarding her lack of knowledge that this was an uninsured vehicle is brought to light by her appellate argument. Plaintiff vehemently denies for the purposes of the accrual of the statute of limitations that she knew or should have known with the exercise of due diligence there was no applicable liability insurance until June 25, 2012. But for the purposes of her appeal of dismissal of her bad faith claims, Plaintiff repeatedly emphasizes that she told State Farm this was a UM accident "within the month" after the accident and this has been a UM case. *Id.*, Doc. No. 44 at 24-26. She claims the "timeline of denial of payment" raises questions as to State Farm's conduct as Jones was injured in an accident on

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[12] Plaintiff has also argued the alleged tortfeasors could not be deemed uninsured under C.R.S. § 10-4-609(6). [See *Aplt. App*. Vol. II. at 198-222, Doc. No. 44, at 20-21.] Section (6) effective January 1, 2011, lists circumstances where an alleged tortfeasor will be deemed uninsured. These circumstances include where the tortfeasor cannot be located for service of process *after a reasonable attempt* and service of process on the insurance carrier is insufficient or ineffective *after reasonable effort*, or, the police report failed to disclose the insurance covering the motor vehicle, and the alleged tortfeasor's insurance coverage when the incident occurred is not actually known by the person attempting to serve process. See C.R.S. § 10-4-609(6). Section (6) was not effective until January 1, 2011 and is not applicable to this matter. Further, the facts and circumstances would clearly meet the criteria of the 2011 amendment, *if* the Plaintiff had acted with due diligence. Jones argues the individuals could not be deemed uninsured until she finally attempted to serve process—and she waited until July 2011 to make any effort. Thus Jones concludes there could be no deeming of the alleged tortfeasors as uninsured "until she accomplished" trying to serve process. *Id*., Doc. No. 44 at 20. This circular argument is again why due diligence is required—the insured could simply toll the statute of limitations indefinitely until she tried to serve process on alleged tortfeasors she knew or should have known were uninsured. This is a perfect example of self-induced ignorance and contrary to Colorado law. See *Sulca*, 77 P.3d at 900-90. Again, State Farm was not contesting the alleged tortfeasor(s) were uninsured.

July 7, 2008 and put "State Farm on notice of her claim and the circumstances of the accident - that the accident involved a 13-year old driver who was using a car with an unidentified owner - within the month." *Id*. at 24.

The Colorado appellate case of *Sulca,* 77 P.3d 897, is decisive here. *Sulca* contained similar facts of an uninsured driver and unknown owner:

> At the scene of the accident, the other driver advised insured that he did not have automobile insurance and he did not own the car he was driving. The driver then left the scene.

Id. at 898. In that case, the court held "we conclude that insured had three years from the date he 'knew' that there was no applicable insurance within which to commence this suit. Here that date was the day of the accident." *Id.* at 901. In *Trigg,* 129 P.3d 1099, the court held that:

> The insured's claim against the insurer accrued as early as [the date of the accident], when the driver admitted he was uninsured, and no later than July 13, 1998, when the insured indicated to his doctor that he was involved in uninsured motorist litigation. *See Sulca v. Allstate Ins. Co., supra* (a claim under § 13-80-107.5(1)(a) against an uninsured motorist carrier commences to run when the insured knew that there was no applicable insurance.

Id. at 1102. By claiming not to "know" in some absolute sense that there is no insurance, a claimant could argue the claim survives into perpetuity. See *Sulca*, 77 P.3d at 900. In *Sulca* the court disagreed with the insured's argument that his UM claim was timely because until he had documented proof that no applicable policy insured the other driver, he did not "know" that the tortfeasor was uninsured. See

id. This is exactly Jones' argument here, and it must fail as a matter of law.[13] See also *McDermott*, 528 P.2d at 920 (there would be a presumption when the owner of a vehicle cannot be identified that it is an uninsured motor vehicle, just as where the driver cannot be identified and is deemed an uninsured motorist).

Further, the court erred in not requiring Jones to prove she had exercised due diligence in trying to determine if the driver or vehicle that hit her was uninsured, and accepting that her filing of her suit against the driver, her parents and mere possible owners (whom she had not investigated) preserved the statute of limitations to sue State Farm. (In fact the court more than once commented that Jones and her attorneys had done nothing). However, a reasonable person with exercise of due diligence would have known of the lack of applicable insurance

[13] *Olson, supra,* also illustrates the point that in some situations, such as in the case of a hit-and-run tortfeasor, whether or not the tortfeasor had insurance might never be known with absolute certainty. "The critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action . . ." 174 P.3d at 854. This requires that plaintiff use due diligence to find out the relevant circumstances or events. *Id.* "This requirement creates an objective standard, and 'does not reward denial or self-induced ignorance.'" *Id.,* citing *Sulca*, *supra*, at 900. As discussed in *Olson,* allowing a plaintiff to have knowledge of the facts essential to their cause of action, but allowing the plaintiff to toll the statute until the plaintiff has talked with an attorney for instance, would nullify the statute of limitations. *Id.* at 854-855. Instead the court found a plaintiff must exercise reasonable diligence in pursuing their legal claim. *Id.* at 855. Otherwise the court found the statute of limitations could be tolled indefinitely as to when the cause of action accrued. *Id.* See also, *Gargano v. Owners Ins. Co*., 2014 U.S.Dist. LEXIS 35296 (D. Colo. 2014) at *7-12. ("Actual knowledge is knowledge of such information as would lead a reasonable person to inquire further. . .Plaintiff is required to exercise reasonable diligence in discovering the relevant circumstances of her claims. . .Plaintiff is judged by an objective standard that does not reward denial or self-induced ignorance.") (citing *Sulca, supra*).

prior to the bodily injury suit. This leads to the important point that the UM action statute of limitation time periods do not run consecutively. In *Sulca, supra,* the court firmly rejected the argument that timely commencing suit against the other driver gives an insured at least another two years to sue the insurer, even if the insured knew of the lack of applicable insurance prior to suing the other driver. See *Sulca*, 77 P.3d at 900. "According to the insured, the three-year and two-year periods of limitation can only run consecutively, not concurrently. We are not persuaded." *Id.* The court held "we conclude that insured had three years from the date he 'knew' that there was no applicable insurance within which to commence this suit. Here that date was the day of the accident." *Id.* at 901. Similar to the insured in *Sulca,* Jones knew, or with the exercise of due diligence should have known, long before the time of filing suit against the underlying tortfeasors on July 5, 2011 there was no applicable insurance, and thus filing that suit did not preserve her claim.[14] Jones did not file suit against State Farm for UM

[14] The case of *Rider v. State Farm Mutual Automobile Insurance Co.*, 205 P.3d 519 (Colo. App. 2009), previously relied on by Plaintiff supports State Farm's position. [See *Aplt. App*. Vol. II. at 198-222, Doc. No. 44 at 15-18] In that case, the Plaintiff sued the uninsured motorist carrier within the three year statute of limitations. *Rider*, 205 P.3d at 521. Four days after the accident the Plaintiff filled out her accident questionnaire stating the other driver was uninsured. *Id*. at 520. It was actually "irrelevant" in that case when the insured knew there was no insurance, because she brought her UM action within three years of the accident. *Id*. Here, as in *Rider*, the "grace period" is not applicable to preserve the statute of limitations. That is the fallacy of Plaintiff's case. *See Rider*, 205 P.3d at 523.

benefits until February 11, 2013. This is well beyond three years after any arguable triggering of the statute of limitations.[15]

The issue here is when would a reasonable Jones exercising due diligence have known that the vehicle was uninsured—the court erred in finding there must be an absolute finality to the knowledge, where the law is there is a point at which a reasonable person through the exercise of due diligence should know there is no insurance. There is also clearly a point where the alleged tortfeasor is presumed or deemed uninsured. Those facts and circumstances include as here where the owners of the vehicle are unknown. The trial court's determination leaves a UM

[15] As shown by the undisputed facts, Plaintiff and her attorneys knew or should have known with the exercise of reasonable due diligence, shortly after the accident that there was no liability insurance to be found. They knew or should have known the 13-year old and her parents were uninsured (they admit it was assumed they were uninsured); the girl and her parents lived in Lincoln, Nebraska; there was no proof of insurance with vehicle; there was only "prior owner" paperwork in the vehicle; the driver's aunt stated Luis Rivera owned the vehicle and the police report listed his address in Aurora, Colorado—in the event it was reasonable to believe he owned the vehicle and had given the 13-year old permission to drive it; and from the date of the accident the owner was unknown. The court even found Plaintiff never thought there was any insurance. At the earliest the statute would accrue on the date of the accident. "Within the month" after the accident Plaintiff admits she knew and put State Farm on notice the driver was uninsured and the vehicle owner was unidentified. Plaintiff has admitted as of March 8, 2010, that she was well aware her statute of limitations on any potential UM action would run in 2011—this is admitted knowledge. There is no doubt Plaintiff and her counsel knew before filing her bodily injury suit that there was no insurance and that was uncontested by State Farm. Even giving the Plaintiff the benefit of the doubt that the statute of limitations accrued at the conclusion of State Farm's investigation—that investigation ended in January 2009. Thus, even under this most lenient standard, Plaintiff's three year statute of limitation for her UM action ran out in early 2012. (Ignoring Plaintiff and her attorneys' admissions this was a UM claim, and Plaintiff's admission she knew the time ran in 2011).

case open possibly forever. By the court's reasoning, this matter has still not accrued because no one still knows who owns the vehicle. This cannot be the case and is in direct contradiction to the law in Colorado. See *Sulca, McDermott, Trigg* and *Olson, supra.* The court's determination thus leads to an impermissible, possibly indefinite tolling, or failure to accrue, of the statute of limitations until an insured knows with absolute certainty that the tortfeasor is uninsured, before the statute of limitations is triggered.

II. THE DISTRICT COURT ERRED IN ENCOURAGING AND ALLOWING JONES' RENEWED EXTRA-CONTRACTUAL CLAIMS WHICH HAD BEEN DISMISSED WITH PREJUDICE; AND IN ALLOWING THOSE CLAIMS TO BE BASED SOLELY UPON STATE FARM'S LITIGATION CONDUCT OF ITS DEFENSE BASED UPON THE STATUTE OF LIMITATIONS.

In its *Order on Summary Judgment*, [*Aplt. App*. Vol. II. at 267-271, Doc. No. 51], the court dismissed Jones' claims for unreasonable delay or denial of benefits and common law bad faith, finding State Farm had an "arguable defense," in its statute of limitations defense. See also *Jones v. State Farm Mut. Aut. Ins. Co*., 2014 U.S. Dist. LEXIS 159206, *7 (D.Colo. 2014). However, the court erred in ever encouraging and allowing Jones to amend her complaint to reassert these claims. A plaintiff's cause of action is barred by a stipulation to dismiss the same with prejudice. *Goff v. Boma Inv. Co,* 181 P.2d 459, 460 (Colo. 1957). See also, *Dailey v. Montview Acceptance Co.*, 514 P.2d 76, 78 (Colo. App. 1973) (The issue was disposed of when plaintiff placed it before the court and then stipulated to have it withdrawn, with prejudice.) In *Dailey*, the stipulated dismissal of the claim

was further disposed of by order of the court, and therefore "properly terminated." *Id*. Plaintiff's Complaint filed February 11, 2013, contained a Third Claim for Relief – Violation of C.R.S. § 10-3-1115(1)(A) & 1116(1) and allegations that could be construed as a common law bad faith claim. [*Aplt. App*. Vol. I. at 49-53]. On March 20, 2013, the parties stipulated to dismiss with prejudice those claims in the Third Claim for Relief. (emphasis in original) [*Aplt. App*. Vol. I. at 77-78, Doc. No. 8]. As stated by Jones therein: "Plaintiff's Third Claim for Relief – Violation of C.R.S. §10-3-1115(1)(A) and C.R.S. § 10-3-1116(1), was pled by Plaintiff against Defendant State Farm. Plaintiff and Defendant State Farm stipulate and agree to dismiss Plaintiff's Third Claim for Relief with prejudice." On March 21, 2013, the trial court dismissed those claims with prejudice. [*Aplt. App*. Vol. I. at 79, Doc. No. 9]. On April 2, 2013, the parties filed a *Stipulated Motion to Strike Allegations from Complaint* [*Aplt. App*. Vol. I. at 80-81, Doc. No. 11], wherein Jones specifically incorporated and added to her prior stipulation for dismissal with prejudice. Jones stated that she stipulated and agreed to strike her allegations of common law bad faith "as follows: 1. The Plaintiff and Defendant have previously stipulated to dismiss the Third Claim for Relief – Violation of C.R.S. §10-3-1115(1)(A) and C.R.S. § 10-3-1116(1) – with prejudice. Doc. 8, which dismissal was ordered by the Court on March 21, 2013, DOC". Jones then added: "2. The Plaintiff also included allegations in the Complaint against Defendant State Farm which could be construed as a bad faith breach of contract claim. Plaintiff intends to pursue only a breach of contract claim for uninsured

motorist benefits and stipulates and agrees to strike allegations in paragraph 26 of Plaintiff's Complaint."[16] The trial court granted the Motion the next day, April 3, 2013, additionally striking Jones' allegations of bad faith. [*Aplt. App*. Vol. I. at 79, Doc. No. 12]. Thereafter, at the Scheduling Conference held September 6, 2013, the court improperly and with patent bias, declared it was in the court's opinion improper for State Farm to dispute the statute of limitations for this claim because no one knew who owned the vehicle or might have insurance. [*Aplt. App*. Vol. I. at 116-124, Transcript of 09/06/13, Scheduling Conference, Doc. No. 23 at 3, ll. 9-17.] The court declared it would not sign the scheduling order because it ordered Jones to amend the complaint to bring a bad faith claim for State Farm's conduct in defending based on the statute of limitations. *Id.* Doc. No. 23 at 8, ll. 1-7. On September 27, 2013, Jones filed *Jones' Motion to Amend to Add Bad Faith Claims Pursuant to the Court's Order*. [*Aplt. App*. Vol. I. at 125-127, Doc. No. 27]. The Court granted the Motion the same day and accepted for filing the Amended Complaint. [*Aplt. App*. Vol. I. at 136, Doc. No. 28]. The Amended Complaint [*Aplt. App*. Vol. I. at128-135, Doc. No. 29] once again made claims under C.R.S. § 10-3-1115(1)(A) & 1116(1) and alleged Bad Faith Breach of Contract. Jones alleged in support of her amended extra-contractual allegations that on June 25, 2012, Mr. Rivera testified he did not own the vehicle and he had no insurance on the vehicle; State Farm participated in that action; Jones had to file this action for

[16] Paragraph 26 of Doc. No. 4 alleged: "At all times relevant to this action, Defendant owed to Plaintiff the implied duty of good faith and fair dealing in the insurance contract."

UM benefits because State Farm asserted the statute of limitations defense; State Farm had filed a motion for summary judgment asserting the statute of limitations, and having lost that motion, was still asserting the defense at the scheduling conference. *Id.,* Doc. No. 29 at 2-3.

First and foremost, the court committed error in allowing Jones to amend her complaint to reassert her extra-contractual claims that had been dismissed with prejudice. Jones' C.R.S. § 10-3-1115 and 1116 claims were clearly barred by the court's orders dismissing any such claim with prejudice. It should also be clear that Jones was adding to her stipulation to dismiss with prejudice any common law bad faith claim, as she specifically incorporated that stipulation with prejudice and added that her complaint might "also" be construed to state a bad faith breach of contract claim—and she stipulated to strike any such allegation and clearly stated her intent to pursue only a breach of contract claim. [*Aplt. App*. Vol. I. at 80-81, Doc. No. 11 at 1-2]. This court should find that Jones' extra-contractual claims are barred as a matter of law by her stipulation to dismiss them with prejudice and court order as to their dismissal.

Even if this Court finds it was not Jones' intent to also dismiss her common law bad faith claims with prejudice, Jones has no basis for such a claim as a matter of law. Jones could not prevail as a matter of law in alleging litigation conduct as a basis for her claim.[17] Jones' *Amended Complaint* bases her extra-contractual

[17] For an insured to prevail on a bad faith breach of contract claim against an insurer, the insured must establish the insurer acted unreasonably and with

claims on State Farm's actions of asserting the statute of limitations after the June 25, 2012 damages hearing in the underlying tort case, which she notes State Farm "participated in." [*Aplt. App*. Vol. I. at 128-135, Doc. No. 29 at 2]. First, as a matter of law it was not bad faith for State Farm to intervene to protect its interests in the state court proceeding. Very similar is the case of *Gargano v. Owners Ins. Co*., 2014 U.S. Dist. LEXIS 35296 (D. Colo. 2014) wherein the plaintiff in an uninsured motorist action brought a separate state court proceeding against the other driver to determine her damages, not naming her UM insurer. *Id.* at *1-2. The insurer intervened in the action to protect its interests, including participating in the damages hearing after default by the uninsured motorist. *Id* (the difference is the plaintiff in *Gargano* filed her UM suit within three years after the accident.) *Id.* The plaintiff in *Gargano* sought to introduce as part of her bad faith claim the litigation conduct of her insurer by intervening and protecting its interests in the state case. *Id*. at * 2-3. The court found such evidence was properly precluded

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knowledge or reckless disregard of its unreasonableness. *Dale v. Guar. Nat'l Ins. Co.*, 948 P.2d 545 (Colo. 1997). The determination of whether an insurer has breached its duties to an insured in bad faith is one of reasonableness under the circumstances. *Surdyka v. DeWitt*, 784 P.2d 819 (Colo. App. 1989). In other words, the question is whether a reasonable insurer under the circumstances would have denied or delayed payment of the claim. *Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567 (Colo. App. 2003)." *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 814-815 (Colo. App. 2006). Thus, to prevail on her bad faith claim, Plaintiff must not only prove State Farm acted unreasonably under the circumstances in asserting the statute of limitations defense, but also that it did so with knowledge or reckless disregard of its unreasonableness. Further, as will be shown, absent extraordinary facts in rare instances, such evidence of litigation conduct is an improper basis for Plaintiff's bad faith claim.

finding the insurer's conduct was proper as set forth in *State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 190 (Colo. 2004). *Id.* ("limited participation may be required to permit the insurance provider to present legitimate defenses that the uninsured motorist fails to raise. 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.")[18] Here as a matter of law, State Farm's intervention in Jones' state action against the alleged tortfeasors cannot be a basis for her bad faith claim.

Second, as a matter of law State Farm's continuing assertion of the statute of limitations defense after the damages hearing on June 25, 2012, cannot be a basis for Jones' extra-contractual claims. Only in extraordinary circumstances is litigation conduct, such as assertion of the statute of limitations defense, evidence of a bad faith claim. In *Gargano, supra*, the court found the insurer's conduct in protecting its interests was not an example of the type of "extraordinary facts that would justify allowing a jury to consider an attorney's litigation conduct as a part

[18] See also *Briggs v. American Family Mut. Ins. Co*., 833 P.2d 859, 863 (Colo. App. 1992) which held "under C.R.C.P. 24(a)(2) a party may intervene as a matter of right if it can show that the representation of his interest is or might be inadequate and the applicant is or might be bound by the judgment in [the] action." Also in *Brekke, supra*, the Colorado Supreme Court held an insurer should be allowed to participate in the damages portion of an uninsured motorist case in order "to present legitimate defenses that the uninsured motorist fails to raise." 105 P.3d at 190. Thus, an attorney's actions designed to achieve that result would not be evidence of bad faith because an insurer is entitled to protect its interests in circumstances like those arising in this case. If an insurer can protect itself, an attorney representing the insurer must be expected to engage in competent and ethical litigation conduct to achieve that end." *Parsons, supra*, at 819.

of a bad faith claim." *Id.* at *3, citing *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 819 (Colo. App. 2006). Accordingly the court dismissed the plaintiff's claims for bad faith and statutory violation with prejudice. *Id.* at *16. Here as well, State Farm's assertion of the statute of limitations defense is not the type of "extraordinary facts that would justify allowing a jury to consider an attorney's litigation conduct as a part of a bad faith claim." See *Gargano, supra*, at *3. Due to the assertion of this claim, State Farm's attorney was forced to withdraw representation. This is exactly why litigation conduct is not allowed as proof of bad faith as a general rule, affording "litigants the utmost freedom of access to the courts to preserve and defend their rights and to protect attorneys during the course of their representation of their clients." See *Parsons, supra,* at 817-818. Further as to the assertion of defenses: "There are means to regulate the conduct of attorneys during litigation besides introducing it as the basis of a bad faith claim. For example, the Rules of Civil Procedure govern the behavior of attorneys in litigation and provide an enforcement mechanism when their behavior strays beyond established boundaries. *E.g.*, C.R.C.P. 11(a) (attorney's signature provides good faith certification pleadings are grounded in fact and law and arguments are not designed to harass, delay, or increase cost of litigation)." *Id.* The Parsons' bad faith claim concerning attorney litigation conduct which did not rise to the test of "extraordinary facts" alleged Allstate's counsel "filed an answer denying all responsibility and consisting of groundless denials and defenses; refused to allow discovery to proceed until a case management order was entered;

declined to sign a case management order; asked the court to vacate the default judgment hearing; would not make himself available for this hearing; forced an unnecessary jury trial to be held; and refused to be deposed." *Id.* at 818. The court found "The nature of these allegations illustrates the problem with allowing attorney litigation conduct to be admitted as evidence of an insurer's bad faith. For example, insurers would be deterred from conducting a vigorous defense if their pleadings could be used as evidence of pre-existing bad faith." *Id*. at 818-819.[19] The attorney's conduct in this case of asserting the statute of limitations defense does not amount to the "extraordinary facts," found only in "rare instances," that would justify allowing a jury to consider an attorney's litigation conduct as part of a bad faith claim. See *Parsons, supra,* at 819.

This court should find that Jones' extra-contractual claims are barred by their dismissal with prejudice. In the event it is found Jones' common law bad faith claim was not dismissed with prejudice, Jones' claim fails as a matter of law as State Farm's intervention in the state proceeding and assertion of the statute of limitations defense cannot be a basis for her claim.

[19] In accord see *Etherton v. Owners Ins. Co.*, 2013 U.S. Dist. LEXIS 1993 at *14-15 (D. Colo. 2013); *Toy v. Am. Family Mut. Ins. Co*., 2014 U.S. Dist. LEXIS 17857 at *7 (D. Colo. 2014) (However, where a plaintiff seeks to introduce evidence of specific conduct that is related to and occurred during litigation, plaintiff must make a specific showing of "extraordinary facts."); *Rabin v. Fid. Nat'l Prop. & Cas. Ins. Co*., 863 F. Supp. 2d 1107, 1117-1118 (D. Colo. 2012) (excluding evidence of an insurer's attempt to assert counterclaims upon a finding that such evidence was "more benign and less probative of bad faith and a section 1116 violation").

III. THE DISTRICT COURT ERRED IN TAKING AWAY THE DEFENDANTS 7TH AMENDMENT RIGHT TO A CIVIL JURY TRIAL.

As held by *Morgantown v. Royal Ins. Co*., 337 U.S. 254, 258 (U.S. 1949):

> The Constitution guarantees to litigants in the federal courts the right to have their cases tried by juries, and Rule 38 of the Rules of Civil Procedure explicitly implements that guarantee. Denial of the right in a case where the demanding party is entitled to it is of course error. The rulings of the district courts granting or denying jury trials are subject to the most exacting scrutiny on appeal.

See also *Christenson v. Diversified Builders, Inc.,* 331 F.2d 992, 994 (10th Cir. 1964); *United States v. Geittmann*, 1984 U.S. App. LEXIS 23380, *10 (10th Cir. 1984) (Valid waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.) Directly on point is *EagleDirect Mktg. Solutions v. Engenus NA LLC*, 2008 U.S. Dist. LEXIS 119480 (D. Colo. 2008). In *EagleDirect* the defendant demanded a jury trial on all issues so triable. *Id.* at *1-2. Thereafter at the scheduling conference the magistrate judge approved the parties proposed scheduling order which was signed by counsel for defendant, which stated that "[t]he trial is to the Court" and that "[c]ounsel believe that trial will take five days." *Id.* at *2. The counsel for the defendant did not move to amend or object to the scheduling order. *Id.* The plaintiff argued the defendant had waived its right to a jury trial. *Id.* The district court denied the right had been waived as follows:

> Rule 38(d), Fed. R. Civ. P., provides that a proper jury demand "may be withdrawn only if the parties consent." Rule 39(a)(1), Fed. R. Civ. P. ,

> additionally provides as follows: When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record. Here, there is no stipulation on the record from the scheduling conference or any other court proceeding that Engenus waived its right to a jury trial on all issues so triable. Thus, in order to satisfy Rule 39(a)(1) , the provision in the scheduling order that trial in this case is to the court must constitute a stipulation to a non-jury trial. In analyzing the effect of the scheduling order's provision for a court trial on Engenus's right to a jury trial, I am mindful that "trial by jury is a vital and cherished right, integral in our judicial system" and that courts "indulge every reasonable presumption" against a waiver of this fundamental right. (internal citations omitted). Although Engenus approved the language in the scheduling order, it did not explicitly acknowledge that it was waiving its right to a jury trial. . . . In fact, counsel for Engenus has submitted a declaration stating that the inclusion of the provision for a court trial in the scheduling order was inadvertent; was not the product of any discussion at the scheduling conference regarding the nature of the trial; and does not reflect Engenus's intent to waive its right for a jury trial. Under these circumstances, it is questionable whether the requirements of Rules 38(d) and 39(a) for waiver of the parties' right to a jury trial have been satisfied. Given the importance of the right to a jury trial, any doubt as to a waiver of this right must be resolved in favor of Engenus.

Id. at *2-5.

Here, at the Scheduling Conference on November 25, 2013 the district court was advised of the oversight by defendant in the proposed Scheduling Order, and that State Farm did not waive its right to a jury trial. [Rec. Vol. 1. at 28, Doc. No. 36, Transcript at 5, ll. 19-25; 6, ll. 1-24.] When Defense counsel stated he had overlooked that Jones' counsel had changed the proceeding to a trial to the court, the court responded, "Well, that's too bad. It's a trial to the Court. You've waived a jury (inaudible)." *Id.* Based on the above, it is clear this was error and an abuse of discretion on the court's part that violated State Farm's fundamental constitutional right to a jury trial. State Farm demanded a trial to a jury in its

Answer and Jury Demand. [*Aplt. App*. Vol. I. at 69-76. Doc. No. 2]: "**DEFENDANT DEMANDS TRIAL TO A JURY OF TWELVE (12) ON ALL ISSUES**." (emphasis in the original).[20] Defendant having overlooked the change in the proposed scheduling order to a trial to the court is certainly not a stipulation to a non-jury trial as required by *EagleDirect, supra.* State Farm certainly did not knowingly, voluntarily and intentionally waive its constitutional right. Further, the court did not indulge every reasonable presumption against waiver and committed error in its determination.

STATE FARM'S RESPONSE TO OPENING BRIEF OF APPELLANT GLADYS JONES

I. Jones' extra-contractual claims were dismissed with prejudice and further are unfounded as a matter of law.

Jones claims on appeal that the court erred in dismissing her extra-contractual claims because she was not given "an opportunity to respond;" there was a factual dispute as to whether the claimed delay or denial of benefits was reasonable under the circumstances; and the court's finding State Farm had an "arguable defense," "does not establish a lack of factual dispute." *Opening Brief of Appellant Gladys Jones* ("*Opening Brief*"), dated 06/30/15, at 17-28. First, Jones attempts to gloss over the stipulated and court ordered dismissal of her extra-contractual claims, and fails to mention the dismissal was with prejudice. *Opening Brief* at 6. Second, the sole basis for any extra-contractual claims is the

[20] State Farm reiterated its demand for a jury trial in its Answer and Jury Demand to Plaintiff's Amended Complaint. [*Aplt. App*. Vol. II. at 1370145, Doc. No. 30.]

litigation conduct of State Farm and its counsels' asserting the statute of limitations defense after the June 25, 2012 damages hearing in her liability lawsuit which is improper as a matter of law. State Farm refers the Court to its *Principal Brief* that Jones' claims are barred in the first instance by their dismissal with prejudice; and as a matter of law improperly based on litigation conduct. With the caveat that Jones' claims are barred, and she cannot prevail on her allegations that State Farm asserting the statute of limitations defense was evidence of bad faith as a matter of law—State Farm will address Jones' further appeal arguments.

Jones argues State Farm intervening in the state proceeding and then continuing to assert the statute of limitations defense rather than paying her, constituted unreasonable delay or denial of benefits owed to her and was bad faith. [See *Aplt. App*. Vol. II. at 198-222, Doc. No. 44 at 22; *Opening Brief* at 6.] Jones first claims she had no notice that the court might grant summary judgment on her bad faith claims[21]—but she herself moved for summary judgment on her statutory and common bad faith breach of contract claims and asked for an order on those claims in *Plaintiff's Response to Defendant's Motion for Summary Judgment.* [*Aplt. App*. Vol. II. at 198-222, Doc. No. 44 at 1.] Jones argued the purported merits of her extra-contractual claims for eight pages of her response. See *id.,* Doc. No. 44 at 18-25.[22] Plaintiff's dissertation on Fed. R. Civ. P. 56 (f) is thus

[21] See *Opening Brief* at 18-22.

[22] State Farm did not respond further to Jones' motion for summary judgment on her extra-contractual claims, as it argued these claims had already been dismissed by the court. See Doc. No. 46. At the Pretrial Conference held April 25, 2014, the

woefully misplaced. She argues this was a judgment independent of a motion for summary judgment but she moved for summary judgment[23] Plaintiff's entire argument on pages 19-22 is baseless; she was the moving party.[24]

Next, Jones argues there was a factual dispute that would preclude summary judgment. See *Opening Brief* at 22-28.[25] In this regard, Jones continues to argue incorrectly that State Farm had a "heightened" duty to her in investigating and processing her UM claim. [See Aplt. App. Vol. II. at 198-222, Doc. No. 44 at 21-24 and *Opening Brief* at 22.] She also continues to incorrectly state she has a "lower burden" of proving her damages in the first-party UM claim context than

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court made findings that State Farm having done its own investigation and finding no insurance, and relying on Jones' various attorneys all saying within a short time after the accident that this was an uninsured motorist claim, was not in bad faith to assert the statute of limitations defense. [*Aplt. App*. Vol. II. at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45 at 9, ll. 4-11.] This was when the court found trial to the court was not necessary and ordered the parties to proceed by a motion for summary judgment on the statute of limitations issue. *Id., Doc. No. 45* at 9-10. The court reiterated, "I don't see the bad faith claim anyway." *Id.* at 11, ll. 8-9.

[23] . "Plaintiff . . . seeks an *Order* entering summary judgment in favor of Plaintiff and against Defendant on Plaintiff's claims pursuant to her Uninsured Motorist Coverage; Breach of Contract; Violation of C.R.S. § 10-3-1115(1)(A) and 1116(1); and Bad Faith Breach of Insurance Contract, pursuant to Fed. R. Civ. P. 56 . . ." [*Aplt. App*. Vol. II. at 198-222, Doc. No. 44 at 1.]

[24] Further, although the court disfavors *sua sponte* dismissals (which this was not), such a dismissal is not reversible error when it is patently obvious that the plaintiff could not prevail on the facts alleged. See *Knight v. Mooring Capital Fund, LLC,* 749 F.3d 1180, 1190 (10th Cir. 2014), citing *McKinney v. Okla. Dep't of Human Servs*., 925 F.2d 363, 365 (10th Cir. 1991).

[25] Jones arguments are under C.R.S. §§ 10-3-1115 and 1116, that she established a factual dispute as to whether State Farm met its obligations to act in good faith in investigating and processing her claim. *Id.* at 24. Jones attempts to reargue her dismissed claims and faults the court for not having made factual findings regarding the "timeline of denial of payment." *Id.*

"in other contexts." *Opening Brief* at 23 (citing third-party default judgment analysis). Her Amended Complaint also alleges as a basis for her bad faith claim that State Farm "owed to Jones an obligation to treat Jones' interests with equal consideration to their own interests." [*Aplt. App*. Vol. I. at 128-135, Doc. No. 29 at 5.] However, there is no "heightened duty" beyond good faith and fair dealing in the first-party context, as there is no "equal consideration rule" applicable to the first-party context. *See American Guaranty & Liability Ins. Co. v. King*, 97 P.3d 161, 169 (Colo. App. 2003); *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 501 (Colo. App. 2011). First-party actions are adversarial in nature. *Bailey v. Travelers Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992). In a first-party case, "the insurer has a right to protect its own interests along with those of the insured, and these interests run parallel to each over, neither being superior." *Id.* The Colorado Supreme Court has held that in the first-party context, the insurer and the insured are not in a fiduciary or quasi-fiduciary relationship. *Brodeur v. Am. Home Assurance*, 169 P.3d 139, 152 (Colo. 2007). This does not mean that the insurer can disregard the interests of the insured. However, the standard for judging a first-party insurer's conduct is not whether it gave plaintiff's interests equal consideration,[26] but whether it had a reasonable basis for the position it took (for a statutory claim), and whether it believed there was a reasonable basis for its position (*i.e.*, the standard of good faith and fair dealing in a common law bad faith claim). Jones misstates the law with regard to State Farm having an even

[26] See *Aplt. App*. Vol. I. at 128-135, Doc. No. 29 at 5.

further "heightened" relationship with its insured in the first-party context. As found by the Colorado Supreme Court in *Goodson v. American Standard Insurance Co*., 89 P.3d 409 (Colo. 2004):

> In a first-party context, where the insured has not ceded to the insurer the right to represent his or her interests, there is no quasi-fiduciary duty. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985). Therefore, the standard of conduct is different. In addition to proving that the insurer acted unreasonably under the circumstances, a first-party claimant must prove that the insurer either knowingly or recklessly disregarded the validity of the insured's claim. *Id*. at 1275. This standard of care "reflects a reasonable balance between the right of an insurance carrier to reject a non-compensable claim submitted by its insured and the obligation of such carrier to investigate and ultimately approve a valid claim." *Id.*

Goodson, 89 P.3d at 414-415. Thus, Jones' contention that State Farm owes her a heightened duty, and to treat her interest with equal consideration to its own, has no legal basis, and is indeed contrary to Colorado law.

Further as set forth in State Farm's *Principal Brief* above, as a matter of law Plaintiff has no basis to bring her extra-contractual claims based on State Farm's assertion of the statute of limitations defense. Plaintiff's supposed assertion of "facts" that would preclude summary judgment do not change this fact that litigation conduct is an improper basis for her bad faith claims absent extra-ordinary facts in rare instances. Further Jones' asserted facts do not create a disputed question of material fact that would preclude summary judgment. She alleges she put State Farm on notice within a month of the accident that this was an uninsured driver with an unidentified owner of the vehicle (this is simply Jones

admitting under the facts and circumstances a reasonable person would have known there was no insurance). *Opening Brief* at 24. She was able to ultimately serve several parties in her liability lawsuit (this fact adds nothing but that she could have with due diligence found out the facts and circumstances shortly after the accident). *Id*. at 25. She maintains State Farm "switched tactics" in arguing this was a UM action and was guilty of "essentially" requiring her to keep investigating adverse parties. (this assertion is simply false-Jones has conceded State Farm from its early investigation could not find any insurance. State Farm never contested this was an uninsured motorist claim or action.)[27] *Id*. at 26. She claims then State Farm persisted in its defense of the statute of limitations. *Id*. Plaintiff cannot prevail on her extra-contractual claims as a matter of law in any event. See *Knight, supra*.

Nor did the court err in dismissing Jones' reasserted extra-contractual claims based on the reasonableness of State Farm's statute of limitations defense—finding based on the briefing and numerous hearings it was "an arguable defense." See *Opening Brief* at 24, 28-29. As argued above, Jones' argument that she has a "lowered burden" of establishing State Farm acted in bad faith is baseless and contrary to Colorado law. See *Opening Brief* at 29. Again she argues that she was the "nonmoving party" when she moved for summary

[27] Jones admits: "Following its investigation, State Farm concluded that no applicable liability insurance existed." Plaintiff acknowledges State Farm (not Plaintiff) did an extensive investigation in the six months following that accident and was not able to find any insurance. [*Aplt. App*. Vol. II. at 198-222, Doc. No. 44 at 2, and 5-6 (Undisputed Facts ¶¶ 15-17].

judgment under F.R.C.P. 56 on her extra-contractual claims. See *id*. Plaintiff's final argument in this regard that the court erred by addressing the "merit" of her extra-contractual claims is equally baseless. See *id.* This Court should not reinstate Plaintiff's extra-contractual claims as they have been dismissed with prejudice and are unfounded in law and fact.

II. Jones' proffered expert testimony is inadmissible.

Jones also argues the district court erred in ruling her proffered expert's testimony was inadmissible. See *Opening Brief* at 29-33. Defendant agrees this Court reviews the court's decision for abuse of discretion and reviews whether proffered expert testimony is admissible *de novo*. *Id*. at 29-31. Jones disclosed as her retained expert witness Chad Hemmat, Esq. to testify Jones did not breach the statute of limitations; and her various counsels' letters all informing State Farm this was a UM claim did not "specifically reference whether a determination was made that this was a uninsured or underinsured matter." *Id*. at 8-9, citing to *Aplt. App*. at 160, Doc. No. 39. Jones also claims Mr. Hemmat provided opinions in his deposition regarding "the propriety of actions by both Jones and State Farm," and was endorsed to testify consistent with his deposition testimony. *Opening Brief.* at 9 and 33. Specifically Mr. Hemmat was offered to testify on the reasonableness of State Farm's actions. *Id*. at 33. Jones states at the April 25, 2014 pretrial conference the court ruled Mr. Hemmat's testimony was inadmissible and the court would not allow him to testify regarding the matters identified in the disclosure. *Id*. at 9-10. Jones claims the court abused its discretion because Mr.

Hemmat's testimony was relevant and reliable, and the court did not make its decision on the record showing it conducted a proper analysis when it struck Mr. Hemmat's proffered testimony. *Id*. at 32. At the April 25, 2014 pretrial conference Mr. Hemmat's testimony was discussed and the court stated it was not going to allow him to testify. Defense counsel stated they were thinking about a motion in *limine* as the testimony was inadmissible. The court agreed the testimony was inadmissible. Jones' counsel did not comment. [*Aplt. App*. Vol. II. at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45 at 4-5.] In *Etherton v. Owners Ins. Co*., 2013 U.S. Dist. LEXIS 1993 (D. Colo. 2013), the plaintiff offered an attorney expert to testify on whether the insurer unreasonably delayed granting consent to settle with the other driver; whether the insurer was obligated to advance payment of its settlement offer; and whether the actions were bad faith. *Id*. at *6-10. These opinions were found to be inadmissible. *Id*. at *10. Whether State Farm's conduct meets the standard for common law bad faith or a statutory violation of C.R.S. §§ 10-3-1115 and 1116, and what constitutes common law bad faith or a violation of C.R.S. §§ 10-3-1115 and 1116, are to be determined by the jury and the court. As noted in the Advisory Committee's Note to Fed. R. Evid. 704: "The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact.' 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 704 (1990). Nevertheless, the rules on expert opinion are not intended to permit experts to 'tell the jury what result to reach." Expert opinion of this type is often excluded on grounds that it states a legal

conclusion, and/or interferes with the function of the judge in instructing the jury on the law. *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993). Such testimony amounts to no more than an expression of the witness' general belief as to how the case should be decided. MCCORMICK ON EVIDENCE, § 12 at 26-27. In *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988) (*en banc*), *cert denied*, 488 U.S. 1008 (1989), the Tenth Circuit considered whether F.R.E. 702 permits an attorney, called as an expert witness at trial, to state his views of the law which governs the verdict and opine whether a defendant's conduct violated that law. The Court concluded that it does not. Recognizing that under F.R.E. 702 its "judgment must … be guided by consideration of whether the testimony of the attorney expert aided the jury in its determination of critical issues in this case," the Court noted that "[w]e must also consider, however, whether the expert encroached upon the trial court's authority to instruct the jury on the applicable law, for it is axiomatic that the judge is the sole arbiter of the law and its applicability." *Specht*, 853 F.2d at 807. The *Specht* Court held that "testimony which articulates and applies the relevant law, however, circumvents the jury's decision-making function by telling it how to decide the case." *Specht*, 853 F.2d at 808. Here, Mr. Hemmat's opinions do nothing more than tell the trier of fact what conclusion to reach – that the legal standards regarding Jones' extra-contractual claims have been satisfied and Jones did not miss the statute of limitations. These opinions should be precluded from trial because it usurps the function of the jury in deciding the facts of the case and

is not helpful to the trier of fact in understanding those facts to make such a determination. *See* FED. R. EVID. 702.

III. Colorado law only obligates State Farm to pay post-judgment interest on any judgment entered against State Farm, and only to pay post-judgment interest on the judgment against the tortfeasors up to the policy limits of coverage.

Jones confuses the judgment against the tortfeasors with the judgment against State Farm. Jones claims the court erred in not awarding her pre-judgment interest from the date of her "judgment" against the underlying tortfeasors which was entered August 17, 2012 in her liability lawsuit. She thus argues it was error for the court in her UM action to calculate the award of interest from the date of the court's Final Order against State Farm entered December 12, 2014. See *Opening Brief* at 33-36. This issue was briefed to the court as set forth in [*Aplt. App*. Vol. II. at 275-278, Doc. No. 53] (Jones' position) and [*Aplt. App*. Vol. II. at 272-274, Doc. No. 56] (State Farm's response position). First, under Colorado law an insurer is not obligated to pay pre-judgment interest on the judgment in the underlying liability suit that exceeds the UM policy limits. Jones acknowledged this fact in her position.[28] Jones claims she is entitled to recover prejudgment interest from the time it was determined UM benefits were due to her under *USAA*

[28] Plaintiff conceded in her position: "Colo. Rev. Statute, Section 13-21-101 does not obligate an insurer to pay prejudgment interest on the judgment where it would increase the liability of the insurer to an amount over that for which it had contracted. *Houser v. Eckhardt*, 35 Colo. App. 155, 532 P.2d 54 (1974), aff'd sub nom., *Security Ins. Co. v. Houser*, 191 Colo. 189, 552 P.2d 308 (1976); *Allstate Ins. Co. v. Starke*, 797 P.2d 14 (Colo. 1990); *Old Republic Ins. Co. v. Ross*, 180 P.3d 427 (Colo. 2008)." See Doc. 53 at 2.

v. Parker, 200 P.3d 350, 359-360 (Colo. 2009). See *Opening Brief* at 34. The fallacy in her argument is that she claims it was determined State Farm owed her UM benefits at the time of her judgment against the underlying tortfeasors. *Id*. at 36. In doing so, Jones confuses the judgment against the tortfeasors as a judgment entered against State Farm—it was not. Colorado law only obligates State Farm to pay post-judgment interest on any judgment entered against State Farm, and only to pay post-judgment interest on the judgment against the tortfeasors up to the policy limits of coverage. See *Parker, supra* and fn. 25 herein. State Farm took the justifiable position it did not owe any coverage, as this court found in its Order of November 10, 2014 when it dismissed the claims for bad faith and unreasonable delay. See Doc. No. 51. Thus, until judgment was entered against State Farm on December 12, 2014, it did not owe any amount in excess of its policy limits. Only after judgment was entered against it would post-judgment interest accrue until paid—as correctly found by the court. The court was correct (as far as its award *if* there was coverage) in awarding the $100,000 UM policy limits plus post-judgment interest from December 12, 2014 forward.

STANDARD OF REVIEW

The district court's interpretation of Colorado law, which governs this diversity action as to the UM statute of limitations, and Jones' renewed extra-contractual claims is reviewed *de novo*. See *Mincin v. Vail Holdings, Inc.,* 308 F.3d 1105, 1108-09 (10th Cir. 2002); *Sherouse v. Ratchner*, 573 F.3d 1055, 1061 (10th Cir. 2009) (An appellate court reviews *de novo* the denial of a motion

for judgment as a matter of law). As to the court's denial of State Farm's right to a jury trial: "Denial of the right in a case where the demanding party is entitled to it is of course error. The rulings of the district courts granting or denying jury trials are subject to the most exacting scrutiny on appeal." *Morgantown v. Royal Ins. Co*., 337 U.S. 254, 258 (U.S. 1949).

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Counsel thinks oral argument will be helpful to the Court. Appellee/Cross-Appellant State Farm requests oral argument.

CONCLUSION

State Farm asks this Court to reverse the trial court's ruling that it must be known with an absolute certainty that there is no liability insurance before the UM statute of limitation begins to accrue; and find that Jones did not preserve the statute of limitations by bringing suit against the alleged tortfeasors when she knew or should have known there was no applicable insurance long before she brought suit. State Farm asks this Court to find based on the facts and circumstances Jones knew or should have known there was no insurance shortly, if not immediately, after the accident, and even under the most lenient standard, Jones three year statute of limitation for her UM action ran out in early 2012. State Farm asks the Court to remand with directions to enter judgment in favor of State Farm and against Jones on the statute of limitations issue. State Farm also asks the Court to remand with directions to enter judgment that Plaintiff's extra-contractual claims are barred as dismissed with prejudice, and/or further Jones had

no basis for her amended extra-contractual claims based on State Farm's defense of the statute of limitations. State Farm asks the Court to rule that the trial court impermissibly took away State Farm's right to a jury trial and if this case is remanded, reinstitute that right. State Farm asks this Court to deny Plaintiff's grounds for appeal for the reasons argued above, and find the court did not err in dismissing her extra-contractual claims; striking her expert's proffered testimony; and awarding her policy limits plus interest running from the time of the final judgment against State Farm in this matter on December 12, 2014.

Respectfully submitted,

FRANK PATTERSON & ASSOCIATES, P.C.

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Certificate of Compliance

As required by Fed. R. App. P. 28.1, I certify that this principal and response brief is proportionally spaced and that this brief complies with the word count/page limitations set forth in Fed. R. App. P. 28.1(e)(2)(B)(i) because it does not contain more than 16,500 words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

By: /S/ Jessica L. McCamy
Jessica L. McCamy

Paralegal Frank Patterson &
Associates, P.C.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Principal and Response Brief as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the AVG AntiVirus Business Edition version 3532, Virus Definition File Dated: August 10, 2015 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /S/ Jessica L. McCamy
Jessica L. McCamy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF was furnished through (ECF) electronic service to the following this the 10th day of August, 2015:

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United States District Court for the
District of Colorado
Magistrate Judge Boyd N. Boland
Case No: 11-cv-01948-BNB-CBS

/S/ Jessica L. McCamy
Jessica L. McCamy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 13-cv-00577-RPM

GLADYS JONES,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

ORDER GRANTING MOTION TO AMEND COMPLAINT

Upon review of plaintiff's motion to amend [27] and pursuant to the hearing held September 6, 2013, it is

ORDERED that the motion to amend is granted and the amended complaint attached thereto is accepted for filing.

Dated: September 27th, 2013

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Date: November 25, 2013
Courtroom Deputy: J. Chris Smith
FTR Technician: Kathy Terasaki

Civil Action No. 13-cv-0577-RPM

GLADYS JONES, — Laurence M. Schneider

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, — Franklin D. Patterson

Defendant.

COURTROOM MINUTES

Further Scheduling Conference

2:50 p.m. Court in session.

Mr. Patterson states defendant's reasons for the continual denial of plaintiff's insurance claim.

Discussion regarding case facts.

Right to jury trial waived by counsel as agreed in scheduling order.

ORDERED: Trial to court set May 27, 2014.
Pretrial conference set April 25, 2014 at 2:00 p.m.

Court advises counsel that any discovery issues with respect to attorney privilege will be resolved pursuant to Rule 37.

Scheduling Order signed.

3:00 p.m. Court in recess.

Hearing concluded. Total time: 10 min.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 13cv-00577-RPM

GLADYS JONES,

Plaintiff,

v.

STATE FARM MUTUAL INSURANCE COMPANY,

Defendant.

ORDER ON SUMMARY JUDGMENT

The question presented by the defendant's motion for summary judgment (doc. 43) is whether the plaintiff's claim for payment of benefits pursuant to the uninsured motorist coverage of her insurance policy issued by State Farm Mutual Automobile Insurance Company (State Farm) is barred by C.R.S. § 13-80-107.5(1)(a) reading as follows:

> (1) Except as described in section 16-5-401(1)(a.5), C.R.S., but notwithstanding any other statutory provision to the contrary, all actions or arbitrations under sections 10-4-609 and 10-4-610, C.R.S., pertaining to insurance protection against uninsured or underinsured motorists shall be commenced within the following time limitations and not thereafter:
>
> (a) An action or arbitration of an "uninsured motorist" insurance claim, as defined in sections 10-4-609 and 10-4-610, C.R.S., shall be commenced or demanded by arbitration demand within three years after the cause of action accrues; except that, if the underlying bodily injury liability claim against the uninsured motorist is preserved by commencing an action against the uninsured motorist within the time limit specified in sections 13-80-101(1)(n) and 13-80-102(1)(d), then an action or arbitration of an uninsured motorist claim shall be timely if such action is commenced or such arbitration is demanded within two years after the insured knows

that the particular tortfeasor is not covered by any applicable insurance. In no event shall the insured have less than three years after the cause of action accrues within which to commence such action or demand arbitration.

There are no factual disputes relevant to this question.

Gladys Jones was injured when she was struck by an automobile driven by Karen Barrios, age 13, on July 7, 2008. There is no question of liability of the driver and presumably the owner of the automobile. The vehicle was impounded by the police and the owner of it has never been identified.

By a letter dated August 1, 2008, Darrell Elliott notified State Farm that he was representing Ms. Jones in connection with uninsured motorist benefits and State Farm opened a claims file and began an investigation to determine whether there was any available liability insurance. Despite diligent efforts the insurer could not identify an owner of the vehicle or the parents of Karen Barrios.

On June 24, 2009, Jerome Malman wrote to State Farm that he had been retained by Ms. Jones "for injuries and damages sustained in an uninsured motorist collision on July 7, 2008." (doc. 43-12). Malman terminated his representation of Ms. Jones shortly thereafter. The plaintiff's present counsel, Amy Gaiennie, sent a letter to State Farm on March 26, 2010, asking that an uninsured motorist claim be set up for the July 7, 2008 accident. (doc. 43-14).

Meredith Quinlan, an attorney in Ms. Gaiennie's law office filed a complaint in the District Court, Adams County, Colorado, on July 6, 2011, naming Karen Barrios, a minor, John and Jane Doe, parent or guardian of Karen Barrios, Gilberto Garcia and Luis A. Rivera as defendants, claiming for injuries and damages caused by the July 7, 2008 incident. In that complaint, counsel alleged that Garcia and Rivera owned the automobile.

The returns of service filed in that case show service on Rosalina Garcia at 2630 Belmont Avenue, Lincoln, Nebraska, as mother of Karen Barrios and of Jane Doe and John Doe on August 12, 2011, and on Luis A. Rivera at 15503 E. Evans Ave., Aurora, Colorado on August 11, 2011 (docs. 50-1; 50-2; 50-3, 50-4). There was no service on Gilberto Garcia. He was dismissed.

None of the defendants appeared in that action. State Farm filed a Motion to Intervene in the state action on December 20, 2011, to limit the damages claimed by the plaintiff to protect itself in the event it would be required to pay uninsured motorist benefits to Ms. Jones.

The motion included the following paragraph:

> 4. Although State Farm denies that Plaintiff can maintain a claim for UM insurance benefits because she failed to assert a claim within the applicable statute of limitations, Intervenor has a right to protect its interest in the event that it is later determined that it must provide UM benefits to Plaintiff. Thus, by seeking to intervene, State Farm is not waiving any defense that it may have to a claim by Plaintiff for UM benefits.
>
> (Doc. 49-1).

Counsel for State Farm had previously notified Ms. Quinlivan that it appeared that the claim would be barred by the statute of limitations. The motion to intervene was not opposed.

At a default judgment damages hearing Luis Rovira appeared and said that he did not own the vehicle. After hearing the evidence and considering State Farm's arguments relating to Ms. Jones' injuries from prior accidents, the court made detailed findings of fact and awarded a judgment of $74,651.78 against Karen Barrios, a minor, John and Jane Doe, parents or guardians of minor Karen Barrios, and Luis Rivera.[1]

---

[1]It is not clear why Luis Rivera was included in the order for judgment after his denial of ownership of the vehicle.

State Farm asserts that this suit must be dismissed because the plaintiff knew that the driver was not insured, there was no proof of insurance in the automobile and the plaintiff's prior lawyers did not make an investigation to discover whether there was any liability insurance coverage of the tortfeasor. The plaintiff's knowledge of the lack of insurance is reflected in the letters from her lawyers and therefore the three years in the first clause of the statute bars the claim, State Farm argues, relying on the provision in C.R.S. § 13-80-107.5(3), providing that the uninsured motorist cause of action accrues when the claimant "should have known by the exercise of reasonable diligence" that she has the claim.

The circumstances of this case are unique. To this day, the parties do not know who owned the automobile and whether there was any insurance. State Farm made a diligent effort to find the facts of ownership and the parents of the driver. If those efforts had been made by Elliott or Malman, the result would have been the same.

Ms. Jones named Luis Rivera in the liability action because Karen told the police that she borrowed the car from him according to the police report. (doc. 14-3).

The plaintiff contends that Rivera's denial of ownership at the default damages hearing on June 25, 2012, should be the time that triggers the accrual of her claim against State Farm. Having filed the tort action within 3 years of the accident the plaintiff had two years from June 25, 2012 to file this civil action. She filed in the Denver District Court on February 11, 2013.

This issue could have been avoided if the plaintiff had named State Farm as a defendant in the tort action. It would be unjust to now grant summary judgment of dismissal when it cannot be said with certainty that there was no liability insurance.

The defendant has made an arguable defense to the plaintiff's claim. Accordingly, the claims for bad faith and unreasonable delay are dismissed.

Upon the foregoing, it is

ORDERED, that the defendant's motion for summary judgment is denied. It is

FURTHER ORDERED that the Third and Fourth Claims for Relief in the Amended Complaint are dismissed. It is

FURTHER ORDERED, that the parties shall attempt to stipulate to the amount of a judgment to be entered for the plaintiff by December 1, 2014.

Dated: November 10, 2014

BY THE COURT:

s/Richard P. Matsch

____

Richard P. Matsch, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 13-cv-00577-RPM

GLADYS JONES,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

FINAL JUDGMENT

Pursuant to the Order for Entry of Final Judgment entered by Senior Judge Richard P. Matsch on December 12, 2014, it is

ORDERED AND ADJUDGED that final judgment isl entered for the plaintiff Gladys Jones and against the defendant State Farm Mutual Automobile Insurance Company in the amount of $100,000.00, plus post-judgment interest at the rate of 0.15 percent per annum and costs upon the filing of a bill of costs within 14 days.

Dated: December 12, 2014

FOR THE COURT:

JEFFREY P. COLWELL, Clerk
s/M. V. Wentz
By________________________________
Deputy

ATTACHMENTS: Attachment Page

Jones v. State Farm Mut. Auto. Ins. Co., 13-cv-00577-RPM,
Order dated September 27, 2013, Doc. No. 28 …..……………………….. 1

Jones v. State Farm Mut. Auto. Ins. Co., 13-cv-00577-RPM,
Court Room Mintues dated November 25, 2013, Doc. No. 32 ………… 2

Jones v. State Farm Mut. Auto. Ins. Co., 13-cv-00577-RPM,
Order dated November 10, 2014, Doc. No. 51 …………………………. 3

Jones v. State Farm Mut. Auto. Ins. Co., 13-cv-00577-RPM,
Final Judgment dated December 12, 2014, Doc. No. 58 ……………….. 8