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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAFEWAY STORES 46 INC.,

Plaintiff - Appellant/Cross-Appellee,

v.

WY PLAZA LC,

Defendant - Appellee/Cross-Appellant.

Nos. 20-8064 & 20-8066

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING (D.C. No. 2:19-CV-00143-KHR)

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Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of overpayments that a lessee (Safeway Stores 46, Inc.) had made to its lessor (WY Plaza, L.C.). The lease allowed

Safeway to deduct construction costs from the payments to WY Plaza. But Safeway neglected to make these deductions for twelve years before demanding repayment. WY Plaza rejected the demand based on Safeway's delay. Safeway responded by paying under protest and suing for restitution and a declaratory judgment.[1] Both parties sought summary judgment.

In its own motion, WY Plaza denied the availability of restitution because the parties' obligations had been set out in a written contract. The district court agreed with WY Plaza. But the court went further, deciding sua sponte that Safeway's delay prevented recovery under the doctrine of laches. So the court granted summary judgment to WY Plaza and denied Safeway's motion.

This appeal followed, and it turns mainly on three issues:

1. **Notice and an opportunity to respond.** The district court granted summary judgment to WY Plaza, relying in part on laches. But laches constitutes an affirmative defense, so WY Plaza had to prove prejudice from Safeway's delay.

   In seeking summary judgment, WY Plaza hadn't asserted a laches defense. So Safeway lacked notice that it needed to present evidence disputing prejudice in order to avoid summary judgment. Given this lack of notice, did the district court err in sua sponte granting summary judgment to WY Plaza based on laches? We answer *yes*.

2. **Lack of evidence on prejudice.** Because laches constitutes an affirmative defense, WY Plaza had to present evidence of

[1] Safeway also claimed breach of the contract and a covenant of good faith and fair dealing, and the district court granted summary judgment to WY Plaza on these claims. Safeway does not challenge the rulings on these claims.

prejudice in order to prevent summary judgment to Safeway on the claim for declaratory relief. Rather than present such evidence, WY Plaza relied on conclusory assertions of faded memories and financial costs. Did the lack of evidence on prejudice entitle Safeway to summary judgment on the claim for declaratory relief? We answer *yes*.

3. **Restitution for overpayments to conform to the contract.** Generally, a claimant cannot obtain restitution based on an implied right when the parties have identified their rights in a written contract. But Safeway relies on the contract itself rather than an implied right. Does Safeway's reliance on the contract prevent restitution to recoup the overpayments? We answer *no*.

I. For twelve years, Safeway mistakenly overpaid under the lease.

The dispute largely involves legal implications from undisputed historical facts surrounding Safeway's delay in exercising contractual rights.

A. The parties form a contract that allows Safeway to deduct its costs to construct an addition.

These rights originated in Safeway's lease of store space from WY Plaza's predecessor (City View Partners). Under the lease, Safeway owed (1) fixed monthly payments and (2) yearly payments based on a percentage of the sales revenue. In exchange, Safeway had the option to expand the store. If Safeway were to expand, it could deduct its construction costs from the yearly payments.

B. Safeway builds an addition, but doesn't deduct the costs from the yearly payments.

Safeway did expand the store, and the lessor then sold the property to WY Plaza. The sale led Safeway and WY Plaza to modify the lease,

memorializing the costs of the addition and keeping the terms for Safeway's yearly payments.

For the first three years, Safeway didn't owe any yearly payments because the sales were too low. Without an obligation for yearly payments, Safeway didn't need to deduct construction costs. Starting in 2005, however, Safeway's sales increased enough to trigger the yearly payment obligations. Safeway made these payments from 2005 on without deducting the construction costs.

In 2010, Safeway noticed an unrelated error that had affected the yearly payments. In light of this error, WY Plaza let Safeway reduce its payments for four years. But Safeway still failed to recognize its ability to deduct the construction costs.

C. Safeway finally demands return of the overpayments, and the district court grants summary judgment to WY Plaza.

In 2018, Safeway realized that it could have been deducting its construction costs. With this realization, Safeway demanded reimbursement for the overpayments from 2005 to 2017.[2] WY Plaza refused this demand, so Safeway made the yearly payments in 2018 and 2019 under protest.

[2] On appeal, Safeway seeks recovery of the overpayments starting in 2012, not 2005.

Safeway sued for restitution and a declaration of the right to deduct the balance of the amortization account from the yearly payments, and both sides sought summary judgment. The district court granted summary judgment to WY Plaza mainly for two reasons:

1. Laches prevented relief because Safeway's delay had prejudiced WY Plaza.

2. Restitution wasn't available because Safeway's mistake was unilateral and the parties had a written contract.

Despite the award of summary judgment to WY Plaza, the district court declined to award attorney fees.

Both parties appeal. Safeway argues that the district court erred not only in granting summary judgment to WY Plaza, but also in declining to grant Safeway's motion for summary judgment. WY Plaza challenges the denial of its motion for an award of attorney fees.

II. We apply state law on the substantive issues.

We apply the substantive law of the forum state—Wyoming. *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1108 (10th Cir. 2002). In determining the content of Wyoming law, we conduct de novo review of the district court's legal rulings. *Id.* at 1108–09.

III. The district court erroneously granted summary judgment to WY Plaza.

The district court granted summary judgment to WY Plaza on the claims for a declaratory judgment and restitution. For both claims, the

district court sua sponte raised the defense of laches and granted summary judgment to WY Plaza. On the restitution claim, the district court added that Safeway couldn't obtain equitable relief because a contract had existed and WY Plaza hadn't shared in the mistake. We disagree with both rulings.

A. The district court erroneously granted summary judgment to WY Plaza on the claim for a declaratory judgment.

Though Safeway waited twelve years to deduct the construction costs, WY Plaza didn't move for summary judgment based on laches. To the contrary, WY Plaza asserted laches only in opposing Safeway's motion for summary judgment on the claim for declaratory relief, arguing there that laches either applied or would create a material dispute of fact. But WY Plaza didn't seek summary judgment based on laches. Despite the lack of any such argument, the district court relied on laches to grant summary judgment to WY Plaza on the claim for declaratory relief.

We conduct de novo review of this holding. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). Conducting this review, we conclude that the district court erroneously failed to notify Safeway before granting summary judgment to WY Plaza based on laches.

1. Safeway lacked notice of a need to address laches when objecting to summary judgment.

Although WY Plaza moved for summary judgment, the motion didn't raise laches. The district court could still raise the issue sua sponte; to do so, however, the court would ordinarily need to provide Safeway with

"notice and a reasonable time to respond." Fed. R. Civ. P. 56(f)(2). The district court could forgo formal notice, but only if Safeway had already been "on notice that [it] had to come forward with all of [its] evidence." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1170 (10th Cir. 2010) (quoting *Howell Petroleum Corp. v. Leben Oil Corp.*, 976 F.2d 614, 620 (10th Cir. 1992)).

The district court didn't warn Safeway of the possibility of granting summary judgment to WY Plaza based on laches. Despite the lack of a warning, WY Plaza argues that Safeway had notice because

- laches constituted an important issue and
- WY Plaza had raised this issue when opposing Safeway's motion for summary judgment on the claim for declaratory relief.

We reject these arguments.

The notice requirement turns on a party's recognition that it "had to come forward with all of [its] evidence," not recognition of the issue's importance. *Id.* Here, for example, Safeway had no reason to recognize the need to present evidence on laches. After all, WY Plaza hadn't sought summary judgment based on laches. So Safeway lacked notice of the possibility that the district court would grant summary judgment *for* WY Plaza based on its use of laches to *oppose* summary judgment. *See Tabura v. Kellogg USA*, 880 F.3d 544, 558 (10th Cir. 2018) (stating that the defendant's assertion of an affirmative defense in opposing summary

judgment for the plaintiff doesn't constitute adequate notice of consideration as a basis to grant summary judgment to the defendant).

2. In granting WY Plaza's motion for summary judgment, the district court relied on arguments that WY Plaza hadn't raised.

The lack of notice was particularly prejudicial because the district court not only acted sua sponte in using laches to grant summary judgment to WY Plaza, but also relied on arguments that WY Plaza hadn't even made when responding to Safeway's motion for summary judgment.

For laches, WY Plaza needed to prove that (1) Safeway had inexcusably waited too long to assert the right and (2) the delay had prejudiced WY Plaza. *Windsor Energy Grp., L.L.C v. Noble Energy, Inc.*, 330 P.3d 285, 289 (Wyo. 2014). We can assume for the sake of argument that Safeway's delay was inexcusable.[3] With this assumption, laches would turn on whether the delay had prejudiced WY Plaza.

In opposing Safeway's motion for summary judgment, WY Plaza claimed three disadvantages from the delay:

1. Safeway's mistake resulted from an error by a paralegal, who was no longer available to explain what had happened.
2. Memories had faded and other witnesses were unavailable.
3. WY Plaza had relied on the income from Safeway's yearly lease payments.

[3] Safeway argues that its delay was excusable, but we need not address this argument.

Appellant's App'x vol. 3, at pp. 396–97. Safeway replied, addressing these purported disadvantages in supporting its own motion for summary judgment. There Safeway pointed out that WY Plaza had shouldered the burden of proof and had relied solely on conclusory assertions. The district court largely agreed with this characterization of WY Plaza's assertions.

For example, on the first claim of prejudice, the district court agreed with Safeway that WY Plaza's "conclusory statements" about the unavailability of a possible witness hadn't created a triable dispute of fact. Appellant's App'x vol. 4, at p. 452.

For the second claim of prejudice, the district court relied on its own evaluation of the evidence rather than WY Plaza's. In opposing Safeway's motion for summary judgment, WY Plaza had asserted only that "it is apparent that memories have faded, witnesses are unavailable, and WY Plaza's defense in this matter is therefore disadvantaged." Appellant's App'x vol. 3, at p. 397. But WY Plaza did not point to any specific facts or refer to any evidence. Despite WY Plaza's conclusory assertion, the district court developed its own argument based on uncited stipulations, answers to interrogatories, and declarations. Appellant's App'x vol. 4, at pp. 451–54. But WY Plaza hadn't referred to any of these documents, and Safeway lacked notice that it needed to address them.

On the third claim of prejudice, the district court agreed with Safeway that WY Plaza hadn't created a triable fact-issue based on the

"bare assertion[s]" of its reliance on the past payments. *Id.* at p. 451.[4] But the court then crafted its own argument of financial prejudice. *Id.* at pp. 452, 454–56.

Because WY Plaza relied solely on conclusory assertions, Safeway had no notice of the need to address new arguments appearing for the first time in the district court's ruling.

* * *

WY Plaza didn't move for summary judgment based on laches, and the district court provided no notice to Safeway that it would need to address laches to avoid summary judgment. But the district court went further. In sua sponte invoking laches as a basis to grant summary judgment to WY Plaza, the district court relied on evidence that WY Plaza hadn't even raised when it objected to Safeway's motion for summary judgment. Given the lack of notice to Safeway, the district court erred by granting summary judgment to WY Plaza on the claim for declaratory relief.

[4] The district court acknowledged that "WY Plaza [did] not meet the necessary burden necessary for summary judgment for their first and third justifications for why they would be prejudiced." Appellant's App'x vol. 4, at p. 451.

B. The district court also erroneously granted summary judgment to WY Plaza on the restitution claim.

Safeway not only sought declaratory relief but also claimed restitution to recoup the yearly overpayments mistakenly made from 2012 to 2017. On this claim, the district court granted summary judgment to WY Plaza based on (1) laches and (2) the unavailability of restitution when a contract existed and the mistake was unilateral. We reject both grounds.

1. The district court erred by sua sponte applying laches to the restitution claim.

In district court, WY Plaza raised laches only when opposing Safeway's motion for summary judgment on the claim for declaratory relief. *See* Appellant's App'x vol. 3, at p. 391 (WY Plaza arguing that "[i]ssues of disputed material fact exist relating to WY Plaza's affirmative defenses which preclude a summary judgment on the declaratory relief sought by Safeway."). On the restitution claim, WY Plaza didn't rely on laches in seeking summary judgment or in opposing it. The district court nonetheless relied partly on laches to grant summary judgment to WY Plaza on the restitution claim. Appellant's App'x vol. 4, at p. 456.

Safeway lacked any conceivable notice of a need to address laches for the restitution claim. So the district court erred by sua sponte relying on laches for the restitution claim.

2. Restitution may be available for a unilateral mistake of fact despite the existence of a contract.

The parties disagree over the availability of restitution for a unilateral mistake when a contract existed. This disagreement involves a matter of law, which we review de novo. *See State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 88 (1st Cir. 2011) (stating that "whether restitution is available is a question of law we review de novo"); *Greene v. McLeod*, 942 A.2d 1254, 1259 (N.H. 2008) (stating that "the availability of restitution is a question of law"). On this legal issue, the district court sided with WY Plaza, concluding that restitution wasn't available because a contract had existed and Safeway's mistake had been unilateral. We disagree with these legal conclusions.

a. Wyoming would likely adopt the Restatement approach to restitution for mistaken overpayments.

Safeway claimed restitution for overpayments mistakenly made from 2012 to 2017. For this claim, Safeway attributed the overpayments to a mistaken belief that they were due.

The Wyoming Supreme Court has not decided whether restitution is available for payments that are mistakenly made, so we must "predict how th[e] court would decide the issue." *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1176 (10th Cir. 2021). To make this prediction, we consider the Restatement of Restitution and Unjust Enrichment, the Wyoming Supreme Court's past treatment of equitable

claims, case law from other jurisdictions, and treatises. Considering these sources, we predict that the Wyoming Supreme Court would permit restitution for the overpayments.

In predicting the Wyoming Supreme Court's approach, we can consider the Restatement of Restitution and Unjust Enrichment. *See June v. Union Carbide Corp.*, 577 F.3d 1234, 1245 (10th Cir. 2009) ("In our view, . . . it would be too adventurous on our part to assume that Colorado would depart from the Restatements."); *see also Am. Airlines v. Christensen*, 967 F.2d 410, 413 n.5 (10th Cir. 1992) (assuming that Utah has adopted the principles of the Second Restatement of Contracts); *Citizens Bank, Booneville, Ark. v. Nat. Bank of Com.*, 334 F.2d 257, 259 (10th Cir. 1964) ("[W]e assume, in the absence of a clear indication to the contrary, that Oklahoma would follow the Restatement of Conflict of Laws."). The Wyoming Supreme Court has relied on the Restatement of Restitution to

- require restitution for unjust enrichment, *Pennant Serv. Co. v. True Oil Co.*, 249 P.3d 698, 703–04 (Wyo. 2011),
- compel restitution of payments mistakenly induced by an innocent representation, *Racicky v. Simon*, 831 P.2d 241, 243 (Wyo. 1992), and
- address restitution in a clash between two taxing units, *Bd. of Cnty. Comm'rs v. Laramie Cnty. Sch. Dist. No. One*, 884 P.2d 946, 959 (Wyo. 1994).

The Restatement identifies the "[m]istaken payment of money not due" as "one of the core cases of restitution . . . ." Restatement (Third) of

Restitution & Unjust Enrichment § 6 cmt. a (Am. L. Inst. 2011). Given this "core case" of restitution, the Restatement allows restitution when someone mistakenly overpays. *Id.* § 6.

To predict what the Wyoming Supreme Court would do, we can consider not only the Restatement but also "decisions from other state and federal courts" and "'the general weight and trend of authority.'" *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1176 (10th Cir. 2021) (quoting *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1537 (10th Cir. 1996)). And many other courts have allowed restitution for mistaken overpayments. *See, e.g.*, *In re APA Assessment Fee Litig.*, 766 F.3d 39, 46–47 (D.C. Cir. 2014) (concluding that a claim for recovery of mistaken overpayments survived a motion to dismiss because the claim had "fit[] a standard pattern of unjust enrichment recovery" under the Restatement); *Morgan Guar. Tr. Co. v. Am. Sav. & Loan Ass'n*, 804 F.2d 1487, 1493 (9th Cir. 1986) ("New York courts have allowed restitutionary actions for payments 'by mistake' in a wide variety of circumstances, some of which appear to involve simple carelessness."); *Time Warner Ent. Co. v. Whiteman*, 802 N.E.2d 886, 890 (Ind. 2004) ("In general money paid under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, notwithstanding a failure to employ the means of knowledge which would disclose a mistake." (quoting 23 I.L.E., *Payment* § 43 (1970))); *Wilson v. Newman*,

617 N.W.2d 318, 322 n.4 (Mich. 2000) (stating that Michigan permits "restitution of mistaken payments, with appropriate exceptions"); *see also DeCoursey v. Am. Gen. Life Ins. Co.*, 822 F.3d 469, 476–77 (8th Cir. 2016) (predicting that the Missouri Supreme Court would recognize restitution of a mistaken payment).

Given the Restatement and the weighty case law elsewhere, we predict that the Wyoming Supreme Court would permit restitution for mistaken overpayments.

b. Restitution may be available to conform to the terms of a written contract when one party overperforms.

WY Plaza argues that even if the Wyoming Supreme Court would ordinarily allow restitution for overpayments, the existence of a contract would prevent relief. We reject this argument.

Wyoming, like many courts, elevates the role of contracts in defining the parties' relative rights and duties. When a written contract exists and defines the respective duties, parties can't use restitution to recover beyond the terms of the contract. So courts often say, as the Wyoming Supreme Court has, that recovery for unjust enrichment isn't generally "available when an express contract exists." *Three Way, Inc. v. Burton Enters, Inc.*, 177 P.3d 219, 224 (Wyo. 2008).

But "[j]udicial statements to the effect that 'there can be no unjust enrichment in contract cases' can be misleading if taken casually."

Restatement (Third) of Restitution & Unjust Enrichment § 2 cmt c (Am. L. Inst. 2011). Statements like these simply acknowledge the primacy of the contract in establishing the parties' obligations. *See id.* § 2 cmt. a (stating that "restitution is generally subsidiary to contract"); *id.* § 2 cmt. c ("[T]he parties' own definition of their respective obligations . . . take precedence over the obligations that the law would impose in the absence of agreement."). So an express contract normally prevents recognition of an implied contract under the guise of unjust enrichment. *Id.* § 2 cmt. c.

Given the primacy of the contract, restitution "does not require the court to set aside the contract; to the contrary, restitution serves to enforce 'adherence to the contract, through ordering repayment of a sum to which the recipient was not entitled under the contract.'" *Id.* § 35 cmt. a (quoting 3 George E. Palmer, *Law of Restitution* § 14.1 (1978)). The Third Restatement of Restitution and Unjust Enrichment explains the overarching role of the contract in restitution for mistaken payments:

> Payments resulting from a misunderstanding of the extent . . . of a valid contractual obligation present[s] a characteristic issue of restitution. Here the typical concern of restitution is with *overperformance* of a contractual obligation . . . . [T]he object of legal remedies for mistake in performance is to bring the transfers between the parties into the conformity with the true state of their contractual obligations.

Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. c (Am. L. Inst. 2011) (emphasis in original).

Professor Perillo takes a similar approach in his influential treatise:

> When an enforceable contract exists between the parties and one of the parties pays money to the other in the mistaken belief that the payment is required by the contract, the payment can be recovered. The same rule holds true if excess payment is made.

Joseph M. Perillo, *Contracts* § 9.29 (7th ed. 2014) (footnotes omitted).[5]

In arguing that the contract bars restitution, WY Plaza disregards the role of the contract as the measure of the parties' obligations. The Restatement explains the fallacy of WY Plaza's approach through an illustration involving a tenant who overpaid on a lease, explaining that the tenant can enforce the terms of the lease contract and recoup the overpayment:

> Landlord erroneously bills Tenant for rent at $1000 per month, which Tenant pays. In fact, the lease calls for a monthly rent of $500. Tenant has a claim in restitution to recover the overpayment. *The result is the same if Landlord submits no bills for rent, and Tenant pays too much as the result of his own misreading of the lease.*

Restatement (Third) of Restitution & Unjust Enrichment 6 cmt. c, illus. 9 (Am. L. Inst. 2011) (emphasis added); *see also United States v. Bedford Assocs.*, 713 F.2d 895, 902 (2d Cir. 1983) (concluding that a tenant was entitled to restitution for overpayments of rent).

When a party overpays based on a factual mistake, the existence of a valid contract doesn't bar restitution. To the contrary, restitution is

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[5] In predicting state law, we can consider treatises. *See Menne v. Celotex Corp.*, 861 F.2d 1453, 1464 n.15 (10th Cir. 1988).

"usually . . . granted almost as a matter of course." Gail F. Whittemore, 3 *Palmer's the Law of Restitution* § 14.8 (3d ed. 2020).

The D.C. Circuit has explained the senselessness of using a written contract to bar restitution when the overperforming party seeks only to conform the payments to those set out in the contract. *In re APA Assessment Fee Litig.*, 766 F.3d 39, 47 (D.C. Cir. 2014). There the defendants (like WY Plaza) opposed restitution on the ground that the parties had a contract. *Id.* The D.C. Circuit rejected that argument, reasoning that the "[d]efendants' basic position, that an unjust enrichment claim is precluded whenever it *relates* to the subject matter of an express contract, would eliminate not just plaintiffs' claim but the entire category of mistaken overpayments—'a characteristic issue of restitution.'" *Id.* (quoting Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. c (Am. L. Inst. 2011)) (emphasis in original).

WY Plaza argues that "[w]here the parties have agreed to their respective rights and obligations in a written agreement, it is indisputable that this Court cannot step in, in the guise of 'equity,' to *reform* those contracts and create obligations where none were bargained for between the parties." Appellee's Resp. Br. at 27 (emphasis added). But Safeway is trying to *enforce* the contract rather than *reform* it.

Granted, restitution may be unavailable if the contract itself allocates the risk of a party's mistake. But when the contract doesn't allocate that

risk, restitution may be necessary to conform performance to the contract. It would make little sense to deny restitution to an overperforming party who seeks to conform its performance to the contract. *See CSX Transp., Inc. v. Appalachian Railcar Servs., Inc.*, 509 F.3d 384, 387 (7th Cir. 2007).[6]

Disregarding the reason for limiting restitution to the parties' contractual obligations, WY Plaza argues that the existence of a contract would prevent restitution. This argument turns the Restatement and the case law on their heads, treating the contract as a roadblock to restitution rather than as the measure of the parties' obligations.

In treating the contract as a roadblock, WY Plaza relies on three Wyoming Supreme Court opinions that reject equitable claims when the parties had valid contracts:

1. *Sowerwine v. Keith*, 997 P.2d 1018 (Wyo. 2000)
2. *Wagner v. Reuter*, 208 P.3d 1317 (Wyo. 2009)

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[6] There the court said:

> The point of the voluntary-payment doctrine is to prevent recovery when a transfer was made pursuant to an agreement of the parties that allocated between them the risk of any later-discovered mistake. But when the mistake relates to a contingency not contemplated by the parties at the time of the voluntary payment, a claim for restitution exists.

509 F.3d at 387 (citing Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. d (Am. L. Inst. Tentative Draft No. 1, 2001)).

3. *Hunter v. Reece*, 253 P.3d 497 (Wyo. 2011)

WY Plaza has misinterpreted these opinions. In *Sowerwine*, *Wagner*, and *Hunter*, the Wyoming Supreme Court disallowed equitable relief—not because there was a contract, but because (1) the terms of a contract resolved the dispute and (2) the requested relief would have deviated from the contractual terms.

In *Sowerwine*, for example, the court disallowed equitable relief because it would have altered the terms of the contract. 997 P.2d at 1021. There the court faced a dispute arising from a property sale. *Id.* at 1019. Before the sale, the sellers had requested continued access for a third party (the father of one of the sellers). *Id.* But the sale contract contained no mention of such access. *Id.* After the buyers obtained the property, they denied access to the father; and the sellers claimed unjust enrichment. *Id.* at 1020. The Wyoming Supreme Court rejected the claim, disallowing recovery for unjust enrichment because the sellers had received everything owed under the contract. *Id.* at 1021.

The contract wasn't a barrier to restitution in *Sowerwine*. To the contrary, the contract served as the measure of the sellers' obligations. *Id.*; *see also* Restatement (Third) of Restitution & Unjust Enrichment § 2 cmt. c (Am. L. Inst. 2011) ("[T]he terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach."). So too the contract here serves as the measure of the parties' obligations. Safeway

seeks only to restore its payments to what the contract had required and to obtain reimbursement of the excess.

In *Wagner*, the Wyoming Supreme Court took a similar approach, rejecting equitable claims because the contract itself had allocated the parties' relative rights and responsibilities. 208 P.3d at 1322. There the plaintiff had sold his farm to the defendant and sought compensation for his work in preparing the farm for the upcoming crop season. *Id.* at 1320. The Wyoming Supreme Court disallowed recovery—not because there was a contract, but because (1) the contract itself had spelled out the parties' rights and (2) compensation for the fieldwork would have deviated from the contractual terms. *Id.* at 1320, 1322.

Wagner—like *Sowerwine*—reflects the primacy of the contract in defining the parties' rights and responsibilities. In *Wagner*, the plaintiff was seeking more than the contract had allowed; here Safeway is seeking to restore its payments to the amount required under the contract.

And in *Hunter*, the Wyoming Supreme Court disallowed recovery for unjust enrichment, reasoning that the parties' contract had resolved the dispute. 253 P.3d at 498–99. There two couples had collaborated to restore a house and resell it. *Id.* at 499. Upon starting the collaboration, the couples entered a contract requiring

- one couple (the Hunters) to finance the project and
- the other couple (the Reeces) to supply labor.

Id. With sale of the house, the contract required the two couples to split the profits evenly. *Id.*

But after the house sold, the Reeces sued for a greater share of the profits. *Id.* at 500. The district court ruled that the contract was invalid and granted relief to the Reeces for unjust enrichment. *Id.* The Wyoming Supreme Court reversed, concluding that

- the contract was valid and served to measure the Reeces' entitlement,
- the contract didn't entitle the Reeces to a greater share of the profits, and
- the Reeces couldn't deviate from the contractual terms under the guise of unjust enrichment.

Id. at 504.

Hunter again reflects the primacy of the contract in defining the parties' rights and responsibilities. There the Wyoming Supreme Court disallowed restitution—not because there was a contract, but because the plaintiffs were seeking more than the contract had allowed. Unlike those plaintiffs, Safeway is seeking to conform its performance to the contract.

Sowerwine, *Wagner*, and *Hunter* do not prevent restitution whenever the parties have a valid contract. To the contrary, these opinions show only that equitable relief can't deviate from the contract. But Safeway isn't trying to deviate from its contract with WY Plaza. To the contrary,

Safeway is just trying to match its payments to the amount owed under the contract.

c. The unilateral nature of Safeway's mistake doesn't prevent restitution.

WY Plaza further questions the availability of restitution to Safeway because the mistake was unilateral rather than mutual. We disagree.

The distinction between unilateral and mutual mistakes arises from the law of contracts. Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. d (Am. L. Inst. 2011). In this setting, mutuality of the mistake dictates the enforceability of a contract. Restatement (Second) of Contracts §§ 152 (mutual mistake), 153 (unilateral mistake) (Am. L. Inst. 1981). For example, when parties form a contract based on a mutual mistake of material fact, courts generally try to protect the parties from unintended contractual obligations. *Id.* § 152. Given that purpose, courts generally allow either party to avoid enforcement when the contracting parties share a material mistake of fact. *See, e.g.*, *Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp.*, 682 F.2d 330, 333 (2d Cir. 1982) (per curiam) (recognizing the remedy of rescission for mutual mistake); *Weissman v. Bondy & Schloss*, 660 N.Y.S.2d 115, 117 (N.Y. 1st App. Div. 1997) (same); *Merced Cnty. Mut. Fire Ins. Co. v. Cal.*, 233 Cal. App. 3d 765, 771–72 (Cal. 5th App. Div. 1991) (stating that rescission may

be available for mistakes that are mutual but not for those that are unilateral).

But the distinction between a unilateral and mutual mistake of fact doesn't apply to restitution claims for overperformance. *See* Gail F. Whittemore, 3 *Palmer's The Law of Restitution* § 14.4 (3d ed. 2020) (stating that "mutuality" of a mistake "should not be necessary when money is paid due to a mistake in performance"); *see also* Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. d (Am. L. Inst. 2011) ("The distinction drawn in the law of contracts between mutual and unilateral mistake has no direct application to the law of restitution."); *accord ITT World Directories, Inc. v. CIA Ed. de Listas, S.A.*, 525 F.2d 697, 700 n.4 (2d Cir. 1975) (stating that a party cannot recover based on a unilateral mistake in formation but can recover based on a unilateral mistake in performance). "When a plaintiff seeks restitution on account of mistake, the basis of liability is that the plaintiff has conferred an unintended benefit on the defendant." Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. d (Am. L. Inst. 2011). So the claim based on mistake "is the same . . . whether or not the [defendant] shared the [plaintiff]'s mistake" or even "was aware of it at the time." *Id.*[7]

[7] The Third Restatement of Restitution and Unjust Enrichment illustrates the availability of restitution for a unilateral mistake of fact:

The Wyoming Supreme Court applied this principle in *Messersmith v. G.T. Murray & Co.*, 667 P.2d 655 (Wyo. 1983), allowing restitution for a unilateral mistake of fact. There a couple had asked their broker about the possibility of selling stock, and the broker misquoted the stock price. *Id.* at 656. This misquotation led the couple to sell the stock based on the wrong price, and the broker overpaid the couple. *Id.* The broker sued the couple, seeking restitution for the overpayment under a theory of mistake of fact. *Id.*

The Wyoming Supreme Court recognized the broker's right to restitution. *Id.* at 657. Granted, the mistake there was mutual because the broker and the couple had shared an incorrect understanding of the stock price. *Id.* But the Wyoming Supreme Court noted that the broker could have obtained restitution even if the mistake had been unilateral, rather than mutual, because either way the court's goal would have been to return the parties to the status quo. *Id.*

WY Plaza and the district court downplay *Messersmith*, reasoning that it had addressed mistakes only when they involved a sale of securities.

> Bank Customer presents Mexican currency for exchange into U.S. dollars. The teller makes the exchange without recognizing that Customer's bills are "old pesos," officially devalued (four years earlier) by a factor of 1000 to 1. Bank has a claim in restitution to recover the amount of the overpayment.

Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. c, illus. 12 (Am. L. Inst. 2011).

It's true that *Messersmith* involved a sale of securities. But the Wyoming Supreme Court said nothing to cast doubt on the need to return the parties to the status quo when the mistake involves the terms of a lease rather than a stock price. *Messersmith* would require the court to return the parties to the status quo even if Safeway's mistake had been unilateral.[8]

The district court thus erred in rejecting Safeway's theory of restitution based on a mistake of fact. In Wyoming, restitution may be available when a party overperforms based on a unilateral mistake of fact even when the parties have a contract. So we reverse the district court's grant of summary judgment to WY Plaza on Safeway's restitution claim.

IV. Safeway is entitled to summary judgment because WY Plaza failed to create a triable fact-issue.

Safeway not only opposed summary judgment but also sought summary judgment on its own. The district court denied Safeway's motion in light of the award of summary judgment to WY Plaza. Safeway appeals the denial of its motion as well as the grant of WY Plaza's. Given our reversal of summary judgment for WY Plaza, we must consider the denial

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[8] WY Plaza points out that the deduction for construction costs was optional rather than mandatory. Appellee's Resp. Br. at p. 27; *see also id.* at p. 28 ("The District [Court] found that Article 20(d) of the contract allows, but does not require, Safeway to deduct [build costs] from percentage rents . . . ."). That is true. From 2012 to 2017, Safeway had the option to pay nothing or annual payments totaling $670,873. *See* pp. 37–38, below. But WY Plaza doesn't explain why this distinction matters, and WY Plaza admits that Safeway made a mistake by failing to deduct the construction costs. Appellee's Resp. Br. at p. 27; *see* p. 30 n.10, below.

of Safeway's motion for summary judgment. *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993). We conclude that Safeway was entitled to summary judgment based on the lack of a genuine dispute of material fact.

A. Safeway is entitled to summary judgment on its claim for a declaratory judgment.

In district court, Safeway sought summary judgment on the claim for declaratory relief. In seeking declaratory relief, Safeway requested a determination that it could continue to deduct the balance of the amortization account from the yearly payments. In objecting to Safeway's motion for summary judgment, WY Plaza asserted an affirmative defense of laches.

When a plaintiff moves for summary judgment and establishes a right to relief, the burden shifts to the defendant to

- raise a defense and
- show the presence of disputed facts.

SEC v. GenAudio Inc., 32 F.4th 902, 941–42 (10th Cir. 2022). Unless the defendant creates a material dispute of fact on an affirmative defense, the district court must grant summary judgment to the plaintiff. *See id.* (when a plaintiff moves for summary judgment and establishes a right to relief, the court should grant the motion unless the defendant can establish a genuine dispute of material fact on an affirmative defense).

WY Plaza does not dispute Safeway's contractual right to deduct the balance of the amortization from the yearly payments. So Safeway has established its claim. On appeal, WY Plaza invokes laches as a basis to affirm the denial of summary judgment to Safeway on its claim for declaratory relief.

1. In asserting laches, WY Plaza didn't refer to evidence creating a triable issue of fact.

To decide whether Safeway had a right to summary judgment, we consider

- whether WY Plaza had created a "genuine dispute as to any material fact" and
- whether Safeway "was entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(c). In applying this two-part standard, we view the evidence and draw all reasonable inferences in the light most favorable to WY Plaza as the non-moving party. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013).

To determine whether WY Plaza created a genuine dispute of material fact, we consider the nature of laches. It is an affirmative defense. *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1024–25 (Wyo. 1989). So WY Plaza bore the burden of proof. *See Younglove v. Graham & Hill*, 526 P.2d 689, 693 (Wyo. 1974) (stating that "the burden of proof is upon the one asserting an affirmative defense").

The doctrine of laches bars equitable relief when the claimant inexcusably waits too long to sue and the delay prejudices the defendant.[9] *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1024–25 (Wyo. 1989). WY Plaza asserts prejudice that is both evidentiary and financial.

a. WY Plaza didn't suffer evidentiary prejudice.

On appeal, WY Plaza urges prejudice from its diminished ability to muster evidence against Safeway on its claims.

i. In opposing Safeway's motion, WY Plaza didn't create a triable fact-issue on evidentiary prejudice.

In opposing Safeway's summary-judgment motion, WY Plaza asserted two forms of evidentiary prejudice: (1) the inability to question Safeway's former employee who was allegedly responsible for the mistake and (2) the fading of witnesses' memories. These assertions didn't create a triable issue of fact.

First, WY Plaza relied on its inability to question a former Safeway employee. When Safeway finally asserted the deduction for construction costs, the obvious question was why it had taken so long to discover the

[9] For the sake of argument, we assume that Safeway's delay was inexcusable. *See* p. 8, above.

mistake.[10] Safeway blamed a paralegal's failure in 2002 to note the deduction on an accounting form that had recited the payment terms.

Regardless of who was to blame, however, the accounting form was available. It recapped Safeway's payment obligations, but said nothing about the deduction for construction costs:

[10] In some places, WY Plaza appears to acknowledge that Safeway had made a mistake. Appellee's Resp. Br. at p. 1 ("This is a case about Safeway making a paperwork mistake in early 2006, . . . sending payments by check annually to WY Plaza based on that mistake, and Safeway not noticing that mistake until November of 2018 . . . ."); *id.* at p. 27 (arguing that Safeway made a "unilateral mistake"). Elsewhere, WY Plaza questions the existence of a mistake. *E.g.*, Appellee's Resp. Br. at p. 23 ("Safeway contends that it was mistaken, but evidence in the record supports the conclusion that it may not have been, given its routine audits and consistent payment of percentage rent year-after-year."). But WY Plaza doesn't argue in its briefs that a fact-finder could have determined that Safeway had intentionally overpaid.

In oral argument, WY Plaza suggested that Safeway may have intended to waive its right to deduct these costs. But WY Plaza has waived this argument by waiting to make it in oral argument. *See McWilliams v. DiNapoli*, 40 F.4th 1118, 1126 (10th Cir. 2022).

FORM RE-55
REAL ESTATE INFORMATION TRANSMITTAL

TRANSMITTAL DATE: March 21, 2002
LEASE, FEE OR MISC ID NUMBER: 10458
STORE\FACILITY NO.: CORP #001 DIV: 05 Facility: 2466 Sub-Fac 00
STORE ADDRESS: 544 N. 3rd Street, Laramie, WY

DESCRIPTION OF ACTION

Lessor/Payee change and increased rent as follows:

Landlord: WY Plaza, L.C., Tax ID# 87-0686344
a Utah limited liability company
c/o Woodbury Corporation
2733 E. Parleys Way, Suite 300
Salt Lake City, UT 84109

Payee: WY Plaza, L.C
c/o Woodbury Corporation
2733 E. Parleys Way, Suite 300
Salt Lake City, UT 84109

Property Manager: Woodbury Corporation
2733 E. Parleys Way, Suite 300
Salt Lake City, UT 84109

Contact: David Speters, Property Manager
Ph: 801-485-7770 x 1403 Cell: 801-450-0220 Fax:801-485-0209
E-Mail: d speters@woodburycorp.com
If David is unavailable call:
Randy Woodbury Ph: 801485-7770 x 1401
E-Mail: r woodbury@woodburycorp.com

Rent Increase: Effective May 1, 2001 rent increased $168.30 per month.
(Retroactive rent has been paid for May 1, 2001 through February 2002 in the amount of $1,683.00 per Check Request by Janice Palmer)
Going forward, from March 2002 on, please pay increased monthly rent in the amount of $21,384.72 pursuant to Article 4 of the Fifth Lease Modification Agreement. Thank-you.

Appellant's App'x vol. 2, at p. 256 (highlighting added).

WY Plaza insisted on a need to question the paralegal to scrutinize Safeway's explanation for its delay. Perhaps the paralegal could have explained why she had omitted a reference to the construction costs. But how could the paralegal's explanation affect WY Plaza's ability to defend the underlying claims? No matter who was to blame, the accounting form unquestionably omitted the deduction for construction costs.

Nor could the paralegal have said anything to muddle Safeway's underlying right to the deduction, for that right unambiguously existed under the lease agreement: "If [Safeway] constructs [the] addition, [Safeway] may deduct from [yearly] rent . . . an amount equal to said [yearly] rent until such time as the balance in the amortization account, as hereinafter created, equals zero." Appellant's App'x vol. 1, at p. 148.[11]

Because the lease agreement unambiguously entitled Safeway to the deduction, the district court couldn't consider evidence of intent outside the terms themselves. *See Bowers Oil & Gas, Inc. v. DCP Douglas, LLC*, 281 P.3d 734, 742 (Wyo. 2012) ("When the provisions in the contract are clear and unambiguous, the court looks only to the 'four corners' of the document in arriving at the intent of the parties." (quoting *Amoco Prod. Co. v. EM Nominee P'ship Co.*, 2 P.3d 534, 540 (Wyo. 2000))). Any extrinsic evidence of intent would have been inadmissible. *Revelle v. Schultz*, 759 P.2d 1255, 1258 (Wyo. 1988). So WY Plaza couldn't have used the paralegal's explanation to undermine Safeway's contractual right to the deduction.

Second, WY Plaza asserted in district court that memories had faded: "[A]s indicated in both parties' submissions on summary judgment, it is

[11] The lease modification agreement left these terms "unchanged and in full force and effect." Appellant's App'x vol. 2, at p. 179; *see* Part I(B), above.

apparent that memories have faded, witnesses are unavailable, and WY Plaza's defense in this matter is therefore disadvantaged." Appellant's App'x vol. 3, at p. 397. This assertion was conclusory, lacking any specificity about what witnesses could have said to bolster WY Plaza's defense.

Specificity was needed because the contract had unambiguously entitled Safeway to deduct the construction costs. *See* pp. 30–32, above. So testimony about the parties' intent would have been inadmissible. *See* p. 32, above.

We've elsewhere rejected conclusory assertions of faded memories. An example is *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001). There the United States had urged laches based on the fading of memories and loss of records: "'Memories fade . . . and retrieval of records will be unnecessarily difficult and potentially impossible in some instances if records have been destroyed.'" *Id.* at 1208. We rejected this argument because it was conclusory: "This conclusory allegation of prejudice is insufficient to establish material prejudice to the United States. The seizures occurred only nine years ago, and the forfeiture proceedings concluded only four years ago; given this timeline, we think the possibility of material prejudice arising from faded memories is far from 'obvious.'" *Id.*; *accord Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992) ("Conclusory statements that there are missing witnesses, that witnesses'

memories have lessened, and that there is missing documentary evidence, are not sufficient [to establish evidentiary prejudice].").

Under *Rodriguez-Aguirre*, WY Plaza's conclusory assertion couldn't prevent summary judgment on the issue of prejudice. Though memories fade, WY Plaza doesn't identify anything relevant that witnesses could have said while their memories were fresh.

ii. The district court's theories of evidentiary prejudice didn't create a triable fact-issue.

On appeal, WY Plaza adopts the district court's theories of evidentiary prejudice. But these theories didn't create a triable fact-issue.

Evidence About the Lease Modification Agreement. Upon completion of Safeway's addition, the parties entered into a lease modification agreement, which acknowledged the expansion and its effect on the lease. The district court questioned the parties' intent in entering the modification agreement, finding prejudice through WY Plaza's inability to probe the parties' intent.

But how could that probe have helped WY Plaza on the underlying issues? The lease and modification agreement unambiguously state Safeway's right to deduct the construction costs, so extrinsic evidence of intent would have been inadmissible. *See* p. 32, above.

WY Plaza points out that the modification agreement didn't

- require Safeway to create an amortization account or

- identify Safeway's interest rate for credit from the construction costs.

But the modification agreement had already incorporated the existing lease terms as to the amortization account and interest rate. *See* Appellant's App'x vol. 2, at p. 129 ¶ 8 ("Except as modified by this Fifth Shopping Center Lease Modification Agreement, the Lease, as previously modified, remains unchanged and in full force and effect.").[12]

Loss of Evidence Regarding Entry into the 2010 Settlement Agreement. In 2010, the parties settled an unrelated dispute over the yearly payments. *See* Part I(B), above. The settlement agreement included a representation that Safeway hadn't recognized any "defaults under the [l]ease by [WY Plaza]" or "current default-related credits." Appellant's App'x vol. 2, at p. 218.

Pointing to this representation, WY Plaza argues that the dispute should have exposed Safeway's mistake. But even if Safeway should have recognized its mistake, negligence wouldn't prevent recovery. *See Messersmith v. G.T. Murray & Co.*, 667 P.2d 655, 657 (Wyo. 1983) (concluding that a broker's negligence does not bar his client's recovery

[12] In district court, WY Plaza suggested a fact-issue over the availability of interest before the creation of an amortization account: "Additionally, if no account was established for seventeen years following completion of the addition, can interest accrue on the principal balance of a non-existent account[?]" Appellant's App'x vol. 2, at p. 391. On appeal, WY Plaza has dropped this suggestion.

for a mistaken overpayment); *see also* Restatement (First) of Restitution & Unjust Enrichment § 18 cmt. c (Am. L. Inst. 1937) ("The fact that the transferor was carelessly ignorant of the facts as to which he was mistaken does not necessarily bar recovery . . . ."); Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. a (Am. L. Inst. 2011) ("[T]he fact that the claimant may have acted negligently in making a mistaken payment is normally irrelevant to the analysis of the claim."). Because negligence wouldn't prevent recovery, WY Plaza's alleged inability to prove Safeway's negligence wouldn't have affected the outcome.

So a triable fact-issue didn't exist on evidentiary prejudice.

b. WY Plaza didn't suffer financial prejudice.

WY Plaza also asserts two forms of financial prejudice: (1) Safeway's excessive accrual of interest because of the delay and (2) reliance on the payments received. But these assertions don't create a genuine dispute of material fact on financial prejudice.

Accrual of Interest. WY Plaza first adopts the district court's theory that Safeway had obtained too much credit for interest because of the delay. But Safeway's delay didn't affect the amount of interest accruing to Safeway in the amortization account, and the district court could have remedied any conceivable harm by adjusting the amount of restitution.

The parties agree that the daily amount of interest is $512.72.[13] This amount is based only on the cost of the addition and does not increase with the accrual of interest. Because the amount remains constant, Safeway's delay couldn't affect the daily amount of interest accruing to the amortization account.

When Safeway deducts construction costs, the credit for those deductions would go first toward the accrued interest. *See Moncrief v. Harvey*, 816 P.2d 97, 107–08 (Wyo. 1991) (adopting the rule that "in the absence of an agreement or statute to the contrary, [a partial payment] should first be applied to the interest due").

By 2013 (when restitution would start), Safeway had accrued about $2.2 million in interest and had paid less than $90,000 in yearly rent. In the next five years, Safeway would owe less than $700,000 in yearly rent

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[13] Safeway's expert witness used simple interest to calculate this amount. WY Plaza relied on that calculation of interest when asserting financial prejudice. Appellee's Resp. Br. at pp. 18–19. But the daily interest would remain constant at $512.72 per day only if the interest weren't compounded.

In oral argument, WY Plaza asserted for the first time that the interest rate was to be compounded. But WY Plaza did not (1) point to anything reflecting the compounding of the interest rate or (2) explain how the interest rate could be compounded if the interest had remained constant at $512.72 each day. In any event, oral argument was too late for WY Plaza to suggest financial prejudice from the compounding of interest. *See McWilliams v. DiNapoli*, 40 F.4th 1118, 1126 (10th Cir. 2022); *see also* p. 30 n.10, above (discussing waiver of a suggestion that Safeway had intentionally withheld the deduction for construction costs).

without the deduction for construction costs. So even if Safeway had promptly started withholding its construction costs, the credit for these costs would have gone toward the accrued interest, leaving the principal amount of debt unaffected. Because the principal amount of the debt would have been unaffected, Safeway's timing didn't affect the daily amount of interest. But even if the delay had affected Safeway's credit for interest, the district court could have remedied the harm by adjusting the amount of the restitution award.

In our view, the district court's theory of financial prejudice didn't create a triable issue of fact. Safeway's delay didn't affect its credit for interest, and the district court could remedy any conceivable harm by modifying the amount of restitution awarded.

Reliance on Payments. WY Plaza also asserts that it made business decisions in reliance on the past payments. But WY Plaza hasn't identified these alleged business decisions or said how Safeway's delay had affected those decisions. In district court, WY Plaza asserted only that its income had been distributed to the owners and used in the regular course of business. With this assertion, WY Plaza supplied no specifics, citation to the record, or explanation of any business decisions affected by the income from Safeway's yearly payment. And the summary-judgment evidence didn't refer to a single distribution to owners or payment in the regular course of business.

Without any specifics or evidence, WY Plaza argues that we can infer reliance from the passage of time and the size of Safeway's payments. But Wyoming law places the burden on WY Plaza to establish a change in position and inability to return to the status quo. *Messersmith v. G.T. Murray & Co.*, 667 P.2d 655, 657–58 (Wyo. 1983). To meet that burden, WY Plaza needed to present evidence that was "certain in every particular with nothing left to inference." *Murphy v. Stevens*, 645 P.2d 82, 92 (Wyo. 1982). So the district court properly rejected WY Plaza's "bare assertion that [it had] relied on the payments in business dealings, tax burdens, and operations . . . ." Appellant's App'x vol. 4, at p. 45.[14]

* * *

WY Plaza bore the burden to prove prejudice but presented no supporting evidence. So WY Plaza failed to create a material dispute of fact on laches.

2. We decline to sua sponte remand on affirmative defenses that WY Plaza has dropped on appeal.

In responding to Safeway's summary-judgment motion on the claim for declaratory relief, WY Plaza relied in district court not only on laches but also on four other affirmative defenses:

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[14] In district court, WY Plaza also asserted that it had paid taxes on the income from the yearly lease payments. Appellant's App'x vol. 2, at p. 392. But WY Plaza has never alleged prejudice from its payment of taxes on Safeway's overpayments.

1. Estoppel
2. Accord and satisfaction
3. Waiver
4. Failure to mitigate damages.

The district court didn't address these defenses, and WY Plaza doesn't mention these defenses here.

Given Safeway's appeal from the denial of its own summary-judgment motion, WY Plaza could have

- raised these affirmative defenses as alternative grounds to affirm or
- urged us, in the alternative, to remand for the district court to consider these defenses in the first instance.

WY Plaza bypassed both options, and we must decide Safeway's appeal based on the arguments presented to us. Based on those arguments, we reverse the denial of Safeway's summary-judgment motion; we see no need to remand for the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages.

The dissent suggests that WY Plaza had no reason to present these defenses on appeal. We disagree. Safeway appealed the denial of its summary-judgment motion, so WY Plaza should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion. Rather than present these four defenses or request a remand, WY Plaza chose to rely here solely on laches.

The dissent points out that we could affirm on an alternative ground. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018)); *see* Dissent at 1. But the dissent doesn't suggest that we should affirm or even consider the four affirmative defenses briefed in district court. After all, we consider alternative grounds for affirmance based in part on whether the appellee has briefed the ground on appeal. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). And we generally consider it imprudent to consider grounds for affirmance that the appellee has not argued on appeal. *See United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020) (stating that it would be imprudent for us to sua sponte affirm on alternative grounds that the appellee has not briefed on appeal); *United States v. Woodard*, 5 F.4th 1148, 1154 (10th Cir. 2021) ("Given our role as arbiter of the parties' arguments, we don't typically 'craft[] arguments for affirmance completely *sua sponte* and, more specifically, without the benefit of the parties' adversarial exchange." (quoting *Chavez*, 976 F.3d at 1203 n.17)). So we would ordinarily decline to sua sponte address the four affirmative defenses that WY Plaza has bypassed in the appeal.

WY Plaza had other options besides urging us to affirm on alternative grounds. For example, WY Plaza could have asked us to remand for the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages. But WY Plaza didn't

do that either. WY Plaza instead chose to rely solely on its laches defense. So we limit our consideration to this defense.

The dissent points out that WY Plaza didn't waive the other four defenses by failing to present them here. We agree, and WY Plaza could have reasserted these defenses if the case had resumed in district court. We addressed that situation in *Oldenkamp v. United States American Insurance Co.*, 619 F.3d 1243 (10th Cir. 2010). The dissent seizes on one sentence in that opinion, where we acknowledged that the appellees hadn't waived an affirmative defense by failing to assert it on appeal. Dissent at 2 (quoting *Oldenkamp*, 619 F.3d at 1249). But we have no occasion to consider waiver, and *Oldenkamp* doesn't apply.

There we reversed the grant of summary judgment for the defendant. *Oldenkamp*, 619 F.3d at 1252. But the *Oldenkamp* plaintiffs hadn't appealed the denial of their own motion for summary judgment. So the reversal of summary judgment for the defendant required a remand for further consideration of the plaintiffs' claims; no other disposition would have made sense. Given the need to remand for further argument, we pointed out that the revival of the plaintiffs' claims would trigger the defendant's right to reassert whatever defenses had been preserved in district court. *Id.* at 1249.

Our case has little in common with *Oldenkamp*. If we were just reversing the grant of summary judgment to WY Plaza and remanding for

further consideration of the merits, WY Plaza could reassert whatever defenses it had preserved in district court. Here, though, we must decide whether the district court should have granted summary judgment to the plaintiff itself. That issue didn't exist in *Oldenkamp*, and we have no issue involving waiver of an affirmative defense.

* * *

We reverse the denial of summary judgment to Safeway on the claim for a declaratory judgment rather than sua sponte remand for the district court to consider defenses that WY Plaza chose to forgo on appeal. So we remand for the district court to grant summary judgment to Safeway on its claim for a declaratory judgment.[15]

B. Safeway is entitled to summary judgment on its restitution claim.

We've earlier discussed restitution in connection with WY Plaza's motion for summary judgment. But Safeway sought summary judgment on its own, and WY Plaza objected on grounds that restitution wasn't

[15] At this stage, we need not parse the specifics of the declaratory judgment itself. We leave those terms of the district court to address on remand. *See Am. Civ. Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 650–51 (6th Cir. 2004) (reversing with instructions to enter declaratory relief but giving the district court discretion to decide the terms of that declaratory relief); *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1472 (9th Cir. 1984) (instructing the district court to "award appropriate declaratory relief"); *Se. Promotions, Ltd. v. City of W. Palm Beach*, 457 F.2d 1016, 1022 (5th Cir. 1972) (instructing the district court to grant declaratory relief but leaving the terms of that relief to the discretion of the district court).

available because a valid contract existed and the mistake was unilateral. But we've already concluded as a matter of law that restitution was available despite the existence of a contract and unilateral nature of Safeway's mistake. *See* Part III(B)(2), above.

In opposing Safeway's motion for summary judgment, WY Plaza also asserted laches. WY Plaza argued that an award of restitution would interfere with business decisions made in reliance on Safeway's past payments. But WY Plaza failed to supply any specifics or evidence. *See* pp. 38–39, above. And we've concluded that the district court had acted correctly in rejecting WY Plaza's conclusory assertion. *See id.*

Even on appeal, WY Plaza presents no specifics, stating instead only a single sentence: "To hold that divesting WY Plaza of $1,000,000 in payments would not financially prejudice the landlord would be to ask the District Court to divorce its judgment from reality." Appellee's Resp. Br. at pp. 19–20. But in district court, WY Plaza had never argued—much less presented evidence—that a restitution award would affect a specific business decision. With no such argument or evidence, the asserted loss of business opportunities didn't create a material dispute of fact on prejudice. *See Murphy*, 645 P.2d at 91 ("Unless the delay has worked injury, prejudice or disadvantage to the defendants or others adversely interested, it is not of itself laches." (cleaned up)).

So Safeway is entitled to summary judgment on its restitution claim.

V. We vacate the denial of attorneys' fees, but decline to consider whether either party is entitled to recover fees.

WY Plaza cross-appeals the district court's denial of attorneys' fees. The lease contained a fee-shifting clause, and the parties agree that the clause entitles the prevailing party to an award of attorneys' fees. But we are vacating the award of summary judgment to WY Plaza. *See* Part III, above. With vacatur of the award of summary judgment to WY Plaza, its argument for attorneys' fees is moot.

VI. Conclusion

The district court erred in awarding summary judgment to WY Plaza based on laches and the unavailability of restitution. So we vacate this award of summary judgment. The court should have instead granted summary judgment to Safeway on the claims for declaratory relief and restitution.

The judgment is vacated and remanded for further proceedings in accordance with this opinion. WY Plaza's cross-appeal is dismissed as moot.

20-8064, Safeway Stores 46 Inc. v. WY Plaza LC

CARSON, J., concurring in part and dissenting in part.

The majority concludes that the district court erred in disposing of this case on laches in favor of Defendant WY Plaza LC ("WY Plaza"). I agree. I further agree with the majority that, in Wyoming, restitution may be available despite the existence of a contract and a unilateral mistake. But I respectfully part ways with the majority when it proceeds to grant summary judgment to Safeway on its claim for declaratory relief.

Even assuming the majority is correct that WY Plaza fails to raise a genuine issue of material fact on its laches defense, I believe it errs by refusing to remand for consideration of the other theories WY Plaza raised to combat Safeway's summary judgment motion at the district court. Indeed, the majority determines that Safeway is entitled to summary judgment because, on appeal, WY Plaza did not raise defenses other than the laches theory upon which the district court granted relief or ask for remand. [See Majority Op. at 39–43.] The majority implies that, when a party wins a denial of summary judgment at the district court and appears before us as appellee, it must be sure to raise all potentially winning defenses and ask us to remand in the event we deem the original basis for denial improper. This newly-minted rule contradicts another we often invoke: "we can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground." Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1180 (10th Cir. 2018) (quoting Alpine Bank v. Hubbell, 555 F.3d 1097, 1108 (10th Cir. 2009)). That rule, rightly, focuses not on what the *appellee* argued. Rather, it

focuses on whether the *appellant* had a fair opportunity to address the grounds supporting the adverse ruling.

The majority's implied rule also contradicts a long-standing rule in this circuit that "[a]lthough the [appellees] could have advanced [an] argument as an alternative ground for affirming the district court's ruling in their favor, a party is not required to raise alternative arguments."[1] Oldenkamp v. United Am. Ins. Co., 619 F.3d 1243, 1249 (10th Cir. 2010). Other circuits agree. For example, the Seventh Circuit explained in a similar context that "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." Schering Corp. v. Ill. Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996). See also, e.g., Ms. S. v. Reg'l Sch. Unit 72, 916 F.3d 41, 49 (1st Cir. 2019) (collecting cases and explaining that failure to raise all possible alternative grounds for affirmance should not doom an appellee); Eichorn v. AT&T Corp., 484 F.3d 644, 657–58 (3d Cir. 2007) ("As [appellees in the previous appeal], they were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds."); Indep. Park Apartments v. United States, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("As appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds."); Kessler v. Nat'l Enters., Inc., 203 F.3d 1058, 1059 (8th Cir. 2000) ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees,

[1] The cited case involved cross-appeals, so the parties were both appellants and appellees. The issue discussed involved the Oldenkamps as appellees.

because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals."); Froebel v. Meyer, 217 F.3d 928, 933 (7th Cir. 2000) ("[S]o long as the [appellees] did not waive their preclusion argument by failing to present the issue to the district court, we may consider it."); Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 740 (D.C. Cir. 1995) (finding no waiver of issue omitted in prior appeal by then-appellee).

A strong rationale supports the "no waiver by appellees" rule. Appellees and appellants have different roles in framing issues and presenting arguments. See Crocker, 49 F.3d at 740–41. An appellee would find itself in a "difficult, if not impossible" position "to both defend the district court's decision and to present, as the basis for an alternative ground, a reworking of the interpretative framework assumed by the district court." Ms. S., 916 F.3d at 49. And, even if an appellee completed that task, "it would not have had a chance to answer [appellant's] reply brief." Id.

Of course, an appellee can file a cross-appeal, which WY Plaza did here.[2] But "[c]ross-appeals are required only when the party prevailing below seeks to enlarge the scope of that judgment; they are not necessary when the party simply presents alternative bases for affirmance." Crocker, 49 F.3d at 741. In addition to spurring unnecessary cross-appeals, requiring appellees to put forth all grounds for affirmance would "create

[2] WY Plaza's cross-appeal addresses only the district court's denial of attorneys' fees. On all other issues (involving the district court's grant of WY Plaza's motion for summary judgment and denial of Safeway's motion for summary judgment), Safeway is the appellant and WY Plaza the appellee.

'judicial diseconomies,'" "fuel a multiplication of arguments," Ms. S., 916 F.3d at 49 (quoting Crocker, 49 F.3d at 741), and dramatically increase the length of briefs.

By granting summary judgment to Safeway on its claim for declaratory relief because WY Plaza "should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion," [Majority Op. at 40] the majority suggests that, in our circuit, we will require appellees to raise all possible grounds for affirmance to avoid waiver. The majority states that "we have no issue involving waiver of an affirmative defense," which would be a correct observation but for the majority's implicit injection of waiver into this appeal.

The simple facts are: Safeway moved for summary judgment; WY Plaza responded, raising multiple defenses; the district court latched onto a single defense in denying Safeway's motion; Safeway appealed; WY Plaza responded, asking us to affirm the district court's rationale; the majority disagrees with the district court's rationale, yet instead of reversing and remanding for further consideration, it declares that WY Plaza waived all other defenses and renders judgment for Safeway. Because the majority's requirement that WY Plaza "present these four defenses or request a remand," [Majority Op. at 40,] contradicts our precedent and sound principles of judicial economy, I respectfully dissent. WY Plaza should not have summary judgment granted against it simply because the district court relied on only one theory in granting relief. Instead of granting summary judgment to Safeway on its claim for declaratory relief, I would remand to the district court for consideration of the claim and defenses.

For this reason, I respectfully dissent in part.