

Original

No. 35168-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

ESTATE OF JOANN H. COWART (DECEASED) BY  
KERRY BRINK, ESQ. as Co-Personal Representative and  
Special Administrator; and JAMES E. COWART, JR.,

Appellants,

v.

GREAT-WEST LIFE & ANNUITY INSURANCE,  
a foreign insurance corporation; ONE HEALTH PLAN OF  
WASHINGTON, INC., a Washington corporation;  
ONE HEALTH PLAN OF COLORADO, INC.; a foreign corporation;  
STEPHEN GORSHOW, M.D. and JANE DOE GORSHOW,  
husband and wife and the marital community composed thereof;  
THOMAS PAULSON, M.D. and JANE DOE PAULSON,  
husband and wife and the marital community composed thereof;  
ROY GOTTFELD, M.D. and JANE DOE GOTTFELD,  
husband and wife and the marital community composed thereof;  
JOHN DOE OR JANE DOE MEDICAL REVIEWERS I THROUGH III  
and JOHN DOE OR JANE DOE SCREENERS IV THROUGH VI,

Respondents.

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TACOMA, WA

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A. INTRODUCTION

Nothing in Great-West's responsive brief should dissuade this Court from reversing the trial court's order on summary judgment. Great-West failed provide any evidence or argument to refute the trial court's oral determination that discovery did not occur until August 28, 1998. Under the discovery rule, the trial court should not have dismissed the complaint of Joann Cowart's estate against Great-West when she did not know, nor should have known, all the elements of her negligence and bad faith causes of action against Great-West more than three years before filing.

Great-West intruded upon the therapeutic relationship between Joann Cowart and her physician. Great-West made a financially-driven decision that caused Joann Cowart's untimely death. She has viable, timely claims for negligence, bad faith, and violations of the Consumer Protection Act, among others.

B. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Great-West's fact recitation suggests that Joann Cowart's incontinence suddenly began between 1997 and 1998 gynecological exams. Brief of Resp'ts at 4-5. Although Joann Cowart did not complain of urinary incontinence to Dr. Nickel (her gynecologist) in a routine

gynecological exam in 1997, the record reveals that she had been dealing with urinary incontinence from a long time before 1998. CP 178-79, 188.

Great-West contends that Dr. Nickel believed the enlarged uterus “could put pressure on the bladder suspension, making it less effective over time.” Brief of Resp’ts at 8. Dr. Nickel actually said the uterus was “acting like a piston that’s sort of pushing and pulling down on the bladder and [would] probably ruin her repair.” CP 188. Contrary to Great-West’s assertion, Dr. Nickel was concerned with action of the uterus hitting against the bladder, not just its size. And he believed the bladder suspension would have to be repeated if it were not performed concurrently with a TAH procedure.

Great-West also implies that Dr. Nickel diagnosed cancer on August 26 and told Joann Cowart the “diagnosis” that same day. Brief of Resp’ts at 12. Dr. Nickel may have suspected cancer on August 26, but he told Joann Cowart that there no way to know for sure until the hysterectomy on August 28. CP 212. On August 26, Joann Cowart still believed that excess fluid in her abdomen could be the result of bladder leakage rather than cancer. *Id.* It was not until August 28 that Joan Cowart was diagnosed with ovarian cancer.

C. SUMMARY OF ARGUMENT IN REPLY

Ascertainable damage or harm to the plaintiff is one of the four necessary elements of a negligence claim: duty, breach, causation, and damages. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). The discovery rule tolls commencement of the statute of limitations until the plaintiff knows or should have known of all four elements of his or her claim. *Allen*, 118 Wn.2d at 758. The existence of these elements is generally a question of fact. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987).

The trial court found, and Great-West concedes, that Joann Cowart did not know nor should she have known that she had cancer in June 1998. Great-West presented no evidence that Joann Cowart knew or should have known of any other harm in June 1998.<sup>1</sup> Great-West's entire body of proof regarding alleged harm to Joann Cowart in June 1998 consisted of James Cowart's isolated comment eight years later that he believed his wife's health was jeopardized by Great-West's denial of her physician's

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<sup>1</sup> Great-West takes pains in its statement of the case to suggest that it did not breach the duty of care. The issue is whether Great-West sustained its burden of proof to the trial court that there is not genuine issue of material fact as to whether Joann Cowart knew or should have known Great-West's actions caused her ascertainable harm in June 1998. In an introductory aside, Great-West also contends that it is not an insurer and cannot be held to the same standard as an insurer. Brief of Resp'ts at 16. As noted in Cowart's opening brief, third party administrators of self-funded insurance plans who function like insurers are held to a similar duty of good faith. *See Long v. Great West Life & Annuity Ins. Co.*, 957 P.2d 823 (Wyo. 1998).

request to perform a TAH surgical procedure in June 1998. This is not substantial evidence and was insufficient to merit summary judgment for Great-West below.

The trial court improperly granted summary judgment on statute of limitations grounds, given its finding on undisputed evidence that Joann Cowart first knew or should have known of her cancer on August 28, 1998. Also, there is still a genuine issue of material fact as to whether Joann Cowart's claim actually accrued in September 2000. Whether the date of discovery of harm was August 28, 1998 or September 2000, the Cowarts' have timely filed claims and should be allowed to proceed.

The Consumer Protection Act (CPA) provides relief to an insured for economic damages resulting from an insurer's bad faith delay of coverage. There is no dispute that the Cowarts' CPA claim was filed within the four year statute of limitations. Summary judgment on the Cowart estate's CPA claim was inappropriate.

#### D. ARGUMENT IN REPLY

The statute of limitations for common law bad faith and negligence claims is three years. RCW 4.16.080(2). The statute of limitations for a medical malpractice claim is three years from the date of act or one year from the date of discovery of all four elements of the claim. RCW 4.16.350. The discovery rule delays commencement of the statute of

limitations until the date of discovery of all four elements of the claim, at which time the cause of action accrues. With respect to the harm element of a negligence claim, a cause of action accrues when a plaintiff knows or should have known of actual, appreciable harm for which he or she can seek relief in court. *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998); *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 595, 5 P.3d 730 (2000).

1. Great-West Does Not Directly Address the Trial Court's Factual and Legal Conclusion that the Cause of Action Accrued on August 28, 1998, and Concedes That Joann Cowart Did Not Know Nor Should Have Known of Her Cancer in June 1998

The trial court concluded in oral findings that August 28, 1998, was the date Joann Cowart first became aware that Great-West's June 1998 denial of the TAH may have delayed discovery of the cancer. RP 6/23/2006 at 45-46. The court's legal conclusion was that the cause of action accrued on August 28, 1998.<sup>2</sup> *Id.* at 46. The trial court did not explain why, given an accrual date of August 28 1998, Cowart did not meet the three-year negligence statute of limitations under RCW 4.16.080(2). Cowart raised this argument on reconsideration. RP 7/14/2006 at 15. The court appeared confused and did not respond to Cowart's argument:

Of course, the plaintiffs have alleged a number of theories of liability here, but – and so it is the [sic] difficult to sort of get through all of that stuff and distinguish between the various rules ... and then apply all of the various statutes of the various claims. I have not heard anything from the plaintiffs that changes my mind.

RP 7/14/2006 at 17. Great-West did not directly address this apparent conflict in its reply brief, simply arguing that June 1998 was when the cause of action accrued. But it is important to note that this was not the trial court's factual finding.

Great-West concedes that in June 1998, Joann Cowart did not know that she had cancer, noting that Dr. Nickel sought to perform the TAH in combination with the bladder suspension solely to relieve Joann's ongoing symptoms of incontinence. Brief of Resp'ts at 8. Great-West also concedes that in June 1998, scheduling of the TAH procedure was considered to be elective and purely a question of "convenient timing" and "patient preference." Brief of Resp'ts at 6, 9-10. This amounts to an admission that denial of the TAH in June 1998 did not cause apparent harm to Joann Cowart. Great-West also concedes that delay of the TAH did not put Joann Cowart on inquiry notice that she should investigate whether she had cancer, arguing that any discovery of cancer at that point would have been a "fortuity." Brief of Resp'ts at 2. Again, it is

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<sup>2</sup> Cowart, of course, does not concede that the trial court's implied legal conclusion is correct, as argued *supra* and in the Appellant's Opening Brief.

undisputed that in June 1998, the sole purpose of the TAH, in combination with the bladder suspension, was to alleviate symptoms of incontinence. Brief of Resp'ts at 2.

Nevertheless, Great-West argues that Joann Cowart's cause of action accrued in June 1998, when Great-West first denied pre-authorization of the TAH. This argument contradicts the trial court's findings, and is insupportable under existing case law.

In *Green v. A.P.C.*, cited extensively by Cowart but not analyzed in detail by Great-West, the plaintiff was a DES daughter.<sup>3</sup> She knew as early as 1981 that the DES exposure had resulted in a hooded cervix, a DES-related abnormality. In 1986 Green was treated for a precancerous condition in her cervix, which she also knew was related to DES exposure. In 1992, Green discovered that she had a T-shaped uterus also caused by DES, which caused reproductive complications. *Green*, 136 Wn.2d at 92-93. Despite Green's awareness that these earlier conditions (the hooded cervix and the precancerous cells) were caused by DES, the Supreme

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<sup>3</sup> Diethylstilbestrol (DES) is a drug that used to be prescribed to prevent prenatal accidents. It was discontinued when it was discovered to have toxic side effects on children including damage to their reproductive systems. *Martin v. Abbott Lab.*, 102 Wn.2d 581, 689 P.2d 368 (1984).

Court concluded that the “harm Kathleen Green sustained was the T-shaped uterus. The damages resulting from the harm consisted of her subsequent difficult pregnancy.” *Id.* at 98 n.6. The Supreme Court held that because A.P.S. failed to prove no genuine issue of material fact that Green knew or had reason to know of the T-shaped uterus before 1992, summary judgment on statute of limitations grounds was inappropriate. *Id.* at 100.

If the Supreme Court had applied Great-West’s theory in the present case to *Green*, Green’s suit would have been time-barred. If Great-West is correct, then Green should have sued in 1981 when she discovered the first abnormality attributable to DES exposure. Great-West has not distinguished *Green*. Great-West also cannot explain why this Court should reach a contrary result, when Great-West concedes that Joann Cowart did not know of have reason to know of her cancer in June 1998.

In *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000), the plaintiff knew of potential harm a decade before filing suit. In 1989, Sabey negotiated the purchase of a corporation, FNAC. Howard Johnson, the actuarial firm in charge of FNAC’s pension plan, knew the plan was underfunded but initially concealed that fact from Sabey, After Sabey’s purchase, Howard Johnson announced the underfunding. Sabey

filed for bankruptcy for his corporations. *Id.* at 579. The Pension Benefits Guaranty Corporation (PBGC) investigated and pursued Sabey's corporations for several years. *Id.* at 580-81. In 1997, the PBGC notified Sabey that he and his corporation would be liable for the debt. In 1998, Sabey sued Howard Johnson for negligence, negligent misrepresentation, and indemnification. The trial court concluded that his claims were time-barred, because the harm occurred in 1989 when Sabey acquired FNAC, learned that the pension was underfunded, and became liable for the debt. *Id.* at 581, 593. The Court of Appeals reversed, noting that although Sabey knew the plan was underfunded in 1989, and that he and his company were *potentially* liable for that underfunding, the harm was not certain until 1997 when the PBGC officially notified him of his liability. The court reasoned that "knowledge of potential liability is not the equivalent of actual harm." *Id.* at 594-95.

When compared to the facts and holdings in *Sabey* and *Green*, the trial court's error in this case becomes clear. Here, Cowart knew that Great-West had improperly denied pre-authorization of the TAH in June 1998, but she knew of no actionable harm resulting from that initial denial. In June 1998, all Joann Cowart knew was that her bladder suspension might have to be redone if her uterus "ruin[ed] her repair." On August 28, 1998, Cowart knew that she had cancer, but not that it was untreatable or

that her life had been shortened. Whether she knew or should have known of harm caused by Great-West in August 1998 is a genuine issue of material fact. Only in September 2000 was Joann Cowart informed that: (1) the cancer was incurable; (2) it had shortened her life span and; (3) the earlier treatment denied by Great-West might have extended her life.

There is a genuine issue of material fact regarding whether, before September 2000, Joann Cowart knew or should have known of any harm resulting from Great-West's breach. Even on the undisputed facts, the earliest possible point at which Joann Cowart knew or should have known of her illness was August 28, 1998. In either case, Cowart's claims for bad faith and common law negligence were filed timely, within three years of August 28, 1998.

2. Summary Judgment Was Inappropriate Because Great-West Presented No Competent Evidence of Actual Damages Incurred in June 1998

In order to prevail at summary judgment, the moving party must prove that there are no genuine issues of material fact. The facts must be viewed in the light most favorable to the non-moving party. *Green*, 136 Wn.2d at 94. If a defendant is invoking the statute of limitations then the defendant must show that the plaintiff knew or had cause to know all elements of the claim *at the time* the defendant argues the cause of action accrued. *Green*, 136 Wn.2d at 99. Argument and assertion is not enough;

the defendant must present competent evidence from medical professionals in the form of affidavits, declarations or other documents. *Green*, 136 Wn.2d at 99-100.

Because Great-West admits that the cancer was not discovered or discoverable until August 28, 1998, the issue is whether Great-West met its summary burden to prove no genuine issue of material fact that the denial of benefits from June to August 1998 caused any separate, ascertainable harm to Joann Cowart. Great-West did not meet its burden.

Great-West claims that Joann Cowart incurred harm in June 1998 when she was “denied benefits” under her insurance policy. This is a mischaracterization. The undisputed facts reveal that Joann Cowart was denied the TAH initially, but that Great-West left the door open for a TAH sometime in the future. In his letter rejecting James Cowart’s appeal letter in June, Dr. Paulson stated “more treatment is needed *before surgery*.” CP 151. And as Great-West acknowledges, it did eventually pay for the TAH. Brief of Resp’ts at 12-13.

Therefore, the foreign cases Great-West cites for the proposition that an insurance bad faith/negligence claim usually accrues when the insurer wrongfully denies coverage (Brief of Resp’ts at 20-23) are inapplicable.

Although there was no immediate harm to Joann Cowart in June 1998 sufficient to state a cause of action, Great-West's bad faith delay of benefits was still unreasonable and a breach of its duty. A plaintiff can have knowledge of the wrongful, even fraudulent, acts of another, but still not have a cause of action if "the plaintiff's damages are not certain to occur or too speculative to be proven." *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 284, 864 P.2d 17 (1993). Dr. Nickel warned Great-West that if the TAH were not performed concurrent with the bladder suspension, Joann Cowart would likely have to endure repeat suspension surgery because the movement of Joann Cowart's enlarged uterus threatened to destroy the first bladder suspension. CP 188. Joann Cowart knew in June 1998 that Great-West's bad faith decision was likely to cause her future harm.<sup>4</sup> However, that harm was only speculative in June 1998.

Great-West argues that Joann Cowart suffered harm immediately because "she was unable to have a medical procedure she wanted to have."<sup>5</sup> Brief of Resp'ts at 32. Nowhere does Great-West explain how a

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<sup>4</sup> However, risk to the integrity of the bladder procedure became moot on August 28 when, too late, Great-West finally agreed to allow a TAH procedure for Joann Cowart because of the newly discovered possibility of cancer.

<sup>5</sup> Great-West also offers as evidence of harm the opinion of Joann Cowart's doctor and father that the TAH was medically necessary in June 1998. That fact is only relevant to whether Great-West breached its duty, not whether Joann Cowart suffered harm as a result.

plaintiff's inability to have a desired elective medical procedure, standing alone, represents sufficient harm to establish a cause of action in a court of law.

Nonetheless, Great-West argues that because Joann Cowart was already "harmed" in June and should have sued then, delay in treatment of the cancer amounts to only "additional damages" citing *Steele v. Organon, Inc.*, 43 Wn. App. 230, 716 P.2d 920 (1986). Brief of Resp'ts at 29. The plaintiff in *Steele* had actual knowledge of appreciable harm immediately after the wrongful act: as a direct result of a drug overdose caused by an improper prescription, she was hospitalized with severe physical symptoms. *Id.* at 235. Years later, Steele suffered heart attack and stroke that were also attributable to the overdose. The court correctly concluded that her earlier hospitalization constituted actual harm from the negligent overdose sufficient to accrue her cause of action.

*Steele* is readily distinguishable. Great-West can point to no evidence of any physical harm that Joann Cowart knew or should have known about in June 1998. In fact, Great-West admits that as of June 1998, all anyone knew was that denial of the TAH simply delayed final resolution of the incontinence symptoms and created the future risk that the bladder suspension surgery would have to be repeated. The actual harm that Great-West's denial caused, unknown until much later, was the

progression of cancer and the shortening of Joann Cowart's life. Great-West concedes that Joann Cowart did not know and should not have known that delay of the TAH allowed the progression of cancer in June 1998.

Great-West contends that James Cowart's isolated statement, eight years after the fact – that he believed denial of the procedure had jeopardized his wife's health – settles any disputed issue of material fact as to when the cause of action accrued. Mr. Cowart is not a medical professional, his opinion as to medical harm carries no weight. *See Green*, 136 Wn.2d at 100 (defendant should have produced evidence from a medical professional as to when plaintiff should have discovered medical harm). Also, James Cowart's knowledge cannot be imputed to Joann Cowart. *See id.* at 102 (husband can bring loss of consortium claim despite pre-existing injury to wife if husband “does not know or cannot know of the injury”). The fact at issue is whether Joann Cowart knew or should have known of actual, appreciable harm in June 1998. *Green*, 136 Wn.2d at 96; *Sabey*, 101 Wn. App. at 595.

Even if James Cowart's statement can be imputed to Joann Cowart, it does not prove actual harm in June 1998. The statement that Joann's health was “jeopardized” describes only a risk of future harm, not a current harm. *Steele* explains the distinction between actual harm and

speculative harm: “It is clear that mere possibility, or even probability, that an event causing damage will result from a wrongful act does not render the act actionable....” *Steele*, 43 Wn. App. at 235. James Cowart’s belief, eight year later, that his wife’s health was jeopardized is not evidence that Joann Cowart had an actionable claim based on actual damages in June 1998. Viewing the facts in the light most favorable to Cowart, Great-West did not sustain its burden to prove that harm occurred in June 1998.

Whether this cause of action accrued August 28, 1998 or September 2000, summary judgment was inappropriate. If August 28, 1998 was the date of accrual, Cowart’s bad faith, negligence, and CPA claims were still filed timely. Also, Cowart has raised a genuine issue of material fact as to whether the cause of action accrued in September 2000, which would mean that additional claims were timely filed. That issue must be resolved by a finder of fact.

3. The Consumer Protection Act Allows Recovery for Economic Damages Associated With An Insurer’s Delay of Coverage Even If the Coverage Relates to Personal Injuries

Cowart has a legitimate claim under the Consumer Protection Act for damage to his business and property stemming from Great-West’s June 1998 denial of benefits. There is no dispute based on any accrual date that

this suit was filed within the CPA's four-year statute of limitations. Brief of Resp'ts at 37.

Great-West claims that Cowart's CPA claims are barred because they are based in part on personal injury to Joann Cowart, citing *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 773 P.2d 871 (1989). Brief of Resp'ts at 38. That case is inapposite. It involved a claim arising from a defective product. Here, Cowart seeks damages arising from bad faith and/or deceptive practices relating to a contract of insurance.

The fact that this is an insurance coverage claim changes the landscape under the Consumer Protection Act. Denial of contracted-for insurance benefits without reasonable justification is a per se CPA violation. WAC 284-30-330(4); *Indus. Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 924, 792 P.2d 520 (1990). One wrongful denial is enough; the plaintiff need not show a pattern of violations. *Kallevig*, 114 Wn.2d at 924.

Even if the claim involves some personal injuries, a party still has a CPA claim for any resulting damage to business or property. In *Anderson v. State Farm Mutual Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000), Anderson was injured in an automobile accident. State Farm, Anderson's insurer, delayed paying coverage for her injuries by failing to advise Anderson of her underinsured motorist (UIM) coverage, and then

by making an unfair settlement offer. *Anderson*, 101 Wn. App. at 330, 335. State Farm argued that Anderson had not proved damage to property, because she was ultimately made whole under the policy. The Court of Appeals reversed summary judgment for State Farm and allowed Anderson's CPA claims to proceed. The court cited as one example of property damages, "financial penalties attributable to the delay because [Anderson] and her husband were short of funds to pay bills associated with the accident." *Anderson*, 101 Wn. App. at 333.

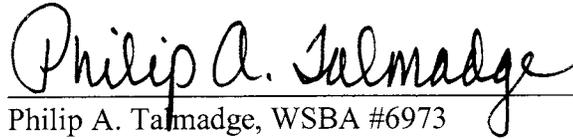
Harm related to Great-West's denial of coverage in June 1998 is compensable under the CPA and should be allowed to proceed.

#### E. CONCLUSION

Summary judgment on these facts was inappropriate. Great-West did not meet its burden of proving that the Joann Cowart knew or had reason to know of actual harm resulting from Great-West's breach in June 1998. The trial court concluded as much. Also, Cowart raised a genuine issue of material fact as to whether Joann Cowart knew or had reason to know of harm before September 2000. This court should reverse the trial court's order of summary judgment and remand for trial.

DATED this 9th day of May, 2007.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited with the U.S. Postal Service a true and accurate copy of the following document: Reply Brief of Appellants, No. 35168-4-II, to the following:

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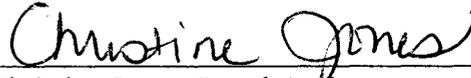
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 14, 2007, at Tukwila, Washington.



Christine Jones, Legal Assistant  
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