

Court of Appeals, State of Colorado
Two East 14th Avenue
Denver, CO 80203

DATE FILED: February 21, 2016 3:25 PM

Appeal from the District Court,
El Paso County
Honorable Edward S. Colt,
District Court Judge
Case No. 15CV30945

Plaintiff-Appellant:

Donna Kovac

v.

Defendant-Appellee:

Farmers Insurance Exchange

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Attorneys for Plaintiff-Appellant
Donna Kovac

COURT USE ONLY

Case Number: 16CA167

AMENDED NOTICE OF APPEAL

I. DESCRIPTION OF THE NATURE OF THE CASE

A. General Statement of the Nature of the Controversy. This is a personal injury action, arising out of an underinsured motorist claim brought by plaintiff-appellant Donna Kovac against defendant-appellee Farmers Insurance Exchange. On December 10, 2015, the trial court granted defendant's motion for summary judgment on the grounds that plaintiff's complaint was untimely and barred by the applicable statute of limitations. On February 9, 2016, the court granted an award of costs in favor of defendant.

B. Judgment, Order, or Parts Being Appealed and Basis for Appellate Court's Jurisdiction. Kovac appeals from (1) the order of December 10, 2015, granting defendant's motion for summary judgment, and (2) the order of February 9, 2016, awarding costs in favor of defendant . A basis for this Court's jurisdiction is provided by C.R.S. § 13-4-102(1).

C. Whether the Judgment or Order Resolved All Issues Pending Before the Trial Court Including Attorneys' Fees and Costs. The orders granting summary judgment and awarding costs have resolved all issues pending before the trial court.

D. Whether the Judgment Was Made Final for Purposes of Appeal

Pursuant to C.R.C.P. 54(b). The trial court did not certify any judgment as final for purposes of C.R.C.P. 54(b).

E. The Date the Judgment or Order Was Entered and the Date of Mailing to Counsel. The order granting summary judgment was entered on December 10, 2015, and electronically served upon counsel on that date. The order awarding costs was entered on February 9, 2016, and electronically served upon counsel on that date.

F. Whether There Were Any Extensions Granted to File Any Motion for Post-Trial Relief. No extensions were granted to file any post-trial motions.

G. The Date Any Motion for Post-Trial Relief Was Filed. No motion for post-trial relief was filed.

H. The Date Any Motion for Post-Trial Relief Was Denied or Deemed Denied Under C.R.C.P. 59(j). No motion for post-trial relief was filed.

I. Whether There Were Any Extensions Granted to File Any Notice of Appeal. No such extensions were sought or granted.

II. ADVISORY LISTING OF ISSUES PROPOSED TO BE RAISED ON APPEAL.

Whether the trial court erroneously ruled that plaintiff's complaint was barred by the applicable statute of limitations.

Whether the trial court erroneously awarded costs of \$21,137.13 in favor of defendant.

III. TRANSCRIPT INFORMATION

No transcript is necessary to resolve issues on appeal.

IV. WHETHER THE ORDER ON REVIEW WAS ISSUED BY A MAGISTRATE WHERE CONSENT WAS NECESSARY

The order was not issued by a magistrate.

V. ATTORNEY INFORMATION

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VI. APPENDIX TO THIS NOTICE OF APPEAL

- A. Order granting summary judgment, dated December 10, 2015.
- B. Order awarding costs, dated February 9, 2016.

Respectfully submitted this 21st day of February 2016.

Walter H. Sargent, a professional
corporation

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Donna Kovac

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically this 21st day of February 2016 to the following:

Paul D. Dinkelmeyer
L. Michael Brooks, Jr.
Larry S. McClung
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/s/ Walter H. Sargent

DISTRICT COURT, EL PASO COUNTY, COLORADO		DATE FILED: February 2, 2016 3:25 PM CASE NUMBER: 2015CV30945 <div style="text-align: center;">⚠ COURT USE ONLY ⚠</div>
Court Address: 270 S. Tejon, Colorado Springs, CO, 80901		
Plaintiff(s) DONNA KOVAC v. Defendant(s) FARMERS INSURANCE EXCHANGE		
		Case Number: 2015CV30945 Division: 8 Courtroom:
Order: Proposed Order re AMENDED REPLY IN SUPPORT OF VERIFIED BILL OF COSTS OF DEFENDANT FARMERS INSURANCE EXCHANGE		

The motion/proposed order attached hereto: GRANTED.

Issue Date: 2/9/2016



EDWARD SAMUEL COLT
District Court Judge

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 Tejon Street Colorado Springs, CO 80903 (719) 452-5000 <hr/> Plaintiff: DONNA KOVAC v. Defendant: FARMERS INSURANCE EXCHANGE	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case No: 2015CV30945 Division: 8
ORDER RE DEFENDANT FARMERS INSURANCE EXCHANGE'S BILL OF COSTS	

THIS MATTER comes before the Court on Defendant Farmers Insurance Exchange's Verified Bill of Costs. The Court, having reviewed the Motion, any and all responses and replies thereto, and otherwise being fully familiar with the facts and circumstances of the above-captioned action, determines as follows:

IT IS HEREBY ORDERED:

1. That Defendant Farmers Insurance Exchange's Motion is hereby **GRANTED** in part and denied in part; and
2. Defendant Farmers Insurance Exchange's is entitled to recover its costs reasonably incurred in defending this case.
3. That Plaintiff is hereby **ORDERED** to pay Defendant Farmers Insurance Exchange's cost and Defendant Farmers Insurance Exchange shall have judgment for the same, in the amount of \$21,137.13.

Dated this ____ day of _____, 2016.

BY THE COURT:

 District Court Judge

DISTRICT COURT, EL PASO COUNTY, COLORADO P.O. Box 2980 Colorado Springs, CO 80901 (719) 452-5447	
Plaintiff(s): Donna Kovac vs. Defendant(s): Farmers Insurance Exchange	^ COURT USE ONLY ^ <hr/> Case No.: 15CV30945 Division: 8 Courtroom: S404
ORDER	

This matter comes before the Court on the motion of Defendant Farmers Insurance Exchange "Farmers" for summary judgment, opposed by Plaintiff Donna Kovac "Kovac". The matter has been fully briefed. To summarize, Farmers argues that the statute of limitations which applies has been violated, and that this case must be dismissed on that basis, and Kovac disagrees.

The basic facts do not appear to be in dispute, and they are set out in some detail in Farmers' motion as statement of undisputed facts, which are set out in pertinent part: The underlying traffic accident in which Kovac was injured happened on October 24, 2010; the other driver, deemed to be at fault for the accident had insurance in the amount of \$100,000 with Shelter Insurance Company; Shelter offered the fully policy limits via a letter dated March 27, 2013, which letter contained a check in the said amount and a release for execution by Kovac and her husband. Farmers pleadings indicate that "It is undisputed that at least of this date, April 2, 2013, Plaintiff's counsel had received and was in possession of the settlement payment from Shelter in the amount of \$100,000." (Summary judgment motion of November 2, 2015, paragraph 5.) Kovac's response of November 30, 2015 provides greater clarity: "A letter from Shelter Insurance dated March 27, 2013 along with the proposed Release agreement and a check for \$100,000 dated March 28, 2013 arrived in Kovac's counsel's office on April 1, 2013." (Kovac's response of November 30, page two.) The parties agree that this case was not filed until April 3, 2015.

Farmers argues that under these facts, the filing was outside the permissible filing date, as set out in the applicable statute of limitations, C.R.S. 13-80-107.5(1)(b), which provides in pertinent part that "...an action or arbitration of an underinsured motorist claim shall be timely if such action is commenced or such arbitration is demanded within two years after the insured received payment of the settlement or judgment on the underlying bodily injury liability claim." Farmers argument is clear, that based on the date Kovac received the check, filing on April 3, 2015 was outside the statute of limitations.

Kovac argues that the date the check was received was not the operative date to begin the statute of limitations. She points out that she needed to clear the settlement with Farmers, based on the language of Farmers policy with her. She avers that immediately upon getting the settlement offer and check, that her attorney requested such permission to settle from Farmers, and that in a letter dated April 3, 2013, with entries dated April 4, 2013, Farmers granted the requested permission to settle. She avers that on April 5, 2013 she and her husband went to the lawyer's office to sign the release agreement and to endorse the check and argues that even with the check being deposited that day, the funds, directed to the lawyer's trust account, would not clear the bank for some time thereafter. Kovac also argues that under the facts presented, she could not accept the offer prior to the permission granted by Farmers. It is Kovac's position that the filing was therefore timely.

It appears that one of the leading cases in this area of the law is *Pham v. State Farm Automobile Insurance Company*, 296 P.3d 1038 (Colo. 2013). "Statutes must be given meaning according to the intent of the legislature enacting them, as expressed in the language it has chosen to use in the statute itself. (Citing.)...While the structure of of section 13-80-107.5 may be complex, requiring careful parsing of its terms and conditions, and may in some regards even be susceptible of more than a single reasonable understanding, the language of the statute itself clearly and unambiguously conditions the two-year limitations period applicable to *uninsured* motorist claims on the insured's awareness of the tortfeasor's lack of any applicable insurance whatsoever, and it just as clearly conditions the limitations period applicable to *underinsured* motorist claims on something other than the insured's awareness that the liability insurance coverage of the motorist in question falls within a range making him underinsured relative to the injured party initiating action." 296 P.3d at 1043. Regarding underinsured claims, the Court wrote "...the latter, just as clearly, conditions its two-year period on the insured's reception of payment of a settlement or judgment on the underlying bodily injury liability claim against the underinsured motorist." 296 P.3d at 1043. "By timely commencing an action against Guerra on their underlying bodily injury claims, at least some of the plaintiff-petitioners clearly preserved their claims against the uninsured motorist, potentially permitting them to file for

underinsured motorist benefits more than three years after accrual of their claims. Under this alternate method of calculation, however, their claims could nevertheless be filed no later than two years after receiving payment of the settlement or judgment on those preserved underlying bodily injury liability claims against the underinsured motorist." 296 P.3d at 1045.

In affirming a trial court's statute of limitations summary judgment, a panel of the Colorado Court of Appeals wrote: "...the language of subsection (1)(b) precludes equating 'payment' with receipt. Subsection (1)(b) uses both 'payment' of a settlement and 'received payment' of a settlement. The General Assembly is presumed to have intended a difference between them. Because Stoesz's argument that 'payment' could mean when the settlement payment was received ignores this presumed difference, it would render the General Assembly's use of the term 'received' superfluous. But courts 'must...avoid interpretations that render statutory provisions redundant or superfluous.' *Wolford v. Pinnacol Assurance*, 107 P.3d 951 (Colo.2005)." *Stoesz v. State Farm Mutual Automobile Insurance Company*, __ P.3d __, 2015 WL 3776869 (Colo. App.2015).

The statute of limitations is clear, and this matter was filed outside of the time limits provided in that statute. The case law supports this construction of the statute, and the Court finds that Defendant Farmers has met its burden regarding summary judgment. Accordingly, summary judgment is granted, and this case is dismissed. Having reached this conclusion, I will not address the other arguments made by the parties regarding summary judgment.

DONE and ORDERED December 10, 2015.

BY THE COURT:



Edward S. Colt
District Court Judge