

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:24-cv-02669-PAB-KAS

GINA M. GILMORE,

Plaintiff,

v.

OWNERS INSURANCE COMPANY,

Defendant.

DEFENDANT’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Owners Insurance Company, through counsel Adam P. O’Brien and Chan H. Park of Thompson, Coe, Cousins & Irons, LLP, submits its Reply in support of its Motion for Summary Judgment (Doc. 36, filed 8/11/25), as follows:

INTRODUCTION

Summary judgment should be granted based on the undisputed facts and governing law because: (1) Plaintiff failed to meet her burden in proving entitlement to payment of a covered benefit under the Policy; (2) Defendant reasonably relied on the findings of the independent adjuster, and Plaintiff failed to provide photos or other evidence that could have warranted reconsideration of Defendant’s coverage position; (3) Defendant was prejudiced by Plaintiff’s failure to comply with Policy conditions, including Plaintiff’s withholding of evidence until after her Complaint was filed; (4) Defendant’s conduct must be measured against the information it had at the time of its coverage decision (as opposed to information submitted after the filing of this

lawsuit); and (5) a mere disagreement on coverage or claim value is insufficient to support common law bad faith or violation of C.R.S. §§10-3-1115 and 10-3-1116.

REPLY CONCERNING UNDISPUTED FACTS

Plaintiff's Amended Response¹ admits facts 1 through 15, 18, and 20 through 24. As to the facts Plaintiff attempts to dispute, the following must be deemed admitted:

16. Plaintiff attempts to dispute the implication or effect of this fact but does not cite any material in the record that contradicts the fact that Defendant requested photos of the property on September 5, 2023. In support of this undisputed fact, Defendant cited to **Doc. 36-11: Ex. K – Defendant's Email to Plaintiff, dated September 5, 2023.**

17. Plaintiff attempts to dispute whether she sent photos to Defendant's request. Plaintiff states that her testimony was that she could not recall. Plaintiff testified that she would have to look back through her emails to try to find photos (*See* Doc. 36-1, at 112:22-25), but no such photos have been produced. In support of this undisputed fact, Defendant cited to **Doc. 36-1: Ex. A – Plaintiff's deposition transcript at 109:11-114:16.** Regardless, Plaintiff points to no evidence in the record that she provided the requested photos.

19. Plaintiff again responds that she could not recall if she sent photos to Defendant. Defendant incorporates its response from paragraph 17 to paragraph 19. Plaintiff does not point to any evidence in the record that she submitted photos or any other information to Defendant for

¹ The first paragraph of Plaintiff's Amended Response (Doc. 42, filed 9/15/25) defines "Plaintiff" and "Gilmore" as "Plaintiff Gina Gilmore, Justin C. Steinhart and Virginia Neff Steinhart." This renders the entirety of the Amended Response confusing because Justin C. Steinhart and Virginia Neff Steinhart are not parties to this case, are not Plaintiffs, are not insureds, have not been identified in disclosures or discovery, and appear to have no relationship to this case or the Motion at issue.

reconsideration of its coverage position prior to filing the Complaint. In support of this undisputed fact, Defendant cited to **Doc. 36-1: Ex. A – Plaintiff’s deposition transcript at 96:10-99:24, 109:11-114:16.**

Plaintiff did not set forth any additional, alleged material facts.

ARGUMENT

I. Plaintiff’s Amended Response denies certain facts without reference to specific evidentiary material, and all material facts must be deemed admitted.

The alleged disputed facts in Plaintiff’s Amended Response again do not comply with the Practice Standards (Civil Cases) of Chief Judge Philip A. Brimmer and must all be deemed admitted.² Plaintiff admits the vast majority of the material facts set forth in Defendant’s Motion. Plaintiff attempts to dispute the implication or effect of certain facts, but Plaintiff makes legal argument, rather than disputing the fact. The Court’s Practice Standards are clear that legal argument is not permitted in the factual sections of a response. *See* Practice Standards (Civil Cases) Chief Judge Philip A. Brimmer at § III.F.3.b.vii (“**Legal** argument is not permitted [in the Material Fact section] and should be reserved for separate portions of the briefs.”).

With respect to Plaintiff’s purported denial of facts 17 and 19, Plaintiff does not point to any evidence in the record that she submitted photos or any other information to Defendant for reconsideration of its coverage position prior to filing the Complaint. *See Id.* at § III.F.3.b.iv (requiring “a **brief** factual explanation of the reason(s) for the denial and a **specific reference** to material in the record supporting the denial.”); *see also Fire Loss Response, LLC v. Am. Fam. Mut.*

² The Court’s Minute Order, dated September 10, 2025, struck Plaintiff’s Response to Defendant’s Motion for Summary Judgment for failure to admit or deny each of Defendant’s undisputed facts. The Court ordered “Plaintiff shall admit or deny each of defendant’s undisputed facts in accordance with the Court’s practice standards.” *See* Doc. 41.

Ins. Co., No. 23-cv-02040-PAB-TPO, 2025 WL 2652873, at n. 8 (D. Colo., Sept. 16, 2025) (concluding that a fact was deemed admitted where the nonmovant failed to cite evidence in support of the denial). Consequently, all of Defendant’s material facts must be deemed admitted.

II. Plaintiff’s breach of contract claim should be dismissed because Plaintiff failed to comply with material Policy conditions, which prejudiced Defendant.

Summary Judgment should be granted on Plaintiff’s breach of contract claim because the undisputed facts establish that Plaintiff failed to comply with Policy conditions, which prejudiced Defendant. No *genuine* dispute exists that Plaintiff failed to return the required proof of loss and failed to provide any photographs or other evidence (such as a cost of repair report, expert report, or engineering report) that could have warranted reconsideration of Defendant’s coverage position prior to suit being filed. *See Adams v. Am. Guarantee and Liability Ins. Co.*, 233 F.3d 1242, 1248 (10th Cir. 2000) (holding that summary judgment is proper where the nonmovant fails to present admissible evidence in the record); *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (“When ... the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying ‘a lack of evidence for the nonmovant on an essential element of the nonmovant’s claim.’”) (citation omitted).

The Court should reject Plaintiff’s argument that Defendant “has not provided one scrap of evidence to prove [prejudice]” and that “Defendant fails to show that anything was actually ‘requested’ by Defendant prior to litigation.” **Doc. No. 42 at pg. 8, ¶39 and pg. 12, ¶46.**³ The undisputed facts establish that:

³ Defendant acknowledges the Policy contains a one-year reporting requirement for hail claims and therefore does not argue that summary judgment is warranted solely based on the timing of the reporting of the claim.

- The Policy required Plaintiff to “protect the property from further damage or loss; make reasonable and necessary temporary repairs[.]” **Doc. 36-2: Ex. B – Certified Owners Insurance Policy at pg. 41; Doc. 42: Plaintiff’s Amended Response at pg. 1, ¶4.**
- Plaintiff admitted that she did not maintain, repair, or replace the roof of the Property at any time. **Doc. 36-1: Ex. A – Plaintiff’s deposition transcript at 9:19-22, 21:5-8, 78:9-13, 95:20-96:7; Doc. 36-8: Ex. H – Plaintiff’s Response to Defendant’s Request for Admissions at pg. 8, no. 2; Doc. 42: Plaintiff’s Amended Response at pg. 1, ¶8.**
- The Policy required Plaintiff to (1): send a signed and sworn Proof of Loss within 60 days after notifying the Defendant of the Loss, including the time and cause of loss, actual cash value and property loss amount, and inventory of all damaged property; and (2) cooperate with and assist Defendant. **Doc. 36-2: Ex. B – Certified Owners Insurance Policy at pg. 41; Doc. 42: Plaintiff’s Amended Response at pg. 1, ¶4.**
- The Policy states that the Defendant owes payment of a covered benefit “within 60 days after we receive [Plaintiff’s] proof of loss and all other request documents and the amount of loss is finally determined by an agreement between you and us, a court judgment, or an appraisal award.” **Doc. 36-2: Ex. B – Certified Owners Insurance Policy at pg. 34; Doc. 42: Plaintiff’s Amended Response at pg. 1, ¶5.**
- Plaintiff did not return the completed Proof of Loss and other requested documents to Defendant, and the Policy conditions for payment were not triggered. **Doc. 36-2: Ex. B – Certified Owners Insurance Policy at pg. 34; Doc. 36-7: Ex. G – Defendant’s Claim Note, dated September 27, 2023; Doc. 36-8: Ex. H – Plaintiff’s Response to Defendant’s Request for Admissions at pg. 8, no. 3; Doc. 42: Plaintiff’s Amended Response at pg. 2, ¶13.**
- Pre-suit, Defendant sent Plaintiff four requests for claim information, including for Plaintiff to submit additional information, photographs, or documentation for Defendant’s reconsideration of denying Plaintiff’s claim. **Doc. 36-6: Ex. F – Defendant’s August 15, 2023 Email to Plaintiff; Doc. 36-1: Ex. A – Plaintiff’s deposition transcript at 100:16-101:4, 109:11-114:16; Doc. 36-9: Ex. I – Defendant’s Correspondence to Plaintiff, dated August 28, 2023; Doc. 36-12: Ex. L – Defendant’s Email to Public Adjuster, dated February 20, 2024; Doc. 42: Plaintiff’s Amended Response at pg. 2, ¶¶12, 14, 16, and 18.**
- Pre-suit, Plaintiff did not send the Defendant any additional information for Defendant’s consideration, including the Unidentified Repair Estimate that pre-dated the Complaint filing. **Doc. No. 42: Plaintiff’s Amended Response at pg. 2, ¶¶17, 19, 21, and 24.**
- Plaintiff’s Unidentified Repair Estimate, dated May 3, 2024 (three months before Plaintiff filed suit), was withheld prior to suit and disclosed in Plaintiff’s Fed. R. Civ. P. 26 disclosures on November 27, 2024. **Doc. No. 42: Plaintiff’s Amended Response at pg. 2, ¶24; Doc. 36-15: Ex. O – Plaintiff’s Fed. R. Civ. P. 26 Disclosures and Unidentified Repair Estimate.**

- The Policy states that the “[Defendant] may not be sued unless there is full compliance with all terms of this policy.” **Doc. 36-2: Ex. B – Certified Owners Insurance Policy at pg. 34; Doc. No. 42: Plaintiff’s Amended Response at pg. 1, ¶6.**

Based on the lack of information and documentation from Plaintiff, Defendant reasonably relied on the independent adjuster’s findings and the Policy terms and exclusions in denying coverage. *See Walker v. State Farm Fire & Casualty Co.*, No. 16-CV-00118-PAB-STV, 2017 WL 1386341, at *4 (D. Colo 2017) (“When the insured’s failure to provide some of the requested records is undisputed, the court may determine their relevance to the insurer’s investigation as a matter of law.”); Allan D. Windt, *1 Insurance Claims & Disputes* §3.2 (6th ed. 2016) (defining an insurer’s “material and substantial disadvantage” when the insurer is put “in the untenable position of either denying coverage or paying the claim without the means to investigate its validity.”).⁴

Plaintiff has not raised triable issues of fact regarding her material non-compliance with the Policy, and Defendant suffered substantial disadvantages as a result. *See Walker v. State Farm Fire & Cas. Co.*, No. 16-cv-00118-PAB-STV, 2017 WL 1386341, at *3-4 (D. Colo. Feb. 2017) (discussing when an insurer suffers a material and substantial disadvantage). Defendant was prejudiced in its inability to reconsider its coverage position and then by having to defend itself in this bad faith case based on evidence that Plaintiff failed to submit before filing suit.

Plaintiff’s reliance on *Hartford Fire Ins. Co. v. Hammond*, 41 Colo. 323 (1907), for the proposition that Defendant waived the proof of loss requirement is distinguishable. First, Defendant is not claiming that “the insured overestimated the amount of is loss[.]” *Id.* at 327.

⁴ Plaintiff’s expert report was not disclosed pre-suit, and it is therefore irrelevant for determining whether Defendant’s coverage determination was appropriate when it was made. As discussed below, Defendant’s coverage determination must be evaluated objectively based on information that Defendant had at the time of the decision.

Second, *Hartford Fire* recognized that there must at least be “substantial compliance” by the insured with the terms of the insurance policy. *Id.* at 327. Here, the material facts establish that Plaintiff did not even substantially comply with the Policy requirements regarding the proof of loss and cooperating with Defendant. Plaintiff not only failed to provide the proof of loss, but also failed to provide any other information that was requested. Even worse, Plaintiff prejudice Defendant by withholding the Unidentified Repair Estimate prior to filing suit. *See Hall v. Allstate Fire & Cas. Ins. Co.*, 20 F.4th 1319, 1323 (10th Cir. 2021).

In addition to unsubstantiated arguments regarding Defendant’s lack of prejudice, Plaintiff fails to distinguish governing case law on the material and substantial disadvantages Defendant sustained when Plaintiff proceeded to sue the Defendant for bad faith. The undisputed facts establish that Defendant sustained material and substantial disadvantage. *See Cleveland v. Auto-Owners Ins. Co.*, No. 22-1109, 2023 WL 4044477, at *3 (10th Cir. 2023); *Cribari v. Allstate Fire & Cas. Ins. Co.*, 861 Fed. Appx. 693, 702 (10th Cir. 2021).

In sum, Plaintiff did not satisfy her initial burden as the insured to prove entitlement to recovery under “the general provisions of the policy.” *Rodriguez v. Safeco Ins. Co.*, 821 P.2d 849, 853 (Colo. App. 1991); *see Bausman*, 252 F.3d at 1115 (“To avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case.”) (citation omitted). Indeed, the Policy conditions that could have required Defendant to issue a payment were never triggered. Plaintiff’s breach of contract claim should be dismissed.

III. Plaintiff’s common law bad faith claim should be dismissed because the undisputed facts cannot establish that Defendant intentionally or recklessly acted unreasonably.

To establish a first-party bad faith claim, Plaintiff must prove that Defendant acted unreasonably and with knowledge of or reckless disregard for the fact that no reasonable basis

existed for denying the claim. *Schultz v. GEICO Cas. Co.*, 2018 CO 87, ¶15; C.R.S. § 10-3-1113(3). A showing of unreasonableness, in and of itself, is insufficient to establish bad faith. Plaintiff must also establish that Defendant acted in reckless disregard of her claim. *See Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 415 (Colo. 2004). Here, no material facts in the record could establish that Defendant acted unreasonably with either intent or reckless disregard.

Plaintiff's Amended Response ignores that Defendant's conduct must be evaluated objectively based on information Defendant had at the time of its coverage decision. *See Vansky v. State Farm Auto. Ins. Co.*, No. 20-cv-01062-PAB-NRN, 2022 WL 900160, at *4 (D. Colo. Mar. 28, 2022). Simply disagreeing over the nature, extent, cause, and value of an insurance claim cannot establish that an insurer acted unreasonably, much less support a claim for bad faith. *See Bucholtz v. Safeco Ins. Co.*, 773 P.2d 590, 593 (Colo. App. 1988).

Plaintiff's Amended Response also improperly relies on counsel's argument about industry standards. However, unsubstantiated allegations and argument of counsel cannot defeat summary judgment. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004); *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000). For example, Plaintiff refers to industry standards and references C.R.S. § 10-3-1104(h). However, C.R.S. § 10-3-1104(h) violations only apply to conduct that is performed either in "willful violation of this part 11 or with such frequency as to indicate a tendency to engage in a general business practice." No evidence in the record could establish a willful violation or a violation with any frequency.

Finally, violation of insurance industry standards is not within the common knowledge of an average juror. *See Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 415 (Colo. 2004) ("The aid of expert witnesses is often required in order to establish objective evidence

of industry standards.”); *see also Redden v. SCI Colorado Funeral Services, Inc.*, 38 P.3d 75, 81 (Colo. 2001) (recognizing that in most cases of professional negligence the applicable standard must be established by expert testimony because it is not within the common knowledge and experience of ordinary persons). Plaintiff fails to present any expert or other evidence in the record that could establish a violation of industry standards and bad faith. Plaintiff cannot create a genuine issue of material fact, and her common law bad faith claim should be dismissed.

IV. Plaintiff’s C.R.S. §§ 10-3-1115, 1116 claim should be dismissed because the undisputed facts cannot establish that Defendant unreasonably delayed or denied payment of a covered benefit under the Policy.

The undisputed facts establish that Defendant acted reasonably based on the findings of the independent adjuster and the information it had at the time of its coverage decision. By arguing that the opinions of her retained engineer create triable issues of fact, Plaintiff ignores governing legal precedent that an insurer’s determination to deny claim benefits “must be evaluated based on the information before the insurer at the time of that decision.” *Schultz v. GEICO Cas. Co.*, 429 P.3d 844, 847 (Colo. 2018). Regardless, Plaintiff’s expert does not discuss or offer opinions on compliance with insurance industry standards, nor would he be qualified to do so.

The undisputed facts establish that Plaintiff failed to provide Defendant any cost of repair report, expert or engineering report, or any other evidence to dispute Defendant’s coverage determination prior to filing suit. Further, as discussed above, the Policy conditions requiring payment of a covered benefit were never satisfied. Thus, Plaintiff cannot meet her burden to provide admissible evidence on her C.R.S. §§ 10-3-1115, 1116 claim. *See Schultz*, 2018 CO 87, at ¶ 19; *see also El Dueno, LLC v. Mid-Century Ins. Co.*, No. 24-1110, 2025 WL 1540329, at *4 (10th Cir., May 30, 2025).

CONCLUSION

Defendant respectfully requests that the Court enter summary judgment dismissing Plaintiff's Complaint and all claims with prejudice.

Respectfully submitted this 29th day of September, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2025, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/ Barbara McCall

Barbara McCall, Legal Assistant

*[Original Signature on File at the Office
Thompson, Coe, Cousins & Irons, LLP]*