SUMMARY
April 19, 2018

2018COA56

No. 17CA0098, Peña v. American Family — Insurance — Motor Vehicles — Uninsured/Underinsured

A division of the court of appeals considers whether a provision of an insurance policy permitting recovery for damages from an uninsured motorist applies when a third party's insurer denies liability but not coverage. Here, the same insurer insured both the plaintiff and the third party. Following a car accident, the insurer took the third party's position that he was not liable for the damage to plaintiff's car. Plaintiff sued insurer for unreasonably delaying her claim for uninsured motorist property damage (UMPD). Under her policy, plaintiff argued she was entitled to treat a denial of liability as a denial of coverage. Her insurer asserts, and the division agrees, that the plaintiff's UMPD coverage does not apply because a denial of liability does not amount to a denial of coverage.

COLORADO COURT OF APPEALS **2018COA56**

Court of Appeals No. 17CA0098
Adams County District Court No. 16CV31040
Honorable Emily E. Anderson, Judge

Marissa Peña,

Plaintiff-Appellant,

v.

American Family Mutual Insurance Company,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE DAILEY
Navarro and Márquez*, JJ., concur

Announced April 19, 2018

Bendinelli Law Firm, P.C., Marc F. Bendinelli, Westminster, Colorado, for Plaintiff-Appellant

Michael L. Adams, Ted Wallace, Englewood, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 Plaintiff, Marissa Peña, appeals the district court's judgment dismissing her complaint against defendant, American Family Mutual Insurance Company. We affirm.

I. Background

¶ 2 While driving her car on June 24, 2013, Peña was involved in a three-car collision. When the accident occurred, she was insured by American Family Mutual Insurance Company (American Family). So too was one of the other drivers involved in the accident, Herman Garner.

¶ 3 In November 2013, Peña sent a letter to American Family asserting a claim under the uninsured motorist provisions of her policy. On September 9, 2015, the law firm representing Peña sent American Family another letter, specifically asserting that despite the conclusion of an investigating police officer

> assigning 100% pf [sic] the fault to Mr. Garner for causing this collision[,] . . . American Family is refusing to repair Ms. Pena's car under Mr. Garner's Property Damage coverage.
>
> . . . .
>
> Further, . . . Ms. Pena has Uninsured Motorist Property damage coverage stemming from her own policy. As you know, a denial from Mr. Garner's insurance company (here American

> Family) permits Ms. Pena to treat Mr. Garner as uninsured[,] entitling Ms. Pena [to] Uninsured Motorist Property Damage coverage. However, American Family has never issued a check for the damages to Ms. Pena's vehicle under that coverage either.[1]

¶ 4 On September 17, 2015, American Family responded that it was denying Peña's claim because (1) having completed its own investigation in the matter, it had "determined that Herman Garner is not responsible for the damage to either vehicle involved in the claim" and (2) because (as pertinent here) Garner's vehicle "had active coverage at the time of the [accident]," Peña's "coverage of Uninsured Motorists Property Damage would not apply."

¶ 5 Peña instituted two actions, one against Garner,[2] the other against American Family. In the case now before us, Peña sued American Family under section 10-3-1115, C.R.S. 2017, for the unreasonable delay and denial of benefits due under the Uninsured Motorist Property Damage (UMPD) provisions of her policy. In support of this claim, she alleged that her UMPD coverage

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[1] The law firm sought only the $2,794.03 which an auto body shop had estimated would be required to repair Peña's car.

[2] American Family has apparently hired counsel to defend Garner in that action.

encompassed her situation here because it "expressly included vehicles that were insured by a . . . policy at the time of the accident but the insurer denies coverage."

¶ 6 American Family moved to dismiss, arguing that Peña's complaint failed, as a matter of law, to state a claim upon which relief could be granted because Peña's UMPD coverage applied only if American Family (as Garner's insurer) denied coverage (rather than liability) for Garner in connection with the accident. Because, according to American Family, it had not denied Garner's coverage, but only his liability, for the accident, Peña's UMPD coverage would not apply.

¶ 7 The district court agreed with American Family's interpretation of Peña's policy and the distinction American Family made between a denial of "coverage" and a denial of "liability." But because American Family had only denied Garner's liability and the issue of his liability had not yet been determined, the court concluded that Peña's UMPD coverage "would not apply at this point" and her "lawsuit [was] premature." Consequently, the court dismissed Peña's case without prejudice.

II. Analysis

¶ 8 On appeal, Peña contends that the district court erred in dismissing her case. We disagree, however, based on an analysis somewhat different from that employed by the district court. *See Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004) (concluding that a trial court's ruling may be affirmed based on any grounds that are supported by the record); *Chryar v. Wolf*, 21 P.3d 428, 431 (Colo. App. 2000) (noting that a judgment that reaches the correct result will be upheld on appeal even if the stated reasons for a trial court's ruling were erroneous).

A. Do We Have Jurisdiction?

¶ 9 Before addressing the merits of Peña's contention, however, we need to address our jurisdiction to hear this appeal. "The dismissal of a complaint without prejudice is generally not appealable unless such dismissal prohibits further proceedings, such as when the applicable statute of limitations would prevent the reinstitution of suit." *Golden Lodge No. 13, I.O.O.F. v. Easley*, 916 P.2d 666, 667 (Colo. App. 1996); *see Farmers Union Mut. Ins. Co. v. Bodell*, 197 P.3d 913, 916 (Mont. 2008) (An order dismissing a complaint without prejudice is not an appealable order absent the existence of

special circumstances such as "the running of a statute of limitations, language in the order of dismissal indicating that the complainant will not be permitted to re-plead, or where the practical effect of the order of dismissal terminates the litigation in the complainant's chosen forum.").

¶ 10 It would appear, at first blush, that the district court's order of dismissal here is not appealable. The district court, remember, dismissed the complaint because, in its view, the complaint was prematurely brought. Almost by definition, a complaint that was prematurely brought could not have been belatedly brought for statute of limitations purposes.

¶ 11 As explained below, however, we reject the district court's determination that the case was prematurely brought. And because the applicable two-year limitations period measured from American Family's September 17, 2015, response, has expired, Peña would have no avenue for relief if we were to turn aside her appeal. *See Wardcraft Homes, Inc. v. Emp'rs Mut. Cas. Co.*, 70 F. Supp. 3d 1198, 1213 (D. Colo. 2014) (applying the two year limitations period of section 13-80-102(1)(a), C.R.S. 2017, for actions brought under section 10-3-1115).

B. Was the Complaint Properly Dismissed?

¶ 12 Regarding the merits of Peña's contention, we review de novo the district court's ruling on a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

¶ 13 A complaint may be dismissed if the substantive law does not support the claims asserted, *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008), or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief, *Ritter*, 255 P.3d at 1088; *cf. Warne v. Hall*, 2016 CO 50, ¶ 1 ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))).

¶ 14 In resolving a Rule 12(b)(5) motion to dismiss, a court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); *Yadon v. Lowry*, 126 P.3d 332, 336

(Colo. App. 2005) (discussing documents attached or referenced in the complaint).[3]

¶ 15 Although we view the factual allegations in the complaint as true and in the light most favorable to the plaintiff, *Ritter*, 255 P.3d at 1088, "we are not required to accept as true legal conclusions that are couched as factual allegations," *Fry v. Lee*, 2013 COA 100, ¶ 17, and, when documents are properly before the court, their legal effect is determined by their contents rather than by allegations in the complaint, *see Stauffer v. Stegeman*, 165 P.3d 713, 716 (Colo. App. 2006) (noting, also, that a court is not required to accept legal conclusions or factual allegations at variance with the express terms of those documents).

¶ 16 On appeal, Peña asserts that the district court erred in not considering whether American Family unreasonably delayed or denied her claim before dismissing her action. We are not persuaded.

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[3] If other matters are presented to and considered by the court, the motion "shall be treated as [a motion] for summary judgment and disposed of as provided in C.R.C.P. 56[.]" C.R.C.P. 12(b). From our view it appears that no other matters were considered by the court.

¶ 17 Peña's complaint did not assert a claim against American Family in its role as Garner's insurer; it asserted, instead, a claim against American Family as her insurer. So the question, in the first instance, was a legal one, *i.e.*, what was American Family's duty to her under the UMPD provisions of her policy.

¶ 18 Under that policy, American Family agreed to

> pay compensatory damages which [Peña is] legally entitled to recover from the owner or operator of an uninsured motor vehicle because of loss or damage caused by an accident arising out of physical contact with [her] insured car. The owner or operator's liability for these damages must arise out of the ownership, maintenance, or use of the uninsured motor vehicle.

Of critical importance, the policy defined an "uninsured motor vehicle" to mean, as pertinent here, "a land motor vehicle . . . insured by a . . . policy at the time of the accident *but the insurer denies coverage*. . . ." (Emphasis added.)

¶ 19 Peña argues that under the terms of her policy, she is entitled to pursue her claim because (1) the police report generated after the accident cited Garner as "100% liable" for the accident; and (2) despite the report, American Family denies that Garner is liable and is providing a defense for him in the other case. Peña's UMPD

coverage was applicable, she asserts, because Garner's insurer (American Family) was denying liability.

¶ 20 But, as other courts recognize, a denial of claim by an insurer for lack of coverage is very different than a denial of a claim by an insurer on the ground that its insured is not liable:

> The former involves a determination as to whether the particular claim asserted is one to which the policy was intended to apply, whereas the latter involves a determination as to the viability of the claim itself. "'Coverage' and 'claim' are by no means synonymous; . . . an insurer against whom a claim is made will frequently deny such claim on issues relating to liability even though coverage actually is afforded in the event that the question of liability is eventually determined against it." *Page v. Insurance Co. of N. America*, . . . 64 Cal. Rptr. 89, [84] ([Cal. Ct. App.] 1967) (construing "uninsured motor vehicle" under California statute). This, however, does not render the insured uninsured as to that claim. The aggrieved party may still file suit against the alleged tortfeasor and, if successful, recover from that person's insurer, so long as the claim is within the scope of the policy. *See generally* 8C Appleman & Appleman, Insurance Law & Practice § 5076.15, at 151 (1981) ("A denial of [a] plaintiff's claim is not, of course, necessarily a denial of coverage[.]").

Noel v. Metro. Prop. & Liab. Ins. Co., 672 N.E.2d 119, 121 (Mass. App. Ct. 1996); *accord Estate of Anderson v. Safeco Ins. Co. of Ill.*,

567 F.3d 404, 407 (8th Cir. 2009) ("[I]t would be 'unreasonable in the context of uninsured motorist insurance to define 'coverage' to include a denial by the liability insurer of the insured's fault in the accident.' To allow for such a definition would conflate 'coverage' with 'liability' when the two are not synonymous. . . . Several courts have noted this distinction in pointing out that 'coverage' relates to whether the policy was intended to apply to a particular claim, whereas 'liability' addresses the viability of the claim on the facts.") (citations omitted); *Page*, 64 Cal. Rptr. at 93-94 ("[I]t is practically a matter of common knowledge that an insurer against whom a claim is made will frequently deny such claim on issues relating to liability even though coverage actually is afforded in the event that the question of liability is eventually determined against it."); *Clark v. Prudential Prop. & Cas. Ins. Co.*, 66 P.3d 242, 245 (Idaho 2003) (stating "[c]overage relates to whether [the insured] has insurance to cover the accident, and liability relates to whether [the insured] was at fault, thus triggering the insurer's obligation to pay").

¶ 21 Because Garner's insurer (i.e., American Family) denied liability but not coverage for the accident, the UMPD coverage of Peña's policy with American Family was inapplicable. *See, e.g.*, *Clark*, 66 P.3d at 245 (denying uninsured motorist coverage when the insurer did not deny coverage but denied liability).[4] And because there was no applicable UMPD coverage here for Peña, there were no benefits which could have unreasonably been delayed or denied under section 10-3-1115. Simply put, Peña had no claim, as a matter of law.

¶ 22 The district court did not reach this conclusion, determining instead that Peña's lawsuit was premature because Garner's liability had not yet been established. This determination was in error: Peña will *never* have a claim against American Family under her policy for unpaid UMPD benefits in connection with this accident. The reason? Garner's insurer (American Family) has not denied coverage, the circumstance which would trigger the

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[4] In her reply brief, Peña argued that we should not interpret her policy this way because (1) the term "coverage" is ambiguous and ambiguities in a policy are construed against the insurer; and (2) the interpretation urged by American Family would violate public policy. We do not, however, consider arguments raised for the first time in a reply brief. *See Meadow Homes Dev. Corp. v. Bowens*, 211 P.3d 743, 748 (Colo. App. 2009).

applicability of Peña's UMPD coverage. If Garner is ultimately found liable, Peña will have a claim against American Family under the liability provisions of *his* policy, not under the UMPD provisions of *hers*. And if he is not, she has no claim at all.

III. Conclusion

¶ 23 The judgment is affirmed.

JUDGE NAVARRO and JUDGE MÁRQUEZ concur.