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COLORADO COURT OF APPEALS
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Appeal from the District Court, El Paso County, Colorado
The Honorable Edward S. Colt, District Judge
Case No. 2015CV30945

PLAINTIFF-APPELLANT:
DONNA KOVAC

v.

DEFENDANT-APPELLEE:
FARMERS INSURANCE EXCHANGE

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Court of Appeals Case

No: 2016CA167

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains 5,800 (9,500 limit) words.

It contains 26 pages.

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

For the party raising the issue:

> It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p. __), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

> It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

S/ L. Michael Brooks, Jr.

_____

Signature of attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. STATEMENT OF THE ISSUE

The Underinsured Motorist (UIM) statute of limitation requires an insured who timely settles with an at-fault driver to bring a UIM action "within two years after the insured received payment of the settlement . . . on the underlying bodily injury liability claim." § 13-80-107.5(1)(b), C.R.S. (2015). Did the trial court correctly hold that Donna Kovac's UIM action was time-barred where her counsel received the at-fault driver's settlement check on April 1, 2013, but did not file suit until April 3, 2015?

II. COMBINED STATEMENT OF THE CASE AND THE FACTS

A. The Accident and UIM claim

In October 2010, Ms. Kovac was involved in a two-car accident with Kevin Filippelli. (CF, p. 113.) At the time of the accident, Farmers insured the vehicle operated by Ms. Kovac under a policy that provided UIM benefits with limits of $250,000 per person and Medical Payments ("Med Pay") coverage in the amount of $5,000. (CF, pp. 100, 195.) A separate Farmers insurance policy with UIM coverage with limits of $500,000 per person and Med Pay benefits in the amount of $5,000 also covered Ms. Kovac. (CF, pp. 100, 195.)

Believing Mr. Filippelli to be at fault, Ms. Kovac made a claim against him for injuries she allegedly sustained in the accident. She never had to file a lawsuit

against him (*see* CF, p. 104) because Mr. Filippelli's liability insurer, Shelter Insurance Company ("Shelter"), tendered the full limits of his automobile liability insurance policy, $100,000, to settle Ms. Kovac's claims. (CF, pp. 212-215.) Shelter issued a check payable to Ms. Kovac in the amount of $100,000 on March 27, 2013. (CF, p. 215.) Shelter's $100,000 settlement check arrived at the office of Ms. Kovac's counsel, Thomas Herd, on April 1, 2013. (CF, pp. 212-213; Opening Brief at 1, 8.) Shelter's cover letter that accompanied the settlement check stated that Shelter was making an offer to pay Ms. Kovac $100,000 (the Shelter policy limits) to fully settle Ms. Kovac's claim against Mr. Filippelli. (CF, p. 129.) The letter asked Ms. Kovac's counsel to send back an executed copy of the release, which was also enclosed with the settlement check. (*Id.*) The letter did not contain any limitations on Ms. Kovac's rights to negotiate the check before the execution of the release. (*Id.*)

On April 2, 2013, Mr. Herd notified Farmers that Shelter had tendered its policy limits, and requested Farmers' consent to settle, which Farmers granted. (CF, p. 216-218.)

Ms. Kovac – who was represented by the same attorney throughout her claim and litigation – filed the present action on April 3, 2015, two years and two

days after her counsel had received the settlement check. (CF, p. 1, 3.) The applicable statute of limitations required her to file her UIM action within two years from the date she received payment of the settlement on the underlying bodily injury liability claim, or April 1, 2015.[1] § 13-80-107.5(1)(b).

B. The trial court's order granting summary judgment

Farmers moved for summary judgment on the grounds the statute of limitations barred Ms. Kovac's claims because she had failed to file suit within two years following payment of a settlement with Mr. Filippelli, as required by the

[1] Ms. Kovac's Opening Brief refers to an internal report prepared by Farmers that contained the statement: "SOL 4/5/15." (*See* Opening Brief at 6 (citing CF, p. 294.)) That report incorrectly referred to the date of the "settlement" (rather than the date that the date she "received payment of the settlement") as the triggering date for the statute of limitation. Farmers produced this internal report as part of its C.R.C.P. 26(a)(1) disclosures in this litigation. Neither Ms. Kovac nor her counsel had a copy of it or relied on it in any way when they made the decision about when to file this action. Further, Ms. Kovac did not rely on this internal Farmers report in her response to Farmers' motion for summary judgment. The only place that this report appears in the record is as an exhibit to an unrelated procedural motion. (*See* CF, pp. 259-267, 294.) Ms. Kovac never raised argument concerning the March 20, 2015 report in responding to Farmers' summary-judgment motion. Accordingly, she cannot rely on that report to support any of her arguments on appeal. *See Murray v. Just In Case Business Lighthouse, LLC*, 2016 CO 47, ¶ 44 ("Arguments not raised before the trial court may not be raised for the first time on appeal.").

UIM statute of limitations, section 13-80-107.5(1)(b).[2] (*See* CF, pp. 99-106.) Ms. Kovac responded in opposition to the motion, and Farmers replied. (CF, pp. 195-258, 392-398.)

At the time that Farmers filed its summary-judgment motion, it believed that Ms. Kovac's counsel, Mr. Herd, had received the settlement check from Mr. Filippelli's insurer on April 2, 2013. Therefore, Farmers argued that Ms. Kovac's UIM claim was time barred as of April 2, 2015. (CF, pp. 104-106.)

In her summary-judgment response, Ms. Kovac admitted that her counsel had actually received the $100,000 settlement check one day earlier, on April 1, 2013. (CF, pp. 196, 212-215; Opening Brief at 1, 8.) Nevertheless, she argued that she could not have "received payment" under section 13-80-107.5(1)(b) until after Farmers had consented to the settlement, she and her husband signed the

[2] Farmers also moved for summary judgment on Ms. Kovac's second and third claims for relief, bad faith breach of insurance contract and unreasonable delay and denial of insurance benefits. (*See* CF, pp. 99, 106-111.) In footnote four of her Opening Brief, Ms. Kovac suggests that this Court should not address Farmers' motion for partial summary judgment with regard to her bad faith and unreasonable delay and denial of benefits claims. However, the parties fully briefed those issues in the trial court, and those arguments independently support summary judgment as to Ms. Kovac's second and third claims for relief. This Court may affirm on any basis supported by the record. *See Ryan Ranch Community Association, Inc. v. Kelley*, 2014 COA 37M, ¶ 52.

release, and the settlement check cleared her counsel's trust account. (CF, pp. 197, 199-200, 221.)

In its reply, Farmers reiterated that, to preserve her claim for UIM benefits, section 13-80-107.5(1)(b) required Ms. Kovac to commence an action against Farmers either: (1) within three years of her October 24, 2010, automobile accident; or (2) if suit was not filed against Mr. Filippelli, within two years from the date Ms. Kovac received payment of the settlement, as long as she received payment within the original three-year statute of limitations. § 13-80-107.5(1)(b). (CF, pp. 393.) Thus, the statute required Ms. Kovac to file suit against Farmers no later than April 1, 2015. (CF, pp. 393.)

In its order granting Farmers' motion for summary judgment, the trial court relied upon the following undisputed facts. First, the underlying accident occurred on October 24, 2010. (CF, p. 399; *see also* CF, p. 113.) Second, the at-fault driver's insurer, Shelter, offered Ms. Kovac full policy limits via a letter dated March 27, 2013, along with a $100,000 check and a release for execution by Ms. Kovac and her husband. (CF, p. 399; *see also* CF, pp. 212-215.) Third, Ms. Kovac admitted that Shelter's letter, release, and $100,000 check arrived in Ms. Kovac's counsel's office on April 1, 2013. (CF, pp. 399; *see also* CF, pp. 196,

212-215; Opening Brief at 1, 8.) The trial court rejected Ms. Kovac's contention that she could not have "received payment" of the settlement until the funds cleared her counsel's trust account some days after she signed the release on April 5, 2013. (CF, pp. 400.)

Relying on *Pham v. State Farm Automobile Insurance Co.*, 2013 CO 17, and *Stoesz v. State Farm Mutual Automobile Insurance Co.*, 2015 COA 86, *cert. denied*, No. 15SC641, 2016 WL 490251 (Colo. Feb. 8, 2016), the trial court held that section 13-80-107.5(1)(b) "clearly[] conditions its two-year period [for underinsured motorist claims] on the insured's reception of payment of a settlement or judgment on the underlying bodily injury liability claim against the underinsured motorist." (CF, p. 400, citing *Pham*, 2013 CO 17, at ¶ 21). The trial court properly held that section 13-80-107.5(1)(b) required Ms. Kovac to file suit against Farmers no later than April 1, 2015. Because she filed her complaint on April 3, 2015 (CF, pp. 116, 399-401; Opening Brief at 7), two days after the expiration of the applicable two-year statute of limitations, the trial court granted Farmers' motion for summary judgment. (CF, p. 400.)

III. SUMMARY OF ARGUMENT

It is undisputed that: (1) Ms. Kovac's trial counsel received the $100,000

check from the tortfeasor's insurer, Shelter, on April 1, 2013; and (2) Ms. Kovac waited to file suit until April 3, 2015. Thus, the only issue is the meaning of the phrase "received payment of the settlement" and whether the trial court properly held that section 13-80-107.5(1)(b) required Ms. Kovac to file suit against Farmers within two years of April 1, 2013.

The trial court correctly granted Farmers' motion for summary judgment. Section 13-80-107.5(1)(b) clearly and unequivocally required Ms. Kovac to file her UIM claim "within two years after the insured received payment of the settlement . . . on the underlying bodily injury liability claim." § 13-80-107.5(1)(b). The excuses raised by Ms. Kovac addressing her execution of the settlement agreement and obtaining Farmers' consent to settle are not contained within the statute and do not serve as a basis for extending the statute of limitations. Section 13-80-107.5(1)(b) does not condition the running of the limitations period on consent by a UIM carrier or when a plaintiff executes a release. *See Stoesz*, 2015 COA 86, ¶¶ 10-16.

As set forth in *Pham*, 2013 CO 17, at ¶ 21, the purpose of the two-year statute of limitations is to give the UIM claimant the opportunity to collect a settlement or judgment against the at-fault driver, and, based upon that event, to

decide whether to pursue further compensation from the UIM insurer. *Pham*, 2013 CO 17, ¶ 21. In *Stoesz*, 2015 COA 86, a division of this court rejected the insured's argument that "payment" could mean the date a payment check "was prepared by [the] insurer" or "the date the parties reached a legally enforceable contractual agreement to pay." *Id.* at ¶¶ 10-16. It noted that the plaintiff-insured's interpretation of the statute would contradict two fundamental principles underlying statutes of limitation by creating uncertainty and extending the deadline for filing UIM claims beyond the two years provided. *Id.* at ¶¶ 21-22.

Ms. Kovac's interpretation of the statute suffers similar deficiencies. Under her argument, an insured could unilaterally toll the statute of limitation simply by having her attorney hold on to a settlement check or refraining from executing a completed settlement agreement, injecting unnecessary uncertainty and unreasonable delay. Section 13-80-107.5(1)(b) barred Ms. Kovac's UIM claim.

IV. ARGUMENT

A. Standard of Review on Appeal and Preservation for Appeal

This Court applies *de novo* review over the trial court's order granting summary judgment to Farmers. *Lewis v. Taylor*, 2016 CO 48, ¶ 13. Further, this Court applies *de novo* review of a trial court's application of the statute of

limitations where the facts relevant to the date on which the statute of limitations accrues are undisputed. *Fiscus v. Liberty Mortgage Corp.*, 2014 COA 79, ¶ 13, *aff'd on other grounds*, 2016 CO 31. Ms. Kovac preserved her objection to the trial court's summary-judgment order. (CF, pp.199-200.)

B. The trial court correctly held that Ms. Kovac's claims are time-barred because she failed to file within two years of receiving payment of a settlement.

1. Summary judgment and statute of limitations

The interpretation of when a claim accrues under a statute of limitations is an issue of law. *Shaw Constr., LLC v. United Builder Servs., Inc.*, 2012 COA 24, ¶ 16. Whether the statute of limitations bars a particular claim is usually a fact question, but if the undisputed facts clearly show that the plaintiff had, or should have had, the requisite information as of a particular date, the issue may be decided as a matter of law. *Deutsche Bank Trust Co. Americas v. Samora*, 2013 COA 81, ¶ 20. A court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c); *Lewis*, 2016 CO 48, at ¶ 13.

2. The UIM statute of limitation provides a two-year window to bring a UIM action after an insured has received payment of a settlement from an at-fault driver.

The parties agree that the statute of limitations provided in section 13-80-107.5(1)(b) applies. It states, as pertinent here:

> (1) Notwithstanding any statutory provision to the contrary, all actions or arbitrations under sections 10-4-609 and 10-4-610, C.R.S., pertaining to insurance protection against uninsured or underinsured motorists shall be commenced within the following time limitations and not thereafter:
>
> * * *
>
> (b) An action or arbitration of an "underinsured motorist" insurance claim, as defined in section 10-4-609 (4), C.R.S., shall be commenced or demanded by arbitration demand within three years after the cause of action accrues; except that, ***if the underlying bodily injury liability claim against the underinsured motorist is preserved by commencing an action against the underinsured motorist or by payment of either the liability claim settlement or judgment*** within the time limit specified in sections 13-80-101 (1) (n) [***three years***]. . . , ***then 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***. In no event shall the insured have less than three years after the cause of action accrues within which to commence such action or demand arbitration.

§ 13-80-107.5(1)(b) (emphases added).

Section 13-80-107.5 governs actions on both uninsured and underinsured motorist claims, but it does so in separate subsections, with each specifically made

applicable to actions on claims of one kind or the other. *Pham*, 2013 CO 17, at ¶ 14. Subsection (1)(b) applies to underinsured – or UIM – claims. That subsection "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" within three years of the date of accrual of the claim. *Id.*

The Supreme Court has described section 13-80-107.5(1)(b) as providing injured motorists "with quite favorable terms for initiating actions on such claims," in that it "provides the insured a term of years following the injury within which to file, much like a tort claim, but also provides him with a period of time after he settles or reaches judgment against the tortfeasor and thus becomes aware of an uncompensated loss." *Id.* ¶ 21. "In fact," the Court observed, "subsection (1)(b) . . . allows an insured to wait to file until [two years] after he has actually received payment of that settlement or judgment." *Id.*

Section 13-80-107.5(1)(b) required Ms. Kovac either to commence an action against Farmers (1) within three years of the accruing event, the October 24, 2010 automobile accident, or (2) because she did not file suit against the at-fault motorist, within two years from the date she "received payment of a settlement" involving the underinsured motorist, as long as she received payment within the

original three-year statute of limitations. *See* § 13-80-107.5(1)(b); *see also Pham*, 2013 CO 17, at ¶ 11.

Ms. Kovac never commenced a lawsuit against the tortfeasor, Kevin Filippelli. Thus, she had two years from the date she ***received payment of the settlement*** from him to file her UIM claim. The parties disagree about the meaning of the phrase "received payment" as it is used in section 13-80-107.5(1)(b), and whether the statute requires something more than the insured's counsel's receipt of the at-fault driver's policy-limits settlement check for payment to have been received.

3. The plain language of section 13-80-107.5(1)(b) supports the trial court's grant of summary judgment to Farmers.

The trial court held as a matter of law that Ms. Kovac had received payment of the settlement proceeds from the tortfeasor on April 1, 2013, the day her lawyer received the settlement check from the tortfeasor's insurer. (CF, p. 401.) Thus, section 13-80-107.5(1)(b) required Ms. Kovac to file suit against Farmers on or before April 1, 2015. *See* § 13-80-107.5(1)(b). Because Ms. Kovac failed to commence her action against Farmers until April 3, 2015, the trial court correctly held section 13-80-107.5(1)(b) barred her suit. (CF, pp. 399-401.)

Ms. Kovac contends, as she did in the trial court, 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. (*See* CF, p. 400; Opening Brief at 15.) The statute, however, does not refer to any of these events as triggering events for the statute of limitation. Rather, the statute uses the plain words "received payment." Those words are unambiguous.

As used in section 13-80-107.5(1)(b), the word "payment" means "the act of paying or giving compensation: the discharge of a debt or obligation." *Stoesz*, 2015 COA 86, ¶ 11 (quoting *Webster's Third New International Dictionary* 1659 (2002)). Although the *Stoesz* court quoted other dictionary definitions of "payment," *id.*, the court declined to apply them to subsection (1)(b) because they incorporated some notion of the delivery or receipt of something of value. The court reasoned that, because subsection (1)(b) uses both the terms "payment" and "received payment," the General Assembly must have intended a difference between them. Thus, if the word "payment" referred to when the settlement payment was received, "it would render the General Assembly's use of the term "received" superfluous." *Id.* at ¶ 16. As stated in *Stoesz*, the definition of "payment" does not include a reference to when payment was received. The relevant text of subsection (1)(b) clearly refers to when "payment" was "received,"

making it necessary for this Court to consider the meaning of "received."

Section 13-80-107.5(1)(b) does not define the word "received." Thus, as in *Stoesz*, it is appropriate to consult a dictionary to define that term based on its plain meaning. *See Stoesz*, 2015 COA 86, at ¶ 11 (quoting *People v. Fioco*, 2014 COA 22, ¶ 19). The dictionary definition of "receive" is "to take possession or delivery of." *Webster's Third New International Dictionary* 1894 (2002).

Read together, the plain meaning of the phrase "received payment" is: the delivery and taking possession of compensation to discharge a debt or obligation. That definition was clearly satisfied on April 1, 2013, when Ms. Kovac, through her counsel, obtained delivery of and took possession of the $100,000 settlement check from Shelter. The receipt of that payment established unequivocally that Mr. Filippelli was covered by liability insurance and provided notice to Ms. Kovac about the amount of her damages for which she was able to obtain liability-insurance compensation, the essential facts necessary to trigger the two-year time period in which to bring a UIM claim. *See generally Pham*, 2013 CO 17, at ¶ 18.

Contrary to Ms. Kovac's assertions, the statute does not allow the limitations period to be conditioned on or manipulated by the timing of the execution of a settlement agreement, obtaining consent to settle, or executing a release. Another

division of this court has already rejected a similar argument in *Stoesz*, 2015 COA 86. There, in construing section 13-80-107.5(1)(b), the court refused to equate "payment" with "the date the parties reached a legally enforceable contractual agreement to pay." *Stoesz*, 2015 COA 86, at ¶¶ 14, 17. The court explained that "including settlement agreements within the meaning of 'payment,' at least for statute of limitations purposes, would contradict two fundamental principles underlying such statutes." *Id.* at ¶ 19. First, it would create uncertainty insofar as the existence of a settlement agreement might be challenged after the fact on the basis that the tortfeasor and the insured "had not reached agreement on all essential terms." *Id.* at ¶ 20. Second, triggering the statute of limitation based on the timing of a settlement agreement "could extend the deadline for filing UIM claims beyond the additional two years provided." *Id.* at ¶ 21. The court was concerned that drafting the agreement in a manner designed to extend the period between execution of the settlement agreement and the making of the settlement payment could result in a significant extension of the time period for bringing suit. *Id.*

Although the *Stoesz* court was concerned with a different part of subsection (1)(b) from the clause at issue here,[3] the court's concerns about uncertainty and the ability to manipulate the process to extend the limitation period remain equally valid here. The precise date on which a settlement agreement is completed is not always readily discernible. Except for mediated settlements governed by section 13-22-308(1), C.R.S. (2015), Colorado law recognizes that settlements can result from informal, unsigned, and even oral agreements. *See Yaekle v. Andrews*, 195 P.3d 1101, 1107 (Colo. 2008); *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1248 (Colo. App. 2001). Thus, the precise date on which a settlement agreement was actually reached may be highly uncertain depending on the case.

The *Stoesz* court's second concern, manipulation of the deadline, also applies here. *Stoesz* posited that postponing the payment of a completed settlement would effectively toll the limitation period beyond the two years permitted under

[3] *Stoesz* involved the clause in subsection (1)(b) stating "if the underlying bodily injury liability claim against the underinsured motorist is preserved by commencing an action against the underinsured motorist or by payment of either the liability claim settlement or judgment within [three years], then an action . . . ." § 13-80-107.5(1)(b). The court was concerned with whether the insured had preserved a UIM claim by obtaining payment of a settlement of the tortfeasor's claim within three years of the date of the accident. *Stoesz*, 2015 COA 86, at ¶ 10.

the statute. *Stoesz*, 2015 COA 86, ¶ 21.[4] So, too, postponing the finalization of a settlement agreement of a fully-paid settlement would effectively toll the limitation period under Ms. Kovac's reading of the statute.

Requiring insureds to bring their claims within a generous two-year window is reason enough to enforce the plain meaning of section 13-80-107.5(1)(b) and affirm the trial court. Colorado appellate courts have enforced the UIM statute's requirements for timely filing suit. *See Pham,* 2013 CO 17, at ¶¶ 13-15; *Stoesz,* 2015 COA 86, at ¶¶ 10-24; *see also Sulca v. Allstate Ins. Co*., 77 P.3d 897, 900 (Colo. App. 2003). The trial court's interpretation also furthers the general purposes of statutes of limitations: to "promote justice, discourage unnecessary delay, and preclude the prosecution of stale claims." *Hickerson v. Vessels*, 2014 CO 2, ¶ 13; *Sulca*, 77 P.3d at 899. It also fits the nature of UIM coverage, under which "the extent of an insurance carrier's legal obligation to provide uninsured/underinsured motorist coverage [is] first and foremost [a] matter of

[4] The Supreme Court in *Pham* was also concerned with this kind of delay, noting "[i]t would . . . clearly be unreasonable to interpret the statute as reserving commencement of the two-year period until payment of a full judgment that had already been settled, rather than payment of the settlement itself." *Pham*, 2013 CO 17, at ¶ 23. Rejecting that theory, the court pronounced a black letter rule that "*payment of the settlement must mark the commencement of the two-year period*." *Id*. (emphasis added).

statutory mandate." *Pham*, 2013 CO 17, ¶ 18. Thus, compliance with the UIM statute of limitations is a necessary condition to maintain an action for UIM benefits.[5]

Contrary to Ms. Kovac's arguments, subsection (1)(b) does not condition the triggering of the two-year limitation period on the execution of the settlement agreement. As the *Stoesz* court observed, "had the General Assembly intended for preservation to occur based on a binding settlement agreement, it could have said so." *Stoesz*, 2015 COA 86, at ¶ 24. Further, section 13-80-107.5(1)(b) does not condition the running of the statute of limitations on the granting of consent by a UIM carrier; nor does it permit the limitations period to be extended based upon the date a claimant executes a release with the tortfeasor. A UIM insurer's consent (or non-consent) to a settlement with an at-fault driver does not affect the validity

[5] Further, delaying the filing of a UIM action may have a damages-inflating effect, especially regarding prejudgment interest. Colorado's personal-injury prejudgment-interest statute – section 13–21–101(1), C.R.S. (2015) – applies to UIM claims. *USAA v. Parker*, 200 P.3d 350, 360 (Colo. 2009). Under that statute, a claimant may recover 9% interest. *See id.* at 353 n.4. Delaying the filing of a UIM action, therefore, may increase the damages for which an insurer may be found liable.

of the settlement.[6] Ms. Kovac's interpretation of the statute injects unnecessary uncertainty and unpredictable delay into the claimant's determination of whether to pursue a UIM claim. It neither advances the timely conclusion of UIM claims, nor the purposes of statutes of limitations generally. *See Hickerson*, 2014 CO 2, at ¶ 13; *Sulca*, 77 P.3d at 899.

The date of receipt of payment, when the check arrives at Ms. Kovac's attorney's office, is a date that is readily ascertainable and objectively verifiable. It cannot be delayed or manipulated by the insured's actions or those of any third party. It is not a matter that would require the disclosure of attorney-client privileged communications, attorney work-product, CRE 408 settlement communications, or third-party bank records in order to obtain verification. All of the later dates suggested by Ms. Kovac fail the *Stoesz* test because of the risk of uncertainty, manipulation, and problems of proof.

Ms. Kovac's own arguments illustrate the uncertainty concern here. In the trial court, Ms. Kovac argued that April 5, 2013, the date she signed the release was the earliest day on which she might have "received payment," but she also

[6] Rather, a failure to obtain consent affects only the insured's ability to pursue a UIM claim if the insured's failure to obtain consent prejudiced the insurer). *See Lauric v. USAA Cas. Ins. Co.*, 209 P.3d 190, 193 (Colo. App. 2009).

argued that "[o]n April 5, 2013, however, Kovac still had not 'received' payment. Although the check was deposited into the firm's trust account on that date, the funds were not released on that date so none of the $100,000 was available to Kovac until several days later after the check had cleared." (CF, p. 199.) The record is devoid of any evidence as to when the funds actually cleared the attorney's COLTAF account and one suspects that neither Ms. Kovac or her lawyer have a precise understanding of when that event occurred. Conditioning the triggering of a statute of limitation on the internal workings of a third-party bank or the communications between a lawyer and his client are precisely the type of uncertainty issues the *Stoesz* court sought to avoid.

Thus, the trial court correctly interpreted the statute to find that counsel for Ms. Kovac received the settlement check from Shelter on April 1, 2013, such that section 13-80-107.5(1)(b) required her to file suit against Farmers on or before April 1, 2015. When she failed to do so, the statute of limitations barred her claim against Farmers.

4. Ms. Kovac's interpretation of section 13-80-107.5(1)(b) fails to advance the timely conclusion of UIM claims and thwarts the purposes of statutes of limitations generally.

Ms. Kovac cites *Westby v. State Farm Mutual Automobile Ins. Co.*, No 15-cv-00076-RBJ, 2016 WL 471357 (D. Colo. Feb. 8, 2016), in support of her contention that she could not have received the settlement payment until she signed the release. As a federal court decision purporting to apply Colorado law, *Westby* is not binding on this Court. *See Ruiz v. Hope for Children, Inc.*, 2013 COA 91, ¶ 15. Further, *Westby* is factually distinguishable and legally flawed.

Factually, *Westby* involves a distinctly different scenario from the one presented here. In that case, the at-fault driver's liability insurer sent a settlement check and draft release to the insured's attorney under cover of a letter *instructing the insured's attorney not to "disburse the settlement funds until all settlement paperwork has been returned to [Titan's] office*." *Id.* at *1 (emphasis added). The non-disbursement clause was integral to the *Westby* court's ruling, as the court explained: "the ordinary person would have interpreted the request from [the at-fault driver's insurer] to [the insured's counsel] about waiting to disburse the funds to be a condition precedent to the disbursement. Put differently, the average individual in either [the insured's attorney] or [the insured's] shoes would have

read the letter and believed that no payment could be received until after the insured had returned the paperwork. *Id.* at * 6. Based heavily on these findings, the court concluded that "[the insured] could not have received payment any earlier than February 7, 2013 when she signed the Release and became legally entitled to the money." *Id.* at * 7.

In this case, in contrast, nothing in Shelter's cover letter to Ms. Kovac's attorney directed him to refrain from disbursing the settlement funds. (CF, p. 129.) The letter simply asked him to return the executed release, without any other conditions. (*Id.*) Shelter's draft release contained no text relating to the timing of disbursement of the funds. (CF, p. 130.) The settlement check, itself, contained no restrictions on the timing of disbursement of funds. Thus, unlike *Westby* there was nothing inherent in the communications accompanying the check that prohibited the distribution of funds until some later event.

Further, the *Westby* court based its decision in part on the interpretation of language in the State Farm policy requiring its insured to bring suit against it within "two years immediately following the date the insured or the insured's legal representative … received payment of the settlement or judgment in the underlying bodily injury liability claim." *Id.* While this language mirrors the statutory

language of section 13-80-107.5(1)(b), the court explicitly conducted its analysis under principles of insurance contract interpretation. *Id.* at *4 n.3.

Legally, *Westby* is based on an unreasonably narrow interpretation of *Stoesz*, saying: "the *Stoesz* Court interpreted another term from the one at issue here, and it did so in an entirely different context. Accordingly, the Court does not find the *Stoesz* interpretation of 'payment' to control here." *Id.* at * 5. While *Stoesz* related to the preservation provision in subsection (1)(b), it construed the word "payment" and discussed the relationship of that word to other words and phrases in subsection (1)(b), including the word "received." The *Westby* court recognized that *Stoesz* stands for the limited proposition that a "settlement agreement did not constitute 'payment.'" *Id.* at * 5 n.5. Nevertheless, the *Westby* court ignored the implications of the *Stoesz* court's holding by ruling that an executed settlement agreement was necessary for an insured to have "received payment." *Id.* at * 7. The *Westby* court ruled, without citation to authority that it was simply a "matter of common sense that the insured cannot receive settlement funds until after the parties have completed the settlement because up until the moment that the

agreement is finalized, the insured is not legally entitled to any money." *Id.* at * 6.[7]

Subsection (1)(b) does not refer to when an insured "completed the settlement"; rather, it refers to when an insured "received *payment* of the settlement." § 13-80-107.5(1)(b) (emphasis added). *Stoesz* unequivocally held that the definition of "payment" did not include a "settlement agreement," but meant the actual "paying or giving compensation" and "the discharge of a debt or obligation." *Stoesz*, 2015 COA 86, at ¶ 11. *Pham* was equally clear that, irrespective of any other event, "payment of the settlement must mark the commencement of the two-year period." *Pham*, 2013 CO 17, at ¶ 23. The *Westby* court's ruling effectively reads the word "payment" out of the statute and equates the word "received" with the finalization of a settlement agreement. That is directly contrary to *Stoesz*. This Court should resist the *Westby* court's invitation to disregard *Stoesz*, a decision that is entitled to "considerable deference" by this Court. *See People v. Rediger*, 2015 COA 26, ¶ 30, *cert. granted on other grounds*,

[7] There is no Colorado law requiring the completion of a settlement agreement before a claimant can "receive" settlement funds, or precluding a settlement payment from being "received" until after a release is signed. *Cf. Fed. Lumber Co. v. Wheeler*, 643 P.2d 31, 37 (Colo. 1981) (affirming finding that parties had valid settlement where claimant was paid an agreed sum and later executed a release).

No. 15 SC326, 2016 WL 1746021 (Colo. Feb. 16, 2016); *In re Estate of Becker*, 32 P.3d 557, 563 (Colo. App. 2000), *aff'd sub nom. In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002).

Westby illustrates the danger of adopting Ms. Kovac's interpretation of the term "received payment." The *Westby* court could not determine precisely when Westby "received payment" of funds from State Farm. *Id.* at *6. Furthermore, that court recognized that counsel could have disbursed settlement funds at some point after the insured had "signed and returned the settlement paperwork." *Id.* Basing a statute of limitations on whether an insured agreed to the settlement terms on a particular date, allows an insured or her attorney to indefinitely extend the statute of limitations for strategic reasons and allows for a great deal of uncertainty about when the statute of limitation begins to run.

V. CONCLUSION

Ms. Kovac's attempts to amend the text of the UIM statute of limitation are unavailing. The statute refers to the date when the insured "received payment." It does *not* say the "date of a legally enforcement contractual agreement to pay." Nor does it state that the UIM insurer must consent to the settlement between the UIM claimant and tortfeasor driver before an insured may "receive[] payment." Ms.

Kovac's interpretation of the statute contravenes the purpose of the statute. As stated in *Pham*, 2013 CO 17, ¶ 21, that purpose is to give the UIM claimant the opportunity to collect a settlement or judgment against the tortfeasor driver, and, based on that event, to decide whether to pursue further compensation from the UIM insurer. *See id.* at ¶ 21. An interpretation that would subject the definition of "payment" to whether and when an insured executed a release or cashed a settlement check would inject unnecessary uncertainty and unpredictable delay into the claimant's determination of whether to pursue a UIM claim. It would neither advance the timely conclusion of UIM claims, nor the purposes of statutes of limitations generally.

Defendant-Appellee Farmers Insurance Exchange respectfully requests that this Court affirm the Trial Court's award of Summary Judgment.

Dated this 11th day of July 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2016, a true and correct copy of the foregoing **ANSWER BRIEF** was electronically filed and served via ICCES upon the following:

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