Appeal Nos. 15-1006 and 1007

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GLADYS JONES
Plaintiff-Appellant

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Defendant-Appellee

APPEAL FROM THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE RICHARD P. MATSCH, SENIOR DISTRICT JUDGE
DISTRICT COURT CASE NO. 2013-CV-577-RPM

RESPONSE/REPLY BRIEF OF APPELLANT GLADYS JONES

ORAL ARGUMENT REQUESTED

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A. The District Court Did Not Err When It Determined that Jones Must Know That There is No Liability Insurance to Trigger the Statute of Limitations under C.R.S. § 13-80-107.5(1)(a).

1. Standard of Review.

Rather that frame an issue presented for review pursuant to Fed.R.App.P. 28.1(c)(2), State Farm argues that 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)." *State Farm's Principal Brief* ("*SFPB*"), at 1. State Farm also argues that the District Court erred "in not requiring any due diligence by Jones as to whether the vehicle was uninsured." *Id.* It appears State Farm is arguing that the District Court erred when it denied State Farm's summary judgment motion brought under Colorado's UIM statute of limitations, C.R.S. § 13-80-107.5(1)(a), because it did not credit State Farm's arguments regarding the due diligence of Jones or her agents. *SFPB*, at 24-30. State Farm did not identify what standard of review it believes applies to either issue.

"[A]ppellate courts typically do not have jurisdiction to review denials of summary judgment motions," *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1150 (10th Cir. 2006), absent certain exceptions not present here. *Id.*; *Estate of Booker v. Gomez*, 745 F.3d 405, 409 (10th Cir. 2014). Here, the District Court denied

State Farm's summary judgment motion and effectively eliminated State Farm's only defense. *Aplt. App.*, at 271. Because State Farm's liability was clear if no statute of limitation applied, the District Court then ordered the parties to "attempt to stipulate to the amount of a judgment to be entered for the Plaintiff…." *Id.* The parties were unable to stipulate. They therefore briefed the issue regarding the amount of judgment. *Id.*, at 272-73 (State Farm's Brief); 275-278 (Jones' Brief); 279-280 (State Farm's Response Brief). After briefing, the District Court issued its Final Judgment resolving the disputed amount. *Id.*, at 282. To the extent that State Farm is appealing the District Court's denial of its summary judgment motion, this Court lacks jurisdiction to do so. *Serna,* 455 F.3d at 1150.

If the Court has jurisdiction to review the District Court's denial of State Farm's summary judgment motion, the standard of review regarding the District Court's legal interpretation of C.R.S. § 13-80-107.5(1)(a) would be *de novo*, applying the same standard as a district court would. *Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004) (citing *City of Wichita v. United States Gypsum Co.*, 72 F.3d 1491, 1497 (10th Cir. 1996)). Generally, "'[s]ummary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting *Biester v. Midwest Health Servs., Inc.*, 77 F.3d 1264, 1265 (10th Cir. 1996)). "[I]f the statute of limitations depends on disputed [material] facts, then summary judgment is

inappropriate." *Wolf v. Preferred Risk Life Ins. Co.*, 728 F.2d 1304, 1306–07 (10th Cir. 1984); *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007) (noting that, under Colorado law, "[i]ssues such as when a cause of action accrues, whether a claim is barred by a statute of limitations, and whether a statute of limitations should be equitably tolled, are issues of fact.") (citations omitted). State Farm acknowledges that "'[w]hether a statute of limitations bars a particular claim is a question of fact.'" *SFPB*, at 20 (quoting *Trigg v. State Farm Mut. Auto. Ins. Co.*, 129 P.3d 1099, 1101 (Colo. App. 2005)).

2. The District Court's Properly Denied State Farm's Summary Judgment Motion Raising a Statute of Limitations Defense Under C.R.S. § 13-80-107.5(1)(a).

State Farm moved for summary judgment. *Aplt. App.*, at 164-182. State Farm argued that Jones' claims against it were barred by the statute of limitations contained in C.R.S. § 13-80-107.5(1)(a), *id.*, at 172-178, and that Jones' claims were barred because she had a duty to exercise due diligence to discover her claims against State Farm, but failed to do so. *Id.*, at 178-182. The District Court denied State Farm's motion because, among other things, "[t]he circumstances of this case are unique … [and even to] this day, the parties do not know who owned the automobile and whether there was any insurance." *Id.*, at 270.

State Farm appeals and argues that 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." *SFPB*, at 1, 20. State Farm's argument fails for several reasons.

a. State Farm Misconstrues C.R.S. § 13-80-107.5(1)(a).

First, State Farm misconstrues the text of C.R.S. § 13-80-107.5(1)(a). The statute provides, in relevant part:

> (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), than 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**. . . .

Id. (emphasis added).

Here, the District Court recognized that "[t]he circumstances of this case are unique … [and even to] this day, the parties do not know who owned the automobile and whether there was any insurance." *Id.*, at 270. By definition, if the parties do not know who owned the automobile and whether there was any insurance covering the automobile, Jones could not have known "the particular tortfeasor is not covered by any applicable insurance," which is what is required to trigger the statute of limitations under C.R.S. § 13-80-107.5(1)(a). The District

Court did not err when it denied State Farm's summary judgment motion when the undisputed facts demonstrated that the parties did not know where there was any insurance available to cover Jones' damages.

b. The Undisputed Facts Show the Exception Contained in C.R.S. § 13-80-107.5(1)(a) Applies.

Second, the District Court correctly denied State Farm's summary judgment motion based on the exception contained in the second part of C.R.S. § 13-80-107.5(1)(a). Specifically, C.R.S. § 13-80-107.5(1)(a) provides that a UIM claim must be filed 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), than 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." *Id.* (emphasis supplied). This exception allows a plaintiff to bring suit within two years after the plaintiff learns that the particular tortfeasor is not covered by any applicable insurance so long as the plaintiff first brought an action against the uninsured motorist. *Id.*

Here, it is undisputed that Jones timely filed against Karen Barrios (a minor), her parents, and individuals she thought owned the vehicle (Luis Rivera

and Gilberto Garcia) within the three-year statute of limitations afforded under C.R.S. § 13-80-101(n). *Aplt. App.*, at 5. This was the Adams County lawsuit, which Jones filed July 5, 2011 (less than three years after the July 7, 2008 auto accident). *Id.* It is also undisputed that Jones gave State Farm notice of the Adams County lawsuit, State Farm moved to intervene, and State Farm actually participated in the default damages hearing. *Id.*, at 19, 22-27. Accordingly, the exception contained in the second part of C.R.S. § 13-80-107.5(1)(a) applies. *See* C.R.S. § 13-80-107.5(1)(a). The exception required Jones to bring her UIM suit against State Farm "within two years after the insured knows that the particular tortfeasor is not covered by any applicable insurance…." *Id.*

As the District Court concluded, even now, "the parties do not know who owned the automobile and whether there was any insurance." *Aplt. App.*, at 270. Thus, the two year exception contained in C.R.S. § 13-80-107.5(1)(a) would not have been exhausted.

Even accepting State Farm's view, as the District Court found, the parties did not know that Luis Rovira would deny owning the vehicle until the default judgment damages hearing, which occurred on June 25, 2012. *Aplt. App.*, at 270. Jones filed this case in state court (prior to removal) on February 11, 2013. *Id.* These undisputed facts show that Jones filed this suit "within two years after the insured knows that the particular tortfeasor is not covered by any applicable

insurance…." C.R.S. § 13-80-107.5(1)(a). The District Court therefore properly denied State Farm's summary judgment motion.

c. State Farm Commits the Straw-Man Fallacy In Advancing Its Arguments Regarding the Three-Year Provision.

In its *Principal Brief,* State Farm addresses only the three-year provision in C.R.S. § 13-80-107.5(1)(a). *SFPB,* at 22-30. State Farm argues that the three year provision "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." *SFPB,* at 23. State Farm continues that Jones had sufficient information from the date of the accident to know, as a reasonable person, that there was no liability insurance that covered her for the accident. *Id.*, at 24.

State Farm's arguments fail under scrutiny because they commit the classical logical fallacy known as the straw-man fallacy. State Farm apparently viewed its argument as more persuasive if it simply attacks Jones' claims under the three-year provision while ignoring the two-year exception contained C.R.S. § 13-80-107.5(1)(a). This is a fallacy, however, because the statute upon which State Farm relies expressly contains the two-year exception. Further, there is no dispute that: (1) Jones filed her state court complaint against the tortfeasors within three years of the accident (*Aplt. App.*, at 5); and (2) Jones filed her state court UIM complaint against State Farm (later removed by State Farm) less than two years

after the June 25, 2012 default damages hearing (*Aplt. App.*, at 270). Accordingly, the question of whether Jones knew, or in the exercise of due diligence should have known, that she had a UIM claim against State Farm three years before she sued State Farm in February 2013 is irrelevant. Rather, the material question is whether "within two years after the insured knows that the particular tortfeasor is not covered by any applicable insurance…." C.R.S. § 13-80-107.5(1)(a). The District Court did not err when it was unpersuaded by State Farm's arguments that Jones knew, or should have known, that she had a UIM claim against State Farm three years prior to suing State Farm because those arguments were immaterial given the exception contained in C.R.S. § 13-80-107.5(1)(a). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (disputed issues of fact must be *material* to a claim).

d. The Authorities on Which State Farm Relies Are Inapposite.

Finally, the authorities upon which State Farm relies are inapposite. Specifically, in the face of the undisputed fact that and "[to] this day, the parties do not know who owned the automobile and whether there was any insurance," *Aplt. App.*, at 270, State Farm argues that the policies behind statute of limitations would be frustrated by allowing it to extend for a lengthy period of time even when a plaintiff fails to investigate her claim. *SFPB*, at 20-22. State Farm also argues that

the three-year provision under C.R.S. § 13-80-107.5(1)(a) applies based on the case law. State Farm errs on both accounts.

To begin, State Farm's arguments regarding the policies advanced by a statute of limitations are generally accurate, but wholly misplaced. Colorado courts "construe statutes of limitations like any other statute by attempting to 'ascertain and effectuate' the General Assembly's intent." *Morrison v. Goff*, 91 P.3d 1050, 1052 (Colo. 2004) (quoting *Hersh Cos. v. Highline Village Assocs.*, 30 P.3d 221, 223 (Colo. 2001)). "Thus, [the court should] attempt to interpret statutes of limitations consistent with their purposes of promoting justice, avoiding unnecessary delay, and preventing the litigation of stale claims." *Id.*

Here, State Farm's complaints are with the text of C.R.S. § 13-80-107.5(1)(a) itself, which the General Assembly properly enacted. State Farm apparently dislikes the statute's exception allowing for a UIM suit to be brought "within two years after the insured knows that the particular tortfeasor is not covered by any applicable insurance…." C.R.S. § 13-80-107.5(1)(a). State Farm argues that the statute will lead to undesirable results, such as allowing a plaintiff to delay asserting a UIM claim for years after an accident, which could "'impair the accuracy of the fact-finding process'" or "'upset settled expectations.'" *SFPB*, at 20 (quoting *Bd. Of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) (involving a different statute of limitations), *abrogation on other grounds recognized by Farrell*

v. McDonough, 966 F.2d 279, 280 (7th Cir. 1992)). Although these concerns may be valid, they are for the legislature; not this Court. *Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010) ("Where a statute leads to undesirable results, it is up to the General Assembly, not the courts, to determine the remedy.").

Additionally, the authority upon which State Farm relies to suggest that that the three-year provision under C.R.S. § 13-80-107.5(1)(a) applies is distinguishable. For example, State Farm cites *Sulca v. Allstate Ins. Co.*, 77 P.3d 897 (Colo. App. 2003), suggesting that it is "decisive here." *SFPB*, at 26. In *Sulca*, an insured brought a UIM action against his insurer approximately five years after the auto accident, but within two years of when he sued the tortfeasor. *Id.*, at 898. The trial court entered summary judgment for the insurer because it concluded that the insured's claim was time barred. *Id.* The Colorado Court of Appeals affirmed. *Id.*

The *Sulca* Court looked specifically at when a party has knowledge of when a tortfeasor is uninsured. The Court noted the uniqueness of the language of the statute of limitation, explaining:

> Under the second clause, if the insured has brought an action against the tortfeasor within the three-year period of limitation for that action, and the insured only discovers that the tortfeasor is uninsured sometime after the accident, then the insured has at least two years from the date of that discovery in which to sue the UIM carrier.

Id., at 900. The Court "conclude[d] that the limitation period in which to bring a claim against a UIM carrier under 13-80-107.5(1)(a) commences to run when the insured knew or, in the exercise of reasonable diligence, should have known that there was no applicable insurance. *Id.*, at 896. The *Sulca* Court further noted that, "at the time of the accident [the] insured also 'knew' that there was no applicable insurance." *Id.*, at 900 (Colo. App. 2003). Thus, in *Sulca*, the insured could not rely on the additional two years provided in the exception because the insured actually knew that the tortfeasor was uninsured at the time of the accident.

Here, however, as the District Court concluded, Jones did not actually know at the time of the accident that no tortfeasors (the driver, the owner of the car or the family) had any insurance coverage available to cover the damages. Indeed, even now, "the parties do not know who owned the automobile and whether there was any insurance." *Aplt. App.*, at 270. Thus, *Sulca* is distinguishable.

The *Sulca* Court also addressed the issue of due diligence. The Court explained "[t]he requirement that a plaintiff use due diligence in discovering the relevant circumstances or event imposes an objective standard and does not reward denial or self-induced ignorance." *Id.*, at 898. State Farm argues that, based on this objective standard, the District Court should have granted summary judgment because Jones had knowledge that the driver who hit her was uninsured at the time of the accident. State Farm's argument misses the mark, however, because there

were other tortfeasors who could have had insurance (e.g., the owner of the car or family of the tortfeasor). A police report is based on the information provided to the investigating officer at the time of the accident and is subject to further investigation. It did not have sufficiently detailed or final information to determine objectively that all particular tortfeasors would not be "covered by any applicable insurance…." C.R.S. § 13-80-107.5(1)(a).

Rather, as State Farm acknowledged, Jones advised State Farm of the accident shortly after it occurred. *Aplt. App.*, at 200, ¶ 7. State Farm conducted its own "extensive" investigation and search for liability coverage until November 2011. *Id.*, at 205, ¶ 29. This included creating individual files for possible tortfeasors that included, Ms. Barrios, Mr. Rivera, Mr. Garcia and an unknown relative, Karine Dazna Cordero-Gomez. State Farm's own claims file notes show State Farm was unable to locate any claimant driver insurance and intended to pursue claimants directly. *Aplee. Supp. App.* at 61.

On December 16, 2011, the state court case hearing Jones' underlying accident claim entered a default judgment against Ms. Barrios, her parents and Mr. Rivera. Mr. Garcia was dismissed as service of process could not be completed. A default judgment damages hearing took place on June 25, 2012, which State Farm participated as an unopposed intervenor. [Doc. 44, at 8]. At the hearing, Mr. Rivera appeared and testified for the first time that he did not have automobile

insurance on the vehicle driven by Ms. Barrios on July 7, 2008. Prior to the damages hearing, both parties continued to investigate and draw unsupported conclusions about the existence of insurance. It was not until the June 25, 2012 hearing that Plaintiff could be expected to have known that the tortfeasors would not be "covered by any applicable insurance…." C.R.S. § 13-80-107.5(1)(a). Even still, because Mr. Garcia was never served and has not been heard from, the parties do not know whether there was any applicable insurance. Thus, even using the objective standard utilized by *Sulca*, 77 P.3d at 898, the District Court was correct when it concluded that "the parties do not know who owned the automobile and whether there was any insurance" even to this day. *Aplt. App.* at 270.

Finally, State Farm relies on *Trigg*, 129 P.3d at 1011, to suggest that "knowledge" under the statute is not some absolute standard. *Trigg* also is inapposite. *Trigg* had a similar fact-pattern as *Sulca*. *Id.*, at 1100. In *Trigg*, the driver admitted he was uninsured at the time of the accident and there were no other potential tortfeasors involved (e.g., the tortfeasor was the owner and the family car doctrine was inapplicable). *Id.* Thus, relying on *Sulca*, the court concluded that the statute of limitations for the UIM claim against the carrier "accrued as early as August 2, 1997, 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." *Id.*, at 1102. *Trigg*, like *Sulca*, is

distinguishable because the plaintiff in both cases actually knew who the tortfeasor was (there was only one) and actually knew the tortfeasor was uninsured. Here, in contrast, "the parties do not know who owned the automobile" (e.g., who all the tortfeasors were) and "whether there was any insurance" for these tortfeasors even to this day. *Aplt. App.* at 270.

3. The District Court's Denial of State Farm's Summary Judgment Motion Was Proper Under Equitable Tolling.

As explained above, "if the statute of limitations depends on disputed [material] facts, then summary judgment is inappropriate." *Wolf*, 728 F.2d at 1306–07. The question of whether accrual of the UIM statute of limitation is equitably tolled under the circumstances is a question of fact. *Olson*, 174 P.3d at 853. A genuine material fact dispute about equitable tolling would be sufficient to defeat State Farm's summary judgment motion. *Id.*

Under Colorado law, "[e]quity will toll a statute of limitations if a party fails to disclose information that [it] is legally required to reveal and the other party is prejudiced thereby." *Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992). The doctrine of equitable tolling is founded upon two fundamental precepts. First, a party may not assert the statute of limitations "if he himself is not in compliance with his statutory duty." *Garrett*, 826 P.2d at 854. Equity often requires tolling in such a situation, because "to allow a party to benefit from its own wrongdoing by its failure to comply with its statutory duty of disclosure

would be highly inequitable." *Id.* (citing *Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720, 724 (Colo. 1976)). Ultimately, the doctrine "rests on the principle that a person should not be permitted to take advantage of his own wrong." *Id.* (citing *Klamm Shell v. Berg*, 441 P.2d 10, 12 (Colo. 1968)). Second, equitable tolling is based on the notion that it is inequitable to enforce the statute of limitations where the failure to provide the required information means that the party invoking the doctrine was not fully informed of critical information needed in order to "exercise an informed judgment as to how to proceed." *Id*. at 855.

State Farm investigated the possible tortfeasor prior to litigation and well after litigation against the tortfeasors had commenced. *Aplt. App.*, at 200, ¶ 7 - 205, ¶ 29; *Aplee. Supp. App.* at 61. Withholding information regarding the lack of liability insurance and then alleging expiration of the statute of limitations is a violation of the fundamental principles of the doctrine of equitable tolling. These questions of fact were before the District Court and were more than sufficient to defeat State Farm's summary judgment motion because there were genuine issues of material fact that rendered summary judgment inappropriate. *See Garrett*, 826 P.2d at 855 (explaining that "[t]he application of the equitable tolling doctrine requires certain factual determinations" and reversing decision so that ALJ could make more extensive factual findings on question of equitable tolling).

4. Conclusion.

This Court should not review the District Court's denial of State Farm's summary judgment motion because denials of summary judgment generally are not reviewable. *Serna*, 455 F.3d at 1150. Even if the Court reviews the District Court's denial of State Farm's summary judgment, the District Court's denial was proper because C.R.S. § 13-80-107.5(1)(a) allowed Jones to sue State Farm "within two years after the insured knows that the particular tortfeasor is not covered by any applicable insurance." The facts demonstrated that "the parties do not know who owned the automobile and whether there was any insurance" even to this day. *Aplt. App.* at 270. Further, the District Court's denial of State Farm's summary judgment motion was appropriate because there were genuine issues of material fact on the question of equitable tolling.

B. The District Court Did Not Abuse Its Discretion When It Allowed Jones to Amend Her Complaint to Add Bad Faith Claims.

1. Standard of Review.

State Farm also argues the District Court erred when it "encouraged" and "allowed" Jones to amend her complaint to add bad faith claims against State Farm. *SFPB*, at 30-37. State Farm did not identify the standard of review applicable to this issue, as Fed.R.App.P. 28.1(c)(2) requires. State Farm assumes that the standard of review is *de novo.* State Farm's assumption is incorrect.

"The decision to grant leave to amend a complaint, after the permissive period, is within the trial court's discretion, Fed.R.Civ.P. 15(a), and will not be disturbed absent an abuse of that discretion." *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991) (citing *Las Vegas Ice and Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)). A court generally may "refuse leave to amend only on 'a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment.'" *Duncan v. Manager, Dep't of Safety*, 397 F.3d 1300, 1315 (10th Cir. 2005) (quoting *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993)).

2. The District Court's Grant of Jones' Motion to Amend Her Complaint Was a Proper Exercise of Discretion, Particularly When State Farm Did Not Object to Jones' Motion to Amend.

Fed.R.Civ.P. 15(a) provides for liberal amendment of pleadings, directing that "[t]he court should freely give leave when justice so requires." The decision to allow a party to amend rests within the sound discretion of the Court. *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 799 (10th Cir. 1998). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The most important "factor in deciding a motion to amend the pleadings, is whether the amendment would prejudice the

nonmoving party." *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1207 (10th Cir. 2006); *see also* Wright, Miller & Kane, Federal Practice and Procedure § 1487 (2d ed. 1990) ("Perhaps the most important factor listed by the Court and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading.").

As more fully set forth in Jones' Opening Brief ("*OB*"), Jones initially included a claim in her complaint for unreasonable delay and denial of benefits, pursuant to C.R.S. § 10-3-1115(1) and 10-3-1116(1). *Aplt. App.* at 51. After State Farm removed the action, at State Farm's request, Jones stipulated to dismissal of this claim with prejudice. *Id.*, at 11.

As the case proceeded, however, Jones sought to reinstate her statutory bad faith claim and to assert a common law bad faith claim for the first time. This approach was endorsed and affirmed by the district court. Specifically, at the scheduling conference, the district court clarified that it would allow Jones to "amend the complaint for bad faith." *Aplt. App.*, at 119. Jones then filed a *Motion to Amend to Add Bad Faith Claims Pursuant to the Court's Order*, along with a proposed Amended Complaint containing reinstating the Third Claim for Relief and articulating the Fourth Claim for Relief for the first time. *Id.*, at 125-127 (Motion); 128-134 (Amended Complaint). State Farm did not file any response objecting to Jones' Motion to Amend or the proposed Amended Complaint. *See*

Docket. State Farm did not demonstrate that the amended claims would cause undue prejudice to State Farm, were advanced in bad faith or based on a dilatory motive, or were futile. Thus, the District Court's exercise if discretion in allowing Jones to amend her complaint was proper. *Frank*, 3 F.3d at 1365; *Minter*, 451 F.3d at 1207.

State Farm had a duty to act in good faith throughout litigation. The tort of bad faith breach of an insurance contract encompasses an entire course of conduct and is cumulative. *Dale v. Guar. Nat'l Ins. Co.*, 948 P.2d 545, 551-552 (Colo. 1997). Claims of insurance bad faith encompass all of the dealings between the parties. *Id*. Moreover, the "duty of good faith and fair dealing continues unabated during the life of an insurer-insured relationship, including through a lawsuit or arbitration between the insured and the insurer." *Sanderson v. Am. Family Mut. Ins. Co.*, 251 P.3d 1213, 1217 (Colo. Ct. App. 2010). In this case, Jones alleged an ongoing course of bad faith conduct that has continued from the time of her initial injury through the present. Under Colorado law, "bad faith is not limited to the decision to grant or deny a claim; rather, bad faith can occur in the unreasonable refusal to investigate a claim and to gather facts." *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 n.20 (Colo. 1985).

The duty of good faith and fair dealing that an insurance company owes does not end with the commencement of litigation and thus continues through trial.

E.g., Parsons ex rel. Parsons v. Allstate Ins. Co., 165 P.3d 809, 815 (Colo. App. 2006) (the tort of bad faith breach of an insurance contract encompasses "all of the dealings between the parties, including conduct occurring after the arbitration procedure"); *Am. Guarantee & Liab. Ins. Co. v. King*, 97 P.3d 161, 169 (Colo. App. 2003) (trial court's bad faith finding appropriate where the "trial court found, with record support, that [insurer] maintained its suit out of dislike for [insured], without proper investigation, and in disregard of information that it did not have a claim; that it attempted to hide this information; that it was aware of and sought to exploit [insured's] vulnerable health; and that it joined the doctor as a defendant to trigger [insured's] indemnification under the settlement agreement, thereby putting more pressure on him."); *Knotts v. Zurich Ins. Co*., 197 S.W.3d 512, 517 (Ky. 2006) (insurer is obligated to deal in good faith in both pre- and post-litigation activities); *O'Donnell v. Allstate Ins. Co*., 734 A.2d 901, 906 (Pa. Super. Ct. 1999) (bad faith suits are not restricted to the denial of claims, but, rather, may extend to the misconduct of an insurer during the pendency of litigation).

The national trend at this point appears to be that "actions taken after an insured files suit are at best marginally probative of the insurer's decision to deny coverage." *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895, 915 (Mont. 1993) (citation omitted); *accord Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 771 N.W.2d 623, 635-36 (S.D. 2009). The Tenth Circuit recognized 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." *Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co*., 71 F.3d 335, 340 (10th Cir. 1995) (quotations omitted). Here, the District Court properly allowed Jones to amend her *Complaint* and add a claim for bad faith based on State Farm's litigation conduct.

In support of its cross appeal, State Farm argues that the dismissal of the claim for delay and denial of benefits under to C.R.S. § 10-3-1115(1) and 10-3-1116(1) ***with prejudice*** means that Jones could not later amend to allege bad faith claims. *SFPB*, at 30-31. State Farm is wrong for several reasons.

First, even if the dismissal of Jones' initial claim for delay and denial of benefits under to C.R.S. § 10-3-1115(1) and 10-3-1116(1) with prejudice meant that she could not amend to reassert a claim under those statutes, the dismissal would not have precluded Jones' amendment to include a common law claim for bad faith. That claim was based on Colorado common law. *Savio*, 706 P.2d at 1274. Under this law, "[w]hen an insured sues his or her insurer for bad faith breach of an insurance contract, the insured must prove that (1) the insurer acted unreasonably under the circumstances, and (2) the insurer either knowingly or recklessly disregarded the validity of the insured's claim." *Sanderson*, 251 P.3d at

1217. "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.'" *Baker v. Allied Prop. & Cas. Ins. Co.*, 939 F. Supp. 2d 1091, 1107 (D. Colo. 2013) (quoting *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 415 (Colo. 2004)). Jones never plead a claim for common law bad faith prior to her motion to amend. Thus, it is logically impossible that a previous dismissal of her statutory claim precludes her from asserting a common law bad faith claim.

Additionally, State Farm misses the mark on its argument that District Court's dismissal of Jones' statutory claim *with prejudice* means that the District Court erred in allowing Jones to amend her complaint. "It is important to realize, however, that denial of leave to amend and dismissal with prejudice are two separate concepts." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (citing *N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000)). Although the District Court's dismissal of Jones' statutory claim with prejudice arguably would have supported a claim preclusion affirmative defense, State Farm did not assert one in its Answer to Jones' Amended Complaint. *Aplt. Appx.*, at 143-144 (asserting eleven affirmative defenses which did not include

claim preclusion or *res judicata*).[1] Further, State Farm did not object to Jones' motion to amend at all; much less on futility grounds. *See docket.*

Moreover, State Farm has failed to identify what undue prejudice it incurred from the amendment, which bars its appeal here. "Courts typically find prejudice only when the amendment unfairly affects the defendants 'in terms of preparing their defense to the amendment.'" *Minter*, 451 F.3d at 1208 (quoting *Patton v. Guyer*, 443 F.2d 79, 86 (10th Cir. 1971)). "Most often, this occurs when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." *Id.* (citations omitted). Here, the proposed amendments arose out of the same subject matter set forth in the complaint and with which State Farm was thoroughly familiar. Further, the proposed amendments related to State Farm's conduct in further delaying and denying benefits in litigation. Thus, it was conduct different than what was originally alleged and which occurred after the first dismiss.

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[1] Under Colorado law, claim preclusion precludes the relitigation of matters that have already been decided on their merits. *Lobato v. Taylor*, 70 P.3d 1152, 1165 (Colo.2003). For claim preclusion to apply, State Farm was obligated to plead and prove four elements existed: (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). State Farm never plead these elements nor moved for relief in its favor on these elements.

Even if Jones' statutory claim was barred by the dismissal with prejudice for conduct that predated the dismissal with prejudice, the dismissal would not bar Jones from asserting entitlement to relief under C.R.S. § 10-3-1115(1) and 10-3-1116(1) for conduct that occurred after the dismissal with prejudice. *See Camus v. State Farm Mut. Auto. Ins. Co.*, 151 P.3d 678, 681 (Colo. App. 2006) (concluding that trial court erred in entering summary judgment in favor of State Farm based on issue preclusion because actions after personal injury action, as alleged in bad faith claim, differed and did not arise from the same transaction or occurrence).

Finally, the authority upon which State Farm relies in support of its argument is inapposite. *SFPB,* at 30 (citing *Goff v. Boma, Inv.*, 181 P.2d 459, 460 (Colo. 1957) and *Dailey v. Montview Acceptance Co.*, 514 P.2d 76, 78 (Colo. App. 1973)). In *Goff,* the Court held that the trial court's judgment for the defendant "was correct, (1) because plaintiff's cause of action was barred by the release in case No. A–2551 and (2) because he clearly ratified the settlement made." 181 P.2d at 460. This case does not involve a settlement or release. In *Dailey,* the Colorado Court of Appeals held that a party's prior quiet title suit which involved same parties and in which prior purchaser's attorney had consented to dismissal of prior purchaser's breach of trust claim with prejudice was res judicata and barred prior purchaser's later suit. 514 P.2d at 78. The *Dailey* Court applied all the elements necessary for claim preclusion (then *res judicata*) and dismissed the

action. *Dailey* is inapposite to this case because this is the *same case* and because State Farm never objected or sought relief based on claim preclusion.

Further, both cases are cases from Colorado that did not consider standards to amend pleadings under Fed.R.Civ.P. 15. They simply are inapposite to the question of whether the District Court abused its discretion in allowing Jones to amend her complaint to assert a claim against State Farm for common law bad faith and to reassert a claim against State Farm based on State Farm's continued delay and denial of benefits, which was an ongoing statutory tort. For the reasons explained fully above, the District Court did not abuse its discretion in allowing Jones' amended claims, either for common law bad faith or for statutory bad faith.

C. The District Court Erred When It Concluded that the Parties Waived the Right to A Jury Trial, But Its Error Is Only Prejudicial Because the District Court Improperly Dismissed Jones' Bad Faith Claims.

1. Standard of Review.

As its last issue on appeal, State Farm argues that the District Court erred when it ruled that State Farm had waived its right to a jury trial. *SFPB*, at 38-40. "Whether a party is entitled to a jury trial is a question of law," reviewed *de novo*. *Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 953 (9th Cir. 2008) (citing *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998)). "The unconstitutional denial of a jury trial must be reversed unless the error is harmless." *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1377 (9th Cir.1997).

2. The District Court's Conclusion that Either Party Waived the Right to a Jury Trial Was Error, But Harmless Unless the Court Reverses the District Court's Summary Judgment on Jones' Bad Faith Claims.

Under Fed.R.Civ.P. 38, a party waives a jury trial unless its demand is properly served and filed. Jones demanded a jury in her complaint. *Aplt. App.* at 51, 61. State Farm also demanded a jury in its Answer. *Id.*, at 75. The parties also requested a four day jury trial in the scheduling order. *Aplee. App.* at 24.

Once a party has requested a jury trial, "[a] proper demand may be withdrawn only if the parties consent." Fed.R.Civ.P. 38(d). "[T]he plain language of Rule 38(d) suggests that one party may not unilaterally withdraw its request for a jury trial if the other party does not consent." *Zero Down Supply Chain Solutions, Inc. v. Global Transp. Solutions, Inc.*, 282 F.R.D. 604, 605-06 (D. Utah 2012).

Here, however, the District Court concluded that State Farm waived its right to a jury trial without first finding that both parties consented to waiver of a jury trial. *SFPB*, at 39 (quoting transcript). Jones agrees this was error, but it was harmless because of the District Court's entry of summary judgment in favor of State Farm on Jones' bad faith claims. For the reasons articulated in Jones' *Opening Brief* and below, however, the District Court's entry of summary judgment in State Farm's favor on Jones' bad faith claims was improper and should be reversed. Once reversed and remanded, the parties' right to a jury trial on Jones' bad faith claims should be reinstated.

II. REPLY IN SUPPORT OF JONES' APPEAL.

A. The District Court Erred in Dismissing Jones' Bad Faith Claims.

In her *Opening Brief*, Jones argued that the District Court erred because it entered summary judgment on her bad faith claims (her Third and Fourth Claim for Relief) when State Farm did not move for summary judgment on those claims and when the District Court did not comply with Fed.R.Civ.P. 56(f). Jones also argued that the District Court erred in granting summary judgment to State Farm on Jones' bad faith claims because there were genuine issues of material fact that were disputed. Finally, Jones argued that the District Court's conclusion that State Farm set forth an arguable defense to her claim did not eliminate otherwise genuine and material fact disputes sufficient to entitle State Farm to summary judgment.

In its *Principal Brief*, State Farm did not respond to each of these arguments separately. *SFPB*, at 40-46. Instead, State Farm clumped all its responsive arguments together, suggesting that the District Court acted properly because Jones' bad faith claims "were dismissed with prejudice" and were "unfounded as a matter of law." Jones responds to each argument *seriatim.*

1. Jones' Bad Faith Claims Were Properly Before the Court.

As more fully set forth in Jones' Opening Brief and discussed above, Jones initially included a claim for unreasonable delay and denial of benefits, pursuant to C.R.S. § 10-3-1115(1) and 10-3-1116(1). *Aplt. App.* at 51. After State Farm

removed the action, at State Farm's request, Jones stipulated to dismissal of this claim with prejudice. *Id.*, at 11. As the case proceeded, however, Jones sought to reinstate her statutory bad faith claim under C.R.S. § 10-3-1115(1) and 10-3-1116(1) and to assert a common law bad faith claim for the first time. After a hearing with the District Court, Jones filed her *Motion to Amend to Add Bad Faith Claims Pursuant to the Court's Order*, along with a proposed Amended Complaint containing reinstating the Third Claim for Relief and articulating the Fourth Claim for Relief for the first time. *Id.*, at 125-127. State Farm did not file any response objecting to Jones' Motion to Amend or the proposed Amended Complaint. *See Docket*. For the reasons articulated above, the District Court's exercise of discretion in allowing Jones to amend her complaint was proper. *Frank*, 3 F.3d at 1365; *Minter*, 451 F.3d at 1207.

In its *Principal Brief*, State Farm alleges "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." *SFPB*, at 40 (emphasis original). This position mischaracterizes Jones' position and the record. Contrary to State Farm's insinuation, the "extra-contractual claims" were appropriately authorized and permitted by district court. Specifically, the Court reinstated Jones' Third Claim for Relief (based on Statutory Bad Faith) and expressly permitted Jones' Fourth Claim for Relief (based on Common Law Bad Faith) for the first time. *Order re*

Motion to Amend Complaint. As a result, both of Jones' claims were viable claims before the district court prior to dismissal.

Moreover, again State Farm confuses the issue of whether it was proper for the District Court to allow Jones to amend her complaint to add the bad faith claims with the question of whether the District Court properly entered summary judgment on those claims. Those are distinct concepts. *Brereton*, 434 F.3d at 1219. State Farm cites no authority to suggest that a District Court may properly dismiss claims that the District Court permitted through an amendment without even requiring the party to move for dismissal of those claims, or without giving notice and an opportunity to respond under Fed.R.Civ.P. 56(f).

Although difficult to discern, it appears that State Farm's argument is that the District Court properly entered summary judgment on Jones' bad faith claims because State Farm argues those claims were dismissed with prejudice and subject to claim preclusion. This argument fails, however, because State Farm never argued claim preclusion barred Jones' bad faith claims in either of its summary judgment motions. *Aplt. App.* at 83-90 (first summary judgment motion); 164-182 (second summary judgment motion). Further, State Farm did not assert the affirmative defense of claim preclusion (or *res judicata*) in its Answer to Jones' Amended Complaint. *See Aplt. Appx.*, at 143-144. State Farm's failure to allege claim preclusion as an affirmative defense, or to move for summary judgment on

claim preclusion, amounts to a waiver of the defense. *See Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.*, 167 P.3d 175, 177 (Colo. App. 2007) (noting that a party waives claim preclusion defense unless party asserts the defense in answer *or* moves to dismiss under Rule 12 on claim preclusion basis).

2. Reversal Is Required Because the District Court Did Not Comply with Fed.R.Civ.P. 56(f).

State Farm alleges that Jones actually moved for summary judgment on the Third and Fourth Claims for relief when Jones moved for summary judgment on State Farm's statute of limitations defense. *SFPB*, at 42, n. 23. State Farm's argument misapprehends the impact of Jones' position in the underlying case.

It was State Farm that moved for summary judgment on Jones' First and Second Claims for Relief, asserting entitlement to summary judgment on Jones' claims for breach of contract and failure to pay uninsured motorist benefits. *Aplt. App.*, at 164-82. State Farm did not move for summary judgment nor seek dismissal of Jones' bad faith claims. *Id.* Instead, it specifically advised that it was not submitting briefing with regard to those claims, explaining: "[a]t the Pretrial Conference on April 25, 2014, the Court dismissed Plaintiff's bad faith and statutory violation claims." *Id.*, at 165.[2]

[2] As more fully explained in Jones' *Opening Brief*, Jones maintains this characterization of what occurred at the pretrial conference is inconsistent with the record and the district court's subsequent orders. *OB*, at 20-22. To the extent that State Farm now maintains that the Third and Fourth Claims for Relief were

Although Jones argued for summary judgment **in her favor** on her bad faith claims against State Farm in her response to State Farm's summary judgment motion, those submissions do not undermine Jones' position that the district court's dismissal was inconsistent with Fed.R.Civ.P. 56(f). Jones submitted this argument with the narrow intent to outline the basis for her claims and moved for summary judgment in *her favor*. *Aplt. App.* at 218-221. The fact that Jones sought summary judgment **in her favor** is distinct from being on notice that the adverse party, State Farm, was seeking dismissal or summary judgment on those claims.

State Farm does not dispute that Fed.R.Civ.P. 56(f) requires the District Court to give "notice and a reasonable time to respond" if the District Court is considering entering summary judgment on an issue that State Farm did not seek summary judgment. State Farm also does not dispute that the District Court did not do so. Further, State Farm does not recite any authority suggesting that a District Court complies with Fed.R.Civ.P. 56(f) when it denies a moving party's motion but reverses the burden on the non-moving party and enters summary judgment against it simply because the non-moving party advanced an argument in its response to the defendant's summary judgment motion. This is unsurprising because allowing a district court to do so would violate Fed.R.Civ.P. 56(f)'s

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dismissed at the pretrial conference, such a dismissal would also evidence reversible error by the district court. Specifically, such action by the district court would also reflect a failure to comply with the requirements of Fed.R.Civ.P.56(f) and would require reversal. *OB*, at 18-22.

operating principle – which is to avoid a district court entering summary judgment against a party when there was no motion or other notice that put the adverse party on notice that the district court was considering doing so.

Jones' argument is not "baseless," as State Farm suggest, but instead is a reflects a precise application of the rules of civil procedure. Specifically, Rule 56(f) requires that a party be given "notice and a reasonable time to respond" in advance of granting summary judgment for a "nonmovant" or "on grounds not raised by a party." Fed.R.Civ.P 56(f). Here, because State Farm neither moved for summary judgment nor raised any grounds for summary judgment in its briefing, Jones could not have been on "notice" of the fact that her claims were subject to dismissal. *See id.* Further, she was given no opportunity to respond to motion for the same from State Farm. Additionally, in ruling on the motion, the district court itself acknowledged that State Farm had not moved for summary judgment on Jones' bad faith claims and that those claims were not before the district court on State Farm's renewed summary judgment motion. *Aplt. App*., at 260:4-9.

Simply, based on the fact that there was no pending request to dismiss or for summary judgment on the Third and Fourth Claims for Relief during the April 25, 2014 hearing and because State Farm specifically disclaimed its intent to seek summary judgment on the same during briefing, Jones was not afforded an

adequate opportunity to guaranteed in Rule 56. As a result, the district court erred in summarily dismissing the Third and Fourth Claims for Relief in the *SJ Order*.

3. Summary Judgment Was Not Warranted On Jones' Bad Faith Claims.

State Farm argues that Jones' bad faith claims are "unfounded as a matter of law." This argument fundamentally misapprehends the question before this Court on appeal and the applicable standard of review.

Summary judgment is only appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This Court examines the record to determine if any genuine issues of material fact were in dispute and whether the substantive law was correctly applied. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). If there were genuine issues of material fact, when taken in the light most favorable to the non-moving party, summary judgment is improper. *Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp.*, 315 F.3d 1271, 1278 (10th Cir. 2003).

Throughout its *Principal Brief*, State Farm argues that Jones' recitation of the burdens and duties that State Farm owed is incorrect. *SFPB*, at 42-42-45. State Farm acknowledges that the reasonableness of its conduct must be

determined objectively, based on proof of industry standards. *Savio*, 706 P.2d at 1274 (Colo.1985). But State Farm forgets that when, as here, conflicting evidence exists, what constitutes reasonableness under the circumstances is ordinarily a question of fact for the jury. *See Rine v. Isham*, 152 Colo. 411, 416, 382 P.2d 535, 537 (1963); *Scoular Co. v. Denney*, 151 P.3d 615, 620 (Colo. App. 2006). Further, the aid of expert witnesses is often required to establish such standards, and whether there was a breach. *Goodson*, 89 P.3d at 415.

Here, Jones submitted evidence in support of her bad faith claims, showing essentially that State Farm's conduct was unreasonable and inconsistent with industry standards. *See OP*, at 23-28 (summarizing this evidence). Further, Jones submitted an expert report and expert testimony in support of her claim that State Farm acted unreasonably under the circumstances. *Aplt. App.*, at 284-361; *see also OB*, at 32-33 (summarizing expert testimony). Jones set forth specific evidence sufficient to establish that her claims are not "unfounded."

As set forth in Jones' *Opening Brief*, Jones is pursing claims based on statutory and common law bad faith. Specific items in the record here evidence a factual dispute regarding whether State Farm met its obligations under the law. *OB*, at 22-28. First, Jones identified substantial and undisputed pre-litigation conduct by State Farm that rises material questions of fact with regard to whether the defendant met its obligations under the law. *Id.* As an initial matter, Jones

disputes State Farm's articulations and descriptions of the duties and relationships between the parties, and maintains that the characterization of State Farm's duties in the *Opening Brief* reflect the state of the law in Colorado. *Id.*, at 22-24. Under either standard, however, genuine issues of material fact with regard to whether State Farm met its obligations.

Jones put State Farm on notice of her claim and the circumstances surrounding the same within a month. *Id.*, at 24-25. Additionally, despite the fact that Jones, through her various representations, continued to conduct diligent investigation into whether there was applicable coverage, State Farm conducted only limited investigation and continued to deny Jones coverage. *Id.*, at 25. All the while, State Farm suspected there would likely be insufficient coverage of the claim, but refused to issue a final determination, leaving Jones in coverage limbo. *Id.* As set forth in the *Opening Brief*, this approach effectively required Jones to turn over every stone in investigating other potential sources of coverage, and then, once this litigation was pending, State Farm abruptly argued that Jones had slept on her rights. *Id.* Such tactics and gamesmanship should not be tool by which State Farm can now avoid liability under a valid claim. *Id.*

Importantly, State Farm employed these tactics from the time Jones provided notice of her claim, through ultimate resolution in the *SJ Order* below. As a result, State Farm's conduct started well before this litigation, but persisted through the

entire duration of Jones' claim. Here, Jones maintains that her Third Claim for Relief was properly reinstated by the district court through filing of her First Amended Complaint, and further, that her Fourth Claim for Relief was only first articulated in the First Amended Complaint. Therefore, the Court must examine State Farm's conduct from the outset through the litigation. As more fully described above, Jones has set forth ample evidence to support her claims.

Second, even assuming, *arguendo*, that Jones' claims could only be premised on conduct that occurred after the First Amended Complaint was accepted by the Court, dismissal of the Third and Fourth Claims for Relief was still in error. As even State Farm concedes, litigation conduct alone can form the basis for bad faith insurance claims.[3] State Farm's own *Principal Brief* confirms that evaluation and analysis of bad faith claims is case-specific and requires the district court conduct a careful analysis and consider all available evidence. *Principal Brief*, at 35-37.

Here, the District Court failed to employ such an analytic framework and instead concluded that because State Farm had an "arguable defense" to Jones' claim, dismissal was appropriate. *SJ Order*, at 5. In doing so, the District Court

[3] State Farm claims, without citation, that claims based on litigation conduct alone require "extraordinary facts." *SFPB*, at 44. Jones respectfully submits that Colorado law dictates that when an insurer acts unreasonably, in any circumstance, it may subject itself to both statutory and common law liability. And further, that the facts here show that State Farm failed to act reasonably in processing, evaluating, and handling Jones' Claim. *See supra*.

circumvented the applicable analysis, and, as a result, prematurely reached and ultimate conclusion regarding the Third and Fourth Claims for Relief. *Id.*

This Court's review revolves around whether there were genuine issues of material fact, when taken in the light most favorable to the non-moving party, that would render summary judgment improper. *Century 21 Real Estate Corp.*, 315 F.3d at 1278. The factual disputes between Jones' evidence in support of her bad faith claim, and State Farm's factual contentions in response, are the very type of factual disputes that are questions of fact for the jury. *See Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 527 (Colo. App. 2008) (summary judgment improper when there are genuine issues of material fact concerning insurer's conduct and whether it was unreasonable). The District Court therefore erred when it entered summary judgment in State Farm's favor.

B. The District Court Erred in Precluding Jones' Proffered Expert Testimony.

Jones agrees with State Farm's recitation of the standard applicable to the admissibility of expert testimony. Specifically, expert opinions are only admissible when they may be "helpful to the trier of fact." *SFPB*, at 47 (citing 3 J. WEINSTEIN & M. BERTER, WEINSTEIN'S EVIDENCE § 704 (1990)). Further, Jones agrees that expert testimony is inadmissible where is simply "tell[s] the jury what result to reach." *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988). Critically, however, where expert testimony informs, educates, and assists a jury in evaluating

a result to reach, it is admissible. *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1204 (10th Cir. 2002); *Kumho Tire Co. Ltd. V. Carmichael* 526 U.S. 137, 147 (1999).

Additionally, in making a determination regarding the admissibility of expert testimony, a district court must perform its "gatekeeper function." *Dodge v. Cotter Corp.*, 326 F.3d 1212, 1223 (10th Cir. 2003). This standard requires a court to weigh the reliability of an experts decision and "must adequately demonstrate by specific findings on the records that tit has performed its duty as gatekeeper." *Goebel v. Denver Rio Grand W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

Here, the claims at issue deal specifically with the propriety of State Farm's actions in evaluating, processing, and determining Jones' claim. Jones proffered testimony regarding those topics from Mr. Hemmat. Then, when counsel for State Farm advised that they were "considering a motion in *limine*," the district court abruptly struck Mr. Hemmat without issuing "any specific findings on the record." *Goebel*, 215 F.2d 1087.[4] The district court's failure to issue "any specific findings on the record" demonstrate that it did not "perform[] its duty as gatekeeper." *Id.*

Furthermore, and contrary to State Farm's contentions, the proffered testimony is admissible. The intricacies of insurance processing and the elements relevant to complex decision regarding coverage, the scope of coverage, and the

[4] State Farm ignores the lack of factual record regarding the District Court's decision in its *Principal Brief*. *See SFPB*, at 48.

timing of such evaluations, assessments, and offers are the precise information at issue and are not information within the ken of the average juror. Mr. Hemmat's testimony is both "reliable" and "relevant," as required by *Daubert.* *See Opening Brief*, at 31-33. Jones did not endorse Mr. Hemmat to usurp the role of the jury in ultimately evaluating the propriety of State Farm's conduct. Instead, Jones endorsed Mr. Hemmat to educate the jury regarding this complex process and to testify regarding State Farm's specific conduct in this case, as set within the framework of typical claim processing, evaluation, and decision-making. *Id.* Such testimony is appropriate and helpful to the finder of fact. *Bankr. Estate of Morris*, 192 P.3d at 524 ("The aid of expert witnesses is often required to establish [insurance industry] standards.") (citing *Goodson*, 89 P.3d at 415).

Because the District Court's decision to strike Mr. Hemmat's testimony was devoid of any specific findings or discussion regarding the basis for the decision, this Court should reverse.

C. The District Court Erred in Calculating Jones' Recoverable Interest.

Finally, this Court should reverse the District Court's interest calculations because the District Court erred when it failed to include prejudgment interest in its final judgment. Prejudgment interest is recoverable for an insurer's failure to pay UIM benefits when due. *USAA v. Parker*, 200 P.3d 350, 359-60 (Colo. 2009). In its *Principal Brief*, State Farm argues that Jones confuses the issue of interest on

her judgment against the uninsured tortfeasors in the state court case with her judgment against State Farm. *SFPB*, at 49. State Farm is the confused party.

In its Policy, State Farm agreed to "pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of the uninsured motor vehicle. The bodily injury must be sustained by an insured and caused by the accident arising out of the operation, maintenance or use of an uninsured motor vehicle." *Aplt. App.*, at 383. On August 17, 2012, the state court found $74,651.78 in damages for Jones' bodily injury claim. *Id.* at 44. On October 24, 2012, the state court also awarded costs in the amount of $51,469.28. *Id.*, at 46. These amounts were due and payable by State Farm because Jones' judgment against the tortfeasors was uncollectible because the tortfeasors had no insurance. Still, State Farm withheld payments, delaying Jones' entitlement to benefits and wrongfully withholding them.

Even so, the District Court refused to find that State Farm wrongfully withheld benefits and therefore refused to impose moratory interest under § 5-12-102(1)(a). In the face of this error, State Farm merely responds with the *ipse dixit* that its position that it did not owe any coverage to Jones was "justifiable" under the factual circumstances. *SFPB*, at 50. Ironically, State Farm's position confirms that there was a question of fact that justifies denial of summary judgment and a determination by the jury as to whether State Farm's position was "justifiable." To

the point, however, the District Court's refusal to apply the wrongful withholding interest rate was error, meriting reversal.

III. CONCLUSION.

On State Farm's cross-appeal, this Court should decline to review the District Court's denial of State Farm's summary judgment motion because denials of summary judgment generally are not reviewable. Even if the Court considers the District Court's denial of State Farm's summary judgment motion, this Court should affirm because the District Court correctly construed C.R.S. § 13-80-107.5(1)(a), because there were factual disputes as to accrual under the statute, and because there were genuine issues of material fact on the question of equitable tolling that rendered summary judgment inappropriate. Additionally, this Court should conclude that the District Court did not abuse its discretion when it allowed Jones to amend her complaint to assert her bad faith claims against State Farm.

On Jones' appeal, this Court should reverse the district court's entry of summary judgment in State Farm's favor on her bad faith claims. This Court also should reverse the District Court's ruling precluding Jones' expert from testifying. Finally, this Court should reverse and remand for a correct calculation of prejudgment interest. Once the Court remands the case for trial on Jones' bad faith claims, the Court should reinstate the jury and conclude that the District Court erred in concluding that either party waived their right to a jury.

IV. CERTIFICATION OF COMPLIANCE.

The undersigned hereby certifies that this brief complies with the word count page limitations set forth in Fed. R. App. P. 32(a)(7)(B) because it does not contain more than 14,000 words as determined by the word or line count of the word-processing system used to prepare the brief.

Respectfully submitted this 28th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this **RESPONSE/REPLY BRIEF OF APPELLANT GLADYS JONES** was served on September 28, 2015 via CM/ECF addressed to:

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(*See* Fed. R. App. P. 25(b))

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