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United States Court of Appeals
Tenth Circuit

June 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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199 EAST PEARL CONDOMINIUM OWNERS ASSOCIATION,

Plaintiff - Appellant,

v.

ACUITY INSURANCE COMPANY,

Defendant - Appellee.

No. 22-8059
(D.C. No. 2:21-CV-00189-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

This appeal involves a dispute between 199 East Pearl Condominium Owners Association (the HOA) and Acuity Insurance Co. (Acuity) over the scope of coverage under a commercial package insurance policy issued by Acuity (the Policy). After Acuity denied coverage for the bulk of the HOA's claimed damage, the HOA filed suit, asserting claims for declaratory judgment, breach of contract, and insurance bad faith. The district court granted summary judgment for Acuity, concluding that some

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

claims were time-barred and the remaining claims failed as a matter of law. The HOA appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

As explained below, we need not resolve the parties' coverage disputes to resolve the issues on appeal. But understanding them helps provide context for our discussion of the issues before us, so we begin by identifying the relevant Policy provisions and outlining the coverage issues. The "Property Coverages" section of the Policy provides that Acuity "will pay for direct physical loss of or damage . . . caused by or resulting from any Covered Cause of Loss." Aplt. App., vol. I at 117. "Covered Causes of Loss" is defined as "Risks of Direct Physical Loss unless the loss is [a] Excluded in Property Exclusions; or [b] Limited in" the Limitations paragraph. *Id.* at 118.

The "Policy Exclusions" section lists numerous coverage exclusions, including one providing that Acuity "will not pay for loss or damage caused by or resulting from . . . [c]ontinuous or repeated seepage or leakage of water . . . that occurs over a period of 14 days or more." *Id.* at 132, 134. The Limitations paragraph provides that Acuity will not pay for damage to the interior of the building "caused by or resulting from rain, snow, sleet, [or] ice, . . . unless" an exception applies. *Id.* at 118. One of those exceptions is for loss or damage caused by or resulting from "thawing of snow . . . or ice." *Id.* The coverage dispute is about the meaning of the long-term leakage exclusion and the interplay between "Policy Exclusion" and "Limitations" on

coverage—in other words, whether the Policy covers damage that falls within both an exclusion and a limitations exception.

With that backdrop in mind, we turn to the underlying facts. Except where indicated otherwise, the following facts are undisputed.

The Policy covered the period between June 10, 2016, and June 10, 2017. In December 2016, a condo owner reported leaks in her ceiling. The HOA retained John Kemp, a professional engineer, to assess the damage to the property. He inspected the property in February 2017 and informed the HOA and its insurance agent of the following conditions on the property: (1) "water damage due to leaks/penetration from roof"; (2) "[f]rozen water inside roofing material"; (3) a "loose vent pipe on 2nd floor roof"; (4) "[r]otting/rusting wood and screws at outer wall 3rd floor"; (5) "[i]ce [d]ams at roof drains"; (6) "[m]issing/inconsistent sealing at flashing/joints"; (7) "[d]amp/wet interior walls/insulation"; and (8) "[w]ater damage at fire suppression piping penetrations." *Id.* at 199-200. The HOA informed Acuity of and sought coverage for water damage to the property in March 2017.

Acuity retained Cardillo Forensics to investigate the damage and its causes. The inspector inspected the roof but could not examine the roof membrane underlying the deck area. In April 2017, he issued a report (the Cardillo report) noting water-related damage throughout the property, including the second floor lobby, and that drywall had been removed, revealing underlying wood framing that "exhibited water-related stains" and "decay . . . indicative of multiple wetting events occurring over time." *Id.* at 203. The report reached three conclusions. First, the

openings in the roofing system that allowed water to enter the building were "not caused by ice dams," but were the "result of deficiencies inherent in the roofing system's installation as well as wear and mechanical damage over the life of the roofing." *Id.* at 205. Second, ice dams that formed on the roof in February 2017 "increased the amount of standing water" that entered the building through the openings in the roof. *Id.* Third, the roof likely did not need to be replaced, but "a roofing rehabilitation plan that focuses on the breaches and wet areas only should be considered." *Id.*

In April 2017, Acuity approved coverage to repair water damage to the interior of the property that was exacerbated by the melting ice dams. But it informed the HOA's insurance agent that "no coverage will be extended" for roof repairs, *id.*, vol. II at 422, and it told an HOA representative it was "unable to consider any payment" for damage to the roof membrane because the damage was caused by maintenance issues, not the melting ice dams, *id.* at 425. Acuity acknowledged that the extent of the covered damage was unknown and told the HOA it could "reopen the claim for additional consequential damages discovered after demolition." *Id.* at 417.

In the summer of 2018, the HOA's contractor removed and replaced the roof and replaced the third-floor deck and HVAC equipment installed on the roof. After that work was completed, additional water leaks occurred in a unit and the second-floor lobby. The HOA conducted an intrusive investigation of the ceiling and wall cavities, revealing structural and other interior damage to a beam and roof joists and sheathing, which required structural repairs. And during mold remediation work in

December 2018, rotted joists were discovered above the same second-floor lobby area where Cardillo had found water-related stains and decay.

In September 2019, the HOA's insurance agent informed Acuity of the additional damage, including the rotting joists. In October 2019, Acuity issued a payment for rot damage but declined to pay for the other damage. Acuity's letter to the HOA explained that the coverage decision was based on the Cardillo report and several of the Policy's coverage exclusions, including the long-term leakage exclusion. The letter invited the HOA to provide "additional information or proof" it wanted Acuity to consider. *Id.*, vol. I at 243. A few days later, the HOA's insurance agent contacted Acuity, and Acuity continued to adjust the claim. The HOA disputes whether the letter effectively reserved Acuity's right to deny, or denied, coverage.

In December 2019, Acuity commissioned an environmental and structural engineering damage assessment from the firm of J.S. Held to determine "the source of the current and/or ongoing water intrusion" at the property. *Id.* at 246. Held issued a report in January 2020 indicating that the access door to the second story roof, which had been obscured by a rooftop deck at the time of Cardillo's inspection, was a significant weakness in the building envelope because it was set within a roof drain trough and had significant gaps "directly above" the area where rotting joists had been discovered in December 2018. *Id.* at 247. Held also observed that the deterioration of structural elements was "consistent with long-term exposure to moisture." *Id.* at 248. Based on these and other observations, Held concluded that the "ongoing water damage" was "associated with an improperly installed roof-

access doorway . . . immediately above the second-floor Lobby containment." *Id.* at 252. Held further concluded that water infiltration had "affected the localized area in the second-story Lobby since the building was constructed in 2004," and that "long-term water infiltration" caused the decay of structural supports, including the rotting joists. *Id.* at 253; *see also id.*, vol. II at 512.

In a January 2020 letter to Acuity that said it "relate[d] to [the HOA's] claims since April 2017," the HOA acknowledged that Acuity had "substantially denied coverage under [the Policy] for water damage due to [the] roof leaks" based on Policy exclusions, and explained why the HOA disagreed with Acuity's "denials on limitation of coverage." *Id.* at 519. Referring to Acuity's invitation in the October 2019 letter to provide additional information relating to the claim, the HOA stated that to the extent the information provided in the January 2020 letter was new to Acuity, it should "treat this letter as an amendment to [the HOA's] previous claims so [Acuity can] render a new amended decision on coverage." *Id.* The letter states that the HOA "became aware of the roof leak in the winter of 2017." *Id.* at 522.

In April 2020, Acuity hired Golden Forensics (GF) to interview witnesses associated with the HOA. In its report summarizing the interviews, GF indicated that one interviewee noticed leaks in her unit between "as early as 2016 [and] as late as February 2017," and reported the leaks to the HOA. *Id.*, vol. I at 277. Mr. Kemp—the consultant who performed the February 2017 inspection for the HOA—confirmed that the HOA reported leaks to him at that time and said he "was aware of leaks" at the property five years earlier. *Id.* He said the second-floor lobby had

"possibly been leaking since the building was constructed in 2004." *Id.* Another interviewee, Ms. Humphreys, said the building had "[a]lways had" leaks, including in the second-floor lobby. *Id.* She said leaks had occurred "since as far back as" the early 2000s, with "more significant" leaks occurring in February 2017. *Id.* In its summary judgment filings, the HOA said Ms. Humphreys was a bookkeeper who did not have authority to speak for the HOA regarding insurance issues. Acuity disputed that assertion, noting that HOA officers identified her in the HOA's property loss notice as the HOA's contact person and the person who knew the relevant history. The HOA also disputed that Mr. Kemp was authorized to speak for the HOA about insurance matters.

Acuity also retained an insurance adjuster to determine the cause of the damage to the ceiling joists and insulation. He concluded that the cause of the loss was water damage in the third floor lobby "from the roof that was in poor condition in 2017. Repairs to the roof did not commence until late 2018 exacerbating damage that may have been abated at the initial time of loss or discovery and not reported in a timely manner." *Id.*, vol. II at 510.

In a June 2020 letter to the HOA, Acuity again explained its decision to deny coverage for most of the additional damage for various reasons, including based on the long-term leakage exclusion. Acuity indicated, however, that the Policy did cover certain interior damage and mold remediation, subject to a reservation of rights, and it issued a payment for the covered damage.

The HOA then retained New West Building Company to remove and replace the roof and repair other damage. When the roof was open, substantial additional structural and other damage was discovered that required structural repairs, including replacing a wood beam with a steel beam. The work took about a year to complete. New West's project manager and superintendent opined that the flashing below and around the door to the roof and the area around the roof drain in front of the door had failed and that "if the roof membrane around and under the door, and around the drain, had been properly installed, the water would not have intruded into the building." *Id.*, vol. III at 668.

In June 2021, the HOA asked Acuity to reconsider its denial of coverage. It repeated its earlier statement that it first learned of the problem "in the winter of 2017," described its efforts to address the problem since then, and took issue with Acuity's reasons for denying coverage. *Id.* at 670. As pertinent here, the HOA maintained that the excluded damage was covered under the limitation exception for damage caused by thawing ice, and insisted that the Policy exclusions, including the one for long-term leakage, did not apply.

Acuity sent the HOA another letter explaining its reasons for denying coverage, including that the damage fell within the exclusion for long-term leakage. As for the HOA's argument that the damage was covered because it was caused by melting ice dams, Acuity explained that "both engineers [who] inspected the property have concluded that the excluded damage was the result of negligent workmanship

and long-term water intrusion that would be inconsistent with an ice damming event." *Id.* at 709.

In September 2021, the HOA filed its complaint against Acuity in Wyoming state court, asserting claims for declaratory judgment, breach of contract, and insurance bad faith. Following removal of the case to federal court pursuant to 28 U.S.C. § 1332 on diversity of citizenship, the district court granted summary judgment for Acuity, concluding that the declaratory judgment and breach of contract claims were time-barred under the Policy's limitations period and that the HOA failed to establish a triable question on the bad faith claim.

II. STANDARD OF REVIEW

Because this is a diversity case, Wyoming law governs the substantive legal issues, but federal law governs the standard for granting summary judgment. *See Stickley v. State Farm Mut. Auto. Ins. Co.*, 505 F.3d 1070, 1076 (10th Cir. 2007). A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

We review the district court's grant of summary judgment de novo, applying that same standard and viewing the evidence in the light most favorable to the HOA

as the non-moving party. *See Cornhusker Cas. Co. v. Skaj*, 786 F.3d 842, 849 (10th Cir. 2015). We also "review the district court's interpretation and determination of state law de novo." *Id.* at 850 (internal quotation marks omitted).

III. DISCUSSION

This appeal presents two questions: (1) whether the Policy's four-year limitations period barred the HOA's declaratory judgment and breach of contract claims; and (2) whether the HOA presented a triable question on its bad faith claims. The answer to the first question is yes and the answer to the second is no.

A. The declaratory judgment and breach of contract claims were untimely.

The Policy states that an action against Acuity "under this insurance" must be brought within four years "from the date on which the direct physical loss or damage was discovered." Aplt. App., vol. I at 187. The district court held that the contractual limitations period did not apply to the bad faith claims and that those claims could not be dismissed on summary judgment under the applicable statute of limitations because there was a material fact dispute about when the HOA reasonably should have discovered the basis for those claims. The propriety of that holding is not before us. Instead, the question for us to decide is when the contractual limitations period started to run on the HOA's other claims—i.e., what "from the date on which the direct physical loss or damage was discovered" means. Acuity contends, and the district court held, that the date of discovery under the Policy's limitations period was the date the HOA discovered or reasonably should have discovered property damage giving rise to the claims, not when it learned the full

extent of the damage. The HOA contends that the Policy's limitations period started to run "anew for each physical loss or damage incurred at the Property." Aplt. Opening Br. at 16. We agree with Acuity and the district court.

Under Wyoming law, contractual limitation periods "are prima facie valid and will be enforced absent a demonstration by the party opposing enforcement that the clause is unreasonable or based upon fraud or unequal bargaining positions." *Nuhome Invs., LLC v. Weller*, 81 P.3d 940, 947 (Wyo. 2003). The HOA has not argued, much less established, that the Policy's limitations period is unreasonable or based on fraud. And while Wyoming courts recognize an insurer's unequal bargaining power over an insured, *see N. Fork Land & Cattle, LLLP v. First Am. Title Ins. Co.*, 2015 WY 150, ¶ 14, 362 P.3d 341, 346 (Wyo. 2015), they also recognize that "parties to an insurance contract are free to incorporate within the policy whatever lawful terms they desire, and the courts are not at liberty, under the guise of judicial construction, to rewrite the policy," *Bergantino v. State Farm Mut. Auto. Ins. Co.*, 2021 WY 138, ¶ 9, 500 P.3d 249, 253 (Wyo. 2021) (internal quotation marks omitted).

"When summary judgment is based upon interpretation of an insurance policy, the rules of contract interpretation apply." *Hurst v. Metro. Prop. & Cas. Ins. Co.*, 2017 WY 104, ¶ 10, 401 P.3d 891, 895 (Wyo. 2017). Wyoming courts "interpret insurance policies like other contracts but give the language the plain meaning a reasonable insured would understand it to mean." *N. Fork Land & Cattle*, 362 P.3d

at 346. Ambiguous language is construed against the insurer, but courts will not torture the language to create an ambiguity. *Id.*

The contractual limitations period at issue here is triggered by the insured's discovery of damage. *See* Aplt. App., vol. I at 187. For purposes of its statutes of limitations, Wyoming applies the discovery rule, which means statutory limitations periods are "triggered when a plaintiff knows or has reason to know of the existence of a cause of action." *Robert L. Kroenlein Tr. ex rel. Alden v. Kirchhefer*, 2015 WY 127, ¶ 16, 357 P.3d 1118, 1124 (Wyo. 2015) (internal quotation marks omitted). Under the discovery rule, "[t]he occurrence of a subsequent incident does not extend the statutory period." *Rawlinson v. Cheyenne Bd. of Pub. Utils.*, 17 P.3d 13, 16 (Wyo. 2001). Thus, it is well established under Wyoming law that a statutory limitations period begins to run when the plaintiff first discovers damage giving rise to the claim, not when she learns of the full extent of the damage. *See id.* at 17-18; *Anderson v. Bauer*, 681 P.2d 1316, 1321 (Wyo. 1984); *Duke v. Housen*, 589 P.2d 334, 343 (Wyo. 1979); *cf. Barlage v. Key Bank of Wyo.*, 892 P.2d 124, 127 (Wyo. 1995) (limitations period started running when plaintiff discovered damage giving rise to claim, not when it later discovered who the potential tortfeasor was). This makes sense, because when there is one cause of the plaintiff's damage, there is "only one cause of action and damage arising years later from that [source of damage] does not create a new cause of action." *Duke*, 589 P.2d at 343. As the Wyoming Supreme Court explained in *Rawlinson*, a rule allowing a limitations period to start anew each time the plaintiff discovers additional damage would mean

that "in cases where there is an ongoing condition, such as water seepage, there would be no means to determine when the statute of limitations should commence." 17 P.3d at 16.

The HOA contends that the discovery rule does not apply here because the limitations period is contractual and the Policy does not specifically incorporate the discovery rule. But the Policy's limitations period is specific to policies issued in Wyoming, *see* Aplt. App., vol. I at 187, and the parties agree that Wyoming law governs the application of the limitations period. We reject the notion that a contract must specifically incorporate individual principles of the governing state's law for them to apply. The Wyoming Supreme Court has not addressed whether discovery has a different meaning for contractual limitations periods than for statutory ones, and the HOA has presented no authority—and we are not aware of any—suggesting that it has different meanings. Nor has the HOA articulated a compelling reason for applying a different discovery rule to contractual limitations periods. That is not surprising, because the same considerations that drove that court's decisions in *Rawlinson* and *Anderson*—both water seepage cases—apply equally here. *See Rawlinson*, 17 P.3d at 17-18 (holding in water seepage case that limitations period was triggered when homeowner first discovered damage caused by water intrusion, not when she learned the extent of the damage); *Anderson*, 681 P.2d at 1321 (holding that action brought by group of homeowners for property damage caused by water seepage into their basements accrued when first homeowner discovered damage, and

explaining that the rule applies even when "the damage is slight, continues to occur, or additional damage caused by the same wrongful act may result in the future").

The HOA's per-event method of determining the accrual date would allow an insured to ignore a known cause of damage then seek coverage for later-discovered additional damage indefinitely. That would turn a limitations period triggered by the insured's discovery of damage into a limitations period triggered by the occurrence of damage, and allow the insured to seek coverage for damage that occurred outside the policy period—here, after June 2017. That is not "the plain meaning a reasonable insured would understand it to mean," *see N. Fork Land & Cattle*, 362 P.3d at 346. We thus conclude that the Policy's limitations period accrued when the HOA first discovered damage caused by its leaky roof, and that it did not begin anew each time the HOA discovered additional damage.[1]

[1] We are not persuaded otherwise by the HOA's arguments based on *Newmont Mines Ltd. v. Hanover Insurance Co.*, 784 F.2d 127 (2d Cir. 1986), and *Northpointe Commerce Park, LLC v. Cincinnati Insurance Co.*, No. 14-CV-587A, 2014 WL 7365931 (W.D.N.Y. Dec. 24, 2014), *report and recommendation adopted*, No. 14-CV-587-A, 2015 WL 1405385 (W.D.N.Y. Mar. 26, 2015). Neither case applied Wyoming law and both are inapposite. In *Newmont*, the court held that "the collapse[s] on two different days of two separate sections of" a roof were separate occurrences for purposes of determining the maximum amount payable for any one occurrence under the applicable insurance policy. *See* 784 F.2d at 129, 135. The question in *Newmont*—the meaning of occurrence for policy limits purposes—was entirely different than the one presented here—the meaning of "from the date on which the direct physical loss or damage was discovered," Aplt. App., vol. I at 187, for accrual date purposes. Thus, the *Newmont* court's explanation of why the cause of the two collapses was irrelevant in determining the meaning of occurrence, *see* 784 F.2d at 137, has no bearing on the question before us. *Northpointe* is similarly off point. It involved the sufficiency of the insured's notice of loss of damage caused by two separate windstorms and the accrual dates for the insured's claims under the

Every contractor the parties hired to inspect the property—Kemp, Cardillo, Held, the insurance adjuster, and New Wave—concluded that the root cause of the HOA's claimed damage was long-term and repeated water intrusion into the building stemming from the faulty roof. The undisputed evidence establishes that the HOA first discovered the damage no later than February 2017. The HOA thus had until February 2021 to file an action under the Policy, so its September 2021 contract-based claims were time-barred.

We need not address the HOA's argument that there were material factual disputes about the timing of its discovery of additional damage, including the damage caused by thawing ice, and whether the HOA's 2019 request for additional coverage was a new insurance claim or a continuation of the 2017 claim. Even if those issues were disputed, they are immaterial to the question of when the limitations period started to run. The question is not when the HOA discovered additional damage or how many insurance claims it filed, but when it first discovered the damage giving rise to a claim. And because the question whether the HOA submitted one or multiple claims does not affect the determination of when the limitations period accrued, we need not address the HOA's contention that in resolving that question the district court improperly weighed evidence and made credibility determinations when it relied on the subject line of the HOA's insurance agent's September 2019 email to Acuity indicating that the HOA was seeking to reopen its 2017 claim.

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policy's limitations period, which was triggered by the date the losses *occurred*, not the date the plaintiff *discovered* the loss. *See* 2014 WL 7365931, at *2, *5-6.

B. The HOA did not present a triable question on its bad faith claim.

Wyoming law distinguishes between substantive bad faith claims that implicate the merits of the insured's claim for coverage and procedural bad faith claims that allege "oppressive and intimidating claim practices." *Hatch v. State Farm Fire & Cas. Co.*, 842 P.2d 1089, 1099 (Wyo. 1992). The HOA asserted a claim for both substantive and procedural bad faith, but it did not present a triable question on either theory.[2]

1. Substantive Bad Faith

To prevail on a claim of substantive bad faith, the insured must show: 1) the absence of any reasonable basis for denying a claim; and 2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Matlack v. Mountain W. Farm Bureau Mut. Ins. Co.*, 44 P.3d 73, 81 (Wyo. 2002). To satisfy the first component, "an insured must show that a reasonable insurer under the circumstances would not have" denied the claim. *Id.* The test for determining whether an insurer denied a claim in bad faith is whether the validity of the claim was "fairly debatable." *Id.* This is an objective test under which the validity of a claim "is fairly debatable if a reasonable insurer would have denied [the claim] . . . under the existing circumstances." *Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051,

[2] An insured need not prevail on a breach of contract claim to pursue the bad faith claim. because even if a coverage claim is fairly debatable, the insurer may nevertheless breach its "duty of good faith and fair dealing by the manner in which it investigates, handles, or denies a claim." *Matlack v. Mountain W. Farm Bureau Mut. Ins. Co.*, 44 P.3d 73, 81 (Wyo. 2002).

1062 (Wyo. 2002). "The logical premise of the debatable standard is that if a realistic question of liability does exist, the insurance carrier is entitled to reasonably pursue that debate without exposure to a claim of violation of its duty of good faith and fair dealing." *Id.* (ellipsis and internal quotations marks omitted).

The question for us to decide is whether it was fairly debatable that the long-term leakage exclusion applies to the unpaid portions of the HOA's claim. The HOA argues that the validity of its claim was not fairly debatable for three reasons. First, focusing on the word "continuous," the HOA argues that the long-term leakage exclusion applies only when the claimed damage was the result of continuous exposure to water infiltration for 14 consecutive days or longer. Second, it argues that the exclusion does not apply because the claim falls within the limitations exception for damage caused by thawing ice. Finally, it argues that the exclusion applies only to damage caused by "leaking pipes and showers/bathtubs, not from weather related events." Aplt. Opening Br. at 24. Acuity argues that the exclusion applies because the undisputed evidence establishes that the damage was the result of repeated instances of water infiltration into the building through the leaky roof, beginning no later than December 2016 and continuing through February 2017 and beyond. Acuity further maintains that the exclusion applies even if the damage was exacerbated by melting ice dams, because the Policy does not cover loss resulting from excluded causes even if a covered cause of loss contributed to the damage.

The Wyoming Supreme Court has not interpreted this or a similarly worded exclusion. Nationwide, however, numerous courts have done so with, as the district

court put it, "widely diverging approaches," Aplt. App., vol. III at 806. We will not review all of the cases cited in the district court's order and the parties' briefs, but we note that none are squarely on point. Given the conflicting authority, it is not surprising that the parties disagree about whether the claimed damage was covered. But the issue for bad faith purposes is not whether the damage was covered—that was the issue presented by the HOA's untimely declaratory judgment and breach of contract claims. The issue for purposes of the bad faith claim is whether the question of coverage was fairly debatable. *See Gainsco Ins. Co.*, 53 P.3d at 1063.

Under Wyoming law, an insurer has a reasonable basis for denying coverage and cannot be found to have acted in bad faith when (1) Wyoming law does not resolve the applicability of the policy exclusion, (2) the law in other jurisdictions is conflicting, and (3) the language of a policy exclusion can, on its face, be applied to the insured's claim. *Id.* (insurer had a reasonable basis for denying a claim and therefore did not act in bad faith "where the underlying incident objectively may be seen as being covered by a policy exclusion, particularly where there is no controlling authority within the jurisdiction").

Although the conflicting authorities may well leave room for debate about the ultimate answer to the coverage question, we conclude that a reasonable insurer could read the plain language of the long-term leakage exclusion as applying to the HOA's claim. It says that loss or damage caused by or resulting from "[c]ontinuous or repeated seepage or leakage of water . . . that occurs over a period of 14 days or more" is not covered. Aplt. App., vol. I at 134. The undisputed evidence establishes

that the unpaid portion of the HOA's claim was for damage that resulted from water infiltration into the building through the leaking roof. The Policy does not require that the leakage continue unabated—the term "continuous *or repeated*" makes clear that the exclusion applies both to unabated leakage and multiple intermittent leakage events occurring over time. A reasonable insurer could also read the Policy as providing that the exclusion applied despite the limitations exception for thawing ice. The Policy provides that a loss is covered unless it is *either* excluded *or* limited. *See id.* at 118. A reasonable insurer could read the excluded-or-limited language as meaning that to be covered, the loss must be *both* unexcluded *and* unlimited, so that a loss is not covered if it is concurrently caused by the combination of a covered cause (thawing ice dams) and an excluded cause (long-term water leakage). We thus conclude that Acuity had a reasonable basis for denying the claim. *See Gainsco Ins. Co.*, 53 P.3d at 1063.

We are not persuaded otherwise by the HOA's arguments based on our unpublished decision in *Wheeler v. Allstate Insurance Co.*, 687 F. App'x 757 (10th Cir. 2017). There, the insurer relied on an exclusion for leakage lasting for "weeks, months, or years," *id.* at 765 (internal quotation marks omitted), to deny coverage for damage caused by a burst water pipe during the first few days of flooding. Applying Utah law, we held that the exclusion applied only to damages caused by leakage over a period of at least weeks, and that the damage caused in the first few days of flooding could be compensable if the insurer could "segregate [the] short-term losses from [the] long-term losses." *Id.* at 769. We also held that factual

questions precluded summary judgment on the insured's bad faith claim. *See id.* *Wheeler* is unhelpful here because it involved a single burst pipe, not repeated damage events, and the insurer did not seek to recover for damage "caused over a longer period of time or that would have been exacerbated by a delay in discovering the flood." *Id.* at 761 (internal quotation marks omitted). Indeed, we expressly distinguished that case from cases in which courts in other jurisdictions held that such exclusions barred coverage for damage caused by leakage over longer periods of time. *Id.* at 769. One of those cases casts doubt on the HOA's argument that the long-term leakage exclusion did not apply because the damage was covered by the limitation exception for damage caused by thawing ice. *See Marsh v. Am. Fam. Mut. Ins. Co.*, 218 P.3d 573, 574-78 (Or. Ct. App. 2009) (holding that water damage caused by leakage over a period of time was excluded under a provision similar to the one at issue here even though the policy provided coverage for other types of water damage).[3] And nothing in *Wheeler* suggests that such exclusions apply to burst pipes but not leaking roofs. *Wheeler* thus does not support any of the HOA's fair-debatability arguments.

[3] *See also Iroquois on the Beach, Inc. v. Gen. Star Indem. Co.*, 550 F.3d 585, 588 (6th Cir. 2008) (under Michigan law, similarly worded exclusion barred claim for seepage damage even though a windstorm, which was a covered cause of loss, initiated the sequence of events that resulted in the loss, because "a loss is *not* covered when it is concurrently caused by the combination of a covered cause and an excluded cause"); *Hall v. Am. Indem. Grp.*, 648 So. 2d 556, 558-59 (Ala. 1994) (exclusion for loss from water pressure applied to claim for loss caused by water pressure from a burst underground water line despite a coverage provision for leakage from plumbing system).

Because it was fairly debatable whether the long-term leakage exclusion applied to the unpaid portion of the HOA's claim, Acuity cannot be found to have acted in bad faith in denying the claim. Accordingly, Acuity was entitled to summary judgment on the substantive bad faith claim.

2. Procedural Bad Faith

An "insurer may breach the duty of good faith and fair dealing by the manner in which it investigates, handles, or denies a claim." *Matlack*, 44 P.3d at 81; *cf.* Wyo. Stat. Ann. § 26-15-124(b) ("Claims for benefits under a property . . . insurance policy shall be rejected or accepted and paid . . . within forty-five (45) days after receipt of the claim and supporting bills."). "A fairly debatable reason to deny a claim is not a defense against torts that may flow from engaging in oppressive and intimidating claim practices." *Hatch*, 842 P.2d at 1099 (internal quotation marks omitted).

The HOA claimed Acuity demonstrated procedural bad faith by closing its file in January 2018 and not notifying the HOA that it was denying the claim until after the HOA submitted its 2019 request to reopen the claim based on its discovery of additional damage, including the rotting joists. The district court concluded, and we agree, that this claim does not raise a material fact dispute about whether Acuity reasonably investigated and processed that claim.

The undisputed evidence establishes that in April 2017, Acuity informed the HOA that it had approved coverage for interior water damage caused by the melting ice dams but that Acuity was "unable to consider any payment for the roof

membrane." Aplt. App., vol. II at 425. Acuity notified the HOA that its decision was based on the Cardillo report's conclusion that the observable damage was the "result of deficiencies inherent in the roofing system's installation," including openings in the roofing system that allowed water to enter, and that the thawing ice dams "increased the amount of standing water" that entered the building through the openings in the roof. *Id.* Acuity told the HOA it could "reopen the claim" if it discovered additional damage during its demolition and roof repair project. *Id.* at 417. For the next two months, Acuity representatives followed up with the HOA's insurance adjuster about the status of the repairs.

In January 2018—eight months after informing the HOA of its coverage decision and having received no additional information from the HOA—Acuity closed its file. Then, in September 2019—over two years after Acuity made its initial decision—the HOA submitted its request to reopen the claim based on the additional damage it discovered in December 2018, including the rotting joists. Acuity reopened the claim, conducted more investigations, and issued a payment for covered rot damage, but it denied coverage for the other damage.

The HOA has cited no authority, and we are not aware of any, suggesting that Acuity's handling of the claim constitutes the type of "oppressive and intimidating claim practices" that can support a procedural bad faith claim, *Hatch*,

842 P.2d at 1099. And on these facts, we agree with the district court that no reasonable jury could find that Acuity acted unreasonably in processing the claim.

In so concluding, we reject the HOA's contention that the district court impermissibly weighed evidence by considering reports attached to the parties' summary judgment pleadings.[4] Courts may not weigh evidence, resolve evidentiary conflicts, or make credibility determinations at the summary judgment stage. *See Anderson*, 477 U.S. at 255. But a court may grant summary judgment when the record, taken as a whole and viewed "through the prism of the [plaintiff's] substantive evidentiary burden," could not lead a reasonable juror to find "that the plaintiff proved his case by the quality and quantity of evidence required by the governing law." *Id.* at 254. That is precisely what happened here—the district court evaluated the evidence and found the HOA's procedural bad faith evidence lacking.

IV. CONCLUSION

The judgment is affirmed.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[4] Because the HOA does not challenge the admissibility of any of the reports, the district court properly considered them on summary judgment. *See Standish v. Jackson Hole Mountain Resort Corp.*, 997 F.3d 1095, 1107 (10th Cir. 2021) (recognizing that courts may consider any admissible evidence in ruling on a summary judgment motion).