**REL:09/27/2013**

**Notice:** This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

# SUPREME COURT OF ALABAMA

**SPECIAL TERM, 2013**

---

**1111117**

---

**State Farm Fire and Casualty Company**

**v.**

**Shawn Brechbill**

**Appeal from Morgan Circuit Court**
**(CV-10-900034)**

MOORE, Chief Justice.

State Farm Fire and Casualty Company appeals from an adverse judgment entered on a jury verdict in the Morgan Circuit Court in favor of homeowner and policyholder Shawn Brechbill on his claim of "abnormal" bad-faith failure to

investigate an insurance claim. We reverse the trial court's judgment and remand.

## I. Facts and Procedural History

On September 7, 2007, Brechbill purchased a 3-story, 30-year-old house in Lacey Springs. One month before closing on the purchase, Brechbill hired Allan McCrispin of McCrispin, Inc., a home-inspection company, to inspect the house. McCrispin did not note any significant cracking around the interior door frames. McCrispin noted some floor squeaking, as is typical for wood floors in older homes, but he saw no evidence of long-term settling of the house.

On September 11, 2007, a State Farm employee inspected Brechbill's house to verify that it met State Farm's underwriting requirements. State Farm's underwriting file on Brechbill's house indicated "yes" to the following question: Does the "applicant dwelling meet all homeowner underwriting guide requirements?" The underwriting file also reported "no unrepaired damage." At all relevant times, Brechbill's home was insured by State Farm.

In his complaint, Brechbill alleged as follows:

> "On January 29, 2008, Brechbill's house suffered damage due to a windstorm. On that date, high winds

> struck the house. An anemometer on the roof measured wind speed at approximately 59 miles per hour. The winds damaged the roof and racked the structure of the residence causing interior walls to crack and buckle and other damage. Interior damage and damage to the shingle roof were visible after the event."

Brechbill described the events of the storm as follows. "It was literally shaking the house. ... It was shaking the windows ... there was so much banging--there was banging and popping in the house. ... The house was shaking so violently--I had a computer on the desk--the screen ... was shaking so bad it was actually walking across the desk." Brechbill also stated that "the house was rocking."

State Farm designated the windstorm that occurred on January 29, 2008, as a state-wide catastrophe due to the high number of insurance claims. State Farm's declaration of a "catastrophe" was based on the number of claims, not the severity of the claims. In north Alabama alone about 300 State Farm insurance claims were submitted.

Brechbill alleged that in the days after the windstorm he noticed that the wall between the master bedroom and the dressing room was buckled and displaced, that the floor squeaks had become widespread, that a door frame had become dislodged, and that cracking started to appear in the drywall.

Brechbill also alleged that the cracks in the drywall were not present when he purchased the house or at any time before the January 29 windstorm. Brechbill alleged that immediately after the storm his house was noticeably more drafty and that interior blinds would move with the wind.

On March 31, 2008, Brechbill submitted a claim to State Farm for payment based on the wind damage. State Farm insurance adjuster Keith Fry inspected Brechbill's house on April 21, 2008. Fry found exterior damage to the roof shingles and interior damage consisting of cracked drywall and separated door jams. Fry concluded the exterior damage to the roof shingles was covered by Brechbill's insurance policy and issued payment for roof repairs. Fry's inspection included a photograph of drywall cracking above a door casing. Fry suggested that State Farm retain an engineer to determine the cause of the interior damages.

State Farm retained Phillip Chapski of Cerny & Ivey Structural Engineers, Inc., who inspected Brechbill's residence on April 24, 2008. Chapski's report, dated May 5, 2008, described his inspection as an "engineering evaluation ... to assess the structural integrity of the residence."

Brechbill was present during this investigation and provided Chapski with background information, which included floor drawings apparently prepared by Brechbill. Chapski's report states: "A visual inspection was performed only. There were no invasive or destructive materials investigations, or laboratory testing performed at the site. This report is limited in scope and based on investigative information gathered before, during, and after the site investigation." Chapski evaluated whether "a wind storm affect[ed] the structural integrity of the residence and if not, what caused the damage." Chapski's report indicates he performed measurements "in the field" as part of his investigation.

From Chapski's visual inspection of the attic, he observed no cracking, misalignment, or apparent settlement or displacement of the wood-framing system supporting the roof structure. From his measurements and review of Brechbill's drawings, Chapski also concluded that the interior load-bearing walls of the residence were not properly aligned with one another, thus creating loading eccentricities and differential stresses and movements within the residence. Chapski observed cracking of the drywall between the master

bedroom and dressing room and in the back bedroom, but he concluded that the cracking of the drywall was limited and not widespread.

Chapski's report featured the following conclusions:

> "1) The cracking of the [s]heetrock and the squeaking of the floors as noted and identified was caused by long-term movement and settlement of the residence. The long-term movement and settlement would have been considered normal and typically occurs as the residence ages and matures over time and [is] a function of a combination of factors influenced by the normal long-term aging, deterioration, and settlement of the building systems and local weather conditions, such as wind, rain, snow, and the freeze thaw cycle.
>
> "2) Another factor that influenced the long-term movement and settlement and the initial cracking was the design, framing, and construction methods used to construct the residence especially the layout of the floor systems above the first floor level. The tall and exposed exterior walls and the wood framing methods used to construct the interior walls stressed the wood framing and support systems resulting in visible cracking of certain interior sheetrock walls.
>
> "3) It is our opinion that the problems with the existing roof covering are considered long-term issues caused from a roof covering that had exceeded its useful life cycle.
>
> "4) It is our opinion that the squeaking floors most probably were an original construction issue.
>
> "5) It is our opinion that the reported moving or 'racking' and audible noises heard during the high winds was considered an expected occurrence given

> the location, size, layout, and construction of the residence. Over time, normal aging and wear will weaken the building systems exacerbating the problem."

Based on Chapski's findings, State Farm representative Heather Woods determined that the interior damage reported by Brechbill was not covered under Brechbill's homeowner's insurance policy. Woods sent a letter to Brechbill citing two reasons for State Farm's denial:

> "We do not insure for any loss to the property ... which ... occurs as a result of any combination of ... wear, tear, ... deterioration, inherent vice, latent defect ... settling, cracking, shrinking, bulging, or expansion of ... walls, floors, roofs, or ceilings.
>
> "We do not insure under any coverage for any loss consisting of ... defect, weakness, inadequacy, fault or unsoundness in: ... siting ... design, specifications, workmanship, construction, grading, compaction; materials used in construction or repair; or maintenance."

Woods also sent Chapski's report to Brechbill and told him he could get his own engineer to evaluate the interior damage.

Brechbill disagreed with Chapski's conclusions. According to Brechbill, Chapski did not verify any of the dimensions or measurements of the house during his investigation, nor did he directly access the attic, other than performing a visual inspection by sticking his head into the attic-access hole. On

May 15, 2008, Brechbill called Chapski to discuss his conclusion that the interior damage was caused by long-term settling. Chapski told Brechbill that this was a typical situation where the damage had been there before the event but had gone unnoticed.

On May 28, 2008, Brechbill called Bert Myers, a State Farm representative, and explained his concern that Chapski had not based his opinion on the specific facts of the case and had ignored facts that the house did not have the issues he was complaining of just a few months before the windstorm. Myers disputed Brechbill's conclusions.

After Chapski's inspection, Brechbill had McCrispin, who had inspected the house at the time Brechbill purchased it, inspect the house to "determine if items have/are changing over time in excess of expected values." As a result, McCrispin issued a second report in June 2008 in which he noted: "In looking at these areas there does appear to have been changes since the original inspection." McCrispin's second report identified four areas that had changed since his original inspection four months before the windstorm. On the main floor, the wall separating the living room and kitchen

had some "give" in the floor boards "that appears to have increased since the original inspection." On the main floor, there was a crack at the bottom corner on the driveway-side window that was not present at the original inspection. Also on the main floor, McCrispin noted that "it appears the trim has popped free from the door frame." In the master dressing room, McCrispin noted a crack above the corner of the doorway. McCrispin did not notice any sign of the exterior siding buckling or moving. McCrispin's second report indicated that the "give" or sag in the floorboards near the wall separating the main-floor kitchen and living room was a result of original construction.

On July 17, 2008, Brechbill met with State Farm representatives Myers and Woods and provided them with McCrispin's initial home-inspection report from 2007 and the follow-up report from June 2008. Myers indicated that Chapski would reassess the areas McCrispin had identified in his follow-up report. Woods asked Chapski to review Brechbill's concerns and McCrispin's second report and to consider five specific areas:

> "1. Plywood roof decking is moving and splitting causing a 5 to 6 ft. crack in roof and shingles. Nails are popping up out of the roofing system also.
>
> "2. Cracking/Buckling/Splitting above and below door and window frames. Master dressing room crack/buckle/split is one area in question.
>
> "3. Squeaking and softness of floors.
>
> "4. Movement and racking of the house frame.
>
> "5. Do you think the wind storm contributed to these damages?"

Chapski reviewed McCrispin's reports, completed a second inspection of Brechbill's residence, and submitted his second report to State Farm on July 29, 2008. His findings and conclusions remained the same. Chapski's second report contains the following statements regarding his subsequent research about wind-speed data gathered 10 miles from Brechbill's house.

> "Wind data was reviewed from the weather station at the Redstone Arsenal Airport. The Redstone Arsenal Airport was located approximately 10 miles from the subject site. ... The wind data collected at the airport would be considered relevant with respect to the subject site and area. As documented from the published data generated at the airport for the time frame of January 28, 29, 30, and 31, 2008, the maximum wind velocity in wind gust recorded for the period researched was 33 miles per hour, which occurred on Tuesday January 29, 2008 at approximately 2:55 pm."

Chapski opined:

> "The conditions and damage[] as inspected and observed were not caused by the heavy winds that reportedly occurred on or about January 29, 2008. Documentation of the wind data as recorded at the Redstone Arsenal Airport indicated no strong winds or precipitation had occurred during that time frame in the general area. All recorded wind speeds were deemed normal and that no strong or damaging wind speeds had occurred."

Chapski's second report evaluated McCrispin's initial report as follows:

> "It was stated in the report that the siding was in generally good condition and that no current sign of buckling or movement was observed. In our opinion, this indicated that damaging movement or racking of the frame at the residence had not occurred. ..."

After discussing Chapski's second report with Brechbill, Heather Woods sent a second denial letter to Brechbill. The second denial letter gives the same two reasons State Farm provided in the first denial letter. However, State Farm's second denial letter added a third reason for denying Brechbill's claim:

> "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events ... Earth movement, meaning the sinking, rising, shifting, expanding, or contracting of earth ... Earth movement includes but is not limited to ... subsidence, erosion, or movement resulting from improper compaction, site selection or any other

> external forces. Earth movement also includes volcanic explosion or lava flow."

In August 2008, Brechbill hired Dr. William Payne of Payne Home Inspections, Inc., to conduct an investigation of the structure. Payne also assessed Chapski's reports and State Farm's conclusions. Payne concluded generally that "[t]he conclusions from the consulting engineers are based on questionable logic and incomplete research." He explained:

> "Neither report from the consulting engineering firm addressed the conditions of the house on the date of the inspection. The conclusions of both reports relied on suppositions of the engineer not the conditions of the house at the time of his inspection.
>
> "The engineer assumed, without justification, the cracks to be in existence before the wind event.
>
> "The consulting engineer incorrectly assumed the damaged walls were load bearing. ... The conclusions from the engineering firm based on the assumption the walls are load bearing are incorrect.
>
> "The wind speeds noted in the second report are based on a weather condition from a location that was not recording weather data at the time the event was occurring at your home.
>
> "The consulting firm made serious errors in inspecting the house and investigating the events surrounding the occurrence of damage to your house.
>
> "The consulting firm ignored relevant information from an independent source (Home Inspector) and from your measurements at the time of the event.

> "The unusual wind load caused excessive movement of the framing and caused the interior cosmetic damage to occur.... I believe the wind load of January 29, 2008, caused the connections between the framing members to fail. Because the connections no longer properly resist the applied horizontal loads, the house moves excessively."

On December 9, 2009, Brechbill sent State Farm the results of Payne's engineering report and a copy of a report Brechbill had himself prepared. Myers again met with Brechbill and forwarded the two new reports to Chapski for analysis and review. Chapski then prepared a third supplemental report of January 15, 2010, on causation of damage. Most of Chapski's original conclusions did not change. His observations about wind speed, however, did change. Chapski's third report found:

> "Based upon review of the information provided by Mr. Brechbill and review of other local meteorological data, it appears that the structure was affected by long-term winds in the range of 55 mph to 65 mph. Cerny & Ivey does not believe the 60 mph wind event was 'unusual' or that horizontal loads resulting from that wind were 'excessive.'"

On January 28, 2010, Brechbill sued State Farm, alleging breach of contract, "normal" bad-faith failure to pay, and "abnormal" bad-faith failure to investigate. After filing its answer, State Farm filed a motion for partial summary judgment on Brechbill's claims of "normal" bad-faith failure to pay and

"abnormal" bad-faith failure to investigate. On October 7, 2010, the trial court granted State Farm's motion for a partial summary judgment as to Brechbill's claim for "normal" bad faith and denied State Farm's motion as to "abnormal" bad faith. The trial court's order reads in pertinent part:

> "It appears to the Court that Brechbill has presented no serious opposition to State Farm's argument that his normal bad faith claim is not supported by substantial evidence. He has created no genuine issue of material fact about whether or not State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim on August 7, 2008. State Farm is entitled to a judgment as a matter of law on Brechbill's normal bad faith claim."

As to the "abnormal" bad-faith claim, the trial court stated:

> "The Court cannot say with a reasonable degree of certainty, based on the record before it, that State Farm has carried its burden to make a prima facie showing that it marshaled all the facts necessary for it to make a good faith coverage determination as to Brechbill's interior damage claim; that it adequately investigated all areas of damage related to the claimed loss; that it adequately investigated whether or not the January 29, 2008 wind event caused the loss as claimed by Brechbill; that it properly and adequately investigated the condition of the interior of Brechbill's home before January 29, 2008, especially in view of its retained engineer's opinions that the interior damage had occurred over a long period of time and was caused by forces or construction practices that predated the claimed wind event; and that it properly subjected Brechbill's claim to a reasonable cognitive review or evaluation before denying the

> claim on August 7, 2008. In arriving at its foregoing conclusions, the Court finds that the Alabama Supreme Court's reasoning and holdings in Jones [v. Alfa Mutual Insurance Co.], 1 So. 3d [23] at 34-37 [(2008)], are persuasive, if not controlling."

The trial court denied State Farm's motion to reconsider the denial of the summary judgment on the "abnormal" bad-faith claim. State Farm sought certification for a permissive appeal from the trial court, which the trial court also denied. In the order denying State Farm's request for a permissive appeal pursuant to Rule 5, Ala. R. App. P., the trial court observed, in pertinent part:

> "Until filing its Motion for Certification [for a permissive appeal], the defendant has not created an issue or presented an argument that the granting of a summary judgment on the plaintiff's 'normal' bad faith claim necessarily would require the Court to grant a summary judgment on the plaintiff's separate 'abnormal bad faith' claim. Moreover, it appears to be settled law that for a plaintiff to survive a motion for summary judgment on a 'normal' bad faith claim, his underlying breach of contract claim must be so strong that he would be entitled to a preverdict judgment as a matter of law. Shelter Mut. Ins. Co. v. Barton, 822 So. 2d 1149 (Ala. 2001). Because of the swearing match between the defendant's expert and the plaintiff's expert as to the cause of the plaintiff's interior damage to his home, the plaintiff in the case at bar would not be entitled to a preverdict judgment on his breach of contract claim as a matter of law. For this reason, the Court granted the defendant's Motion for Partial

> Summary Judgment as to the plaintiff's 'normal' bad faith claim.
>
> "In 'abnormal bad faith' cases, however, the predicate of a preverdict judgment as a matter of law on the plaintiff's breach of contract claim is not required. White v. State Farm Fire & Cas. Co., 953 So. 2d 340 (Ala. 2006); Employees' Benefit Ass'n v. Grissett, 732 So. 2d 968 (Ala. 1998); Jones v. Alfa Mut. Ins. Co., 1 So. 3d 23 (Ala. 2008). Given this distinction between the predicates for getting a 'normal' versus an 'abnormal' bad faith claim to a jury, the Court finds no controlling question of law on which there is substantial ground for a difference of opinion."

The trial began on November 14, 2011. At the close of Brechbill's case, State Farm moved unsuccessfully for a judgment as a matter of law. At the close of all the evidence, State Farm again filed a motion for judgment as a matter of law, which the trial court denied.

On November 22, 2011, the jury returned a verdict for Brechbill and awarded him $150,000 in compensatory damages on the breach-of-contract claim and $150,000 on the "abnormal" bad-faith-failure-to-investigate claim ($100,000 in compensatory damages and $50,000 in punitive damages). After the verdict, State Farm renewed its motion for a judgment as a matter of law and filed a motion for a new trial. State Farm's posttrial motions were denied by operation of law

pursuant to Rule 59.1, Ala. R. Civ. P. The trial court thereafter entered an order purporting to deny State Farm's posttrial motions on March 26, 2012. On April 30, 2012, State Farm timely appealed the adverse judgment on the "abnormal" bad-faith claim but did not appeal the judgment on the breach-of-contract claim.

## II. Standard of Review

This Court's standard of review for a ruling on a judgment as a matter of law is "'materially indistinguishable from the standard by which we review a summary judgment.'" Webb Wheel Prods., Inc. v. Hanvey, 922 So. 2d 865, 870 (Ala. 2005) (quoting Hathcock v. Wood, 815 So. 2d 502, 506 (Ala. 2001)). "We must decide whether substantial evidence was presented to the jury, which, when viewed in the light most favorable to [the nonmovant], would warrant a jury verdict in [the movant's] favor." 922 So. 2d at 870. Our standard of review for a ruling on a summary-judgment motion is well settled:

> "'"[W]e utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact," Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988), and whether the movant was "entitled to a judgment as a matter of law." Wright v. Wright, 654 So. 2d 542

> (Ala. 1995); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Wright, 654 So. 2d at 543 (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.'"

Preskitt v. Lyons, 865 So. 2d 424, 426-27 (Ala. 2003) (quoting Hobson v. American Cast Iron Pipe Co., 690 So.2d 341, 344 (Ala. 1997)).

## III. Analysis

The issue in this appeal is whether the trial court, after finding that State Farm had a reasonably legitimate or arguable reason for refusing to pay Brechbill's claim at the time of the August 7, 2008, denial, erroneously denied State Farm's motion for a judgment as a matter of law on Brechbill's claim of "abnormal" bad-faith failure to investigate, which we will refer to as the bad-faith-refusal-to-investigate claim.[1]

[1]Instead of the confusing terms "normal" and "abnormal" bad faith, this opinion will use the more descriptive terms

When this Court in 1981 adopted the tort of bad faith in regard to the failure to pay an insurance claim, it held, "an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.'" Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1, 7 (Ala. 1981). This tort has four elements plus a conditional fifth element, as follows:

> "(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> "(b) an intentional refusal to pay the insured's claim;
>
> "(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> "(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."

---

"bad-faith refusal to pay" and "bad-faith refusal to investigate," respectively.

National Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982).

State Farm argues that Brechbill's bad-faith-refusal-to-investigate claim cannot proceed as a matter of law because the trial court expressly found that State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim at the time of its denial. State Farm cites our holding in Weaver v. Allstate Insurance Co., 574 So. 2d 771, 774 (Ala. 1990), as follows:

> "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."

(Emphasis added.) State Farm notes that bad faith is a single tort, not two torts: that is, bad-faith refusal to investigate is the last element in the original articulation of the tort of bad-faith refusal to pay.

Brechbill, however, argues that a bad-faith-refusal-to-investigate claim can proceed to the jury even when evidence of bad-faith refusal to pay is insufficient to survive a judgment as a matter of law, citing Jones v. Alfa Mut. Ins.

Co., 1 So. 3d 23 (Ala. 2008) (plurality opinion). Brechbill maintains, contrary to State Farm's assertion, that there are two types of bad-faith claims. He quotes Employees' Benefit Ass'n v. Grissett, 732 So. 2d 968 (1998):

> "[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."

Id. at 976 (emphasis added).

As a preliminary matter, we agree with State Farm that there is only one tort of bad-faith refusal to pay a claim, not two "types" of bad faith or two separate torts. Since Chavers, this Court has referred to this tort in the singular:

> "[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.'"

405 So. 2d at 7. Even the quote from Grissett to which Brechbill refers discusses two methods "to establish a bad-faith refusal to pay an insurance claim," recognizing the singularity of the tort, albeit with different options for proof thereof. We have repeatedly held that the tort of bad-

faith refusal to pay a claim has four elements--(a) a breach of insurance contract, (b) the refusal to pay claim, (c) the absence of arguable reason, (d) the insurer's knowledge of such absence--with a conditional fifth element: "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." Bowen, 417 So. 2d at 183. Thus, for the tort of bad-faith refusal to pay, "[r]equirements (a) through (d) represent the 'normal' case. Requirement (e) represents the 'abnormal' case." Grissett, 732 So. 2d at 976. But the tort has always been one.

Regardless of whether the claim is a bad-faith refusal to pay or a bad-faith refusal to investigate, the tort of bad faith requires proof of the third element, absence of legitimate reason for denial: "Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith." Chavers, 405 So. 2d at 924 (emphasis added). As we held in Weaver, where the "[insurer's] investigation established a legitimate or arguable reason for refusing to

pay [the insured]'s claim, [that] is all that is required." 574 So. 2d at 774. See also Bowers v. State Farm Mut. Auto. Ins. Co., 460 So. 2d 1288, 1290 (Ala. 1984) ("[W]here a legitimate dispute exists as to liability, ... a tort action for bad faith refusal to pay a contractual claim will not lie.").

In the present case, the trial court's order ruling on the motion for a partial summary judgment states:

> "Brechbill has presented no serious opposition to State Farm's argument that his normal bad faith claim is not supported by substantial evidence. He has created no genuine issue of material fact about whether or not State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim on August 7, 2008."

(Emphasis added.) In its order denying State Farm's request for a permissive appeal, the trial court explained: "Because of the swearing match between the defendant's expert and the plaintiff's expert as to the cause of the plaintiff's interior damage to his home, the plaintiff in the case at bar would not be entitled to a preverdict judgment on his breach of contract claim as a matter of law." Because the trial court's ruling eliminated the third element of bad-faith refusal to pay, Brechbill's claim relying on the fifth element, i.e., that

State Farm "intentionally failed to adequately investigate" the claim, must fail. Weaver, 574 So. 2d at 774. The existence of an insurer's lawful basis for denying a claim is a sufficient condition for defeating a claim that relies upon the fifth element of the insurer's intentional or reckless failure to investigate. The trial court's summary judgment on the third element of bad faith established the law of the case and should have foreclosed further litigation of that claim. Belcher v. Queen, 39 So. 3d 1023, 1038 (Ala. 2009).

The Jones case, relied upon by the trial court and Brechbill to permit the bad-faith-refusal-to-investigate claim to proceed, is distinguishable. In Jones, we affirmed a summary judgment for Alfa Mutual Insurance Company on the Joneses' "normal" bad-faith-refusal-to-pay claim and found that Alfa's structural engineer's "report creates a question of material fact that would preclude the Joneses from receiving a preverdict judgment as a matter of law on the underlying breach-of-contract claim." Jones, 1 So. 3d at 34. We also concluded, in a portion of the decision joined by a plurality, that the following facts, taken as a whole, created a jury question on the bad-faith-refusal-to-investigate claim:

> "After Hurricane Opal, Alfa never investigated any records it had of the condition of the Joneses' house before the hurricane. The record reflects that Alfa never contacted a realtor who visited the Joneses' house three days before Hurricane Opal made landfall, even though, according to Harold Jones, Bradshaw had inquired about purchasing the Joneses' residence. Alfa never inquired of the Joneses as to who would have seen their house before Hurricane Opal and never attempted to interview anyone who may have visited the Joneses' house before Hurricane Opal. Alfa never considered its own 'rewrite' inspection of the Joneses' house, including photographs of the exterior of the house and never inquired of Sanders, its own employee, as to the condition of the Joneses' house when he conducted the 'rewrite' inspection, even though Sanders testified that he did not recall seeing any cracks in the interior or exterior walls of the Joneses' house when he conducted the 'rewrite' inspection three months before Hurricane Opal."

1 So. 3d at 36-37. Likewise, Brechbill asserts that State Farm never considered "before and after" evidence from its own insurance agent, from real-estate agents, from the prior owner, and did not speak to McCrispin or anyone else who may have seen the house before the windstorm.

In Jones, evidence for the insurer's denial was gathered after the denial was made, whereas here a debatable reason for State Farm's denials existed at the time of the denials. See, e.g., Pyun v. Paul Revere Life Ins. Co., 768 F. Supp. 2d 1157, 1171-72 (N.D. Ala. 2011) (holding that because "Met Life had

a reasonably debatable reason for denying Plaintiff's claim at the time of its denial of Plaintiff's claim.... [, it] is entitled to summary judgment on Plaintiffs extraordinary bad-faith claim").

State Farm may or may not have perfectly investigated (or reinvestigated) Brechbill's claim to his satisfaction, but perfection is not the standard here. "Alabama law is clear: ... regardless of the imperfections of [the insurer's investigation, the existence of a debatable reason for denying the claim at the time the claim was denied defeats a bad faith failure to pay the claim." Weaver, 574 So. 2d at 775 (quoting State Farm Fire & Cas. Co. v. Balmer, 891 F.2d 874, 877 (11th Cir. 1990)). This fact, present in Weaver and in the instant case, was nonexistent in Jones.

The facts before us do not rise to the level of bad faith, dishonesty, self-interest, or ill will inherent in bad-faith conduct. Even if State Farm improperly omitted some aspects of a complete investigation, "more than bad judgment or negligence is required in a bad-faith action." Singleton v. State Farm Fire & Cas. Co., 928 So. 2d 280, 287 (Ala. 2005). "Bad faith, then, is not simply bad judgment or negligence. It

imports a dishonest purpose and means a breach of 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, 405 So. 2d 916, 924 (Ala. 1981). A bad-faith-refusal-to-investigate claim cannot survive where the trial court has expressly found as a matter of law that the insurer had a reasonably legitimate or arguable reason for refusing to pay the claim at the time the claim was denied. Because State Farm repeatedly reviewed and reevaluated its own investigative facts as well as those provided by Brechbill, it is not liable for a tortious failure to investigate.

We reverse the judgment on the bad-faith-refusal-to-investigate claim and remand the case to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, Bolin, Parker, and Main, JJ., concur.

Moore, C.J., and Murdock, J., concur specially.

Bryan, J., concurs in the result.

MOORE, Chief Justice (concurring specially).

I. Introduction

This case exemplifies some of the confusion the tort of bad faith has created over the last 30 years for Alabama trial courts, for appellate courts, and for attorneys in general.

In Lavoie v. Aetna Life & Casualty Co., 374 So. 2d 310, 312 (Ala. 1979) ("Lavoie I"), this Court stated that it would "not foreclose the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits," citing Vincent v. Blue Cross-Blue Shield of Alabama, Inc., 373 So. 2d 1054 (1979), and Childs v. Mississippi Valley Title Insurance Co., 359 So. 2d 1146 (1978).

However, it was not until 1981 that this Court, according to Justice Reneau Almon in his dissent in Chavers v. National Security Life & Casualty Co., 405 So. 2d 1, 15 (Ala. 1981), with "zeal, ardor, and with iron determination, introduce[d] [us] to Mr. Bad Faith" and recognized the intentional tort of bad faith for the breach of a contract by an insurance company. In Chavers this Court adopted the test proposed in the dissent in Vincent and held that

> "an actionable tort arises for an insurer's intentional refusal to settle a direct claim where

> there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.'"

405 So. 2d at 7. The tort of bad faith is based upon the fact that "'[e]very contract contains an implied in law covenant of good faith and fair dealing'" and the "'[b]reach of [that] covenant provides the injured party with a tort action for "bad faith" notwithstanding that the acts complained of may also constitute a breach of contract.'" Id. at 4 (quoting Childs, 359 So. 2d at 1152).

The next year in National Savings Life Insurance Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982), Justice Richard ("Red") Jones distinguished "ordinary" bad-faith cases from "extreme" cases, which in time led to the phraseology of the "normal" bad-faith case versus the "abnormal" bad-faith case. 419 So. 2d at 1363-1364 (Jones, J., concurring specially). Justice Champ Lyons in Employees' Benefit Ass'n v. Grissett, 732 So. 2d 968, 976 (1998), defined the "abnormal" bad-faith case as follows:

> "The rule in 'abnormal' cases dispensed with the predicate of a preverdict [judgment as a matter of law] 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.
>
> "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 (citations omitted).

In 1999, Justice Lyons explained these terms for the Court again: "[t]he 'unusual or extraordinary' case was then referred to as the 'abnormal' bad-faith case, and the 'directed-verdict-on-the-contract-claim' case was called the 'normal' bad-faith case." State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 306 (Ala. 1999).

Chief Justice Bo Torbert noted in Chavers that "[i]t will be interesting to follow the impact of the majority's views on the contractual relationship between the insurers and their insureds." Chavers, 405 So. 2d at 14 (Torbert, C.J., dissenting).

And throughout the years, Justices, including Chief Justice Torbert, Justice Hugh Maddox, and Justice Jones, did indeed watch with great interest that impact.

In 1984 Chief Justice Torbert, dissenting in Aetna Life Insurance Co. v. Lavoie, 470 So. 2d 1060, 1079 (Ala. 1984) ("Lavoie II"), explained:

> "Tort duties are difficult to judicially define or confine; ... the process becomes endless, with attempts to cover each fact situation specifically as it arises, ultimately causing more confusion than clarity, as the specific rules inevitably conflict."

In Lavoie II, Justice Maddox, also dissenting, stated that "the Court has expressed differing views on the standards to be used ... in determining when and under what circumstances the tort was established." 470 So. 2d at 1088 (Maddox, J., dissenting).

Three years later, Justice Maddox noted in a special concurrence in Aetna Life Insurance Co. v. Lavoie, 505 So. 2d 1050, 1058 (Ala. 1987) ("Lavoie III"), that the Court has had "difficulty with this kind of claim from the beginning."

Justice Jones also expressed concern, shortly after the Court first recognized the tort of bad faith, that the two tiers of bad faith were confusing. He stated:

> "I think it is more confusing than helpful to discuss the requisite elements of punitive damages in a bad faith context in terms of either 'malice' on the one hand or 'wanton and reckless' on the other. ... Language that implies a two-tier test is misleading and improper."

Continental Assurance Co. v. Kountz, 461 So. 2d 802, 810 (Ala. 1984) (Jones, J., concurring specially).

Justice Maddox, dissenting in that case, opined that the test for "normal" bad faith is much like a court having to say that although "obscenity" cannot be defined, "I know it when I see it." Id. at 811. (Maddox, J., dissenting). He charged the Court with "fail[ing] to give ... settled principles to guide ... in determining when, and under what circumstances, the tort can be established." Id.

Alabama's present version of the tort of bad faith remains at least as confusing and amorphous as when the Court recognized the tort in 1981. Such difficulties will always be present whenever the judiciary violates the separation-of-powers doctrine.

## II. The Impact of Chavers

"The whole question of bad faith by insurance companies might be an issue more properly addressed by the legislature." Lavoie II, 470 So. 2d at 1080 (Torbert, C.J., dissenting).

"'[I]n our scheme of government, policy questions like this, [that] involve the heavily regulated insurance industry, should properly be addressed by the Legislature, but the Legislature has not acted.'" Lavoie III, 505 So. 2d at 1058 (Maddox, J., concurring specially) (quoting his dissent in Kountz, 461 So. 2d at 812). In Lavoie III, Justice Maddox stated:

> "[I]t is apparent that there are serious public policy considerations involved which are difficult for me, and I believe for this Court, to address.
>
> "The same public policy considerations which plagued me in Chavers, when the tort was recognized, continue to plague me.
>
> "....
>
> "'... [I]n our scheme of government, policy questions like this, especially since they involve the heavily regulated insurance industry, should properly be addressed by the Legislature, but the Legislature has not acted.'"

Id. at 1057-58. See also Kountz, 461 So. 2d at 811-13(Maddox, J., dissenting) (same); and Thomas v. Principal Fin. Group, 566 So. 2d 735, 751 (1990) (Maddox, J., concurring in part and dissenting in part) (same); Independent Fire Ins. Co. v. Lunsford, 621 So. 2d 977, 982 (Ala. 1993) (Maddox, J., concurring in part and dissenting in part) (same); and Ex

parte Simmons, 791 So. 2d 371, 382 (Ala. 2000) (Maddox, J., concurring in the result) (same).

On October 2, 1981, this Court released both Chavers and Gulf Atlantic Life Insurance Co. v. Barnes, 405 So. 2d 916 (1981). In Chavers, the Court recognized that it was making a "new" law, stating:

> "[T]he law applicable to first party actions involving a direct claim by the insured is not so well settled. ...
>
> "....
>
> "... Heretofore, we have reserved any ruling on this tort, 'necessarily awaiting the factual context of a live litigated case for a more definitive statement of its elements and application.'"

Chavers, 405 So. 2d at 5-6 (citation omitted) (emphasis added). Chavers recognized "the intentional tort of bad faith in first party insurance actions." Id. at 6. On the very same day, the Barnes opinion sought to "restate" the requirements,

> "under Alabama law, for establishment of the tort of bad faith refusal to pay a valid claim. The latest pronouncement by this Court on this question was made in Chavers v. National Security Fire and Casualty Company."

405 So. 2d at 923. Chavers also cross-referenced Barnes: "[W]e have now by our opinion in this case, as well as in [Barnes,]

delineated the tort of bad faith requisites with sufficient clarity to be helpful." 405 So. 2d at 11.

Taking Chavers and Barnes together, this Court believed its recognition of the tort of bad faith was a pronouncement of Alabama law. The pronouncement of what a new tort law shall be for future application is a legislative act. "It has been well said, that, 'to declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislation.'" Alabama Life Ins. & Trust Co. v. Boykin, 38 Ala. 510, 513 (1863). The Constitution bars the judiciary from exercising legislative powers, which are wholly vested in the legislative branch. This Court's attempt in Barnes and Chavers to recognize a new tort was an unconstitutional usurpation of legislative powers.

Chavers based its judicial legislation on what members of this Court believed public policy required. See Chavers, 405 So. 2d at 6 ("[T]he inherent policy considerations mandat[e] our recognition of a redressable tort for intentional breach of good faith."). However, "[t]he Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not trod." Cavalier

Mfg., Inc. v. Jackson, 823 So. 2d 1237, 1248 (Ala. 2001). "[T]he authority to declare public policy ... is reserved to the Legislature." Ex parte State Farm Fire & Cas. Co., 764 So. 2d 543, 547 (Ala. 2000). Although the legislature may determine a need for action based upon public policy, the judiciary must be blind to the competing public-policy interests and conditions of insurer and insured, for "[j]ustice is blind, says the law, and in her judgment must see no man, color, race, or condition." Jones v. State, 21 Ala. App. 234, 236, 109 So. 189, 191 (1926).

Those times when the legislature has not acted give the Court no mandate for judicial usurpation of legislative powers, even in areas of great public concern, such as an insurer's refusal to pay a legitimate claim. Thus, contrary to Justice Maddox's recommendation, the Court cannot and should not "fashion an appropriate remedy for every wrong, and should [not] do so if the legislative branch does not address the wrong." Lavoie III, 505 So. 2d at 1060 (Maddox, J., concurring specially). "[T]he legislature is uniquely qualified to make those determinations." Id.

> "The job of making law belongs exclusively to the Legislature. The desire or need for action in a

> particular area of public policy cannot justify a court's intruding itself into the field of legislation in order to reach a desired result...."

Ex parte James, 836 So. 2d 813, 876 (2002) (Moore, C.J., concurring in the result in part and dissenting in part). In the area of tort law, "[t]o enact a judge's public policy vision ... represents an attempt to have the judiciary act in a legislative capacity." 836 So. 2d at 859. Legislative inaction simply does not grant the judiciary new powers either to engage in public-policy analysis or to create law. Perhaps an intentional breach of a contract for insurance should be punishable by an award of punitive damages, but that is a question that should be addressed by the legislature of this State, not the courts.

## III. The Nature of Judicial Opinions

The members of the judiciary are often tempted to think judicial opinions create law, as if, by fiat, "'out of the facts the law arises' ... created in the Supreme Court's laboratory with only an empty test tube." Chavers, 405 So. 2d at 14 (Almon, J., dissenting). When the judiciary indulges this temptation, our government of laws is dismantled, replaced with a government of men, in violation of Art. III,

§ 43, of our Constitution. Blackstone explained, "the law, and the opinion of the judge are not always controvertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." 1 William Blackstone Commentaries *71. "[W]e may take it as a general rule, 'that the "decisions of courts of justice are the evidence of what is common law."'" Id. (emphasis added). Again, "these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law." Id. at *69 (emphasis added).

Chancellor James Kent agreed: "The reports of adjudged cases are admitted to contain the highest and most authentic evidence of the principles and rules of the common law." 1 James Kent Commentaries on American Law *465 (1826). As judges, we are "sworn to determine, not according to [our] own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." Commentaries *71 (emphasis added).

Thus, our judicial opinions are not law, but rather evidence of the law. We issue opinions; we do not enact

statutes. Judicial opinions are signposts. As signposts, judicial opinions may point later travelers the right direction to already existing law, or may point the wrong direction to previously nonexistent, judicially created "law." The judiciary should maintain correct signs but remove or replace signs that lead travelers astray. Chavers and Barnes did not point to existing Alabama law; those cases purported to create new law. Because of this, the opinions in Chavers and Barnes must not be confused with Alabama's tort law. The legislature never enacted the tort of bad faith, and this Court had no power to do so. Chavers and Barnes thus provide no authoritative evidence of tort law in Alabama. Consequently, the judicially legislated tort of bad-faith refusal to pay an insurance claim should not be recognized as part of Alabama law by this Court or any Alabama court. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined." Commentaries at *70. The tort of bad-faith

refusal to pay an insurance claim is not simply bad law; it is not law at all.

## IV. Conclusion

In 1998, Justice Maddox urged the Court to look "at the history of the establishment of the tort of bad-faith failure to pay an insurance claim," stating that "it very well may be appropriate for this Court, or for the Legislature, to reexamine the tort of bad-faith failure to pay." Grissett, 732 So. 2d at 982, 984 (Maddox, J., concurring in the result); see also Ex parte Simmons, 791 So. 2d 371, 382-83 (Ala. 2000) (Maddox, J., concurring in the result) ("The fact that trial courts and this Court are still being presented with questions relating to when, and under what circumstances, a bad-faith cause of action can accrue, suggests that an alternative to the bad-faith cause of action would be more appropriate.").

Although the legitimacy of the judicially created tort of bad-faith refusal to pay was not challenged in this case, I believe that this Court's recognition of the tort as the law in Alabama was unconstitutional. I urge the Court to reexamine Chavers, to overrule it in an appropriate case, and to abolish this judicially legislated tort, leaving to the legislative

branch the right to determine policy questions such as the intentional breach of an insurance contract by an insurance company.

MURDOCK, Justice (concurring specially).

As the main opinion notes, this Court in National Security Fire & Casualty Co. v. Bowen, 417 So. 2d 179 (Ala. 1982), stated the elements of a claim of "bad faith" in the following manner:

> "'(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> "'(b) an intentional refusal to pay the insured's claim;
>
> "'(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> "'(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> "'(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.'"

___ So. 3d at ___ (quoting Bowen, 417 So. 2d at 183).

I do not understand element (c) of the tort of bad-faith refusal to pay an insurance claim as referring to an absence of a debatable reason in an absolute sense, but as referring to an absence from the insurer's decisional process of a debatable reason. See, e.g., National Sav. Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982) ("Whether an

insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision was made."); Jones v. Alabama Farm Bureau Mut. Cas. Co., 507 So. 2d 396, 400 (Ala. 1986) (holding that an investigation conducted after the denial of a claim cannot have served as an arguable basis for denying the claim); and National Ins. Ass'n v. Sockwell, 829 So. 2d 111, 130 (Ala. 2002) (noting that it is "an insurer's responsibility to marshal all of the pertinent facts with regard to its insured's claim before it refuse[s] to pay"). With this understanding, I agree with the main opinion that element (c) is an element of both "normal" and "abnormal" bad-faith claims.[2]

[2]To understand element (c) in an absolute sense would be to ignore two facts. First, it would ignore the fact the "intentional refusal" required by element (b) is something more than the mere failure described in element (a) (the failure to pay a contractual obligation that is in fact owed); that this "something more" relates to the mind-set of the insurer in its decision-making process; and that element (c) speaks in reference to "that refusal" required by element (b), not to the mere "breach" required by element (a). Second, it would mean that, even when there is in fact no true basis for refusing to pay an insured's claim (as must always be true pursuant to element (a)), an insurer might by dumb luck avoid any liability for its bad-faith refusal to pay the insured's claim without even investigating if, in fact, there was "out there somewhere," although unknown to the insurer, an

I do not intend hereby to express any opinion as to the holding in Jones v. Alfa Mutual Insurance Co., 1 So. 3d 23 (Ala. 2008), or any basis for distinguishing this case from Jones.

---

"arguable" reason for such a refusal.