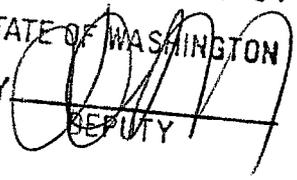


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DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

NO. 47659-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NATALIE and JAMES RYAN BOLDT, and the marital community comprised
Thereof,

Appellants,

vs.

QUICK COLLECT, INC., an Oregon corporation,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT, Honorable Elizabeth P.
Martin, Judge

BRIEF OF RESPONDENT

REED McCLURE

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I. INTRODUCTION

State Farm sent plaintiff Natalie Boldt several requests for information to investigate her PIP claim. The policy required her to provide this information. When State Farm received no response, it closed the claim. Over three years later, Mrs. Boldt called State Farm to complain that plaintiffs had been sued for chiropractic bills. She then completed and returned State Farm's forms, and State Farm paid the outstanding bills. State Farm also reimbursed her husband for wages that were garnished, and paid all amounts owed the collection agency. Despite this, plaintiffs sue State Farm. The trial court properly granted State Farm summary judgment because plaintiffs failed to create a material factual issue, and their claims are barred by statutes of limitations.

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

1. Personal Injury Protection Coverage Claim.

On September 29, 2009, plaintiff Natalie Boldt allegedly sustained injuries in a motor vehicle accident. She made a claim under the Personal Injury Protection ("PIP") coverage of her State Farm car policy.

PIP coverage is a first party coverage which pays reasonable and necessary medical expenses for bodily injury sustained by an insured in an

automobile accident. The policy did not impose on State Farm any obligation to defend or respond to a suit against an insured. CP 513, 570

The car policy provided that a person making a claim under the PIP coverage must do the following:

- (1) notify *us* of the claim and give *us* all the details about the death, injury, treatment, and other information that *we* may need as soon as reasonably possible after the injured *insured* is first examined or treated for the injury. . . .;
- (3) provide written authorization for *us* to obtain:
 - (a) medical bills;
 - (b) medical records;
 - (c) wage, salary, and employment information; and
 - (d) any other information *we* deem necessary to substantiate the claim.

CP 540 (boldface italics in original).

On October 2, 2009, State Farm sent Mrs. Boldt a letter explaining benefits payable under the PIP coverage. State Farm enclosed an Application for Benefits form, which requested information set forth in subparagraph (1), above. State Farm also enclosed an Authorization for Release of Information form, which would allow State Farm to obtain medical records and wage loss information as provided in subparagraph (2), above. State Farm asked Mrs. Boldt to complete, sign, and return these documents. CP 576-82

Mrs. Boldt claims that she sent State Farm completed forms in December 2009, but it is undisputed State Farm did not receive the completed forms. On December 29, 2009, State Farm sent another letter with application and authorization forms. The letter stated that State Farm was "unable to consider payment of your medical bills until after we receive the application and authorization". CP 571, 584

State Farm did not receive the completed forms. On February 1, 2010, State Farm sent another letter with application and authorization forms. The letter stated State Farm would return all bills unpaid unless the completed forms were returned. CP 571, 589

State Farm also attempted to contact Mrs. Boldt about her PIP claim by telephone. She had no home phone, only a cell phone. She testified: "I can't tell you exact names of who I talked to. It was really hard for me to get in touch with anybody because they would call when I was at work and unable to answer my phone. And then I would have to call after the fact and leave a message and we played phone tag quite a bit, so that's why I can't recall exactly who I spoke with." CP 678-79

State Farm did not receive the completed forms. On February 10, 2010, State Farm closed the claim. Up to that time, State Farm had issued the following payments to Kriss Chiropractic, P.S., for services provided

to plaintiff: \$605.00 on October 30, 2009; \$360 on January 22, 2010; and \$482.00 on February 1, 2010. CP 571

On March 16, 2010, a Kriss Chiropractic employee called State Farm to check on the status of payment of outstanding bills. The caller was told that State Farm still did not have a completed and signed PIP application or release on file. The caller stated she would talk to Mrs. Boldt. CP 571

Merribeth Brooks at Kriss Chiropractic testified she spoke with Mrs. Boldt several times, beginning in February, 2010, about the need to submit the PIP application in order to get State Farm to make payments. CP 324-25 Mrs. Boldt admits she was told by a Kriss Chiropractic employee that State Farm had not received forms. She thought she had sent in the forms. However, she never contacted State Farm about this. CP 405-06

After speaking with the Kriss Chiropractic employee, State Farm reopened the claim. On March 31, 2010, State Farm sent still another letter with application and authorization forms, notifying Mrs. Boldt that it was "unable to consider payment of your medical bills until after we receive the application and authorization". CP 594

On May 20, 2010, State Farm still had not received a completed and signed application or authorization from Mrs. Boldt. In fact, State

Farm had heard nothing from her since before it previously closed the claim on February 10. State Farm re-closed the claim on May 20. CP 571

Plaintiffs assert that during the September 2009 to April 2010 time frame, they had a problem with people stealing mail from their mailbox. They do not know if mail from State Farm was stolen. CP 403-04, 688-89

2. Collection Action.

Mrs. Boldt spoke with Ms. Brooks at Kriss Chiropractic several times between February 2010 and October 2012 about outstanding invoices on her account. CP 325 Beginning around October 30, 2012, the collection agency made several calls to Mr. and Mrs. Boldt. CP 303-04 Yet Mrs. Boldt did not contact State Farm. CP 572

On July 10, 2013, after more than three years, Mrs. Boldt called State Farm and said her husband had been served with a summons for outstanding chiropractic bills. Claim representative Kim Tan told Mrs. Boldt that chiropractic bills had been returned because State Farm had not received a completed and signed PIP application or authorization, despite multiple requests. Ms. Tan faxed Mrs. Boldt another letter with forms. Mrs. Boldt completed and signed the forms, and faxed them back. CP 408, 547, 572

Claim representative John Brines reviewed these documents and the file, and noted a discrepancy between the charges billed by the

chiropractor's office and the amounts paid by State Farm. On July 18, 2013, he telephoned Kriss Chiropractic. State Farm had previously made three payments of \$605, \$360, and \$482, but Mr. Brines learned that the chiropractor's office did not record the \$605 payment. After confirming that all three payments had been deposited, Mr. Brines faxed to the chiropractor's office documentation showing payment. CP 547

Since State Farm had now received the completed and signed application and authorization, State Farm decided to pay the outstanding chiropractic charges. On July 19, 2013, State Farm mailed to Kriss Chiropractic two checks totaling \$640.50, the balance of the chiropractic charges, along with documentation showing the prior payments. A copy was sent to Mrs. Boldt. CP 547-48, 551

On August 2, 2013, the letter came back in the mail, and State Farm mailed it again. The two drafts were deposited. CP 548 Plaintiffs admit that prior to August 20, 2013, State Farm paid Kriss Chiropractic all amounts billed for care provided to Natalie Boldt. CP 398, 407

3. Insurance Fair Conduct Act Notice.

On September 23, 2013, Mrs. Boldt called State Farm and said that the collection agency was garnishing her husband's wages. CP 572 Mrs. Boldt then sent a letter to State Farm, which State Farm received on or about October 3, 2013. CP 573 The letter stated that it was a "notice under

RCW 48.30.015 that I intend to file a lawsuit against State Farm under the Washington Insurance Fair Conduct Act, RCW 48.30.015". Mrs. Boldt claimed in the letter that State Farm had "unreasonably denied me coverage" because it did not take care of the collection lawsuit for her. The letter concluded: "I just found out that my husband's wages are being garnished \$300 per paycheck and it makes it difficult to feed our family. Please fix this problem as soon as possible". CP 412, 599

After receiving this letter, State Farm decided to pay collection costs, including the collection agency's legal fees. On October 9, 2013, State Farm issued payment in the amount of \$1,198.32 to reimburse plaintiffs for the amounts that had been garnished from Mr. Boldt's wages. Mr. Boldt picked up the check on October 10. CP 573

Also on October 9, State Farm issued payment in the amount of \$1,446.26 to Quick Collect, Inc., to pay for outstanding interest, legal fees, and costs. Quick Collect received this payment by October 14, and promised to file a satisfaction of judgment once the check cleared. CP 573

Mrs. Boldt admits that State Farm fixed the garnishment problem. State Farm paid her husband back the amount that had been garnished. State Farm paid Quick Collect everything it claimed was owed. CP 410-11

B. STATEMENT OF PROCEDURE.

On November 5, 2013, plaintiffs filed this action against Quick Collect and Kriss Chiropractic. CP 1-23 On February 19, 2014, plaintiffs voluntarily dismissed their claims against Kriss Chiropractic. CP 26-27

On August 19, 2014, plaintiffs filed a Motion for Leave to Amend Complaint, with a proposed amended complaint attached. CP 35-36, 37-66 The proposed amended complaint would add State Farm as a defendant. CP 36 On September 2, plaintiffs re-filed their motion. CP 106-07

On August 26, 2014, plaintiffs served State Farm through the insurance commissioner with copies of a summons, the initial complaint, the motion for leave to amend, and the proposed amended complaint. The proposed complaint had interlineations on it. CP 415-83

On September 8, 2014, the court granted the motion to amend. The order required plaintiffs to file the amended complaint, and stated that plaintiffs "shall serve the other parties with the amended complaint". CP 110-11 On September 9, plaintiffs filed the amended complaint. CP 113-42 Plaintiffs never served State Farm with the amended complaint. CP 395

On March 13, 2015, State Farm moved for dismissal for insufficient process and insufficient service of process pursuant to CR 12(b)(4) and (5), and for summary judgment pursuant to CR 56. CP 372

Plaintiffs responded on April 10. CP 603-17 On April 24, the court granted State Farm's motion for summary judgment, but denied State Farm's motion to dismiss based on insufficient process. CP 693

On May 4, 2015, plaintiffs filed a motion for reconsideration. CP 701 On May 29, the court denied this motion. CP 871 On June 3, plaintiffs filed a notice of appeal, seeking review only of the April 24, summary judgment order. CP 872-76 On July 15, the court entered Agreed Stipulation and Substitute Findings of Fact and Order of Final Judgment of Dismissal with Prejudice of Claims Against Defendant State Farm; and CR 54(b) Certification. CP 901-03 No appeal from this order was filed.

III. ARGUMENT

A. STANDARD OF REVIEW.

Review of summary judgment rulings is de novo. The reviewing court engages in the same inquiry as the trial court. Summary judgment is properly granted where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Where the moving party brings forth admissible evidence supporting the absence of any issue of material fact, the “adverse party may not rest upon the mere allegations or denials of [a] pleading, but [a] response, by affidavits or as otherwise provided in this rule, *must set forth specific facts* showing that there is a genuine issue for trial.” *Michak v. Transnation*

Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (*quoting* CR 56; emphasis in original).

B. THE COURT SHOULD NOT CONSIDER ISSUES WHICH WERE NOT CALLED TO THE TRIAL COURT'S ATTENTION.

Plaintiffs seek reversal based on issues they never called to the attention of the trial court. They never argued below that State Farm violated WAC 284-30-330(2), (4), or (16), or RCW 48.30.090. They never argued that State Farm's claim representative gave legal advice. Instead, they opposed State Farm's summary judgment motion with arguments they have now abandoned. This court should not consider new issues never argued to the trial court.

State Farm moved for summary judgment because plaintiffs could not prove bad faith or violations of the Insurance Fair Conduct Act ("IFCA") or the Consumer Protection Act ("CPA"), and based on statutes of limitations. CP 378 In response, plaintiffs made an estoppel argument they have now abandoned. CP 608 They asserted WAC 284-30-395 did not permit State Farm to deny PIP benefits, also now abandoned. CP 611 They asserted State Farm failed to assist Mrs. Boldt. CP 610

Plaintiffs' response did not mention statutes of limitations, nor did it address State Farm's arguments relating to the IFCA or the CPA.

Plaintiffs never referred to WAC 284-30-330(2), (4), or (16), or RCW 48.30.090. No mention was made of giving legal advice. CP 603-17

RAP 9.12 creates a special rule for orders on summary judgment: “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court”.

An appellate court will generally not consider arguments raised for the first time on appeal. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992) (declining to consider new summary judgment arguments); *accord Visser v. Craig*, 139 Wn. App. 152, 165 n.8, 159 P.3d 453 (2007) (same); *Milligan v. Thompson*, 110 Wn. App. 628, 633, 42 P.3d 418 (2002) (same). This rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This court therefore should not consider the issues and arguments raised for the first time on appeal by plaintiffs. They were never called to the trial court’s attention.

C. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' INSURANCE FAIR CONDUCT ACT CLAIM.

1. Plaintiffs Have No IFCA Claim Because State Farm Paid All Benefits Owed Under the Policy, Before Plaintiffs Even Sent Their IFCA Notice.

An IFCA cause of action requires unreasonable denial of a claim for coverage or payment of benefits by an insurer. RCW 48.30.015(1). Plaintiffs concede that State Farm paid all benefits payable under the PIP coverage by August 2013, before plaintiffs sent their IFCA notice. CP 398, 407, 599 Plaintiffs' IFCA claim therefore was correctly dismissed.

The IFCA created a new cause of action based on unreasonable denial of a claim for coverage or benefits. *Malbco Holdings, LLC v. AMCO Ins. Co.*, 546 F. Supp. 2d 1130, 1132 (E.D. Wash. 2008). It provides:

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

RCW 48.30.015(1).¹

¹ The IFCA did not become law until December 6, 2007. See *Malbco Holdings*, 546 F.Supp.2d at 1132. Therefore, plaintiffs' assertions at pages 16-17 of their brief that cases decided in 1984, 1990, and 2005 indicate how IFCA may be violated are rather suspect.

The IFCA requires that an “insured must show the insurer unreasonably denied a claim for coverage or that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under IFCA”. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 79, 322 P.3d 6, 20 (2014).

Although RCW 48.30.015(2), (3) and (5) permit trebling of damages and recovery of fees based on violation of certain insurance regulations, a regulatory violation alone is insufficient to support an IFCA cause of action.

IFCA provides a cause of action to a "first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer. . . ." RCW 48.30.015(1). Such a person "may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section." *Id.* The following two paragraphs of the statute permit recovery of treble damages and attorneys' fees if the plaintiff can show either an unreasonable denial of coverage or payment or a violation of one of several enumerated WAC provisions. RCW 48.30.015(2), (3). However, a violation of one of the enumerated WAC provisions alone is not sufficient to sustain a cause of action under IFCA. There must be an unreasonable denial of coverage or payment.

MK Lim, Inc. v. Greenwich Ins. Co., 2011 U.S. Dist. LEXIS 126395 (W.D. Wash. 2011). *Accord Seaway Properties, LLC v. Fireman's Fund Ins. Co.*, 16 F. Supp. 3d 1240, 1255 (W.D. Wash 2014) (by its plain

language, IFCA gives no right to sue solely for violation of a regulation); *Hann v. Metropolitan Casualty Ins. Co.*, 2012 WL 3098711, at *3 (W.D. Wash. 2012) (violations of regulations “do not, on their own, provide a IFCA cause of action absent an unreasonable denial of coverage or payment of benefits”); *Weinstein & Riley, P.S. v. Westport Ins. Corp.*, 2011 WL 887552, at *30 (W.D. Wash. 2011), *aff’d*, 484 Fed. Appx. 121 (9th Cir. 2012) (“[v]iolations of the regulations enumerated in RCW 48.30.015(5) provide grounds for trebling damages or for an award of attorney’s fees; they do not, on their own, provide a cause of action absent an unreasonable denial of coverage or payment of benefits”).

Recently, another federal judge concluded that the legislature did not intend to create a cause of action based on a regulatory violation alone.

The conflict between subsection (5) and the other IFCA provisions does not mandate the recognition of an implied cause of action. In subsection (1), a mere few lines above subsection (5), the legislature clearly, explicitly, and expressly created a cause of action against an insurer who unreasonably denied an insured coverage or the payment of benefits. RCW 48.30.015(1). If the legislature truly intended to create a third IFCA cause of action arising out of subsection (5), they would have utilized the same or similar language as in subsection (1). It is this Court’s finding that the legislature, by declining to do so, expressed an intent *not* to create an independent IFCA cause of action under subsection (5).

Workland & Witherspoon, PLLC v. Evanston Ins. Co., 2015 WL 6553877, at *7 (E.D. Wash. 2015) (emphasis in original).

Plaintiffs' assertion that State Farm should have defended the collection suit cannot be the basis for an IFCA claim. The PIP coverage is a first party coverage. It contains no contractual language creating any duty to defend a collection suit. Moreover, only first party claimants may bring an IFCA cause of action. RCW 48.30.015(1); *Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 201, 312 P.3d 185 (2013), *rev. denied*, 179 Wn.2d 1010 (2014).

First party coverage pays specified benefits directly to the insured when a determinable contingency occurs, allowing an insured to make her own personal claim for payment against the insurer. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 914 n.8, 169 P.3d 1 (2007). The PIP coverage pays for Mrs. Boldt's own medical expenses incurred for injuries sustained in a motor vehicle accident. Mrs. Boldt's claim under the PIP coverage was a first party claim. *Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 95 n.1, 95 P.3d 313 (2004).

In contrast, third party coverage involves an insurer's duties to defend and indemnify an insured for claims brought by others against the insured. *Dan Paulson Constr.*, 161 Wn.2d at 914.

The PIP coverage contains no provision requiring State Farm to defend or indemnify an insured against claims brought by a third party. It is a first party coverage. Therefore, State Farm's failure to defend the

collection action was not a denial of a claim for coverage or payment of first party benefits. It cannot be the basis for an IFCA cause of action.

Plaintiffs admit that State Farm paid all PIP benefits owed Mrs. Boldt by August, 2014. As will be discussed in the next section, this was prior to when Mrs. Boldt sent the IFCA notice. Therefore, plaintiffs have no cause of action under the IFCA.

2. Plaintiffs Have No IFCA Claim Because State Farm Resolved the Basis of Their Cause of Action Within 20 Days of Receipt of the IFCA Notice.

As required by the IFCA, at least 20 days prior to filing suit, Mrs. Boldt sent State Farm notice that she planned to file suit under the IFCA. The notice stated that Mr. Boldt's wages were being garnished, and asked State Farm to "fix this problem as soon as possible". CP 599 State Farm immediately fixed this problem. It reimbursed plaintiffs for the garnished wages and paid the collection agency all it claimed was owed. CP 410-11 The collection agency received payment well within the 20-day period specified in the IFCA. Since State Farm resolved the basis for the IFCA claim within 20 days of receipt of the notice, plaintiffs' IFCA claim was correctly dismissed.

The IFCA creates a condition precedent for pursuing a cause of action. The first party claimant must send written notice of the basis for the cause of action to the insurer twenty days prior to filing an action.

(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. . . .

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

RCW 48.30.015(8)(a)-(b).

The purpose of this subsection is apparent. A first party claimant is required to notify an insurer of the basis of a potential IFCA claim twenty days prior to filing an action, to give the insurer the opportunity to resolve the basis for the claim before an action is filed. The 20-day notice requirement allows an opportunity for resolution without litigation. This benefits the insured, the insurer, and the larger Washington State citizenry by preserving judicial resources.

Mrs. Boldt asked State Farm in the notice to “fix th[e] problem” of garnishment of Mr. Boldt’s wages. CP 599 State Farm did exactly what Mrs. Boldt requested in her letter. Mrs. Boldt admitted at her deposition that State Farm fixed the problem by promptly reimbursing the Boldts for the wages that were garnished, and by paying the collection agency all amounts it claimed the Boldts owed, stopping the garnishment process. State Farm did this well within the 20-day statutory time limit.

Plaintiffs assert that State Farm should have reimbursed Mr. Boldt for time spent driving to the State Farm agent's office, fixed plaintiffs' credit rating, etc. But Mrs. Boldt did not ask for any of this in her notice. An insurer is not required to read a claimant's mind to determine the basis for her cause of action. It is only required to read her notice.

Further, the IFCA creates a cause of action for "unreasonabl[e] deni[al of] a claim for coverage or payment of benefits by an insurer". RCW 48.30.015(1). This is the "basis" of an IFCA cause of action. The statute permits the insurer to avoid an IFCA suit by accepting coverage previously denied, or by paying benefits previously denied, within 20 days of receipt of the required notice. As discussed above, State Farm paid all PIP benefits owed before Mrs. Boldt even sent the notice. The court correctly dismissed the IFCA claim.

3. Plaintiffs' IFCA Claim is Barred by the Three-Year Statute of Limitations.

State Farm closed its file for Mrs. Boldt's PIP claim in May, 2010. She did not amend her complaint to sue State Farm until September, 2014, more than four years later. CP 113-42, 571 Her IFCA claim is therefore barred by the three-year statute of limitations.

RCW 4.16.080(2) requires that "any other injury to the person or rights of another not hereinafter enumerated" be "commenced within three

years". IFCA claims are subject to this three-year limitations period. *Walker v. Metropolitan Prop. & Cas. Ins. Co.*, 2013 WL 942554, at *5 (W.D. Wash. 2013); *see also Ward v. Stonebridge Life Ins. Co.*, 2013 WL 3155347, at *5 (W.D. Wash. 2013), *aff'd*, 608 Fed. Appx. 487 (2015).

Statutes of limitations begin to run when a cause of action accrues. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). A cause of action accrues when the party has the right to apply to a court for relief. *Id.* Generally, a tort cause of action accrues at the time of the act or omission causing injury. *See In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992) (personal injury actions). A contract action accrues on breach. *Vertecs*, 158 Wn.2d at 576.

As noted above, the IFCA requires an unreasonable denial of a claim for coverage or payment of benefits, in other words, unreasonable breach of a contract to pay insurance benefits. If State Farm denied plaintiff PIP benefits, it did so no later than when it closed its file on May 20, 2010, after sending several letters to Mrs. Boldt stating it would not consider payment of her medical bills until after it received a completed and signed application and authorization. Mrs. Boldt had a right to apply for relief from a court at that time. Her claims accrued, and the statute of limitations began to run.

Plaintiffs' assertion that they did not receive mail from State Farm did not prevent their claim from accruing. An employee of Kriss Chiropractic told Mrs. Boldt in March, 2010, that State Farm was declining to pay bills. Despite this knowledge, she did nothing.

State Farm closed Mrs. Boldt's PIP claim on May 20, 2010. The three-year statute of limitations for the IFCA expired no later than May 20, 2013. The IFCA claim is therefore time barred.

D. THE TRIAL COURT CORRECTLY DISMISSED THE INSURANCE BAD FAITH CLAIM.

1. State Farm's Handling of Mrs. Boldt's Claim Was Reasonable Based on Undisputed Material Facts.

The policy required Mrs. Boldt to provide information giving State Farm all the details about her injury, treatment, and other information needed by State Farm, and to provide an authorization allowing State Farm to obtain records. State Farm requested this information at least four times to fulfill its obligation to investigate her claim, but received no response. CP 576, 584, 589, 594 As a matter of law, State Farm's decision to close the claim in light of Mrs. Boldt's failure to provide information needed in State Farm's investigation was not unreasonable, frivolous, or unfounded.

Washington recognizes a tort cause of action for bad faith mishandling of a first party claim by failing to conduct a reasonable

investigation. *St. Paul Fire & Marine Ins. Co. v. Orvia, Inc.*, 165 Wn.2d 122, 131-32, 196 P.3d 664 (2008). This cause of action arises out of the insurer's contractual and statutory obligation to fully and fairly investigate the claim. *Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998).²

“Claims of bad faith are not easy to establish and an insured has a heavy burden to meet.” *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002). To establish a claim for bad faith claim handling, “the policyholder must show the insurer’s breach of the insurance contract was unreasonable, frivolous, or unfounded”. *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469-70, 78 P.3d 1266 (2003). Neither denial nor delay, unaccompanied by an unfounded or frivolous reason, constitutes bad faith. *Insurance Co. of Pennsylvania v. Highlands Ins. Co.*, 59 Wn. App. 782, 786-87, 801 P.2d 284 (1990), *rev. denied*, 116 Wn.2d 1032 (1991). Plaintiffs further must prove they were harmed. *Coventry Associates*, 136 Wn.2d at 283.

² Plaintiffs’ reliance on *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986) is misplaced, because that case involved a reservation of rights defense against a third party claim. An insurer’s obligations when handling a first party claim are different. *Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d at 281.

Plaintiffs’ reliance on *Peterson v. Big Bend Ins. Agency*, 150 Wn. App. 504, 202 P.3d 372 (2009) and *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 121 P.3d 1204 (2005), *rev. denied*, 157 Wn.2d 1006 (2006) in their discussion of the duty of good faith is also misplaced. These cases dealt with negligence and misrepresentation claims against insurance agents, not bad faith claims against insurers.

An insurer is entitled to summary judgment dismissing a bad faith claim if “there are no disputed material facts pertaining to the reasonableness of the insurer’s conduct under the circumstances, or the insurance company is entitled to prevail as a matter of law on the facts”. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003).

A mere mistake is not bad faith. “As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a good faith mistake.” *Coventry Associates*, 136 Wn.2d at 280 (emphasis omitted).

In this case, State Farm was attempting to fulfill its obligation to investigate Mrs. Boldt’s claim. At least four times, State Farm requested that she complete and return a PIP application requesting information needed by State Farm, and an authorization allowing State Farm to obtain records. The policy required her to provide this information. So did WAC 284-30-370, which requires “[a]ll persons involved in the investigation of a claim [to] provide reasonable assistance to the insurer”. However, State Farm received no response to its letters. Mrs. Boldt even admits her chiropractor’s office told her that State Farm had not received

required forms, but she did not contact State Farm. State Farm did not breach its obligation to reasonably investigate her claim.

It is true that State Farm chose to pay some chiropractic bills while it waited for Mrs. Boldt to return the completed PIP application and authorization forms. This decision to pay the bills without delay benefited the insured. However, State Farm never agreed to pay bills indefinitely without the information it needed to establish the reasonableness and necessity of the bills and charges. Eventually, when State Farm did not receive the information it needed, State Farm decided to close its file. This was not unreasonable.

Plaintiffs assert that whether Mrs. Boldt mailed forms in December, 2009, and whether State Farm received them, are disputed fact issues. This is incorrect. State Farm accepted, for purposes of summary judgment, Mrs. Boldt's assertion that she sent the forms. However, it is undisputed that State Farm never received them.

Plaintiffs allege State Farm failed to defend them in the collections suit. However, the policy imposed no obligation on State Farm to do so. Plaintiffs had no insurance claim for defense of a collection suit. Therefore, they have no bad faith claim relating to failure to defend the suit.

If the insured claims that the insurer [acted] in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. The policyholder has the burden of proof. The insurer is entitled to summary judgment if reasonable minds could not differ that its [actions] w[ere] based upon reasonable grounds.

Smith v. Safeco Ins. Co., 150 Wn.2d at 486.

State Farm repeatedly requested basic information about the accident and Mrs. Boldt's injuries to determine whether her injuries were related to the accident, and whether her treatment was reasonable and necessary for those injuries. This was part of its reasonable investigation, and the policy required Mrs. Boldt to provide this information. It was reasonable as a matter of law for State Farm to close its file when it did not receive this information. The trial court correctly granted summary judgment dismissing the bad faith claim.

2. Plaintiffs' Bad Faith Claim is Barred by the Three-Year Statute of Limitations.

State Farm closed its file for Mrs. Boldt's PIP claim in May, 2010. Plaintiffs did not amend their complaint to sue State Farm until September, 2014, more than four years later. Their bad faith claim is therefore barred by the three-year statute of limitations.

Bad faith claims against insurers are subject to the three-year limitation period of RCW 4.16.080(2). *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 529-30, 125 P.3d 134 (2004). A cause of action accrues

when a party has a right to apply to a court for relief. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d at 575.

State Farm closed its file on May, 20, 2010, after sending several letters to Mrs. Boldt stating it would not consider payment of her medical bills until after it received a completed and signed application and authorization. Mrs. Boldt was informed of this by the office of Kriss Chiropractic, but did nothing. The statute of limitations therefore expired no later than May, 20, 2013. Since plaintiffs failed to sue State Farm by that date, the trial court correctly ruled that their claim is time barred.

E. THE TRIAL COURT CORRECTLY DISMISSED THE CONSUMER PROTECTION ACT CLAIM.

1. State Farm Did Nothing Unfair or Deceptive.

State Farm closed Mrs. Boldt's PIP claim after it was unable to complete its investigation because it received nothing in response to repeated requests that she return a completed PIP application and records authorization. State Farm informed her it would do so in writing. State Farm did nothing unfair or deceptive.

To prove a violation of the CPA, RCW ch. 19.86, plaintiffs must show: "(1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) which injury is causally linked to the

unfair or deceptive act.” *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990).

The Insurance Commissioner has promulgated regulations regarding insurance practices. WAC 284-30-330 sets forth certain unfair or deceptive acts or practices in the settlement of insurance claims. Violations of these regulations are not actionable, except as part of a CPA claim. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 62, 1 P.3d 1167 (2000). A violation may constitute a per se unfair or deceptive act or practice, satisfying the first three elements of a CPA cause of action. *Kallevig*, 114 Wn.2d at 922-23.

However, an insured must do more than prove a technical regulatory violation. An insurer’s violation of a regulation is actionable only if, considering the facts and circumstances at the time, the insurer lacked reasonable justification for its actions. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633-34, 915 P.2d 1140 (1996) (holding that reasonableness standard is implicit in the unfair claims practices regulations, even where word “reasonable” is not used). This is because RCW 19.86.920 “imports the reasonableness standard into the CPA as a whole”. *American Manufacturers Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 699, 17 P.3d 1229, *rev. denied*, 144 Wn.2d 1005 (2001).

Plaintiffs submitted no evidence of unfair or deceptive conduct by State Farm. State Farm attempted to complete its investigation as required by the insurance policy and Washington law. At least four times, State Farm requested that Mrs. Boldt complete and return a PIP application requesting information it needed, and to provide an authorization allowing it to obtain records. The policy required her to provide this information. So did WAC 284-30-370, which requires “[a]ll persons involved in the investigation of a claim [to] provide reasonable assistance to the insurer”. Mrs. Boldt admits her chiropractor’s office told her State Farm had not received forms, but she did not contact State Farm. State Farm received no response to its many letters. Under these circumstances, State Farm’s closure of the claim was not unfair or deceptive.

Plaintiffs assert on appeal that State Farm misrepresented policy terms and benefits in violation of RCW 48.30.090. However, they fail to identify any such misrepresentation. In fact, State Farm sent a letter to plaintiff at the outset of the claim accurately describing the benefits payable under the PIP coverage.

Plaintiffs assert on appeal that State Farm failed to acknowledge and act reasonably promptly upon communications in violation of WAC 284-30-330(2). However, they fail to identify any communications

received by State Farm from Mrs. Boldt during her claim, much less a communication to which State Farm did not respond. There were none.

Plaintiffs assert on appeal that State Farm denied benefits without conducting a reasonable investigation in violation of WAC 284-30-330(4). To the contrary, it is undisputed that State Farm attempted to conduct a reasonable investigation, but State Farm never received the information it requested. Further, State Farm did not deny benefits. It closed the claim pending receipt of the information it requested. Once the information was received, State Farm paid the outstanding bills.

Plaintiffs assert on appeal that State Farm failed to adopt and implement reasonable standards for the prompt investigation of PIP claims in violation of WAC 284-30-330(16). However, they submitted no evidence relating to standards adopted by State Farm. They identify no standards they believe State Farm should have adopted, but did not. They have failed to create a genuine issue of material fact.

State Farm did nothing unfair or deceptive. Plaintiff was required to cooperate in State Farm's investigation and provide information and a records authorization. State Farm informed plaintiff in writing it would not consider payment of medical bills until after it received the application and authorization. State Farm did not receive the requested information,

so State Farm closed the claim. The court should affirm summary judgment dismissing the CPA claim.

2. State Farm's Agreement to Pay Chiropractic Bills After Mrs. Boldt Finally Provided Completed Forms Does Not Support a CPA Claim.

Plaintiffs' assertion that State Farm made a misrepresentation when it agreed to pay the outstanding bills is wrong. State Farm paid the bills and was led by Kriss Chiropractic to believe that nothing further was required. Everyone was surprised when Quick Collect garnished Mr. Boldt's wages. As plaintiffs note, Quick Collect was at fault and they have already obtained summary judgment against it. (Brief of Appellant at 2, n.2) State Farm is not responsible for Quick Collect's actions.

A detailed analysis of the facts is in order. Mr. Boldt was served with the summons and complaint in the Quick Collect lawsuit on June 21, 2013, and the declaration of service was signed and sent to the court for filing on June 24. CP 265 Mrs. Boldt's testimony that the Boldts were not served until July 9 may not be considered because she has no personal knowledge concerning service on her husband. CR 56(e); ER 602. Her husband did not testify to a different date. CP 285-87

The summons instructed plaintiffs to "respond to the complaint by stating your defense in writing, and serve a copy upon the person signing this summons within 20 days after the service of this summons". CP 235

Yet Mrs. Boldt did not contact State Farm until July 10, 2013, 19 days after service. CP 569, 572 She faxed the summons and complaint to State Farm that day, but her fax did not indicate the date of service. CP 234-42

On July 15, 2013, 24 days after service, Quick Collect filed a motion for order of default and judgment. CP 261-62

On July 16, 2013, 25 days after service, John Brines spoke with Mrs. Boldt. Mr. Brines was a State Farm PIP adjuster. He testified that PIP coverage does not defend lawsuits, and he has never handled the defense of a collection lawsuit against a State Farm PIP insured. CP 546-47 He reviewed the file and noted it had been years since State Farm had requested a PIP application and authorization and never received them. He explained to Mrs. Boldt that this would need some review before he could discuss it further with her. CP 547, 569, 635

Mr. Brines reviewed the documentation and noted a discrepancy between the charges billed and the amounts paid by State Farm. On July 18, 2013, he telephoned the office of Kriss Chiropractic and established that Kriss had failed to record a \$605 payment by State Farm. He faxed documentation to Kriss showing prior payments, and emailed this documentation to Mrs. Boldt. CP 547, 568; *see also* CP 326

Because Mrs. Boldt had now returned a signed and completed application and authorization, State Farm decided to pay the outstanding

bills. On July 19, State Farm mailed two checks with supporting documentation to pay the balance of the chiropractic charges, with a copy sent to Mrs. Boldt. CP 547-48, 551-66, 568; *see also* CP 326

Mr. Brines told Ms. Brooks of Kriss Chiropractic that he would be sending payment for the balance due, and the next day, Ms. Brooks called Quick Collect. She let them know about the error in the failure to post a payment. Kriss Chiropractic received payment from State Farm on or about August 2, 2013. On August 15, Ms. Brooks sent a fax to Quick Collect letting them know that Mrs. Boldt's account had been paid in full. CP 326-27

On September 10, 2013, Quick Collect served a writ of garnishment on Mr. Boldt's employer. CP 244 On September 23, Mrs. Boldt called State Farm and stated that the collection agency was garnishing Mr. Boldt's wages. CP 568, 572 Kim Tan called Ms. Brooks at Kriss and told her about the garnishment. Ms. Brooks stated that Kriss had received payment in full, and she would contact Quick "to find out what was going on". CP 327 She asked Quick to stop the proceedings, but they refused, informing her that the account was not Kriss' anymore. CP 328

Mr. Brines did not tell Mrs. Boldt whether or how to respond to the collections lawsuit. He did not tell her State Farm would defend her or respond for her. CP 548

With this background in mind, we consider Mrs. Boldt's testimony about the statement allegedly made by Mr. Brines. She claims they spoke a second time, on or after July 16, 2013. CP 637 He allegedly said:

I remember him saying there was a difference in the amount of the bills, and that it didn't match up with what they had put in the claim, and that those bills had since been written and mailed to Kriss Chiropractic, and that everything had been taken care of. And I specifically asked if I needed to contact someone in regard to the summons, and he told me no, it had been taken care of.

CP 636 Mrs. Boldt testified these were the exact words used. *Id.*³

If taken at face value, Mrs. Boldt's testimony indicates that Mr. Brines told her the bills had been taken care of. Mr. Brines was relying on his conversation with Ms. Brooks at Kriss, as they both believed that payment resolved the lawsuit. While Quick Collect may have taken a different view, a CPA violation cannot be based on a good faith mistake. *Coventry Associates*, 136 Wn.2d at 280.

³ Mrs. Boldt testified in a declaration that Megan Knight or Kimberly Tan told her she did not need to respond to the lawsuit and State Farm would handle it for her. CP 619 However, she previously testified at her deposition that neither Ms. Knight nor Ms. Tan told her this. CP 836 A party opposing a summary judgment motion may not create a genuine issue of material fact with a declaration that contradicts earlier deposition testimony and fails to explain the inconsistency. *State Farm Mut. Auto. Ins. Co. v. Treckiak*, 117 Wn. App. 402, 71 P.3d 703 (2003), *rev. denied*, 151 Wn.2d 1006 (2004).

There is no evidence that Mrs. Boldt ever asked State Farm to defend the collection lawsuit. Mr. Brines never said that State Farm would defend the Boldts in the lawsuit.

Further, the alleged conversation was after the 20-day period for answering the complaint had expired, and Quick Collect had already moved for default. The Boldts had already failed to protect their own interests as instructed in the summons. Any reliance on what Mr. Brines said, at that late date, would not be reasonable as a matter of law.

Finally, if the court considers plaintiffs' newly asserted argument that Mr. Brines engaged in the practice of law, it must reject it. The alleged statement was not "legal advice". Mr. Brines simply communicated that State Farm had taken care of paying outstanding bills.

Even when an insurer agrees to defend an insured under a liability coverage, the insurer does not practice law. The insurer appoints defense counsel who represents the insured. *Tank v. State Farm*, 105 Wn.2d at 388. Here, however, we are dealing with a first party PIP coverage, and State Farm never agreed to defend plaintiffs.

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 45 P.3d 1068 (2002), does not support plaintiffs' position. In that case the court held that the practice of law includes selection and completion of legal instruments by which legal rights and obligations are established, and where an adjuster

developed a non-adversarial relationship with a third party claimant, the adjuster's preparation of and advice to sign a release could be the practice of law. *Jones*, 146 Wn.2d at 303, 305, 310, 312. State Farm did not require Mrs. Boldt to sign a release or other legal document in exchange for payment of medical bills under the PIP coverage.

State Farm's agreement to pay the outstanding medical bills was not unfair or deceptive. State Farm is not responsible for the collection agency's garnishing of Mr. Boldt's wages after full payment was made. The alleged conversation took place after Quick Collect had moved for default, and plaintiffs had failed to protect their own interests. CP 261-62 The CPA claim was correctly dismissed.

3. The Consumer Protection Act Claim is Barred by the Four-Year Statute of Limitations.

State Farm closed its file for Mrs. Boldt's PIP claim in May, 2010. She did not amend her complaint to sue State Farm until September, 2014, more than four years later. The CPA claim is therefore barred by the four year statute of limitations.

CPA claims are subject to a four-year statute of limitations. RCW 19.86.120. State Farm closed its file on May, 20, 2010, after sending several letters to Mrs. Boldt stating it would not consider payment of her medical bills until after it received a completed and signed application and

authorization. Mrs. Boldt was informed by the office of Kriss Chiropractic that State Farm was not paying bills because it had not received forms. The statute of limitations therefore expired no later than May, 20, 2014. Since plaintiffs failed to sue State Farm by that date, their claim is time barred.

F. MRS. BOLDT'S CLAIMS ACCRUED WHEN STATE FARM DECLINED TO PAY, NOT WHEN THE COLLECTION ACTION WAS FILED.

Plaintiffs assert that their claims did not accrue for purposes of statutes of limitations until a collection suit for unpaid bills was filed against them, judgment was entered, and Mr. Boldt's wages were garnished. They assert that failure to pay Mrs. Boldt's medical bills did not harm her. Plaintiffs' position is contrary to Washington law.

Mrs. Boldt's damages would include unpaid medical bills. *Schreib v. American Family Mut. Ins. Co.*, 2015 WL 5175708, at *5 (W.D. Wash. 2015). A PIP insured's bad faith and CPA causes of action therefore accrue when the insurer denies payment. *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299 (W.D. Wash. 2013). Similarly, an IFCA cause of action accrues when the insurer denies coverage or payment. *Lenk v. Life Ins. Co. of N. Am.*, 2010 WL 5173207 (E.D. Wash. 2010); *see also Malbco Holdings*, 546 F. Supp. 2d 1130 (precipitating event giving rise to IFCA claim is unreasonable denial).

Even a delay in payment can harm the insured by increasing her personal liability. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 497, 983 P.2d 1129 (1999); *aff'd*, 142 Wn.2d 784, 16 P.3d 574 (2001); *accord Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298-99, 38 P.3d 1024, *rev. denied*, 147 Wn.2d 1016 (2002).

If plaintiffs' position were accepted, then no insured denied PIP benefits could sue their insurer until a medical provider sues the insured, obtains a judgment, and attempts to execute on it. This may never happen. In the meantime, the insured's credit rating could be negatively impacted when the provider reports the debt to a credit bureau. This can constitute harm for purposes of a bad faith or CPA action. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992). Plaintiffs' claims accrued no later than May 2010, when State Farm closed the claim.

G. AS A MATTER OF UNDISPUTED FACT, STATE FARM PROVIDED REASONABLE ASSISTANCE TO MRS. BOLDT.

Plaintiffs make the conclusory assertion that State Farm did not provide reasonable assistance to Mrs. Boldt. Nothing could be further from the truth. State Farm sent Mrs. Boldt a letter at the outset of the claim explaining the PIP coverage and describing its benefits. State Farm sent PIP application and authorization forms four times. State Farm tried

to call Mrs. Boldt. State Farm left a message with her chiropractor. There is no factual issue whether State Farm provided reasonable assistance.

H. AN INSURER HAS NO FIDUCIARY DUTY APART FROM ITS DUTY OF GOOD FAITH.

Plaintiffs assert that State Farm breached a fiduciary duty to them. However, an insurer owes no fiduciary duty to an insured separate and apart from its duty of good faith.

State Farm was not plaintiff's fiduciary. "Because an insurer must give *equal* consideration to an insured, but is not required to put the insured above itself, this court has also noted that the relationship between an insured and an insurer is not a true fiduciary relationship." *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130 n.3, 196 P.3d 664 (2008) (emphasis in original).

All Washington cases discussing this breach of this "quasi-fiduciary" duty do so in the context of an insurance bad faith claim. *See e.g. Onvia*, 165 Wn.2d at 130; *Safeco Ins. Co. v. Butler*, 118 Wn.2d at 389. None recognize a separate cause of action. Indeed the Supreme Court has stated:

We are doubtful that there is any real difference between a "fiduciary" duty and a duty of "good faith" in the insurance context. We say that because we have long held that the duty of the insurer to act in good faith toward the insured is the same as the fiduciary relationship that the insurer has to the insured.

Van Noy v. State Farm Mut. Ins. Co., 142 Wn.2d at 793 n.2.

The court further stated that the “applicable fiduciary duty that an insurer owes to its insured” is “a duty to exercise . . . good faith”. *Id.* at 794. Therefore, State Farm owed no separate fiduciary duty.

I. STATE FARM WAS NOT REQUIRED TO SHOW PREJUDICE.

Plaintiffs assert that State Farm was required to show it was prejudiced by Mrs. Boldt’s failure to cooperate in State Farm’s investigation. However, the issue here is the reasonableness of State Farm’s conduct, not denial of benefits. Whether State Farm was prejudiced is not at issue.

An insurer must show prejudice before it can rely on breach of a cooperation clause to deny a claim. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 295 P.3d 201 (2013). However, State Farm did not deny coverage, nor did it make a final decision not to pay any bills. State Farm closed its file pending receipt of information it requested. State Farm’s letters said: “We are unable to consider payment of your medical bills until after we receive the application and authorization.” CP 584, 589, 594 State Farm was willing to reopen the claim and consider the bills for payment once it received the completed forms. In fact, State Farm did pay the bills when it received the completed forms over three years later.

The issue for purposes of the bad faith, IFCA, and CPA claims is whether State Farm's requests were reasonable. As plaintiffs contend, State Farm had an obligation to conduct a reasonable investigation. State Farm requested information about the car accident and Mrs. Boldt's injuries, and an authorization to obtain medical records. The policy permitted State Farm to request this information, which was basic and material to determining the reasonableness and necessity of treatment, and whether the injuries were related to the accident.

Further, State Farm had no other way to obtain the information. Without a medical records authorization, the Health Insurance Portability and Accountability Act (HIPAA) prevented State Farm from obtaining Mrs. Boldt's records or health care information. 45 CFR §164.512. The trial court correctly concluded it was reasonable as a matter of law for State Farm to request this information as part of its investigation.

In any event, State Farm was materially prejudiced in its investigation as a matter of law if the requested information was not provided. State Farm had no other way to determine that the injuries were related to the accident, or that treatment was reasonable and necessary.

J. THE TRIAL COURT DID NOT FAIL TO CONSIDER MATERIAL FACTS SUBMITTED BY PLAINTIFFS.

Plaintiffs assert that the trial court failed to consider unspecified materials they presented. They identify no such materials facts that could create a genuine issue of material fact.

In response to State Farm's motion for summary judgment, plaintiffs submitted a detailed declaration of plaintiff Natalie Boldt, along with some of her deposition testimony. CP 618-24 Plaintiffs had previously filed a separate motion for summary judgment against defendant Quick Collect, Inc., which they supported with another declaration by Mrs. Boldt. CP 194-203 The declarations were to a degree duplicative, with the declaration opposing State Farm's summary judgment, not surprisingly, directed more to the claims against State Farm.

After the court granted State Farm's motion, plaintiffs filed a motion for reconsideration asserting that the court had failed to consider the declaration filed in support of the summary judgment motion against Quick Collect, and a timeline they included in that motion. CP 174-77, 702 State Farm responded with a detailed analysis of these materials showing that they included no material facts relating to State Farm's motion for summary judgment not already before the court. State Farm also pointed out that the timeline in plaintiffs' brief was not admissible

evidence, and that it related only to the claims against Quick Collect. State Farm relies upon and incorporates by reference that analysis here. CP 820-22

After reviewing the materials that allegedly were not considered, the trial court denied plaintiffs' motion for reconsideration. CP 871 Plaintiffs identify no material facts in those materials which could create a genuine issue of material fact, and the court in fact did consider them. Any contention that this is a basis for reversal should be rejected.

K. THE COURT DID NOT REFUSE TO LET PLAINTIFFS AMEND THE COMPLAINT.

Plaintiffs assert in a heading in their brief, without any related assignments of error or issues, and without any supporting argument or citation to the record, that the court erred in "refusing to let Boldt amend the complaint". (App. Br. 32) However, the court granted the only motion to amend filed by plaintiffs, and they did amend their complaint. Plaintiffs' motion for reconsideration, filed after the court granted State Farm's motion for summary judgment, was not a motion to amend the amended complaint. In any event, any motion to amend at that time would have been untimely.

1. Plaintiffs Failed to Appeal From or Assign Error to Any Order Denying a Motion to Amend Their Complaint.

Plaintiffs did not appeal from an order denying a motion to amend their complaint. They appealed only from the order granting summary judgment in favor of State Farm entered on April 24, 2015. CP 872-76 Since no order denying a motion to amend was designated in the notice of appeal, the court should not review such an order. RAP 2.4(a).

Further, plaintiffs did not mention denial of a motion to amend in any assignment of error or in any of their issues pertaining to assignments of error. “The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto”. RAP 10.3(g).

Plaintiffs provide no argument supporting their assertion that a motion to amend was denied, much less showing why such denial should be reversed. When neither the assignments of error nor the substance of the briefs raises an issue, the court should not address the issue. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 138 n.4, 331 P.3d 40 (2014). See also *Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 174, 68 P.3d 1093 (2003) (declined to consider objections to unspecified exhibits), *rev. denied*, 150 Wn.2d 1021 (2003).

2. The Court Granted Plaintiffs' Motion to Amend.

On September 8, 2014, the court granted plaintiffs' motion to amend their complaint and add State Farm as a defendant. On September 9, 2014, plaintiffs filed their first amended complaint. Plaintiffs never filed a motion to amend the first amended complaint. Since plaintiffs' motion to amend was granted, there is nothing for them to appeal.

3. Plaintiffs' Obscure References in Their Motion for Reconsideration Were Not a Motion to Amend.

A careful review of the record reveals that "Plaintiffs' Motion For Reconsideration of State Farm's Summary Judgment Dismissal", filed on May 4, 2015, contained three references to amendment of their complaint, each simply stating that leave to amend should be freely granted. CP 705, 710 Plaintiffs did not file a proposed amended complaint or describe any requested amendment. This may be the alleged "motion to amend".

Plaintiffs' motion for reconsideration was not a motion to amend. A motion "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought". CR 7(b). The title of the motion, "Plaintiffs' Motion For Reconsideration of State Farm's Summary Judgment Dismissal", gave no indication it was a motion to amend the complaint. CP 701 Plaintiffs' "Relief Requested" section made no mention of amending the complaint. CP 701

The motion did not state with particularity the grounds therefor. Indeed, to this day plaintiffs have not articulated why they want to amend their complaint, or what the proposed amendment would say.

CR 15 imposes an additional requirement on motions to amend a complaint. "If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion." CR 15(a). Plaintiffs never submitted a proposed second amended complaint.

Even if the motion for reconsideration could be considered a motion to amend, it was not timely. It was filed after April 24, 2014, the date when the court dismissed plaintiffs' claims against State Farm. CP 693. Washington appellate courts have repeatedly affirmed denial of motions to amend brought at or shortly before scheduled summary judgment motions based on timeliness. *Del Guzzi Constr. Co. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 888-89, 719 P.2d 120 (1986); *Wallace v. Lewis County*, 134 Wn. App. 1, 26, 137 P.3d 101 (2006); *Donald B. Murphy Contrs., Inc. v. King County*, 112 Wn. App. 192, 199-200, 49 P.3d 912 (2002); *Trust Fund Services v. Glasscar, Inc.*, 19 Wn. App. 736, 744-45, 577 P.2d 980 (1978). Plaintiffs' motion for reconsideration was filed after the court granted State Farm's motion.

Plaintiffs did not move to amend their amended complaint. Failure to grant a motion to amend that was never filed is not a basis for reversal.

L. THE JUDGMENT SHOULD BE AFFIRMED BASED ON INSUFFICIENCY OF PROCESS.

In addition to moving for summary judgment, State Farm moved for dismissal based on insufficient process and insufficient service of process pursuant to CR 12(b)(4) and (5). The court incorrectly denied this motion. Service of process was defective because plaintiffs served State Farm with their motion to amend and proposed red-lined amended complaint before leave to amend was granted. They never served State Farm with the amended complaint. Therefore, the court lacked personal jurisdiction over State Farm, and dismissal of plaintiffs' claims should be affirmed on this basis.

A respondent is entitled to argue any grounds in support of the superior court's order that are supported in the record. No cross-appeal is required. *McGowan v. State*, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002). Indeed, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court, provided that it is supported by the record and is within the pleadings and proof. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); (applying RAP 2.5(a)). "[W]e can affirm a trial court on any alternative basis supported by the record and

pleadings, even if the trial court did not consider the alternative.”
Champagne v. Thurston County, 134 Wn. App. 515, 520, 141 P.3d 72
(2006), *aff’d on other grounds*, 163 Wn.2d 69, 178 P.3d 936 (2008).

This court should affirm dismissal based on insufficiency of service of process, because plaintiffs did not serve State Farm with the amended complaint after leave to amend was granted. “Proper service of the summons and complaint is essential to invoke personal jurisdiction”.
Scanlan v. Townsend, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014).
“Proper service of process must comply with both constitutional and statutory requirements”. *Id.* Sufficiency of service of process is a question of law for the court. *Gross v. Sunding*, 139 Wn. App. 54, 67, 161 P.3d 380 (2007). Appellate courts review de novo whether service of process is proper. *Scanlan*, 181 Wn.2d at 847.

Where a plaintiff amends her complaint, service is not valid unless performed after leave to amend is granted. In *Will v. Frontier Contrs, Inc.*, 121 Wn. App. 119, 89 P.3d 242 (2004), *rev. denied*, 153 Wn.2d 1008 (2005), a plaintiff moved to amend his complaint to add a new claim. The plaintiff served the defendant with the motion to amend and a proposed amended complaint, but failed to serve the amended complaint after the court granted leave to amend as required by CR 5. This court held that “CR 15 requires the moving party to serve the amended complaint on the

opposing party after the court grants leave to amend". *Will*, 121 Wn. App. at 127. The court followed a Tenth Circuit decision holding that service of an amended complaint without leave of court is without legal effect. *Id.* at 126-27 (quoting *Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998)). The court held that service of a proposed amended complaint prior to the granting of leave to amend did not constitute service of the amended complaint.

Will, unlike this case, did not involve a motion to dismiss for insufficient service of process. In *Will* the plaintiff moved to amend his complaint to add a new claim against an existing defendant. Since the defendant had already been served with original process, personal jurisdiction was not at issue. The court was asked to determine whether dismissal was an appropriate sanction for failure to serve the amended complaint as required by CR 5. The court held that the trial court abused its discretion when it dismissed the lawsuit because counsel's failure was not willful. *Will*, 121 Wn. App. at 128-33.

Here, in contrast, plaintiffs moved to amend to join a new defendant, State Farm. State Farm was not a defendant before plaintiffs amended their complaint. State Farm has never been served with process. As held in *Will*, plaintiffs' service of a draft amended complaint before

leave was granted to amend and join State Farm was without legal effect. Therefore, the court lacked personal jurisdiction over State Farm.

Plaintiffs argued below that State Farm waived original service of process based on an email exchange between counsel. CP 616-17 However, on September 10, 2014, State Farm filed a notice of appearance expressly stating that original service of process may not be served on counsel. CP 144-45 Two days later, plaintiffs' counsel emailed the order and the amended complaint, and asked "if email is sufficient or if you need paper copies in the mail too". CP 651 State Farm's counsel, new to the case, mistakenly responded that his client had been served with the order and the amended complaint, relying upon the Insurance Commissioners' Certificate of Service, which incorrectly stated that State Farm was served with "Summons; Complaint; Order Amending Case Schedule; Motion for Leave to Amend Complaint; Order Granting Motion for Leave to Amend Complaint; First Amended Complaint". CP 668-69

Obviously plaintiffs' counsel knew what documents had been served on State Farm. She could see that State Farm's counsel was mistaken. She did not correct him. CP 669

State Farm's counsel did not intend to waive any rights of his client, nor did he have authority to do so. He did not and would not agree to accept original service of process on State Farm. CP 669

The offer of plaintiffs' counsel to mail the amended complaint would not have accomplished original service of process. Personal service of process is required for the summons and complaint. CR 4(d). Only pleadings subsequent to the original complaint may be served on a party by mail on a party's attorney. CR 5(a)-(b).

State Farm's Second Affirmative Defense in its answer to the amended complaint, filed on October 6, 2014, provided: "Service of process is defective, as plaintiff served State Farm prior to the court's order granting leave to amend the complaint." CP 163 This preserved the defense. CR 12(b).

State Farm did not waive the defense of insufficient service of process. Waiver requires intentional and voluntary relinquishment of a known right. Plaintiffs have not established waiver.

"A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them."

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). Intent to waive must be clear and unequivocal. *Vail v. Bailey*, 178 Wash. 490, 498, 35 P.2d 37 (1934). State Farm did not intend to waive original service of process, and counsel had no authority to do so.

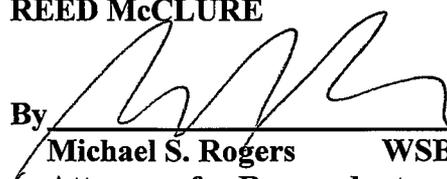
Plaintiffs never served State Farm with the amended complaint after leave was granted. Therefore, State Farm has not been served with process and the court lacked personal jurisdiction. Pursuant to CR 12(b)(4) and CR 12(b)(5), this court should affirm dismissal based on insufficient service of process.

IV. CONCLUSION

The material facts are undisputed. Reasonable minds could not differ that State Farm's handling of Mrs. Boldt's claim was reasonable in all respects. Further, plaintiffs' claims are barred by statutes of limitations. The court should affirm judgment in favor of State Farm.

Dated this 30th day of December, 2015.

REED McCLURE

By 

Michael S. Rogers

WSBA #16423

Attorneys for Respondent

1. Brief of Respondent; and
2. Affidavit of Service By Mail

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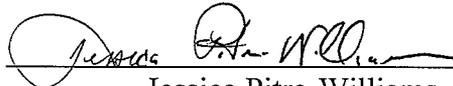
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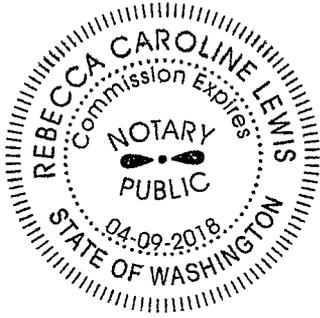
DATED this 30th day of December, 2015.



 Jessica Pitre-Williams

STATE OF WASHINGTON)
) ss.
 COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on
12-30-15 by Jessica Pitre-Williams.



A handwritten signature in black ink, appearing to read "REBECCA LEWIS", written over a horizontal line.

Print Name: REBECCA LEWIS
Notary Public Residing at LYNNWOOD, WA
My appointment expires 4-9-2018