Court of Appeals, State of Colorado Colorado State Judicial Building 101 West Colfax Avenue, Suite 800 Denver, CO 80202 Appeal from District Court, County of Jefferson Judge Lily W. Oeffler Case No. 2008CV1754	
Plaintiff-Appellant: GEROL K. FIELDS **Defendant-Appellee:** STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation	**▲COURT USE ONLY▲**
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APPELLANT'S AMENDED OPENING 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 7,961 words.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Equity will toll a statute of limitations if a party fails to disclose information it was legally required to reveal and the other party is prejudiced thereby. After the accident, Defendant-Appellee ("State Farm") was required to provide Plaintiff-Appellant ("Fields") with a disclosure of all No-Fault benefits available to him. State Farm did not do so; instead it affirmatively misled Fields by repeatedly telling him that he was only entitled to the basic No-Fault benefits. Fields was prejudiced by these misstatements because he relied on State Farm to inform him of what benefits he was entitled to receive—as it was required to do under the law. Because of this, Fields was prejudiced in many ways, including not receiving the benefits he is still owed. Did the trial court err in concluding that State Farm's failure to inform Fields of his benefits as required by law—and the resultant prejudice to Fields—did not equitably estop it from invoking the statute of limitations?

2. Waiver occurs when a party deliberately relinquishes a known right. A defense under the statute of limitations can be waived through implication by the actions of the defendant. Here, after expressly invoking the statute of limitations, and after this lawsuit was filed, State Farm acknowledged its obligations, promised to fulfill its obligations, and partially paid the No-Fault benefits due to Fields along

with interest due on those benefits back to 1997. Did the trial court err in ruling that State Farm had not waived its statute of limitations defense?

3. A promise to honor a stale contractual obligation restarts the statute of limitations even when the statute would bar enforcement of the contract absent the promise. After this lawsuit was filed, State Farm promised to fulfill its obligations that had been incurred more than ten years previously, and further promised to pay by actually paying a portion of the benefits and interest. Did the trial court err in dismissing all of Fields' claims as time barred, despite State Farm's promise to pay additional PIP benefits?

4. An insurer's post-litigation conduct can give rise to independent common law bad faith claims. State Farm has engaged in a pervasive pattern of misconduct towards Fields, much of it occurring after Fields filed this lawsuit. Did the trial court err in holding that State Farm's post-litigation bad faith conduct was non-actionable due to the statute of limitations?

II. STATEMENT OF THE CASE

This is an action under the No-Fault Act seeking benefits which were purchased from State Farm and the remedies that arise from State Farm's failure to disclose and provide those benefits. The action was commenced by Fields, who had been severely injured in 1996 as a pedestrian when he was struck by an

automobile. State Farm originally paid No-Fault benefits under the driver's policy, as it was the primary policy. But Fields also qualified as an injured insured under his parents' policy, and should have received additional No-Fault benefits purchased under that policy. Fields alleged that, in violation of the No-Fault Act and in breach of the contract of insurance, State Farm failed to inform him of his entitlement to (and to provide) the No-Fault benefits due to him under his parents' policy, despite its admitted awareness of the policy and the additional benefits it provided. Instead, State Farm only paid the available benefits under the driver's policy and then deceptively informed Fields beginning in 1997 that all No-Fault benefits available to him had been exhausted.

After State Farm refused in writing to honor any claim under the parents' policy in January 2008, Fields brought this action on May 1, 2008, asserting claims for breach of contract, violation of the No-Fault Act, breach of the duty of good faith and fair dealing, statutory willful and wanton breach of contract, and declaratory relief. Following the filing of the complaint, State Farm acknowledged in writing in July 2008 that benefits were owed to Fields under the parents' policy, and promised to pay those benefits, and then promptly returned to its previous course of conduct of failing and refusing to pay any benefits until March 2011, when it paid a portion of the benefits due and owing along with statutory interest.

After State Farm removed this case to federal court and it was remanded back to Jefferson County District Court on September 12, 2008, Fields twice was granted leave to amend his complaint. His second amended complaint was filed on July 13, 2011, and following discovery and cross motions for summary judgment filed on December 9, 2011, the trial court granted State Farm's motion for summary judgment and denied Fields' motion in part. In an Order dated February 10, 2012, the trial court held that all of Fields' claims were time barred because they accrued no later than 1998, and were "simply untimely." Following the trial court's ruling, Fields timely filed a notice of appeal with this Court.

III. STATEMENT OF MATERIAL FACTS

On July 3, 1996, Fields was attempting to cross a highway as a pedestrian when he was struck by a vehicle driven by State Farm insured Karen Eiffert. (*Traffic Accident Report, CD pp. 990-991*.) Pursuant to Colorado's former No-Fault Act, primary No-Fault (or "PIP") coverage for Fields was afforded by the driver's policy ("Eiffert policy"). State Farm opened a claim for Fields under the Eiffert policy and assigned it claim number 06-3741-262. (*State Farm's letter to Fields, CD pp. 970-973*.)

When the accident occurred, Fields was living in his parents' basement. Unbeknownst to him, his parents had also purchased an automobile insurance

policy from State Farm, and which was in effect at the time of Fields' accident on July 3, 1996 and provided coverage for Fields. (*Certified copy of Fields policy, CD pp. 913-946*.) Specifically, State Farm owed Fields, as a resident relative, excess coverage—called P3 coverage, which is a State Farm version of extended PIP benefits—if the basic PIP benefits of the Eiffert policy were exhausted. State Farm Claim Representative Ty Morris opened a claim for Fields under the parents' policy on February 27, 1997, and assigned it claim number 06-3781-302. (*Deposition transcript of Cindy Marshall at 78-79, CD p. 952*.)

As a resident relative, Fields did not have access to the same information about the policy as a named insured, nor did he have a direct contractual relationship with State Farm. State Farm never provided Fields with a copy of the policy or declarations page, and there is no evidence that Fields was ever aware of the additional PIP coverage provided by the parents' policy until after a certified copy of the policy was provided by State Farm in 2008 in connection with this litigation.

As part of its Eiffert policy claims processing and pursuant to the obligation imposed by COLO. REV. STAT. § 10-4-706(4)(b) to provide a written disclosure of available benefits, State Farm provided a letter and claim form to Fields on August 29, 1996, describing and soliciting a claim for PIP benefits. (*State Farm's letter to*

Fields, CD pp. 970-973.) State Farm never provided a similar letter or claim form to Fields for PIP benefits under the parents' policy. (*Deposition transcript of Cindy Marshall at 48: 21-25; 49: 11-13, CD pp. 950-951; Defendant's Response to Request for Admission No. 3, CD p. 993*.)

State Farm's claim file for the claim under the parents' policy contained a Coverage Information sheet dated February 28, 1997. The Coverage Information sheet listed the coverage in force under the parents' policy on July 3, 1996. This sheet showed that the parents' policy provided the additional P3 coverage—specifying that the P3 coverage provides an additional $50,000 in PIP medical coverage above the basic level of coverage, such as provided by the Eiffert policy. (*Coverage Information sheet, CD p. 947*.) This sheet was available to State Farm's adjustors, but was not provided to Fields. Thus, based on its claims file, in February 1997 State Farm knew that the parents' policy provided an additional $50,000 in PIP medical coverage and a zero deductible, but did not provide that information to Fields.

Fields' accident-related injuries were severe, and he quickly used up all of the medical coverage benefits available under the Eiffert policy. Yet despite knowing that the parents' policy entitled Fields to an additional $50,000 in medical coverage, State Farm began to send letters in June 1997 to Fields and his medical

providers advising that all PIP medical and rehabilitation benefits were exhausted. (*Exhaustion letters to Fields, CD pp. 974-979*.)

On July 31, 1997, Claim Representative Kristine Curry began handling Fields' claim file under the parents' policy and eventually, on May 6, 1998, Ms. Curry requested authorization to close the file, which was granted on that same date by a State Farm manager. (*Progress Report, CD p. 995*.) On a number of occasions, Fields called State Farm requesting more PIP benefits for his ongoing accident-related expenses. (*Deposition transcript of Gerol Fields at 109:24-111:17, CD p. 897*.) At no time did Ms. Curry or anyone else at State Farm acknowledge or inform Fields about the existence of the additional benefits provided by the parents' policy.

Fields finally learned of the benefits he should have received under his parents' policy when State Farm provided his attorneys with a certified copy of the policy Fields on January 7, 2008, in relation to another claim which has since been dropped by Fields. (*Letter from State Farm's counsel to Fields' counsel, CD pp. 956-957*.) On that same date, counsel for State Farm provided a letter to Fields' attorneys stating that State Farm would not pay any benefits to Fields because any liability it had on any of his claims was barred by the statute of limitations. (*Letter from State Farm's counsel to Fields' counsel, CD pp. 956-957*.)

After Fields filed suit in May 2008, the claim file (06-3781-302) for the parents' policy was reopened by State Farm, and on July 16, 2008, State Farm's counsel sent a letter to Fields attorneys reversing its previous position that any of Fields' claims were untimely, stating, "State Farm has had an opportunity to review Mr. Fields' claim again in detail. During the course of that review, it was determined that there are additional PIP benefits available to Mr. Fields for medical expenses." (*Letter from State Farm's counsel to Fields' counsel, CD pp. 899-900*.) As a result, an additional $50,000 was made available to pay for accident related medical expenses incurred by Fields. (*Id.*)

But State Farm never made the benefits available to Fields. After reopening the claim file, State Farm did not attempt to pay the medical expenses that it had previously denied based on the erroneous contention that all available benefits had been exhausted. Instead, without Fields' knowledge or permission, it attempted only to determine if Medicaid might have a claim. (*July 24, 2008 letter from State Farm to Medicaid, CD p. 901*.) Years later, State Farm finally paid some of the benefits due under the parents' policy when it issued two payments to Fields in March 2011, one representing statutorily mandated interest on prescription bills submitted to State Farm on June 18, 1997, and the other reimbursing Fields for some out-of-pocket expenses and for the June 1997 prescriptions, which had not

been paid because of State Farm's incorrect claim that PIP benefits were exhausted. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906*.)

Beginning in April 2011, State Farm began paying other bills for Fields' accident-related medical expenses, and eventually prepared a spreadsheet of Fields' claims listing the bills that had been paid. But many of these supposed payments of benefits were to providers who had already been paid by Medicaid for the services they rendered, effectively paying those providers twice. (*Spreadsheet, CD p. 1010-1027*.) One such example occurred on March 31, 2011, when State Farm sent payment to St. Anthony Central Hospital in the amount of $21,278.11, for a charge that had already been paid by Medicaid. (*Letter from State Farm to St. Anthony Central Hospital, CD p. 910*.)

State Farm first indicated that it did not have enough documentation to pay Fields' medical expenses in January 2011 (despite paying benefits out of its existing claim file a couple of months later), and medical records and bills were quickly provided to State Farm in February 2011. (*Letter from Fields' counsel to State Farm, CD pp. 1006-1007*.) State Farm still contends that it has not received sufficient information to pay all of Fields' outstanding expenses, and has to date only paid about $35,000 of the $50,000 it promised to pay. (*Spreadsheet, CD p. 1010-1027*.) However, even this paid amount is deceptive, because State Farm

gave most of this money to medical providers who had already been paid by Medicaid, despite specific instruction from Fields to not pay these providers. In other words, State Farm paid Fields' medical providers who had already been compensated for the services they had rendered. These payments have unnecessarily diluted and dissipated the limited benefits available to cover Fields' ongoing accident-related medical expenses.

IV. SUMMARY OF ARGUMENT

The trial court erred in ruling that the statute of limitations was not tolled by State Farm's misinformation and violation of its statutory duty to disclose to Fields the additional No-Fault benefits available to him under the parents' policy. Colorado's former No-Fault Act required an insurer to "furnish to the insured or injured person entitled to benefits a fact sheet enumerating the rights of such person to PIP benefits." State Farm admits that it never provided this information to Fields with respect to the benefits available under his parent's policy, and "[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). A party may not assert the statute of limitations "if he himself is not in compliance with his statutory duty." *Id.* at 854. State Farm's failure to honor its statutory obligation to

advise its insured of the availability of the medical benefits he needed impaired and prejudiced his ability to seek and obtain these benefits, and therefore the trial court erred in ruling that equitable tolling did not apply to his claims in this case.

Also, the trial court erred in ruling that State Farm's conduct following the filing of the underlying lawsuit did not constitute a waiver of its statute of limitations defense. Prior to the filing of this action, State Farm expressly refused to provide any further benefits to Fields, asserting that all of his claims were barred by the statute of limitations. After Fields filed this action, State Farm filed a motion to dismiss Fields' claims arguing that they were all barred by the statute of limitations. (*Defendant's Motion to Dismiss, CD p. 76-88.*) Approximately three weeks after invoking the statute of limitations, State Farm reversed its position and promised to pay the benefits due, and then did pay some of the benefits along with statutory interest.

Waiver is shown by "the intentional relinquishment of a known right or privilege." *Venard v. Dept. of Corrections*, 72 P.3d 446, 450 (Colo. Ct. App. 2003). The acknowledgement and payment of these monies by State Farm, with interest, after it had invoked the statute of limitations defense demonstrates a deliberate abandonment of a recognized right, and therefore constitutes a waiver of any statute of limitations defense in this case. This knowing and intentional

conduct came after State Farm had expressly invoked the statute of limitations in writing, and it obviously was aware of the right to decline to pay any benefits on this basis, but consciously chose to relinquish that right. The trial court erred in concluding that State Farm had not waived this defense.

The trial court also erred in dismissing Fields' claims despite State Farm's July 2008 express promise to pay the benefits due under the parents' policy after this action was filed. A promise to pay a previous contractual obligation is enforceable even if the statute of limitations would bar enforcement of the obligation absent the promise. RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981). Colorado has adopted this section of the Restatement, and therefore "a new promise to pay a debt, an unqualified acknowledgement of a debt from which a promise to pay may be implied, or part payment of a debt will start the limitations period running anew." *Drake v. Tyner*, 914 P.2d 519, 522 (Colo. Ct. App. 1996). Notwithstanding the finding that State Farm's July 2008 letter constituted an acknowledgement and promise to pay the No-Fault benefits due, and Fields' pleadings expressly alleging State Farm's ongoing failure to honor this promise, the trial court ruled without explanation that the statute of limitations defense asserted by State Farm was unaffected by the renewed promise, and that "Plaintiff's 2008 claims are simply untimely." (*Order at 8-9, 10, CD p. 1277-79.*)

The trial court's ruling that Fields' claims based on the renewed promise to pay in 2008 were untimely was error.

Finally, the trial court erred in ruling that Fields' claims for bad faith based on State Farm's conduct after this lawsuit was filed were barred by the statute of limitations. 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, Fields alleged an ongoing course of bad faith conduct that has continued from the time of his 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). Moreover, the fact that an insurer finally begins to pay the benefits due does not eliminate the bad faith claims arising from the insurer's entire course of conduct. *See Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 417

(Colo. 2004). The analysis centers on the insurer's conduct, and not on its "ultimate financial liability." *Id*. at 416. Here, Fields' claims are based on State Farm's continuing bad faith conduct that continues to this day. As a result, at a minimum, all claims for such conduct occurring within the limitations period are timely, and the trial court erred in ruling otherwise.

V. ARGUMENT

A. Standard of Review

This appeal is taken from the trial court's grant of summary judgment in favor of State Farm. A grant of summary judgment is reviewed *de novo* on appeal. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.,* 74 P.3d 294, 298-299 (Colo. 2003). Summary judgment is a drastic remedy that should only be granted if there is a clear showing that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Avicomm, Inc. v. Colorado Pub. Utils. Com'n.*, 955 P.2d 1023, 1029 (Colo. 1998). Even the possibility of the existence of a genuine issue of fact has been enough to defeat summary judgment. *Abrahamsen v. Mountain States Telephone & Telegraph Co.*, 494 P.2d 1287, 1289-1290 (Colo. 1972).

It is the moving party that bears the burden of showing that no genuine issue of fact exists. *Johnston v. CIGNA Corp.*, 916 P.2d 643, 645 (Colo. Ct. App. 1996).

As to the specific issues in this case, the determination of the time when a claim accrues under a limiting statute is normally a question of fact for the jury. *Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152, 158-59 (Colo. Ct. App. 1995).

B. The trial court erred in holding that State Farm's failure to comply with its statutory duty to notify Fields—instead continually and affirmatively misleading him—did not toll the running of the statute of limitations

Unlike Fields, State Farm knew of the medical benefits available to Fields under the parents' policy, and did not disclose their existence to Fields until after this lawsuit was filed. Contrary to the trial court's ruling, these actions should toll the statute of limitations for all of Fields' claims under the parents' policy.

"Equity 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); *Civale v. State Farm Mut. Auto. Ins. Co.*, No. 02CA2331, slip op. at 7-8 (Colo. Ct. App. Feb. 19, 2004)[1] (*CD pp. 958-966*). Under the No-Fault Act, an

[1] *Civale* is an unpublished Court of Appeals decision. Fields recognizes that there is a general rule against the citation of unpublished decisions. But in this case it is permissible under the collateral estoppel exception to the rule. Court of Appeals Forms and Policies, Policy of the Court concerning citation of unpublished opinions, *available at*

insurer had to "furnish to the insured or injured person entitled to benefits a fact sheet enumerating the rights of such person to PIP benefits." COLO. REV. STAT. § 10-4-706(4)(b). An insurer's failure to provide this disclosure to the insured with the required information should warrant the application of the doctrine of equitable estoppel if the insured is prejudiced by not receiving the required disclosure. *Civale*, *supra*, at 8.

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)).

The second fundamental principle for the doctrine of equitable tolling is based on the notion that it is not equitable to enforce the statute of limitations where the failure to provide the required information means that the party invoking

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http://www.courts.state.co.us/Courts/Court_Of_Appeals/Forms_Policies.cfm (last visited July 26, 2012).

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. In this case, State Farm's failure to provide the correct information about PIP benefits required by law, instead providing incorrect and misleading information to Fields about the benefits available to him, provides ample support for the applicability of tolling to these facts.

State Farm violated its statutory duty to fully inform Fields of the available benefits in several ways, the most prejudicial of which was the failure to inform Fields that the parents' policy provided him with additional PIP benefits.[2] State Farm was required by law to provide this basic information that any insured would need in order to make an informed judgment with respect to their entitlement to the available No-Fault benefits. COLO. REV. STAT. § 10-4-706(4)(b). Once State Farm was aware that Fields was making a claim, it was required to, among other things, "furnish to the insured or injured person entitled to benefits a fact sheet enumerating the rights of such person to PIP benefits." *Id*. State Farm has admitted that it failed to provide any such information or fact sheet, despite its acknowledgement that it was notified of the claim for "insurance benefits under the

[2] State Farm also had duties to inform Fields of the availability of the benefits under both COLO. REV. STAT. § 10-3-1104 and the insurance regulations, and failed to comply with those duties as well. *See* 3 COLO. CODE REGS. § 5-2-8(3)(A).

Parents' Policy [sic]" in 1997. (*Defendant's Motion for Summary Judgment at 10, CD p. 717*.) State Farm provided a letter and claim form to Fields on August 29, 1996, under the Eiffert policy, describing and soliciting a claim for the Eiffert PIP benefits, (*Letter from State Farm to Fields, CD pp. 970-973*), but failed to do so with respect to the PIP benefits available under the parents' policy, (*Deposition transcript of Cindy Marshall at 48: 21-25; 49: 11-13, CD pp. 950-951*; *Defendant's Response to Request for Admission No. 3, CD p. 993*), even though it admits that those P3 benefits existed under that policy and that it was aware of a claim under it. Moreover, State Farm cannot excuse its failure to comply with the statutory mandate by contending that it never received a specific claim for PIP benefits under the parents' policy. "When an insurance carrier receives adequate notice of a claim under one policy or coverage, it has notice as to all coverages." *Rose Medical Ctr. v. State Farm Mut. Auto. Ins. Co*., 903 P.2d 15, 17-18 (Colo. Ct. App. 1994).

State Farm's failure to comply with the statutory requirement to inform Fields about the additional coverage available to him under the parents' policy was not the only way in which it prejudiced his ability to obtain those benefits. State Farm also incorrectly informed Fields on multiple occasions in 1997 and thereafter that all available PIP benefits had been exhausted. (*Exhaustion letters to Fields,*

CD pp. 974, 977-979.) This was not accurate; instead the information regarding the availability of those benefits under the parents' policy was present in State Farm's files and was simply not relayed to Fields. (*Deposition transcript of Cindy Marshall at 149, CD p. 953*.) In addition to violating its statutory obligations, this conduct materially hindered and prejudiced Fields' ability to discover and obtain the additional PIP benefits to which he was rightfully entitled, benefits that State Farm knew about from the moment it was informed about and opened the claim under the parents' policy in 1997. (*Coverage Information sheet, CD p. 947*; *Deposition transcript of Cindy Marshall, CD pp. 948-955*.) This conduct also violated State Farm's statutory duty under COLO. REV. STAT. § 10-3-1104(1)(h)(III), which prohibits insurers from "[m]isrepresenting pertinent facts or insurance policy provisions related to coverages at issue."

These circumstances, with State Farm both violating the statute and actively misleading Fields to believe that he had no other PIP benefits available to him, should toll the statute of limitations at least until State Farm finally acknowledged the existence of the P3 benefits in 2008. *See Civale*, *supra*, at 7-8 (State Farm not entitled to summary judgment on statute of limitations, since issues of material fact remained as to whether State Farm had provided insured with forms and other information required by No-Fault Act); *see also Garrett*, 826 P.2d at 855

(remanding for further development of the factual record to determine whether statute of limitations should be equitably tolled, based on defendant's failure to provide claimant with a document as required by state regulation); *Strader*, 551 P.2d at 724 (as a matter of law, lender's failure to disclose "true" interest rate on loan violated its statutory duty to disclose and equitably tolled the statute of limitations on the borrowers' claim); *Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1028-29 (Colo. Ct. App. 2002) (insurer was not entitled to summary judgment on statute of limitations, since issues of material fact remained as to whether insurer "hindered" timely filing of claim by repeatedly failing to provide insured with complete copy of policy). The trial court erred by concluding otherwise, because the trial court's ruling has the effect of allowing State Farm to benefit from its own wrongdoing.

In concluding otherwise, the trial court based its reasoning on the ruling in *Olson v. State Farm Mutual Automobile Insurance Co.*, 174 P.3d 849, 853 (Colo. Ct. App. 2007), but *Olson* is inapposite here for multiple reasons. First, *Olson* did not involve a claim for No-Fault benefits, and therefore did not involve the insurer's violation of a statutory duty such as that found in COLO. REV. STAT. § 10-4-706(4)(b). *Olson* involved only a claim for uninsured motorist ("UM") benefits, and the UM statute does not contain a requirement to inform the insured of all

available benefits. The *Olson* court found instead that the insurer "did not have a legal duty" to provide the insured with the information he claimed it had withheld. 174 P.3d at 859.

The analysis is different in this case because State Farm at all times had a statutory duty to provide this information to Fields, but did not do so. In addition, the UM coverage at issue in *Olson* was described by the insurer to the insured in writing, and the insured had actually collected some UM benefits under that coverage. *Olson*, 174 P.3d at 852. This case is different, because it is not disputed that State Farm did not notify Fields of the existence of the P3 benefits under the parents' policy. (*Deposition transcript of Cindy Marshall at 49:11-13, CD p. 951*.) This case is also different from *Olson* because here State Farm affirmatively misled Fields on numerous occasions by misinforming him that all available PIP benefits had been exhausted (*Exhaustion letters to Fields, CD pp. 974, 977-979*), whereas in *Olson* State Farm simply remained silent about whether any further UM benefits might be owed. *Id*. at 859-60. State Farm's affirmative actions in this case of misinforming Fields about the available benefits is the sort of conduct insurers are forbidden to engage in, as expressly noted by the court in *Olson*: "insurers are prohibited from making misrepresentations about facts or coverage." *Id*. at 585.

The trial court erred in failing to recognize these distinctions and applying the wrong analytical framework. The correct rule is found in *Garrett* and *Strader, supra*, which both involve the failure to make a legally required disclosure, like the disclosure required here. COLO. REV. STAT. § 10-4-706(4)(b). In such situations, the plaintiff is only required to demonstrate that the failure to comply with the statutory obligation caused prejudice to the ability to timely file the claim. *See Garrett*, 826 P.2d at 855 (citing *Strader,* 551 P.2d at 724). The question of whether State Farm's actions prejudiced Fields raises disputed issues of fact that require further development and cannot be resolved on summary judgment. *See Dupre*, 62 P.3d at 1029.

C. The trial court erred when it held that State Farm's conduct beginning in 2008 did not preclude its statute of limitations defense

1. State Farm waived its right to invoke the statute of limitations

Prior to the filing of this action, State Farm expressly refused to provide any further benefits to Fields, asserting that all of his claims were barred by the statute of limitations. (*January 7, 2008 letter from State Farm's counsel to Fields' counsel, CD pp. 956-957*.) Then, months after this lawsuit was filed and many years after the insurance benefits at issue in this case were originally due, State Farm made an unconditional written acknowledgement and promise to pay the

contractual benefits owed to Fields. (*July 16, 2008 letter from State Farm's counsel to Fields' counsel, CD pp. 899-900*) ("State Farm has determined that Fields should receive the P3 level of PIP benefits, rather than the P1 level he already has received."). State Farm eventually also paid some of these benefits along with statutory interest dating back to June 1997. (*March 3, 2011 letter from State Farm to Fields' counsel, CD p. 906*)

Waiver is "the intentional relinquishment of a known right or privilege." *Venard v. Dept. of Corrections*, 72 P.3d 446, 450 (Colo. Ct. App. 2003). "A waiver may be explicit, as when a party orally or in writing abandons an existing right or privilege; or it may be implied, as, for example, when a party engages in conduct which manifests an intent to relinquish the right or privilege, or acts inconsistently with its assertion." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984) (citations omitted). An implied waiver is shown when the waiver conduct is free from ambiguity and clearly manifests the intention to not assert the right or privilege. *Venard*, 72 P.3d at 450. The question of whether a waiver has occurred must be assessed in light of the relevant facts and circumstances known at the time of the alleged waiver. *See Johnson v. Industrial Comm.*, 761 P.2d 1140, 1147 (Colo. 1988).

State Farm's July 2008 letter and later payment of benefits and penalties is an implied waiver of the statute of limitations defense. When first contacted in late 2007, State Farm affirmatively stated that all benefits and claims under either policy were untimely. (*January 7, 2008 letter from State Farm's counsel to Fields' counsel, CD pp. 956-957*.) Fields then filed this lawsuit making claims for payment of additional P3 PIP coverage under the parents' policy, along with the attendant rights and remedies provided by the No-Fault Act and the common law. (*Complaint, CD pp. 5, 10-11*.) State Farm responded with a motion to dismiss, again asserting that all claims were time barred. (*Defendant's Motion to Dismiss, CD p. 76-88.*) Then, on July 16, 2008, State Farm reversed course and—contrary to its previous position—stated that it would provide the P3 benefits purchased by Fields' parents. (*Letter from State Farm's counsel to Fields' counsel, CD 899-900*). State Farm then continued to pursue its defense of this case including asserting the statute of limitations defense in its pleadings and motion for summary judgment. (*Defendant's Motion for Summary Judgment, CD pp. 708-719.*) Then on March 3, 2011, State Farm reiterated its waiver of the statute of limitations defense by paying a part of the P3 benefits with interest for the late payment of benefits dating back to 1997, when it first received the bills it was now paying. (*State Farm's letter to Fields' counsel, CD p. 906*.)

From these facts, State Farm knew that Plaintiff was making a claim for benefits under the parents' policy. It was fully informed of all of the claims brought by Fields in relation to that coverage. With that knowledge, State Farm promised to pay the benefits, paid the benefits (though untimely), and paid some statutory penalties. Those statements and actions constitute an implied waiver of the statute of limitations defense.

State Farm was aware of all claims brought by Fields at the time it took the actions constituting an implied waiver of its statute of limitations defense. Because of its awareness of these claims, and decision to nevertheless act in the way that it did, the trial court erred in holding that State Farm had not waived the statute of limitations defense for all of Fields' claims. Like the statute of limitations issue, the question of whether a waiver has occurred is normally for a jury to decide. *Gulf Ins. Co. v. State*, 607 P.2d 1016, 1019 (Colo. Ct. App. 1979) (because waiver turns on issue of intent, it may not be resolved by summary judgment). At the very least, the trial court erred by ruling that State Farm had not waived the statute of limitations defense as a matter of law, because State Farm's knowledge and intent in taking the actions it did involve disputed issues of fact, to be resolved by a jury.

2. The trial court erred in dismissing all of Fields' claims despite its conclusion that State Farm's July 2008 letter constituted a "promise to pay" additional PIP benefits

Despite holding that State Farm had made a promise to pay the benefits under the parents' policy during the course of this litigation, the trial court nevertheless held that Fields' claims were untimely.

A promise to pay a previous contractual obligation is enforceable even if the statute of limitations would bar enforcement of the obligation absent the promise. RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981). In Colorado, "a new promise to pay a debt, an unqualified acknowledgement of a debt from which a promise to pay may be implied, or part payment of a debt will start the limitations period running anew." *Drake v. Tyner*, 914 P.2d 519, 522 (Colo. Ct. App. 1996); *see also Rossi v. Osage Highland Dev., LLC*, 219 P.3d 319, 322 (Colo. Ct. App. 2009). Moreover, promises within the scope of Section 82 of the Restatement are not to be narrowly construed, but rather are to be enforceable in accordance with their own terms based upon the moral obligation to pay the debt otherwise made unenforceable by the statute of limitations. *Jordan v. Bergsma*, 822 P.2d 319, 320 (Wash. Ct. App. 1992).

Here, after this lawsuit was filed and many years after the insurance benefits at issue in this case were originally due, State Farm made an unconditional written

acknowledgement and promise to pay the contractual benefits owed to Fields. (*July 16, 2008 letter from State Farm's counsel to Fields' counsel, CD pp. 899-900*) ("State Farm has determined that Fields should receive the P3 level of PIP benefits, rather than the P1 level he already has received."). The trial court ruled that this letter constituted "an acknowledgement of available benefits up to $50,000 under the policy and a promise to pay any appropriate benefits up to $50,000." (*Order at 8, CD p. 1277.*)

Following its voluntary promise to pay the additional benefits, State Farm later acted in accordance with its promise by issuing partial payment of the benefits owed, including extra-contractual interest due under Colorado's No-Fault Act, calculated back to when the covered expenses originally were due. (*State Farm's Responses to Plaintiff's Initial Discovery Requests at 9, CD p. 664*) ("State Farm applies an 18% interest rate from the 31st day after receiving the bill until payment is made."). As a result, State Farm's promise to pay and subsequent payment of past-due benefits along with statutory (non-contractual) interest eliminates any statute of limitations defense as to these benefits, because the renewed obligation confirmed by the trial court "is subject to the statute of limitations and to other rules appropriate to the form and terms of the new promise." RESTATEMENT § 82, cmt. c.

Despite finding that State Farm's July 2008 letter constituted an acknowledgement and promise to pay the No-Fault benefits due, and Fields' repeated pleadings and arguments expressly alleging State Farm's ongoing failure to honor this renewed promise, the trial court ruled without explanation that the statute of limitations defense asserted by State Farm was unaffected by the renewed promise, and that "Plaintiff's 2008 claims are simply untimely." (*Order at 8-9, 10, CD pp. 1277-1278, 1279*.)

Fields' claims for benefits due under the contract of insurance also include all the rights and remedies provided by the contract and the No-Fault Act, as well as common law, because these sources provide the rules and requirements applicable to the payment of No-Fault benefits an automobile insurance contract. *See* RESTATEMENT § 82, cmt. c; *Scoggins v. Unigard Ins. Co*., 869 P.2d 202, 203 (Colo. 1994) (No-Fault Act governs rights and liabilities for personal injury protection benefits); *see also Giampapa v. American Family Mut. Ins. Co*., 64 P.3d 230, 234 (Colo. 2003). The claims for statutory remedies were also made timely when State Farm tendered payment of a portion of those remedies to Fields. An enforceable promise to pay can be proven not only by the promise itself, but also by a "voluntary transfer of money…by the obligor to the obligee, made as interest

on or part payment of…the antecedent indebtedness." RESTATEMENT, *supra*, § 82(2)(b); *see also Drake*, 914 P.2d at 522 (part payment of a debt sufficient).

State Farm's contract of insurance expressly states that the contract and payment of benefits are subject to the provisions of the No-Fault Act,[3] and State Farm has acknowledged that in handling the claims under its policies, it was and is required to comply with the No-Fault Act. (*Cindy Marshall deposition transcript pp. 149-150, CD p. 705*.) State Farm's express promise to provide the additional PIP benefits due is therefore a promise to provide them as due under the contract of insurance and the No-Fault Act, and State Farm's statute of limitations defense is precluded as to all associated penalties and remedies.

The No-Fault Act, with its attendant remedies and penalties for non-payment, was incorporated as part of every automobile insurance contract issued in Colorado. *See Marquez v. Prudential Prop. & Cas. Ins. Co.*, 620 P.2d 29, 33 (Colo. 1980). The payment of both the benefits themselves and the statutory penalty for non-payment is consistent with the requirements of the No-Fault Act and State Farm's contractual obligations, and demonstrates that the renewed promise made by State Farm extends beyond the benefits to also encompass the attendant remedies and penalties.

[3] State Farm's insurance contract states that "we will pay [PIP benefits] in accordance with the No-Fault Act." (*Fields policy at 10, CD p. 685*.)

When an insurer has wrongfully refused to pay benefits to an insured, the insured may…seek remedies under contract law, tort law, and the [No-Fault Act]." *Giampapa*, 64 P.3d at 234. Because a promise to pay is not to be narrowly construed, the renewed promise to pay the amounts due under the contract as well as partial payment of the statutory remedies means that Fields' claims of declaratory judgment, breach of contract, statutory bad faith, common law bad faith, and punitive damages are not barred by the statute of limitations.

3. The trial court erred in dismissing Fields' common law bad faith claims based on State Farm's conduct occurring within the limitations period relevant to this action

Fields' claim for common law bad faith was also incorrectly held to be time barred by the trial court. An insurer is liable for bad faith when "the insurer's conduct was unreasonable and…the insurer either knew that its conduct was unreasonable or recklessly disregarded the fact that its conduct was unreasonable." *Burgess v. Mid-Century Ins. Co*., 841 P.2d 325, 328 (Colo. Ct. App. 1992) (citing *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985)). The analysis centers on the insurer's conduct, and not on its "ultimate financial liability." *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 416 (Colo. 2004); *Breaux v. Am. Family Mut. Ins. Co*., 554 F.3d 854, 863 (10th Cir. 2009). 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). A bad faith claim can arise from each instance of unreasonable conduct by an insurer, but for the purposes of a statute of limitations determination, acts of bad faith may not be connected to prior bad faith acts by the defendant. *Harmon v. Fred S. James & Co. of Colorado, Inc.*, 899 P.2d 258, 262 (Colo. Ct. App. 1994).

State Farm has engaged in a pattern of bad faith conduct directed at Fields. The bad faith acts fall into two categories, the first related to the actions State Farm took when it initially adjusted Fields' claims in and around 1996-1999. These bad faith claims are not time barred for the reasons stated above. But the second set of bad faith actions by State Farm are not barred by the statute of limitations for an additional reason. These are the actions taken by State Farm in and around 2007 through the present. These claims are not time barred.

In October 2007, Fields' attorneys first began requesting a copy of the policies insuring Fields at the time of his accident. (*October 25, 2007 letter from Fields' counsel to State Farm, CD p. 996*.) A copy of the policy was finally provided on January 7, 2008. (*Letter from State Farm's counsel to Fields' counsel, CD pp. 956-957*.) Because State Farm continued to deny the P3 benefits, Fields was compelled to file this lawsuit on May 1, 2008. (*Complaint, CD pp. 2-11*.) After Fields filed this lawsuit, State Farm continued its bad faith course of conduct

by, after finally acknowledging Fields' entitlement to the additional benefits provided by the P3 coverage, deciding that its first and only order of business for more than two years was to create subrogation activity by Medicaid, rather than make the P3 benefits immediately available to its insured. (*July 24, 2008 letter from State Farm to Medicaid, CD p. 901*.)

Much later, State Farm finally issued two payments to Fields on March 3, 2011, one representing interest on prescription bills submitted to State Farm on June 18, 1997 and a bill from OrthoLogic Corp, submitted to State Farm on June 16, 1997, and the other to reimburse Fields for some out of pocket expenses and for the prescriptions State Farm refused to pay in June, 1997, that it had claimed at the time were not compensable because all PIP benefits had been exhausted. (*State Farm's letter to Fields' counsel, CD p. 906.*) State Farm then denied a number of medical bills claiming that there was not enough information submitted for it to pay, but failed to identify what information it would require. (*February 10, 2011 letter from State Farm to Fields' counsel, CD pp. 1120-1121*.) Subsequently, State Farm has made some payment for medical expenses, but has unreasonably dissipated Fields' coverage by spending most of it on payment of bills that had already been paid by Medicaid, paying providers who had already been compensated contrary to the explicit instructions of Fields. (*May 29, 2009 letter*

from Fields' counsel to State Farm's counsel, CD p. 1004; *February 15, 2011 letter from Fields' counsel to State Farm's counsel, CD pp. 1006-1007; January 20, 2011 letter from Fields' counsel to State Farm's counsel, CD pp. 1008-1009; Spreadsheet, CD p. 1010-1027*.) State Farm still has not paid all of the additional PIP benefits due. *Id.*

These facts show a continuing course of bad faith conduct by State Farm to wrongfully conceal and deprive Fields of the P3 benefits to which it admits he is entitled. State Farm continued to commit acts of bad faith starting in 2007 through the present. The trial court held that Fields' claim for bad faith based on these acts was also time barred. (*Order at 9, CD p. 1278.*) This ruling leads to the bizarre result that State Farm's bad faith acts committed within months of, or after, the filing of the complaint in this case were time barred before they occurred. This is error. The other interpretation of this ruling is that State Farm's bad faith is a continuing course of conduct, and all acts of bad faith tie back to the original act of bad faith. However, this Court has ruled that insurance bad faith is not a continuing course of conduct that ties each bad faith act to those that preceded it. *Harmon,* 899 P.2d at 262.

At a minimum, the claims for those bad faith acts committed by State Farm around and after the filing of the complaint in this case are timely. Fields' claims

include allegations of delay and bad faith conduct as to the acknowledged P3 PIP benefits that continues to the present, and the trial court erred in ruling that these claims are untimely.

VI. CONCLUSION

The trial court erred in dismissing all of Fields' claims on the basis that they were "untimely," because State Farm's conduct, both before and after the instant action was filed, eliminated any potential defenses based on the statute of limitations.

Plaintiff-Appellant respectfully requests that this Court reverse the district court's order granting summary judgment in favor of State Farm.

Respectfully submitted this 3rd day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2012, a true and correct copy of the above was filed with the Clerk of the Colorado Court of Appeals and served upon the following via LexisNexis File and Serve®:

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