

**IN THE CIRCUIT COURT OF CULLMAN COUNTY, ALABAMA**

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

**DEFENDANT'S AMENDED  
MOTION FOR SUMMARY JUDGMENT**

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

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

This motion is amended to be based on the following:

- A. The sworn statement of Charles E. Whitley, Jr., P.E., attached hereto and

incorporated herein as Exhibit “D.”

## **II. AMENDED STATEMENT OF UNDISPUTED FACTS**

1. It is undisputed that Charles E. Whitley, Jr., is a registered professional engineer in the state of Alabama (#19393) and is qualified to offer expert opinions in this matter. *Exhibit 1 to sworn statement of Whitley*. It is undisputed that he inspected the plaintiffs' poultry houses on May 5, 2003.

2. It is undisputed that when windstorm acts on a poultry house, the posts on one side of the house will lean in the same direction as the posts on the opposite side because the opposing posts are attached to the same truss: “When wind blows against a structure, if it's blowing perpendicular to the ridge, you get a pressure along the wall that the wind is actually blowing against. You get suction along the opposite wall. You also get an uplift force on the roof of the structure. If the structure were to deflect as a result of that wind, because of the connection between points A and B by the truss, the points have to move the same amount. You know, it's not possible for one side to remain in position and the other side to move as a result of an external force because of the connection between those two points. Basically, they're locked together and have to move together in response to that external force.” *Whitley Sworn Statement, page 21*. In discussing plaintiffs' poultry house one (1), Whitley continued, “[I]n this case, one post stayed in, was plumb, the other posts were leaning outward, which indicated the movement was not the result of wind.” *Whitley Sworn Statement, page 22*.

3. Whitley's diagram showing the attachment of opposite posts to a fixed truss is copied with the following explanation: "Q: So, in simple terms, with the poultry house

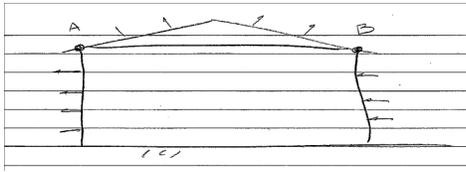


diagram marked as Exhibit 4, if Post B moves because of wind, then the opposite post, Post A will also move in the same direction of the wind? A: Yes. In the same direction and in the same amount." *Whitley Sworn Statement, page 22.* As noted in the immediately preceding paragraph, one side of poultry house one (1) was plumb and the opposite side was leaning, inconsistent with damage caused by windstorm.

4. In respect to Whitley's inspection of plaintiffs' poultry house one (1), it is undisputed that he found that "a large percentage of wood that the house was constructed from was deteriorated. There was evidence of long-term water standing, long-term deterioration. And the post[s] along one side – along the left side exterior wall of the house were leaning outward. There was also some deflection of the roofing structure." *Whitley Sworn Statement, pages 15-16.* It is undisputed that Whitley did not believe that the damage was caused by windstorm:

"Q: With respect to House No. 1, was it your opinion and is it your opinion that House No. 1 was damaged by wind storm?

"A: No.

"Q: Can you tell me why it is your opinion that House No. 1 was not damaged by wind storm?

“A: There were two facts that conclusively eliminated wind damage to the house, and the nature of the damage and the construction indicated other results.

“Q: And what were those results?

“A: The damage to the house was the result of long-term deterioration and high moisture contents that was leading to warping and twisting of the wood and rotting of the wood.

*Whitley Sworn Statement, pages 17-18.*

“Q: And the opinion that you expressed to Farm Bureau, based on your background, training, and education, and experience, was that House No. 1 was not damaged as the result of wind storm?

“A: Correct.”

*Whitley Sworn Statement, pages 24-25.*

5. In respect to Whitley's inspection of plaintiffs' poultry house two (2), it is undisputed that he found “[a] portion of the roof structure was sagging, support posts along the left side wall were leaning. Right side wall posts were also leaning. There was a lot of water stain and deterioration of the wood used for that house.” *Whitley Sworn Statement, page 16.* It is further undisputed that Whitley did not believe that this damage was caused by windstorm:

“Q: In respect to House No. 2, you found the roof to be sagging. Left side posts were leaning in what direction?

“A: The left side posts were leaning outward with the slope of three inches in four feet.

“Q: And with respect to the right posts?

“A: Right side posts were leaning inward with a slope of one inch in four feet.

“Q: Is that an indication of wind storm?

“A: No.

“Q: And why is it not an indication of wind storm?

“A: Because, as we discussed with House 1, due to the connection of the top of the posts on the opposite walls, they would have to move the same amount.

“Q: And so it's the same logic applied to House 2 as to House 1?

“A: Yes. Same conditions were present in both houses, both in terms of deterioration of the members, the high moisture contents, and the lack of wind damage.

“Q: And the expert opinion that you expressed to Farm Bureau, based on your training, education, and experience, was that House 2 was not damaged as the result of wind storm?

“A: Correct.

“Q: What was the cause of damage, if anything?

“A: The long-term deterioration of the wood,

the high moisture content of the wood.”

*Whitley Sworn Statement, pages 25-26.*

6. In respect to Whitley's inspection of plaintiffs' poultry house three (3), it is undisputed that he found “One truss had deflected and was damaged. The wooden roof support members were water-stained and deteriorated, and it also deflected. A lot of water stains in the house.” *Whitley Sworn Statement, pages 16-17.* Whitley did not find any leaning – plaintiffs' claimed damage – to house three (3). *Whitley Sworn Statement, page 29.* It is further undisputed that Whitley did not believe that the damage he did note was caused by windstorm:

“Q: During your inspection of House 3, did you find any evidence of damage to the house from wind storm?

“A: No.

“Q: And did you state your opinion to Farm Bureau, based on your background, training, education, experience, that House 3 was not damaged by wind storm?

“A: Yes.”

*Whitley Sworn Statement, page 32.*

7. It is undisputed, as set forth in paragraphs eight (8) to 16 in Farm Bureau's statement of undisputed facts in its motion for summary judgment, that Whitley continued to receive and review information provided by the plaintiffs following the denial of their claim, ostensibly in support of their claim that the poultry houses were caused to lean by windstorm.

Nevertheless, it remained Whitley's opinion (based upon his background, training, education, and experience) after submitting his reports and letters to Farm Bureau “and considering the documents that were provided to [him] through Farm Bureau by Mr. Holcomb,” that the poultry houses were not damaged by wind storm: “Q: **Was it your opinion and is your opinion that the damage you found was neither the result of nor caused by wind storm?**

A: **Correct.**” *Whitley Sworn Statement, page 44.*

8. It is undisputed that no one from Farm Bureau ever directed Whitley to write anything specifically in his report in respect to his findings; that no one from Farm Bureau ever suggested to him what should be put into any report, including the Holcomb report; that all of Whitley's findings were based on accepted structural engineering standards and principles; and **that the damage to the Holcomb poultry houses was the result of numerous factors unrelated to wind storm.** *Whitley Sworn Statement, pages 44-45.*

#### **IV. DEFENDANT’S ARGUMENT OF CONTROLLING LEGAL AUTHORITY**

##### **C. Breach of Contract/Windstorm**

9. Plaintiffs did not and have not presented substantial evidence from any source that the damage to the poultry houses resulted from the enumerated cause of windstorm, defined as a wind of tumultuous force and sufficient velocity to have caused the damage. Farm Bureau is therefore entitled to summary judgment on plaintiffs' claim of breach of contract. It relied upon an uncontradicted expert opinion that the damage to the poultry houses was the result of numerous factors unrelated to wind storm.

#### **D. Bad Faith**

10. As argued in Farm Bureau's motion for summary judgment, no appellate court in Alabama has held that an insurer is not entitled to rely on the opinion of an expert in determining the validity of an insurance claim. To the contrary, Alabama has recognized the principle that reliance on the advice of an expert founded on a “professional evaluation of the credibility of admissible evidence” can, as a matter of law, insulate the insurer from bad faith liability. See, Chavers v. National Sec. Fire & Casualty Co., 405 So.2d 1, 6-7 (Ala. 1981). Although the genesis of this principle lies in the context of advice of counsel, the Alabama Supreme Court extended the reach of same into review of medical records by an expert physician [Mordecai v. Blue Cross-Blue Shield of Alabama, Inc., 474 So. 2d 95 (Ala. 1985)] and an expert accountant [Insurance Co. v. North America v. Citizensbank of Thomasville, 491 So. 2d 880 (Ala. 1986)]. In the context of reliance on the advice of a third-party expert, therefore, there should be no distinction drawn between the advice of a structural engineer and that of an expert legal counsel, physician, or accountant.

11. Farm Bureau had a written and detailed report from a structural engineer stating that the damage resulted from a myriad of other causes, most specifically construction matters which allowed excessive moisture to build up over time. It was and is Whitley's expert opinion that the damage to the Holcomb poultry houses was not the result of windstorm, and Farm Bureau relied on his certified opinion that particular construction and building factors, including but not limited to moisture, caused the claimed damage to occur. Farm Bureau

relied on the certified opinions of the engineer within the circumstances of its overall claim investigation in denying the Holcomb claim, and consequently, did not intentionally fail to properly investigate the claim or intentionally fail to subject the results of its investigation to a cognitive evaluation. Farm Bureau is therefore entitled to summary judgment on plaintiffs' claim of bad faith.

#### **V. PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, it affirmatively appears without dispute that there is no genuine issue as to any material fact, and that Farm Bureau is entitled to judgment as a matter of law as to all claims alleged in the plaintiffs' Complaint. The defendant moves the court to enter summary judgment in its favor pursuant to Rule 56 of the *Alabama Rules of Civil Procedure* and to make said judgment final pursuant to Rule 54(b), costs taxed as paid.

/s/ P. Ted Colquett \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 9th day of October, 2007, a copy of the foregoing was served on all counsel of record in this cause by one or more of the following in accordance with the *Alabama/Federal Rules of Civil Procedure*:

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

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