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| Court of Appeals, State of Colorado<br>Colorado State Judicial Building<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202<br><br>Appeal from District Court, County of Jefferson<br>Judge Lily W. Oeffler<br>Case No. 2008CV1754 | **EFILED Document**<br>**CO Court of Appeals**<br>**12CA0603**<br>**Filing Date: Nov 13 2012 06:44PM MST**<br>**Transaction ID: 47705553**<br><br>**▲COURT USE ONLY▲** |
| **Plaintiff-Appellant:** GEROL K. FIELDS<br><br>**Defendant-Appellee:** STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation | |
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**APPELLANT'S REPLY BRIEF**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 5,230 words.

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) where required by C.A.R. 28(k), a citation to the precise location in the record where the issue was raised and ruled on.

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## I. INTRODUCTION

Try as it might, State Farm cannot alter the critical facts that show the trial court erred in granting summary judgment on behalf of State Farm. State Farm failed to inform Plaintiff about the PIP benefits at issue in this case despite its statutory obligation to do so. State Farm's failure prevented Plaintiff from gaining the knowledge required for his claims to accrue in 1997. State Farm's violation of its statutory duty also tolls the statute of limitations. Equity tolls a statute of limitations if a party fails to make legally required disclosure that prejudices the other party. *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992). A party may not assert the statute of limitations if it fails to comply with its statutory duty, *id.* at 854, and here State Farm failed to honor its statutory obligations.

State Farm's eventual payment of the benefits it failed to reveal waived its statute of limitations defense. Waiver is shown by "the intentional relinquishment of a known right or privilege." *Venard v. Dept. of Corrections*, 72 P.3d 446, 450 (Colo. Ct. App. 2003). State Farm's acknowledgement and payment of these same additional PIP benefits, with interest, after it had expressly invoked the statute of limitations was a deliberate abandonment of an absolute defense to Plaintiff's claims.

The promise to pay and partial payment of these benefits make Plaintiff's claims timely because a new promise to pay a debt, an unqualified acknowledgement of a debt from which a promise may be implied, or part payment of a debt will restart the limitations period. *Drake v. Tyner*, 914 P.2d 519, 522 (Colo. Ct. App. 1996).

Lastly, Plaintiff preserved the argument that, if nothing else, he could recover for State Farm's bad-faith conduct beginning anew in 2007. The trial court erroneously resolved the contested factual questions relating to these issues in granting summary judgment, and none of State Farm's arguments raised in its answer make that ruling proper.

## II. ARGUMENT

### A. Reply to State Farm's assertions regarding the standard of review

State Farm agrees that review of an order granting summary judgment is *de novo*, (Answer Br. at 14,) but claims Colorado courts have not addressed the standard of review for tolling—asserting it should be abuse of discretion. (*Id*. at n.2.) This is untrue. Appellate review of summary judgment on issues involving tolling is still *de novo*. *Morrison v. Goff*, 74 P.3d 409, 410-11 (Colo. Ct. App. 2003).

State Farm also argues Plaintiff did not preserve an argument, but does not discuss the standard for preservation. To preserve an issue for appeal, courts

require that the party brought the issue to the district court's attention and the district court have the opportunity to rule on the issue. *Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1188 (Colo. Ct. App. 2011). The lower court need not actually rule on the issue. *Munoz v. Indus. Claim Appeals Office of Colo.*, 271 P.3d 547, 550 (Colo. Ct. App. 2011). Plaintiff sufficiently preserved all issues raised here.

### B. The trial court erred in concluding that Plaintiff's claims are untimely

State Farm contends that Plaintiff's claims accrued in 1997 when State Farm informed him that he had exhausted his PIP benefits, but this is incorrect. State Farm informed Plaintiff only about the benefits available to him under the Eiffert policy, the policy covering the vehicle that struck him. Those benefits are not at issue in this case; instead the issues here all relate to the additional PIP benefits provided by the policy State Farm issued to Plaintiff's parents.

State Farm does not dispute that it knew of the additional PIP benefits provided by the parents' policy, that it had a statutory duty to reveal them to Plaintiff, and did not do so. COLO. REV. STAT. § 10-4-706(4)(b). State Farm's conduct both prevented Plaintiff's claims from accruing by preventing Plaintiff from becoming aware of those benefits, and tolled the statute of limitations.

#### 1. Contested issues of fact preclude summary judgment on the date of accrual

Determining when a cause of action accrues depends on the plaintiff's knowledge of the facts essential to the cause of action. *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. Ct. App. 2007). In this case, Plaintiff's claims could not have accrued until the date he knew or should have known that State Farm failed to provide him with the additional PIP benefits available under the parents' policy. *Id.* A statute of limitations defense is an affirmative defense on which State Farm bears the burden of proof; it must establish sufficient facts to demonstrate accrual of the claims at issue. *Crosby v. Am. Family Mut. Ins. Co.*, 251 P.3d 1279, 1283 (Colo. Ct. App. 2010). Here, material issues of fact remain as to when Plaintiff first knew or should have known of the essential facts related to his claims under the parents' policy, and therefore the trial court erred in granting summary judgment on this issue. *Wagner*, 166 P.3d at 307.

State Farm opened a claim for Plaintiff under the parents' policy, (Answer Br. at 18,) knew of the PIP benefits Plaintiff should have received under that policy, (*Coverage Information sheet, CD p. 947*,) and still did not inform Plaintiff about the benefits. An insurer's knowledge of a claim for one type of coverage under a policy is notice as to all coverages under that policy. *Rose Med. Ctr. v. State Farm Mut. Auto. Ins. Co.*, 903 P.2d 15, 17 (Colo. Ct. App. 1994). Despite this, State Farm's correspondence to Plaintiff only ever mentioned the Eiffert policy benefits. (*Exhaustion letters to Fields, CD pp. 974, 977-979*.)

The evidence in this case does not demonstrate that Plaintiff knew or should have known of the additional PIP benefits provided by the parents' policy. State Farm provided no evidence that Plaintiff ever saw or received any policy documents, correspondence, or any other information describing the PIP coverage provided by the parents' policy, even though State Farm knew of that additional coverage. (*Coverage Information sheet, CD p. 947.*) Instead, Plaintiff testified his parents' policy and benefits "were never discussed by anybody as far as I knew," (*Deposition transcript of Gerol Fields at 107:16-20, CD p. 896,*) and that he did not know in 1997 that his parents purchased a policy providing additional PIP benefits. (*Id. at 127:2-12, CD p. 1229.*)

This distinction is critical. State Farm asserts that no later than July 18, 1997, Plaintiff knew that he would receive no further PIP benefits from State Farm, (Answer Br. at 17,) but State Farm's letters to Plaintiff refer only to the Eiffert policy, and State Farm never mentioned or informed Plaintiff about the existence of the additional PIP benefits provided by the parents' policy. Although an attorney submitted a claim for uninsured motorist benefits under the parents' policy on Plaintiff's behalf, there is no evidence that Plaintiff or the attorney ever knew of the additional PIP benefits provided by that policy.

As a result, the authorities State Farm cites—the same authorities relied on by the trial court—are inapposite. Even though no claim for reformation is at issue

with respect to the instant appeal, (Answer Br. at 4,) the cases cited by State Farm all relate to reformation claims based on an insurer's failure to make an offer of enhanced PIP benefits at the time the insured purchased the policy under which it later paid claims. *See Crosby*, 251 P.3d at 1279; *Jackson v. Am. Family Mut. Ins. Co.*, 258 P.3d 328 (Colo. Ct. App. 2011); *Murry v. GuideOne Specialty Ins. Co.*, 194 P.3d 489 (Colo. Ct. App. 2008). None of these cases discuss an undisclosed policy or coverage. State Farm's failure here was not in the offer of coverage, but in hiding coverage it had a duty to disclose.

State Farm cites *Murry, supra,* for the proposition an attorney's knowledge of the law can be imputed to the client, (Answer Br. at 16,) but the issue in this case does not relate to knowledge of the law. The determinative question is whether Plaintiff knew or should have known of the existence of the additional benefits provided by the parents' policy. State Farm has the burden of proving accrual of the claims, *Crosby,* 251 P.3d at 1283, but failed to show actual knowledge by Plaintiff of the existence of the additional PIP benefits in 1997, or that Plaintiff should have known of those benefits at any time, even though State Farm knew of them. Because of this, material disputed issues of fact remain regarding the date Plaintiff first had knowledge of the facts essential to the causes of action at issue in this case, and the trial court erred in granting summary judgment.

### 2. State Farm's failure to inform Plaintiff about the additional PIP benefits tolled the statute of limitations

Even if, *arguendo*, Plaintiff should have known of the facts giving rise to his claims in 1997, State Farm's failure to fulfill its statutory duty to tell Plaintiff of the additional coverage results in equitable tolling of the statute of limitations. Equity will toll a statute of limitations if a party fails to disclose information it is legally required to reveal and the other party is prejudiced. *Garrett*, 826 P.2d at 855.

State Farm hindered and prejudiced Plaintiff's ability to timely claim the PIP benefits provided by the parents' policy because it did not inform him about those benefits in derogation of its statutory duty. COLO. REV. STAT. § 10-4-706(4)(b). State Farm also actively misled Plaintiff by telling him that he had exhausted all available benefits, even though an additional $50,000 in benefits provided under the parents' policy remained available. Thus, State Farm also failed to comply with statute by misrepresenting pertinent facts or insurance policy provisions. COLO. REV. STAT. § 10-3-1104(1)(h)(III).

State Farm tries to minimize its statutory violations by suggesting that it only failed to provide Plaintiff with a "fact sheet," (Answer Br. at 19,) but this is incorrect. The law required State Farm to inform Plaintiff that he had a right to the benefits, as well as what he had to do to claim them. COLO. REV. STAT. § 10-4-

706(4)(b). State Farm failed to give Plaintiff a "fact sheet," but also failed to give Plaintiff that statutorily required information in any other way.

Either State Farm's failure to honor its statutory obligation or its misleading communications is enough to trigger equitable tolling. In the insurance context, an insurer's actions which hinder or prejudice the insured's ability to timely submit the claim equitably toll the statute of limitations. *Dupre v. Allstate Ins. Co*, 62 P.3d 1024, 1028-29 (Colo. Ct. App. 2002); *Civale v. State Farm Mut. Auto. Ins. Co.*, No. 02CA2331, slip op. at 7-8 (Colo. Ct. App. Feb. 19, 2004) (*CD pp. 965-66*). This is exactly what happened here.

Thus, Plaintiff presented evidence of both State Farm's omissions and its actively misleading conduct that hindered his ability to submit a timely claim. These statutory violations are sufficient to demonstrate the existence of factual issues preventing summary judgment. *Civale*, *CD pp. 965-66*; *Dupre*, 62 P.3d at 1028-29.

Even the authorities cited by State Farm require equitable tolling here. State Farm asserts that the ruling in *Garrett, supra,* is inapplicable because it does not deal with an insurer's statutory violation but rather the insurer's failure to provide the claimant with access to essential information needed to timely submit his claim. (Answer Br. at 21.) But this supports Plaintiff's position. Here, not only did State Farm fail to provide Plaintiff with access to essential information needed

to timely submit his claim, but did so in violation of its statutory duties. If the failure in *Garrett* results in equitable tolling, the same behavior that additionally violates the law has an even stronger case for equitable tolling.

*Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720 (Colo. 1976) illustrates the same principle. In *Strader*, the creditor's failure to reveal the true interest rate contributed to the running of the statute of limitations. Here, State Farm's failure to reveal the existence of the additional PIP benefits provided by the parents' policy contributed to the running of the statute of limitations. State Farm also attempts to distinguish *Civale*, but does so with meaningless distinctions. (Answer Br. at 22.) *Civale* is important because the statutory violation alleged in that case is the same one at issue here, and the court concluded that the issue should not have been determined by summary judgment. *Civale, supra, CD pp. 965-66*. Like *Civale*, the relevant issue here is whether the insurer's failure to provide the information required by law prejudiced the insured, not when that failure occurred. *Id.*

Finally, the trial court and State Farm both rely heavily on *Olson v. State Farm Mutual Automobile Insurance Co.*, 174 P.3d 849, 853 (Colo. Ct. App. 2007).[1] But *Olson* did not involve the insurer's violation of a statutory requirement to disclose coverage information. *Olson* involved only a claim for uninsured

[1] This case is alternatively referred to by State Farm and the trial court as "Olsen" and "Olson." *See, e.g.*, Ans. Br. at 15.

motorist ("UM") benefits, and unlike the No-Fault Act the UM statute does not require an insurer to provide the insured with specific information about the coverage available. *Olson*, 174 P.3d at 859. Moreover, there was no contention in *Olson* that the insurer misled the insured about the UM coverage available. *Id.* at 852. This case is different because State Farm violated a statute by not notifying Plaintiff of the existence of the additional PIP benefits under the parents' policy. COLO. REV. STAT. § 10-4-706(4)(b). It then violated another statute by misinforming Plaintiff about the coverage that he should receive. COLO. REV. STAT. § 10-3-1104(1)(h)(III).

The affirmative misrepresentations about the exhaustion of the available benefits exemplifies the sort of conduct insurers are forbidden to engage in; as the *Olson* court affirmed, insurers cannot make misrepresentations about facts or coverage. *Olson*, 174 P.3d at 857. Unlike the situation in this case, where State Farm informed Plaintiff that all benefits had been exhausted, State Farm did not address whether any further UM benefits were available in *Olson*. *Id*. at 859-60.

Both *Garrett* and *Strader, supra*, imposed equitable tolling based upon a failure to make a legally required disclosure of information needed to timely submit a claim, like the disclosure required by the No-Fault Act here. In such situations, the plaintiff must only demonstrate that the insurer's statutory violation hindered or prejudiced the plaintiff's ability to timely sue. *Garrett*, 826 P.2d at

855. Plaintiff provided such evidence, and the question of whether State Farm's actions hindered Plaintiff's ability to timely submit his claim raises disputed issues of fact that the trial court erroneously resolved on summary judgment. *Dupre*, 62 P.3d at 1029; *Civale, CD pp. 965-66*.

### C. State Farm waived its statute of limitations defense

State Farm argues that the trial court correctly ruled it did not waive the statute of limitations defense because "none of State Farm's correspondence indicated an intentional relinquishment of the defense." (Answer Br. at 13.) Determining State Farm's intent implicates issues of fact that a court should not resolve on summary judgment. *Gulf Ins. Co. v. State*, 607 P.2d 1016, 1019 (Colo. Ct. App. 1979). State Farm suggests that its intent can be divined as a matter of law because the contents of its correspondence and its actions are not in dispute. (Answer Br. at 28.) But State Farm's correspondence and conduct are demonstrably inconsistent and irreconcilable, and therefore the trial court erroneously resolved the question of State Farm's intentions regarding the statute of limitations as a matter of law.

State Farm explicitly invoked this defense before Plaintiff even filed this lawsuit. In a letter dated January 7, 2008, it stated "State Farm has concluded that Mr. Fields would be barred from receiving any additional PIP benefits …because his claims would be barred by the applicable statute of limitations and related case

law developed in this jurisdiction." (*Letter from State Farm's counsel to Fields' counsel, CD p. 956-57.*) Moreover, this letter refers to (and encloses) the parents' policy in affirming State Farm's position that "any claim for additional PIP benefits" under that policy "would be time-barred." (*Id.*)

However, State Farm's July 16, 2008, letter says the opposite. Rather than reject "any" claim for benefits under the parents' policy as "time-barred," State Farm instead agreed to make additional PIP benefits in the amount of "$50,000 available to pay for additional medical expenses incurred by Mr. Fields." (*Letter from State Farm's counsel to Fields' counsel, CD p. 899.*) It is difficult to imagine a more complete reversal of its previous position, and because State Farm contradicted its original invocation of the statute of limitations both by the July 2008 letter and its later payment of benefits to Plaintiff, these inconsistent positions and actions create inescapable factual issues regarding State Farm's intent that the trial court erroneously resolved on summary judgment. *Gulf Ins. Co.,* 607 P.2d at 1019.

State Farm contends its July 2008 letter cannot, as a matter of law, be a waiver of its defenses, (Answer Br. at 25,) but it provides no authority for this position and the "relevant assertions" it quotes from the letter equally contravene its previous position that "any claim for additional PIP benefits would be time-barred." Instead, State Farm's letter states those additional PIP benefits are "now

available," to Plaintiff, and that its standard practice would be to "pay the oldest medical bills first." (*Id*.)

Just as importantly, State Farm did more than just promise to provide the previously-denied benefits. It later paid some of those benefits and more than $9,000 in interest to Plaintiff, and indicated that it would consider additional accident-related expenses for payment. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 654*.) State Farm ultimately paid out more than $33,000 in additional PIP benefits. (*State Farm Spreadsheet, CD pp. 1010-1027*.)

A reasonable finder of fact could logically conclude that the July 2008 letter, followed by payment of previously-denied benefits with interest, was an intentional relinquishment of the known right to invoke the statute of limitations. *Venard*, 72 P.3d at 450. Even the lengthy explanation State Farm provides confirms that the positions stated in the January 2008 letter and the July 2008 letter are irreconcilable without characterizing State Farm intentions. (Answer Br. at 24-26.) State Farm also explains why its later payment of benefits and interest totaling over $40,000 either to or on behalf of Plaintiff remained consistent with its January 2008 position that "***any*** claim for additional PIP benefits would be time-barred." (Answer Br. at 25-26 (emphasis added).) State Farm's explanation of its inconsistent behavior is not an issue that can be decided as a matter of law; instead, a jury should determine whether State Farm's actions reflect intent to waive the

absolute statute of limitations defense it previously raised. *Gulf Ins. Co.*, 607 P.2d at 1019. The trial court erred in deciding this issue as a matter of law.

None of State Farm's arguments or authorities eliminates the need for factual findings, because they don't involve the sort of conduct found here. State Farm's reliance on *Cooper v. First Interstate Bank of Denver, N.A.*, 756 P.2d 1017 (Colo. Ct. App. 1988) is unavailing because the *Cooper* defendant did not act inconsistently. The defendant did not mention the statute of limitations defense in the sole letter at issue, and never acted inconsistently with the intention to enforce that defense. *Id. at* 1019.

In *Trigg v. State Farm Mutual Automobile Insurance Co.*,129 P.3d 1099 (Colo. Ct. App. 2005), because the letter at issue waived only a notice provision, and contained no mention of the statute of limitations at any point, the court found nothing in the letter a jury could possibly construe as a waiver of the statute of limitations. *Id.* at 1102. Here, in contrast, State Farm repeatedly invoked the statute of limitations defense in its January 2008 letter.

State Farm's citation to *Church Mutual Insurance Co. v. Klein*, 940 P.2d 1001 (Colo. Ct. App. 1996), is also inapposite. There the only communication from the insurer was a reservation of rights letter, and there was no suggestion of any subsequent conduct by the insurer that was inconsistent with this position. *Id.* at 1003.

Considering State Farm's inconsistent actions and communications, a reasonable fact finder could conclude that State Farm's words and actions evince intent to waive the statute of limitations defense. The trial court erred in determining this issue as a matter of law.

### D. State Farm's promise and partial payment make Plaintiff's claims timely

State Farm concedes a new promise to pay a debt or partial payment will restart the limitations period. *Drake*, 914 P.2d at 522; (Answer Br. at 28-31.) This is black-letter law. RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981).[2] State Farm argues instead that its acts do not fall within this rubric, not that it is the wrong test. (Answer Br. at 28-31.) This argument highlights the district court's error because whether State Farm's actions were the kind that would restart the limitations period rests on State Farm's intent, *Drake*, 914 P.2d at 522, which State Farm acknowledges. (Answer Br. at 30.) This was reversible error because a court should not determine intent on summary judgment. *In re Water Rights*, 854 P.2d 791, 796 (Colo. 1993) ("the issue of a party's intent is a question of fact and is not an appropriate issue for summary disposition.").

[2] State Farm makes a brief argument that section 82 of the Restatement (Second) of Contracts does not apply to insurance contracts. (Answer Br. at 29.) Courts regularly use that section in insurance cases. *See, e.g., Wells v. Hartford Acci. & Indem. Co.*, 459 S.W.2d 253 (Mo. 1970). Plaintiff's research could not find, nor does State Farm cite to a single ruling declining to apply section 82 to insurance contracts. Rather the rule uses expansive language applying to all contractual debts. *See Drake*, 914 P.2d at 522.

State Farm argues that the district court correctly determined its intent, claiming the district court "captured the purpose behind the July 2008 letter." (Answer Br. at 29.) That "State Farm made no such clear and unequivocal statement [of intent]." (*Id*. at 30.) And that its "communications and isolated payments of bills" were not an acknowledgement of a debt. (*Id*. at 31.) But that misses the point. All of these statements rest on a finding of intent, which a court should not resolve on summary judgment as the district court did here. *In re Water Rights*, 854 P.2d at 796.

From the facts in evidence, a reasonable fact finder could find the following, contrary to the findings of the district court: State Farm admittedly wrongfully denied Plaintiff $50,000 of the benefits it owes him, (Answer Br. at n.1;) and it actively misled Plaintiff about the benefits owed to him. (*Exhaustion letters to Fields, CD pp. 974, 977-79.*) This prevented Plaintiff from seeking his legal remedies. (Opening Br. at 15-22.) State Farm realized its mistake when it reviewed its file in 2008. (*Letter from State Farm's counsel to Fields' counsel, CD p. 899.*) State Farm knew the statute of limitations would prevent Plaintiff from bringing any claims. (*January 7, 2008 letter from State Farm's counsel to Fields' counsel, CD pp.956-57.*) Instead of asserting this defense, State Farm recognized its obligation to pay those benefits and promised to do so. (*Letter from State Farm's counsel to Fields' counsel, CD p. 899.*) When it promised to pay those

benefits, State Farm already had several medical bills that could be paid with the additional $50,000 in benefits. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906*.) This belies State Farm's current argument that its letter was only an acknowledgement of benefits, not a promise to actually pay its debt. (Answer Br. at 29.) Then, in further recognition of its obligation, State Farm paid a portion of the benefits it owed. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906.*) State Farm also recognized its obligation to pay the statutorily owed penalties for its late payment of benefits and issued a partial payment of its debt for the statutory penalties. (*Id*.) These facts evince State Farm's intent to fulfill its obligation to Plaintiff by paying the benefits and penalties it owes.

The other issue arising with State Farm's promise and partial payment is which claims are now timely. (Opening Br. at 21-28; Answer Br. at 31-33.) State Farm argues its actions only apply to claims under the policy, but not tort or statutory claims. (Answer Br. at 32.) But a court should not narrowly construe a promise to pay. *Jordan v. Bergsma*, 822 P.2d 319, 320 (Wash. Ct. App. 1992). Its terms govern the interpretation. *Id*. A jury should determine whether the promise and partial payments encompassed all of Plaintiff's claims, which is plausible since State Farm made the promise and payments after State Farm knew of all Plaintiff's claims.

At a minimum, the promise and partial payment make timely the claims under the policy and statute. State Farm stated it would pay in compliance with its policy, and then paid in compliance with the policy. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906*; *Fields policy at 10, CD p. 685.*) The No-Fault Act is a part of the policy. *Marquez v. Prudential Prop. & Cas. Ins. Co.*, 620 P.2d 29, 33 (Colo. 1980). And the No-Fault Act mandates payment of penalties for late paid benefits. COLO. REV. STAT. § 10-4-708. State Farm recognized this by paying the interest mandated by the No-Fault Act back to 1997. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906.*) Even a narrow construction of these actions can reasonably lead to the conclusion they apply at least to the policy and statutory claims.

A promise to pay an otherwise stale debt can make a claim for that debt timely. *Drake*, 914 P.2d at 522. A partial payment of an otherwise stale debt can make a claim for that debt timely. *Id.* Here, State Farm both promised to pay and then partially paid its stale debt. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906.*) The district court erred and its order should be overturned.

### E. Plaintiff preserved the argument that his bad faith claim for State Farm's post-2007 actions is timely

The district court erred in ruling that the statute of limitations barred Plaintiff's bad-faith claim for State Farm's actions occurring starting in 2007 through the present. An insurer is liable for bad faith when its conduct is

unreasonable. *Burgess v. Mid-Century Ins. Co*., 841 P.2d 325, 328 (Colo. Ct. App. 1992). Each instance of bad-faith conduct can establish a claim of bad faith. *Harmon v. Fred S. James & Co. of Colo., Inc.*, 899 P.2d 258, 262 (Colo. Ct. App. 1994). Bad faith encompasses an insurer's entire course of conduct and is cumulative. *Dale v. Guar. Nat'l Ins. Co*., 948 P.2d 545, 551-552 (Colo. 1997). For a statute of limitations determination, an insurer's bad-faith acts may not be strung together for one accrual date—claims based on each act can accrue on a different date. *Harmon,* 899 P.2d at 262.

State Farm argues the trial court correctly dismissed Plaintiff's bad-faith claims under *Harmon*. But *Harmon* mandates a different result. When bad-faith conduct occurs, all bad-faith actions within the statute of limitations are actionable. *Id*. at 260, 262. All bad-faith actions outside the statute of limitations period are not actionable, but are likely admissible. *Id*.

Here, at a minimum, the trial court should have held that State Farm's bad-faith actions occurring post-2007 were actionable as they occurred within the limitations period.[3] State Farm does not contest this would be the appropriate outcome, but asserts Plaintiff did not preserve the argument. (Answer Br. at 35.) Plaintiff preserved this argument.

[3] The statute of limitations date is actually before 2007, but State Farm did not begin to act in bad faith toward Plaintiff again until 2007, which is comfortably within the limitations period.

To preserve an argument, a party must bring the issue to the district court's attention and the court must have the opportunity to rule on the issue. *Valentine*, 252 P.3d at 1188. But the lower court need not actually rule on the issue. *Munoz*, 271 P.3d at 550.

When State Farm filed its Motion for Summary Judgment, it argued all claims were untimely. (*State Farm's Motion for Summary Judgment at 11, CD p. 718.*) It did not try to distinguish between its bad-faith actions from 1997 through 2000 and those after 2007, (*id*.,) despite Plaintiff amending the complaint to specifically allege post-litigation bad-faith conduct. (*Second Amended Complaint at 9, CD p. 489.*)

Plaintiff responded to State Farm's motion regarding bad faith with three arguments. First, as Plaintiff argues here, State Farm's actions make all of Plaintiff's claims timely. (*Compare Plaintiff's Response to Defendant's Motion for Summary Judgment at 15, CD p. 882 with* Opening Br. at 31.) Second, Plaintiff argued that State Farm acted in bad faith from the beginning of his claim, and so Plaintiff can recover for all bad-faith actions as part of a continuing conduct. (*Plaintiff's Response to Defendant's Motion for Summary Judgment at 20, CD p.* 887.) Plaintiff abandoned this argument on appeal.

Finally, Plaintiff argued he could recover for State Farm's post-2007 bad-faith actions, which started shortly before the complaint was filed and continued

through the present. (*Id. at 15-20, CD p.882-87*.) Both here and at the trial court level, Plaintiff argues bad faith depends on whether the insurer's conduct was appropriate under the circumstances, whether it knew its conduct was unreasonable, and the entire course of conduct is cumulative and actionable. (*Compare Plaintiff's Response to Defendant's Motion for Summary Judgment at 15-16, CD p. 882-83 with* Opening Br. at 30.) Plaintiff then listed facts supporting his bad-faith claim; one paragraph describing State Farm's bad-faith actions between 1997 and 2000, and ten paragraphs of post-2007 bad-faith actions. (*Plaintiff's Response to Defendant's Motion for Summary Judgment at 16-20, CD p. 883-87*.) These arguments and assertions brought to the Court's attention that Plaintiff sought recovery for State Farm's post-2007 bad-faith actions.

State Farm's response to these arguments in the trial court strengthens this conclusion. State Farm titled its reply, "State Farm's post-litigation conduct is not continuing bad faith." (*State Farm's Reply in Support of Motion for Summary Judgment at 11, CD p.1094*.) State Farm argued Plaintiff did not amend his complaint to include allegations of post-litigation conduct. (*Id*.) State Farm argued Plaintiff had not shown sufficient facts to prevail on State Farm's post-2007 bad-faith conduct. (*Id*. at n.4.) Finally, State Farm cited extensively to *Harmon*, the case dictating the outcome here. (*Id. at 11-12, CD p. 1094-95*.)

To have preserved the argument, Plaintiff must show the issue was brought to the trial court's attention and the court had the opportunity to rule on the issue. *Valentine*, 252 P.3d at 1188. Plaintiff argued State Farm was liable for its post-2007 bad-faith conduct. State Farm responded to that argument at length. The trial court had the controlling authority. The court had the opportunity to rule on the issue in its order, and dismissed this claim. Plaintiff sufficiently preserved this argument.

## III. CONCLUSION

For the foregoing reasons, the judgment should be reversed, and the case remanded for further proceedings.

Respectfully submitted this 13th day of November, 2012.

HAGENS BERMAN SOBOL SHAPIRO, LLP

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## CERTIFICATE OF SERVICE

I certify that on this 13th day of November, 2012, a true and correct copy of the above was filed with the Clerk of the Colorado Court of Appeals and served upon the following via LexisNexis File and Serve®:

Michael S. McCarthy

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