

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 GOTTESFELD, M.D. and JANE DOE GOTTESFELD,
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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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

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A. INTRODUCTION

For purposes of the running of the statute of limitations, a cause of action does not accrue until the plaintiff knows all the elements of his or her potential cause of action. A plaintiff must exercise reasonable diligence in pursuing a cause of action and, once put on notice of appreciable harm caused by another's wrongful conduct, must make further diligent inquiry. Here, an issue of fact exists as to when the Cowarts discovered or reasonably should have discovered, that the refusal of Great-West Life and Annuity Insurance Company (Great-West) and the physicians who performed prospective utilization review for Great-West to preauthorize a total abdominal hysterectomy (TAH) for Ms. Cowart was causally connected to the tragic injury she suffered. The trial court erred in granting the defendants' motion for summary judgment on the ground the Cowarts' tort claims were time-barred. Further, the Cowarts' claim under the Consumer Protection Act (CPA), RCW ch. 19.86, was clearly timely under the CPA's four-year statute of limitations, and the evidence shows the existence of a genuine issue of material fact as to whether Great-West is liable to the Cowarts under the CPA for its breach of the duty of good faith it owed them.¹

¹ As discussed below, in addition to being timely, the Cowarts' tort claims present genuine issues of material fact precluding summary judgment.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting defendants' motion for summary judgment.

2. The trial court erred in denying the Cowarts' motion for reconsideration of the order granting defendants' motion for summary judgment.

(2) Issue Pertaining to Assignments of Error

1. Did the trial court err in summarily dismissing the Cowarts' tort claims on the ground they were barred by the applicable statutes of limitations, where the Cowarts filed their complaint within one year of their discovery of all the elements of their potential causes of action and where, in the exercise of reasonable diligence, they could not have discovered all the elements sooner? (Assignments of Error Nos. 1, 2).

2. Did the trial court err in summarily dismissing the Cowarts' tort claims on the ground they were barred by the applicable statutes of limitations, where the claims were for recovery of benefits under the health insurance plan and the claims were timely under the limitations period contained in the plan? (Assignments of Error Nos. 1, 2).

3. Did the trial court err in summarily dismissing the Cowarts' CPA claim where it was filed within four years of the date on which the

Cowarts discovered all the elements of the cause of action under the CPA and where the evidence shows a genuine issue of material fact as to whether Great-West breached the duty of good faith it owed the Cowarts? (Assignments of Error Nos. 1, 2).

4. Are the Cowarts entitled to attorney fees on appeal with regard to their CPA claim? (Assignments of Error Nos. 1, 2).

C. STATEMENT OF THE CASE

James and Joanne Cowart had health insurance coverage under a group plan provided by Amerus Life Insurance Company (Amerus Life) to its independent insurance agents and their eligible dependents. CP 94-148. Mr. Cowart was an independent agent of Amerus Life. CP 6. Amerus Life entered a services contract with Great-West under which Great-West was third party administrator of the Amerus Life plan and performed specified services in the administration of the plan. CP 1337-48. Such services included benefit determination and benefit payments in accordance with the plan. CP 1346. The plan provides that, with respect to insureds' benefits, "Great-West has full discretion and authority to determine the benefits and amounts payable and to construe and interpret all terms and provision of [the policy] booklet." CP 1414. One Health Plan of Washington and One Health Plan of Colorado, also named defendants, performed claims and health care management functions for

Great-West. CP 4. Another defendant, Dr. Stephen Gorshow, was Great-West's Medical Director. *Id.*

On June 15, 1998, Ms. Cowart went to her ob/gyn Gary W. Nickel, M.D., complaining of urinary incontinence when she laughed, coughed, or jogged. CP 757. Dr. Nickel diagnosed stress urinary incontinence (SUI), an enlarged uterus, menorrhagia, and uterine fibroids. *Id.*² Dr. Nickel recommended both an abdominal bladder suspension procedure and a TAH to alleviate Ms. Cowart's SUI. CP 2017-18. Removing Ms. Cowart's uterus by a TAH was indicated because an enlarged uterus, such as Ms. Cowart's, puts pressure on the bladder and reduces the effectiveness of a bladder suspension procedure. CP 2017.

Dr. Nickel requested preauthorization of both a TAH and a bladder suspension procedure from Great-West, as required under the Cowarts' health insurance plan. Thomas Paulson, M.D., of Great-West reviewed Dr. Nickel's request for preauthorization of both procedures. Dr. Paulson spoke with Dr. Nickel about the proposed procedures by telephone in a recorded conversation. *See* CP 186-90. Dr. Paulson neither requested nor reviewed Ms. Cowart's medical records. CP 2042. When Dr. Paulson

² Menorrhagia is abnormally profuse menstrual flow. *Medline Plus Medical Dictionary*, <http://www2.merriam-webster.com/cgi-bin/mwmednlm> (last visited January 4, 2007). Uterine fibroids are benign tumors of the uterine wall consisting of fibrous and muscular tissue. *Id.*

expressed doubt as to the medical necessity of a TAH,³ Dr. Nickel explained that the bladder suspension procedure would not likely be successful without a TAH also being performed: "I don't think we're gonna get a good result without removing the uterus. It's acting like a piston that's sort of pushing and pulling down on the bladder and probably ruin her repair if you did just a stress incontinence procedure." CP 188. Dr. Nickel recommended that Dr. Paulson speak with Robert Modarelli, M.D., the urologist who was scheduled to perform the bladder suspension procedure, to obtain more information on the advisability of a TAH. CP 189. Dr. Paulson spoke with Dr. Modarelli in another recorded telephone conversation. CP 191-92. Dr. Modarelli stated that, given that Ms. Cowart did not intend to have any more children and, assuming she had significant prolapse of her uterus, both a TAH and a bladder suspension should be performed. *Id.* Subsequently, Dr. Paulson decided to deny preauthorization of a TAH and informed Dr. Nickel of his decision. CP 150, 193.

The Cowarts appealed Dr. Paulson's denial of preauthorization of a TAH. Their appeal was reviewed by Ray Gottesfeld, M.D., of Great-

³ In the letter sent to Ms. Cowart informing her of Dr. Paulson's denial of preauthorization, the sole reason for the denial was: "The test results do not support the planned care." CP 150.

West, who affirmed Dr. Paulson's decision. CP 151-52. Dr. Gottesfeld neither requested nor reviewed Ms. Cowart's medical records before rendering his decision. CP 2042.⁴

Dr. Nickel disagreed with the determination of Drs. Paulson and Gottesfeld that a TAH was not medically necessary in June 1998. Indeed, in Dr. Nickel's opinion, that determination was so far below the standard of care as to be totally unreasonable and unfounded. CP 1221.

On June 22, 1998, Dr. Modarelli, assisted by Dr. Nickel, performed a bladder suspension procedure on Ms. Cowart. CP 990. About a month later, Ms. Cowart was startled by a mouse and jumped suddenly. CP 2123. She developed increasingly severe pain in her abdomen. *Id.* She was admitted to the hospital where Dr. Nickel examined her, and she was released. *Id.*

In August 1998, while traveling to Utah, Ms. Cowart experienced bloating and severe abdominal pain. *Id.* On August 24, 1998, an ultrasound and needle biopsy were performed. Fluid was found in Ms. Cowart's abdomen, which tested for malignant cells consistent with adenocarcinoma. CP 1768. The next day, an abdominal and pelvic CT scan were performed. Ms. Cowart had an adverse reaction to the contrast

⁴ In the letter sent to Ms. Cowart informing her of Dr. Gottesfeld's decision to affirm Dr. Paulson's denial of preauthorization of a TAH, the sole reason for the decision is: "More treatment is needed before surgery." CP 151.

media used in the CT scan and was transferred to the emergency room for care. CP 1768. Dr. Nickel again requested preauthorization from Great-West for a TAH, and, this time, Great-West preauthorized the TAH procedure. CP 2126. On August 28, 1998, Roger B. Lee, M.D., assisted by Dr. Nickel, performed a TAH. CP 992. During the surgery, the physicians discovered Stage III-C ovarian cancer. CP 992. The surgeons also found a cancerous tumor wrapped around Ms. Cowart's intestines they were unable to remove. CP 2114.

After the TAH, Ms. Cowart underwent three months of chemotherapy. *Id.* On November 16, 1998, she underwent "second look" exploratory surgery. CP 994, 2114. The cancerous tumor on her intestines had shrunk to the size of a quarter, and the surgeons were able to remove it. CP 2114.

From the spring of 1999 until May 2000, Ms. Cowart's cancer was in remission. CP 2116. In May 2000, while on vacation, the Cowarts learned Ms. Cowart's cancer had returned. *Id.* She again began a regimen of chemotherapy. CP 1942.

In September 2000, Ms. Cowart went to the M.D. Anderson Cancer Center at the University of Texas to participate in clinical trials and discuss treatment alternatives. CP 1001-03. A physician at M.D. Anderson told Ms. Cowart the facility had no treatment available that

could help her and told her “pretty much go home and live life, you don’t have much of it left.” CP 2285. This was the first time the Cowarts learned that Ms. Cowart had only two to three years to live. CP 1208.⁵

On August 27, 2001, the Cowarts filed a complaint against Great-West, Amerus, One Health Plan of Washington, One Health Plan of Colorado, Dr. Gorshow, Dr. Paulson, Dr. Gottesfeld, and other John Doe and Jane Doe defendants. CP 3-14.⁶ The complaint alleged several causes of action: breach of contract; bad faith and breach of fair insurance claims practice; violation of Washington’s Consumer Protection Act (CPA), RCW ch. 19.86; intentional and negligent infliction of emotional distress, and breach of medical standards and practices. *Id.* The complaint also sought declaratory and injunctive relief. *Id.*⁷

Great-West removed the action to the United States District Court for the Western District of Washington, arguing federal question jurisdiction existed because the Cowarts’ claims were preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et

⁵ Ms. Cowart was born on September 25, 1949. CP 1896. The physician’s statement in 2000 that Ms. Cowart had, at most, three years to live meant that she was expected to live only to age 54.

⁶ The defendants will be collectively referred to as “Great-West” unless the context requires otherwise.

⁷ Prior to consulting with their trial counsel, the Cowarts had been consistently been informed that the Amerus health plan was governed by ERISA and, consequently, the Cowarts had no actionable claims against Great-West. CP 2428.

seq. CP 15-21. After removing the action, Great-West filed a motion for summary judgment. CP 1173-96. The Cowarts filed a memorandum in opposition. CP 1080-1111. The District Court, the Honorable Robert J. Bryan, did not rule on the motion for summary judgment, but rather remanded the matter for lack of subject matter jurisdiction on December 20, 2002, finding ERISA did not preempt the Cowarts' claims. CP 1139, 1142. This was the first notice to the Cowarts that ERISA did not preempt their claims. CP 2430.

Upon remand, Great West again moved, on May 26, 2006, for summary judgment and filed numerous declarations in support. CP 57-228.⁸ The Cowarts filed an opposition to the motion and supporting declarations. CP 1265-1416. Great-West filed a reply in support of its motion for summary judgment. CP 1679-1712. The Cowarts filed a motion to strike arguments raised for the first time in Great-West's reply. CP 1723-28. Specifically, the Cowarts objected to the argument that the harm Ms. Cowart suffered as a result of Great-West's wrongful denial of a TAH was not reasonably foreseeable. *Id.*

⁸ Ms. Cowart died during the pendency of the lawsuit. After her death, the trial court granted leave, on May 12, 2006, to amend the complaint to substitute Ms. Cowart's estate as a plaintiff. CP 55-56. The plaintiffs/appellants will be referred to as "the Cowarts."

The trial court, the Honorable Bryan E. Chushcoff, heard oral argument on the motion for summary judgment, RP June 23, 2006, and, by order entered June 23, 2006, granted Great-West's motion. CP 1739-41.⁹ The court concluded the Cowarts' claims were barred by the applicable statutes of limitations and did not reach the merits of the claims. RP June 23, 2006 at 42.

The Cowarts filed a motion for reconsideration of the order granting Great-West's motion for summary judgment, with supporting declarations. CP 1742-2457. Great-West filed a response, also with supporting declarations. CP 2458-2515. The Cowarts filed a reply. CP 2604-29. The trial court heard oral argument on the Cowart's motion for reconsideration, RP July 14, 2006, and, by order dated July 14, 2006, denied the motion. CP 2634-36. The Cowarts timely filed a notice of appeal of the order granting Great-West's motion for summary judgment and the order denying the Cowarts' motion for reconsideration.

D. SUMMARY OF ARGUMENT

The Cowarts had tort claims for Great-West's bad faith, negligence, and medical negligence. The trial court erred by dismissing

⁹ During oral argument, the trial court allowed arguments on the issue of foreseeability, which was the subject of the Cowarts' motion to strike. RP June 23, 2006 at 5-9, 36, 42. The court also determined, after granting Great-West's motion for summary judgment, that the Cowarts' motion to strike the arguments on foreseeability was moot. *Id.* at 51.

the Cowarts' tort claims on the ground they were barred by the applicable statute of limitations. The statutes of limitations began to run when the tort claims accrued. The medical negligence claim accrued when the Cowarts knew, or reasonably should have discovered all of the essential elements of their possible cause of action. This did not occur until September 2000, when the Cowarts first learned that Ms. Cowart's life expectancy had been dramatically shortened because of the ovarian cancer. It was not until this point that the Cowarts can reasonably be charged with notice prompting them to make further inquiry to ascertain whether Great-West's denial of preauthorization of a TAH in June 1998 caused Ms. Cowart's shortened life expectancy. And, in fact, this is the point at which the Cowarts undertook an investigation into causation. The limitations period on the Cowarts' medical negligence claim began to run in September 2000, and their complaint, filed in August 2001, was timely. At a minimum, a genuine issue of fact exists as to when the Cowarts became, or should have become, aware of all the elements of their tort claims. Summary judgment dismissal of the tort claims on the ground they were untimely was error. Further, the Cowarts' tort claims, which are claims seeking recovery under the health insurance plan, were timely under the limitations period contained in the plan.

The Cowarts' CPA claim is governed by a four-year statute of limitations. The trial court did not address this aspect of the Cowarts' case. Even using the date on which Great-West claims the Cowarts' cause of action accrued, June 22, 1998, the Cowarts' CPA claim was not time-barred. Dismissal of the CPA claim on the merits was error because the evidence shows a genuine issue of material fact as to whether Great-West breached the duty of good faith it owed the Cowarts. The Cowarts are entitled to an award of attorney fees under the CPA.

E. ARGUMENT

(1) Standard of Review

Appellate court review of a summary judgment order is de novo. *Morton v. McFall*, 128 Wn. App. 245, 252, 115 P.3d 1023 (2005). When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291, 100 P.3d 310 (2004), *review denied*, 154 Wn.2d 1018 (2005). This Court must consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Id.* Summary judgment is properly granted only where the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment dismissal must be denied if the plaintiff can establish a right of recovery under any

provable set of facts. *Judy v. Hanford Env'tl. Health Found.*, 106 Wn. App. 26, 33-34, 22 P.3d 810, *review denied*, 144 Wn.2d 1020 (2001).

The question of when the elements of a cause of action should have been discovered to begin the running of the statute of limitations is a question of fact. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998). “Summary dismissal under a statute of limitations should be granted solely when the pleadings, depositions, interrogatories, admissions and affidavits in the record demonstrate that there is no genuine issue of material fact as to when the statutory period commenced.” *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 342, 88 P.3d 417 (2004), *review denied*, 153 Wn.2d 1004 (2005).

(2) The Cowarts’ Claims Raise Genuine Issues of Material Fact Precluding Summary Judgment

The trial court did not reach the merits of the Cowarts’ claims. The trial court granted Great-West’s motion for summary judgment on the ground the Cowarts’ tort claims were barred by the applicable statutes of limitations.¹⁰ Not only, as discussed below, were the claims timely, but they also set forth well-recognized causes of action. Further, the evidence raises genuine issues of material fact as to these claims.

¹⁰ The trial court did not address either the timeliness or the substance of the Cowarts’ CPA claim. As discussed below, the CPA claim was not barred by the applicable statute of limitations.

Briefly,¹¹ Great-West owed a duty to the Cowarts to act in good faith in connection with the administration and determination of their claims under the Amerus health plan. Third party administrators of self-funded insurance plans are held to a duty of good faith, similar to that imposed upon insurers, where the administrators function like an insurer. *See, Long v. Great West Life & Annuity Ins. Co.*, 957 P.2d 823 (Wyo. 1998); *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462 (Colo. 2003); *Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793 (10th Cir. 1995). Insurers can be liable in Washington for both a common law bad faith claim and bad faith under the CPA. *See, e.g., American Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 697-98, 17 P.3d 1229 (2001). Here, Great-West functioned like an insurer with respect to the determination and payment of claims under the Amerus health plan under which the Cowarts were insured. *See, e.g., CP 94, 94, 150, 151, 1207, 1344, 1346.* Accordingly, it owed the Cowarts a duty to act in good faith with respect to their claims. The record contains evidence showing that Great-West breached this duty. *See CP 1311-1416.*

¹¹ As the principal issue on appeal is whether the trial court erred by dismissing the Cowarts' claims based on their timeliness, the Cowarts provide here only a summary of the substantive aspects of their claims.

Doctors Paulson and Gottesfeld also owed Ms. Cowart a duty of care in their determination of whether a TAH was medically necessary. In making this determination, the physicians exercised their professional skill and training and made a medical decision that profoundly affected the course of treatment for Ms. Cowarts' ovarian cancer as well as her chances of survival. In effect, Great-West's physicians intruded on Ms. Cowart's care by her physicians in denying approval of the TAH procedure. Great-West is, therefore, subject to liability for medical negligence under RCW 7.70.030, despite the absence of a traditional physician-patient relationship between its physicians and Ms. Cowart. *Daly v. United States*, 946 F.2d 1467, 1469 (9th Cir. 1991); *Eelbode v. Chec Med. Ctrs., Inc.*, 97 Wn. App. 462, 984 P.2d 436 (1999). The record contains evidence that, in determining a TAH was not medically necessary in June 1998, Drs. Paulson and Gottesfeld acted below the standard of care. *See* CP 2036-47.

As to damages, the Cowarts are entitled to recover damages for the defendants' actions that proximately caused the drastic reduction in Ms. Cowart's life expectancy. *Herskovitz v. Group Health Coop. of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983) (recognizing a cause of action for negligence resulting in the plaintiff's reduced life expectancy).

(3) The Cowarts' Medical Negligence Claims Are Not Barred by the Statutes of Limitations

In its motion for summary judgment, Great-West argued the Cowarts' medical negligence claims were barred by the applicable statutes of limitations.¹² The trial court agreed and granted Great-West's motion, dismissing the Cowarts' claims as time-barred. This was error.

The Cowarts' bad faith and negligence claims are subject to a three-year statute of limitations. RCW 4.16.080(2). Their medical malpractice claim is governed by RCW 4.16.350, providing that an action for damages for injury occurring as the result of health care based on alleged professional negligence:

shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later.

The statutes of limitations on the Cowarts' tort claims began to run when their causes of action accrued. *Giraud v. Quincy Farm & Chem.*, 102 Wash. App. 443, 449, 6 P.3d 104 (2000), *review denied*, 143 Wn.2d 1005 (2001). "Usually, a cause of action accrues when the plaintiff suffers

¹² In its written motion for summary judgment, Great-West also argued service of the complaint was untimely. CP 69. Great-West abandoned this argument during oral argument on the motion. RP June 23, 2006 at 11. In any event, service was timely. The Cowarts filed their complaint on August 27, 2001; ninety days thereafter was November

injury or damage.” *Id.* However, where, as here, there is a delay between an injury and the plaintiff’s discovery of the injury, the discovery rule applies to determine when a cause of action accrues:

In certain torts, however, injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action. The rule of law postponing the accrual of the cause of action is known as “the discovery rule.”

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 769, 733 P.2d 530 (1987).

The discovery rule tolls the date of the accrual of the cause of action until the plaintiff discovers, or reasonably should have discovered, all of the essential elements of the possible cause of action. *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979), *superseded by statute on other grounds as stated in Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619 (1984); *Green*, 136 Wn.2d at 95. In a negligence action, the discovery rule tolls the statute of limitations until the plaintiff discovers, or reasonably should discover, the existence of duty, breach, causation, and damages. *Ohler*, 92 Wn.2d at 511.

The discovery rule does not, however, toll the statute of limitations until a party walks into an attorney’s office and is specifically advised that

25, 2001, which was a Sunday. Service was effected the next court day, November 26, 2001, CP 69, 1141, 1147-48, and was timely. RCW 1.12.040; CR 6(a).

he or she has a cause of action. *Reichelt*, 107 Wn.2d at 772. That is, the discovery rule does not require a plaintiff to understand every legal consequence of his or her claim. *Green*, 136 Wn.2d at 95. Rather, the key consideration with regard to the discovery rule is the factual, rather than the legal, basis for the cause of action. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). “The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action.” *Id.*

The discovery rule requires a plaintiff to exercise reasonable diligence in pursuing a legal claim. *Reichelt*, 107 Wn.2d at 772. The general rule is:

when a plaintiff is placed on notice by some appreciable harm occasioned by another’s wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. “[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.”

Green, 136 Wn.2d at 96 (quoting *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909)).

The application of the discovery rule presents a question of fact. *Ohler*, 92 Wn.2d at 511. Accordingly, the question of when a plaintiff should have discovered that the injury was caused by another’s negligence

is an issue of fact. *Lo v. Honda Motor Co., Ltd.*, 73 Wn. App. 448, 464, 869 P.2d 1114 (1994). Likewise, whether the plaintiff exercised due diligence is an issue of fact. *Allen*, 118 Wn.2d at 760.

In *Ohler*, the plaintiff commenced a medical malpractice and products liability action when she was 22 years old to recover for injuries she sustained during the first 16 days of her life. She alleged that her blindness, discovered upon her discharge from the hospital after her premature birth, was caused by the negligence of the hospital and the manufacturer of the incubator into which she was placed for 16 days after her birth and in which she was administered oxygen. The trial court ruled her claims were barred by the applicable statutes of limitations.

The Supreme Court reversed the trial court and held the claims were not time-barred because the discovery rule tolled the statutes of limitations. The Court held the plaintiff's claim against the hospital "did not accrue until she discovered or reasonably should have discovered all of the essential elements of her possible cause of action, i.e., duty, breach, causation, damages." *Id.* at 511. Although the plaintiff knew from an early age she was blinded by the administration of an excessive amount of oxygen during the 16 days she spent in the incubator, the Court determined an issue of fact existed as to whether she knew or should have known the administration of too much oxygen was a breach of the

hospital's duty. The Court reached a similar result with respect to the plaintiff's product liability claim against the manufacturer of the incubator, holding the claim did not accrue until after the plaintiff discovered or reasonably should have discovered all the essential elements of her possible cause of action. *Id.* at 514.

In *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988), the issue was whether a products liability action brought in July 1986 arising out of an airplane crash in March 1974 was barred by the applicable statute of limitations, RCW 7.72.060(3), under which a product liability action had to be brought within three years from the time the plaintiff discovered or, in the exercise of due diligence should have discovered, the harm and its cause. The Court held the statute of limitations in a products liability action begins to run when the plaintiff discovers, or in the exercise of due diligence should have discovered, "a factual causal relationship of the product to the harm." *Id.*, 111 Wn.2d at 319. That is, the plaintiff must know or should with due diligence know that the cause in fact was an alleged defect. *Id.*

In sum, knowledge of the injury alone is insufficient to start the running of the statute of limitations. *Webb*, 121 Wn. App. at 343. "[N]o action should be filed until specific acts or omissions can be attributed to a particular defendant." *Id.* at 345. This rule rejects the "shoot first, ask

questions later” litigation style under which a party who lacks conclusive evidence of negligence files suit and then invokes the civil discovery rules to force disclosure of information not otherwise available. *Id.*

Great-West, as the party moving for summary judgment, had the burden of showing the absence of any issue of material fact with regard to what the Cowarts should have known and when they should have known it. *See, Green*, 136 Wn.2d at 99. It failed to meet this burden.

Great-West argued below that the statutes of limitations began to run on June 22, 1998, the date on which it denied Dr. Nickel’s request for preauthorization of a TAH for Ms. Cowart. CP 67-69. The statutes of limitation could not have commenced to run on that date. Under the discovery rule, in order for the statute of limitations to have commenced on that date, the Cowarts would have to have known, on that date, of the existence of all the elements of their tort claims, including causation and damages. There is absolutely no evidence that the Cowarts knew all the elements of their potential causes of action against Great-West and the other defendants on that date, particularly the existence of harm or injury. *See, First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 285, 864 P.2d 17 (1993) (for the statute of limitations to begin to run, the aggrieved party must know that some actual and appreciable damage occurred). At most, on June 22, 1998, the Cowarts knew that Ms. Cowart was suffering

from stress urinary incontinence, an enlarged uterus, menorrhagia, and uterine fibroids, that Dr. Nickel recommended a bladder suspension and a TAH, and that Great-West denied preauthorization of a TAH and authorized a bladder suspension. While the Cowarts may have known on June 22, 1998 of the duty of Great-West owed them and of Great-West's breach of that duty in refusing to preauthorize a TAH, the Cowarts did not know, nor did they have reason to know, on June 22, 1998, that Great-West's breach of duty caused the Cowarts the tragic injury of shortening Ms. Cowart's life expectancy to two or three years. Not until the Cowarts had knowledge of this causal relationship and of the damages they suffered did the statutes of limitations on their tort claims begin to run.¹³ The record in no way supports Great-West's argument that the statutes of limitations commenced to run on June 22, 1998.¹⁴

Nor does the record support the argument that the statute of limitations on the Cowarts' tort claims commenced to run on August 28,

¹³ Causation and damage are essential elements of the Cowarts' tort claims. See *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 258, 63 P.3d 198 (2003) (bad faith); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005) (negligence); *Webb*, 121 Wn. App. at 346-47 (medical negligence).

¹⁴ The case on which Great-West relied below, *Steele v. Organon, Inc.*, 43 Wn. App. 230, 716 P.2d 920, review denied, 106 Wn.2d 1008 (1986), is distinguishable. In *Steele*, the plaintiff had knowledge of the fact of her damage shortly after she began taking the drug that injured her. Her action against the physicians who prescribed the drug, filed over nine years after she began taking the drug, was untimely. Here, by contrast, the Cowarts had no knowledge of the fact of damage until they learned of Ms. Cowart's shortened life expectancy.

1998, when Drs. Lee and Nickel performed a TAH and discovered Ms. Cowarts' ovarian cancer. This Court rejected a similar argument in *Lo v. Honda Motor Co., Ltd.*, supra. That case was a medical malpractice action by the mother of a child diagnosed at birth as a spastic quadriplegic with cerebral palsy against the hospital and physicians who delivered the child. At issue was whether the mother's action, filed when the child had just turned four years old, was barred because the plaintiff should have discovered all the facts giving rise to the claim for injuries within three years after the child's birth. The hospital and the physicians argued the statute of limitations began at the child's birth because his mother knew he suffered from birth asphyxia on that date. They also argued, alternatively, that the statute commenced no later than the date on which the mother's attorneys were told by the child's physician that the child's condition resulted from birth asphyxia due to a compressed umbilical cord.

This court rejected this argument, finding it tantamount to an argument that the injury, birth asphyxia, in and of itself gave rise to a duty to inquire whether a cause of birth asphyxia might be medical malpractice. *Id.* 73 Wn. App. at 456. The court refused to hold as a matter of law that the fact of a traumatic medical event and knowledge of its immediate cause equates with notice that the injury was caused by a medical error or omission. *Id.* at 460. Rather, the court reiterated "the claimant should

have a reasonable opportunity to discover that the injury was caused by an act or omission.” *Id.* The court relied on the reasoning of *Grumman*, supra, where the Supreme Court held that where the causal connection between an product and an injury is not immediately obvious, the question whether a plaintiff has exercised due diligence in discovering that causal connection is a factual question not resolvable on summary judgment. In *Grumman*, as discussed, the fact of a helicopter crash, without more, did not start the statute of limitations running on the products liability action filed by the pilot’s father against the manufacturer of the helicopter. Rather, the Court determined an issue of fact existed as to what the father knew or should have known about the cause of the harm, where the evidence showed that the father did not realize, until ten years after the crash, that the crash might have resulted from a defect in the helicopter’s elevator control assembly.

Similarly, here, the mere fact of the discovery of Ms. Cowart’s ovarian cancer in August 1998 is not sufficient to have put the Cowarts’ on notice of causation or damage. At that time, the Cowarts did not know, nor did they have reason to know, that the delay in performing a TAH due to Great-West’s refusal to preauthorize a TAH in June 1998 caused Ms. Cowart’s life expectancy to be drastically reduced. Their knowledge of proximate cause was missing.

The earliest date on which the Cowarts can be said to have discovered, or been reasonably expected to discover, all of the essential elements of their potential causes of action was September 21, 2000. On that date, for the first time, the Cowarts learned from the physicians at M.D. Anderson that Ms. Cowart's life expectancy was only two to three years because of ovarian cancer. *See* CP 2285 (the physicians at M.D. Anderson told Ms. Cowart they had no treatment that would help her and told her "to go home and live life, you don't have much of it left"); CP 224 (During the Cowarts' September 2000 visit with the physicians at M.D. Anderson, "the doctors first said it was likely [Ms. Cowart] had a very substantially reduced life expectancy. [The Cowarts] were told it was very short (approximately two or three years)."). Knowledge that Ms. Cowart had only two or three years left to live was the first "notice of some appreciable harm" sufficient to have put the Cowarts on inquiry notice and charge them with the duty of further inquiry to ascertain causation. *See, Green*, 136 Wn.2d at 95. That is, only after receiving this information from the physicians at M.D. Anderson would a reasonable person have been prompted to undertake further investigation into whether, had Great-West authorized a TAH in June 1998, Ms. Cowart would have had a greater chance of surviving the cancer or would have had a longer life expectancy and accordingly, whether Great-West's

actions or inactions proximately caused their injury. This was the first point at which the Cowarts knew or should have known the elements of a cause of action under *Herskovits* to recover damages for a diminished life expectancy. At a minimum, an issue of fact exists as to when the Cowarts knew or should have known of all the elements of their cause of action, precluding summary judgment dismissal of their claims. *See, Weisert v. Univ. Hosp.*, 44 Wn. App. 167, 173, 721 P.2d 553 (1986) (where reasonable persons can differ as to when the plaintiff discovered all the elements of their cause of action, a genuine issue of material fact exists as to whether the plaintiff timely filed the lawsuit, and summary judgment is not proper).

The trial court erred in granting Great-West's motion for summary judgment on the ground the Cowarts' tort claims were time-barred. Neither the three-year statute of RCW 4.16.080(2) for the Cowarts' common law negligence and bad faith claims, nor the time periods of RCW 4.16.350 for the medical negligence claims have expired. The Cowarts' tort claims were timely and should not have been dismissed on summary judgment. At a minimum, a genuine issue of material fact exists as to when the elements of the Cowarts' tort causes of action should have been discovered, precluding summary judgment dismissal of these claims. *See Green*, 136 Wn.2d at 100; *Ohler*, 92 Wn.2d at 511.

(4) The Cowarts' Claims Are Timely under the Terms of the Insurance Policy

The health insurance plan under which Ms. Cowart was insured contains a limitation on the time within which an insured can bring a legal action to recover benefits under the plan that is tied to the due date for the submission of a proof of claim. A contractual limitation prevails over a general statute of limitation unless the limitation is prohibited by statute or public policy or is unreasonable. *Wothers v. Farmers Ins. Co.*, 101 Wn. App. 75, 79, 5 P.3d 719 (2000). For example, limitations of actions in insurance policies for periods of less than one year are prohibited by RCW 48.18.200. But, “Washington courts rarely invoke public policy to override express terms of an insurance policy.” *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876 n.1, 784 P.2d 507 (1990). Generally, courts enforce contractual limitations periods. *See, e.g., Panorama Village Condo. Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001); *Ashburn v. Safeco Ins. Co.*, 42 Wn. App. 692, 696-97, 713 P.2d 742 (1986); *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 873-74, 621 P.2d 155 (1980).

Under the Cowarts’ plan, an insured must submit a proof of claim to Great-West no later than 15 months from the date of the insured’s claim for benefits. CP 140. An insured may bring a legal action to recover

benefits under the plan “no sooner than 60 days, and no later than 3 years, after the time written proof of loss is required to be given under the terms of the Plan.” CP 141. Accordingly, under the plan, an insured may bring a legal action to recover benefits three years plus 15 months, or four years and three months, after the insured submits a claim for benefits. In the case of Ms. Cowart’s claim for preauthorization of a TAH, the statute of limitations under the plan expired September 22, 2002, which is four years and three months after the date on which Great-West refused to preauthorize a TAH for Ms. Cowart. Under this limitation period, the Cowarts’ complaint, filed on August 27, 2001, was timely.

Great-West argued below that this limitation period, plainly stated in the insurance policy under which Ms. Cowart sought coverage, does not apply to the Cowarts’ tort claims because the claims are not claims seeking recovery under the plan, relying on *Simms*. That case does not, however, support Great-West’s argument. The insurance contract at issue in *Simms* contained a one-year limitation period within which an insured was required to bring an action to recover on a claim. The insured failed to bring his action to recover for theft losses within one year of the losses. The issue of whether the contractual limitation period applied to the insured’s claim for recovery under the policy did not arise in the case. Rather, the issues presented included whether the one-year limitation

period was valid and whether the one-year limitation period governed the insured's CPA claim. The court held the one-year limitation period was valid and governed the insured's claim for payment for his theft losses. The court held further that the insured's CPA claim arose under the statute itself, not the insurance policy, so the CPA's four-year statute of limitation governed that claim.

Here, the Cowarts are not arguing their CPA claim is governed by the limitation period in the health insurance policy. Rather, as discussed below, the CPA is governed by the four-year limitations period in RCW 19.86.120. Their tort claims, however, are claims seeking the recovery of benefits under the policy, benefits Great-West wrongfully denied. As such, these claims are governed by the contractual limitation period and were timely.

(5) The Cowarts' Consumer Protection Act Claim Is Timely and Presents a Genuine Issue of Material Fact

An action under the CPA is subject to a four-year statute of limitations. RCW 19.86.120 ("Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues."). Even using the date on which Great-West alleges the statute of limitations began to run on the

Cowarts' claims, June 22, 1998, their CPA claim, filed in August 2001, was timely.¹⁵

The Cowarts alleged two separate claims: one for the tort of bad faith and one for violation of the CPA arising out of Great-West's bad faith handling of their claims. CP 9. These two claims are properly viewed as separate claims. *See, Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 328, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001); *see also, Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992) ("An action for bad faith handling of an insurance claim sounds in tort."); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997) ("Insureds may bring a private action against their insurer for breach of the duty of good faith under the Consumer Protection Act.").

An insurer's breach of the duty of good faith is a per se violation of the CPA. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 361, 581 P.2d 1349 (1978); *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 422, 788 P.2d 1096 (1990). Because a third party administrator who, as does Great-West, functions as an insurer is likewise held to a duty of good faith, *Long, supra, Cary, supra, Wolf, supra*, it follows that a breach of the

¹⁵ The defendants' counsel admitted the Cowarts' CPA claim is not time barred. RP June 23, 2006 at 14.

duty of good faith by such a third party administrator also gives rise to a cause of action under the CPA. The Cowarts presented evidence creating a genuine issue of material fact as to whether Great-West acted in bad faith in denying Ms. Cowart's request for preauthorization of a TAH in June 1998. *See* CP 1311-1416 (declaration of Charles Miller). Accordingly, a genuine issue of material fact exists as to whether, because of Great-West's bad faith denial of preauthorization, Great-West is liable to the Cowarts under the CPA. Summary judgment dismissal of the Cowarts' CPA claim was error.

(6) The Cowarts Are Entitled To an Award of Attorney Fees under the CPA

The CPA provides for an award of attorney fees to a person who brings and prevails in an action for violation of the statute. RCW 19.86.090. Attorney fees are recoverable both at trial and on appeal under the CPA. *Svensen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001).

The Cowarts requested attorney fees under the CPA in their complaint. CP 13. They are entitled, should they prevail on appeal on the CPA claim, to an award of attorney fees at trial and on appeal.

F. CONCLUSION

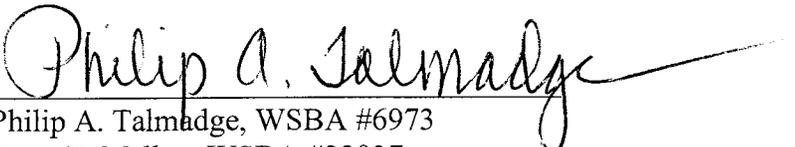
The Cowarts' claims were timely under the applicable statutes of limitations and the contractual limitations period. Their claims did not

accrue until they were put on inquiry notice to conduct further investigation and they knew of the existence of all the elements of their possible causes of action. This did not occur until September 2000. Their complaint, filed in August 2001, was timely. The trial court erred in summarily dismissing the Cowarts' tort claims on the ground they were untimely. The Cowarts' CPA was not only timely but raises genuine issues of material fact precluding summary judgment. The trial court erred in summarily dismissing the Cowarts' CPA claim as well.

For the reasons set forth here, this Court should reverse the trial court's order granting the defendants' motion for summary judgment and dismissing the Cowarts' claims. The Cowarts should be awarded attorney fees at trial. Costs on appeal, including reasonable attorney fees on appeal, should be awarded the Cowarts.

DATED this 14th day of January, 2007.

Respectfully submitted,



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APPENDIX

West's RCWA 4.16.080

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.16. Limitation of Actions (Refs & Annos)

4.16.080. Actions limited to three years

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

CREDIT(S)

[1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

West's RCWA 4.16.350

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.16. Limitation of Actions (Refs & Annos)

**4.16.350. Action for injuries resulting from health care or related services--
Physicians, dentists, nurses, etc.--Hospitals, clinics, nursing homes, etc.**

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

- (1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;
- (2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or
- (3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

CREDIT(S)

[2006 c 8 § 302, eff. June 7, 2006. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

West's RCWA 7.70.030

West's Revised Code of Washington Annotated Currentness

Title 7. Special Proceedings and Actions (Refs & Annos)

[^]Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

➔7.70.030. Propositions required to be established--Burden of proof

No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

- (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
- (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

CREDIT(S)

[1975-'76 2nd ex.s. c 56 § 8.]

West's RCWA 48.01.030

West's Revised Code of Washington Annotated Currentness

Title 48. Insurance (Refs & Annos)

Chapter 48.01. Initial Provisions (Refs & Annos)

➔**48.01.030. Public interest**

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

CREDIT(S)

[1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

WAC 284-30-340

Wash. Admin. Code 284-30-340

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER, OFFICE OF
CHAPTER 284-30. TRADE PRACTICES
UNFAIR CLAIMS SETTLEMENT PRACTICES

Copr. (C) 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Current with amendments included in the Washington State Register,
Issue 06-23, dated December 6, 2006.
284-30-340. File and record documentation.

The insurer's claim files shall be subject to examination by the commissioner or by his duly appointed designees. Such files shall contain all notes and work papers pertaining to the claim in such detail that pertinent events and the dates of such events can be reconstructed.

CREDIT(S)

Statutory Authority: RCW 48.02.060 and 48.30.010. 78-08-082 (Order R 78- 3), § 284-30-340, filed 7/27/78, effective 9/1/78.

WAC 284-30-360

Wash. Admin. Code 284-30-360

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER, OFFICE OF
CHAPTER 284-30. TRADE PRACTICES
UNFAIR CLAIMS SETTLEMENT PRACTICES

Copr. (C) 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Current with amendments included in the Washington State Register,
Issue 06-23, dated December 6, 2006.
284-30-360. Failure to acknowledge pertinent communications.

- (1) Every insurer, upon receiving notification of a claim shall, within ten working days, or 15 working days with respect to claims arising under group insurance contracts, acknowledge the receipt of such notice unless payment is made within such period of time. If an acknowledgement is made by means other than writing, an appropriate notation of such acknowledgement shall be made in the claim file of the insurer and dated. Notification given to an agent of an insurer shall be notification to the insurer.
- (2) Every insurer, upon receipt of any inquiry from the office of the insurance commissioner respecting a claim shall, within fifteen working days of receipt of such inquiry, furnish the department with an adequate response to the inquiry.
- (3) An appropriate reply shall be made within ten working days, or 15 working days with respect to communications arising under group insurance contracts, on all other pertinent communications from a claimant which reasonably suggest that a response is expected.
- (4) Every insurer, upon receiving notification of claim, shall promptly provide necessary claim forms, instructions, and reasonable assistance so that first party claimants can comply with the policy conditions and the insurer's reasonable requirements. Compliance with this paragraph within the time limits specified in subsection (1) of this section shall constitute compliance with that subsection.

CREDIT(S)

Statutory Authority: RCW 48.02.060 and 48.30.010. 78-08-082 (Order R 78- 3), § 284-30-360, filed 7/27/78, effective 9/1/78.

WAC 284-30-380

Wash. Admin. Code 284-30-380

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER, OFFICE OF
CHAPTER 284-30. TRADE PRACTICES
UNFAIR CLAIMS SETTLEMENT PRACTICES

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Current with amendments included in the Washington State Register,
Issue 06-23, dated December 6, 2006.

284-30-380. Standards for prompt, fair and equitable settlements applicable to all insurers.

(1) Within fifteen working days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer shall contain a copy of the denial.

(2) If a claim is denied for reasons other than those described in subsection (1) and is made by any other means than writing, an appropriate notation shall be made in the claim file of the insurer.

(3) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, within forty-five days from the date of the initial notification and no later than every thirty days thereafter, send to such claimant a letter setting forth the reasons additional time is needed for investigation.

(4) Insurers shall not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

(5) Insurers shall not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. Such notice shall be given to first party claimants thirty days and to third party claimants sixty days before the date on which such time limit may expire.

(6) No insurer shall make statements which indicate that the rights of a third party claimant may be impaired if a form or release is not completed within a given period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

CREDIT(S)

Statutory Authority: RCW 48.02.060 and 48.30.010. 78-08-082 (Order R 78- 3), § 284-30-380, filed 7/27/78, effective 9/1/78.

DECLARATION OF SERVICE

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

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FILED
COURT OF APPEALS
DIVISION II
JAN 12 PM 3:09
STATE OF WASHINGTON
BY Christine Jones
DEPUTY

Original filed with:
Court of Appeals, Division II

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: January 12, 2007, at Tukwila, Washington.

Christine Jones
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