SUPREME COURT OF ALABAMA

OCTOBER TERM, 1998-99

1961769 and 1961770

State Farm Fire and Casualty Company

v.

Gaines B. Slade and Ina Slade

Gaines B. Slade and Ina Slade

v.

State Farm Fire and Casualty Company

Appeals from Montgomery Circuit Court
(CV-95-458)

LYONS, Justice.

This case involves allegations of misrepresentation, suppression, deceit, breach of contract, and bad faith, all arising from the sale of a homeowner's insurance policy and the adjustment of a claim on that policy. Gaines B. Slade and Ina Slade sued State Farm Fire and Casualty Company after it had denied their insurance claim based on damage to their home.

Facts and Procedural History

In March 1992, the Slades undertook construction of their home in Montgomery. They paid approximately $650,000 for the construction. During the construction of their home, the Slades' next-door neighbors began construction of a home and removed a substantial amount of soil from their lot. The soil removal created a severe drop-off between the neighbors' property and the Slades' property. This drop-off required the Slades to construct a retaining wall on the property line, along the drop-off, to prevent erosion and soil movement.

On January 16, 1993, the Slades purchased a State Farm "Homeowner's Extra" policy. This policy was in effect at the time of the occurrence of the events later made the basis of the Slades' claim. On August 4, 1993, the retaining wall collapsed when lightning struck it during a severe storm. The collapse of the wall caused the ground around the Slades' backyard pool to give

way; this resulted in extensive damage to the pool area. State Farm paid for the repairs to the Slades' pool and paid for the replacement of the wall and the soil that was washed away during the storm. Soil was replaced up to three feet from the corner of the Slades' home, but no soil was replaced under the slab area of the home.

In October 1993, the Slades noticed cracking in the ceilings and in the interior and exterior walls of their home. They informed State Farm of this cracking on November 8, 1993. On November 15, 1993, David Majors, a State Farm claims adjuster, went to the Slades' home and examined the cracks in the walls and ceilings and in the exterior of the home. Mr. Slade told Majors that he had contacted Walter Riley, the contractor who had rebuilt the Slades' pool and retaining wall, and had asked him to monitor the cracks and possible ground movement around the home to determine if any ground movement was causing the cracking. Riley contacted three firms to have them determine the cause of the cracking and give estimates for repair. When Mr. Slade talked with Majors, Mr. Slade attributed the cracking to the fact that lightning had struck the retaining wall and caused it to collapse.

The three firms began their work in November 1993. Because the firms did not complete their reports by Christmas, the Slades asked State Farm and the firms to suspend work until after the Christmas holidays. By January 19, 1994, State Farm had received all three reports stating the cause of the damage, the repairs needed, and the estimated cost of the repairs. All three of these reports stated that the cause of the cracking at the Slades' home was that the soil beneath their home had moved by settling or shifting and that this soil movement had caused the foundation to move, thereby causing the cracks. The reports also said that the soil had moved as a result of the collapse of the retaining wall after lightning had struck it.

Sometime after January 1, 1994, State Farm became concerned that the cracking in the Slades' home might not be covered under their policy, because the policy contained an exclusion for losses

caused by "earth movement." Although the policy covered damage to the Slades' property caused by lightning, Di Williams, Majors's claims supervisor, believed that the Slades' claim presented a "concurrent causation question," meaning there was a question whether the two events, the lightning and the earth movement, had combined to cause the Slades' loss. According to State Farm, any loss caused by earth movement was not covered, because the policy states that losses caused by earth movement are excluded "regardless of: (a) the cause of the [earth movement] ... or (b) if other causes acted concurrently or in any sequence with the [earth movement] to produce the loss."

On January 13, 1994, Williams and Majors conferred with State Farm's claims superintendent in Montgomery, Pat Craig, about the earth-movement exclusion. Williams telephoned State Farm's in-house legal counsel, James Swift, to brief him on the facts of the Slades' claim and to discuss the concurrent-causation question. Swift asked her what the engineer's report stated regarding the cause of the Slades' loss. Williams told Swift that State Farm did not have an engineer's report. Williams then wrote a note to

Majors, on State Farm's claims log, telling him to contact the Slades for the purpose of getting an engineer's report and to tell the Slades that State Farm would review the engineer's report and "get back with them on coverage." The note also told Majors not to commit to coverage. Majors never told the Slades about the possible coverage questions.

After the conversation with Swift on January 13, 1994, Williams, Majors, and Craig believed that the Slades' loss was covered under the policy only if the lightning had directly hit either the Slades' home or the soil underneath their home. Also at this time, Craig and Williams assumed the main responsibilities in the adjustment of the Slades' claim.

On January 19, 1994, Craig received the last of the three initial reports regarding the cause of the damage at the Slades' home and the cost of repair. On that day, Craig wrote in the log of the Slades' claim: "Received report from Quality Assurance Testing Laboratories, states earth movement, does not state cause due to lightning, need to write letter to insured to bring up to

date on where we are." He also received a telephone call from Riley, the contractor, about hiring an engineer. Craig made a note of this call in the claims log, and, according to the Slades, wrote "not insured." However, at trial, Craig testified that he could not read his own handwriting and was unsure of his notation.

Craig testified that the three initial reports gave him "serious concerns" as to whether the Slades' claim was covered under their policy. He told Riley that he would find a structural engineer who would determine if the lightning was the direct cause of the damage. On January 24, he sent a letter to in-house counsel James Swift indicating that the reports addressed earth movement and not direct lightning contact with the soil. Craig again stated that he wanted to contact a structural engineer in order to learn whether the cracking at the Slades' home was direct damage from lightning. Craig testified that he was concerned that the three initial reports were not thorough. However, Craig never talked to anyone who had prepared the initial reports.

On January 28, 1994, Craig telephoned J.A. "Buck" Durham, a structural engineer. Craig said he had never used Durham before and that he got his name from Harry Dillinger, a State Farm claims superintendent in Huntsville. Craig did not inquire about Durham's expertise. Instead, he relied on Dillinger's recommendation that Durham was qualified to address the problems at the Slades' home. Craig set a date, February 2, 1994, for Durham to travel to Montgomery to conduct an "independent investigation" of the Slades' claim. Craig later obtained the Slades' permission for Durham to inspect their home. The Slades thought Durham would conduct the inspection to determine how to repair their home. However, at this time Craig did not inform the Slades -- nor had he informed them before -- that their claim might not be covered under their policy.

Either during or after Craig's first conversation with Durham, Durham filled out an "Insurance Engineering Inspection Form." In that form, Durham wrote that the Slades' house was worth $500,000 and that the type of claim was "severe cracking -- interior/exterior -- possible soil problem." However, Craig denied

giving Durham that information and testified that he told Durham only that there was "some interior cracking" in the Slades' home.[1] Also, although State Farm has consistently maintained that its usual policy is to attempt to find coverage for the insured, Craig did not tell Durham about the lightning or tell him that State Farm's policy was to attempt to find coverage for the insured.

On February 2, 1994, both Craig, who had not been to the Slades' home, and Durham visited the property. At this visit, Craig did not inform the Slades of State Farm's coverage questions. Craig looked at the damage and then went back to his office. There, he wrote Mr. Slade a letter that, he says, was a "reservation of rights" letter, although it did not conform with State Farm's policies for such a letter. However, the letter did give notice that State Farm had questions about covering the damage to the Slades' home. This letter read:

> "Dear Mr. Slade:
>
> "I am writing you this letter to follow up our meeting of Wednesday, February 2, 1994, at your home. The meeting at your home was the result of receiving several reports from Mr. Walter Riley of B.A. Parsons Contracting concerning damage that has occurred at your home. We received the last report on January 19, 1994, from Quality Assurance Testing Laboratories, Inc.
>
> "All of the reports have indicated that the problem at your home appears to be earth movement related to settlement in the suspected area under your home.
>
> "Mr. J.A. Durham, an engineer I contacted, was at your home on February 2 for the purpose of furnishing us with a detailed report concerning the problems at your home.
>
> "The purpose in contacting and having Mr. Durham inspect your home was to determine what is causing the earth movement at your home.
>
> "Hopefully, Mr. Durham's final report will provide us with the cause of the earth movement.
>
> "I have to advise you that under [your] Homeowner's policy, there are losses that would not be insured. Losses due to settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings would not be covered under your policy.
>
> "Earth movement, meaning the sinking, rising, shifting, expanding, or contracting of earth, all whether combined with water or not, would not be covered under your Homeowner's policy.
>
> "I will have to wait to receive Mr. Durham's final report as to his findings to be able to make any determination whether the damage to your home will be covered by your Homeowner's policy.

"As I indicated in our meeting of February 2, I advised you that as soon as I receive Durham's report, I will be back in contact with you to discuss his findings.

"Sincerely,

"Pat J. Craig"

On February 2, when Craig left, Durham remained at the Slades' home to complete his inspection. Durham's inspection consisted of a visual examination, talking with Mr. Slade, and examining the soil-compaction-test reports,[2] the construction plans for the Slades' home, and the city inspector's report of his inspection of the foundation of the Slades' home. Durham also said that before making his inspection of the Slades' house, he had visited the Montgomery County office of the Soil Conservation Service, where, he said, he learned that the soils around the Slades' home are "expansive clays," meaning that the soils often shrink or swell, resulting in soil instability.

On February 20, Craig received Durham's report from the February 2 inspection. Durham concluded that the cracking at the Slades' home was the result of "post-construction differential foundation settlement." Durham believed that improper soil compaction and faulty construction of the Slades' home had caused the settlement. In his report, Durham stated: "I do not feel that this settlement is related, in any way, to the severe storm or lightning that occurred in August, 1993." His report did not address the findings of the three initial reports, that the soil movement resulted from the collapse of the retaining wall, which had been caused by the lightning strike. Neither Durham nor Craig found any evidence that the lightning had directly struck the Slades' home. No one ever found any evidence of charring or burning. In fact, the Slades never contended, until trial, that lightning had directly struck their home.

On the basis of Durham's report, Craig recommended that the Slades' claim be denied. On March 10, 1994, a five-person claims committee voted to deny the Slades' claim. The information before the committee included Durham's report, the three initial reports, and the recommendations of State Farm's employees involved in the

adjustment of the Slades' claim. No one communicated to the Slades the action of the claims committee.

Evidence presented at trial indicated that after the action of the claims committee State Farm thought the Slades would sue. Other evidence indicated that State Farm refused to give the Slades a copy of Durham's report and that State Farm continued to investigate the Slades' claim by hiring more engineers. A letter from Durham to one of these engineers told the engineer to investigate the Slades' property "with the purpose being to defend the insurance company against any claim of lightning-related, settlement, or structural damage." (Emphasis added.) State Farm also continued to send the Slades letters stating that State Farm was still considering coverage. Later, on July 25, 1994, a second claims committee was convened; it also voted to deny the Slades' claim. The evidence also indicates that the Slades frequently inquired about the status of their claim and were told that State Farm was still considering coverage.

During this time, State Farm hired other engineers to inspect the Slades' home. Every report tendered to State Farm indicated that the soil under the Slades' home had shifted or settled. Some reports stated that the cause of the shifting was poor construction; some reports indicated that natural swelling and shrinking of the clay under the Slades' home caused the soil movement; and other reports stated that the lightning strike and the subsequent collapse of the Slades' retaining wall may have started the chain of events that resulted in the soil movement. Based upon all these reports, Craig, on August 29, 1994, sent the Slades a formal denial letter, citing what he considered to be the relevant exclusions in their policy.

On February 27, 1995, the Slades sued State Farm and a number of contractors who had been involved in the construction of their home. The Slades entered into a pro tanto settlement with all defendants other than State Farm, in the amount of $301,500. The initial complaint against State Farm alleged fraud and suppression in the sale of the policy, breach of contract, and bad faith in the adjustment of their insurance claim. The Slades amended their complaint to allege fraud, suppression, and deceit by State Farm

during the adjustment of their claim. The parties tried the case before a jury.

During voir dire examination of prospective jurors, State Farm used 10 of its 12 peremptory strikes against black veniremembers.

The attorney for the Slades made a "Batson challenge,"[3] and the trial court, finding a prima facie case of racial discrimination, required State Farm to give race-neutral reasons for striking the black jurors. Unsatisfied with State Farm's reasons, the trial judge reinstated four of the black veniremembers.

During the trial, the court granted State Farm's motion for a judgment as a matter of law ("JML")[4] as to the Slades' claim alleging fraud in the sale of the policy and a partial JML on the Slades' claim alleging that State Farm had breached a contract to provide coverage for harm caused by "collapse" of their house, but denied State Farm's motion for a JML on the other claims. The jury found in favor of the Slades on their claims alleging fraud and bad faith in the adjustment of the Slades' insurance claim, but it found against the Slades on the breach-of-contract claim. The jury awarded the Slades $668,850 in compensatory damages, but reduced that award by $301,500, the amount of the pro tanto settlement.

The jury also awarded the Slades $301,500 in punitive damages. The trial court entered a judgment in favor of the Slades in the amount of $668,850.

State Farm filed a timely post-judgment motion for a JML and a motion to alter or amend the judgment, or, in the alternative, a motion for a new trial. The Slades also filed a timely post-judgment motion for a JML or for a new trial on the breach-of-contract claim related to the alleged "collapse coverage" and the claim alleging fraud in the sale of the insurance policy. The Slades also asked the court to reinstate the amount of the verdict before it was reduced by the amount of the pro tanto settlement. The trial court denied all post-trial motions. The trial court also awarded the Slades costs in the amount of $21,753.83, including the expenses incurred by the Slades' experts. State Farm appealed, and the Slades cross appealed.

State Farm presents several issues. The Slades do not want us to address their cross appeal if we affirm the judgment against State Farm. For the reasons discussed below, we reverse those portions of the judgment State Farm appeals from, and we render a judgment in favor of State Farm on the Slades' claims alleging bad faith and fraud in the adjustment of their insurance claim. We affirm that portion of the trial court's judgment that is the basis of the Slades' cross appeal.

I. State Farm's Appeal

State Farm argues that the trial court erred in denying its pre- and postverdict motions for JML on the Slades' breach-of-contract, fraud, and bad-faith claims. When reviewing a ruling on a motion for JML, this Court uses the same standard the trial court used initially in granting or denying a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case or issue to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). In an action filed after June 11, 1987, the nonmovant must present substantial evidence to withstand a motion for JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992). Under this standard, we review State Farm's arguments.

A. Breach of Contract

State Farm first contends that it was entitled to a JML on the Slades' contract claim. It says that although it prevailed on the contract claim, a JML on the contract claim would have prevented the bad-faith claim from going to the jury because a predicate for liability for bad-faith failure to pay a claim is contractual coverage. The Slades argue that they did not have to prevail on the breach-of-contract claim, for three reasons: (1) that the jury, by finding that State Farm had acted in bad faith, implicitly found that coverage existed; (2) that in a case alleging a bad-faith failure to investigate an insured's claim, like this case against State Farm, the jury need not find contractual coverage; and (3) that this Court should recognize that bad faith on the part of an insurer gives rise to a cause of action separate and independent from the insurance contract because the law imposes upon an insurance company a duty to act in good faith.

We begin with State Farm's contention that it was entitled to a JML on all aspects of the Slades' breach-of-contract claim. We address only those portions of the breach-of-contract claim that went to the jury, and not the portion of that claim alleging collapse coverage, on which the trial court granted State Farm a JML and which is the subject of the Slades' cross appeal. We agree that State Farm was entitled to a JML on one aspect of the breach-of-contract claim submitted to the jury.

The Slades attempted to prove that a lightning strike either directly or indirectly caused the damage to their home and that, according to the terms of their policy with State Farm, the damage was a loss that State Farm should have covered. The Slades maintain that the following section of their policy provides coverage for their loss:

> "SECTION I -- LOSSES INSURED
>
> "COVERAGE A -- DWELLING
>
> "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I -- LOSSES NOT INSURED.
>
> "COVERAGE B -- PERSONAL PROPERTY
>
> "We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in SECTION I -- LOSSES NOT INSURED.
>
> "1. Fire or lightning."

(Emphasis in original.) The Slades contend that they produced substantial evidence indicating that lightning caused "direct physical loss," i.e., the cracking in their home. They argue that this evidence consists of their expert's testimony and the investigative reports that state that lightning caused the soil movement that caused the damage to their home.

The Slades' expert, Richard Kithill, testified that, in his opinion, the lightning struck the Slades' retaining wall and then traveled through the ground and into the metal rebar used to strengthen the concrete in the Slades' home. From there, Kithill said, the lightning caused "explosions due to small particles of water in [the concrete], and leading to the degradation of the ability of the slab to act as a foundation to the house and support the house." The Slades also relied on the reports from various engineers and soil experts indicating that the lightning caused the soil movement that resulted in the cracking in their home. Thus, we have two factual bases adduced in support of coverage: (1) lightning striking the slab and (2) lightning striking the ground and causing earth to move and thereby damaging the slab.

State Farm attempts to discredit Kithill's testimony by calling it "science fiction." However, State Farm does not argue that Kithill's testimony was improperly admitted. Therefore, we conclude that Kithill's testimony created a factual question as to whether the lightning directly struck the Slades' home; that portion of the Slades' contract claim that was based upon Kithill's testimony was properly submitted to the jury.

State Farm also contends that even if Kithill's testimony created a factual question as to coverage, State Farm was entitled to a JML on the Slades' other coverage theory, that lightning caused soil movement that resulted in the cracking in their home. State Farm says that an exclusion in the Slades' policy precludes such coverage. This exclusion provides, in pertinent part:

> "2. 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. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually,

> involves isolated or widespread damage, arises from natural or external forces, or occurs as the result of any combination of these:
>
> > "....
> >
> > "b. Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes, but is not limited to earthquake, landslide, mudflow, sinkhole, subsidence and erosion. Earth movement also includes volcanic explosion or lava flow, except as specifically provided in SECTION I -- ADDITIONAL COVERAGES, Volcanic Action."

(Emphasis in original.) State Farm maintains that this provision unambiguously excludes any of the Slades' loss caused by earth movement. We agree.

The language of the policy specifically states that a covered loss, such as a loss resulting from lightning, is excluded from coverage if the loss would not have occurred without earth movement. Also, according to the policy, earth movement means the "shifting of ... earth." The Slades' second theory of liability under the contract is that lightning caused the soil to shift or settle and that the shifting or settling resulted in the cracking in their home. According to the unambiguous terms of the contract, the Slades could not use this theory as a basis for contractual liability. Thus, the trial court erred in denying State Farm's motion for a JML as to this issue.

In so holding, we are mindful of this Court's decision in Bly v. Auto Owners Ins. Co., 437 So. 2d 495 (Ala. 1983). In Bly, this Court was called upon to interpret an earth-movement clause similar to the one here. The Blys sought insurance coverage for damage to their house that they alleged had resulted from vibrations caused by several heavy logging trucks passing their home on a nearby road. Bly, 437 So. 2d at 496. The Blys' insurance policy covered a "direct loss" caused by a vehicle, but excluded losses "caused by, resulting from, contributed to or aggravated by any earth movement, including, but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting." Id. The trial court entered a summary judgment in favor of the insurer. Id. at 496.

In interpreting the terms of the Blys' policy, this Court held "that the word 'direct' means 'immediate' or 'proximate' and is not synonymous with physical contact." Id. Furthermore, the Court agreed that the language "any earth movement" was ambiguous.

> "'It is a general rule of construction that exceptions to coverage must be interpreted as narrowly as possible in order to provide maximum coverage for the insured. Further, such exceptions must be construed most strongly against the company drafting and issuing the policy.'
>
> "....
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> "In the instant case, the enumerated types of earth movement are all natural phenomena. While the policy states that the exclusion is not limited to the specified types of earth movement, it can be reasonably concluded that the intent was to include other natural phenomena involving earth movement. This conclusion is supported by the rule of ejusdem generis, 'which ordinarily limits the meaning of general words and things to the class or enumeration employed.' ...
>
> "The policy is at best ambiguous as to whether the vibrations caused by the passing vehicles constitute
>
> 'earth movement' within the meaning of the exclusion. ..."

437 So. 2d at 497 (citations omitted).

The earth-movement exclusion in the instant case, however, is much broader than the exclusion in Bly. The exclusion in the Slades' policy is not limited to movement caused by natural events. It states that loss caused by earth movement is excluded regardless of the cause of the earth movement, "whether other causes acted concurrently or in any sequence with [earth movement]," or whether the earth movement arose from "natural or external forces." The exclusion also states that earth movement includes "the shifting ... of earth," unlike the clause in Bly, which did not define "earth movement." This Court does not rewrite the unambiguous terms of an insurance contract. Central Mut. Ins. Co. v. Royal, 269 Ala. 372, 113 So. 2d 680 (1959). Also, insurance companies and their insureds are free to agree to any terms in a contract "so long as they do not offend some rule of law or contravene public policy." Northam v. Metropolitan Life Ins. Co., 231 Ala. 105, 106, 163 So. 635, 636 (1935). Accordingly, State Farm was entitled to a JML on this portion of the Slades' breach-of-contract claim.

In sum, we conclude that the portion of the Slades' breach-of-contract claim based upon the expert's testimony indicating that lightning struck the slab was properly submitted to the jury, which

found for State Farm. We also hold that the portion of the breach-of-contract claim based upon the allegation that lightning struck the wall and caused earth movement was not properly submitted to the jury. Next, we must consider the effect that this conclusion has on the Slades' claim of bad-faith refusal to pay their insurance claim.

B. Bad Faith

State Farm says that because it was entitled to a JML on the Slades' theory of liability involving the soil movement and because the Slades' expert testimony merely created a factual question, the trial court erred in denying its motion for a JML on the bad-faith claim. The Slades maintain that they were not required to succeed on the contract claim, for the following reasons: (1) that the jury, by finding that State Farm had acted in bad faith, implicitly found that coverage existed; (2) that in a case alleging bad-faith failure to investigate -- i.e., an "abnormal case,"[5] which they say this one is -- a jury need not find contractual coverage; and (3) that bad faith on the part of an insurer should provide a cause of action separate and independent from the insurance contract because the law imposes upon an insurance company a duty to act in good faith. State Farm counters with the argument that the jury should not have been allowed to consider the bad-faith claim because, it says, this is a normal bad-faith case in which it had a legitimate reason to deny the Slades' claim.

A plaintiff can establish a bad-faith refusal to pay an insurance claim by two theories: (1) that the insurer had no lawful basis for the refusal to pay the claim and knew that it had no lawful basis, or (2) that the insurer intentionally failed to determine whether there was any lawful basis for refusing to pay. Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1, 7 (Ala. 1981). In National Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982), this Court described the first theory as the "normal" bad-faith case, and the second as the "abnormal" case (see n. 5). As we stated in Employees' Benefit Ass'n v. Grissett, [Ms. 1961766, September 11, 1998] ___ So. 2d ___ (Ala. 1998):

> "In 'normal' cases, the plaintiff's contract claim had to be so strong that the plaintiff would be entitled to a preverdict JML; if a fact issue made a JML inappropriate, then the defendant was entitled to a JML on the plaintiff's bad-faith claim. [Dutton,] 419 So. 2d at 1362. Even so, a trial court's failure to enter a JML on the plaintiff's breach-of-contract claim is not fatal as long as the trial court correctly determines that the plaintiff has met the standard of proof required for a JML. Loyal American Life Ins. Co. v. Mattiace, 679 So. 2d 229, 235 n. 2 (Ala.), cert. denied, ___ U.S. ___, 117 S.Ct. 361 (1996).
>
> "....
>
> "The rule in 'abnormal' cases dispensed with the predicate of a preverdict JML for the plaintiff on the contract claim if the insurer had recklessly or intentionally failed to properly investigate a claim or to subject the results of its investigation to a cognitive evaluation. Blackburn v. Fidelity & Deposit Co. of Maryland, 667 So. 2d 661 (Ala. 1995); Thomas v. Principal Financial Group, 566 So. 2d 735 (Ala. 1990)."

___ So. 2d at ___.

Furthermore, both parties point to the requirements for a plaintiff to prove a bad-faith refusal to pay an insurance claim:

> "(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."

National Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982). Requirements (a)-(d) represent the normal case; requirement (e) represents the abnormal case. Grissett, ___ So. 2d at ___. With these standards in mind, we address State Farm's arguments.

State Farm argues that it was entitled to a JML on the Slades' bad-faith claim because it was entitled to a JML on the Slades' contract claim alleging that lightning and soil movement combined to cause their loss and because the Slades' expert testimony did not satisfy the preverdict-JML standard for normal bad-faith cases. As stated in Grissett, supra, in a normal case "the plaintiff's contract claim had to be so strong that the plaintiff would be entitled to a preverdict-JML." ___ So. 2d at ___ (emphasis added).

"Ordinarily, if the evidence produced by either side creates a fact question with regard to the contract claim, the bad faith claim must fail." Thomas v. Principal Financial Group, 566 So. 2d 735, 745 (Ala. 1990).

In the instant case, State Farm, and not the Slades, was entitled to a JML on that part of the Slades' contract claim relating to the soil movement. Also, the Slades' expert testimony merely created a factual question for the jury and did not prove that their contract claim was so strong that they were entitled to a JML on that claim. This fact question arose because every report received by State Farm indicated that either natural or lightning-caused soil movement or faulty construction had caused the damage to the Slades' home and that none of these events was covered under the Slades' policy. Furthermore, the Slades never claimed until trial that lightning had directly struck their home. Instead, they asserted that lightning had struck their retaining wall and that the soil underneath their home had shifted. Finally, it is undisputed that the technology used by the Slades' expert at trial did not even exist in 1994 when State Farm denied the Slades' claim. Based upon these facts, we agree with State Farm that the Slades' bad-faith claim should not have been submitted to the jury.

The Slades, however, assert that their bad-faith claim is the abnormal case, that State Farm failed to properly investigate their claim. They argue that this Court has already recognized a scenario in which a defendant could prevail on the plaintiff's breach-of-contract claim and yet the jury could find that the defendant had committed the tort of bad-faith refusal to pay an insurance claim. They maintain that this scenario could occur, as they say it did here, when a defendant denies an insured's claim after intentionally failing to determine whether a lawful basis exists to deny that claim, and then justifies "its denial by gathering information which it should have had in the first place." Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1053 (Ala. 1987). They contend that State Farm denied their claim as early as January 19, 1994, when, they say, Pat Craig, State Farm's adjuster,

wrote "not insured" in the claims log and that State Farm had not done a thorough investigation at that time. State Farm argues that this is not an abnormal case and that it actually denied the Slades' claim on August 29, 1994, months after completing an investigation of their claim, when State Farm for the first time advised the Slades that it was denying coverage. State Farm maintains that it never constructively denied the Slades' claim.

In determining whether a claim involves a bad-faith failure to investigate, the date of denial is crucial because "information received by the insurer after the date of the denial is irrelevant to the determination of whether the insurer denied at that date in bad faith." Insurance Co. of North America v. Citizensbank of Thomasville, 491 So. 2d 880, 883 (Ala. 1986). An insurance company's denial is either "express," otherwise known as "actual," or "constructive." Blackburn, supra, 667 So. 2d at 668. In Alabama, a plaintiff can establish a constructive denial in either

of two ways: "(1) by showing that the passage of time is so great that the delay alone creates a denial; or (2) by showing sufficient delay in payment coupled with some wrongful intent by the insurance company." Barry D. Woodham, Comment, "'Constructive Denial,' 'Debatable Reasons,' and Bad Faith Refusal to Pay an Insurance Claim -- The Evolution of a Monster," 22 Cumb. L. Rev. 349, 361 (1992) (citations omitted).

The Slades argue that State Farm constructively denied their claim by delaying payment with a wrongful intent. They do not argue that the delay in payment was so great that the delay alone constituted a denial. They say that State Farm denied their claim on January 19, 1994, or on March 10, 1994, when State Farm's claims committee voted to deny the Slades' claim. They maintain that they produced evidence indicating State Farm had a wrongful intent, including evidence that it investigated the claim solely to find a lack of coverage; that it misrepresented to them that it was still considering coverage when a claims committee had already voted to deny coverage; and that it refused to turn over the engineer's investigative report regarding the damage to their home.

Even if we agreed with that argument, we could not hold that State Farm constructively denied the Slades' claim before

August 29, 1994. As early as January 14, 1994, five days before the alleged constructive denial, State Farm had evidence indicating that soil movement had caused the damage to the Slades' home.

Thus, based on the unambiguous earth-movement exclusion, State Farm could have denied coverage as early as January 14, 1994.

In relying on its unambiguous exclusion, State Farm was not guilty of using its own subjective interpretation of the terms of the policy. Compare Blackburn, supra, 667 So. 2d at 669. Furthermore, if we accepted the Slades' contention, we would require an insurance company to publish its initial conclusions as early as possible, without completing a thorough investigation, lest it be found to have a "wrongful intent" in conducting a deeper investigation that reinforces an earlier conclusion. We will not subject an insurance company to a choice between liability under a bad-faith-failure-to-investigate theory for publication of a denial of coverage without an adequate investigation, and liability for a constructive denial imposed after it has conducted a more thorough investigation that confirms an earlier determination of no coverage, on the theory of delay coupled with a wrongful intent. Accordingly, we hold that no constructive denial occurred and that the actual date of denial was August 29, 1994, when State Farm first published its final decision.

Having determined the actual date of denial, we must consider whether State Farm failed to properly investigate the Slades' claim, whether it recklessly disregarded facts or proof submitted by the insureds, or whether it had failed to subject the results of the investigation to a cognitive review as of the date it denied the claim. Blackburn, supra, 667 So. 2d at 668; Gulf Atlantic Life

Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1986). The record shows that originally the Slades complained that the cracking was caused by soil movement they claimed was caused by the lightning strike. Not until trial did they assert that lightning had directly struck their home. Furthermore, every report concerning the damage to their home indicated that earth movement had occurred. Therefore, State Farm cannot be said to have improperly

investigated to determine the cause of the earth movement, nor can it be said that State Farm disregarded facts or proof submitted by the Slades.

The Slades argue that State Farm failed to send out a lightning expert to determine whether lightning had struck their home. However, at no time before the trial did the Slades claim that lightning had struck their home. Furthermore, as previously noted, it is undisputed that the technology used by the Slades' expert was not available during the adjustment of their claim and that no evidence, other than the Slades' expert testimony, indicated that the Slades' home had been struck by lightning. Thus, we cannot hold that the Slades produced substantial evidence indicating that State Farm failed to properly investigate the Slades' claim.

Also, the Slades did not produce substantial evidence indicating that State Farm failed to subject the results of its investigation to a cognitive review. State Farm received several reports from several engineers, and each report stated that earth movement had occurred. Based on those reports, State Farm ordered more reports, to determine the cause of the Slades' loss. The evidence also shows that State Farm considered all of these reports in its decision-making.

Therefore, we do not agree with the Slades that this is an abnormal case. A constructive denial did not occur, and State Farm did not fail to properly investigate the Slades' claim before, or on, the actual date of denial. Thus, the Slades' bad-faith claim must fail unless we accept their final argument: that bad faith on the part of an insurer should be recognized as a cause of action that arises separately from, and independently of, any claim for benefits under the insurance contract, on the basis that the law implies a duty of good faith in every insurance contract.

Essentially, the Slades argue that a plaintiff should be allowed to recover for a defendant insurer's bad faith, even in the absence of coverage, when the plaintiff has suffered extracontractual damages resulting from the insurance company's bad-faith administration of the plaintiff's insurance claim. They say that a special relationship exists between the insurer and the

insured and that the duties flowing from this relationship do not apply only when the insured files a covered claim. They also contend that an insurance company should not be allowed to adjust an insured's claim in any manner it chooses and yet escape liability on the basis that it made a determination of no coverage after a thorough investigation.

However, this Court has consistently refused to recognize a cause of action for the improper handling of an insurance claim in the first-party context beyond the situation in which the insurer denies the claim and thereafter generates evidence to support its denial. Kervin v. Southern Guaranty Ins. Co., 667 So. 2d 704, 706 (Ala. 1995). Furthermore, the purpose of the tort of bad-faith failure to pay a claim is to ensure that both parties receive the benefits due them under the policy, and not to provide an extracontractual remedy. This Court stated several years ago:

> "'Every contract contains an implied in law covenant of good faith and fair dealing; this covenant provides that neither party will interfere with the rights of the other to receive the benefits of the agreement. [Citations omitted.] Breach of the covenant [of good faith] provides the injured party with a tort action for 'bad faith' notwithstanding that the acts complained of may also constitute a breach of contract.'"

Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1, 4 (Ala. 1981) (quoting Childs v. Mississippi Valley Title Ins. Co., 359 So. 2d 1146 (Ala. 1978)) (emphasis added). The Slades were not entitled to the benefits they claimed under the policy. We decline to expand the range of abnormal cases, and we reject the Slades' final argument.

C. Fraud

The jury found in favor of the Slades on their claims of misrepresentation and suppression in the adjustment of their policy. State Farm argues that the trial court erred in refusing to grant its pre- and postverdict motions for JML on these claims, for two reasons: (1) "that there is no separate tort for fraud or fraudulent suppression in the handling of a claim because the tort of bad faith covers the handling of the claim" and (2) that it was entitled to a JML on the Slades' claims of fraudulent

misrepresentation and suppression.

First, we disagree with State Farm's contention that there is no separate tort of fraud or fraudulent suppression in the handling of an insurance claim. An insurer's conduct in connection with the denial of a claim under its policy may support a fraud or suppression action even in a setting where a bad-faith refusal to pay a claim is also presented. Jones v. Alabama Farm Bureau Mut. Cas. Co., 507 So. 2d 396, 401 (Ala. 1986). To support such a claim, however, the plaintiff must show that the insurer induced the insured to act, or to fail to act, in reliance on the alleged fraud or suppression. Id. at 401. Therefore, we must turn to State Farm's second contention.

State Farm argues that it was entitled to a JML on both of these fraud claims because, it argues, the Slades did not justifiably rely on its alleged suppression and misrepresentation and because its conduct was not the proximate cause of their loss. The Slades argue that they relied to their detriment on State Farm's alleged misrepresentation and suppression by delaying the repair on their home, thereby increasing their repair costs. The essence of the alleged misrepresentation is State Farm's statements that it was still investigating when, the Slades allege, State Farm's internal records reflected a decision to deny the claim.

The Slades argue that because of this misrepresentation, they were entitled to await State Farm's final decision before undertaking repairs to their home. State Farm contends, for two reasons, that, as a matter of law, this delay cannot be taken as evidence of reliance: (1) because the Slades were required under both the principle of mitigation of damages and the language of their policy to repair their home, and (2) because the Slades should not be allowed to sit idly by in hope of receiving money for repairs, when their policy unambiguously states that no coverage exists.

We begin by noting that the Slades filed this action before this Court decided Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997). Thus, we must test the Slades' alleged reliance under the old "justifiable reliance standard" established in Hickox v. Stover, 551 So. 2d 259 (Ala. 1989) (a standard rejected in Foremost Ins. Co.). In Hickox, this Court stated:

> "'Reliance should be assessed by the following standard: A plaintiff, given the particular facts of his knowledge, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that representation is "one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth."'"

551 So. 2d at 263, quoting Southern States Ford, Inc. v. Proctor, 541 So. 2d 1081, 1091-92 (Ala. 1989) (Hornsby, C.J., concurring specially).

Even under the old justifiable-reliance standard, one could not find in this case the reliance required for a fraud action. Mrs. Slade is a teacher and has a doctorate in elementary education. Mr. Slade has run several businesses, and he knew that State Farm had some questions about whether the damage to his home was covered and knew that State Farm might not pay the claim. Furthermore, State Farm sent the Slades letters, one as early as February 2, 1994, telling them that State Farm had questions about coverage and that State Farm would get back with them when it resolved those questions. Mrs. Slade testified that she read those letters but ignored them because, she said, she was convinced that their loss was covered. However, there was no evidence to indicate that State Farm ever lulled the Slades into believing that the damage to their home was covered. Therefore, we conclude that the Slades could not have justifiably relied on State Farm's representations.

Furthermore, the Slades failed to produce substantial evidence indicating that State Farm's conduct proximately caused their loss. "A critical element of a fraud claim is that the plaintiff's damage or loss was a 'proximate result of the alleged [fraud].'" City Realty, Inc. v. Continental Cas. Co., 623 So. 2d 1039, 1043 (Ala. 1993), quoting Green Tree Acceptance, Inc. v. Standridge, 565 So. 2d 38, 42 (Ala. 1990). Also, where the plaintiff's loss is a result of the plaintiff's own failure to act, the plaintiff's loss is not proximately caused by the defendant's alleged fraud. City Realty, 623 So. 2d at 1043.

It is undisputed that the Slades knew that the cracking in their home was worsening and yet failed to take any action.

Therefore, any increased damage to the Slades' home was caused by their own failure to act and not by State Farm's conduct. Furthermore, as stated above, the Slades failed to produce any evidence indicating that State Farm induced them to act or induced them not to act, evidence required under Jones, supra. Accordingly, we hold that State Farm was entitled to a JML on the Slades' claims alleging misrepresentation and suppression in the adjustment of their insurance claim.

D. Conclusion as to State Farm's Appeal

Having determined that State Farm was entitled to a JML on the Slades' breach-of-contract, bad-faith, and fraud claims that went to the jury, we need not address State Farm's following arguments: (1) that it is entitled to a new trial on the basis that the jury's verdict is inconsistent; (2) that the trial court erred in finding a prima facie case of a discriminatory use of peremptory challenges by State Farm; (3) that the trial court erred in allowing the Slades' "pattern and practice" witnesses to testify; (4) that the jury failed to give State Farm credit for the pro tanto settlement between the Slades and the construction defendants; and (5) that the Slades failed to produce the "clear and convincing evidence" of oppression, fraud, wantonness, or malice necessary to support an award of punitive damages.

The trial court's judgment entered in favor of the Slades on their bad-faith and fraud claims is reversed, and a judgment on those claims is rendered in favor of State Farm. Furthermore, because the Slades are not to be considered the prevailing parties, we reverse the trial court's award of costs to the Slades.

II. The Slades' Cross Appeal

In their cross appeal, the Slades argue three errors: (1) that the trial court erred in granting State Farm's preverdict motion for a JML on their claim alleging fraud in the sale of their policy; (2) that the trial court erred in admitting evidence of the pro tanto release and allowing a reduction of the verdict by the amount paid under it; and (3) that the trial court erred in granting State Farm's motion for a JML on the issue of collapse coverage. Because we are rendering a judgment in favor of State Farm as to the Slades' claims that went to the jury (see Part I),

the argument relating to the pro tanto settlement is moot. Therefore, we will address only arguments one and three.

A. Fraud in the Sale of the Policy

The Slades contend that the trial court erred when it granted State Farm's preverdict motion for a JML on the Slades' claim that State Farm's agent, Chester Carr, fraudulently induced them to buy State Farm's policy. They maintain that Carr misrepresented the extent of the coverage under the policy and suppressed the fact that the policy contained exclusions. They say Carr told Mr. Slade that the policy was "an all-risk, full coverage on everything" policy, and that that statement was a misrepresentation because, in fact, the policy contained exclusions, which they say Carr suppressed. They also point to Carr's statements that the policy was "the Cadillac of all insurance" and that the policy was "the very best." They maintain that, in reliance on Carr's statement, they entered into the insurance contract and that they relied to their detriment.

In granting State Farm's preverdict motion for a JML, the trial court held that the Slades could not have justifiably relied on Carr's statements, because both Mr. and Mrs. Slade are well-educated, because Mr. Slade had entered into several insurance agreements before entering into this one, and because they were put on notice of the exclusions in the policy by the fact that the exclusions were not hidden. The trial court also held that no confidential relationship existed between Carr and the Slades. Because we agree with the trial court that the Slades could not have justifiably relied on Carr's statements, we do not address the other elements of misrepresentation and suppression.

As noted above, this a pre-Foremost case and therefore must be judged under the justifiable-reliance standard. Given Mrs. Slade's education level, Mr. Slade's business sophistication, and the fact that Mr. Slade had entered into several insurance contracts before, we conclude that the Slades could not have justifiably relied on Carr's representations, because the exclusions in the policy were plainly obvious and were unambiguous; the Slades must have closed their eyes to avoid discovering them. See Hickox, supra, 551 So. 2d at 263.

The Slades, however, argue that the fraud occurred at the time of the purchase and before they received a copy of the policy. They rely on Hicks v. Globe Life & Accident Ins. Co., 584 So. 2d 458 (Ala. 1991), in which this Court recognized a cause of action for fraud based on reliance between the time of the alleged misrepresentation and the delivery of the policy, where the plaintiff had paid premiums and had cancelled an existing insurance policy during the interval. In the present case, however, there is no evidence of reliance by the Slades through payment of premiums, cancellation of an existing insurance policy, or otherwise, before they received State Farm's policy. Therefore, we agree with the trial court that, as a matter of law, the Slades did not justifiably rely on Carr's alleged statements.

B. Collapse Coverage

Finally, the Slades argue that the trial court erred when it granted State Farm's preverdict motion for a JML on the issue whether the Slades' loss was covered by a provision of their policy that covered loss caused by "collapse" of their house. They contend that their policy provided coverage for losses caused by collapse and that they produced substantial evidence from which the jury could have found that the damage to their home was covered under the collapse provision of their policy. However, we note that the Slades' policy states that "[c]ollapse does not include settling, cracking, shrinking, bulging or expansion." Furthermore, this Court long ago determined that "collapse" does not include settling or cracking in a home. See Central Mut. Ins. Co. v. Royal, supra, 269 Ala. at 373-75, 113 So. 2d at 682-83. "When the language of an insurance policy is clear and unambiguous it must be construed as it reads." Id., 269 Ala. at 375, 113 So. 2d at 683. The Slades produced no evidence of property damage other than the settling and cracking in their home.

In addition, we note that the collapse-coverage provision of the Slades' policy does not provide for losses caused by earth movement, but instead restricts collapse coverage to other losses, for which the Slades did not claim coverage. Furthermore, the

plain language of the Slades' policy shows that the earth-movement exclusion would apply to the Slades' claim of collapse coverage as well. Therefore, we conclude that the trial court properly granted State Farm's preverdict motion for a JML on the issue of collapse coverage.

III. Conclusion

The judgment awarding the Slades $668,850 on their claims alleging bad faith and fraud in the adjustment of their insurance claim is reversed, and a judgment is rendered in favor of State Farm on those claims. The trial court's judgment as to the Slades' claims alleging fraud in the sale of their insurance policy and breach of contract based upon the claimed collapse coverage is affirmed. The Slades' arguments, on cross appeal, relating to State Farm's introduction of evidence of the pro tanto release is moot because we render a judgment in favor of State Farm on the Slades' claims of bad faith and fraud in the adjustment of their insurance claim and because we affirm the trial court's entry of a JML on the Slades' claim that they had collapse coverage and their claim of fraud in the sale of their insurance policy.

1961769 (THE APPEAL) -- REVERSED AND JUDGMENT RENDERED.

1961770 (THE CROSS APPEAL) -- AFFIRMED.

Hooper, C.J., and Maddox, Houston, See, Brown, and Johnstone, JJ., concur.

1. In fact, by February the cracking in the Slades' home had become quite severe. It had caused cracks in the brick veneer on all sides of the house, cracks in floors and tiles, and other serious damage.

2. Soil compacting is done when the natural soil upon which a house is to be built is unstable. The process involves removing the natural soil and then replacing it with a compacted, imported soil-fill to ensure stability of the home's foundation. The tests are performed to confirm that the compacted soil is sufficiently stable to support the house.

3. A "Batson challenge" or "Batson motion" refers to the United States Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), in which that Court held that it is unconstitutional for the prosecution in a criminal case to use its peremptory challenges to strike a juror on account of his or her race. A Batson motion

or objection, therefore, challenges the opposing party's use of peremptory strikes as being racially motivated.

4. Effective October 1, 1995, Rule 50, Ala. R. Civ. P., was amended, as a matter of form only, so as to rename "motions for directed verdict" and "motions for judgment notwithstanding the verdict" as "motions for judgment as a matter of law." Rather than continue to use the terminology of the former rule, which terminology is sometimes used in the briefs and the record in this case, we have used in this opinion the terms used in the amended rule.

5. The terms "normal" and "abnormal" have often been used with the recognition of two "tiers" of bad faith, the first tier being whether there was no lawful basis for the refusal to pay, coupled with knowledge of that fact (the normal case), and the second being whether there was "an 'intentional failure to determine whether or not there was any lawful basis for refusal'" (the abnormal case). Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1981). To avoid confusion in this opinion, we use the terms "normal" and "abnormal."