IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:20-cv-03295-DDD

CESARE MORGANTI, an individual,

Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I., a Wisconsin corporation,

Defendant.

DEFENDANT AMERICAN FAMILY'S MOTION FOR SUMMARY JUDGMENT

Defendant, by and through its attorneys, Sutton | Booker | P.C., moves for summary judgment pursuant to Fed. R. Civ. P. 56 as follows:

INTRODUCTION

This is a property damage bad faith case stemming from a disagreement about whether payment is owed for damage to Plaintiff's wood shake roofs. American Family denied the coverage as excluded under Plaintiff's policy. Plaintiff disagrees. Actual Cash Value is a defined term in Plaintiff's policy and is defined to be the least of four different calculation methods. Plaintiff did not retain an expert to calculate the actual cash value under the four methods and did not disclose any affirmative expert opinions acknowledging the wood shake roof exclusion language or the definition of actual cash value in Plaintiff's policy. The actual cash value of Plaintiff's wood shake roofs is zero. No additional amounts would be owed even if the damage was not excluded (which it is) and American Family is entitled to summary judgment.

On October 11, 2019, Plaintiff made a claim for wind damage from a June 7, 2019, storm. American Family inspected the property five days later and determined the wood shake roof damage was caused by age related wear and tear and excluded by the policy. American Family communicated its findings and the basis of its denial to Plaintiff in writing the same day. After Plaintiff demanded a reinspection and submitted a public adjuster's estimate, the property was reinspected by a different adjuster who also determined the wood shake roof damage was caused by age- and weather-related wear and tear. This was communicated to Plaintiff in writing on May 22, 2020. Plaintiff then retained a lawyer, who alleged American Family was acting in bad faith and demanded three times the replacement costs as a "settlement" despite actual cash value language in the policy. American Family then sent a third-party engineer to again inspect the property. The engineer concluded that the wood shake roof damage was caused by age-related deterioration and deferred maintenance. Immediately upon receiving the engineer's report, American Family provided a copy to Plaintiff with another letter explaining the basis of the denial. Without further contact, Plaintiff filed suit.

This motion seeks summary judgment on all claims. American Family quickly inspected the property, issued an estimate for the covered hail damage, and communicated the basis of its denial on the wood shake roofs to Plaintiff. When Plaintiff disagreed, American Family sent a different adjuster, and then an engineer to inspect, communicating the basis for its coverage denial at each step. The June 7, 2019, damage Plaintiff reported in October 2019 is excluded by his policy, but even if it were covered, no additional amounts are owed. Plaintiff's policy affords actual cash value on his wood shake roofs which, based on the age and condition of Plaintiff's roofs, under the actual cash value definition in Plaintiff's policy, is zero. Because no additional

payment is owed, Plaintiff's bad faith claims fail as well. Regardless, American Family's denial, based on policy language excluding losses consisting of, or caused directly or indirectly by, wear and tear, deterioration, and other listed exclusions, is reasonable. Plaintiff's disagreement and conclusory allegations that American Family's position is unreasonable does not make it so.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff is the owner of property at 1147 S. Peak View Drive, Castle Rock, Colorado, 80109, including a house, garage, and barn. Ex. 1 (Property report), p. 2; [Doc. 3, ¶ 6].

2. Plaintiff's property has been insured with American Family since 2012. Ex. 2 (FNOL) p. 1; Ex. 3 (2012 Declarations Page); Ex. 4 (Policy and Application), pp. 8-12.

3. The house was built in 1973, the garage in 2005, and both have wood shake roofs. Ex. 1 (Property Report), p. 2. *See also*, Ex. 6 (Phelan Depo), p. 259:2-21; Ex. 5 (Plaintiff Depo), p. 29:19-22.

4. Plaintiff believes the roof was replaced shortly before he purchased it in 1993 based on the color of the wood shakes. Ex. 5 (Plaintiff Depo), p. 138:23-139:13

5. If the roof was replaced in 1993, it was done without a permit. Ex. 1 (Property report), pp. 3-4; Ex. 6 (Phelan depo), p. 258:14-260:1; Ex. 7 (Logan depo), pp. 58:14 – 61:19; Ex. 8 (Cupit depo), p. 157:22-158:23.

6. The barn was built in 1977 and has an asphalt shingle roof. It is undisputed there is no wind damage to the barn's asphalt shingles. Ex. 1 (Property report), pp. 2-4; Ex. 6 (Phelan depo), p. 263:4-23.

7. After purchasing the property in 1993, Plaintiff did no maintenance on the roofs. Ex. 5 (Plaintiff Depo) pp. 31:24-32:24, 195:11-196:14; Ex. 30 (Discovery Responses),

Interrogatory Responses #7 and #8.

8. "How We Settle Losses – Section 1" of the policy, states:

> We will pay the cost to repair or replace the damaged part of property insured under Coverage A with
> material of like construction for similar use on the same premises subject to the following:
>
> a. the actual cash value;
> b. the cost to repair or replace damaged property with materials of like construction; or
> c. any policy limit that applies.
>
> …

Ex. 4 (Policy), pp. 8-9.

9. Actual Cash Value is a defined term in the Policy's definitions section:

> Actual cash value. This means the least of the:
>
> a. value of damaged property;
> b. change in value of damaged property directly due to the loss;
> c. cost to repair damaged property; or
> d. cost to replace damaged property less any deduction for:
>
> (1) age;
> (2) condition;
> (3) obsolescence; or
> (4) depreciation;
>
> at the time of loss.

Ex. 4 (Policy), p. 3

10. Insurance carriers in Colorado have limited wood shake roof surface coverage to actual cash value (if they were insured at all) since 2008. Ex. 8 (Cupit Depo), pp. 38:19-40:2; 42:16-24; Ex. 9 (Craver Depo), p. 190:14-191:10.

11. Plaintiff's policy has contained this actual cash value on wood shake roofs language since inception in 2012, with the language moving from an endorsement to the policy in 2015. Ex. 10 (2015 letter), pp. 6; Ex. 3 (2012 Declarations Page); Ex 32 (Renewal Letters).

12. The Policy covers sudden and accidental direct physical loss unless excluded and contains the following exclusions to the coverage:

> We do not cover loss consisting of, or caused directly or indirectly by any of the following Exclusions. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> 7. Rust, Corrosion, Frost, Condensation, Wet or Dry Rot;
> …
> 8 Settling, Cracking, Shrinking, Bulging OR Expansion of Pavements, Patios, Foundations, Walls, Floors, Roofs, or Ceilings
> …
> 14. Wear And Tear, Marring, Scratching, Deterioration.

Ex. 4 (Policy), p. 6.

13. The policy requires Plaintiff to comply with the following duties after a loss:

> You, any insured, and any person or entity claiming coverage under this policy must:
> a. give us prompt notice;
> ….
> e. protect the property from further damage;
> f. make reasonable and necessary repairs to protect the property and keep records of the cost of these repairs;
>
> We have no duty to provide coverage under this policy if you or any person or entity claiming coverage under this policy fails to perform these duties. These duties after a loss do not waive any of our rights in this policy.

Ex. 4 (Policy), p. 7.

14. On October 11, 2019, Plaintiff reported damage from a June 7, 2019 storm. Ex. 2 (FNOL) p. 2; Ex. 5 (Plaintiff Depo) pp. 62:24-63:1, 80:17-81:4.

15. American Family opened claim number 01001942724 and assigned field adjuster, Corwin Frey, who inspected on October 16, 2019, with Plaintiff's contractor, allowing him an opportunity to point out any alleged damage. Ex. 11 (Frey Depo), p. 222:15-223:2; Ex. 5 (Plaintiff Depo), pp. 81:7-82:16, 109:12-16; [Doc. 3, ¶ 32].

16. Mr. Frey communicated the basis of his denial in a written October 16, 2019, letter. Ex. 12 (Denial Letter); Ex. 5 (Plaintiff Depo), p. 86:12-88:22.

17. Plaintiff provided a copy of his policy to his contractor, public adjuster, and attorney, but did not read it or review it in general or the provisions regarding roof coverage in any great detail. Ex. 5 (Plaintiff Depo), pp. 9:18-22, 45:23-46:17; 50:2-5, 206:1-22.

18. Plaintiff contacted American Family to discuss his disagreement with the denial and to request a reinspection. Ex. 5 (Plaintiff Depo), p. 82:21-84:4, Ex. 13 (Claim Notes), p. 5.

19. On October 21 and 24, 2019, American Family requested Plaintiff submit an estimate of the damages for a reinspection to be scheduled. Ex. 5 (Plaintiff Depo), pp. 84:1-85:13, 92:7-18; Ex. 13 (Claim Notes), pp. 3-5.

20. Plaintiff had a January 2, 2020, roof replacement estimate from his contractor but did not provide it to American Family until July 31, 2020. Ex. 14 (Landa Estimate); Ex. 5 (Plaintiff Depo) pp. 65:2-10, 85:25-86:11, 96:2-14; 100:13-16; Ex. 15 (Matthiesen Depo), p. 217:21-218:16; Ex. 16 (Weeks Depo) p. 187:22-188:5; Ex. 30 (Discovery Responses), Interrogatory Response # 4.

21. On March 17, 2020, Plaintiff retained Peter Ridulfo as his public adjuster. Ex. 5 (Plaintiff Depo) pp. 41:17-23, 61:2-5, 97:21-99:15; Ex. 17 (Ridulfo Depo), p. 24:11-25:12; Ex. 18 (Ridulfo contract).

22. Mr. Ridulfo submitted his letter of representation and requested the policy on March 17, 2020. Ex. 19 (Ridulfo Letter).

23. Adjuster Dustin Sanderson was assigned and provided the policy and photographs on March 27, 2020. Ex. 13 (Claim Notes) p. 2; Ex. 20 (Sanderson Depo), p. 29:11-18; Ex. 15 (Matthiesen Depo), p. 39:15-21.

24. On May 12, 2020, Mr. Ridulfo submitted a sworn proof of loss for full roof replacements, totaling $85,167.95. Ex. 21 (Proof of Loss), Ex. 22 (Ridulfo Estimate); Ex. 30 (Discovery Responses), Interrogatory #4.

25. Mr. Sanderson reinspected the property with Mr. Ridulfo and a new contractor, Seamus Bradley, on May 19, 2020.[1] Ex. 20 (Sanderson Depo), p. 25:4-26:22; Ex. 23 (Bradley Depo), p. 96:6-20.

26. On May 22, 2020, Mr. Sanderson reiterated American Family's claim decision in writing, stating "the damage to the wood shake roof is the result of age wear and tear. Over time with the expanding and contracting of the roof, the staples will start to loosen and staples will start to push out of the decking causing the shingles to no longer be secure." Ex. 24 (Sanderson Email); Ex. 20 (Sanderson Depo), p. 135:2-15; Ex. 5 (Plaintiff Depo) pp. 120:11-123:14.

27. Mr. Ridulfo did not explain the policy language related to wood shake roofs to Plaintiff. Ex. 19 (Ridulfo Depo), p. 189:4-10; Ex. 5 (Plaintiff Depo), p. 59:3-60:17.

28. Plaintiff then retained an attorney, who on July 31, 2020, submitted a 30-day time limited demand of $225,000 and alleging bad faith. Ex. 25 (Demand Letter); Ex. 5 (Plaintiff Depo), p. 126:18-127:13.

29. American Family retained Knott Laboratory to inspect the property and issue a report. Ex. 15 (Matthiesen Depo), p. 52:15-53:13; Ex. 6 (Phelan depo), p. 233:4-20.

30. Knott Laboratory engineer Tim Phelan inspected the property on August 25, 2020, with Mr. Ridulfo and Mr. Bradley present. Ex. 6 (Phelan depo), p. 35:18-23.

[1] Mr. Sanderson was accompanied by another recently hired adjuster who was shadowing. This adjuster was not assigned to the claim (Ex. 30, Matthiesen Depo), p. 39:22-40:1), had no claim related responsibilities, and did not document his impressions of the inspection at the time.

31. Mr. Phelan documented missing collateral damage to the property that he would expect to see after a significant wind event and considered this when analyzing the cause of the damage. Ex. 26 (Knott Report), pp. 3, 8-13; Ex. 6 (Phelan depo), pp. 263:4-23, 264:8-266:18.

32. Both at and after the inspection, Mr. Phelan asked Mr. Ridulfo about the age and maintenance or repairs to the wood shake roofs but was not given the information. Ex. 6 (Phelan Depo), p. 250:15-252:11; Ex. 27 (Phelan Emails); Ex. 17 (Ridulfo Depo), p. 230:3-231:21.

33. Mr. Phelan's September 3, 2020, report, summarizing his findings, states in part:

> The fractured, displaced, and missing wood shakes at the subject property were consistent with long-term moisture-related dimensional changes in the material resulting in withdrawal of the fasteners, long-term, age-related deterioration of the wood shakes, and deferred maintenance of the roofing system subjected to multiple normal and expected cyclical wind loads over the service life of the wood shakes and not the result of a single wind event that occurred on or about June 7, 2019.

Ex. 26 (Knott Report), pp. 3-6; Ex. 6 (Phelan Depo), p. 123:8-124:15.

34. American Family provided Mr. Phelan's report to Plaintiff the same day and again reiterated its coverage decision. Ex. 28 (Manzanares Depo), p. 34:9-35:19; Ex. 29 (Coverage Position Letter).

35. Plaintiff does not recall an engineer inspecting his property and did not recall discussing the engineer's report or retaining his own engineer with Mr. Ridulfo. Ex. 5 (Plaintiff Depo), pp. 128:11-20, 130:15-24, 135:21-136:4, 137:5-9.

36. Plaintiff did not do any maintenance or repairs in the 25 years he owned the property, denying the roofs ever sustained damage requiring any repair. Ex. 30 (Discovery Responses), Interrogatory Response 7 and 8; Ex. 5 (Plaintiff Depo), 31:24-32:24, 195:11-196:14.

37. Plaintiff has done no repairs since the June 2019 storm to protect his property. Ex. 30 (Discovery Responses), Interrogatory Responses #1 and #5; Ex. 5 (Plaintiff Depo), pp. 63:9-13, 190:14-18; Ex. 23 (Bradley Depo), p. 191:10-192:24; Ex. 17 (Ridulfo Depo), pp. 55:3-56:2, 57:18-23.

38. Plaintiff concedes he "observed multiple uplifted shakes, dislodged shakes, wind-blown shakes and yard debris" after the June 7, 2019 storm and knew there was damage. Ex. 5 (Plaintiff Depo), pp. 62:11-23, 70:8-72:24.

39. American Family's costing expert, Paul Logan, calculated the ACV of Plaintiff's roofs under all four methods included in the policy's ACV definition and determined the least of the four methods is $0. Ex. 31 (Logan report), pp. 16-18; Ex. 7 (Logan Depo), p. 224:14 – 225:11, 235:23-236:12; UF #9.

40. Mr. Logan's calculations assumed Plaintiff's May 5, 2020, estimate as the costs to replace Plaintiff's wood roofs.[2] Ex. 31 (Logan report), p. 6, Ex. 7 (Logan Depo), pp. 26:3-10.

41. Plaintiff did not calculate the actual cash value using methods (a) or (b). UF #9.

42. Over time, wood shakes deteriorate and split and fasteners oxidize and withdraw. Ex. 6 (Phelan Depo), pp. 134:14-138:3, 142:9-144:23, 290:1-291:3; Ex. 8 (Cupit Depo), p. 138:1-140:16; Ex. 23 (Bradley Depo), pp. 71:23-72:20, 74:5-75:17, 78:12-79:6.

43. Plaintiff's agents did not explain to him how wood shakes age, and he is not aware of the types of maintenance that can extend the life of wood shake roofs. Ex. 5 (Plaintiff Depo), pp. 142:3-20; 168:23-169:13.

[2] American Family does not agree Plaintiff's wood roof replacement cost estimates are accurate but because the policy affords only actual cash value coverage on the roofs, Mr. Logan was asked to use those costs to avoid creating immaterial disputed issues of fact.

STANDARD OF REVIEW

Summary judgment is proper when 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "material" fact is one that might reasonably affect the outcome of the case. *Id.* Once a movant has met his initial burden under Rule 56(c), the burden shifts to the non-moving party to show that there are issues of material fact requiring a trial. *Concrete Works, Inc., v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1315 (1995). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (internal citations omitted).

ARGUMENT

I. American Family is Entitled to Summary Judgment On Plaintiff's Breach of Contract Claim Because Wear-and-Tear And Deterioration Are Excluded In His Policy.

Plaintiff's breach of contract claim fails because the terms of his Policy do not provide for additional payment. Where an insured files suit against his insurer seeking coverage under a policy of insurance, "the insured has the burden of proof to establish the nature and extent of any loss and that the loss claimed was caused by one of the perils insured against ('covered') by the policy." *Advantage Homebuilding, LLC v. Md. Cas. Co.,* 470 F.3d 1003, 1008 (10th Cir. 2006). "Assuming the insured can satisfy this burden, the insurer then has the burden of proving that

any exclusionary clauses within the policy apply to preclude coverage." *Id.; Rocky Mountain Prestress, LLC v. Liberty Mut. Fire Ins. Co.*, 960 F.3d 1255, 1260 (10th Cir. 2020). If the insurer shows that an exclusion applies, "the burden then shifts back to the insured to provide the applicability of an exception to the exclusion." *Leprino Foods Company v. Factory Mutual Ins. Co.,* 453 F.3d 1281, 1287 (10th Cir. 2006).

Even if Plaintiff could establish the damage is covered, he cannot establish there is any applicable exception to the cited exclusions in his policy. Plaintiff's policy covers sudden and accidental direct physical loss subject to several relevant exclusions (*e.g.,* rot, wear/tear, deterioration). UF #12. American Family explained "over time with the expanding and contracting of the roof the staples will start to loosen and the staples will start to push out of the decking causing the shingle to no longer be secured." UF # 26. The third-party engineer identified damage "consistent with long-term moisture-related dimensional changes in the material resulting in withdrawal of the fasteners, long-term, age-related deterioration of the wood shakes, and deferred maintenance." UF #33. Plaintiff admits he did no maintenance or repairs on the roof in the 25 years he owned it before the June 2019 storm. UF #7, 36. Plaintiff followed none of the manufacturer's recommendations to extend the life of the wood, did not have the roofs inspected or repair loose fasteners – ever – much less routinely, and admits **no one performed work** on the roofs in the years before the storm, claiming no work was needed. UF #7, 36, 42, 43. He waited four months to report the damage and did no repairs to protect his property during that time. UF #14, 37. This is not sudden or accidental, but even if it was, it is excluded.

II. Because Plaintiff's Wood Roofs Were Beyond Their Life Expectancy Before the Alleged Damage, The Actual Cash Value of His Wood Roofs is Zero And His Breach Claim Fails.

Even if the damage was covered, which American Family disputes, the actual cash value of Plaintiff's aged wood roofs as defined in his policy is zero, and no additional amounts would be owed under the Policy.

Plaintiff's policy provides coverage for wood shake roofs on an actual cash basis. UF # 8-11. Plaintiff's Policy's How We Settle Losses Section states, "[w]e will pay the cost to repair or replace … subject to the following: … (5) For any loss to wood roof surfaces, we will pay the least of: the actual cash value, the cost to repair or replace damaged property with materials of like construction; or any policy limit that applies," UF #8.

Not all insurance policies include a definition of actual cash value and courts have been asked to interpret this phrase. However, here, actual cash value **is defined** in Plaintiff's policy – in fact it is **the very first term defined** in the policy's definitions section.

1. Actual cash value. This means the least of the:

    a. value of damaged property;
    b. change in value of damaged property directly due to the loss;
    c. cost to repair damaged property; or
    d. cost to replace damaged property less any deduction for:
        (1) age;
        (2) condition;
        (3) obsolescence; or
        (4) depreciation;

    at the time of loss.

UF #9. The ACV definition has been in Plaintiff's policy since 2015 and Plaintiff was notified of the definition in a 2015 Explanation of Changes letter. UF #11. The 2015 letter also advised Plaintiff that the language in the "Actual Cash Value Wood Roof Surface Loss Settlement

Endorsement (END. 596A)" previously attached to his policy "has been integrated into the base Gold Star Homeowners policy" under the How We Settle Losses Section. UF #11. Plaintiff received the letter and produced it. UF #11. He renewed his policy several times after. UF #11.

American Family's retained costing expert, using Plaintiff's May 2, 2020, estimate as the assumed replacement costs for purposes of his damages calculation (see FN 1), determined the actual cash value under each of the four defined methods as set forth below. Mr. Logan is the only expert in this case to do this. In rebuttal, Plaintiff raised several disputes about Mr. Logan's methodology for method (d), however because method (b) result in a lower calculation than either methods (a), (c), or (d), and the definition states actual cash value is the least of the four methods, those disputes are not material. Specifically, because the wood roofs were beyond their remaining life expectancy before the June 2019 storm, and remained beyond their remaining life expectancy after, the same depreciation percentage applies, resulting in zero net change.

Mr. Logan calculated the actual cash value as follows:

a. Value of damaged property at time of loss: $6,933 residence, $5,146 garage;
b. Change in value of damaged property directly due to loss: $0 residence, $0 garage;
c. Cost to repair damaged property: $69,332 residence[3]; $15,835 garage;
d. Cost to replace damaged property less deduction for age, condition, obsolescence, or depreciation: residence $6,933.25, garage $5,146.52.

UF # 39. As Mr. Logan explained in his deposition, the net change of zero is true regardless of whether Plaintiff's roof was replaced shortly before he purchased the property or whether it was original. *Id.* Plaintiff concedes if the roof was replaced shortly before Plaintiff purchased the property, no permit was pulled. UF #4, 5. Either way, Plaintiff's claim the 1973 roof was replaced in 1993 is consistent with Mr. Logan's determination that the roof was beyond its

[3] Plaintiff claims the roof must be replaced and did not issue a repair estimate.

remaining useful life on June 6, 2019. Plaintiff does not have a qualified expert, or any expert or witness at all, that calculated the actual cash value under method (b) – the change in value caused by the windstorm – and cannot rebut Mr. Logan's costing calculations based on the actual cash value definition in the policy to create a disputed issue of fact.

Plaintiff cannot create a genuine issue of fact that additional amounts are owed. Plaintiff did not offer an actual cash value calculation or even acknowledge the wood shake roof surface damage was limited to actual cash value during the claim or in litigation. *See* UF #41. *See also*, UF #20, 24, 28 (presuit replacement cost demands). Plaintiff's experts did not address the actual cash value language in their affirmative reports. It was not until American Family retained a costing expert to calculate the actual cash value under each of the policy definition's four methods that Plaintiff even acknowledged the language in the How We Settle Losses Section but continuing to ignore the policy's **definition** of actual cash value. While there are disputes about how the depreciation method (method (d)) is calculated, these are immaterial. The definition expressly limits the actual cash value to the **least** of the four methods and it is undisputed the depreciation method is not the lowest.

Plaintiff's "evidence" that the roof was in good condition before the alleged date of loss is conclusory. The undisputed facts establish that Plaintiff has no idea what the condition of his roof was because he never had it inspected and did no maintenance. UF #7, 36. *See Gallegos v. Safeco Ins. Co. of Am.*, No. 14-CV-1114-WJM-MJW, 2015 WL 3526956, at *2 (D. Colo. June 4, 2015), *aff'd,* 646 F. App'x 689 (10th Cir. 2016) (dismissing breach of contract claim because plaintiff failed to meet his burden of proving exception to wear and tear, and deterioration exclusion to coverage).

III. Plaintiff's Claims For Bad Faith Breach Of Insurance Contract and Statutory Bad Faith Fail Because No Additional Amounts Are Owed and American Family Had A Reasonable Basis For The Denial

Because no additional amounts are owed, Plaintiff's bad faith claims fail. "It is settled law in Colorado that a bad faith claim must fail if, as is the case here, coverage was properly denied and the plaintiff's only claimed damages flowed from the denial of coverage." *Hall v. Allstate Fire & Cas. Ins. Co.*, 20 F.4th 1319, 1325 (10th Cir. 2021) *quoting MarkWest Hydrocarbon, Inc. v. Liberty Mutual Ins. Co*., 558 F.3d 1184, 1193 (10th Cir. 2009); *see also York v. Safeco Ins. Co. of Am.*, No. 20-CV-00801-CMA-KMT, 2021 WL 1998621 (D. Colo. May 19, 2021) (granting summary judgment on bad faith claims because plaintiff's breach claim failed for lack of competent evidence); *656 Logan St. Condo. Ass'n, Inc.* 389 F. Supp. 3d at 957 (dismissing bad faith claims after dismissing plaintiff's breach claim due to plaintiff's late notice of loss), *Sunflower Condo. Ass'n, Inc.* 2018 WL 2196089, at *9 (same).

Plaintiff's claims for insurance bad faith and statutory unreasonable denial also fail because Plaintiff cannot establish that American Family acted unreasonably. To succeed on a claim for insurance bad faith, Plaintiff must prove 1) that American Family acted unreasonably in handling the claim, and 2) American Family knew or recklessly disregarded that its claim handling was unreasonable; and 3) American Family's unreasonable conduct caused Plaintiff damage. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985). To succeed on the statutory unreasonable denial claim, Plaintiff must prove that American Family denied payment of a covered benefit without a reasonable basis. C.R.S. § 10-3-1115(1)(a). *See also*, *Wahlert v. Am. Standard Ins. Co. of Wis.*, 173 F. Supp. 3d 1187, 1193 (D. Colo. 2016); *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 497 (Colo. App. 2011). Both claims require proof of unreasonable

conduct. "The party asserting [a] bad faith claim has the burden of proof, and thus the burden of demonstrating the unreasonableness of the insurer's actions lies with the insured. *Green Earth Wellness Ctr., LLC., v. Atain Specialty Ins. Co.,* 163 F. Supp. 3d 821, 836-37 (D. Colo. 2016) (emphasis original). To demonstrate such unreasonable conduct, an insured must come forward with evidence (typically from an expert) that the insurer's conduct violated industry standards. *Id., see also, Bankruptcy Estate of Morris v. COPIC Ins. Co*., 192 P.3d 519, 524 (Colo. App. 2008). "[I]n appropriate circumstances, as when there are no genuine issues of material fact, reasonableness may be decided as a matter of law." *Vaccaro v. Am. Family Ins. Co.,* 275 P.3d 750 (Colo. App. 2012).

Allegations consisting solely of conclusory statements based on a plaintiff's subjective beliefs are insufficient to establish unreasonable conduct. *5555 Boatworks Drive LLC v. Owners Ins. Co.*, No. 16-CV-02749-CMA-MJW, 2017 WL 6361398, at *5 (D. Colo. Dec. 13, 2017) (plaintiff's conclusory allegations insufficient to overcome summary judgment where insurer's handling of the claim included an investigation of the alleged damage, hiring an engineering expert to report on causation, explanation of its coverage positions, and affording the plaintiff several opportunities to submit additional information). Where a denial of an insured's claim was reasonable based on a fair application of the policy exclusions, an insured cannot maintain either a statutory or common law bad faith claim against the insurance company. *Wagner v. Am. Family Mut. Ins. Co.*, 569 F. App'x 574, 580 (10th Cir. 2014). Unreasonable conduct cannot be established by virtue of a mere disagreement, and "[i]t is not sufficient for an insured to simply tender a different valuation of a claim." *Green Earth Wellness Ctr,* 163 F. Supp. 3d at 836. As the Court in *Green* acknowledged, if a difference in opinion were the standard for bad faith,

"essentially every insurance dispute would proceed to trial on such a claim, as disputes between the insurer and insured over the proper valuation of the loss are routine".

"For purposes of bad faith, the reasonableness of an insurer's conduct is evaluated under the circumstances that existed at the time." *Anderson v. State Farm Mut. Auto. Ins. Co.*, 416 F.3d 1143, 1147–48 (10th Cir. 2005); *see Schultz v. GEICO Cas. Co.*, 2018 CO 87, ¶ 15, 429 P.3d 844, 847. Here, Plaintiff's industry standard expert made no effort to separate out what American Family knew at the time the claim was denied. Ex. 16 (Weeks Depo), p. 54:8-63:7. Mr. Weeks confirmed the basis of his determination that American Family's coverage determination was unreasonable is that he, personally, disagrees with it. *Id*. at p. 325:11-326:8.

Plaintiff cannot establish that American Family's conduct was unreasonable or in violation of any objective industry standard. Plaintiff's disagreement on the cause of damage does not make American Family's determination unreasonable. If this were the standard every dispute would be the basis for a bad faith claim. Plaintiff's conclusory statements that American Family's coverage decision was wrong and, therefore, unreasonable, does not make it so.

American Family sent two separate adjusters to inspect on two different occasions. UF #15, 25. The basis of the denial was communicated in writing following both. UF #16, 26. American Family hired an engineer who did a thorough investigation and wrote a lengthy report summarizing his methodology and his conclusions. UF #29-33. The report was provided to Plaintiff and his agents. UF #34. Plaintiff admitted in his deposition he did not read it, his policy, or American Family's letters. UF #16, 17, 26, 33. Plaintiff's agents did not explain the wood shake roof actual cash value language in his policy to him. UF #17, 27, 43.

The undisputed facts create a detailed record of the reasonable basis supporting American

Family's coverage denial and confirm this basis was communicated to Plaintiff at each step of the claim. UF #16, 19, 23, 26, 34. Plaintiff may disagree with American Family's denial, but disagreement is not enough. This is especially true here, where American Family retained and specifically relied on the expertise of an engineer in reaching its pre-suit coverage decision. American Family's application of policy language and its denial, supported by the findings of its engineer, was reasonable as a matter of law. *Avalon Condo. Ass'n, Inc v. Secura Ins.,* No. 14-CV-00200-CMA-KMT, 2015 WL 5655528, at *6 (D. Colo. Sept. 25, 2015) (D. Colo. Sept. 25, 2015) (dismissing statutory bad faith claim on the basis that the carrier reasonably relied on its expert's report in the light of all other available evidence); *McGlothlen v. Am. Fam. Mut. Ins. Co.,* No. 11-CV-02892-DME-KLM, 2013 WL 1767790, at *5 (D. Colo. Apr. 24, 2013) (dismissing bad faith claims because reliance on expert's causation determination was reasonable); *Glacier Constr. Co. Travelers Prop. Cas. Co. of America*, 569 F. App'x 582, 591 (10th Cir. 2014) (summary judgment on bad faith in value dispute case where insurer relied on its retained expert).

CONCLUSION

Plaintiff cannot create a genuine dispute that additional amounts are owed. The damage is excluded under Plaintiff's policy. Even if the damage was not excluded, the actual cash value of Plaintiff's wood roofs is zero and no additional payment is owed. Plaintiff's bad faith claims are conclusory and based on nothing more than a disagreement. American Family reasonably applied the policy language in excluding the damage and reasonably relied on its expert engineer. American Family is entitled to summary judgment on all claims.

Respectfully submitted this 15th day of April, 2022.

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I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1), this Motion contains **5286** words not including the caption, certificate of service, and this certification of compliance.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2022, I electronically filed a true and correct copy of the above and foregoing Defendant American Family's Motion For Summary Judgment with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

R. Daniel Scheid
Scheid Cleveland, LLC
501 South Cherry Street, Ste 1100
Denver CO 80246

/s/ Tammy L. Hanks
A duly signed original is on file at Sutton | Booker | P.C.