IN THE CIRCUIT COURT OF WINSTON COUNTY, ALABAMA

JOHNNY BROCK; SHARLENE BROCK,	}	
Plaintiffs,	}	
v.	}	**CASE NO. CV-2009-900071**
FARM BUREAU INSURANCE OF N.C., INC.; NORTH CAROLINA FARM BUREAU INSURANCE GROUP; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.; BRYAN MEINERT,	}	
Defendants.	}	

DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT

COME NOW the Defendants, FARM BUREAU INSURANCE OF N.C., INC.; the defendant incorrectly designated as NORTH CAROLINA FARM BUREAU INSURANCE GROUP; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.; and BRYAN MEINERT (hereinafter referred to as "Defendants" or "Farm Bureau"), and file their Motion for Summary Judgment pursuant to Rule 56 of the Alabama Rules of Civil Procedure as to each paragraph and sub-paragraph of Plaintiffs' complaint and amended complaint(s) on the ground that

there is no genuine issue as to any material fact, and Defendants are entitled to judgment as a matter of law. Defendants move the Court to make judgment final, pursuant to Rule 54(b), of the Alabama Rules of Civil Procedure.

This motion is based on the following:

A. Pleadings and discovery to date.

B. Deposition testimony of Plaintiff, Johnny Brock, and exhibits to same.

C. Farm Bureau claim file for Johnny Brock claim FO 1062343 referred to as "FBINC claim file."

D. Depositions to date and exhibits to same including Leon E. Turner, III; and Todd Childers.

I. STATEMENT OF UNDISPUTED FACTS

1. This case arises from a paid insurance claim.

2. It is undisputed that Plaintiffs, Johnny and Sharlene Brock, were insured by Farm Bureau Insurance of N.C., Inc., under a named-peril farmowner's policy (FO 1062343) and made a claim for windstorm damage to poultry houses located at 2435 County Road 66 in Arley, Alabama, on or about **September 1, 2005**. The date of loss was noted in the claim file to be **August 29, 2005**, and the claim was initially adjusted by Southeastern Claims Service, Inc., and its employee, Tommy Pennington,

who inspected the property on **September 9, 2005** (FBINC claim file).

2. On **September 15, 2005**, Pennington reported to Farm Bureau and stated, among other findings, the following:

Damage – Structure one: Inspection reveals high winds blew off 5 pieces of metal from the roof of structure one. The insured stated the curtain fell on the east exterior wall due to high winds and he had to restring it. Also, the structure is visibly leaning length ways. I have called a structural engineer to have a look at the structure to determine the cause of the leaning. Any depreciation was based on the age and condition of the property at the time of the inspection.

Damage – Structure two: Inspection reveals that high winds blew 6 pieces of metal off the roof of structure two. The insured stated a door was damaged by high winds. It appears as if the door is just off of its track. The insured stated this was all the damage to structure two. Any depreciation was based on the age and condition of the property at the time of the inspection.

Damage – Structure three: Inspection reveals minor wind damage to some metal ridge capping and metal roofing of structure three. The insured stated that structure three was leaning width ways due to high winds. Again, I have called a structural engineer to have a look at the structure to determine the cause of the leaning. Any depreciation was based on the age and condition of the property at the time of the inspection.

Damage – Structure four: Inspection reveals high winds blew 3 pieces of metal off the roof of structure four. The insured stated this was all the damage to structure four. Any depreciation was based on the age and condition of the property at the time of the inspection.

Damage – Structure five: Inspection reveals high winds blew 3 pieces of metal off the roof of structure five. Also, the insured stated high winds blew debris into his curtain on the west exterior wall causing minor cosmetic damage. The insured stated this was all the damage to structure five. Any depreciation was based on the age and condition of the property at the time of the inspection.

Damage – Structure six: Inspection reveals high winds blew 1 piece of metal off the roof of structure six. Also, nails were up all over the roof of structure six. It appeared to me as if the nails had been up for quite some. Any depreciation was based on the age and condition of the property at the time of the inspection.

3. Following receipt of same, Farm Bureau authorized the hire of a certified and Alabama licensed professional structural engineer, Ned Fortenberry, of Engineering Design & Testing, Inc. (ED&T), to conduct a further inspection of the loss property (Plaintiffs' poultry houses), and specifically to determine the cause of "leaning" to houses one (1) and three (3). It is undisputed that only these houses out of six were reported by Pennington to Farm Bureau as having sustained "leaning" damage. The remaining four houses were reported to have sustained varying degrees of metal ridge or roofing damage. Fortenberry inspected the property on **September 26, 2005** (FBINC claim file).

4. On **October 7, 2005**, Fortenberry rendered a written report to Farm Bureau through Pennington that detailed his inspection of the property and stated in part:

> deflection that is required for stability of this type of structure. Columns in Poultry House No. 1 and No. 3 leaned uniformly in the left-to-right direction. Poultry House No. 2 had columns that leaned in opposite left-to-right directions. The root cause of lateral movement of columns in Poultry House No. 1 and No. 3 is related to the inadequate truss to column connections and the inadequate soil compaction around the base of columns. Wind may have contributed to the amount of lean but is not the root cause.

5. Fortenberry reached the following conclusions:

of this type of structure. Columns in Poultry House No. 1 and No. 3 leaned uniformly in the left-to-right direction. When compared to Poultry House 2 which had columns that leaned in opposite left-to-right directions. The root cause of lateral movement of columns in Poultry House No. 1 and No. 3 is related to the inadequate truss to column connections and the inadequate soil compaction around the base of columns. Wind may have contributed to the amount of lean but is not the root cause.

The rear-to-front lean of the poultry houses are all in a different global direction, and the lean in each house was noted to progressively become greater toward the rear of the house. With the similarity of the amount of rear-to-front deflection noted and the lack of lateral restraint provided by the soil around the columns, much of this deflection may have occurred in initial construction. Because of the magnitude of deflection noted at the end walls, wind can not be eliminated and may at some point time have contributed to the amount of end wall deflection. However, all three end walls could not have been damaged by the same storm.

The sag in the trusses located near the front of Poultry House No. 3 has resulted from imposed equipment loads. Wind forces may have contributed to additional deflection to the truss members where the design loads had previously been exceeded.

6. Farm Bureau's adjuster, Bryan Meinert, subsequently inspected the property and met with Johnny Brock on **October 21, 2005**, and made an offer to settle the claim as to all six houses in the amount of $25,444.64. The claim file reflects that Brock "has Porter/Baker coming in Monday & will C/B (call back)." It is

undisputed that Porter & Baker is a farm property construction firm located in Addison, Alabama. The claim file further indicates that Meinert called Brock on **October 24, 2005**, and left a message for a return call on the Brock's answering machine. Not having his message returned, Meinert telephoned Brock again on **October 27, 2005**, and spoke with Sharlene Brock who stated that Johnny Brock was not in; Meinert requested that the latter call him. On **November 10, 2005**, not having heard from Brock, Meinert prepared a "Property Claim Narrative Report" to Todd Childers at Farm Bureau (FBINC claim file).

7. In this report, Meinert stated in part:

> **OPENING COMMENTS:**
> I received this CAT 47 file which had been assigned to Southeastern for appraisal. The IA called for a structural engineer to determine the cause for lean condition in multiple poultry houses. The condensed version of this report is that while wind may not be the root cause of these losses, wind can NOT be ruled out as an aggravating, or contributing factor. With this in mind, I am attempting to negotiate this loss with the insured.

> **INVESTIGATION SUMMARY:**
> IA assigned to this loss by DCM as I was on vacation at time of loss. IA assigned ED&T to preform C&O. Upon my return and after review of the IA and C&O report, arranged face to face meeting with the insured to include my own walk through inspection.

DESCRIPTION OF LOSS:

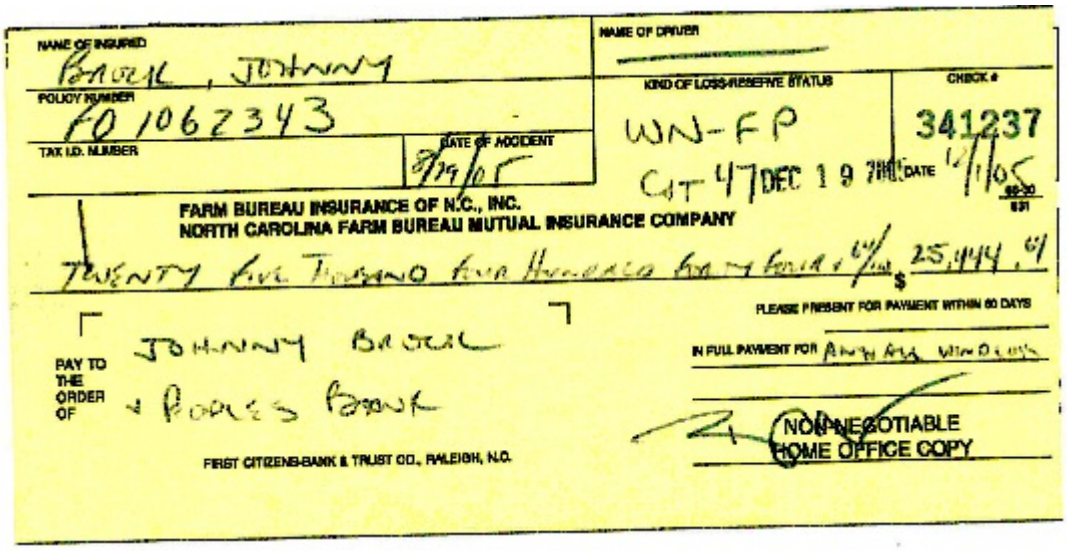
Insured has 6 poultry houses. Poultry house 1 has a lean to the rear. Poultry house 2 has a lean to right and rear when viewed from the front of the structure, it also appears to have approximately 8 broken trusses involving at least the lower chord. PH 2 appears to be the most heavily damaged. Poultry house 3 has a lean to the left when viewed from the front with 4-5 damaged trusses. Poultry house 4 has no visible damage. Poultry house 5 has a lean to the left and rear when viewed from the front and it appears that only the rear half of the structure is affected. The damages to Poultry house 6 are nearly identical to the 5th house. These observations are based on a walk through inspection conducted with the insured on 10/21/2005. The IA has completed an estimate in the ACV amount of $5,194.64 which represents the uncontested damages. My estimates for the additional repairs is $21,250.00. After application of the $1000.00 deductible the offer extended to our insured as a compromise settlement was $25,444.64.

CLOSING COMMENTS:

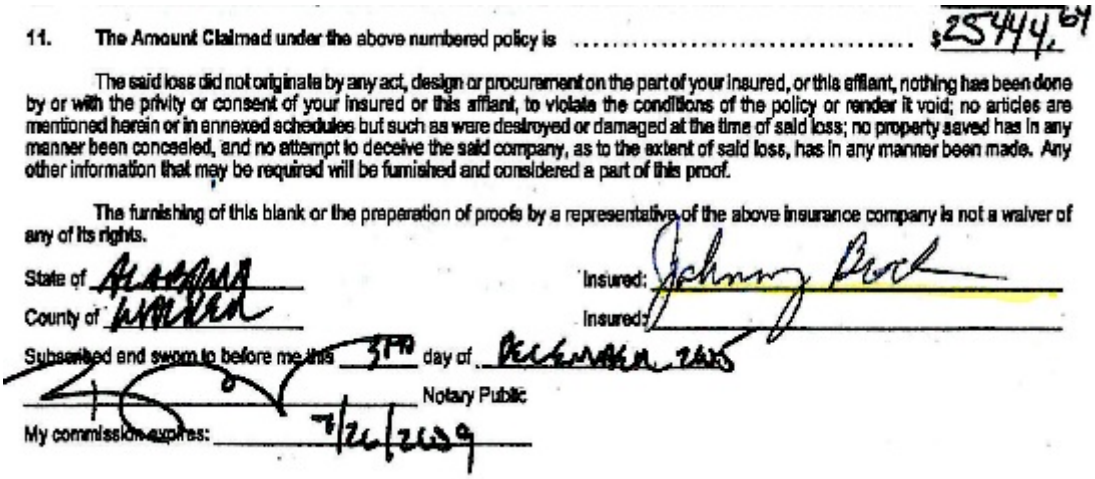
In my meeting with the insured he indicated that he had several contractors come out to estimate damages although no written copies were provided to this adjuster. Mr. Insured stated that one company had stated that damages exceeded $100k, but again no further information was forthcoming. Insured did appear to be open to a compromise settlement, and that is the course I am pursuing at this time.

8. Subsequent to this report, Meinert negotiated a claim payment to Brock in the amount of $25,444.64, based upon his personal inspection and calculation of estimates to repair the property damage. It is undisputed that Meinert wrote a check to Brock in this amount on **December 1, 2005**, that stated on its face, "IN FULL PAYMENT FOR Any & All Wind Loss." It is undisputed that Brock endorsed and

deposited this check. It is moreover undisputed that Brock signed a "Sworn Statement in Proof of Loss" which stated the total amount claimed under the policy was $25,444.64 (FBINC claim file):



NAME OF INSURED: Brock, Johnny
NAME OF DRIVER:
POLICY NUMBER: FO 1062343
KIND OF LOSS/RESERVE STATUS: WN-FP
CHECK #: 341237
TAX I.D. NUMBER:
DATE OF ACCIDENT: 8/29/05
DATE: 12/1/05
CAT 47 DEC 19
FARM BUREAU INSURANCE OF N.C., INC.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY
TWENTY FIVE THOUSAND FIVE HUNDRED SIXTY FOUR AND 64/100 $ 25,144.64
PAY TO THE ORDER OF: JOHNNY BROCK & POOLE'S BANK
FIRST CITIZENS BANK & TRUST CO., RALEIGH, N.C.
PLEASE PRESENT FOR PAYMENT WITHIN 60 DAYS
IN FULL PAYMENT FOR ANY AND WINDOWS
NON-NEGOTIABLE
HOME OFFICE COPY



11. The Amount Claimed under the above numbered policy is $25444.64

The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant, nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of Alabama
County of Walker
Insured: Johnny Brock
Insured:
Subscribed and sworn to before me this 3rd day of December 2005
Notary Public
My commission expires: 7/26/2009

9. It is undisputed that Brock testified that he obtained an oral estimate from a Mr. Kevin Andrews for repair and/or replacement of houses one (1), two (2),

and three (3) in the amount of $140,000.00, but this estimate was never put into writing and was not provided to Farm Bureau or Meinert at any time other than by verbal reference (Brock, pp. 124-128). It is undisputed that Brock never submitted a written estimate to Farm Bureau (Brock p. 144). Although he can read, write, and understand the English language, Brock did not read all of the language on the settlement check before he endorsed and deposited same (Brock, p. 143).

10. After he deposited the settlement check, Brock did not have any further contact with Farm Bureau about the claim even though he disagreed with the estimates for repair calculated by Meinert which lead to the offer of $25,444.64. In fact, it is undisputed that Brock disagreed with the claim payment (Brock, p. 145), but he did not use all of the payment to undertake repair on the poultry houses and only "put metal on the top and fixed some broken trusses." Brock never submitted any other information to Farm Bureau or communicated with it in respect to the claim; he continued to receive flocks of birds for the houses – and has not incurred any loss of income to date; he did not write the Alabama Department of Insurance with any complaint after the claim payment; and he did not communicate with or write to Farm Bureau with any complaint after same (Brock, p. 148).

11. But "about a year ago," or roughly on or about **November 23, 2009**,

more than four (4) years after the loss event, Brock was contacted by the now former Winston County Sheriff, Ed Townsend – out of the blue, Brock states – and was told that he needed to call Daryl Burt, one of the Plaintiffs' attorneys in this case. It is undisputed that Sheriff Townsend does not know Brock, yet he called Brock and on the telephone and "says you go see Daryl Burt about hurricane damage from '05." Brock freely admits that he did not ask Sheriff Townsend any questions about how he (Townsend) knew about Brock's property damage; stated that Townsend has never been to his property; and offered that he "does not know" if the Sheriff was "running Farm Bureau cases" (Brock, pp. 150-155).

12. And it is undisputed that in his judgment, **Brock felt that his claim was denied when "Bryan Meinert put that check in [his] hand" for the claim payment on December 1, 2005** (Brock, p. 160).

II. CONTROLLING LEGAL AUTHORITY

A. Burden of Proof

13. The moving party in respect to summary judgment 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 reasonably 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).

14. 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 generally, 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. Affirmative Defenses

(A) Accord and Satisfaction

15. "When a check is sent upon the condition that it be accepted in full payment of a disputed claim, there is, as a general rule, but one of two courses open to the creditor — either to decline the offer and return the check, or accept it with the condition attached. The moment the creditor endorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition, and is estopped from denying such agreement." Public National Life Insurance Co. v. Highsmith, 256 So.2d 912, 919 (Ala. 1971). Further, "As a general rule, when a check is tendered upon the condition that the creditor accept it in full payment of a disputed claim, there are two options available to the creditor. He may reject the tender or accept the tender with the condition attached. Endorsing and depositing the check is tantamount to accepting the tender with the condition attached. Such acts fulfill the requirement for an accord and satisfaction." Bivins v. White Dairy, 378 So.2d 1122, 1124 (Ala.Civ.App.1979). "There is no legal obligation to cash a check tendered as a full settlement of a disputed claim when it is not for the correct amount due. If plaintiff had cashed the check so tendered, that circumstance would have given

rise to a claim that it was an accord and satisfaction." Boohaker v. Trott, 145 So.2d 179, 184 (Ala. 1962) (citation omitted).

16. In Shoreline Towers Condominium Owers Ass'n, Inc. v. Zurich American Ins. Co., 196 F.Supp.2d 1210 (S.D. Ala. 2002), a condominium association's claims against a property insurer for improperly applying windstorm deductible in calculating benefits payable were discharged by accord and satisfaction: "An accord and satisfaction occurred between Zurich and Shoreline because there was a genuine dispute as to the amount of damages owed under the Policy, and Shoreline agreed to accept payment of $86,000 as a final settlement of all claims. *Ala. Code § 7-3-311* (1975). By accepting the $86,000 check, Shoreline agreed to the condition under which payment was made, which was the release of all claims. Under Alabama law, an accord and satisfaction has occurred if there is a dispute as to an amount owed and an agreement is reached on how much will be paid to extinguish all obligations." Shoreline Towers v. Zurich American Ins. Co., 196 F.Supp.2d at 1215, citing Tatum v. Cater, 119 So.2d 223, 225 (Ala. 1960).

B. Statute of Limitations: Bad Faith

17. In respect to claims for bad faith refusal to pay insurance benefits, "The statutory limitations period for bad faith claims arising on or after January 9, 1985, is

two years. Our supreme court has held that 'the bad faith refusal to pay a claim is merely a species of fraud and, as such, the statute of limitations applicable to fraud apply.'" McLeod v. Life of the South Insurance Company, 703 So.2d 362, 364 (Ala.Civ.App. 1997) (citations omitted). The McLeod court continued, "'The running of the statute of limitations [for fraud] may be triggered when the party seeking to bring the action knew of facts which would put a reasonable mind on notice of the **possible existence** of fraud. This is also the standard by which to determine when a cause of action for bad faith refusal to pay insurance benefits accrued for the purposes of commencing the running of the statute of limitations.'" McLeod, 703 So.2d at 364, citing Farmers & Merchants Bank v. Home Ins. Co., 514 So.2d 825, 831-32 (Ala. 1987) (emphasis in original). "'[A] cause of action for bad faith refusal to honor insurance benefits **accrues upon the event of the bad faith refusal, or upon the knowledge of the facts which would reasonably lead the insured to a discovery of the bad faith refusal**.'" McLeod, *supra* at 365, citing Blackburn v. Fidelity & Deposit Co. of Maryland, 667 So.2d 661, 668 (Ala. 1995), the latter quoting Safeco Ins. Co. of America v. Sims, 435 So.2d 1219, 1222 (Ala. 1983)

(emphasis added).[1]

C. Statute of Limitations: Fraud

18. *Alabama Code 1975*, § 6-2-3, provides, "In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his claim." Although the statute explicitly provides that the claim is not considered as having accrued until the aggrieved party's discovery of the fact constituting the fraud, the discovery issue is viewed objectively rather than subjectively. In other words, "the fraud is deemed to have been discovered for the purposes of the statute of limitations when the party actually discovers the fraud, or which has facts which, upon closer examination, would have put a reasonable person on inquiry which, if pursued, would have led to the discovery of the fraud." Alabama Tort Law, Roberts & Cusimano, § 20.21 (4th ed. 2004).

19. Roberts and Cusimano continue, "Another frequently invoked

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[1] In McLeod, the court concluded, "The issue before us is whether the **denial letter** of March 31, 1992, provided McLeod with knowledge of facts that would reasonably lead him to discover what he alleges to have been a bad faith refusal to pay his claim, and to discover what he claims to have been a fraudulent suppression of the existence of the incontestability clause. If the letter did give him that knowledge, then his bad faith and fraudulent suppression claims are barred because they were not brought within two years of March 31, 1992. McLeod, 703 So.2d at 365 (emphasis added).

expression is that fraud is deemed to have been discovered when it ought to have been discovered. In other words, there must be some disposition and effort to obtain a knowledge of the facts, a requirement of reasonable diligence. The question is not simply what facts the aggrieved party actually knew, but of what facts he might have actually obtained knowledge had he sought it form the natural sources of information that were at his command." Alabama Tort Law, Roberts & Cusimano, *supra*.

20. In the case of RaCON, Inc. v. Tuscaloosa County, et al., 953 So.2d 321 (Ala. 2006), the Alabama Supreme Court stated, "A two-year statute of limitations applies to fraud actions. That limitation period begins to run when the claimant discovers the fraud. In Alabama, fraud is discoverable as a matter of law when a claimant receives documents that put him or her on notice that the fraud reasonably should be discovered." RaCON v. Tuscaloosa County, 953 So.2d at 336. Working from this rule of law, the facts in RaCON indicated that it had received correspondence from a project engineer detailing additional work (construction of rock buttresses) to be performed on a road project; RaCON did not prepare its bid based upon this work and subsequently claimed fraud in having to do accomplish the work and to recover damages over and above its bid amount for same. The correspondence, however, stated the obligations of RaCON under the contract in respect to the additional work, contrary

to RaCON's assertion that it did not discover the requirement of such until much later at a meeting at which it was directed to do the work. In rejecting RaCON's argument, the court wrote, "The **plain meaning** of BKI's November 30, 1999, letter was that RaCON would have an expansive obligation to construct rock buttresses. . . . BKI's statements in that correspondence unquestionably are **inconsistent** with RaCON's alleged pre-bid understandings." RaCON v. Tuscaloosa County, 953 So.2d at 336.

21. See, also, Jones v. Kassouf & Company, P.C., 949 So.2d 136, 140 (Ala. 2006): "[A] party will be deemed to have 'discovered' a fraud as a matter of law upon the first of either the actual discovery of the fraud or when the party becomes privy to facts that would provoke inquiry in a reasonable person that, if followed up, would lead to the discovery of the fraud" (citations omitted). And see, Auto-Owners Insurance Company v. Abston, 822 So.2d 1187 (Ala. 2001): the insured brought an action against his health and automobile insurers to recover for breach of contract and fraud in connection with payments made to the health insurer following payment to the health insurer of subrogation benefits by Auto-Owners. It was undisputed that Auto-Owners sent a letter to Abston telling him that a request for reimbursement of medical expenses had been made by the health insurer; Abston sued for fraud, bad faith, and breach of contract after learning that some medical expenses remained unpaid. The Alabama

Supreme Court held that it was undisputed that Abston received the letter from Auto-Owners and read same and "[t]aken as a whole, that information would make clear to a reasonable person that (1) Auto-Owners had received a request for reimbursement . . . (2) that the request for reimbursement was for medical expenses that had been paid [by the health insurance carrier]; and (3) that this reimbursement was in accordance with the agreement between [the health insurer and Abston]." Auto-Owners v. Abston, 822 So.2d at 1195. The court continued:

> "Although expressed in terms of misrepresentation and suppression of various specific facts, all of Abston's fraud claims are founded on Auto-Owners' decision to pay Congress Life rather than Abston or the medical providers directly. Based on the information Abston received from [Auto-Owners] Abston was privy to facts that would provoke inquiry in the mind of a person of reasonable prudence, which, if followed up, would have easily led to the discovery of Auto-Owners' intention to pay, and its eventual payment to, Congress Life (the health insurer). Therefore, the two-year statutory limitations period on Abston's fraud claims began to run on Abston's receipt of [Auto-Owners'] August 21, 1996, letter."
>
> Auto-Owners v. Abston, 822 So.2d at 1195-1196.

22. See also, Dickinson v. Land Developers Const. Co., Inc., 882 So.2d 291 (Ala. 2003): "The 'discovery rule,' found in Ala.Code 1975, § 6-2-3,1 applies to fraud

claims. See Sanders v. Peoples Bank & Trust Co., 817 So.2d 683, 686 (Ala.2001). We have held that '[t]he question of when a party discovered or should have discovered the fraud is generally one for the jury.' Potter v. First Real Estate Co., 844 So.2d 540, 546 (Ala.2002) (quoting Ex parte Seabol, 782 So.2d 212, 216 (Ala.2000), quoting in turn Liberty Nat'l Life Ins. Co. v. Parker, 703 So.2d 307, 308 (Ala.1997)). However, a party will be deemed to have 'discovered' a fraud *as a matter of law upon the first of either the actual discovery of the fraud or when the party becomes privy to facts that would provoke inquiry in a reasonable person that, if followed up, would lead to the discovery of the fraud.* Auto-Owners Ins. Co. v. Abston, 822 So.2d 1187, 1195 (Ala.2001); Gray v. Liberty Nat'l Life Ins. Co., 623 So.2d 1156, 1159 (Ala.1993) (emphasis added).

D. Statute of Limitations: Conspiracy

23. A two-year statute of limitations applies to conspiracy claims. In the case of Boyce v. Cassese, 941 So.2d 932 (Ala. 2006), the Alabama Supreme Court noted, "Because the conspiracy to defraud claim is dependent upon the underlying fraud, the statute of limitations on that claim began to run at the same time as did the statute for the underlying fraud claim." Boyce, 941 So.2d at 943-944 (citations omitted).

E. Statute of Limitations: Unjust Enrichment

24. A two-year statute of limitations applies to unjust enrichment claims. See

generally, Flying J Fish Farm v. Peoples Bank of Greensboro, 12 So.3d 1185 (Ala. 2008); Davant v. United Land Corp., 896 So.2d 475 (Ala. 2004); and Johnston-Tombigbee Furniture Mfg. Co, Inc. v. Berry, 937 So.2d 1047 (Ala. 2006).

F. Statute of Limitations: Negligence

25. The applicable statute of limitations for Plaintiffs' negligence claims is two years. Alabama Code 1975, § 6-2-38(l): "All actions for injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

III. ARGUMENT

G. Plaintiffs' Claims are Time-Barred

26. Plaintiffs' claims against Farm Bureau as enumerated and discussed are barred by the applicable statutes of limitations. The claims of fraud and bad faith are subject to a two-year statute from the time at which they ought to have been discovered, and the law imposes a requirement of reasonable diligence on plaintiffs to do so: "[A] party will be deemed to have 'discovered' a fraud as a matter of law upon the first of either the actual discovery of the fraud or when the party becomes privy to facts that would provoke inquiry in a reasonable person that, if followed up, would lead to the discovery of the fraud." Jones v. Kassouf & Company, P.C., *supra*. Moreover, the

running of the statute for bad faith may be triggered when the party seeking to bring the action "knew of facts which would put a reasonable mind on notice of the possible existence" of same. McLeod v. Life of the South Insurance Company, *supra*.

27. Defendants contend that Plaintiffs' claims for bad faith, fraud, negligence, unjust enrichment, and conspiracy are barred by applicable statutes of limitations. And this contention goes directly to the heart of the purposes of limiting commencement of actions by time and the integrity of case law governing same. Defendants recognize that such statutes must be applied in a manner to provide all parties a full opportunity to try their rights in court, but any interpretation of the law that puts the control of the setting of limitations periods in the hands of one party to the dispute over the other is disfavored. See, generally, Swisher Intern., Inc. v. U.S., 27 F. Supp. 2d 234 (Ct. Int'l Trade 1998), rev'd on other grounds, 205 F.3d 1358, 85 A.F.T.R.2d 2000-1166 (Fed. Cir. 2000), reh'g and suggestion for reh'g en banc denied, (May 22, 2000).

28. There is and can be no disagreement that Plaintiffs in this case filed their complaint against the Defendants outside of the applicable statutes of limitation on their causes of action for alleged bad faith failure to pay, fraud, negligence, unjust enrichment, and conspiracy. In fact, **Plaintiffs filed their lawsuit more than 4**

years after the settlement checks dated December 1, 2005, in full and final payment of wind claims were endorsed and deposited. Consequently, this is not a small measurable circumstance where a plaintiff failed to file within the statute by one, two, or even six weeks – **Plaintiffs herein failed to file until 208 weeks or 1,456 days after December 1, 2005**; for statute purposes, **Plaintiffs herein failed to file until 105 weeks (date of filing of this case was December 11, 2009) or 735 days after December 1, 2007.**

29. Plaintiffs' answer to their claims being barred by the applicable statutes of limitation must evolve to the contention that they were not alerted to the *existence of any potential fraud or claims* until they were *told* by the then-Sheriff of Winston County to go see attorney Daryl Burt. In this regard, Plaintiffs' position would be completely inapposite to the controlling case law which does not say, has not said, or even hinted that the *existence of a potential fraud or claim* is predicated upon an affirmative act such as being told by any individual – much less the highest law enforcement officer in the county – to contact a lawyer. To the contrary, the standard is that fraud and all other claims are discovered as a matter of law when a claimant becomes privy to facts that would provoke inquiry in a reasonable person that, if followed up, would lead to the discovery of the fraud. See, RaCON, Inc. v.

Tuscaloosa County, et al., *supra*; Jones v. Kassouf & Company, P.C.,*supra*.

30. And in respect to the application of the statute being either a question of law or fact, the case of Howard v. Mutual Sav. Life Ins. Co., 608 So.2d 379 (Ala. 1992), demonstrates the necessity of applying the statute as matter of law in this case. "Had Howard made no showing that she had inquired as to her coverage and had received the company's response, the trial court's determination would have been correct. Given Howard's 'suspicions' that she had been shortchanged, a reasonable person in her position would have had a basis to suspect fraud. **Had she made no further inquiry, the limitations period would have begun to run**." Howard, 608 So.2d at 383. And there is no doubt that this issue **can and must be decided as a matter of law** in all cases where the Plaintiff knew of facts which would put a reasonable mind on notice of the possible existence of fraud. Howard, 608 So.2d at 382, citing Sexton v. Liberty National Life Ins. Co., 405 So.2d 18 (Ala.1981), and Seybold v. Magnolia Land Co., 376 So.2d 1083 (Ala.1979).

31. Any interpretation of the law that puts the control of the setting of limitations periods in the hands of one party to the dispute over the other is disfavored. Any exception to controlling law based upon decision after decision placing the burden on a claimant to make a reasonable inquiry or to have facts in hand which would lead

the reasonable mind to go further in investigating a potential fraud creates a slippery slope in the interpretation of not only the two-year statutes applicable in this case but in all other statutes of limitation. For if a claimant is able to subvert the statute based upon an out of the "blue" phone call from a sitting Sheriff or otherwise, no statute of limitation is safe. There would be nothing to prevent a claimant in same or similar circumstances from waiting five, six, or 10 years to bring a claim and argue that it was only after conferring with an attorney that he knew he even might have a claim. And that clearly puts the statute in the hands of one party and one party only.[2]

WHEREFORE, THESE PREMISES CONSIDERED, the Defendants, FARM BUREAU INSURANCE OF N.C., INC.; the defendant incorrectly designated as NORTH CAROLINA FARM BUREAU INSURANCE GROUP; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.; and BRYAN MEINERT (hereinafter referred to as "Defendants" or "Farm Bureau"), file their Motion for Summary Judgment pursuant to Rule 56 of the Alabama Rules of

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It should be beyond question that Plaintiffs knew or were aware of the existence of facts that they had a claim in 2005. They went through and fully participated in the claim process and accepted the claim settlement check. They disagreed with it and were on notice of facts to lead them further. But they went no further. Only the contact admittedly initiated by a law enforcement official telling them to contact a specific lawyer – who then became their lawyer in this case – brought them to the point of filing their lawsuit. And if statutes of limitation are allowed to be measured and determined by when a lawyer or his proxy approaches a potential client and supplies the client with documents in support of an alleged theory, then all statutes of limitation are meaningless. That cannot be the statutory, legal, or public policy of the state of Alabama.

Civil Procedure as to each paragraph and sub-paragraph of Plaintiffs' complaint and amended complaint(s) on the ground that there is no genuine issue as to any material fact, and Defendants are entitled to judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of May, 2011, a copy of the foregoing was served on all counsel of record in this cause by AlaFile/CM-ECF electronic filing.

/s/ P. Ted Colquett
OF COUNSEL