Court of Appeals, State of Colorado Two East 14th Avenue Denver, CO 80203 Appeal from the District Court, El Paso County Honorable Edward S. Colt, District Court Judge Case No. 15CV30945	DATE FILED: August 15, 2016 11:28 PM
Plaintiff-Appellant: **Donna Kovac** **v.** **Defendant-Appellee:** **Farmers Insurance Exchange**	**COURT USE ONLY** Case Number: 16CA167
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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains 2,746 words.

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INTRODUCTION

Farmers argues that, for purposes of C.R.S. §13-80-107.5(1)(b), Kovac "received payment of the settlement" before there was even a settlement. More specifically, Farmers contends that Kovac "received payment of the settlement" of her bodily injury liability claim against Filippelli (the underinsured motorist) when her attorney, Thomas Herd, received an offer from Shelter, Filippelli's insurer, to settle all claims of Kovac and her husband against Filippelli and Petra Davis (the owner and named insured of the vehicle driven by Filippelli) for $100,000.00. Farmers apparently reasons that, because the offer from Shelter included a check for the amount of the settlement offer, Kovac "received payment of the settlement" on the day that Herd received Shelter's settlement offer, even though there was no settlement until some days later.

As Judge Jackson recognized in *Westby v. State Farm Mut. Auto. Ins. Co*., No. 15-cv-00076-RBJ, 2016 WL 471357 (D. Colo. Feb. 8, 2016), Farmers's position defies "common sense." 2016 WL 471357, at *6. It is also contrary to the plain language of C.R.S. §13-80-107.5(1)(b), case law construing the statute, the purposes of the statute, and governing law regarding so-called "settlement checks" that are tendered as or in support of settlement offers that have not yet been accepted.

ARGUMENT

The parties do not appear to have any substantial dispute about the governing statutory language. An action on a UIM claim must generally be commenced "within three years after the cause of action accrues." C.R.S. § 13-80-107.5(1)(b). If, however, the underlying bodily injury liability claim against the underinsured motorist is "preserved" by commencing an action against the underinsured motorist or by payment of the liability claim settlement or judgment within the three-year period specified in C.R.S. § 13-80-101(1)(n),[1] then an action on a UIM claim shall be timely if such action is commenced "within two years after the insured received payment of the settlement or judgment on the underlying bodily injury liability claim." *Id*.

Here, it is undisputed that Kovac properly "preserved" her bodily injury claim against Filippelli, since payment of the settlement was well within three years after the accident on October 24, 2010. The issue is whether Kovac, having "preserved" her claim against Filippelli, thereafter commenced this UIM action within two years after she "received payment of the settlement" on the bodily injury claim against Filippelli.

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[1] Where the cause of action against the underinsured motorist is for wrongful death, the two-year period of C.R.S. § 13-80-102(d) applies. *See* C.R.S. § 13-80-107.5(1)(b).

Farmers contends that Kovac "received payment of the settlement" of her claim against Filippelli on April 1, 2013, when Herd received Shelter's settlement offer, apparently because the offer included a check – which Farmers repeatedly characterizes as a "settlement check" – for the amount of Shelter's offer. Answer Br. 1, 6, 12-13, 14, 19, 20. Farmers does not, however, say how Herd's receipt of a settlement offer, accompanied by a check that was payable to Kovac and her attorney "upon acceptance," would constitute Kovac's receipt of "payment of the settlement" when there was, in fact, no settlement.

Indeed, throughout its answer brief, Farmers avoids any discussion about when a settlement actually occurred or when Kovac received payment of any such settlement. Instead, Farmers focuses on Herd's receipt of Shelter's offer, including the check. According to Farmers, the two-year statutory period begins to run when "the insured's counsel's receipt of the at-fault driver's policy-limits settlement check for payment [has] been received." Answer Br. 12. Farmers says that Kovac is now arguing that "she could not have received payment of the at-fault driver's settlement check until after she (1) obtained consent to settle from Farmers; and (2) executed the release [that accompanied Shelter's settlement offer]." *Id*. at 12-13 (citing Opening Br. At 15). Farmers notes that the statute does not require an

insurer's consent or the execution of a release before the two-year period may begin to run. *Id*. at 7, 13.

As Kovac has already discussed, however, *see* Opening Br. 11-12, Farmers is missing the point. First, regardless of whether Herd was statutorily *required* to obtain Farmers's consent before settling the bodily injury claim on the terms proposed by Shelter, it appears undisputed that neither he nor his client actually entered into such a settlement until after they received Farmers's consent, which was not earlier than April 3-4, 2013, after Farmers ran "carrier discovery" on Filippelli and concluded that he had no viable assets apart from his coverage under Shelter's policy. *Id*. at 4-5.[2]

Likewise, regardless of whether Kovac and her husband *could* have accepted Shelter's offer without executing the written release form provided by Shelter with

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[2] In seeking to obtain Farmers's consent before agreeing to settle on Shelter's proposed terms, Herd was not merely seeking to comply with a statutory provision. Nor was he unnecessarily delaying a possible settlement. Rather, Herd was simply acting prudently in the interests of his client. As Farmers recognizes, Answer Br. 19 n.6, an insured's failure to notify her insurer and obtain its consent prior to settling with an underinsured motorist may prevent her from later pursuing a UIM insurance claim. *Lauric v. USAA Cas. Ins. Co*., 209 P.3d 190, 193 (Colo. App. 2009). Moreover, Herd could not reasonably assume Farmers's consent to the proposed settlement merely because Shelter was tendering policy limits; the proposed settlement required Kovac to give up all claims against Filippelli and Davis for all amounts, not merely claims against Filippelli within specified policy limits. Herd properly requested consent and took no action on Shelter's settlement offer until Farmers communicated its consent no earlier than April 3-4, 2013.

its settlement offer, Farmers offers no evidence that they did so. Rather, the evidence shows that, after Farmers gave its consent to Shelter's proposed settlement for policy limits, Kovac and her husband accepted the offer on April 5, 2013, when they executed the release of all claims against Filippelli and Davis "as a voluntary settlement of a disputed claim" in exchange for $100,000.00. CF, p. 140. Thus, even if Kovac *could* have settled her claim against Filippelli prior to April 5, 2013, it appears undisputed that she did not do so.[3]

Farmers nevertheless continues to contend that, even if there was not yet a settlement of Kovac's claim against Filippelli, Kovac "received payment of the settlement" when Herd received, as one of the documents contained in Shelter's settlement offer, a check made payable to Kovac and her attorney "upon acceptance." Farmers cites no authority to support its contention that receiving a check tendered but not yet accepted as full satisfaction of a disputed or unliquidated claim constitutes receipt of "payment of the settlement" when there is not yet a settlement agreement.

Indeed, established law is to the contrary. Under Article 3, Section 3-311 of the Uniform Commercial Code, adopted by Colorado at C.R.S. § 4-3-311, a check

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[3] Farmers recognizes this in discussing its own internal report of March 20, 2013, which concluded that Kovac did not settle her claim against Filippelli until April 5, 2013. *See* Answer Br. 3 n.3 (citing CF. p. 294).

or other negotiable instrument may be used to satisfy and discharge a disputed or unliquidated claim if the instrument or an accompanying written communication contains a conspicuous statement to the effect that the instrument is tendered as full satisfaction of the claim. C.R.S. § 4-3-311(b). However, the claim is not satisfied, nor is the settlement paid, merely by the claimant's receipt of the check or instrument. Rather, it must also be shown that the claimant "obtained payment of the instrument," C.R.S. § 4-3-311(a)(iii), and payment of the check is not "obtained" until the check is "accepted" as satisfaction of the claim. *Id*. at cmt. ¶ 4. Such acceptance of a "settlement" check (or "full payment" check) is accomplished by negotiating the check, typically by cashing it. *See Anderson v. Rosebrook*, 737 P.2d 417, 419-20 (Colo. 1987); *Klismet's 3 Squares Inc. v. Navistar, Inc*., ___ N.W.2d ___, ___, 2016 WL 2354272, at ¶ 14 (Wis. App. May 5, 2016) ("[w]hen a creditor receives a check offered in full settlement of an obligation and cashes the check, . . . the action of cashing the check will be considered an acceptance of the offer," quoting *Hoffman v. Ralston Purina Co*., 86 Wis. 2d 445, 454, 273 N.W.2d 214 (1979)).[4]

[4] Moreover, the claimant cannot be considered to have "obtained payment" or "received payment," despite having received the alleged "settlement check," if the funds are not actually available. *O Bar Cattle Co. v. Owyhee Feeders, Inc*., 71 U.C.C. Rep. Serv. 2d 68, 2010 WL 678970, at *4-5 (D. Idaho 2010).

Here, even assuming that Shelter's tendered check, accompanied by the written settlement offer and release form, sufficiently satisfied statutory standards for an enforceable "full payment" or settlement check, it appears undisputed that the tendered check was not accepted and negotiated, and payment was not "obtained" or "received" until – at the very earliest – April 5, 2013, when the check was endorsed and deposited in Herd's COLTAF account. Kovac's UIM insurance action, filed less than two years thereafter, was thus timely.

With no evidence of any settlement, or payment of that settlement, or receipt of payment of that settlement prior to April 5, 2013, it is difficult to see what basis exists for Farmers's assertion that Kovac received payment of that settlement on April 1, 2013. Seeking to bolster its assertion, Farmers offers two judicial opinions.

First, Farmers cites *Stoesz v. State Farm Mut. Auto. Ins. Co*., 2015 COA 86. In *Stoesz*, plaintiff, who was injured in a motor vehicle accident, waited almost three years after the accident before sending an e-mail to the underinsured motorist's liability insurer confirming a policy-limits settlement. 2015 COA 86, at ¶ 3. Shortly after the three-year "preservation" period expired, plaintiff's UIM insurer approved the settlement, at plaintiff's request. *Id*. The underinsured motorist's insurer then issued the settlement check. *Id*. Within two years of receiving the settlement payment, plaintiff commenced her UIM action. *Id*.

This Court held that plaintiff's UIM action was untimely – not because she had failed to file her UIM action within two years of receiving payment of the settlement, but rather because her UIM claim was not properly "preserved" through payment of settlement funds within three years after the accident, as required by C.R.S. § 13-80-107.5(1)(b). *Id*., at ¶¶ 5-26. The alleged existence of a settlement agreement, and even the agreement of the underinsured motorist's insurer to toll the statute of limitations on the bodily injury liability claim against its insured pending approval of the settlement agreement by plaintiff's UIM insurer, was insufficient to avoid the clear language of the statute requiring payment of the settlement within three years of the accident to "preserve" the UIM claim. *Id*., at ¶¶ 5, 10, 21, 26. No purported ambiguity in the word "payment" was sufficient to create a material issue about whether the underinsured motorist paid the settlement within three years of the accident. *Id*., at ¶¶ 3-22.[5] The court did note that payment of the settlement by the underinsured motorist's insurer does not mean the same thing as receipt of payment of the settlement by the injured party, but that hardly helps Farmers here, since receipt of payment of the settlement

[5] The Court recognized that other scenarios, such as authorization by the underinsured motorist's insurer within the initial three-year period to replace a settlement check lost in the mail, might raise different questions about when payment of the settlement occurred. *See id*., at ¶ 22 n.3.

would presumably not precede payment of the settlement, which occurred no earlier than April 5, 2013.

The second case that Farmers relies upon is *Pham v. State Farm Auto. Ins. Co*., 296 P.3d 1038 (Colo. 2013). But *Pham*, which focused primarily on the question of whether the time for bringing an action against a UIM insurer under C.R.S. § 13-80-107.5(1)(b) should have been tolled or extended while there was still uncertainty about whether there was inadequate insurance, *see, e.g.*, 296 P.3d at 1042-46, provides no support for Farmers's position here. Quite the opposite. In *Pham*, the supreme court emphasized that C.R.S. § 13-80-107.5(1)(b) now "provide[s] injured motorists quite favorable terms for initiating actions on such [UIM] claims," "not only provid[ing] the insured a term of years following the injury within which to file, much like a tort claim, but also provid[ing] him with a period of time *after he settles* or reaches judgment against the tortfeasor and thus becomes aware of an uncompensated loss." *Id*. at 1045 (emphasis added). "*In fact*, subsection (1)(b) does not *merely* allow filing within two years *after a settlement* of [sic] judgment is reached; it *also* allows an insured to wait to file until *after he has actually received payment of that settlement* or judgment." *Id*. (emphasis added). The implication of the court's comment is quite clear. The two-year period in subsection (1)(b) does not begin to run until there is a settlement or judgment

and the insured has actually received payment of that settlement or judgment. Here, where it appears undisputed that there was no settlement until, at the earliest, April 5, 2013, the two-year period following Kovac's receipt of that settlement could not have expired prior to, at the earliest, April 5, 2015, so the complaint against Farmers was timely filed on April 3, 2015.

Finally, with no statutory or judicial support for its position that Kovac "received payment of the settlement" on April 1, 2013, when her attorney received Shelter's settlement offer, Farmers attempts to distinguish or discredit Judge Jackson's decision in *Westby*, which Farmers describes as "factually distinguishable and legally flawed." Answer Br. 21. First, Farmers points out that the underinsured motorist's insurer asked that settlement funds not be disbursed until all settlement paperwork had been returned to the insurer. *Id*. Here, no similar request was included in Shelter's correspondence with Herd. But Judge Jackson concluded, "as a matter of common sense," that neither the plaintiff nor her attorney could receive payment of settlement funds until after the parties had completed the settlement that established legal entitlement to those funds; the request not to disburse funds until all settlement paperwork had been returned to the settling insurer did not affect that conclusion. *Westby*, at *6.

Second, Farmers notes that Judge Jackson was interpreting policy language, not statutory language, requiring a UIM action to be filed within two years after "the insured or the insured's legal representative" received payment of the settlement of the underlying bodily injury liability claim. Answer Br. 22. But the only significant difference between the policy language in *Westby* and the governing statutory language here is that, under the policy language, the two-year period could begin to run when the insured's "legal representative" received payment of the settlement; the statute specifically requires that the insured receive the payment. *Westby*, at *4 n.3.

Third, Farmers argues that Judge Jackson in *Westby* committed legal error based on "an unreasonably narrow interpretation of *Stoesz*." Answer Br. 23. According to Farmers, Judge Jackson correctly recognized that the court in *Stoesz* held that the settlement agreement in that case did not constitute "payment" of the settlement, *id*. (citing *Westby*, at *5 n.5), but failed to recognize the "implications" of the *Stoesz* court's holding by ruling that a settlement agreement was necessary for an insured to receive payment of the settlement. *Id*. at 23. Farmers misconstrues *Stoesz*, which merely held that a settlement agreement did not, by itself, constitute "payment" of the settlement and therefore did not satisfy the statutory requirement

that the settlement must be paid within three years to preserve a UIM claim. *See Stoesz*, 2015 COA 86, at ¶ 19.

Because there was no settlement prior to April 5, 2013, and Kovac could not and did not receive payment of that settlement before there was a settlement, the action commenced on April 3, 2015, was timely.[6]

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings and trial.

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[6] As noted in the opening brief, *see* Opening Brief at 15 n.4, the trial court did not address any arguments regarding partial summary judgment as to Kovac's second and third claims (for bad faith and unreasonable delay and denial of benefits). Kovac believes that those claims should be addressed by the trial court in the first instance, and in light of additional evidence that has come to light during discovery. Farmers has likewise acknowledged that the trial court did not resolve those claims, but has also neither briefed those issues nor requested this Court's resolution of those claims. *See* Answer Br. 4 n.2.

Respectfully submitted this 15th day of August 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically this 15th day of August 2016 to the following:

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