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 REPLY BRIEF

Respectfully submitted,

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Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED
October 15, 2015

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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 its Reply Brief states:

REPLY

I. The district court erred in determining the insured must know with absolute certainty 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.

A. An order on a motion for summary judgment is reviewable when a final judgment has been rendered in the case. Jones' arguments would only apply to an interlocutory appeal.

Jones first argues that State Farm has not presented an appealable issue for review by this Court. *Response/Reply Brief of Appellant Gladys Jones,* dated 09/28/15 ("*Aplt. Response Brief*") at 1-3.[1] This is not an interlocutory appeal of the *Order on Summary Judgment*, dated 11/10/14, *Aplt. App.* Vol. II. at 267-271, Doc. No. 51.[2] This appellate court's jurisdiction derives from 28 U.S.C. § 1291. The district court issued a *Final Judgment* on December 12, 2014, [*Aplt. App*. Vol. II. at 283, Doc. No. 58], deciding the amount of uninsured motorist ("UM") benefits State Farm owed Jones. This is the final order on appeal.[3] Although it is procedural law that an order denying a motion for summary judgment is not a final

[1] Jones' contention State Farm did not set forth standards of review is inaccurate. See *State Farm's Principal and Response Brief*, dated 08/10/15 ("*State Farm's Principal Brief*") at 50-51.

[2] Jones' cited case law involves interlocutory appeals of denials of summary judgment in the criminal context. See *Aplt. Response Brief* at 1-2.

[3] See *Defendant's Docketing Statement*, dated 01/22/15, at 2. State Farm agreed with Jones' jurisdictional statement in her *Opening Brief of Appellant Gladys* Jones, dated 06/30/15 at 1-2. ("*Opening Brief*"), and was not required to file one pursuant to Fed.R.App.P 28.1(c)(3). Jones' appeal is of course largely based on the same *Order on Summary Judgment*.

decision within meaning of 28 USCS § 1291, and therefore ordinarily not reviewable *on interlocutory appeal*, it is reviewable where a final judgment has been rendered in the case. See *Myers v. Oklahoma County Bd. of County Comm'rs*, 80 F.3d 421, 426 (10th Cir. 1996) (the district court's order granting summary judgment in favor of defendant will be reviewable on appeal from the district court's final judgment.); *Stewart v. United States*, 186 F.2d 627, 634 (7th Cir. 1951) *cert den* (1951) 341 U.S. 940, 95 L.Ed. 1367, 71 S.Ct. 1000 (Although order denying motion for summary judgment is not appealable, where appeal is from final judgment, any issue of law presented by record may properly be considered.); *New York v. Nuclear Reg. Com*., 550 F.2d 745, 759 (2nd Cir. 1977) (Order denying motion for summary judgment is reviewable when final judgment has been rendered in case). The district court's ruling on the issue of the statute of limitations was in favor of Jones and decided this case—all that was left was the amount of UM benefits owed, which was decided by the *Final Judgment* [*Aplt. App*. Vol. II. at 283, Doc. No. 58]. It is an appealable issue whether the district court erred in determining the insured must know, with an absolute certainty, there is no liability insurance to trigger the statute of limitations under C.R.S. § 13-80-107.5(1)(a). Jones' argument that the Court cannot review this issue as a mere denial of a summary judgment motion is without merit.[4]

[4] This argument also fails to recognize that in denying State Farm's motion the district court granted cross-summary judgment in Jones' favor finding she had complied with the statute of limitations. The district court concluded a trial to the court was unnecessary, and the only issue in the case, whether Jones' UM claim

B. The statute of limitations for a UM action begins to run when a plaintiff 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. 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).

1. The erroneous holding regarding the absolute certainty standard.

Jones argues in her Response that the trial court was correct in holding an insured must know with an absolute certainty that a vehicle is uninsured to trigger the statute of limitations under C.R.S. § 13-80-107.5(1)(a). *Aplt. Response Brief* at 3-5. She states "even to this day" the statute of limitations has not been triggered because "the parties do not know who owned the automobile and whether there was any insurance." *Id.* at 4. This demonstrates Jones' argument, and the district court's holding, is untenable. Jones' potential UM action against State Farm would be deferred or suspended indefinitely. Conversely, Jones to this day would not have any claim to uninsured motorist benefits against State Farm. This is exactly what the statute of limitations was enacted to prevent.[5]

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was barred by the applicable statute of limitations, would be decided on cross-motions for summary judgment. *Aplt. App*. Vol. II at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45 at 11.

[5] Jones also dismisses the clear purpose behind statutes of limitations and State Farm's arguments that public policies for such statutes are frustrated by this ruling. Plaintiff says such concerns are "wholly misplaced" in this case. *Aplt. Response Brief* at 8-9. However, the district court's finding that completely upends the purposes of the statutes of limitations and rewards a plaintiff's denial or self-induced ignorance. Here the court stated it did not want to "penalize" Jones with the statute of limitations. *Aplt. App*. Vol. II. at 240-264, Transcript of 10/23/14, Motions Hearing, at 11, ll. 14-16. The public policy behind a statute of limitations controls, whether the plaintiff is sympathetic or not and whether a

The Colorado courts have flatly rejected the argument an insured does not "know" there is no insurance until they have absolute proof. See, *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 900 (Colo. App. 2003). The court in *Sulca* also 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, or should have known through the exercise of due diligence, of the lack of applicable insurance prior to suing the other driver. *Id*. Contrary to Jones' contentions that *Sulca* is distinguishable, *Sulca* involved an uninsured driver and an unknown owner where the driver simply told the insured he did not have insurance and did not own the car—and left the scene. See *Sulca* at 898. Under these facts and circumstances the court concluded the insured "knew" (or should have known) on the date of the accident there was no liability insurance. Did he know with absolute certainty? No. Indeed, the *Sulca* facts are much more uncertain as to the existence of liability coverage than the facts here. Jones' arguments, and the district court's ruling that there is an absolute standard, are directly contrary to the holdings of the Colorado courts. Further, Jones claims *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099 (Colo. App. 2005) is "inapposite" and that the district court was correct in holding that "knowledge" under the UM action statute of limitations is an "absolute" standard. *Aplt.*

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claim has merit or not. This case is one where there is the potential for endless tolling, and is out of step with the purpose of limitations periods in general. See *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420, 182 L. Ed. 2d 446, 452 (U.S. 2012).

Response Brief at 13-14. She states in *Trigg* the plaintiff also "knew" the tortfeasor was uninsured, and there was no other possible tortfeasor. *Id*. at 14. However, here, as in *Trigg*, Jones' UM cause of action accrued as early as the date of the accident, and no later than January, 2009.[6] Jones' claim that this has to be absolute knowledge, as the district court also held, was addressed by *Sulca*. This would thwart the purpose of the statute of limitations by allowing a UM claim to survive into perpetuity. See *Sulca* at 900. In *Sulca* the insured argued Jones' exact argument that he did not have absolute proof that there was no applicable liability policy and thus he could not "know" whether the tortfeasor was uninsured. This argument was rejected. See *id. Olson v. State Farm Mut. Auto.*

[6] 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); there was no proof of insurance with the 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. Jones in her *Opening Brief* has cemented that she knew and put State Farm on notice within a month of this accident that the driver was a 13-year old and the owner of the vehicle was unidentified. *Opening Brief* at 24. The court even found Plaintiff never thought there was any insurance. At the earliest the statute would accrue on the date of the accident. 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 from the date of the accident, *and Plaintiff's admission she knew the time ran on her UM action in 2011*). See verified facts in *State Farm's Principal Brief* at 11-18.

Ins. Co., 174 P.3d 849, 854 (Colo. App. 2007) 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.

Plaintiff does not dispute State Farm's Statement of the Pertinent Facts. See *State Farm's Principal Brief* at 11 -18. For brevity State Farm respectfully refers the Court to these facts as if set forth fully herein. These verified facts dictate a ruling in favor of State Farm that as a matter of law Jones knew, or a reasonable person would have known, in the exercise of due diligence, that there was no applicable liability insurance that would cover the acts of the alleged tortfeasor, Ms. Barrios, and this knowledge would exist at numerous dates shortly after the accident, all of which bar the suit against State Farm filed February 11, 2013. [7] See *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 898 (Colo. App. 2003); *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099, 1101 (Colo. App. 2005); *Olson*

[7] Jones fails to address the fact it is highly improbable there would be liability *coverage* for Ms. Barrios' use of the vehicle if this mysterious owner with liability insurance was ever found. Such owner would have had to give Ms. Barrios permissive use of the car; negligently entrusted the car to her; or left the keys in it with it running as Jones' pled in her Complaint. [Rec. Vol. 2 at 143, Complaint, Doc. No. 43-15 at ¶¶ 7, 28-29 and 33-42.] Jones has admitted it was assumed the minor driver and her parents were uninsured [*Aplt. App.* Vol. II at 184-197, Transcript of 04/25/14, Pretrial Conference, Doc. No. 45 at 4, ll. 1-9]. Indeed, for the purpose of reinstating her extra-contractual claims, she has argued on appeal that 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 a month" of the accident. *Opening Brief* at 24. The district court acknowledged "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.]

v. State Farm Mut. Auto. Ins. Co., 174 P.3d 849 (Colo. App. 2007). The district court's ruling that this knowledge must be an absolute certainty is plain error.

2. The erroneous holding regarding due diligence.

The district court also erred by not requiring Jones to prove she had exercised due diligence—when as a matter of law she clearly had not exercised any due diligence until she attempted service for her liability suit in August 2011. The district court commented more than once that Jones and her attorneys had done *nothing* up until that time to investigate. See *e.g. Aplt. App*. Vol. II. at 240-264, Transcript of 10/23/14, Motions Hearing, at 14, ll. 18-25, 15, ll. 11-24. Jones does not deny this but argues she was not required to exercise due diligence under the two year exception. This Court should decide as a matter of law Jones and her attorneys failed to exercise due diligence as required in discovering the relevant circumstances of her claim. This Court should find that with the exercise of due diligence a reasonable person would have known there was no liability insurance to cover Ms. Barrios shortly after the accident, and as a matter of law well before three years of February 11, 2013. See *Sulca, Trigg, Olson, and Gargano v. Owners Ins. Co.*, 2014 U.S.Dist. LEXIS 35296 (D.Colo. 2014) at *7-12.

Notably Jones never touches upon whether she exercised due diligence. This is because she claims due diligence is "irrelevant" and "immaterial" as long as the insured sues the tortfeasors within three years of the accident. She states: "the question of whether Jones knew, or in the exercise of due diligence should

have known, that she had a UIM [sic] claim against State Farm three years before she sued State Farm in February 2013 is irrelevant." *Aplt. Response Brief* at 8. She tells the Court it does not matter if she knew or should have known that there was no liability insurance three years prior to suing State Farm, because the three year statute of limitations is "immaterial given the exception." *Id.* Jones' argument is unfounded.[8] She claims the relevant law is all "distinguishable" from her case, when it is in reality directly on point. *Id.* at 10-14. She concedes the court in *Sulca v. Allstate Ins. Co.*, 77 P.3d 897 (Colo. App. 2003) held the three year statute of limitations to bring an UM action against the UM insurer begins to run "when the insured knew or, in the exercise of reasonable diligence, should have known that there was no applicable insurance." *Id*. at 11, citing *Sulca* at 896. However, she tells the Court her case is different because in *Sulca* the insured "knew" there was no applicable insurance. *Aplt. Response Brief* at 11. Jones simply asks the Court to ignore the "or, in the exercise of reasonable diligence, should have known that there was no applicable insurance." See *Sulca* at 896. Here she claims there could still have been an owner found, and that the information on the police report was not sufficient to alert a reasonable person there was no insurance. *Id.* at 11-12. State Farm's position is that Jones had, or

[8] Jones had previously relied below on the case of *Rider v. State Farm Mutual Automobile Insurance Co.*, 205 P.3d 519 (Colo. App. 2009), which actually supported State Farm's position. In that case, the plaintiff sued the uninsured motorist carrier within the three year statute of limitations. *Rider*, 205 P.3d at 521. It was "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*.

should have had the requisite information, with the exercise of due diligence, to know there was no liability coverage (*via* the driver or some owner whose liability insurance would cover Ms. Barrios' acts), or Ms. Barrios would be presumed or deemed uninsured (as she was by State Farm) shortly after the accident or no later than January, 2009. See *Sulca v. Allstate Ins. Co*., 77 P.3d 897, 898 (Colo. App. 2003). The Court may decide this issue as a matter of law examining the district court's ruling *de novo*. Here, Jones and her attorneys waited 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 knowing State Farm accepted it as a UM claim, before attempting to locate the driver and her parents, and the possible owners.[9] 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. See *Opening Brief* at 15. However, her argument in her Response is even further attenuated, that due diligence is immaterial and irrelevant entirely, if an insured sues the tortfeasors within three

[9] 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. *Opening Brief* 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. Mr. Rivera lived in Aurora, Colorado at the address on the police report, and was served on August 11, 2011, and testified he did not own the car on June 25, 2012.

years of the accident, and regardless of what she knew or should have known. See *Aplt Response Brief* at 8.

As stated in *Olson, supra:* "The critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action . . ." 174 P.3d at 854 (Colo. App. 2007). 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, supra* 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*). As a matter of law the Colorado courts have rejected this absolute standard and the district court's decision must be reversed. Here, as in *Sulca* and *Trigg,* Jones cannot rely on the additional two years provided in the exception because she

knew or should have known with the exercise of due diligence that Ms. Barrios was uninsured at the time of the accident.

3. The statute of limitations time periods run concurrently, not consecutively as argued by Jones.

Jones argument that commencing suit against the other driver gives an insured another two years to sue the insurer, even if the insured knows of the lack of applicable insurance prior to suing the other driver, incorrectly assumes that the UM action statute of limitations time periods run consecutively. This argument also has been firmly rejected by the Colorado courts. See *Sulca*, *supra* at 900. The three year and two year time periods run concurrently. *Id.* 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. Jones claim that it does not matter if she knew or should have known through the exercise of due diligence that there was no applicable insurance under the two year exception is meritless.

4. Ms. Barrios would be deemed an uninsured motorist.

Jones challenges State Farm's assumption Ms. Barrios was uninsured because the vehicle *might* have been insured - but that is the point. It does not matter if this vehicle was insured if that insurance did not cover Ms. Barrios here. In any event, Jones also ignores that that the Colorado courts have determined that

an “underinsured 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 *State Farm Mut. Aut. Ins. Co. v. Nissen*, 835 P.2d 537, 539 (Colo. App. 1992), *aff’d*, 851 P.2d 165 (Colo. 1992); *Morgan v. Farmers Insurance Exchange*, 511 P.2d 902 (Colo. 1973); *White v. Farmers Insurance Exchange*, 946 P.2d 598 (Colo. App. 1997); *State Farm Mut. Aut. Ins. Co. v. Nissen, supra*; *Farmers Ins. Exchange v. McDermott*, 527 P.2d 918 (Colo. App. 1974). In *McDermott* the Colorado appellate court determined an "uninsured motor vehicle" included motor vehicles whose drivers cannot be identified. 527 P.2d at 920. That applies in the instant case. 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

concedes she knew the driver was a 13-year old, 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. *Opening Brief* at 24.

5. State Farm never contested Jones' right to make a U claim on the grounds there was some possible liability coverage precluding Jones' claim. State Farm contested the claimed amount of damages actually related to this accident.

Plaintiff also does not respond to the important fact State Farm did not dispute that Ms. Barrios was uninsured. Indeed, State Farm never argued there was some possible liability coverage which would preclude Jones' UM claim. Plaintiff has even conceded State Farm concluded at the end of January 2009 that "no applicable liability insurance existed." [Rec. Vols. 1 and 2 at 87-105, Doc. Nos. 43-7 through 43-10, Exhibits G-J; *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.] Plaintiff acknowledges State Farm (not Jones) did an extensive investigation in the six months following that accident and was not able to find any insurance coverage. See *id.*, Doc. No. 44, at 5-6 (Undisputed Facts ¶¶ 15-17). Jones has never alleged, nor could she, that State Farm required her to prove there was no insurance coverage.

In conclusion on this issue, the law in Colorado is that a point arises when a reasonable person through the exercise of due diligence should know there is no liability insurance. There is also clearly a point when the alleged tortfeasor is presumed or deemed uninsured. Those facts and circumstances include as here

where the owners of the vehicle are unknown. By the district court's reasoning, this UM claim has still not accrued because no one yet knows who owns the vehicle. The trial court's determination leaves a UM case open possibly forever—exactly as Jones argues on appeal that "to this day" her UM statute of limitations has not been triggered. This cannot be the case and is in direct contradiction to the law in Colorado. See *Sulca, McDermott, Trigg, Olson,* and *Gargano supra.* The court's determination thus leads to an impermissible, possibly indefinite tolling of the statute of limitations until an insured knows with absolute certainty that the tortfeasor is uninsured.

C. Jones' argument regarding equitable tolling is not responsive on appeal, has never been raised by Jones below or in her Opening Brief, and is frivolous and groundless and lacks a good faith basis.

Jones asserts a new argument in her Response, that the statute of limitations was equitably tolled by unspecified "wrongdoing" on the part of State Farm. *Aplt. Response Brief* at 14. This argument is not only non-responsive and has never been raised by Jones in the district court, but it is frivolous and should be stricken. Jones acknowledges that equitable tolling would require State Farm to have failed to disclose information it was legally required to reveal and to the prejudice of the other party. *Id.* at 14, citing *Garrett v. Arrowhead Improvement Ass'n,* 826 P.2d 850, 855 (Colo. 1992). She cites rulings regarding a party benefitting from "wrongdoing," and failures to comply with statutory duties, while having no basis for any such claim against State Farm. See *Aplt Response Brief* at 14-16. Under Colorado law, "an equitable tolling of a statute of limitations is limited to

situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). Colorado courts allow equitable tolling only rarely. See *Escobar v. Reid,* 668 F. Supp. 2d 1260, 1272 (D. Colo. 2009)(citing *Noel v. Hoover*, 12 P.3d 328, 330 (Colo. Ct. App. 2000), which noted "[t]he doctrine of equitable tolling is limited to situations in which either the defendant's wrongful conduct prevented the plaintiff from asserting the claims in a timely manner or truly exceptional circumstances prevented the plaintiff from filing the claim despite diligent efforts." Here Jones asserts the first situation in a factual vacuum, claiming with no evidence whatsoever that State Farm wrongfully impeded her ability to bring her UM action within the statute of limitations. This is wholly unsupported and directly contrary to the verified undisputed facts as incorporated herein from *State Farm's Principal Brief* at pages 11-18. A plaintiff bears the burden to show that a limitations period should be equitably tolled and Jones has wholly failed that burden as a matter of law as she has not alleged or offered any evidence that State Farm wrongfully withheld information or failed to comply with any legally required disclosure and that such wrongful conduct was to her detriment. Jones' claim in this regard is frivolous at best and lacks a good faith basis in fact and law.

II. It was an abuse of discretion for the district court to encourage and allow Jones' to re-allege extra-contractual claims which had been dismissed with prejudice. Reviewing the question of law involved *de novo,* it was also

error to allow such claims to be based solely upon State Farm's statute of limitations defense.

Jones admits she stipulated to dismiss her claim for unreasonable delay and denial of benefits under C.R.S. § 10-3-1115(1) and 10-3-1116(1) *with prejudice*. *Aplt. Response Brief* at 18. However, she argues because the district court later "endorsed" her proposed amendment at the scheduling conference, it suddenly washes away her stipulation and the district court's order dismissing her claim with prejudice. *Id*. However, as briefed in *State Farm's Principal Brief* at 30-31:

> 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*.

Here Jones concededly stipulated to have this claim withdrawn and dismissed with prejudice. The district court then "properly terminated" the claim. Under any review standard be it *de novo* on the questions of law, or abuse of discretion as to matters within the district court's discretion,[10] Jones as a matter of law simply cannot re-allege her claims which had been dismissed with prejudice, and it was an abuse of discretion for the district court to encourage her and allow her to do so.

Jones also claims because she was clearly "articulating" her common law bad faith claim for the first time in her motion to amend, it should be allowed.

[10] See *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 134 S. Ct. 1744, 1748, 2014 U.S. LEXIS 3106 (U.S., 2014).

Aplt Response Brief at 18 and 21.[11] After moving to dismiss her C.R.S. § 10-3-1115 and 1116 claims with prejudice, and having such claims dismissed with prejudice, Jones then stipulated to also include any allegations in her Complaint "which could be construed as a bad faith breach of contract claim." Jones emphasized that she intended to pursue only a breach of contract claim for uninsured motorist benefits and not pursue a bad faith breach of contract claim. The court additionally struck any bad faith allegations. See *Aplt. App*. Vol. I. at 77-78, Doc. No. 8; at 79, Doc. No. 9; at 80-81, Doc. No. 11; and at 79, Doc. No. 12. Jones assertion that she can now clearly articulate a common law bad faith claim, despite the previous stipulation to include any such allegations of bad faith along with dismissal of her C.R.S. § 10-3-1115 and 1116 claims with prejudice, is contrary to the law. See *Goff v. Boma Inv. Co*, 181 P.2d 459, 460 (Colo. 1957); *Dailey v. Montview Acceptance Co.*, 514 P.2d 76, 78 (Colo. App. 1973). Jones made clear her allegations that "could be construed" as a common law bad faith claim were also to be dismissed with prejudice.

Jones also argues even if her claims had been "arguably" dismissed with prejudice, that because State Farm did not file a response objecting to her proposed amendment, the prior dismissal of her claims with prejudice should be ignored. *Aplt. App.* Vol. I. at 18-19, and 22-23. First, Jones fails to mention she

[11] Jones admits to prove common law bad faith she would have to prove State Farm acted unreasonably under the circumstances, and (2) State Farm did so knowingly or with reckless disregard of the validity of Jones' UM claim. *Aplt. Response Brief* at 21-22, citing *Sanderson v. Am. Fam. Mut. Ins. Co.*, 251 P.3d 1213, 1217 (Colo. App. 2010).

filed her proposed amendment and it was granted the same day. State Farm was not even given an opportunity to respond. See *id.* at 125-127, Doc. No. 27 (dated 09/27/13) and Vol. I at 136, Doc. No. 28 (dated 09/27/13). Jones also has no support that a dismissal with prejudice can be waived in this manner (or waived at all). Jones also states State Farm should not be allowed to appeal the district court's allowing of her amendment because State Farm has not identified any undue prejudice it would suffer by Jones being allowed to reinstate dismissed extra-contractual claims (that allow exemplary damages) at the scheduling conference for trial. *Id.* at 23. The prejudice to State Farm is obvious and patently unjust. It would mean nothing if a party could simply resurrect their terminated claims by a simple leave to amend. Jones also argues State Farm's case law citations are "inapposite" as they involve claims that were dismissed with prejudice and found to bar later suit on those same claims. *Id.* at 24. She claims here she is trying to reinstate the dismissed with prejudice claims in "the *same case*" so this is distinguishable and allowed. *Id*. at 24-25 (emphasis by Jones). Jones tells the Court that State Farm "misses the mark" that dismissal of a claim with prejudice means the party cannot amend her complaint to reinstate the same claim in the same case.[12] This defies logic. Jones states her extra-contractual claims arise out of the same subject matter as set forth in her original complaint

[12] Jones argues "denial of a leave to amend and dismissal with prejudice are two separate concepts." *Id.* at 22. Jones' citation has nothing to do with this case. Jones was not denied a leave to amend and then later granted a leave to amend on these claims. The claims *were* dismissed with prejudice.

and would not raise any significant new factual issues. *Aplt. Response Brief* at 23. Thereby Jones concedes her claims should be precluded by her stipulation and court order to dismiss the claims with prejudice. The district court abused its discretion in allowing the amendment.

Further, Jones admits her proposed amendments are based on State Farm's litigation conduct (asserting the statute of limitations defense) which she alleges delayed payment to her—and claims this conduct was "different than what was originally alleged and which occurred after the first dismiss." *Id.* Jones claims her unreasonable delay or denial of benefits claim is not precluded because this is a new claim for litigation conduct that occurred after the dismissal with prejudice. *Id*. at 23-24. Jones concedes that it is the law in Colorado, as recognized by the 10th Circuit that "[i]n general an insurer's litigation tactics and strategy in defending a claim are not relevant to the insurer's decision to deny coverage . . . [o]nce litigation has commenced, the actions taken in its defense are not . . . probative of whether [an insurer] in bad faith denied the contractual lawsuit." *Aplt. Response Brief* at 20-21, citing *Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co*., 71 F.3d 335, 340 (10th Cir. 1995)(quotations omitted). However, here she argues, the district court allowed her to amend her complaint to bring a bad faith claim based on litigation conduct. However the district court's ruling is in direct contradiction of the law Jones just cited to this Court as prevailing. *Aplt. Response Brief* at 21. This just proves the point that the district court abused its discretion in granting leave to amend not only because the claims

had been dismissed with prejudice, but because they were baseless. Reviewing the relevant law *de novo*, this Court can determine that State Farm's litigation conduct of asserting the statute of limitations defense could not be a basis for Jones' extra-contractual claims as a matter of law. *Gargano v. Owners Ins. Co.*, 2014 U.S. Dist. LEXIS 35296 (D. Colo. 2014) is directly on point here. Only in extraordinary circumstances is litigation conduct, such as assertion of the statute of limitations defense, evidence of a bad faith claim. There must be "extraordinary facts that would justify allowing a jury to consider an attorney's litigation conduct as a part 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; *Parsons, supra,* at 819.[13] 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 assertion of the statute of limitations defense cannot be the basis for her claim.

[13] 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) *Rabin v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 863 F. Supp. 2d 1107, 1117-1118 (D. Colo. 2012).

III. If this matter is remanded State Farm's right to a jury trial should be reinstated.

Jones concedes that the district court erred in taking away State Farm's constitutional right to a civil jury trial (Jones states "the parties'" right). Jones argues however that the district court's unconstitutional denial was harmless error because the district court entered summary judgment in favor of State Farm on Jones' bad faith claims. *Aplt. Response Brief* at 25-26. She then claims if this Court reverses that decision and remands her bad faith claims, then the jury trial should be reinstated. *Id.* In any event, not agreeing this was harmless error, State Farm of course agrees that if this is case is remanded *on any issue* the jury trial demand should be reinstated.

Respectfully submitted,

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Certificate of Compliance

As required by Fed. R. App. P. 28.1, I certify that this reply brief is proportionally spaced and that the brief complies with the word count/page limitations set forth in Fed. R. App. P. 28.1(e)(2)(C) because it does not contain more than 7,000 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.

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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: October 15, 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
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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 15th day of October, 2015:

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

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