APPELLATE CASE NO. 1111117

SUPREME COURT OF ALABAMA

STATE FARM FIRE AND CASUALTY COMPANY,

Appellant,

vs.

SHAWN BRECHBILL,

Appellee.

ON APPEAL FROM
THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA
CIVIL ACTION NO.: CV-2010-900034

***AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF BRECHBILL'S APPLICATION FOR REHEARING**

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

If oral argument is granted on the Application for Rehearing, United Policyholders requests leave to participate in same. The Appellee, Mr. Brechbill, is *pro se.* Considering that Mr. Brechbill does not have counsel, United Policyholders believes that allowing the *Amicus* to participate in oral argument will assist the Court and will help level the playing field.

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SUMMARY OF THE ARGUMENT

The majority's opinion confuses the issues in a manner that is inconsistent with the past 30 years of Alabama "bad faith" jurisprudence and thereby creates a great risk of confusion and uncertainty in future cases.

It is clear that the majority's opinion is based on a peculiar procedural fact—namely that the trial court conclusively determined in a pre-trial summary judgment that State Farm "had a reasonably legitimate or arguable reason for refusing to pay." This was the "law of the case." The opinion should be limited to that procedural fact. Instead, however, the majority goes beyond what is necessary and (1) indicates that an "abnormal" claim requires proof all of the elements of the "normal" claim plus more, which is incorrect and confuses the elements, and (2) makes unnecessary factual determinations. The majority ignores or overlooks State Farm v. Slade and misinterprets Weaver v. Allstate.

The majority's opinion should be revised. It should be limited to its own particular procedural facts and end there. Alternatively, it should clarify and restate the elements to remove the confusion, and it should likewise

confirm that the past 30 years of "bad faith" law are not being overruled.

ARGUMENT

UP, representing the interests of Alabama policyholders, is very concerned that the majority's opinion in the case at bar has confused the issues. UP desires that the Court grant rehearing and clarify the majority's opinion so that both insurers and policyholders have clear guidance going forward.

A. THE MAJORITY'S OPINION SHOULD BE CLARIFIED SUCH THAT IT IS CLEARLY LIMITED TO THE PECULIAR PROCEDURAL FACTS UPON WHICH THE MAJORITY BASED THE OPINION.

Upon a close reading of the majority's opinion in the case at bar, it is clear that the majority based the opinion on one critical procedural fact, to wit:

> The trial court found, on summary judgment, that Brechbill "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." Therefore, the trial court ruled that "State Farm is entitled to a judgment as a matter of law on Brechbill's normal bad faith claim."[1]

[1] UP understands that Brechbill may dispute the accuracy of the majority's opinion on this point. UP defers to Brechbill on that issue.

> On appeal, this Court then held, "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."

Thus, the foundation of the majority's opinion is the trial court's finding, on pre-trial summary judgment, that there was no question of fact as to whether the insurer "had a reasonably legitimate or arguable reason for refusing to pay." This became the "law of the case" and should have prevented any form of "bad faith" claim from reaching trial, according to the majority's opinion. Due to the summary judgment, it was already determined (before trial) that there was no factual issue as to whether there was a "reasonably legitimate or arguable reason," and therefore there was no triable issue. The majority's opinion could have stopped there, at the "law of the case" issue.

UP is concerned that the discussion in the majority's opinion unnecessarily goes beyond the "law of the case" issue and risks creating confusion in future cases. If the majority's opinion is to stand, it should be clarified. Specifically, it should be clarified so that the opinion is

clearly limited to the peculiar and particular procedural fact upon which the majority based the opinion.

In other words, if the Brechbill case is to create any precedent, the precedent should merely be that for a "bad faith" claim to reach trial, there must at least be a genuine issue of material fact as to whether or not the insurer had "a reasonably legitimate or arguable reason for refusing to pay." Because the trial court in this case had already determined "no genuine issue of material fact" on the issue, the trial court improperly allowed the bad faith claim to be tried. That is as far as the Brechbill precedent should be allowed to go. UP requests that this Court grant rehearing and clarify the majority's opinion so that the Brechbill precedent is appropriately limited to its own peculiar procedural facts.

B. THE MAJORITY'S OPINION IGNORES OR OVERLOOKS STATE FARM v. SLADE AND SHOULD BE REVISED TO BE CONSISTENT WITH SLADE, WHICH ALREADY CLEARLY STATED THE ELEMENTS OF "ABNORMAL" BAD FAITH.

To date, this Court's most definitive explanation of the "abnormal" bad faith claim appears in State Farm Fire & Cas. Co. v. Slade, 747 So.2d 293 (Ala. 1999). Slade also involved State Farm, a damaged home, and conflicting expert

reports. Yet, the majority's opinion in the instant case fails even to mention Slade, much less to discuss, explain, follow, or distinguish it.

In Slade, this Court set out a lengthy and well-reasoned explanation of the law of "bad faith." including the following:

> Thus, a plaintiff must establish that his or her claim is either the normal case or the abnormal case of bad faith. To this date, the abnormal cases have been limited to those instances in which the plaintiff produced substantial evidence showing that the insurer (1) intentionally or recklessly failed to investigate the plaintiff's claim; (2) intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review; (3) created its own debatable reason for denying the plaintiff's claim; or (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim.
> …
>
> 'The absence of a debatable reason not to pay a claim cannot be grounded on the vagaries of construction of an ambiguity.' *Grissett,* supra, 732 So.2d at 977. An insurer can be liable for the tort of bad faith when it fails to properly investigate the insured's claim. *Thomas,* supra.
> …
>
> This evidence, the Slades say, shows that State Farm never investigated the possibility that lightning directly struck their dwelling, a fact, which if proven, would negate the application of the earth-movement exclusion. The Slades maintain that this failure created a question of fact as to whether State Farm properly investigated their claim, and, therefore, that the trial court

properly submitted this portion of their bad-faith claim to the jury. We agree.

…

As this Court stated in *Lavoie*, an insurance company has a "responsibility to marshal all ... facts" necessary to make a determination as to coverage "*before* its refusal to pay." (Emphasis in original.) This duty must include a duty to investigate a covered event that an insured claims has caused his loss. Otherwise, the duty to properly investigate, imposed by the law regarding the tort of bad faith and recognized in *Barnes*, supra, would be meaningless. Therefore, we reject State Farm's contention, and we hold that this portion of the Slades' bad-faith claim was properly submitted to the jury.

…

As stated above, we have concluded that the Slades produced substantial evidence indicating that State Farm did not properly investigate their claim. Therefore, State Farm was not entitled to a preverdict JML on the third aspect of the Slades' bad-faith claim.

…

In so doing, we make it clear that in order to recover under a theory of an abnormal case of bad-faith failure to investigate an insurance claim, the insured must show (1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review and (2) that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured's claim.

This is nothing new. Under the elements established in *Bowen*, supra, the plaintiff has always had to prove that the insurer breached the insurance contract. Practically, the effect is that in order to prove a bad-faith-failure-to-investigate claim, the insured must prove that a

> proper investigation would have revealed that the insured's loss was covered under the terms of the contract. This result preserves the link between contractual liability and bad-faith liability required by *Chavers*, supra, and *Dutton*, supra.

Slade, 747 So.2d at 306-07, 315-18 (emphasis added).

Thus, according to Slade, proof of "abnormal" bad faith requires the policyholder to show (1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review, and (2) that the insurer breached the contract for insurance coverage when it refused to pay the insured's claim. As to the first element, the Slade court cited examples of such proof from previous cases, where the insurer:

> (1) intentionally or recklessly failed to investigate the plaintiff's claim;
> (2) intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review;
> (3) created its own debatable reason for denying the plaintiff's claim; or
> (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim.

Slade at 306-07.

The majority's opinion ignores or overlooks Slade. This is unfortunate. Slade is the most clear and thorough explanation of the method of proving "abnormal" bad faith.

The Court should grant rehearing and revise the opinion in the case at bar so that it addresses Slade and either follows it or distinguishes it. To ignore or overlook Slade risks confusion in future cases.

C. THE MAJORITY'S OPINION SHOULD BE REVISED TO CONFIRM THAT IT IS NOT INTENDED TO OVERRULE SLADE AND VARIOUS OTHER CASES.

As discussed above, the majority's opinion does not even mention Slade. Thus, it would seem that the Court did not overrule Slade or the various other cases that are consistent with Slade. Indeed, the overall tone of the majority's opinion is that it is not changing anything but is merely clarifying what has been the law since Chavers in 1981.

UP is concerned, however, that the insurance industry will attempt to argue in future cases that Slade and other cases have been overruled by Brechbill and are no longer "good law." Therefore, UP requests that the Court grant rehearing and revise the majority's opinion to confirm that no previous cases are being overruled, and particularly the following:

- Chavers v. National Security Fire & Cas. Co., 405 So.2d 1 (Ala. 1981);

- Gulf Atlantic Life Ins. Co. v. Barnes, 405 So.2d 916 (Ala. 1981);
- Continental Assurance Co. v. Kountz, 461 So.2d 802 (Ala. 1984);
- Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050 (Ala. 1987);
- Blackburn v. Fidelity and Deposit Co. of Maryland, 667 So.2d 661 (Ala. 1995);
- Employees' Benefit Ass'n v. Grissett, 732 So.2d 968 (Ala. 1998);
- State Farm Fire & Cas. Co. v. Slade, 747 So.2d 293 (Ala. 1999);
- National Ins. Assoc. v. Sockwell, 829 So.2d 111 (Ala. 2002); and
- Jones v. Alfa Mutual Ins. Co., 1 So.3d 23 (Ala. 2008).

If the Court will provide this clarification, then it will avoid the risk of the insurance industry unfairly and inaccurately claiming that Brechbill is "new law" that has swept away the past 30 years of existing law.

D. THE MAJORITY'S OPINION CONFUSES THE ELEMENTS OF "BAD FAITH" AND SHOULD BE CLARIFIED TO MAKE CLEAR THAT A REASON FOR DENIAL IS NOT "REASONABLY LEGITIMATE OR ARGUABLE" IF IT IS BASED ON AN IMPROPER INVESTIGATION.

The majority's opinion may be correct when it states that there is a singular tort of "bad faith" which is subject to two distinct methods of proof—the "normal" claim and the "abnormal" claim. The majority's opinion may also

be correct when it states that both methods of proof require proof of "the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason)."

However, the majority's opinion then confuses the elements when it states that the "abnormal" claim requires proof of an extra element, or "fifth element," or "last element," or however else it may be described. In reality, the "abnormal" case is not a fifth element. It is merely an alternative method for proving the third element (as stated in the emphasized portion of Slade above). State Farm admitted as much in its briefs, where State Farm stated, "In finding whether there is an intentional failure to determine if there exists a lawful basis for refusing the claim, the relevant question before the trial court becomes whether the insurer properly investigated the claim." (State Farm Reply Brief, p. 27, quoting Weaver v. Allstate Ins. Co., 574 So.2d 771, 773 (Ala. 1990)).

This Court has recognized consistently that an insurer has a duty to gather all of the facts relating to a claim before making a denial. See Sockwell, 829 So.2d at 130; Slade, 747 So.2d at 315-16; see also Allan D. Windt,

Insurance Claims and Disputes: Representation of Insurance Companies and Insureds at §2:5 (Sixth Ed. 2013)("The implied covenant of good faith and fair dealing in the policy should necessarily require the insured to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage.").

As a result, an insurance company's denial of a claim is "fairly debatable" or "lawful" only if the insurer has done a proper investigation and evaluation of all the relevant facts before making a decision on the claim:

> "the trier of fact, by defining, on the part of the insurer, an 'intentional failure to determine whether or not there was any lawful basis for refusal,' may use that fact as an element of proof that no lawful basis for refusal ever existed. The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proofs submitted by the insured."

Barnes, 405 So.2d at 924; accord Kountz, 461 So.2d at 807 ("one method of proving that Continental had no legitimate

reason to deny payment would be a showing that the defendant intentionally failed to determine whether or not there was any lawful basis for denying payment").

Accordingly, the majority's opinion in this case should be revised to state the elements more accurately, as follows:

> (1) an insurance contract between the parties and a breach thereof by the defendant;
>
> (2) an intentional refusal to pay the insured's claim;
>
> (3) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason). In the "abnormal" case, the reason for refusal is not legitimate or arguable if it is based on an improper claim investigation or analysis[2]; and
>
> (4) the insurer's actual knowledge of the absence of any legitimate or arguable reason.

Thus stated, the elements are much clearer than as stated in the majority's opinion. "Abnormal" means "alternative," not "extra." The elements as restated above are entirely consistent with "abnormal" bad faith being an alternative

[2] A claim investigation or analysis is improper where the insurer, for example: (1) intentionally or recklessly failed to investigate the plaintiff's claim; (2) intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review; (3) created its own debatable reason for denying the plaintiff's claim; or (4) relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim. Slade at 306-07.

method of proof, as has been explained in Slade and Weaver and other opinions of this Court.

Accordingly, the majority's opinion should be revised to restate the elements with better clarity as set out above. To suggest that the "abnormal" claim requires proof of the "normal" plus something "extra" is inconsistent with the past 30 years of Alabama's case law and risks creating confusion. In reality, the "failure to investigate/evaluate" fits within the third element and is not an "extra" or "fifth" element. In future cases, all parties (both insurers and policyholders) will be better served if the elements are better clarified.

E. THE MAJORITY'S OPINION SHOULD BE REVISED BECAUSE IT MAKES UNNECESSARY FACTUAL DETERMINATIONS AND INVADES THE PROVINCE OF THE JURY.

In the case at bar, the majority based its opinion on the "law of the case" issue, as discussed above. The majority held that, once the trial court entered a pre-trial summary judgment finding an "arguable reason," the bad faith claim should have been dead. The bad faith claim should have been excluded from trial altogether.

Having reached that conclusion, the majority should have stopped there. Any additional discussion should have

been pretermitted. Anything additional is unnecessary and is dictum. Ex parte Williams, 838 So. 2d 1028, 1031 (Ala. 2002)("Because obiter dictum is, by definition, not essential to the judgment of the court which states the dictum, it is not the law of the case established by that judgment.").

It is unfortunate that the majority's opinion in the instant case states, in dictum, "The facts before us do not rise to the level of bad faith, dishonesty, self-interest, or ill will inherent in bad-faith conduct." This is not necessary to the majority's opinion, and the opinion should be revised to delete it.

Furthermore, this factual determination is improper on appellate review and invades the province of the jury's verdict. "The resolution of conflicts in the evidence rests solely with the trier of fact." Sharrief v. Gerlach, 798 So.2d 646, 651 (Ala. 2001). "We decline to substitute our judgment for that of the jury in matters dealing with credibility of witnesses and weight of the evidence." Marsh v. Green, 782 So.2d 223, 227 (Ala. 2000); accord Lafarge N. Am., Inc. v. Nord, 86 So. 3d 326, 332 (Ala. 2011), reh'g denied (Dec. 16, 2011). The Court's factual determination,

if not dictum, is an improper "second guess" of the jury's factual determination. Therefore, the majority's opinion should be revised to delete it.

F. IF NOTHING ELSE, THE MAJORITY'S OPINION SHOULD BE REVISED TO INCORPORATE JUSTICE MURDOCK'S SPECIAL CONCURRENCE.

In Justice Murdock's special concurring opinion, he stated, "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." Even if it does nothing else, the Court should revise the majority's opinion to incorporate Justice Murdock's explanation and reasoning.

CONCLUSION

For all of the above reasons, the Court should grant rehearing and should revise its opinion to be consistent with the relief sought by Brechbill and UP.

Respectfully submitted this the 17th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing upon the following persons by email and/or by placing a copy of the same in the U.S. Mail on this the 17th day of October, 2013:

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