COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202 Appeal from District Court, County of Jefferson The Honorable Lily W. Oeffler Case No. 2008CV1754 **Appellant:** GEROL K. FIELDS **Appellee:** STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation Attorneys for Appellee State Farm Mutual Automobile Insurance Company: Michael S. McCarthy, #6688 Marie E. Williams, #32273 Sarah L. Geiger, #40377 FAEGRE BAKER DANIELS LLP 1700 Lincoln Street, Suite 3200 Denver, Colorado 80203-4532 Telephone: (303) 607-3500 Facsimile: (303) 607-3600 E-mail: michael.mccarthy@FaegreBD.com marie.williams@FaegreBD.com sarah.geiger@FaegreBD.com	▲ **COURT USE ONLY** ▲ Case No. 2012CA603
ANSWER 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 8,529 words.

The brief complies with C.A.R. 28(k). It contains, under a separate heading, a statement of whether Appellee agrees with the Appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Marie E. Williams
Marie E. Williams

Attorney for Appellee State Farm Mutual Automobile Insurance Company

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II. STATEMENT OF THE CASE

A. Nature of the Case

Fields' claims are based on actions allegedly taken by State Farm in 1996. (*See* Complaint, ID#19657844, R. 4-5; Amended Complaint, ID#34650143, R. 326-27; Second Amended Complaint, ID#38681138, R. 468-69.) The district court properly concluded that all of Fields' claims – first filed 12 years later, in 2008 – were time-barred, and entered summary judgment in favor of State Farm. (*See* Order, ID#42446800, R. 1270-79.) Fields now appeals that decision. (*See* Notice of Appeal, ID#43310227.)

This case initially arose out of a series of decisions relating to the Colorado Automobile Accident Reparations Act, Colorado Revised Statutes § 10-4-701, *et seq.* ("CAARA" or the "No-Fault Act"). Before its repeal in 2003, the No-Fault Act required automobile insurers to include a basic level of personal injury protection ("PIP") coverage in all policies sold in Colorado. C.R.S. § 10-4-706(1)(a)-(e) (2002). State Farm's so-called "P1" level of PIP benefits provided this statutorily-mandated minimum coverage. *Clark v. State Farm Mut. Auto. Ins. Co.*, 433 F.3d 703, 706 (10th Cir. 2005). In addition to the basic PIP benefits, the No-Fault Act also required insurers to offer optional enhanced PIP benefits in exchange for higher premiums. C.R.S. § 10-4-710(2)(a) (2002).

On July 3, 1996, Fields was struck by an automobile driven by Karen Eiffert as he ran across Interstate 25 at night. (Ex. 23 to Response to Motion for SJ, ID#41584567, R. 990-91.) He received the basic "P1" level of PIP benefits under Eiffert's State Farm insurance policy and by 1997, had exhausted all benefits under that policy. (Ex. C to Response to Motion to Amend Complaint, ID#34950666, R. 354-55.) Fields was 40 years old at the time of the accident and lived in his parents' basement. (Ex. B-1 to Motion for SJ, ID#41330740, R. 815.) His parents also had purchased a State Farm automobile insurance policy and, due to his living situation, Fields qualified for benefits as a "resident relative" under his parents' policy. (Ex. A-2 to Motion for SJ, ID#41330740, R. 773-74.) That policy contained a higher level of PIP coverage, known as "P3" coverage, that included an additional $50,000 in medical benefits. (*Id.* at R. 776.)

When he first filed this case, Fields made claims against State Farm based on two legal theories: (1) that State Farm failed to offer extended PIP coverage to the relevant policyholders in compliance with § 10-4-710 when it sold both Eiffert's Policy and his Parents' Policy; and (2) that, contrary to the policy terms and the No-Fault Act, State Farm failed to pay Fields the P3 level of PIP benefits under his Parents' Policy. (Complaint, ID#19657844, R. 7-10.) Shortly before trial, Fields decided to withdraw all claims based on the first theory, while trying to

avoid bifurcation of the case into equitable and legal claims. (Response to Motion to Bifurcate, ID#41728412, R. 1063.) Thus, at the time the trial court granted summary judgment to State Farm, Fields' only claims arose out of State Farm's failure to pay him the P3 level of PIP benefits.

Importantly, Fields was represented by attorneys in 1996 and 1997 who inquired about benefits from State Farm under both Eiffert's Policy and Fields' Parents' Policy. (Ex. A-5 to Motion for SJ, ID#41330740, R. 801-03.) He nevertheless chose to wait until 2008 to bring his claims against State Farm.[1]

Aware of the staleness of his claims, Fields tried to resist the statute of limitations' effect in the district court with a variety of theories, including: (1) that State Farm's alleged misconduct should equitably toll the statute; (2) that State Farm impliedly waived its right to assert the statute of limitations defense; and (3) that State Farm's allegedly continuing bad faith extended the statute of limitations. The undisputed facts, however, reveal no good reason why Fields waited 11 years after his claims accrued to file this case. Accordingly, the district court correctly held that all of Fields' claims are time-barred and its decision should be affirmed.

[1] After Fields filed this lawsuit in 2008, State Farm realized its inadvertent error in not paying Fields the P3 level of PIP benefits under his Parents' Policy. It then made a decision to pay certain additional medical benefits on Fields' behalf, up to the P3 limits.

B. Course of Proceedings and Disposition Below

Fields filed his initial Complaint on May 1, 2008. His claims for breach of contract, insurance bad faith, and declaratory relief were based on State Farm's alleged actions 12 years earlier, in 1996. (Complaint, ID#19657844, R. 3.) State Farm timely removed the case to federal court and filed a motion to dismiss the complaint, arguing that Fields' claims were time-barred. (Notice of Removal, ID#20031246, R. 15 & Response to Motion to Amend Complaint, ID#34950666, R. 339.) The federal court, however, remanded the case to the district court on September 16, 2008. (Letter of Remand, ID#22571353, R. 23.) Fields did nothing to pursue his case until two years later when on December 1, 2010, he filed a Motion to Amend the Complaint. (Motion to Amend Complaint, ID#34650143, R. 321.) State Farm opposed that motion, arguing that the amendment would be futile because Fields' claims were barred by the statute of limitations. (Opposition, ID#34950666, R. 343-44.) The district court granted Fields' motion to amend and denied the motion to dismiss that State Farm had initially filed in federal court. (Order, ID#36210957, R. 383.)

After proceeding through discovery, the parties filed cross-motions for summary judgment on December 9, 2011, with State Farm again arguing that all of Fields' claims were time-barred. For his part, Fields argued that a letter from State

Farm in 2008 extending an additional $50,000 in benefits to him under certain conditions revived all of his claims against State Farm. (Motion for SJ, ID#41330740, R. 708-11 & Fields' Motion for Summary Judgment, ID#41328854, R. 591.)

On February 10, 2012, the district court granted State Farm's Motion for Summary Judgment. The court first considered when Fields "knew or should have known" of his claims. (Order, ID#42446800, R. 1272.) Relying on precedent from this Court, the district court noted that plaintiffs like Fields "are required to exercise reasonable diligence in discovering the relevant circumstances of their claims and should not be rewarded for 'denial or self-induced ignorance.'" (*Id.* at R. 1273 (citing *Crosby v. American Family Mut. Ins. Co.*, 251 P.3d 1279 (Colo. App. 2010) and *Murry v. GuideOne Specialty Ins. Co.*, 194 P.3d 489 (Colo. App. 2008)). The trial court found that the facts of the Murry case mirror the facts of Fields' case. (Order, ID#42446800, R. 1273-74.) "[B]oth plaintiffs were pedestrians who sustained significant injuries after being struck by a vehicle in the mid 1990s, and both plaintiffs initially retained counsel shortly after the incident." (*Id.* at 1274.) After examining letters of representation sent by Fields' attorneys in 1996 and 1997 to State Farm, and considering the fact that one of those attorneys filed a lawsuit on Fields' behalf in 1997 against the driver of the car that struck

him, the trial court rejected Fields' self-serving assertion that he did not remember hiring attorneys shortly after his accident. (*Id.*) Particularly important here, the trial court noted that a "February 4, 1997 letter specifically asks for benefits pursuant to Plaintiff's parents' policy, clearly indicating that the attorneys were aware of this policy in 1997." (*Id.*) The only reason provided for Fields' late-filed lawsuit was that he hired new lawyers years later.

The trial court was also troubled by the necessary legal consequences of Fields' theory: "Under Plaintiff's theory, a statute of limitations may be tolled indefinitely if a new attorney discovers another claim to pursue. This simply violates the clear objective of statute of limitations to promote justice, avoid unnecessary delay, and prevent the litigation of stale claims." (*Id.* at 1275.) Thus, the trial court held that Fields knew or should have known of his claims in the instant litigation by as early as 1997, and no later than 1998. (*Id.*) His claims filed in 2008 thus are time-barred.

The trial court then went on to consider whether any of the many arguments advanced by Fields would obviate the effect of the statute of limitations. (*Id.* at 1275-78.) The court first concluded that equitable tolling does not save Fields' claims, noting that there was no action taken by State Farm that prevented Fields from bringing his claims earlier. (*Id.* at 1276-77.) "Nothing changed between

1997 and 2008 except that Plaintiff retained new attorneys who asserted the present claims." (*Id.* at 1276.) Thus, the court found equitable tolling to be inappropriate. (*Id.* at 1277.)

Nor did State Farm's decision in 2008 to pay additional PIP benefits to Fields waive the statute of limitations defense. On July 16, 2008, State Farm sent a letter to Fields' attorneys indicating that an additional $50,000 in PIP benefits should be available to Fields. (*Id.*) The trial court properly concluded that, although the applicable statute of limitations had run, "the letter in no way revives Plaintiff's other claims in the present lawsuit or bars the Defendant's statute of limitations defense." (*Id.* at 1277-78.)

Nor does the so-called "continuing violation" doctrine save Fields' claims. The trial court properly found that the continuing violation doctrine does not apply in the present case. (*Id.* at 1278 (citing *Harmon v. Fred S. James of Colorado, Inc.*, 899 P.2d 258, 262 (Colo. App. 1994)).) Again, the Court concluded that Fields' claims for alleged bad faith accrued when Fields knew or should have known that State Farm failed to provide him with P3 coverage under his parents' insurance policy (*Id.*) And again, the court found that this occurred in 1997. (*Id.*) Thus, Fields' claim for bad faith was untimely.

Finally, after holding that all of Fields' claims were untimely, the trial court noted that State Farm's 2008 letter "constitutes an acknowledgment of an obligation under the policy and a promise to fulfill this obligation." (*Id.* at 1279.) And so, although Fields' claims are all time-barred, he remains entitled "to any reasonable medical expenses that would fall under the policy." (*Id.*)

C. Statement of Facts

On July 3, 1996, as Fields ran across Interstate 25 on his way to a concert, he was struck by an automobile. (Ex. 3 to Fields' Motion for SJ, ID#41328854, R. 631.) The driver of the vehicle, Karen Eiffert, carried a State Farm automobile insurance policy that contained the P1 level of PIP benefits ("Eiffert Policy"), offering $100,000 in medical and rehabilitative benefits to a covered individual, as well as some additional benefits such as essential services. (Ex. A-1 to Motion for SJ, ID#41330740, R. 742.) After Fields applied for benefits under the Eiffert Policy in 1996, State Farm timely paid all available benefits under that policy. (Ex. C to Response to Motion to Amend Complaint, ID#34950666, R. 354-55.) Because Fields lived in his parents' basement at the time of his accident, however, he also qualified for benefits as a "resident relative" insured under his parents' State Farm automobile insurance policy. (Ex. A-1 to Motion for SJ, ID#41330740, R. 766 & 773.) That policy contained the P3 level of PIP benefits, offering an

additional $50,000 in medical benefits. (*Id.*) State Farm inadvertently did not realize that Fields also qualified for benefits under the Parents' Policy until after this lawsuit was filed in 2008.

By December 13, 1996, Fields' attorneys began communicating with State Farm regarding his insurance benefits. (Ex. B to Response to Motion to Amend Complaint, ID#34950666, R. 352; Motion for SJ, ID# 41330740, R. 710; Ex. A-5 to Motion for SJ, ID #41330740, R. 801-03.) In February of 1997, one of Fields' attorneys, David Mintz, sent a letter to State Farm inquiring about benefits available under Fields' Parents' Policy. (Ex. A-6 to Motion for SJ, ID #41330740, R. 803.) In that letter, Mr. Mintz referenced the policy number of the Parents' Policy and specifically requested uninsured motorist and liability benefits under that policy on Fields' behalf. (*Id.*) In addition, on or about February 19, 1997, Mr. Mintz, in association with another attorney, filed a lawsuit on Fields' behalf against Ms. Eiffert in Boulder County District Court arising from the 1996 accident. (Ex. B-2 to Motion for SJ, ID #41330740, R. 827-29.) Because Fields failed to establish Ms. Eiffert's liability in the accident, a prerequisite to the collection of any underinsured or liability benefits under the Parents' Policy, the lawsuit was apparently not prosecuted, the case was dismissed, and State Farm closed its claim under that policy. (Ex. 25 to Response to Motion for SJ,

ID#41584567, R. 995 & Ex. 14 to Fields' Motion for SJ, ID#41328854, R. 689.) State Farm, therefore, did not pay any PIP benefits under the Parents' Policy in 1997 nor did it believe Fields was entitled to any other benefits under that policy at that time. Fields testified under oath, however, that as early as 1997 ***he*** believed that he was entitled to additional benefits under his Parents' Policy. (Ex. B-1 to Motion for SJ, ID#41330740, R. 808; Ex. C to Response Opp. Motion in Limine, ID#42083478, R. 1226.)

At some point in 2006 or 2007, Fields retained his present counsel to pursue claims against State Farm based on the events that occurred in 1996 and 1997. (Ex. 27 to Response to Motion for SJ, ID#41584567, R. 997.) Contrary to Fields' representations in his Opening Brief, State Farm promptly responded to Fields' attorneys' requests for policy information in 2006 and in 2007. (Ex. E to Reply in Support of Motion for SJ, ID#41773848, R. 1109-10; *but see* Opening Brief at 31.) This lawsuit subsequently was filed in May 2008.

In July of 2008, in the process of reviewing Fields' claim file, State Farm discovered that he had lived with his parents at the time of the accident and was therefore covered under his Parents' Policy at the time of his accident. (Ex. 11 to Fields' Motion for SJ, ID#41328854, R. 652-53.) State Farm immediately informed counsel for Fields of this discovery and extended to Fields the difference

between the P1 level of PIP benefits it had already paid by 1997 and the higher P3 level of benefits available under his Parents' Policy. (*Id.*) In the July 2008 letter to Fields explaining its decision, however, State Farm made it very clear that there were only a handful of additional outstanding bills in its file and it believed that Medicaid had a lien on any additional benefits available under the policy. (*Id.*)

Fields initially refused to submit any documentation that would allow State Farm to pay additional medical expenses on his behalf. When he finally provided certain bills on February 15, 2011, State Farm promptly paid the bills that it could determine were reasonable, necessary, and accident-related. (Ex. 7 to Response to Motion for SJ, ID#41584567, R. 906 & Ex. H to Reply in Supp. of Motion for SJ, ID 41773848, R. 1118-20.) State Farm also informed Fields that it required additional information before making any further payments on his behalf. (Ex. 12 to Fields' Motion for SJ, ID#41328854, R. 654.) No further information has been provided.

III. SUMMARY OF THE ARGUMENT

The relevant facts are straightforward and undisputed. Fields was injured in a car accident in 1996. He was represented by counsel as early as December 1996. Nevertheless, Fields waited over 11 years to bring suit against State Farm. In the face of claims that are clearly time-barred, Fields has advanced numerous

arguments that lack merit. The trial court properly concluded that Fields knew the requisite facts to bring his claims in 1997.

Nor is there any basis, as a matter of law, to afford Fields the benefits of equitable tolling of the statute of limitations. The district court properly concluded, and the undisputed facts demonstrate, that "[n]othing changed between 1997 and 2008 except that Plaintiff retained new attorneys who asserted the present claims." (Order, ID#42446800, R. 1276.)

Nor did State Farm's July 2008 letter waive the statute of limitations defense. The undisputed facts demonstrate that none of State Farm's correspondence indicated an intentional relinquishment of the defense. Indeed, State Farm was simultaneously continuing to pursue a statute of limitations defense in this litigation. Thus, the district court properly concluded that the applicable statute of limitations had run, and "the [July 2008] letter in no way revives Plaintiff's other claims in the present lawsuit or bars the Defendant's statute of limitations defense." (*Id.* at 1277-78.)

Finally, Colorado law does not recognize the continuing violation doctrine to extend or revive the statute of limitations on insurance bad faith claims. Fields' contentions, therefore, that State Farm continued its bad faith that began in 1997 cannot revive his claims now. In addition, because Fields waived any argument

that State Farm's conduct in 2008 or 2011 were discrete acts of bad faith giving rise to additional claims, he may not assert this argument on appeal. The district court correctly held that all of Fields' claims are time-barred, and its February 10, 2012 Order should be affirmed.

IV. ARGUMENT

A. Standard of Review and Preservation of Issues for Appeal

State Farm agrees that this Court's review of the summary judgment order is *de novo*. (Opening Brief ("Opening Br.") at 14.) *De novo* review is proper "because all summary judgments are rulings of law in the sense that they do not rest on the resolution of disputed facts." *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 58 (Colo. 2003).[2] With respect to statute of limitations arguments, "if undisputed facts demonstrate that the plaintiff had the requisite information as of a particular date, then the issue of whether the statute of limitations bars a particular claim may be decided as a matter of law." *Trigg v. State Farm Mut. Auto. Ins. Co.*,

[2] Note that courts in Colorado have not specified the standard of review in cases involving a district court's ruling on the applicability of equitable tolling, but there is authority in the Tenth Circuit that even on appeal from summary judgment, an abuse of discretion standard is the appropriate standard in cases involving equitable tolling. *See Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004). ("[w]e review the district court's refusal to apply equitable tolling for an abuse of discretion.") As the discussion below demonstrates, the district court did not abuse its discretion in refusing to apply equitable tolling to Fields' claims.

129 P.3d 1099, 1101 (Colo. App. 2005). And "[o]nce the statute of limitations has been raised as a defense, the burden is upon the plaintiff to establish the defendant's actions prevented him or her from filing a timely claim." *Olsen v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007).

With one exception, State Farm agrees that Fields has preserved the issues he raises on appeal. As discussed more specifically below, Fields raises a new argument on appeal regarding his ability to bring claims against State Farm for its actions in 2008.

B. The district court properly concluded that all of Fields' claims are time-barred.

As the trial court recognized, Colorado law is clear that claims arising under the No-Fault Act, as all of Fields' claims do, are governed by a three-year statute of limitations. *Crosby*, 251 P.3d at 1285 (citing C.R.S. § 13-80-101(1)(j)); *Murry*, 194 P.3d at 492; *Wagner v. Grange Ins. Ass'n.*, 166 P.3d 304, 307 (Colo. App. 2007). "The pivotal issue in these cases is the time at which the plaintiff's claim accrued." *Crosby*, 251 P.3d at 1285. At least three different divisions of this Court have considered this pivotal issue and concluded – as a matter of law – that any one of three different dates is independently sufficient to establish the accrual of claims such as those brought by Fields:

> (1) The date when the insurance company notifies the claimant that only basic PIP benefits are available under the policy;
>
> (2) The date when the payment of basic PIP benefits ended; or
>
> (3) The date when the claimant is represented by counsel and there exists precedent for seeking policy reformation based on the failure to offer extended PIP benefits.

See Jackson v. American Family Mut. Ins. Co., 258 P.3d 328, 332-33 (Colo. App. 2011); *Crosby*, 251 P.3d at 1285-86; *Murry*, 194 P.3d at 493-94.1 "[A]ny of these dates was sufficient to give the plaintiff notice of facts essential to her claim and that she should have inquired into the matter further." *Crosby*, 251 P.3d at 1285 (citing *Murry*, 194 P.3d at 493).

"Plaintiffs are required to exercise reasonable diligence in discovering the relevant circumstances of their claims." *Crosby*, 251 P.3d at 1285 (citing § 13-8-108(8)); *Murry*, 194 P.3d at 492. "They are judged on an objective standard that does not reward denial or self-induced ignorance." *Id.* (citing *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 900 (Colo. App. 2003)). Especially where, as here, Fields was represented by attorneys – who are presumed to know the law – he cannot claim ignorance of facts essential to the cause of action. *See Murry*, 194 P.3d at 494 ("An attorney is presumed to know the law, and an attorney's knowledge is imputed to the client if it relates to the proceedings for which the attorney has been employed.").

The undisputed facts demonstrate the following. Fields admits receiving letters from State Farm on or about June 3, 1997 and July 18, 1997. (*See* Ex. B-1 to Motion for SJ, ID#41330740 at 75:6-25, R. 810 & 77:10-78:3, R. 812-13.) Those letters explained that Fields had exhausted his PIP coverage, and would receive no further benefits: "Please be advised that your medical and rehabilitation benefits have been exhausted." "We are paying the [essential services] claim from June 2, 1997 through July 3, 1997, as this will be your last essential service claim as this benefit will be expired." (Ex. A to Motion for SJ, ID#41330740, R. 799.) And in fact, Fields received no further PIP benefits before commencing this case some 11 years later. (*See* Ex. A to Motion for SJ, ID#41330740 at ¶ 11, R. 721.)

No later than July 18, 1997, then, Fields knew that he would receive no further PIP benefits from State Farm relating to the July 3, 1996 accident. Under the law articulated by this Court, that alone was sufficient to give Fields "notice of facts essential to [his] claims and that [he] should have inquired into the matter further." *Crosby*, 251 P.3d at 1285. In fact, Fields did inquire further. He testified under oath that, in 1997, he believed that he was entitled to additional PIP benefits under both the Eiffert Policy and the Parents' Policy. (*See* Ex. B-1 to Motion for SJ, ID#41330740 at 106:18-107:15, R. 821-22 & 126:1-127:1, R. 823-24.) Fields testified that he made phone calls to State Farm seeking those additional PIP

benefits. (*Id.*) At that time, Fields knew all of the facts necessary to commence a case such as the instant one, seeking to recover additional PIP benefits.

Fields also was represented by counsel at the time. Two attorneys wrote to State Farm in 1996 and 1997, advising that they jointly represented Fields and requesting certain insurance benefits on his behalf under the Parents' Policy. (*See* Exs. A-5 & A-6 to Motion for SJ, ID#41330740, R. 801-03.) Specifically, through his attorneys, Fields presented a claim for underinsured motorist benefits under his Parents' Policy. (*See* Ex. A to Motion for SJ, ID#41330740 at ¶ 12, R. 721.) State Farm adjusted Fields' claim for underinsured motorist benefits and, finding that the prerequisites for such coverage did not exist (because Eiffert was not at fault), closed that claim and made no payments under the Parents' Policy in 1997. (*See id.*) Thus, both Fields and his attorneys knew or should have known all facts required to bring the instant action by July 1997.

This is precisely the situation that statutes of limitation are intended to prevent. "We interpret a statute of limitations consistently with its purpose of promoting justice, avoiding unnecessary delay, and preventing the litigation of stale claims." *Crosby*, 251 P.3d at 1283. Fields knew or should have known of the availability of P3 coverage under his Parents' Policy, and that State Farm was not going to extend the P3 level of benefits to him, no later than July 1997. Because

Fields did not file such a case, however, before the three-year limitations period expired in July 2000, the trial court properly concluded that all of his claims are time-barred. (Order, ID#42446800, R. 1275.)

C. The district court properly held that Fields was not entitled to equitable tolling of the statute of limitations.

Fields argues that State Farm's alleged failure to provide him with a fact sheet explaining the PIP benefits under his parents' policy in 1997 should indefinitely toll the statute of limitations or toll it "at least until State Farm finally acknowledged the existence of the P3 benefits in 2008." (Opening Br. at 19.) At bottom, Fields argues that he has an indefinite period of time within which to bring claims against State Farm. (*Id.* at 15-16.) The doctrine of equitable tolling does not support this theory and the district court correctly rejected it.

Equitable tolling is not favored in Colorado and only applies in one of two situations: (1) "the defendant's wrongful conduct prevented plaintiff from asserting the claim in a timely manner; or (2) extraordinary circumstances prevented the plaintiff from filing the claim within the statutory period." *See, e.g., Ferrel v. Colo. Dep't of Corr.*, 179 P.3d 178, 188 (Colo. App. 2007); *Gognat v. Ellsworth*, 224 P.3d 1039, 1048 (Colo. App. 2009). The Colorado Supreme Court has added that in order for the latter basis to apply, the plaintiff must have "ma[d]e a good faith effort[] to pursue the claims" against the defendant within the statutory

period. *Dean Witter Reynolds, Inc. v. Hartman,* 911 P.2d 1094, 1097 (Colo. 1996). Generally, in order to establish an entitlement to equitable tolling or estoppel, a plaintiff "must be ignorant of the relevant facts; and rely on the other party's conduct to his or her detriment." *Olsen*, 174 P.3d at 858.

The undisputed facts in this case reveal that: (1) Fields was represented by attorneys in 1997 (Exs. A-5 and A-6 to Motion for SJ, ID#41330740, R. 801-03); (2) he believed he was entitled to additional insurance benefits sometime in 1997 (Ex. B-1 to Motion for SJ, ID#41330740, R. 816-17.); and (3) he believed that State Farm wrongfully withheld those benefits at that time. (*Id.* at R. 817-18 & 822-23.) Thus, Fields presented no evidence that State Farm took any action that prevented him from bringing his claims in a timely manner. And although Fields had the requisite facts to bring a claim in 1997, he made ***no*** effort to pursue his claims until 2008. *But see Olsen*, 174 P.3d at 854 (statute of limitations "require[s] [a] plaintiff [to] use due diligence to find out the relevant circumstances or events. . . [t]his requirement . . . 'does not reward denial or self-induced ignorance.'") The trial court thus properly concluded that equitable tolling does not apply here.

The trial court astutely recognized that "Nothing changed between 1997 and 2008 except that Plaintiff retained new attorneys who asserted the present claims." (Order, ID#42446800, R. 1276.) That is insufficient to warrant application of

equitable tolling. Rather, the common denominator in all Colorado cases applying equitable tolling is that the defendant prevented the plaintiff from successfully filing his or her claims within the statutory period.

For example, in a case cited by Fields, *Garrett v. Arrowhead Improvement Ass'n.*, the plaintiff's insurer and employer failed to provide the plaintiff with a medical report indicating that his workers compensation injury had worsened. 826 P.2d 850, 852 (Colo. 1992). That report "play[ed] a crucial role in supporting" the claimant's claim, without which, the claimant could not successfully reopen the claim at issue. *Id.* at 853. In *Garrett*, the Court remanded the case for the administrative court to determine if, despite the fact that the insurer failed to provide the medical report in a timely manner, the plaintiff had enough knowledge of his worsened condition in order to bring a claim within the statutory period. *Id.* at 855. It was not, therefore, the insurer's violation of its statutory duty that was determinative, but whether or not that violation prevented the claimant from having access to essential information to bring his claim within the statutory period. *See also Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720, 724 (Colo. 1976) (creditor's failure to reveal true interest rate was an "act[] or omission[] [that] contribute[d] to the running of [the] statute of limitations"); *Shell Western E & P, Inc. v. Dolores County Bd. of Comm'rs*, 948 P.2d 1002, 1007

(Colo. App. 1997) ("Where a defendant's wrongful actions have been the cause of a plaintiff's failure to institute a timely action, the defendant may be estopped from relying upon the resulting delay as a defense to the plaintiff's claim.").

Fields derives the only support for his novel argument that he is entitled to equitable tolling from an unpublished decision from this Court. The Court held in that case that it could not decide on the record before it when State Farm breached the insurance contract at issue. *Civale v. State Farm*, No. 02CA2331, slip op. at 4 & 7-8, R. 962 & 965-66; Opening Brief at 15. Unlike the record in that case, the undisputed facts here reveal that State Farm's alleged breach of any duty or of the relevant insurance contract occurred—at the latest—in 1997 when it inadvertently failed to pay Fields additional PIP benefits under his Parents' Policy. Thus, neither *Civale* nor the well-established law regarding equitable tolling suggests that Fields is entitled to that tolling here.

Indeed, contrary to Fields' representations, *Olsen v. State Farm Mutual Automobile Insurance Co.* is on point. 174 P.3d at 854. In *Olsen*, the insured argued that due to the insurer's misconduct, including the insurer's failure to "advise the insured of the maximum benefits available or the procedures to be followed to obtain those benefits," that he was entitled to equitable tolling of the statute until he consulted an attorney and learned of the insurance company's

misconduct. *Id.* The court swiftly rejected this theory, noting that such a theory could lead to an indefinite tolling of the statute, inconsistent with a plaintiff's duty to exercise due diligence in order to discover the relevant facts to bring timely claims. *Id.* at 855. Further, the court stated that by sending a communication to the insured offering to resolve a UM claim, State Farm made "an unequivocal statement" that there would be no more payments to the insured unless the insured contacted the insurer for further discussion. *Id.* at 859. Fields acknowledges numerous times that State Farm made similar "unequivocal statements" that he would not be receiving additional benefits in 1997. (Opening Br. at 6-7; Response to Motion for SJ, ID#41584567, R. 873 & 879.) Such statements were all that was required to trigger Fields' claims here. State Farm's alleged failure to provide him with a PIP fact sheet in 1997, relating to a policy he was well aware of at that time, did not affect his ability to bring timely claims against State Farm in 1997; State Farm did nothing to "string Mr. Fields along." *Olsen*, 174 P.3d at 859.[3] In fact, Fields managed to bring the present case in 2008 without having received that fact

[3] Fields argues that he was "prejudiced" by State Farm's failure to provide him with the fact sheet because he could not obtain additional benefits. (Opening Br. at 16, 18-19.) It is only the prejudice to a plaintiff that affects an ability to bring suit that is relevant, however, in any consideration of equitable tolling under the law. *See, e.g., Olsen*, 174 P.3d 858 (stating that to withstand summary judgment, "plaintiff must assert facts sufficient to establish that the defendant's actions prevented the filing of a timely claim").

sheet. The district court thus correctly held that Fields is not entitled to equitable tolling and his claims are time-barred.

D. The district court properly held that State Farm did not intentionally waive its statute of limitations defense.

Waiver is an intentional relinquishment of a known right; it requires the unequivocal and decisive act of a party showing such purpose. *Venard v. Dep't of Corrs.*, 72 P.3d 446, 450 (Colo. App. 2003). Fields argues that in its July 2008 letter, State Farm impliedly waived its statute of limitations defense in this case. (Opening Br. at 23.) Conduct forming the basis of an implied waiver, however, must be "free from ambiguity and clearly manifest the intention not to assert the benefit." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984); *Venard*, 72 P.3d at 450. State Farm did nothing "to clearly manifest an intent" to waive its statute of limitations defense in this case. On the contrary, State Farm sent numerous communications to Fields indicating its full intent to rely on a statute of limitations defense before and after Fields filed his Complaint. In January of 2008, State Farm informed Fields that any claims against State Farm would be time-barred. (Ex. 10 to Fields' Motion for SJ, ID#41328854, R. 650-51.) After Fields filed his Complaint, State Farm reiterated its position in its Motion to Dismiss and subsequent Opposition to Plaintiffs' Motion to Amend his Complaint. (SF Motions, R.78 & ID#34950666, R. 338.)

In July of 2008, State Farm, in the course of reviewing its files following the commencement of this lawsuit, discovered that Fields lived with his parents at the time of his accident and therefore would have been entitled to additional PIP benefits representing the difference between the P1 level of PIP benefits he received under the Eiffert Policy and the P3 level of benefits in his Parents' Policy. (Ex. 11 to Fields' Motion for SJ, ID#41328854, R. 652-53.) Upon this discovery, State Farm sent a letter to Fields informing him, "there remains an additional $50,000 available to pay for additional medical expenses incurred by Mr. Fields." (*Id.*) That letter made the following additional relevant assertions:

1. State Farm's standard claims-handling practice is to pay the oldest medical bills first;
2. State Farm's file only contained a bill from Denver General and a "handful of smaller charges";
3. State Farm "believe[d] that Medicaid has a subrogation right against the additional benefits now available."

(*Id.*)

State Farm made no "unconditional written acknowledgment" or "promise to pay" a specified amount of money or any other sums. State Farm made a straightforward extension of an additional $50,000 in insurance benefits available to pay for incurred medical expenses. The letter cannot, as a matter of law, be interpreted as a waiver of any of State Farm's defenses.

Fields also argues that a March 2011 letter from State Farm, and payments made to providers or to himself for previously-incurred covered medical expenses, waived State Farm's statute of limitations defense. (Opening Br. at 23-24.) Rather than promise any additional amounts to Fields, however, the March letter reflects State Farm's need to evaluate recently-submitted documentation and includes State Farm's request for signed medical releases from Fields in order to facilitate the receipt of additional information. (Ex. 7 to Response to Motion for SJ, ID#41584567, R. 906.) The payments made in March 2011 were only for those specific medical bills that State Farm referenced in its letter. Neither the letter nor the payments "clearly manifested" any intent to forego the statute of limitations defense on Fields' claims in the litigation.

In a similar scenario, this Court has held that the obligors' acknowledgement of a debt owed on a promissory note did not constitute a waiver of their statute of limitations defense against other enforcement rights of a creditor bank. *Cooper v. First Interstate Bank of Denver, N.A.*, 756 P.2d 1017, 1018-1019 (Colo. App. 1988). In *Cooper*, borrowers defaulted on a note secured by stock. *Id.* They wrote the bank acknowledging the default and waived any claim related to bank's ability to foreclose on the stock. *Id.* The bank filed a claim against the borrowers for a deficiency judgment on the note, which the trial court held was barred by the

statute of limitations. *Id.* On appeal, this Court held that the borrower's letter was not an implied waiver of the statute because "the letter discusse[d] only the disposition of [the] collateral and not all remedies available under the note." *Id.*

Similarly, in *Trigg v. State Farm*, the plaintiff tried to rely on a letter sent by a claims specialist after the case had been filed, which letter expressly waived a notice provision in the policy at issue, to further argue that the insurer also waived its statute of limitations defense. 129 P.3d at 1102. In affirming the trial court's order in favor of the insurer, the court stated, "there is nothing in the letter that can possibly be construed as a waiver by the insurer of the statute of limitations." *Id.* Differentiating between policy defenses associated with claims handling and affirmative defenses used in litigation, the court suggested that an insurer could not waive affirmative defenses by communicating with the insured regarding the insurance policy. *Id.*; *see also Moreno v. American Standard Ins. Co. of Wisconsin*, Civil Action No. 07-cv-01904, 2009 WL 112537, at *3 (D. Colo. Jan. 15, 2009) (holding that letter from insurer to insured offering to reform insurance policy did not affect the statute of limitations). Similarly here, State Farm makes no mention of the statute of limitations or Fields' claims in this case in any of the communications discussed above and therefore these communications cannot, as a matter of law, constitute a waiver of State Farm's statute of limitations defense.

See Dawdy v. Dykhouse, No. 250876, 2005 WL 119823, at *1-2 (Mich. App. Jan. 20, 2005) (discussing an insurer's payment of an insured's medical bills after the statute of limitations expired and holding that the payment did not act as a waiver of the underlying personal injury suit, but only as to that one payment).

Fields also argues that the district court erred because the issue of waiver may not be resolved on summary judgment. (Opening Br. at 25.) The case law is clear, however, that "[t]he determination of whether [a] waiver has occurred is a question of law if the material facts are not in dispute." *Church Mut. Ins. Co. v. Klein*, 940 P.2d 1001, 1003 (Colo. App. 1996); *Trigg*, 129 P.3d at 1102 (finding no waiver of statute of limitations for insurer as a matter of law). Because the undisputed facts illustrate that State Farm did not waive its statute of limitations defense, this Court should affirm the district court's ruling.

E. The district court properly concluded that neither State Farm's July 2008 letter nor its payments of previously-incurred medical expenses revived Fields' claims.

The district court correctly held that State Farm's communications in 2008, its isolated payments of specific medical bills between 2008 and 2011, and its satisfaction of potential Medicaid liens did not revive Fields' time-barred claims in this case.

The district court's Order captured the purpose behind the July 2008 letter: "[a]lthough true that ***State Farm did not agree to pay any additional amounts***, the 2008 letter explicitly acknowledges the availability of ***$50,000 remaining in potential benefits under the insurance policy."*** (Order (emphasis added), ID#42446800, R. 1277.) The letter made no representations regarding paying anything and simply confirmed the availability of $50,000 in additional PIP medical benefits insurance coverage. Neither the letter nor any subsequent benefit payments, therefore, were "an unqualified acknowledgement of a debt" sufficient to revive all of Fields' claims.

None of the cases on which Fields relies are relevant to this situation. The *Drake* and *Rossi* cases to which Fields cites discuss promissory notes, which of course memorialize a debt for a specific sum. (Opening Br. at 26.) The instant case involves insurance benefits. Unlike obligors under promissory notes and other security instruments, insurance contracts require an insurer to determine the type and amount of benefits payable through presentation of a claim and a related claims investigation. State Farm could not have acknowledged a debt when it had not yet determined how much, if any, was owed in additional PIP benefits for Fields' medical bills. *See, e.g., Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43, 48 (Colo. App. 1997) ("Since an insurer has no obligation to pay for non-

covered expenses, the insurer must be given a reasonable opportunity to determine whether the expense meets the criteria for payment"). State Farm's offer to extend potential benefits, therefore, was not an acknowledgment of any specific sum or debt sufficient to revive the statute of limitations on Fields' claims.

Further, under the partial payment doctrine, if the statute of limitations has already expired on a debt, as is the case here, partial payment alone does not restart the statute of limitations, but such payment must be accompanied by a "***clear and unequivocal***" intent to revive the debt. *Drake v. Tyner*, 914 P.2d 519, 522 (Colo. App. 1996). State Farm made no such clear and unequivocal statement sufficient to revive any of Fields' claims.

If the doctrine were at all applicable to insurance benefit payments, State Farm's payments could only be considered discrete, severable payments of the bills it received or payments of "multiple debts," rather than a partial payment on one larger debt. When "multiple debts" are involved, however, if the debtor does not "expressly recognize[] or acknowledge[] a particular debt . . . the law does not [] imply a promise on his or her part to pay the balance." *Id.* Therefore, only the specific debt to which the debtor directs payments can be revived. *See U.S. Fidelity & Guaranty Co. v. Krebs*, 190 So.2d 857, 861 (Miss. 1966) (stating rule in Mississippi that "in order for an acknowledgment to bar the statute of limitations it

was imperative to state when the balance was due, to whom the balance was due, and for what the balance was due"). State Farm paid every bill to which it directed payment, leaving no additional "debt" to be acknowledged.

Because State Farm's July 2008 letter did not specify a particular payment it owed and its subsequent payments were made for specific bills, neither its payments nor its communications revived the statute on any additional debt. *See, e.g.*, *In re Brill*, 318 B.R. 49, 53 (S.D.N.Y. Bankr. 2004) ("The creditor has by no means definitively proven that the part payment made in 1996 revived the limitation period because he has not shown that the payment was made under circumstances from which a promise to honor the entire obligation may be inferred."). Because State Farm's communications and isolated payments of specific bills were not "clear and unequivocal acknowledgement[s] of a debt," the district court correctly held that neither State Farm's July 2008 letter nor its isolated payments revived any of Fields' claims.

Next, Fields argues that because the "attendant [tort and statutory] remedies for an insurer's refusal to pay PIP benefits [are] incorporated" into every No-Fault insurance policy, State Farm's alleged "partial payment" and acknowledgment of benefits should revive all of his tort and statutory claims. (Opening Br. at 28-30.) The mere fact that Fields would have been entitled to bring tort and statutory

claims had his claims been timely, however, does not expand the reach of the acknowledgment of debt and partial payment theories. At most, State Farm's July 2008 letter reflected only a "new promise" to pay certain incurred medical bills; under no circumstances could that letter or subsequent payments have revived Fields' attendant tort or statutory claims. *See, e.g., Flickinger v. Ninth District Prod. Credit Ass'n. of Wichita, Kansas*, 824 P.2d 19, 24 (Colo. App. 1991) (stating plaintiff's tort claim for bad faith "is not a claim arising under the pertinent policy").

Other jurisdictions applying the partial payment and acknowledgment of debt rules similarly emphasize that the theories have limited applicability and do not affect the statute of limitations on any related tort or statutory claims. *See, e.g., Renault v. Greer*, 448 So. 2d. 536, 537 (Fla. Dist. Ct. App. 1984) ("unlike claims in contract, a new promise does not extend the statute of limitations for actions grounded in tort."); *Luther & Morgan v. Payne*, 247 S.W. 39, 40 (Ky. Ct. App. 1923) ("acknowledgments, new promise, or part payment has been confined in its application to contracts express or implied for the payment of money and has not been extended to actions in *tort* or upon specialties which are required to be brought within a certain time"). Therefore, the district court properly held that

neither State Farm's 2008 letter nor any subsequent payment of specific medical bills revived all of Fields' claims.

F. The district court properly held that the continuing violation doctrine has no application in this case.

Fields argues that State Farm engaged in a "pattern of bad faith," beginning in 1996 or 1997 that extended the statute of limitations for his claims against State Farm until his lawyers finally sued State Farm in 2008, and that he should be able to bring claims against State Farm for allegedly committing bad faith after this Complaint was filed. (Opening Br. at 31-32.) Because Colorado rejects the continuing violation theory in the context of insurance bad faith claims, and because Fields has not preserved his argument regarding additional claims based exclusively on State Farm's alleged actions occurring in 2007 or 2008, the district court's ruling should be affirmed.

The district court properly applied well-established Colorado law when it held that the "continuing violation" theory could not revive the statute of limitations on Fields' claims. (Order, ID#42446800, R. 1278.) Fields argues in his Opening Brief, however, that State Farm "engaged in a pattern of bad faith conduct directed at Mr. Fields" and a "continuing course of bad faith" that should allow Fields to bring his stale claims against State Farm now. (Opening Br. at 31 & 33.) In *Harmon*, this Court explicitly held that the "existence of an ongoing relationship

between an insurer and an insured did not provide a basis for tolling" the statute of limitations. 899 P.2d at 261. Thus, Colorado law does not apply the continuing violation theory to the extension or revival of the statute of limitations on insurance bad faith claims. Fields acknowledges this on appeal yet still insists that his claims are timely because State Farm allegedly continued its bad faith in 2008. (*See* Opening Br. at 31.)

Nothing has changed since Fields filed his Response to State Farm's Motion for Summary Judgment and indeed, not since 1997. As Fields admits numerous times, State Farm told him in 1997 that his benefits were exhausted. (Ex. B-1 to Motion for SJ, ID#41330740, R. 808-09.) Fields was represented by attorneys in 1996 and 1997, and those attorneys had filed a lawsuit against Karen Eiffert on his behalf by February 19, 1997. Those attorneys also inquired about benefits under the very policy on which Fields is now suing. (Exs. A-5 & A-6 to Motion for SJ, ID#41330740, R. 801-03 & Ex. B-2, R. 827-29.) Any alleged bad faith claims based on either of the policies at issue in this case were thus time-barred long before State Farm's alleged refusal to provide those same benefits in 2008. Holding that State Farm's actions after Fields filed this Complaint vitiated the statute of limitations would have the same effect of allowing the continuing violation theory to revive his bad faith claims based on conduct occurring in 1997.

See, e.g., Geiger v. American Standard Ins. Co. of Wis., 192 P.3d 480, 485 (Colo. App. 2008) ("because a claim of bad faith breach of insurance contract encompasses an insurer's entire course of conduct, [plaintiffs] cannot maintain separate claims based on American Standard's denial of benefits and subsequent delayed payment of benefits.") The district court, therefore, properly held that State Farm's actions in 2008 did not revive Fields' claims.

In an effort to evade the dispositive consequences of the district court's summary judgment order, Fields changes course, arguing for the first time on appeal that he should be allowed to bring claims against State Farm for "actions taken . . . in and around 2007 through the present." (Opening Br. at 31.) In his Opposition to State Farm's Motion for Summary Judgment, however, Fields argued that State Farm continued its bad faith course of conduct "that began at the commencement of the claim and continues through the present day." (Fields' Motion for SJ, ID# 41584567, R. 883.) He went on to argue that "[the] facts show a ***continuing course of bad faith*** conduct by State Farm to wrongfully deprive Mr. Fields of the P3 benefits . . ." (*Id.* at 887.) At no point in the summary judgment briefing below did Fields argue that State Farm's actions in 2008 constituted new actions of bad faith for which the statute had not expired. Fields lost his opportunity to make this argument by failing to raise it below. *See, e.g., O'Connell*

v. Biomet, Inc., 250 P.3d 1278, 1282 (Colo. App. 2010) (stating that arguments not presented or ruled upon by the trial court may not be raised for the first time on appeal); *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1170 (Colo. App. 2010) (arguments may not be raised for the first time on appeal). Therefore, this argument was waived and may not serve as the basis for reversing the district court.

V. CONCLUSION

The trial court correctly ruled that, as a matter of law, Fields' claims accrued in July 1997. At that time, Fields knew that State Farm would not pay him additional PIP benefits, and he had attorneys representing him who had sought benefits on his behalf from State Farm under both policies at issue in this lawsuit. State Farm did nothing to prevent Fields from filing his claims on time, did not waive its statute of limitations defense to his claims, and cannot be subjected to the inapplicable theory of a continuing violation for its alleged bad faith. The district court's summary judgment order should be affirmed.

Respectfully submitted this 9th day of October, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2012, a true and correct copy of the foregoing **ANSWER BRIEF** was electronically filed and served via LexisNexis File & Serve on the following:

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A printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

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