IN THE CIRCUIT COURT OF CULLMAN COUNTY, ALABAMA

GERRY HOLCOMB; GLENDELL HOLCOMB,	}	
Plaintiffs,	}	
v.	}	**CIVIL ACTION NO. CV-2005-289**
FARM BUREAU INSURANCE OF N.C., INC.; GLORIA WILLIAMS; et al.,	}	
Defendants.	}	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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 Larry McMurrey, attached hereto as Exhibit "B."

D. Deposition testimony of plaintiff, Gerry Holcomb, and cited portions of same which are attached hereto as Exhibit "C."

II. STATEMENT OF UNDISPUTED FACTS

1. It is undisputed that 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 February 15, 2003. *Plaintiffs' Complaint and all paragraphs thereof.*

2. It is undisputed that plaintiffs reported a claim to Farm Bureau on March 17, 2003. On March 18, 2003, Farm Bureau employee Larry McMurrey contacted and obtained a recorded statement from plaintiff, Gerry Holcomb. Mr. Holcomb first expressed understanding that the conversation was being recorded and subsequently granted permission for same. Mr. Holcomb was asked questions and made the following, corresponding responsive statements, among others:

> "Q. And sir could you tell us just in your own words what's happened that has caused this claim to be submitted?
>
> "A. Well I, I just noticed the other day that uh ... uh some of my houses are swaging [sp. swagging] in places and got to checking it out and it was like the rafters are broke in 'em. (PAUSE) and uh ... that's on two houses on G & G, my G & G Farm and on uh ... my farm I got some uh ... (PAUSE)

uh ... don't know what you call 'em, purloins [sp. purlins] or what but they're, they're [swagging] in the middle and need to be replaced and uh ... on uh the uh ... whole thing on both those houses the whole tops needs to be uh ... renailed (TELEPHONE RINGING) that's, that's what I was looking at.

"Q. What, you said you first noticed this uh ... (PAUSE)

"A. ... Well I just one day, when I found out they was gonna cancel the uh ... (BACKGROUND NOISE) all the insurance on 'em, the uh lapse [sp. collapse] insurance, I got the motion [sp. notion] and it's like I told my uh ... agent that how I got not noticing I wanted to get something done with it before they cancel my insurance out on 'em, [collapse], (INAUDIBLE - MUMBLING) insurance.

"Q. (PAUSE) Ok you know what has caused the problem?

"A. Na'll I sure don't.

"Q. Have you ever had a problem with these buildings before?

"A. Na'll.

"Q. (PAUSE) have you had anybody look at it to give you a uh ... uh estimate or give you a uh ... uh views as to what they think the problem is or what needs to be done?

"A. Na'll I sure hadn't, uh ... like I said I didn't even think anything about it to uh ... till the other day got to looking at 'em and seen, then I seen the problems with 'em.

"Q. Ok any additional information that you feel would be of importance to us in uh ... checking into this for you?

"A. To what now?

"Q. Is there any additional information you feel we need to be aware of that would assist us in uh checking into this claim for you?

"A. Uhhh...as far as I know.

"Q. And you understand that I have made a recording of our interview?

"A. Yes.

"Q. And it has been recorded with your permission?

"A. Yes.

"Q. And you certify that the answers you given are true and correct to the best of your knowledge?

"A. Yes."

Affidavit of Leon Turner, ¶ 3; Affidavit of Larry McMurrey, ¶ 3.

3. It is undisputed that Mr. McMurrey noted in the claim file that the insured, Mr. Holcomb, was unsure of what caused the problems with the poultry houses but has problems with purlins on four of same. Mr. McMurrey noted that Holcomb was to call him when the birds were removed from the houses so that an inspection could be made and that this would be about the middle of April, 2003. Mr. McMurrey further noted that he would have

Engineering Design & Testing, Corp. ("ED&T"), a structural engineering firm, inspect the houses with him at that time. *Affidavit of Leon Turner, ¶ 4; Affidavit of Larry McMurrey, ¶ 4.*

4. It is undisputed that Mr. Holcomb contacted McMurrey on April 28, 2003, by telephone and said that his birds had been removed. An inspection was scheduled for May 1, 2003. On that date, McMurrey met with Holcomb and noted the filing in the claim file: "Met with Mr. Holcomb and he showed me damage he has observed to his buildings. He does not know what has caused the damage. I took photos and advised that I would get an engineer to inspect to confirm cause of failure. It appears to me this claim will not be covered but felt an engineer could confirm if there is anything we can help with." McMurrey subsequently contacted Charles Whitley, a licensed and Alabama-certified structural engineer at ED&T who stated that he would call Holcomb and schedule an inspection. *Affidavit of Leon Turner, ¶ 5; Affidavit of Larry McMurrey, ¶ 5.*

5. It is undisputed that Mr. Whitley inspected the poultry houses on May 5, 2003. Mr. McMurrey called Whitley on May 21, 2003, after receiving a call from Holcomb inquiring as to the status of the claim. At that time, McMurrey noted the following in the claim file: "Called Charles Whitley 205-541-9804. He didn't see any storm damage. He will call his office and if report is not in the mail he will have them fax it to me." Later that afternoon, McMurrey received a faxed copy of the engineer's report and noted, "No damage in any of the 3 houses would be covered by our policy." Afterward, McMurrey telephoned Holcomb's

agent, Ms. Gloria Williams, and reviewed the engineering report with her. *Affidavit of Leon Turner, ¶ 6; Affidavit of Larry McMurrey, ¶ 6.*

6. It is undisputed that Mr. McMurrey telephoned Holcomb on May 23, 2003, and left a message for him to return the call. The same was returned that day and a meeting was scheduled on May 27, 2003, with Holcomb at his home to review the engineer's report. Mr. Holcomb met with McMurrey on May 27, and the following was noted in the claim file: "Met with Mr. Holcomb and reviewed his coverage and the report from ED&T. I advised no coverage available for the problems he has with his poultry houses. Gave him a copy of the ED&T report." Thereafter, on May 29, 2003, McMurrey wrote in the claim file, "Received copy of ED&T report and I have reviewed with Mr. Holcomb. I have advised that based on engineer's report there is no coverage under the policy to assist on his claim. I will close file when invoice received and paid from ED&T. File pending invoice." Farm Bureau's claim file was subsequently closed on May 30, 2003. *Affidavit of Leon Turner, ¶ 7; Affidavit of Larry McMurrey, ¶ 7.*

7. It is undisputed that the ED&T report of May 21, 2003, was sent to McMurrey by Whitley and referred to the assignment to evaluate the cause of damage to Holcomb's poultry houses. The report was certified by Whitley on the same date. The engineering report, attached to this affidavit as Exhibit "B," stated in pertinent part:

> "Engineering Design & Testing Corp. (ED&T) has conducted an investigation into the above referenced damage. Mr. Holcomb has reported damage to his poultry houses. The purpose of this

investigation has been to inspect the property, review available information, and evaluate the cause of the observed damage.

"An inspection of the site was conducted on [May] 5, 2003. Present during the inspection was Mr. Holcomb, owner of the property. Figures 1 - 36 contain photographic prints of the facility and the observed damage.

"OBSERVATIONS

"1. Three poultry houses were reported by Mr. Holcomb as being damaged. He stated that he noticed the damage a few weeks prior to ED&T's inspection. According to Mr. Holcomb, there have been no changes in the appearance of the damages and no repairs have been made.

"CONCLUSIONS

"1. The observed damage to the poultry houses owned by Mr. Holcomb is a result of numerous factors. In the first house the observed deflection of the house is caused by the high moisture content of the framing members and trusses. The high moisture content leads to not only the rotting and deterioration of the members, but also weakens the members and causes warping. The Timber Construction Manual provides data on the strength of various types of wood. The provided values are based on wood with a moisture content of less than 19 percent. When the moisture level of the wood rises above 19 percent, factors are applied to reduce the capacity of the wood. With the members in the house having moisture contents as high as 34 percent, the capacity of the members has been reduced.

"2. The leaning of the posts is a result of the

expansion and warping of the wood due to the moisture absorption or of improper construction. Were the leaning due to high winds, the posts on opposite side of the building would have the same slope. The posts on the left side of the building had a slope of one inch in four feet while the right side posts were plumb.

"3. The observed damage .to the second house is a result of the same actions that damaged the first house. The knot in the top chord of the sagging truss has also contributed to the damage. The knot weakens the member, resulting in the member being more susceptible to deflection problems.

"4. The damage to the third house is a result of poor design and an overloading of one truss. The purlins in the house are 2x4's spaced at 24 inches and spanning 12 feet. According to tables provided by the Southern Pine Council, a number 2 Southern Pine 2x4 rafter should span no more than 8 feet and 3 inches when spaced at 24 inches center to center. This span applies for a live load of 20 pounds per square foot and a dead load of 10 pounds per square foot. Thus, the purlins in the third house exceed the allowable span.

"5. The placement of the chains on the deflected truss and the type of damage to the truss are consistent with an excessive load having been applied to the truss. Evidence indicates that a heavy item was hoisted from the truss, resulting in the damage to the chords and the deflection of the truss."

Affidavit of Leon Turner, ¶ 8; Affidavit of Larry McMurrey, ¶ 8.

8. It is undisputed that Mr. Holcomb came by the Farm Bureau office in Cullman, Alabama, on June 30, 2003, and met with McMurrey and brought estimates to rebuild the poultry houses and to remove and reinstall his existing equipment. The estimates were prepared by Mr. Tim Gore at Farmco Builders, Inc., in Albertville, Alabama. Mr. McMurrey noted that the estimates started out by saying, "house has severe wind damage." He additionally noted that he called Whitley at ED&T and asked him to contact Gore to discuss the difference of opinion in the cause of loss and faxed him a copy of the Farmco estimates. Mr. McMurrey contacted me on June 30, 2003, and advised that the claim file would have to be re-opened based on Holcomb's submission of estimates for replacement of the houses "with notation that this is needed due to severe wind damage." The claim file reflects that Whitley attempted repeatedly to contact Gore throughout the month of July, 2003, and McMurrey finally called Holcomb on July 21, 2003, and enlisted his help in contacting Gore and asking him to call Whitley. *Affidavit of Leon Turner, ¶ 9.*

9. It is undisputed that on August 13, 2003, Whitley wrote Gore and attempted to follow-up on a telephone conversation between them in late July of 2003: "I asked you to review your file and specifically address the wind damage to the buildings, detailing the specific areas you felt were wind damaged, and breaking out the cost for wind damage repairs from code issues. Since that time I have received no response. Please contact me at your earliest opportunity so that we can resolve the issue as quickly as possible." *Affidavit of Leon Turner, ¶ 10.*

10. It is undisputed that thereafter, on August 19, 2003, Turner communicated with McMurrey as noted in the claim file via e-mail correspondence:

> "LARRY,
>
> "GERRY HOLCOMB CALLED UP HERE TODAY WANTING A STATUS REPORT ON HIS CHICKEN HOUSE CLAIM. IN LOOKING AT THE FILE, IT APPEARS THAT ED&T AND FARMCO HAVEN'T GOTTEN TOGETHER YET. PLEASE ADVISE THE INSURED ON WHAT THE CURRENT STATUS IS AND SEE IF YOU CAN LIGHT A FIRE UNDER ED&T AND FARM CO. THANKS.
>
> "LEON
>
> "*** Comments from: 4014 - MCMURREY, LARRY; 08/19/03 10:05
> Leon. I've already done so. Mr. Holcomb is aware of the difference of opinion indicated in the report from ED&T and the estimate submitted by Tim Gore. He has been told several tines now that this has to be resolved. I have had ED&T send Tim Gore a letter to get this clarified and they have faxed me a copy of the letter they sent Tim Gore. Tim has sent a response but did not address the "cause" issue and Charles, at ED&T is following up with him on this. This will probably be a compromise settlement but at this time don't have the info to make offer. Larry
>
> "*** Comments From: 2649 - TURNER, LEON; 08/19/03 10:10
> THAT'S FINE. SINCE INSURED APPEARS TO HAVE A SHORT MEMORY, YOU MAY WANT TO DOCUMENT YOUR CONVERSATIONS WITH HIM BY SENDING

A LETTER. THAT WAY, HE WON' T BE ABLE TO CALL UP HERE ALLEGING THAT HE HASN'T HEARD FROM ANYONE.
LEON"

Affidavit of Leon Turner, ¶ 11.

11. It is undisputed that on the same date, McMurrey wrote to Holcomb and stated, in part, "As you know, the 'cause' of loss must be established since your policy only provides coverage for the specific perils listed. We are trying to give your claim every consideration and as a result this issue has to be addressed." Then, in response to an inquiry from Holcomb's Farm Bureau agent, Gloria Williams, McMurrey wrote to her on September 8, 2003, and stated, "Gloria, I don't know if they (Whitley and Gore) have spoken or not. I know that ED&T has sent several letters to Tim Gore at Farmco trying to discuss the 'CAUSE' of the damage rather than the cost of repair. Mr. Holcomb is aware of this and has previously called Raleigh and has been made aware of the situation. ED&T said no wind. Tim Gore at Farmco said wind damage. The disagreement on this has to be resolved. As soon as the problem is resolved with an agreement with the contractor, ED&T will let me know. At that time I will be able to contact Mr. Holcomb with a settlement offer or stand on the original denial." *Affidavit of Leon Turner, ¶ 12.*

12. It is undisputed that Whitley wrote the following to Gore at Farmco on September 9, 2003, and same was returned to and received by Whitley on September 17, 2003, with Gore's signature appearing as below indicating his acceptance of the accuracy of Whitley's statement, "You provided a cost estimate for the repair of the houses but did not

attempt to determine the cause" of the damage:

> "Please review this letter in an effort to finalize our efforts on the Holcomb project. If I remember correctly, the last time we talked, you stated that your proposal for the work at the Holcomb residence was based on information provided by Mr. Holcomb. Mr. Holcomb stated that he had wind damage to his poultry houses. You provided a cost estimate for the repair of the houses but did not attempt to determine the cause of the damages. If I am stating this correctly, please sign below and return this letter to Engineering Design & Testing. Feel free to contact me at any time so that we can resolve this issue as quickly as possible. Thank you for your time."
>
> 
> Mr. Tim Gore
> FarmCo Builders Inc.

Affidavit of Leon Turner, ¶ 13.

13. It is undisputed that Holcomb telephoned McMurrey on September 25, 2003, and McMurrey reviewed with him the statement from Tim Gore in which Gore agreed by his signature that he did not attempt to determine the cause of the damage. McMurrey noted in the claim file, "I advised Mr. Holcomb based on this we would not be in a position to change our decision. He said he would refer this matter to an attorney. McMurrey subsequently wrote to Holcomb on September 30, 2003, and acknowledged receiving a voice mail from him and provided in his correspondence a copy of the ED&T report and stated, "We have not received any information that would change the conclusion reached in that report. Based on the cause of your damage, as reflected in this report, there would be no coverage

available for your repairs." McMurrey continued, "As you know, we have spent a great deal of time getting clarification from Tim Gore as to his opinion as to the cause of your damage. I am enclosing a copy of his signed statement in which he indicates he has not determined a cause of damage and relied on your statement that wind had damaged the houses." On November 17, 2003, McMurrey noted in the claim file, "There has been no further word from Mr. Holcomb since my letter to him of 9/30/03. File is once again closed." *Affidavit of Leon Turner, ¶ 14.*

14. It is undisputed that on December 17, 2003, McMurrey received a letter from attorney Perry Knight, representing Holcomb in respect to the clam. He called Knight and left a message for the call to be returned, but not having heard from him, called Knight again on December 18, 2003. In their conversation, Knight referenced a November 21, 2003, letter from Gore which stated in part, "roof metal has blown loose uplifting lath and pulling nails loose. Leaks have caused lath and trusses to rot and decay." McMurrey telephoned Whitley and advised him of this letter, and Whitley subsequently wrote Gore on December 22, 2003, in which he questioned Gore as to whether another inspection of the poultry houses had been made; whether the damage reported by Gore on November 21 had occurred since the loss date of February 15, 2003; and if there was additional damage, whether he, Gore, was able to separate the original damage from subsequent damage. McMurrey advised Turner on January 16, 2004, that he was requesting the claim file be re-opened and that we would have to wait and see what came out of the conflict resolution between ED&T and Gore. McMurrey noted,

"Insured's atty is aware of efforts and is in agreement with this initial approach." As of January 19, 2004, no response, however, had been received by Whitley from Gore as to Whitley's earlier letter of December 22, 2003. *Affidavit of Leon Turner, ¶ 15.*

15. It is undisputed that on January 27, 2004, McMurrey noted in the claim that he had received a fax from Whitley with a copy of Gore's response and that it appeared evident that Gore was not making a causation claim or statement as to the damage. McMurrey received a call from attorney Knight on January 30, 2004, and Knight indicated that he had received Gore's response also and that he, Knight, would talk with Holcomb about it. McMurrey told Knight that "we are still in a position of maintaining the cause is not covered." This was communicated to Turner on the same date. Having heard nothing further from Holcomb or Knight, McMurrey closed the claim file again on March 15, 2004. *Affidavit of Leon Turner, ¶ 16.*

16. It is undisputed that on May 24, 2004, McMurrey faxed Whitley after receiving a report from Mr. Norris "Buddy" Fowler in respect to the cause of loss which stated, "The houses appear to have received wind and storm damage." In his fax to Whitley, McMurrey wrote, "Please make contact to resolve the 'cause' factor. Please follow the steps you did previously in regard to letters to the contractor with copies to Mr. Holcomb's attorney, Perry Knight." Thereafter, Whitley wrote to Fowler and asked specific questions as to Fowler's inspection of the houses and his findings, noting that an "earlier inspection by ED&T determined that there was no storm damage to the structures." Fowler, who is not a structural

engineer, but a contractor, wrote Whitley on June 18, 2004, and stated in part, "Damage to the facilities I viewed appeared to me to be wind damage." Fowler affirmatively stated that he was not able to determine when the observed damages occurred and that it was not his opinion that the damages occurred at one time. *Affidavit of Leon Turner, ¶ 17.*

17. It is undisputed that on July 9, 2004, McMurrey wrote Knight that he had asked the home office of Farm Bureau in Raleigh, North Carolina, to review this matter and advise him of the company's position. After receiving these reports from McMurrey, Turner obtained a weather report from Compu-Weather Experts in Hopewell Junction, New York, in respect to weather conditions at the location of Holcomb's property located at 222 Holcomb Road in Baileyton, Alabama. The report indicated that on February 15, 2003, the peak wind gust was 25 miles-per-hour. It further stated,

> "On 2/15/03 (date of the incident): Rain, heavy at times and occasionally embedded with thunderstorms, occurred between approximately 7:40 am-1:30 pm, 5:00-10:30 pm, and then again from around 11:00 pm through the remainder of the day. Approximately 1.60-1.80 inches of rain fell on this day. Winds were mainly southeast to southwest at speeds between approximately 4-18 mph with gusts to between approximately 20-25 mph."
>
> *Affidavit of Leon Turner, ¶ 18.*

18. It is undisputed that the "Beaufort Scale" provided to Turner by Compu-Weather stated that wind speeds between 25 and 31 miles-per-hour were classified as a "strong breeze," while winds between 19 and 24 miles-per-hour were classified as a "fresh

breeze," which would cause small trees with leaves to begin to move. "Slight structural damage" under the Beaufort Scale would not occur until a wind speed of 47 to 54 miles-per-hour was reached. Mr. Turner wrote attorney Knight on July 19, 2004, and recounted his review of the file and findings to him. He stated, in part

> "It has been our position from the onset of this claim that we would pay for any damages caused by the peril of windstorm. Mr. Holcomb's policy does afford coverage for windstorm damages. This means that a direct physical loss would have had to occur from a specific windstorm event. Through our investigation and the reports supplied by both, ED and T and Mr. Fowler, there has not been any evidence to show that a windstorm event caused this damage. Furthermore, Mr. Fowler himself states that he did not detect any leaning to the poultry houses.
>
> "Therefore, if there are any damages to the poultry houses that are a result of a windstorm, we would like to see some type of detailed estimate of repairs. As it has been stated from the beginning of this process, we have not found any evidence of windstorm damage to Mr. Holcomb's poultry houses.
>
> "While we would readily compensate Mr. Holcomb for any windstorm damages that can be traced to a specific date of loss, we need to have actual documentation to show that a windstorm loss has occurred. As of this date, no one has been able to supply us with any documentation to support that finding.
>
> "We will be more than happy to consider any additional information you or Mr. Holcomb would want to supply. I feel that we have exhausted

> numerous measures to determine what, if any, damages have occurred to Mr. Holcomb's poultry houses by the peril of windstorm. Ultimately, it is the policyholder's responsibility to prove his loss and at this time, Mr. Holcomb has failed to show us any information contrary to what has already been provided through the adjuster's investigation and the subsequent engineer's report. We will continue to keep Mr. Holcomb's file open and consider any additional information he may want to supply to us."
>
> *Affidavit of Leon Turner, ¶ 19.*

19. It is undisputed that Holcomb cannot state or identify the date on which the wind damage was alleged to have occurred to his poultry houses and concedes that it may have been any day in February of 2003 or even before. Mr. Holcomb further cannot any specific weather event which caused him to go and inspect his houses for damage:

> 0065
> Q. (BY MR. COLQUETT:) To your best recollection, what was the day -- the date, I should say, on which you made a claim for the wind damage to your poultry houses?
>
> 0066
> A. I can't give you an exact date because I -- I can't remember it.
> Q. All right. Was it in February of '03?
> A. Probably. I'm not -- I'm not sure. That's the day that's on the paperwork.
> Q. All right. Do you know -- or I should say do you have a judgment of the specific day on which the wind damage occurred that you've alleged?

A. No, I sure don't.
Q. Okay. So it could have been at any time in the month of February?
A. Yeah, or -- yes.
Q. Any day from February 1 to February 28 of '03?
A. It could have been.

0067

Q. Well, were there any storms that you remember in February of '03 that stand out in your mind?
A. No.
Q. You don't remember any storms in February of '03 that may have resulted in a

0068

tornado watch or warning or a thunderstorm watch or warning or severe weather watch or warning, anything out of the ordinary in respect to weather at any time during those days in February of '03?
A. Not any specific date, I don't.
Q. And so there wasn't any weather event, any weather occurrence that prompted you to go out specifically and look at the condition of your houses?
A. Let me put it this way: I've got eight houses. I don't go out and look at the houses every day and unless -- if I look down a house and wind -- or tin is blowed up, yeah, I go check then. But, you know, generally, just a visual inspection is all I do.
Q. Okay. So in answer to the question, with respect to this claim, you don't recall there being any weather event after which you specifically went out and inspected your houses?
A. No, not for sure.

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REEXAMINATION BY MR. COLQUETT:
Q. Now, let me make sure I understand you here. You're not even limiting whatever caused these damages that you've described to February of '03?
A. Yes.
Q. I mean, you are limiting that it occurred in February of '03 or it occurred just sometime?
A. I noticed it in February, '03.
Q. But you don't know when it occurred?
A. I don't know when it occurred for sure, but there was wind -- considerable winds during February or about that time.
Q. When in February was there a considerable wind of '03?
A. I don't know. I can't give you a specific date.

Holcomb Deposition, pages 65-68, 130.

20. It is undisputed that Holcomb met with McMurrey at his farm on May 5, 2003, and told McMurrey that he did not know exactly what has caused the damage to the poultry houses. In fact, Holcomb said that he wanted "them" to tell him what caused the damage. *Holcomb Deposition, page 73*. Holcomb agreed that at the point in time of the inspection, he did not know whether or not it would be a covered claim. *Holcomb Deposition, supra*. It is further undisputed that at the time of Whitley's inspection, there had been no change in the condition of the poultry houses between the time Holcomb reported the claim and Whitley arrived to conduct the inspection. *Holcomb Deposition*, *page 76*.

21. It is undisputed that Gore did not tell Holcomb that the damage to the poultry houses was caused by a windstorm event:

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Q. And with respect to Tim Gore, he didn't -- y'all didn't discuss any particular wind storm event?
A. No.
Q. And you didn't describe any wind storm event to him?
A. No.
Q. And you've never described a wind storm event to anybody with respect to your claim?
A. No.
Q. And you've never related your

0120
claim to a specific wind storm event?
A. No.
Q. And in fact, you can't do that?
A. (Witness shakes head.)
Q. No?
MR. LITTLE: A specific event?
Q. A wind storm event. I mean, even more than one event, you can't relate the damage to the houses to one or more wind storm events?
A. No, I don't.

Holcomb Deposition, pages 119-120.

22. It is undisputed that a registered and Alabama-licensed engineer (Whitley) certified to Farm Bureau and McMurrey that the claimed damage of leaning to the Holcomb poultry houses was neither the result of nor caused by windstorm. Rather, the engineer certified that particular construction and building factors, including but not limited

to moisture, caused the claimed damage to occur. Farm Bureau and McMurrey relied on the certified opinions of the engineer within the circumstances of its overall claim investigation in denying the Holcomb claim. Mr. Holcomb did not present substantial evidence to Farm Bureau and McMurrey, either before or after the denial of his claim, that the damage he alleged to his poultry houses was the result of or caused by the named peril of windstorm. Mr. Gore did not have an ultimate opinion as to whether the poultry houses were damaged by windstorm; Mr. Fowler affirmatively stated that he was not able to determine when the observed damages occurred and that it was not his opinion that the damages occurred at one time. Farm Bureau and McMurrey consider 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 Holcomb that a windstorm event occurred on his property nor that damage was caused by same. *Affidavit of Leon Turner, ¶ 20; Affidavit of Larry McMurrey, ¶ 9.*

23. It is undisputed that on or about May 12, 2002, Farm Bureau issued a renewed farm owner's policy of insurance to the plaintiffs. The Holcombs had first obtained the policy in 1997 through Gloria Williams, an insurance agent, who had been referred to them by their neighbors. *Holcomb Deposition, page 23*. The plaintiffs wanted to insure their poultry houses with a new insurance company because their former carrier, Alfa, would not provide them with collapse coverage on two of their poultry houses. *Holcomb Deposition,*

pages 24-25. Ms. Williams procured the collapse coverage the plaintiffs requested.

24. It is undisputed that the plaintiffs purchased the policy and were satisfied that Ms. Williams had fully explained to them the coverage provided by the policy. *Holcomb Deposition, page 29*. After the application was completed and signed, the Holcombs received a copy of their policy. *Holcomb Deposition, page 31*. The declarations page of the policy clearly set forth the coverage provided by the policy. The Holcombs had their policy in their possession and had every opportunity to review the document for alleged errors. *Holcomb Deposition, page 80*. The Holcombs also received declarations pages showing the pertinent coverage types and amounts whenever they made a change to their policy. *Holcomb Deposition, pages 32-33.*

25. It is undisputed that on or about February 15, 2003, plaintiffs believe that their poultry houses were damaged as a result of strong winds. *Plaintiffs' Complaint.* Plaintiffs allege that the damage to the poultry houses should have been covered under their insurance policy. Farm Bureau, after performing an investigation of the plaintiffs' claims, decided that the loss was not covered by the policy. The plaintiffs allege that Williams fraudulently misrepresented to them that they had coverage on the buildings. *Holcomb Deposition, page 48*.

26. It is undisputed that Williams filed a motion for summary judgment on August 9, 2006. In same, it was stated that plaintiffs allege that Farm Bureau, by and through its agent Williams, intentionally or recklessly misrepresented that the plaintiffs "had insurance

coverage for their poultry houses and that claims would be paid according to the terms of their policy of insurance." It was further stated that the alleged misrepresentation asserted by the plaintiffs was not a false statement. in fact, it was a true statement. Plaintiffs sought insurance coverage for their poultry houses from Williams, specifically collapse coverage. *Holcomb Deposition, page 26*. The motion further stated that Williams complied ably with the request and procured Farm Bureau insurance for the Holcombs that covered their poultry houses and included collapse coverage.

27. It is undisputed that the motion for summary judgment filed by Williams stated that as the policy clearly shows, the Holcombs had insurance coverage for the poultry houses, including collapse coverage. The motion noted that the plaintiffs' claims were simply not within the coverage they had procured from Ms. Williams. Thus, it stated that the alleged misrepresentation in the instant case was not a misrepresentation of a material fact. The motion for summary judgment noted that even assuming, arguendo, that Ms. Williams' representation could be interpreted to be a material falsity, plaintiffs still have not raised a genuine issue of material fact to preclude summary judgment for Williams.

28. It is undisputed that, as the motion for summary judgment filed by Williams stated, the plaintiffs were fully capable of reading and understanding the English language, and they had experience dealing with contracts. *Holcomb Deposition, pages 80-81*. The motion continued, "The plaintiffs, thus, unreasonably relied on Ms. Williams' oral assertions and cannot now claim that they are entitled to more comprehensive coverage under

the policy. Plaintiffs had in their possession documents which would have put them on notice of the falsity of any alleged misrepresentation, yet chose to merely 'look over' those documents rather than thoroughly review them." *Holcomb Deposition, page 80.* Therefore, the motion stated, their reliance on such alleged statements is unreasonable and there is no genuine issue of material fact as to this fraud claim.

29. It is undisputed that the court granted the motion for summary judgment by Gloria Williams on November 27, 2006. Plaintiffs make no claim for fraud against Farm Bureau separate or apart from the fraud alleged against Williams: "Defendant Farm Bureau, by and through their agent Gloria Williams, represented to the plaintiffs that they had insurance coverage for their poultry houses and that claims would be paid according to the terms of their insurance policy." *Plaintiffs' Complaint.*

III. CONTROLLING LEGAL AUTHORITY

A. General Burden of Proof

30. 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).

31. 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

32. 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 November 27, 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

33. 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).

34. 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).
>
> 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.

"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]

35. 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:

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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.'"

"[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 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**.

". . . .

"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."

833 So.2d at 1043, 1046 (Ala. 2002) (citations omitted) (emphasis added to original).

36. 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."

37. 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.

38. 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."
>
> Fidelity-Phenix Fire Ins. Co. v. Board of Education, *supra*, at 985.

39. 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."

40. 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).

41. 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 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).

42. The following multi-jurisdictional cases address the question of proximate cause in respect to windstorm: 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 question for the jury*, and that it could have found from the evidence that the barn would not have fallen of its own weight without the action of the winds, and that windstorm was the cause of the collapse.

43. 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, and to again infer that such wind had caused the damage in question, which inferences, said the court, were not supported by the evidence.[2]

D. Bad Faith/Reliance on Expert Opinion

44. 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

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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).

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).

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

46. 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.

47. 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.

48. 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.

49. 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.[3]

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

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[3]

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.

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).

51. 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.

52. 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."

53. 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.

54. 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.

55. 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*.[4]

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[4] 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.

IV. DEFENDANT'S ARGUMENT OF CONTROLLING LEGAL AUTHORITY

A. General Burden of Proof

56. 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. 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

57. 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 November 27, 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

58. As stated, the policy of insurance between Farm Bureau and plaintiffs is

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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).

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*.

59. 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*.

60. It is not disputed that Farm Bureau employee Larry McMurrey contacted Mr. Holcomb on March 18, 2003, and obtained a recorded statement in which Mr. Holcomb stated that he did not know what caused the damage to the poultry houses; that he had just "got

to looking at 'em and seen" the damage; and that he wanted to "get something done" with the houses before his insurance lapsed. Mr. McMurrey inspected the houses on May 1, 2003, after Holcomb's flocks were removed and informed him that he would have an engineer come out and do an inspection to confirm the cause the of the damage. Thereafter, Charles Whitley, an Alabama-licensed structural engineer, inspected the poultry houses on May 5, 2003, and informed McMurrey on May 21, 2003, that he did not see any evidence of storm damage. In fact, Whitley noted in his written report that none of the damage he inspected was caused by a windstorm:

> "1. The observed damage to the poultry houses owned by Mr. Holcomb is a result of numerous factors. In the first house the observed deflection of the house is caused by the high moisture content of the framing members and trusses. . . .
>
> "2. The leaning of the posts is a result of the expansion and warping of the wood due to the moisture absorption or of improper construction. Were the leaning due to high winds, the posts on opposite side of the building would have the same slope. The posts on the left side of the building had a slope of one inch in four feet while the right side posts were plumb.
>
> "3. The observed damage .to the second house is a result of the same actions that damaged the first house. . . .
>
> "4. The damage to the third house is a result of poor design and an overloading of one truss. . . .
>
> "5. The placement of the chains on the deflected truss and the type of damage to the truss are

> consistent with an excessive load having been applied to the truss. Evidence indicates that a heavy item was hoisted from the truss, resulting in the damage to the chords and the deflection of the truss."

61. Thereafter, following denial of his claim, Holcomb obtained estimates from Mr. Tim Gore at Farmco Builders which stated, "house has severe wind damage," and brought them to McMurrey on June 30, 2003. Gore is not a structural engineer. Mr. McMurrey reopened his file and contacted Whitley and asked him to contact Gore to get to the bottom of the discrepancy between their findings. It is not disputed that Whitley attempted repeatedly to contact Gore throughout the month of July of 2003 and finally wrote to him on August 13, 2003, and asked Gore to review his file and "specifically address the wind damage to the buildings," among other things. Mr. Gore returned a letter to Whitley on September 17, 2003, with his, Gore's, signature confirming that he "did not attempt to determine the cause of the damages." The claim was again denied, and McMurrey closed his file.

62. Then, on May 24, 2004, McMurrey faxed Whitley a report that he had received from Mr. Norris "Buddy" Fowler, a second building contractor but not a structural engineer, which stated that the "houses appear to have received wind and storm damage." McMurrey asked Whitley to contact Fowler in an effort to resolve this discrepancy between the two reports. Fowler wrote Whitley on June 18, 2004, and stated that the damage "appeared" to be wind damage, but he could not say when the damage occurred and that it was not his opinion that the damage occurred at one time. Even Holcomb could not state or

identify the date on which the wind damage was alleged to have occurred, and could not identify any specific weather event which afterward caused him to go out and inspect the poultry houses for damage.

63. 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.

D. Bad Faith

64. 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.

65. 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.

66. In respect to the "abnormal" variety of bad faith, plaintiffs have presented no evidence that Farm Bureau intentionally failed to properly investigate the claim 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; following receipt of the engineer's report, Farm Bureau continued to attempt to reconcile the opinions of plaintiffs' contractors – Gore and Fowler – to the findings of its engineer, Whitley. In the end, neither Gore nor Fowler were able to state that the damage to plaintiffs' poultry houses was caused by the named and specified peril of windstorm.

67. 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.

68. Farm Bureau had a written and detailed report from a structural engineer stating that the damage resulted from a myriad of other causes, most specifically construction matters which allowed excessive moisture to build up over time. It is also clear that Gore did not attempt to identify the cause of the damage he found and that Fowler only stated that it "appeared" the houses had been damaged by wind, although he could not say when. Mr. Holcomb has, therefore, presented only speculation as to whether the poultry houses were damaged by windstorm, and even he 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*.

69. In respect to the qualifications of Gore and Fowler to opine as to the cause of the damage, neither has been shown to be an expert in structural engineering – unlike

Whitley. 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."

70. 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, including but not limited to moisture, 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 Holcomb 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.

/s/ P. Ted Colquett
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CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of August, 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
[ ] Hand-delivery

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