IN THE CIRCUIT COURT OF CULLMAN COUNTY, ALABAMA

ELLIS MURPHREE; MARILYN MURPHREE,	}	
Plaintiffs,	}	
v.	}	**CIVIL ACTION NO. CV-2005-296**
FARM BUREAU INSURANCE OF N.C., INC.; GLORIA WILLIAMS; et al.,	}	***Oral Argument Requested***
Defendants.	}	

MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT, FARM BUREAU INSURANCE OF N.C., INC.

COMES NOW the defendant, **FARM BUREAU INSURANCE OF N.C., INC.** (hereinafter referred to as "defendant" or "Farm Bureau"), and files its motion for summary judgment pursuant to Rule 56 of the *Alabama Rules of Civil Procedure* as to plaintiffs' claims of breach of contract, fraud, and bad faith and each paragraph and sub-paragraph of their complaint in respect to same on the ground that there is no genuine issue as to any material fact, and defendant is entitled to judgment as a matter of law.

The defendant further moves the court to make said judgment final, pursuant to Rule 54(b) of the *Alabama Rules of Civil Procedure*.

This motion is based on the following:

A. The pleadings.

B. The affidavit of Leon E. Turner, III, Associate Property Claims Manager,

Farm Bureau Insurance of N.C., Inc., attached hereto as Exhibit "A," and documentary evidence and exhibits incorporated in the same.

C. Affidavit of James A. Durham, attached hereto as Exhibit "B," and documentary evidence and exhibits incorporated in the same.

D. Deposition testimony of plaintiff, Ellis Murphree, attached hereto as Exhibit "C."

II. STATEMENT OF UNDISPUTED FACTS

1. Plaintiffs' complaint charges defendant with breach of contract, fraud, and bad faith in respect to a claim for windstorm damage to poultry houses owned by plaintiffs in Cullman County, Alabama, on or about September 6, 2004. *Plaintiffs' Complaint and all paragraphs thereof.*

2. It is undisputed that on or about July 15, 2004, Farm Bureau issued a policy of farm property insurance to plaintiffs. The Murphrees obtained the policy through Farm Bureau agent, Gloria Williams, who had been referred to them by Ellis Murphree's brother. *Ellis Murphree Deposition, page 26*. Farm Bureau sent the Murphrees a copy of their policy, which they received. *Ellis Murphree Deposition, page 34*. The declarations page of the policy clearly set forth all of the coverages provided by the policy, and the Murphrees had same in their possession and had opportunity to review it for any errors or omissions. *Ellis Murphree Deposition, page 47.*

3. It is undisputed that plaintiffs reported a claim involving two poultry

houses to Farm Bureau on September 8, 2004, and indicated that the date of loss was September 6, 2004. Farm Bureau field adjuster Chuck Whitlock in Cullman contacted Ellis Murphree on September 8 and made arrangements to inspect the poultry houses on the following day, September 9, 2004. Thereafter, on September 9, Whitlock inspected the poultry houses with Murphree and obtained photographs and noted on a claim activity log that he had done so and that the insured, Murphree, "does not know what happened but something happened to make walls (of the poultry houses) lean." Mr. Whitlock informed Murphree that he would assign an engineer to determine the "C&O," or cause and origin of the alleged damage. *Affidavit of Leon Turner, ¶ 2.*

4. It is undisputed that on the following day, September 10, 2004, Whitlock engaged Jade Engineering & Inspection, Inc., of Decatur, Alabama, to inspect the poultry houses. On a fax cover sheet to Jade, Whitlock wrote, "Please inspect the attached poultry house and determine the cause of loss for the damage. The walls of the (sic) both poultry houses are leaning." He provided directions to the plaintiffs' property and concluded his fax by stating, "Please contact the insured within 24 hours of your receipt of this assignment and schedule an appointment to inspect the property at your convenience. He is presently out of birds, but expects to receive a new flock next week. Please send your final report within 25 days of this assignment or contact as to when the report will be sent. Please acknowledge your receipt of this assignment." *Affidavit of Leon Turner, ¶ 4.*

5. It is undisputed that on September 10, Whitlock completed a claim form

in which he noted information relevant to the reporting of the claim and also his investigation to the date of same: "The claim was received on September 8, 2004. Insured was contacted the same day and an appointment was scheduled for the next day to inspect the property. On September 9, the property was inspected and the insured was present at the time of the inspection. It was obvious that the walls of the poultry houses were leaning, however, there was (sic) no visible signs of obvious wind damage to the poultry houses or any other surrounding structures." Under the heading "Cause of Loss," Whitlock noted, "The damage is described as the walls of the poultry houses are leaning. Jade Engineering has been contacted to determine the cause of loss for the damage to both poultry houses." Further, under the heading "What Remains To Be Done," he stated, "Secure an engineer's report on the cause of loss." *Affidavit of Leon Turner, ¶ 5.*

6. It is undisputed that on or about September 10, 2004, Jade was contacted by Chuck Whitlock of Farm Bureau Insurance of N.C., Inc., to perform an inspection of poultry houses located on County Road 684 in Cullman County, Alabama. On a fax cover sheet to Jade, Whitlock wrote, "Please inspect the attached poultry house and determine the cause of loss for the damage. The walls of the (sic) both poultry houses are leaning." As stated above, Whitlock provided Jade directions to the plaintiffs' property and concluded his fax by stating, "Please contact the insured within 24 hours of your receipt of this assignment and schedule an appointment to inspect the property at your convenience. He is presently out of birds, but expects to receive a new flock next week. Please send your final report within

25 days of this assignment or contact as to when the report will be sent. Please acknowledge your receipt of this assignment." It is undisputed that the only instructions to Jade Engineering by Farm Bureau through Whitlock were for Jade to (1) conduct an inspection and (2) determine the cause of damage. *Affidavit of James Durham, ¶ 3.*

7. It is undisputed that Jade's inspection of the Murphree poultry houses was conducted on September 24, 2004, by employees Stanley T. White and Todd Padgett. The inspection consisted of visual observations, photographs, sketches, and post lean measurements. It is undisputed that White and Padgett walked around each of the two poultry houses and performed visual inspections of the roof and side wall structures looking for evidence of building lean. They entered each building and utilized a four foot builder's level to measure actual post lean, and they utilized a water level to check for possible post settlement in poultry house one (1). White and Padgett also dug out beside two posts in each house to determine the depth of post embedment. Following the inspection on September 24, White and Padgett met with James Durham to present their inspection findings. It is undisputed that Jade then compiled the detailed field notes made during the inspection, photographs, and developed CAD drawings which showed the amount of post lean measured inside each house, and reviewed a past structural analysis of poultry house design. Jade's final opinions as to the cause of damage were based on the site visit, inspection observations, post inspection structural analysis and review, and the professional engineering judgment of Durham regarding the cause of the alleged lean to both poultry houses. A written report was

rendered by Jade Engineering to Farm Bureau on October 6, 2004. *Affidavit of James Durham, ¶ 5.*

8. It is undisputed that Jade's October 6, 2004, report was addressed to Chuck Whitlock at Farm Bureau in Cullman, Alabama, and was identified as arising from the inspection of the Murphree poultry houses. The report was divided into sub-parts including "Site Visit and Inspection," "Post Inspection Analysis," and "Assessment and Conclusion," among others. It is undisputed that the report stated in pertinent part with emphasis added:

> "As per your request, representatives from our firm visited the subject farm on September 24, 2004 in order to inspect two poultry houses. We understand that you asked our firm to evaluate the cause and extent of building lean in the two poultry houses (agricultural-type pole buildings). The inspections were performed by Messrs. Stanley T. White and Todd Padgett.
>
> "Please be advised that our inspection consisted of visual observations, photographs, sketches, and post lean measurements. Our inspectors walked around each of the two buildings and performed visual inspections of the roof and side wall structures looking for evidence of building lean. They then entered each building and utilized a four foot builders level to measure actual post lean. They also utilized a water level to check for possible post settlement in building one. Lastly, they excavated beside two posts in each building in order to determine the depth of post embedment.
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"During our inspection we met with Mr. Murphree who explained that he is not sure how old his two poultry houses are. He said that he has only owned them for three years. He said that **in 2004, several storms with high winds** passed through the area of his poultry farm. He said that **during the last storm metal roofing was blown off of the roof and he had to be reattach it in the rain**. He said that he **did not notice any evidence of wall lean in his two poultry houses until the last time the chickens were caught—several weeks ago**. We scanned the surrounding property and observed **no evidence of felled trees**. Mr. Murphree verified that no trees were blown down during the previous storms.

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"We found that post lean [in poultry house building one (1)] **varied from north to south with the majority of lean toward the east**. **Some posts near the south end were found to be plumb or leaning toward the west**. We found that the amount of post lean varied from 1/8 inches to 2¼ inches. The maximum lean found in poultry house #1 was 2¼ inches. Please be advised that the values shown on Sheet 2 represent the actual amount of lean for the 4-foot length of the level. The 'total' amount of lean would be nearly twice the measurements we obtained with a 4 foot level because the actual post heights are between 7 and 8 feet tall. In addition to our east and west wall measurements, we found that the south end wall is leaning inward toward the north about 3 inches while the north wall is plumb along most of the wall.

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"We next entered Building #2 to measure post lean and determine the depth of post embedment. See Sheet 2 for post layout and post lean measurements. We walked along the east and west walls of Building #2 and measured the amount of lean at posts which were spaced 25 feet on center. The maximum lean we found was 3½ inches toward the west in the west wall. **In fact, we found that nearly all of the posts in this building leaned toward the west. This is opposite the direction of lean in Building 1**.

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"**Assessment and Conclusion**

"Based on our site visit, inspection observations and post inspection research, it is our firm's opinion that the **post lean in both buildings is fairly typical for an estimated 20-year old poultry house** with post embedment depths less than 30 inches. The **varying amount of east and west lean present in the buildings can be attributed to inadequate post embedment depth and long term wind exposure**. The structural analysis of these buildings revealed that the posts need at least 4 feet of embedment into "stiff' soil in order to resist code specified wind loads. The east and west post lean in both buildings has probably been caused by long term exposure to moderate winds (less than 70 mph) and occasional exposure to high winds. Our structural analysis suggests that if a code specified 70 mph wind had occurred, the buildings would probably have sustained great damage and very possibly collapsed.

"The largest amount of wall lean found for both buildings was in the east/west direction. We found that end walls of the east building leans

> inward toward the center of the structure. **We feel that the end walls leaning towards the center of the building is the result of wenching equipment up and down that is attached to the bottom of the roof trusses.**"
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> *Affidavit of James Durham, ¶ 6; Affidavit of Leon Turner, ¶ 6.*

9. It is undisputed that no one from Jade has ever seen or reviewed a copy of the insurance policy regarding coverage of the Murphree poultry houses. Neither Durham nor any employee of Jade had any discussion or communication with any employee, officer, or agent of Farm Bureau Insurance of N.C., Inc., regarding how to perform the inspection of the Murphree poultry houses or any other poultry house. It is undisputed that no employee, officer, or agent of Farm Bureau directed, suggested, or controlled the manner or methodology in which the poultry houses were to be inspected. It is undisputed that no employee, officer, or agent of Farm Bureau directed, suggested, or controlled the content and findings of Jade's final report, and no one from Farm Bureau sought to influence the objectivity of the report, which was based on accepted structural engineering standards and principles. *Affidavit of James Durham, ¶ 4*. There were no conflicts in the engineering conclusions derived from the inspection, and all findings were based on accepted structural engineering standards and principles, and the report was objectively prepared based on such standards and principles. *Affidavit of James Durham, ¶ 7*.

10. It is undisputed that no employee of Farm Bureau had any discussion or communication with any employee, officer, or agent of Jade Engineering regarding how

to perform the inspection of the Murphree poultry houses or any other poultry house. No employee, officer, or agent of Farm Bureau directed, suggested, or controlled the manner or methodology in which the poultry houses were to be inspected. No employee, officer, or agent of Farm Bureau directed, suggested, or controlled the content and findings of Jade's final report, and no one from Farm Bureau sought to influence the objectivity of the report, which was based on accepted structural engineering standards and principles. It is undisputed that after Jade submitted its report to Farm Bureau, no employee of Farm Bureau had any further discussions with any employee, officer, or agent of Jade Engineering regarding the inspection, engineering findings, or the report itself. No employee of Farm Bureau has ever discussed or communicated with any employee, officer, or agent of Jade regarding coverage issues, policy provisions, or denial of the Murphree claim or any other claim. It is undisputed that Farm Bureau had no reason, evidence, or cause to question the engineering findings based on the inspection, and all findings were relied upon as based on accepted structural engineering standards and principles, and that the report was relied upon as objectively prepared based on such standards and principles as certified to Farm Bureau. *Affidavit of Leon Turner, ¶ 11.*

11. It is undisputed that after receiving and reviewing in detail the engineering report, Turner wrote plaintiffs on October 21, 2004, and stated, "We have received the summary report from Jade Engineering and Inspection, Inc. regarding the recent inspection of poultry houses number 1 and number 2 at your property. Following will be the

assessment of that inspection. The engineer states that it his opinion that the post lean in both buildings, number 1 and number 2, is fairly typical for houses with the age your houses have on them. The post embedment depths are less than 30 inches and due to this fact, the houses have developed leans over this extended period of time. Since there is no evidence of windstorm damage to the poultry houses, there is no peril coverage for this reported loss." *Affidavit of Leon Turner, ¶ 7.*

12. It is undisputed that Ellis Murphree has no judgment or knowledge of any weather event or storm which would have caused the poultry houses to lean and that simply because the houses were leaning that Farm Bureau should have paid the insurance claim:

> 0108
> Q. (MR. COLQUETT)All right. You don't know of any weather event, any storm that caused the houses to lean; is that correct?
> A. That's right.
> Q. The basis of your claim is that the houses are leaning, they have to be leaning because of wind because there's no other reason that you know of to cause a poultry house to lean, and because they're leaning, in your judgment, because of wind, Farm Bureau should have paid the claim?
> MR. LITTLE: Object to the form.
> A. Yes, sir.
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> • • • •
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> 124
> Q. The contention that you -- sort

of the bottom line in this lawsuit is that you made a claim for leaning poultry houses which you believe to have been caused by a wind storm?
A. Yes, sir.

0125
Q. All right. As far as when that wind storm occurred, you and I simply don't know?
A. That's right.
Q. And it was only after you could see a visible lean that you made the claim?
A. Yes, sir.
Q. You know of no other causes of leaning to a poultry house other than a wind storm?
A. No, sir.
Q. Can a poultry house lean from long-term exposure to wind?
A. I'm not an engineer.

Ellis Murphree Deposition, pages 108, 124-125.

13. It is undisputed that a registered and Alabama-licensed engineer (Durham) certified to Farm Bureau that the claimed damage of leaning to the Murphree poultry houses was neither the result of nor caused by windstorm. Rather, the engineer certified that particular construction and building factors caused the claimed damage to occur. Farm Bureau relied on the certified opinions of the engineer within the circumstances of its overall claim investigation in denying the Murphree claim. The Murphrees did not present substantial evidence to Farm Bureau, either before or after the denial of the claim, that the damage he alleged to his poultry houses was the result of or caused by the named

peril of windstorm. Farm Bureau considers claims made under the named peril of windstorm in the context first of whether the weather event underlying the claim was singular, violent, and tumultuous, and if such an event did occur, whether the damage alleged was the result of or caused by the event. There was neither substantial evidence submitted by the Murphrees that a windstorm event occurred on their property nor that damage was caused by same. In fact, Ellis Murphree does not know of any weather event which would have caused the claimed damage. *Affidavit of Leon Turner, ¶ 10; Ellis Murphree Deposition, page 108.*

III. CONTROLLING LEGAL AUTHORITY

A. General Burden of Proof

14. When a motion for summary judgment is filed, the moving party has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. Once this showing is made, the burden then shifts to the opponent, who must present " substantial evidence" creating a genuine issue of material fact, so as to avoid the entry of judgment against it. Lee v. City of Gadsden, 592 So. 2d 1036 (Ala. 1992). If the party opposing the motion fails to offer substantial evidence (or that evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonable infer the existence of facts sought to be proved) to contradict that presented by the movant, the Court is left with no alternative but to consider the evidence uncontroverted. Whatley v. Cardinal Pest Control, 388 So. 2d 529 (Ala. 1980).

15. In opposing a motion for summary judgment, a party cannot use conclusory allegations, speculation or subjective beliefs to satisfy the requirement of substantial evidence. Peterman v. Auto Owner's Ins. Co., 623 So. 2d 1059 (Ala. 1993). Summary judgment should only be denied when there are genuine issues of material fact, and an issue is genuine only if reasonable persons could disagree. Long v. Jefferson County, 623 So. 2d 1130 (Ala. 1993). However, if there are only issues of law and no genuine issue of material fact remaining before the trial court, then summary judgment is not only proper, but mandatory if, as a matter of law, proof of the material facts supporting the moving party's position has been made with no substantial evidence to the contrary offered in opposition. See, Coggin v. Starke Bros. Realty Co., Inc., 391 So. 2d 111 (Ala. 1980); and Watson v. Auto Owner's Ins. Co., 599 So. 2d 1133 (Ala. 1992).

B. Fraud/Misrepresentation

16. Plaintiffs' claim of fraud – of any species – is barred as against this defendant by *res judicata*. The alleged fraud of this defendant was adjudicated by the court's final judgment granting summary judgment for Williams on December 21, 2006. The allegation of fraud was brought against Williams and Farm Bureau, which is in privity with Williams as a party. Consequently, defendant does not cite any controlling legal authority in respect to fraud.

C. Breach of Contract/Windstorm

17. The policy of insurance between Farm Bureau and plaintiffs is a "named

peril" or "specified risk-policy." Consequently, for alleged damage to a structure caused by a named peril to be covered under the terms of the policy, same must be caused by one or more of the named perils. In this case, the named peril at issue is windstorm. The difference between a named peril policy and an "all risk policy" has been described as "vast": "[A] 'named perils' policy is very limited in scope and coverage. An 'all risk' policy is very broad in its coverage." State Dep't of Ins. v. Gallagher, 622 So.2d 370, 372 (Ala.Civ.App. 1993).

18. Appleman's describes the difference between the policies:

> "Customarily in the insurance industry, insurance policies are drafted to transfer risks in one of two ways. First is specified-risk policies which are drafted to cover damage or harm to the insured subject matter only for the damage or harm resulting from causes or risks expressly specified in the policy. In specified-risk policies, the specified causes or risks are typically stated in the general coverage description (the insuring part) as well as in separate headings (as is done in all-risk policies).
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> The provisions that define coverage in specified-risks policies usually serve a restrictive function. For instance, in all motor vehicle liability insurance policies, the insuring clause states 'arising out of the ownership, maintenance or use' which both specifies the coverage scope and is an important specific limitation of the risks transferred to the liability insurer.
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> "The second drafting method is for the coverage part of the policy to state that the policy covers all causes of loss to the subject matter insured except those causes which are specifically excepted, or persons or interests excluded from the policy.

". . . .

". . . .

"The second point to emphasize is that an 'all-risk' policy is more favorable to an insured than is a 'specified-risk' policy for several reasons. First there is less of a chance of having a gap in coverage. Gaps may exist in the package policy which combines discrete specified-risk coverages available in separate policies. **Second is the matter of burden of proof. With specified risk policies, the insured usually has the burden to prove that the loss is covered within one of the specified risks. The insured has a more favorable rule under all-risks coverage.**

". . . .

"[U]nder an all-risk policy, the insured must initially prove that the loss or damage was caused by some event or risk other than normal depreciation or inherent vice or defect; then the burden of proof is on the insurer to prove that the loss is not covered by evidence showing an exception, exclusion or other limitation applies."

1-1 Appleman on Insurance § 1.6 (emphasis added to original).

"[T]he **majority American rule requires the insured to prove that the insured event has transpired, that is, the specified risk (fire, windstorm, lightning, etc.) was the cause (usually, proximate cause) of the loss or property damage**. Under the all-risks method as used in marine insurance, the burden of proof is reversed with the insurer having to prove an exclusion or exception or other no-coverage limitation."

> 1-1 Appleman on Insurance § 1.11 (emphasis added to original).[1]

19. The insured's burden of proving that property damage was caused by a named or specified peril in the context of a named peril policy is recognized in Alabama. In State Farm Fire & Cas. Co. v. Shady Grove Baptist Church, 833 So.2d 1039 (Ala. 2002), plaintiffs claimed insurance collapse coverage following the collapse of a portion of their church roof. Summary judgment was granted to State Farm on the allegations of fraud and bad faith; the case was tried to jury verdict on the breach of contract claim. State Farm appealed from denial of its motion for new trial/motion for judgment notwithstanding the verdict. On review, the Alabama Supreme Court held (1) that the insured-church failed to present substantial evidence that the collapse of the church's roof resulted from an enumerated cause and was covered; (2) that testimony of the church pastor and former trustee and deacon concerning their beliefs as to the specific cause was speculative and did not rise to the level of substantial evidence; and (3) State Farm's engineering report concluded that improper construction, not blasting in the area, caused the collapse. The court noted:

> "[I]t is not State Farm's position on appeal that the collapse was excluded from coverage; rather, State Farm asserts that the collapse was not covered under the policy. Therefore, this is not a case in which the Church has to prove that a collapse, as

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[1] See also, Ingersoll-Rand Financial Corp. v. Employers Ins. of Wausau, 771 F.2d 910, 912 (5th Cir. 1985): "[A] 'named peril' policy is to be differentiated from an 'all risks' policy. 'A policy of insurance insuring against "all risks" creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.'"

> defined within the policy, has occurred and State Farm then has to prove that a certain exclusion within the policy removed the collapse from the scope of its coverage. . . . Rather, in resisting State Farm's motions for a judgment as a matter of law, and for the trial court's denial of those motions to have been proper, **the Church must have submitted substantial evidence showing that the collapse fitted within the definition of that term in the policy and that it was covered under the policy by virtue of its being caused by at least one of the six enumerated causes provided in the policy**.
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> ". . . .
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> "After considering the evidence presented by the Church, **we conclude that the Church failed to present substantial evidence showing that the collapse of the roof on its building was a result of any one of the enumerated causes contained in the policy. Rather, the testimony elicited provided several possible causes for the collapse, but substantial evidence as to any one cause was not presented**. Further, the testimony of Preston Walker and Hugh Walker bolster this conclusion because their statements concerning their **beliefs as to the specific cause of the collapse were speculative**. Therefore, their testimony does not rise to the level of substantial evidence."
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> 833 So.2d at 1043, 1046 (Ala. 2002) (citations omitted) (emphasis added to original).

20. In Cont'l Cas. Co. v. Plantation Pipe Line Co., 902 So.2d 36 (Ala. 2004), Continental argued that plaintiff had not presented substantial evidence that a leak in a pipeline caused contamination of a creek during a time period which fell within the scope of

Continental's coverage in a named peril policy: "[In State Farm Fire & Cas. Co. v. Shady Grove Baptist Church, this] Court held that the policyholder had failed to prove by substantial evidence that the collapse of a roof fell within the coverage of State Farm's insurance policy. This Court held that offering speculative testimony of several possible theories on the reason for the collapse of the roof was not 'substantial evidence.' Thus, we reversed the trial court's judgment because the trial court had erred in denying State Farm's motion for a judgment as a matter of law." The court noted, however, that Plantation's expert testified on direct and cross-examination that he believed that the 1972 leak caused the contamination, and thus, Plantation had presented "substantial evidence" of the connection between the leak and contamination. Expert testimony in presenting "substantial evidence" was also identified in Wright v. Commercial Union Ins. Co., 818 F.2d 832, 836 (11th Cir. 1987): "William Stahl's testimony was subject to bitter attack by Commercial Union's expert. The evidence presented by Commercial Union, however, does not strip the (expert) opinion rendered by Stahl of its probative value."

21. In the Alabama Supreme Court case of Great American Ins. Co. v. Railroad Furniture Salvage of Mobile, Inc., 162 So.2d 488 (Ala. 1964), the court held that where there are no limiting terms in the policy, "windstorm" is to be defined as a "wind of such tumultuous force and sufficient velocity as to proximately cause injury to the insured's property"; "[a]ny other view would work an imposition upon the insured." That is, if an insurer "wishes to adopt some scale which establishes the velocity of wind necessary for a

windstorm," the court wrote, citing the second leading case of Gerhard v. Travelers Fire Ins. Co., 18 N.W.2d 336 (Wis. 1945), "it should incorporate its proposed standard in the policy by clear terms." Great American Ins. Co. v. Railroad Furniture, *supra*, at 493. Otherwise, in the absence of definition or limitation in the policy, the distinction between "windstorm" and "wind" is that a "windstorm must be taken to be a wind of sufficient violence to be capable of damaging the insured property either by its own unaided action or by projecting some object against it." Gerhard v. Travelers Fire Ins. Co., *supra*, at 337.

22. In Kemp v. American Universal Insurance Company, 391 F.2d 533 (5th Cir. 1968) the U.S. 5th Circuit Court of Appeals wrote, "In absence of a definition or limitation of the subject, a 'windstorm' must be taken to be a wind of sufficient violence to be capable of damaging insured property either by impact of its own force or by projecting some object against the property, and in order to recover on a windstorm insurance policy, not otherwise limited or defined, it is sufficient to show that wind was the proximate or efficient cause of loss or damage notwithstanding other factors contributed to loss." The 5th Circuit concluded that since the policy was silent as to any definition of windstorm, that the "fairest and best" definition of same is a "force of natural air which is: capable of damaging the insured property either by its own unaided action or by projecting some object against it." 391 F.2d 533, 534 (5th Cir. 1968), citing Roach-Stravhan-Holland Post No. 20 Am. Legion Club, Inc. v. Continental Ins. Co. of N.Y., 112 So.2d 680 (1959). The court also cited Gerhard v. Travelers Fire Ins. Co., *supra*, with approval of its definition of windstorm, as well as Fidelity-Phoenix

Fire Ins. Co. v. Board of Education, 204 P.2d 982 (Okla. 1948), which sought to define by example a windstorm event:

> "An example of judging the quality of the wind by its effect is to be found in Atlas Assur. Co., Ltd. v. Lies, 70 Ga.App. 162, 27 S.E.2d 791, 795, where the court approved an instruction of the trial court wherein it is declared 'if you find that the wind blew hard enough to blow a tree down, then that would be the same as a windstorm, if the wind was that hard.' We do not hold that the blowing down of the plum tree above referred to (such a tree was blown down in the storm made the basis of the claim in Fidelity-Phenix) establishes the fact of a windstorm as a matter of law, but we do hold that fact to be competent evidence touching the force and violence of the wind and that same together with other matters recited were sufficient to sustain the finding of the jury that a windstorm was the proximate cause of the falling of the roof."
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> Fidelity-Phenix Fire Ins. Co. v. Board of Education, *supra*, at 985.

23. The test to be applied by a court in determining whether there is ambiguity "is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood them to mean." In determining whether an ambiguity exists, a court should apply the common interpretation of the language alleged to be ambiguous. "This means that the terms of an insurance policy should be given a rational and practical construction." State Farm Fire & Casualty Co. v. Slade, 747 So.2d 293, 308-309. In determining the common meaning of the terms of an insurance policy, the Alabama Supreme Court has looked to dictionary definitions. Slade, *supra*, citing Emergency Aid Ins.

Co. v. Dobbs, 263 Ala. 594, 83 So.2d 335 (1955). In *Webster's New Twentieth Century Dictionary of the English Language (Unabridged 1962)*, "windstorm" is defined as "a storm with a violent wind accompanied by little, if any rain or snow." In *Webster's Ninth New Collegiate Dictionary (1983)*, it is defined as "a storm marked by high wind with little or no precipitation." The *Merriam-Webster OnLine Dictionary* defines windstorm as "a storm marked by high wind with little or no precipitation." And, the on-line *Visual Thesaurus* states windstorm is "a violent weather condition with winds 64-72 knots (11 on the Beaufort scale) and precipitation and thunder and lightning."

24. The following multi-jurisidictional cases and treatise address the definition of windstorm: For there to be recovery on a windstorm policy, cause designated in policy must have been proximate and not remote cause of the loss, particularly where policy requires it to be direct cause of loss. Grain Dealers Mut. Ins. Co. v. Belk, 269 So. 2d 637 (Miss. 1972); for insured to recover under windstorm rider of fire policy covering "direct loss by windstorm," it must he established by preponderance of evidence that windstorm of itself was sufficient to, and did, cause alleged damage to insured property, even though there may be other contributing causes. Lewis v. St. Paul Fire & Marine Ins. Co., 155 W.Va. 178, 182 S.E.2d 44 (1971); it is necessary that windstorm be of such force that it may be deemed dominant and efficient cause of building's collapse; evidence failed to establish that collapse of cotton warehouse which had been deteriorating for some time was caused by wind so as to be within windstorm coverage of policy. Beattie Bonded Warehouse Co. v. General Acc. Fire

& Life Assur. Corp., 315 F. Supp. 996 (D.S.C. 1970); "windstorm" is wind of sufficient force to proximately cause damage, by its unaided action or by projecting some object, to ordinary condition of thing insured within meaning of named peril policy covering loss caused by windstorm. Koory v. Western Cas. & Sur. Co., 153 Ariz. 412, 737 P.2d 388 (1987); wind of such force and violence is the unusual, rather than the usual. Lumbermens Mut. Cas. Co. v. Ely, 253 Md. 254, 252 A.2d 786 (1969). Additionally, "[a] 'windstorm' need not have either the cyclonic or the whirling features which usually accompany tornadoes or cyclones, but *it must assume the aspect of a storm - - that is, an outburst of tumultuous force.* In the absence of a definition or limitation in the policy, a windstorm must be taken to be a wind of *sufficient violence* to be capable of damaging the insured property either by its own unaided action or by projecting some object against it, assuming the property to be in a reasonable state of repair." 43 Am Jur 2d, Insurance, § 468 (1982) (emphasis added to original).[2]

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[2] Moreover, in cases involving the issue of whether the loss was due to windstorm or the construction or condition of the insured property, the question of proximate cause has been treated as an issue of fact.

In North British & Mercantile Ins. Co. v. Sciandra, 54 So.2d 764 (Ala. 1951), plaintiff suffered damage to property which he alleged was caused by lightning or windstorm, risks covered by a policy of insurance that had been issued by the defendant. The defendant contended that the loss suffered by the plaintiff was due to the fact that the building was not properly constructed and that an accumulation of water on the roof caused it to collapse. In affirming the denial of defendant's motion for new trial following the jury's verdict for plaintiff, the court stated, "There was evidence to support the defendant's theory that the collapse of the roof was due to an accumulation of water on top of an improperly constructed building. But on this question, the evidence was in sharp conflict. *The jury found against the defendant on this issue. It was for the jury to determine which witnesses to believe*." 54 So.2d at 766 (emphasis added). The court continued,

> "We are not willing to say that the jury would not have been justified in finding that there was a windstorm at the time the insured property was damaged merely because the velocity of the wind did not exceed 31 m.p.h. *We think the question as to whether or not there was a windstorm was one for the jury.*
> " . . . .
> "In the very nature of things, a difficult question is raised as to

25. Additionally, in Friedman v. Employers' Fire Ins. Co., 336 Ill. App. 140, 83 N.E.2d 40 (1948), the damaged property was a large skylight in plaintiffs building which suffered a partial collapse, and the plaintiff offered evidence from readings at an airport 8 miles distant which showed that on the day the injury occurred a sustained wind of about 24 miles-per-hour was blowing which reached a maximum gust of 31 miles-per-hour, but no testimony was introduced by the plaintiff tending to show that a windstorm took place in the immediate area of the damaged building. The defendant insurer contended that the collapse of the skylight was due to the fact that it was badly corroded about the metal sills and generally in a poor state of repair, and asserted that the damage could not have been caused by wind because only a moderate breeze prevailed on the day of the occurrence of the damage. The court stated, in *reversing a judgment entered on a verdict for the plaintiff*, that in order to sustain the verdict it would be necessary to infer that a wind of sufficient velocity and force to cause the damage in question had prevailed in the area of the insured building,

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> just what cause the roof of the insured building to collapse. *We think the issue is one which is peculiarly within the province of the jury to decide. We hold, therefore, that in this case the question as to whether or not the roof was caused to collapse by a windstorm was for the jury's determination.*" 54 So.2d at 768 and 769 (emphasis added).

In Danielson v. St. Paul Fire & Marine Ins. Co., 256 Minn. 283, 98 N.W.2d 72 (1956), it was undisputed that the insured property, a barn which collapsed, was in some respects in seriously deteriorated condition, the evidence showing that some of the sills and uprights were rotted; that there was "waving" in the roof; that the building was 18 inches to 2 feet out of plumb; and that the barn door was out of line and could not be closed. It further appeared from the evidence that the wind had been blowing strongly over a period of several days preceding the fall of the barn, reaching gusts on one day of 25 miles-per-hour, and on another of 38 and occasionally 46 miles per hour, but the collapse occurred on a day which was comparatively calm. The insurer contended that the fall was due to deterioration of the structure, and the insured asserted that it was the result of the action of the high winds, and the court stated, in affirming judgment for the insured, that the cause of the fall was a *fact question for the jury.*

and to again infer that such wind had caused the damage in question, which inferences, said the court, were not supported by the evidence.[3]

D. Bad Faith/Reliance on Expert Opinion

26. The tort of bad faith is an intentional tort. From its inception in 1981, through the most recent decisions of the Supreme Court of Alabama, the bad faith cause of action has been recognized as an intentional tort, and the requisite intentional conduct has been carefully preserved. Jones v. Alfa Mut. Ins. Co., 875 So. 2d 1189 (Ala. 2003); Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1981); State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 303 (Ala. 1999). As such, it cannot survive a motion for summary judgment absent proof tested against the "clear and convincing" standard of each of its elements: "[A] plaintiff, in order to go to the jury on a claim [alleging intentional tortious conduct], must make a stronger showing than that required by the "substantial evidence rule" as it applies to the establishment of jury issues in regard to tort claims generally. . . ." ITT Speciality Risk Services, Inc. v. Barr, 842 So.2d 638, 646 (Ala. 2002), citing Hobbs v. Alabama Power Co., 775 So.2d 783, 787 (Ala. 2000), quoting Lowman v. Piedmont Executive Shirt Mfg. Co., 547 So.2d 90, 95 (Ala. 1989).

27. The basic elements of proof of a bad faith claim are: (a) the existence of

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[3] See, additionally, Jay Bee Warehouse Co. v American Eagle Fire Ins. Co., 270 F.2d 883 (7th Circuit 1959; Glens Falls Ins. Co. v Browning, 228 Ark 1087, 312 S.W.2d 335 (1958); Druggist Mut. Ins. Co. v Baker, 254 S.W.2d 691 (Ky. 1952); Hayward v Carolina Ins. Co., 51 So.2d 405, reh. den. 52 So.2d 468 (La. 1952); Bogalusa Gin & Warehouse v Western Assur. Co., 6 So.2d 740 (La. 1942); Albert Lea Ice & Fuel Co. v United States Fire Ins. Co. 58 N.W.2d 614 (Mn. 1953); and Wulf v. Farm Bureau Ins. Co. of Nebraska, 190 Neb. 34, 205 N.W.2d 640 (1973).

an insurance contract between the parties and a breach of same; (b) an intentional refusal to pay the claim; (c) the absence of any reasonably legitimate or arguable reason for such refusal – the absence of a debatable reason; (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason. When the species of bad faith is asserted to be that of the "extraordinary" or "abnormal" kind, such as the intentional failure to determine the existence of a lawful basis to be relied upon – bad faith failure to investigate – plaintiff is also required to prove that: (e) the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. Nat. Sec. Fire & Cas. Ins. Co. v. Bowen, 417 So.2d 179, 183 (Ala. 1979); State Farm Fire & Cas. Ins. Co. v. Slade, *supra*, at 303-307, 316-319; Acceptance Insurance Co. v. Brown, 832 So.2d 1, 16-17(Ala. 2001); Employees' Benefit Association v. Grissett, 732 So.2d 968, 975-976 (Ala. 1998).

28. The "directed verdict on the contract claim standard" was set forth in National Savings Life Ins. Co. v. Dutton, 419 So.2d 1357 (Ala. 1982). Recognizing the plaintiff's burden to be a heavy one, the court stated that in order to recover, the plaintiff must establish that he is *entitled* to a directed verdict on the contract claim, and thus *entitled to recover on the contract a claim "as a matter of law*." Ordinarily, if the evidence produced by either party created a fact issue on the contract claim, thus legitimating the carrier's denial of same, the tort claim fails and is not to be submitted to the jury. Dutton, *supra*. The Dutton court set forth the "directed verdict" test to be applied to "normal" or "ordinary" cases and observed the test was not to apply to every bad faith case; it is an objective standard to measure

whether the plaintiff has met his burden.

29. Employee's Benefit Assoc. v. Grissett, *supra*, describes the "abnormal" bad faith claim: "The rule in 'abnormal' cases dispensed with the predicate of a preverdict JML for the plaintiff on the contract claim if the insurer had recklessly or intentionally failed to properly investigate a claim or to subject the results of its investigation to a cognitive evaluation. . . . A defendant's knowledge or reckless disregard of the fact that it had no legitimate or reasonable basis for denying a claim may be inferred and imputed to an insurer when it has shown a reckless indifference to facts or proof submitted by the insured." 732 So.2d at 976, citing Blackburn v. Fidelity & Deposit Co. of Maryland, 667 So.2d 661 (Ala. 1995); Thomas v. Principal Financial Group, 566 So.2d 735 (Ala. 1990); Gulf Atlantic Life Ins. Co. v. Barnes, *supra*, at 924. "So, a plaintiff has two methods by which to establish a bad-faith refusal to pay an insurance claim: he or she can prove the requirements necessary to establish a 'normal' case, or, failing that, can prove that the insurer's failure to investigate at the time of the claim presentation procedure was intentionally or recklessly omissive." 732 So.2d at 976.

30. The court in State Farm Fire & Cas. Co. v. Slade, *supra*, at 318, again sought to clarify the plaintiff's burden in the "abnormal" case:

> "Therefore, we reject the Slades' argument that in the abnormal bad-faith case in which the insurer fails to properly investigate the insured's claim contractual liability is not a prerequisite to bad-faith liability, and the Slades' argument that the tort of bad faith provides a cause of action that is

> separate and independent of an insurance contract. In so doing, we make it clear that in order to recover under a theory of an abnormal case of bad-faith failure to investigate an insurance claim, the insured must show (1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review and (2) that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured's claim.
>
> "This is nothing new. Under the elements established in *Bowen*, supra, the plaintiff has always had to prove that the insurer breached the insurance contract. Practically, the effect is that in order to prove a bad-faith-failure-to-investigate claim, the insured must prove that a proper investigation would have revealed that the insured's loss was covered under the terms of the contract. This result preserves the link between contractual liability and bad-faith liability required by *Chavers*, supra, and *Dutton*, supra."
>
> 747 So.2d at 318.

31. Understanding the court's historical use of the term "refuse" in the context of its earlier decisions in bad faith cases, the Slade court's use of the term "refused" in describing the abnormal case preserved the requirement of intentional conduct by the insurer to support a claim of bad faith. See, e.g., Chavers v. National Sec. Fire & Cas. Co., *supra*, at 6-7 (insurer cannot "willfully refuse to evaluate or honor a claim," and requiring a "refusal coupled with actual knowledge" to establish bad faith); LeFevre v. Westberry, 590 So. 2d 154, 162 (Ala. 1991) ("[A] cause of action for bad faith arises only 'where the insurer has acted with

the conscious intent to injure.'"); Davis v. Cotton States Mut. Ins. Co., 604 So. 2d 354, 359 (Ala. 1992) ("there must be refusal to pay, coupled with a conscious intent to injure"); Harrington v. Guaranty Nat'l Ins. Co., 628 So. 2d 323, 326 (Ala. 1993) (same); United Ins. Co. of America v. Cope, 630 So. 2d 407, 411 (Ala. 1993) (an insurer cannot avoid the obligation to pay a valid claim "by deliberately refusing to determine whether a claim is valid"); see also Berry v. United of Omaha, 729 F.2d 1127, 1129 (11th Cir. 1983) ("[R]efusal to pay is a tortuous act that cannot be erased by subsequent payment ... [t]he affirmative act, not the condition of nonpayment, should be the focus of the courts' inquiries."); Neal v. State Farm Fire & Cas. Co., 908 F.2d 923, 926 (11th Cir. 1990) (holding that a plaintiff bringing a bad faith claim on a theory of constructive denial must still prove "wrongful intent" to show a tortuous refusal to pay on the part of the insurer). Thus, under Slade, the recklessness of an insurer's investigation alone does not establish bad faith. To the contrary, as in Barnes, the plaintiff in an abnormal bad faith case must show that the reckless investigation resulted in an intentional and wrongful refusal to pay that constituted a breach of the insurance contract.[4]

32. The existence of a legitimate basis for refusing payment forecloses either

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[4]

There should be no question that bad faith may not be proven in the "abnormal" case by simply demonstrating "reckless" conduct. In dicta to Employees' Benefit Association v. Grissett, the court wrote, "We have come very far from Justice Jones's concurrence in *Continental Assurance Co. v. Kountz*, 461 So.2d 802, 810 (Ala. 1984), where he expressed concern that indiscriminate references to recklessness might cause confusion that could lead to the imposition of liability for bad faith **without proof of an intentional injury**." 732 So.2d at 976, n. 4.

Also, in Jones v. Alfa Mut. Ins. Co., *supra*, the court expressly rejected the trial court's determination that the bad faith claim was a "negligence based" claim which accrued at the time of damage, not discovery, and was thus barred by the statute of limitation. Instead, because bad faith is an intentional tort, the court held that the cause of action accrued either upon the event of the bad faith refusal, or upon the knowledge of facts that would reasonably lead the insured to a discovery of the bad faith refusal. 875 So.2d at 1191-1192.

the "normal" or "abnormal" claim of bad faith. Whether denominated a "normal" or an "abnormal" case, the existence of a legitimate basis for refusing to pay a claim has been held to bar a claim of bad faith. In the initial formulation of the tort, bad faith was found only where there was "no lawful basis for the refusal' or the "intentional failure to determine whether or not there was any lawful basis for such refusal." Chavers, 405 So. 2d at 7. Explaining the significance of the Chavers "intentional failure to determine" tier (which was later recognized as the "abnormal" form of bad faith), the Alabama Supreme Court emphasized, "Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be liable in an action based upon the tort of bad faith." Barnes, 405 So. 2d at 924. Barnes became the law of the Eleventh Circuit in State Farm Fire and Cas. Co. v. Balmer, 891 F.2d 874 (11th Cir.), cert. denied, 498 U.S. 902 (1990). In Balmer, the Eleventh Circuit concluded: [H]owever recklessly an insurer conducts its investigation, a bad faith claim cannot succeed where the insurer had an arguably lawful basis for denying the claim. "When a claim is "fairly debatable," the insurer is entitled to debate it, whether the debate concerns a matter of fact or law.' National Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982) (citation omitted). A debatable reason for denying a claim is 'an arguable reason, one that is open to dispute or question.' Id. If the evidence offered by the insured 'fails to eliminate any arguable reason for denying payment, any fairly debatable reason on a matter of fact or a matter of law, he cannot recover under the tort of "bad faith refusal."' Balmer, 891 F.2d at 875-876. The holding of the Court in Balmer was later cited approvingly by the Supreme Court of Alabama in Weaver v. Allstate Ins. Co.,

574 So. 2d 771 (Ala. 1990): With regard to Weaver's allegation that Allstate intentionally failed to adequately investigate the accident, we agree with the trial court that no triable issue was presented on this issue, because we hold that Allstate's investigation established a legitimate or arguable reason for refusing to pay Weaver's claim, which is all that is required. Weaver, 574 So. 2d at 774-775 (citing Balmer, supra).

33. Alabama recognizes the principle that an insurer's reliance on the advice of an expert in the investigation and evaluation of an insurance claim is an absolute defense to an allegation of bad faith. In Chavers v. National Sec. Fire & Casualty Co., *supra*, the court noted, "National Security would have us recognize advice of counsel as an absolute defense under these circumstances. While advice of counsel, along with all the other relevant factors, may be considered by the trial judge in his determination whether the strongest tendencies of the evidence, if believed, make out a case for the jury on the 'lawful basis for refusal' issue, it is not necessarily an absolute defense. Where, as here, the advice of insurer's counsel is not founded on *professional evaluation of the credibility of admissible evidence*, but instead is confined totally to *inadmissible and unproved hearsay* evidence, absent any ongoing investigation relative thereto, such advice cannot serve, as a matter of law, to insulate the insurer client from bad faith liability." 405 So.2d at 8 (emphasis added). Consequently, if the advice of an expert *is* founded on a *professional evaluation* of evidence, the insurer is insulated as a matter of law from bad faith liability.

34. Davis v. Cotton States Mut. Ins. Co., 604 So. 2d 354, 359 (Ala. 1992),

states, "In other circumstances reliance on the advice of informed counsel has often been sufficient in itself to establish good faith or to rebut a claim of bad faith. Lynch v. Green Tree Acceptance, Inc., 575 So. 2d 1068 (Ala. 1991); Hanson v. Couch, 360 So. 2d 942 (Ala. 1978); and Uphaus v. Charter Hospital of Mobile, 582 So. 2d 1140 (Ala. Civ. App. 1991). There is no indication in the record that the insurers were not entitled to rely on their lawyer's advice. It is a reasonable inference from these facts that the insurers' complaint for a declaratory judgment was filed with the aim of resolving the doubt raised by their lawyer's advice." In Lynch, *supra* at 1070 (Ala. 1991), the defense of "advice of counsel" was applied in a suit for malicious prosecution: "It is well settled in this state that advice of counsel, honestly sought and acted on in good faith, supplies an indispensable element of probable cause for legal action and is a complete defense to an action for malicious prosecution." See, also, Katrishen v. Allstate Ins. Co., 2007 U.S. Dist. LEXIS 32024 (D. Ala. 2007): "After a thorough investigation, which included obtaining the advice of legal counsel who conducted Katrishen's examination under oath and reviewed the complete file and applicable law, Katrishen's claim was denied by Allstate."

35. An insurer's reliance on the advice of an expert in the investigation and evaluation of an insurance claim as an absolute defense to an allegation of bad faith included the advice of a medical expert in Mordecai v. Blue Cross-Blue Shield of Alabama, Inc., 474 So. 2d 95 (Ala. 1985). The Mordecais filed a two-count complaint against Blue Cross alleging breach of contract for health insurance and bad faith failure to pay for the expenses of

continuous home-nursing care. Blue Cross denied both counts, contending that the private duty nursing care was determined by Blue Cross to be medically unnecessary. Blue Cross moved for summary judgment on both counts, with a supporting affidavit of Dr. Stephen L. Stigler, in which he opined that the care rendered to Mrs. Mordecai was not medically necessary and did not require skilled nursing services. In these respects, the Mordecais alleged, "Furthermore, Dr. Stigler, upon whose advice Blue Cross relied in making its determination of no medical necessity and its determination that the services rendered were custodial in nature and not covered under the contract, quite obviously overlooked certain portions of the nurse's summaries and notes which revealed that a professional nurse was necessary to perform the service." In affirming summary judgment for Blue Cross on the count for bad faith, the court stated,

> "The evidence showed that Blue Cross accepted and evaluated documents supporting the claim. We reject the Mordecais' claim that Blue Cross was under a duty to do more than review the documents claimant submitted to it. Whether Blue Cross correctly determined that the home nursing care rendered to Mrs. Mordecai was not 'medically necessary' can be tried in the breach of contract action still pending between these parties.
>
> "In summary, the Mordecais, in brief, state that 'the terms of the contract which require Blue Cross to make a determination of medical necessity in each case where a claim is submitted to [it] under the contract carry with them a duty and obligation of fair dealing on the part of Blue Cross which extends beyond a mere review of nurses' notes as occurred in this case.'

> "We recognize that we are reviewing a summary judgment, but we are satisfied from the record that the trial court had before it evidence showing that the movant was entitled to a summary judgment on the bad faith claim."
>
> 474 So.2d at 98-99.

36. An insurer's reliance on the advice of an expert in the investigation and evaluation of an insurance claim as an absolute defense to an allegation of bad faith included the advice of an accounting expert in Insurance Co. of North America v. Citizensbank of Thomasville, 491 So. 2d 880 (Ala. 1986). Citizensbank obtained a banker's blanket bond from INA in 1975 which included fidelity coverage for fraudulent or dishonest acts of the officers and employees of the bank. In 1979, the bank filed nine proof of loss forms with INA claiming certain losses suffered by it were the result of dishonest and fraudulent acts by a former bank president and chief executive officer. INA subsequently spent 14 months in its investigation and evaluation of the claims, including investigation by a licensed C.P.A. and attorney, Virgil Sandifer. The bank sued for bad faith and alleged a constructive denial of its claim. The court, in reversing and remanding a jury verdict for the bank, wrote,

> "The appellant, INA, argues that the first tier of the test is not met because the jury only awarded a portion of the contract claim, and therefore that a lawful basis, or at least a debatable reason, must have existed for the refusal of the entire amount being claimed. Furthermore, INA argues that the claims were properly investigated, INA having hired a CPA to perform the investigation and the investigation having entailed over 400 hours of

work and the compilation of a 17-volume report.

"On the other hand, the appellee, Citizensbank, argues that INA never had a lawful basis for refusing the claims, and that the fact that Thomas Branch was indicted and was found guilty in regard to two of the claims clearly shows the absence of a lawful basis for refusal. Furthermore, Citizensbank argues that the investigation by INA was inadequate and was merely preparation for trial, and that the investigation was designed solely to support its own position."

[491 So.2d at 882].

"In the ordinary case, in order for the plaintiff to recover on a bad faith claim, the plaintiff must show that if the contract claim had been tried on the date of the denial, the plaintiff would have been entitled to a directed verdict; i.e., information received by the insurer after the date of the denial is irrelevant to the determination of whether the insurer denied at that date in bad faith. Although no express denial was ever made by INA in this case, we will consider that a constructive denial occurred at the end of the 24-month limitation set in the terms of the bond for filing suit to recover under the bond. Therefore, we must examine what was before INA at the time of the constructive denial.

"On the date of the constructive denial, INA had in its possession the results of an extensive investigation into these claims by Virgil Sandifer. Sandifer's testimony indicated that he is a well qualified specialist in the area of bank audits, fraud investigations, and insurance claim investigations. He is licensed both as a C.P.A. and as an attorney.

" . . . .

"The investigation report included a recommendation by Sandifer that the claims not be immediately paid.

" . . . .

"The findings of Sandifer, and the recommendation that INA had at the time of the constructive denial, are reflected in the following portion of Sandifer's testimony at trial:

> 'Q. From your investigation and study of the documentation and the bank records and the statements of witnesses and things you have done in this case which you have described to the jury, can you tell us if you found anything of a fraudulent or dishonest nature on the part of Mr. Tom Branch? . . .
>
> 'A. No, sir.
>
> '"Q. From your investigation and study of the documentation and the bank records and the statements of witnesses that have been described, do you find anything that indicated Tom Branch had received any financial benefit from any of the transactions we have talked about here?
>
> 'A. No, sir.

"The 'manifest intent' of Mr. Branch was not easily determinable and was debatable in this case.

"We are of the opinion that Citizensbank was not entitled to a directed verdict on the contract claim, because there was conflicting information on most, if not all, of the individual claims. Thus, there was a genuine dispute about the validity of the claims, and that dispute provided a debatable reason for

> denying coverage. When a claim is debatable, an insurance company is entitled to debate it. . . . We believe that in this case, INA was entitled to debate the claim and perhaps was obligated to its stockholders to do so. Looking at the decision in retrospect, if INA had not debated the claims but rather had paid them in full to avoid a possible bad faith action, it would have improperly paid more than $300,000 of corporate funds to Citizensbank."
>
> 491 So.2d at 884.

37. If any of the reasons for denial is at least "arguable," the bad faith claim will not lie. McCoughlin v. Farm Bureau Mutual Casualty Co., 437 So.2d 86 (Ala. 1983). Bad faith is not a judgment or negligence . . . it involves a dishonest purpose and means a breach of a known duty, *i.e.*, good faith and fair dealing, through some motive of self-interest or ill will. Gulf Atlantic Life Ins. Co. v. Barnes, *supra*.[5]

IV. DEFENDANT'S ARGUMENT OF CONTROLLING LEGAL AUTHORITY

A. General Burden of Proof

38. As will be discussed below, Farm Bureau has prima facie established that there is no genuine issue of material facts as to any allegation made against it by plaintiffs.

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[5] Bad faith also does not necessarily exist even if the claim is judged to be a legitimate one. In short, whether a claim is ultimately judged to be payable and therefore a meritorious one is not necessarily evidence of bad faith. The focus is on the events and circumstances surrounding the investigation and leading up to the ultimate denial of the claim rather than on the subsequent determination that a claim is a valid one that comes after the initiation of litigation. Davis v. Cotton States Mutual Insurance Co., *supra*. Further, as in the instant case, partial payment of a claim is evidence which should be considered along with all other evidence to determine the insurer's intent at the time denial is made. Partial payments, or offers to pay, may be considered as evidence of a lack of a dishonest purpose or ill will. See, *generally*, Aetna Life Insurance Co. v. Lavoie, 470 So.2d 1060 (Ala. 1984).

Plaintiffs have not conversely through discovery of any fact or matter established by substantial evidence to contradict the evidence presented by Farm Bureau. Therefore, Farm Bureau is entitled to summary judgment in its favor (see case citations in discussion of controlling legal authority, *supra*).

B. Fraud/Misrepresentation

39. As noted in Farm Bureau's discussion of controlling legal authority, plaintiffs' claim of fraud – of any species – is barred as against this defendant by *res judicata* by virtue of the court's granting of summary judgment for Gloria Williams on December 21, 2006. Consequently, Farm Bureau will not cite or argue any controlling legal authority in this respect, and it is entitled to summary judgment on plaintiffs' claims of fraud and misrepresentation.

C. Breach of Contract/Windstorm

40. As stated, the policy of insurance between Farm Bureau and plaintiffs is a "named peril" or "specified risk policy." Consequently, for alleged damage to a structure caused by a named peril to be covered under the terms of the policy, same must be caused by one more or more of the named perils. In this case, the named peril at issue is windstorm, which is not defined in the policy. It has been otherwise defined by precedent, however, as a "wind of such tumultuous force and sufficient velocity as to proximately cause injury to the insured's property." Great American Ins. Co. v. Railroad Furniture Salvage of Mobile, Inc., *supra*. Moreover, in the absence of definition or limitation in the policy, the distinction

between "windstorm" and "wind" is that a "windstorm must be taken to be a wind of sufficient velocity to be capable of damaging the insured property." Gerhard v. Travelers Fire Ins. Co., *supra*.

41. Since plaintiffs' policy of insurance is a named peril policy, therefore, plaintiffs must have submitted substantial evidence showing that the damage to their poultry houses was caused by a wind of such tumultuous force and sufficient velocity to be capable of causing the damage, in order to recover for breach of contract against Farm Bureau. Speculative evidence of possible theories for the damage is not substantial evidence as required for a named peril policy. State Farm Fire & Cas. Co. v. Shady Grove Baptist Church, *supra*; Cont'l Cas. Co. v. Plantation Pipe Line Co., *supra*.

42. In determining whether the plaintiffs submitted substantial evidence of a windstorm of tumultuous force and velocity, it is first undisputed that Farm Bureau employee Chuck Whitlock inspected the poultry houses with Ellis Murphree on September 9, 2004, and obtained photographs and noted on a claim activity log that he had done so and that the insured, Murphree, "**does not know what happened but something happened to make walls (of the poultry houses) lean**." ¶ *3, supra*. Mr. Whitlock subsequently retained Jade Engineering to inspect the poultry houses and gave the following instructions: "Please inspect the attached poultry house and **determine the cause of loss for the damage**. The walls of the (sic) both poultry houses are leaning." ¶ *4, supra*. He also made the following entry in his file: "On September 9, the property was inspected and the insured was present

at the time of the inspection. It was obvious that the walls of the poultry houses were leaning, however, there was (sic) **no visible signs of obvious wind damage to the poultry houses or any other surrounding structures**." ¶ *5, supra*.

43. It is undisputed that Jade's October 6, 2004, report addressed to Whitlock at Farm Bureau in Cullman, Alabama, stated in part the following observations and conclusions:

> "During our inspection we met with Mr. Murphree who explained that he is not sure how old his two poultry houses are. He said that he has only owned them for three years. He said that **in 2004, several storms with high winds** passed through the area of his poultry farm. He said that **during the last storm metal roofing was blown off of the roof and he had to be reattach it in the rain**. He said that he **did not notice any evidence of wall lean in his two poultry houses until the last time the chickens were caught—several weeks ago**. We scanned the surrounding property and observed **no evidence of felled trees**. Mr. Murphree verified that no trees were blown down during the previous storms.
>
> • • • •
>
> "We found that post lean [in poultry house building one (1)] **varied from north to south with the majority of lean toward the east**. **Some posts near the south end were found to be plumb or leaning toward the west**.
>
> • • • •
>
> "We walked along the east and west walls of

Building #2 and measured the amount of lean at posts which were spaced 25 feet on center. The maximum lean we found was 3½ inches toward the west in the west wall. **In fact, we found that nearly all of the posts in this building leaned toward the west. This is opposite the direction of lean in Building 1**.

• • • •

"**Assessment and Conclusion**

"Based on our site visit, inspection observations and post inspection research, it is our firm's opinion that the **post lean in both buildings is fairly typical for an estimated 20-year old poultry house** with post embedment depths less than 30 inches. The **varying amount of east and west lean present in the buildings can be attributed to inadequate post embedment depth and long term wind exposure**. The structural analysis of these buildings revealed that the posts need at least 4 feet of embedment into "stiff' soil in order to resist code specified wind loads. The east and west post lean in both buildings has probably been caused by long term exposure to moderate winds (less than 70 mph) and occasional exposure to high winds. Our structural analysis suggests that if a code specified 70 mph wind had occurred, the buildings would probably have sustained great damage and very possibly collapsed.

"The largest amount of wall lean found for both buildings was in the east/west direction. We found that end walls of the east building leans inward toward the center of the structure. **We feel that the end walls leaning towards the center of the building is the result of wenching equipment up and down that is attached to the**

bottom of the roof trusses."

¶ *8, supra*.

44. It is further undisputed that Ellis Murphree has no judgment or knowledge of any weather event or storm which would have caused the poultry houses to lean and that simply because the houses were leaning that Farm Bureau should have paid the insurance claim. ¶ *11, supra*. Mr. Murphree later submitted correspondence from his first cousin, Doug Murphree (*see Ellis Murphree Deposition, page 78*), to Farm Bureau which purported to support his contentions as related to the claimed damage. This correspondence, however, did not address the "leaning" of the poultry houses, which was the claim made to Farm Bureau. Additionally, Farm Bureau employee Leon Turner carefully considered the letter from Doug Murphree but reached the following conclusions:

> "In reviewing and assessing the letter from Murphree Construction, I considered that Doug Murphree did not represent himself to be a registered professional engineer and did not indicate any experience in structural engineering or design and testing. I further considered that his inspection did not appear to have taken place until more than three months after the date of inspection by Jade Engineering and that **same addressed only repairs to the roofs on each house and not the leaning of the poultry house walls, which was the claim reported to Farm Bureau**. The statement in the Murphree Construction letter was consistent with the statement in the Jade Engineering report made by Ellis Murphree to Jade that 'during the last storm metal roofing was blown off of the roof' and had to be reattached in the rain. **I considered that**

> **this statement was not made in reference to any single windstorm event by Murphree, only that 'in 2004, several storms with high winds passed through the area of his poultry farm.'** I also considered, in reviewing the Murphree Construction letter, that Ellis Murphree stated to Jade that 'he did not notice any evidence of wall lean in his two poultry houses until the last time the chickens were caught – several weeks ago.' I further considered the finding of the Jade report that '**[w]e scanned the surrounding property and observed no evidence of felled trees. Mr. Murphree verified that no trees were blown down during the previous storms**.' I considered that the lean in poultry house one (1) varied as stated in the Jade report and that the lean in poultry house two (2) was opposite to that of house one (1). **If a single windstorm event had occurred, in my judgment, the houses would be leaning consistently in the same direction**. Additionally, the engineering report found that the leaning of the end walls of the poultry houses was due to the winching of equipment and not from windstorm. Consequently, I found after a thorough review of the engineering report and the Murphree Construction letter that there was **no substantial evidence that a windstorm event had occurred which caused the leaning to the walls of the poultry houses, and the Murphree Construction letter was not inconsistent with this finding**.
>
> *Affidavit of Leon Turner, ¶ 9.*

45. Consequently, plaintiffs did not and have not presented substantial evidence from any source that the damage to the poultry houses resulted from the enumerated cause of windstorm, defined as a wind of tumultuous force and sufficient velocity to have

caused the damage. Farm Bureau is therefore entitled to summary judgment on plaintiffs' claim of breach of contract.[6]

D. Bad Faith

46. Plaintiffs have presented no clear and convincing evidence that Farm Bureau acted in bad faith in the investigation and denial of their claim, either of the "normal" or "abnormal" variety, and Farm Bureau is entitled to summary judgment on the claim for bad faith.

47. In respect to the "normal" variety of bad faith, plaintiffs are not entitled to a directed verdict against Farm Bureau on the breach of contract claim for the reasons discussed in immediately preceding paragraphs. Thus, plaintiffs have not and cannot comply with the "Dutton rule": if the evidence produced by either party creates a fact issue on the contract claim, legitimating the insurer's denial of the claim, the tort claim fails and is not submitted to the jury. National Savings Life Ins. Co. v. Dutton, *supra*. To be certain, not only is there at minimum a fact issue on the contract claim, it is more correct that Farm Bureau is entitled to summary judgment on same because of plaintiffs' failure to present substantial evidence in support of their claim.

48. In respect to the "abnormal" variety of bad faith, plaintiffs have presented no evidence that Farm Bureau intentionally failed to properly investigate the claim

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And even if plaintiffs *had* presented evidence of the cause of loss as windstorm, same raises a question of fact for the jury which would preclude plaintiffs from a directed verdict on the contract claim, thereby foreclosing any submission of normal bad faith to the jury, as addressed in argument immediately following this footnote. North British & Mercantile Ins. Co. v. Sciandra, *supra*.

or intentionally failed to subject the results of its investigation to a cognitive evaluation. To the contrary, Farm Bureau retained a licensed structural engineer to conduct a thorough and objective inspection of the poultry houses: "A registered and Alabama-licensed engineer (James A. Durham) certified to Farm Bureau that the claimed damage to the Murphree poultry houses was neither the result of nor caused by windstorm. Rather, the engineer certified that particular construction, building, and weather factors, including but not limited to long term exposure to moderate winds, caused the claimed damage to occur. Farm Bureau relied on the certified opinions of the engineer within the circumstances of its overall claim investigation in denying the Murphree claim. The Murphrees did not present substantial evidence to Farm Bureau, either before or after the denial of their claim, that the damage they alleged to their poultry houses was the result of or caused by the named peril of windstorm." *Leon Turner Affidavit, ¶ 10.*

49. No appellate court in Alabama has held that an insurer is not entitled to rely on the opinion of an expert in determining the validity of an insurance claim. To the contrary, Alabama has recognized the principle that reliance on the advice of an expert founded on a "professional evaluation of the credibility of admissible evidence" can, as a matter of law, insulate the insurer from bad faith liability. See, Chavers v. National Sec. Fire & Casualty Co., *supra*. Although the genesis of this principle lies in the context of advice of counsel, the Alabama Supreme Court extended the reach of same into review of medical records by an expert physician (Mordecai v. Blue Cross-Blue Shield of Alabama, Inc., *supra*)

and an expert accountant (Insurance Co. v. North America v. Citizensbank of Thomasville, *supra*). In the context of reliance on the advice of a third-party expert, therefore, there should be no distinction drawn between the advice of a structural engineer and that of an expert legal counsel, physician, or accountant.

50. Farm Bureau had a written and detailed report from a structural engineer stating that the damage resulted from a myriad of other causes, as opposed to correspondence from Ellis Murphree's first cousin which addressed roof damage, not made a part of his claim to Farm Bureau. Plaintiffs have, therefore, presented only speculation as to whether the poultry houses were damaged by windstorm, and even they cannot identify the date when the damage occurred. As the court found in State Farm Fire & Cas. Co. v. Shady Grove Baptist Church, *supra*, "the Church failed to present substantial evidence showing that the collapse of the roof of its building was a result of any one of the enumerated causes contained in the policy. Rather, the testimony elicited several possible causes for the collapse, but substantial evidence as to any one cause was not presented. Further, the testimony of Preston Walker and Hugh Walker bolster this conclusion because their statements concerning their beliefs as to the specific cause of the collapse were speculative. Therefore, their testimony does not rise to the level of substantial evidence." State Farm Fire & Cas. Co. v. Shady Grove Baptist Church, *supra*.

51. In respect to the qualifications of Doug Murphree to opine as to the cause of the damage, he has not been shown to be an expert in structural engineering – unlike

Durham. Although the cases do not state that an "expert" must provide "substantial evidence" in respect to a named peril or specified risk policy before the insured will be found to have put forth "substantial evidence" as to the cause of damage, they do note that an expert's testimony was part of this equation. In Cont'l Cas. Co. v. Plantation Pipe Line Co., *supra*, Plantation's "expert" testified as to the link between a leak in a pipeline caused groundwater contamination, and the court found this to be substantial evidence. Likewise, in Wright v. Commercial Union Ins. Co., *supra*, the 11th Circuit noted, "William Stahl's testimony [plaintiff's expert] was subject to bitter attack by Commercial Union's expert. The evidence presented by Commercial Union, however, does not strip the (expert) opinion rendered by Stahl of its probative value."

52. Farm Bureau has set forth in painstaking detail the steps which it took in the investigation and evaluation of plaintiffs' claim, including but not limited to the retention of a structural engineer. It relied on the engineer's certified opinion that particular construction and building factors caused the claimed damage to occur. Farm Bureau relied on the certified opinions of the engineer within the circumstances of its overall claim investigation in denying the Murphree claim, and consequently, did not intentionally fail to properly investigate the claim or intentionally fail to subject the results of its investigation to a cognitive evaluation. Farm Bureau is therefore entitled to summary judgment on plaintiffs' claim of bad faith.

V. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, it affirmatively appears without dispute that there is no genuine issue as to any material fact, and that Farm Bureau is entitled

to judgment as a matter of law as to all claims alleged in the plaintiffs' complaint. The defendant moves the court to enter summary judgment in its favor pursuant to Rule 56 of the *Alabama Rules of Civil Procedure* and to make said judgment final pursuant to Rule 54(b), costs taxed as paid.

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CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of September, 2007, a copy of the foregoing was served on all counsel of record in this cause by one or more of the following in accordance with the *Alabama/Federal Rules of Civil Procedure*:

[X] AlaFile/CM-ECF electronic filing
[ ] E-mail, delivery receipt requested
[ ] U.S. Mail
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