FILED
2023 Jul-14 PM 03:54
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

THOMAS BONDS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 5:22-CV-618-LCB**
	)	
STATE FARM INSURANCE COMPANY,	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendant.	)	

STATE FARM FIRE AND CASUALTY COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This case arises out of a dispute over an insurance policy's exclusion for damage consisting of wear and tear on a residential roof. After Plaintiff Thomas Bonds ("Plaintiff") discovered a small leak on the ceiling of his home in November of 2020, he filed an insurance claim with State Farm Fire and Casualty Company ("State Farm"). State Farm found minor wind damage to 16 shingles on the roof and to the portion of the ceiling discovered by Plaintiff, and it adjusted the claim for that damage. But Plaintiff wanted the entire worn-out roof replaced. So he sued State Farm for alleged breach of contract and bad faith.

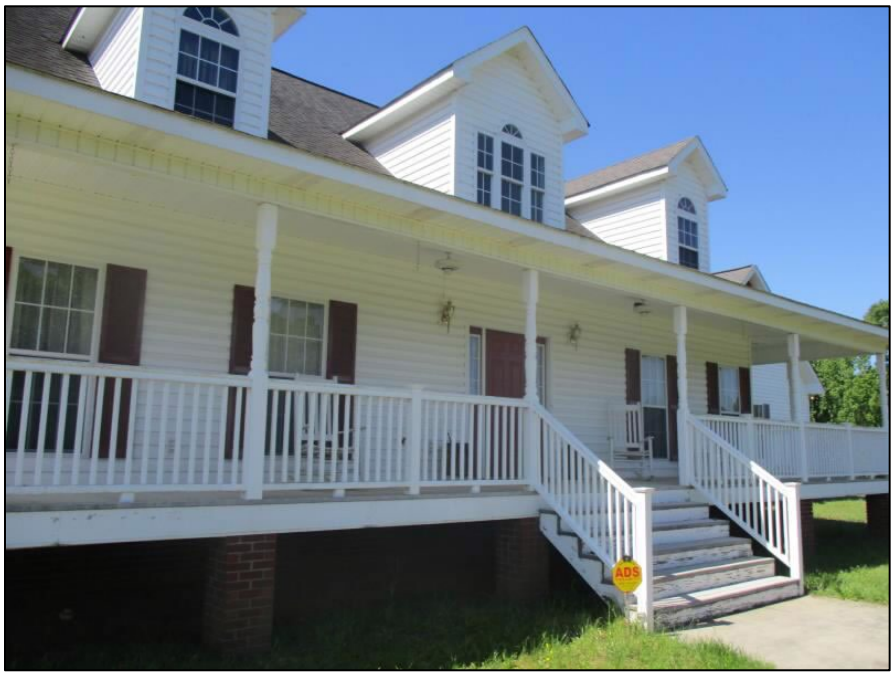
The problem with Plaintiff's claims is that damage consisting of wear and tear on his roof is excluded by the insurance policy, and these exclusions are routinely enforced under Alabama law. Because State Farm adjusted for the covered damage on the roof and was not required to compensate Plaintiff to replace the worn-out roof, he cannot establish the elements of his breach-of-contract claim. And he also cannot establish the elements for his bad faith claim because there was no breach of the policy (an essential element) and State Farm had a reasonably legitimate or arguable reason for its refusal to pay for a full roof.

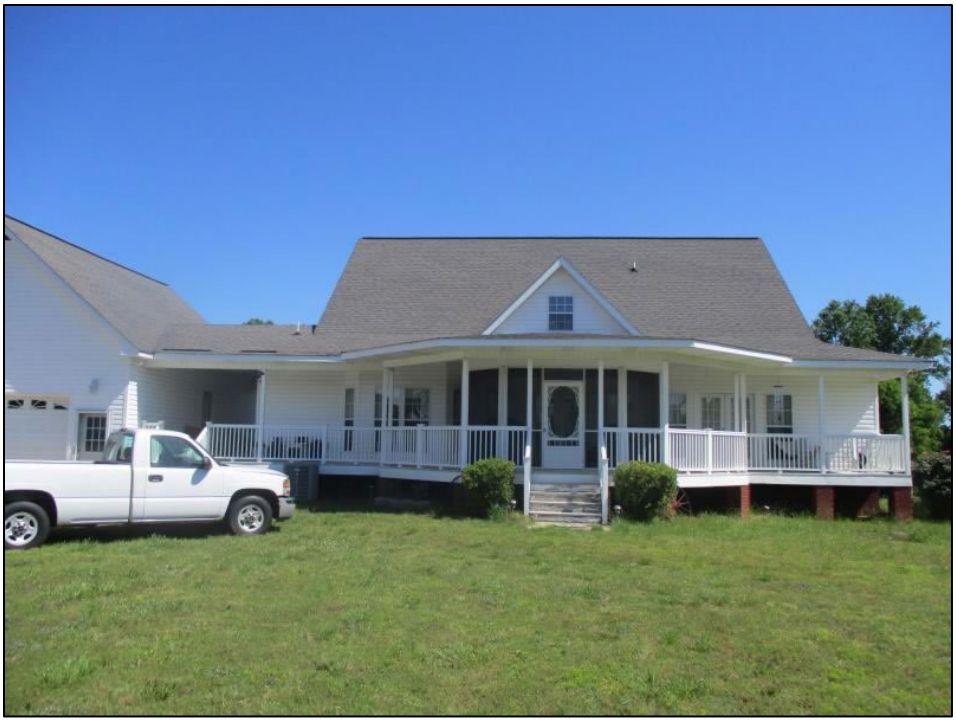
State Farm respectfully requests that the Court enter summary judgment in its favor on Plaintiff's claims for breach of contract (Count I) and bad faith (Count II) for the reasons that follow.

II. STATEMENT OF UNDISPUTED FACTS

A. Plaintiff Began Building His Home in 2003.

1. Plaintiff began the construction of his home in Cullman County, Alabama, in 2003. (Ex. A, Bonds Dep. 11:20–12:15.) The home is a two-story house with a composition shingle roof. (Ex. A, Bonds Dep. 12:19–23, 18:17–23.) Below is an accurate depiction of the front and back of Plaintiff's home, respectively:





(Ex. B, Claim File at Bonds | SF 000119, 000126.)[1]

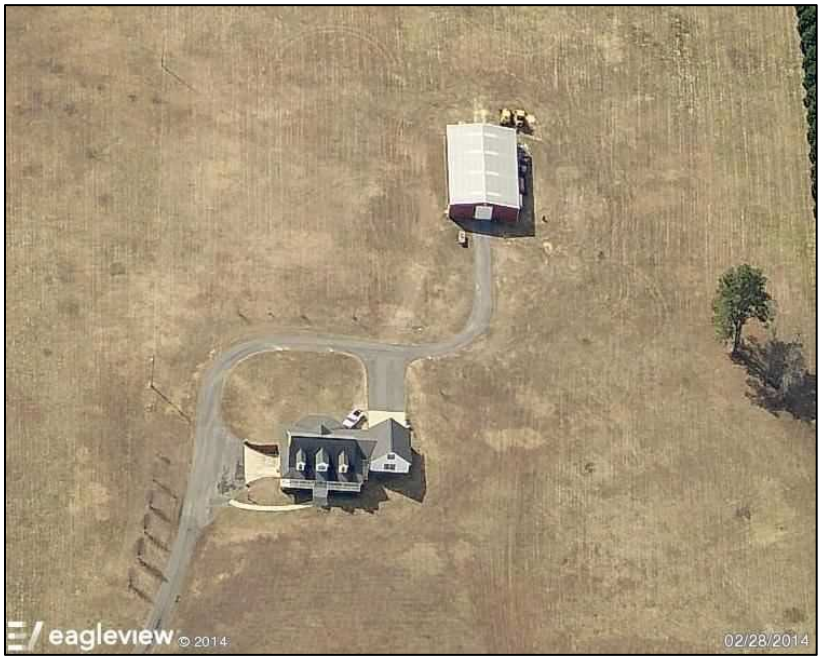
2. The home's composition shingle roof was installed in February of 2004 as part of the original construction. (Ex. A, Bonds Dep. 22:19–23:4, 24:16–21.) According to Plaintiff, he never repaired or replaced the roof following its original installation nearly two decades ago until he replaced the roof in October of 2021. (Ex. A, Bonds Dep. 22:19–23:11, 24:6–21, 46:2–11, 86:3–10.)

3. Plaintiff also has a shed on the property, which is made completely of metal:

[1] Exhibit B contains excerpts from the Claim File for Claim No. 01-19M1-32G, and the parties agreed to its authenticity. (*See* Ex. C, Trotter Dep. 95:2–5.)

(Ex. A, Bonds Dep. 20:4–14; Ex. B, Claim File at Bonds | SF 000138.)

4. The photo below is an accurate depiction of the aerial view of Plaintiff's property, including the dwelling and the metal shed:



(Ex. B, Claim File at Bonds | SF 000346.)

B. Plaintiff Obtained a Homeowners Insurance Policy With State Farm in 2011.

5. In 2011, Plaintiff obtained a homeowners insurance policy with State Farm. (Ex. A, Bonds Dep. 28:1–16.)

6. The insurance policy, Policy No. 01-BM-D389-7 (the "Policy"), was in effect between November 11, 2020 and November 11, 2021. (Ex. D, Certified Policy No. 01-BM-D389-7.)

C. Plaintiff Discovered a Minor Interior Water Leak on the Ceiling.

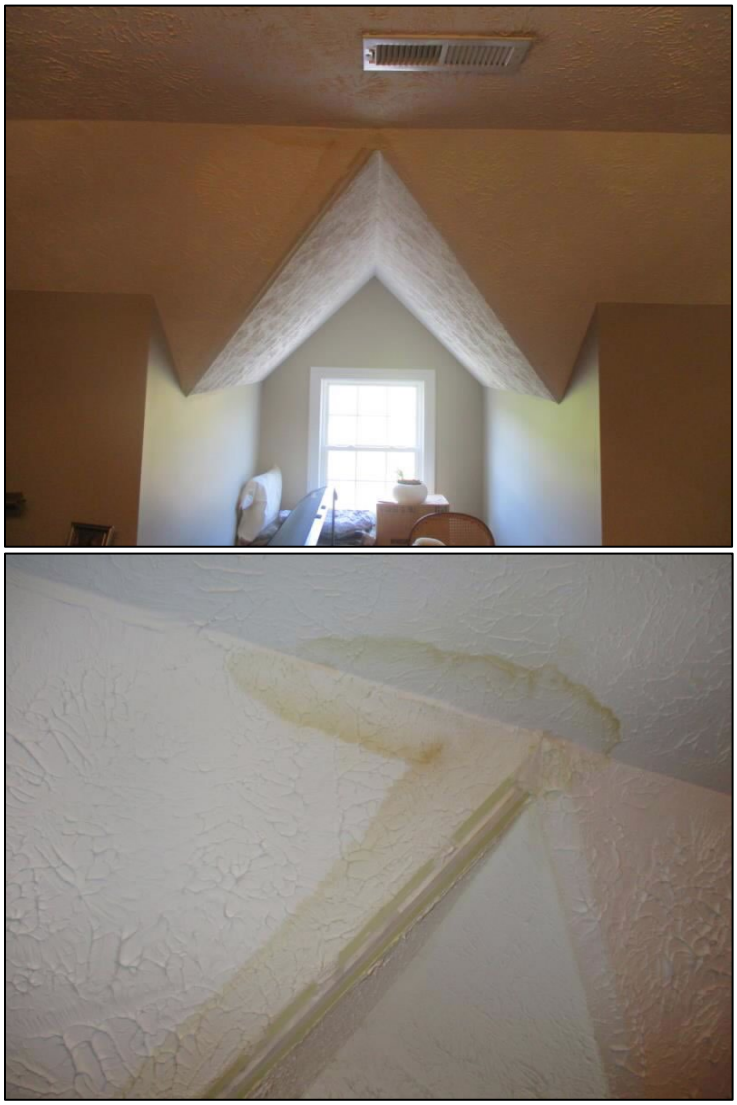
7. Plaintiff noticed a small leak in the interior of the home around November of 2020. (Ex. A, Bonds Dep. 48:16–51:15.) The leak was located on the ceiling near the window on the second floor. (Ex. A, Bonds Dep. 49:1–8.)

8. Believing that the leak had originated from the roof of the home, Plaintiff recruited the help of his daughter's boyfriend, who climbed on the roof and installed roofing cement on the shingles above the leak. (Ex. A, Bonds Dep. 49:1–8, 50:2–12.)

9. The leak returned around March of 2021, so Plaintiff called a roofing contractor with Top Choice Roofing to repair that small portion of the roof. (Ex. A, Bonds Dep. 53:6–23.) The contractor told Plaintiff that he also installed roofing cement "on a couple of other places that . . . would give problems shortly." (Ex. A, Bonds Dep. 53:6–54:4.) Plaintiff did not know what caused the leak. (Ex. A, Bonds

Dep. 54:5–7.)

10. This is where the leak was and what it looked like approximately two months later:



(Ex. B, Claim File at Bonds | SF 000146–147.)

11. The interior stain and sheetrock were never repaired, and this is the only leak that Plaintiff observed in the home. (Ex. A, Bonds Dep. 52:9–53:5.)

12. After completing the shingle repairs, the contractor with Top Choice

Roofing told Plaintiff that he needed to replace his roof. (Ex. A, Bonds Dep. 49:9–50:1.) The contractor gave Plaintiff a full replacement estimate of $22,750. (Ex. A, Bonds Dep. 55:3–22; Ex. A.3 at Bonds 0019.)

13. Plaintiff was not satisfied with the proposal because it was too expensive, so he obtained another estimate from Miller Roofing for $19,535 a week later. (Ex. A, Bonds Dep. 59:6–60:1; Ex. A.3 at Bonds 0018.) Still dissatisfied, he obtained a third estimate from Phillips Roofing for $19,002 in May of 2021. (Ex. A, Bonds Dep. 61:2–10; Ex. A.3 at Bonds 0020.) Each contractor's estimate was to replace the entire roof. (Ex. A.3 at Bonds 0018–20.)

D. State Farm Investigated Plaintiff's Insurance Claim, Adjusted for the Covered Damage, and Did Not Pay for The Excluded Wear and Tear.

14. Plaintiff submitted an insurance claim with State Farm on May 7, 2021. (Ex. A, Bonds Dep. 64:1–23; Ex. B, Claim File at Bonds | SF at 000002.) State Farm immediately began evaluating Plaintiff's claim and, the same day that Plaintiff reported the claim, State Farm obtained weather data from AccuWeather for the reported date of loss. (Ex. B, Claim File at Bonds | SF 22.) According to the weather data, there was not a hailstorm on the March 17, 2021 date of loss.[2] (Ex. B, Claim File at Bonds | SF 000022.)

15. On May 10, 2021, Kyle Wallace, an independent adjuster retained by

[2] Plaintiff reported his claim with a date of loss of March 17, 2021, but he noticed the interior water leak in November of 2020. (Ex. A, Bonds Dep. 49:1–8, 64:1–23.)

State Farm, spoke with Plaintiff and inquired about the damage to the home to prepare for his inspection. (Ex. B, Claim File at Bonds | SF 000021.) That same day, Plaintiff scheduled an inspection for May 15, 2021. (Ex. B, Claim File at Bonds | SF 20.)

16. In preparation for the inspection, Mr. Wallace also requested and obtained an EagleView [3] report to determine the measurements of the home, including the roof. (Ex. B, Claim File at Bonds | SF 000019.)

17. During the inspection, Mr. Wallace met with Plaintiff at the property and conducted an inspection of the home, including the roof, the exterior, and the interior, as well as of the metal shed on Plaintiff's property. (Ex. B, Claim File at Bonds | SF 000018–19.) Mr. Wallace also took photographs of what he inspected. (Ex. B, Claim File at Bonds | SF 000102–141, 000143–190.)

18. Following his inspection, Mr. Wallace noted that the roof was "in poor condition" and had "wear." (Ex. B, Claim File at Bonds | SF 000019.) Mr. Wallace also noted that the roof was approximately 16 years old. (Ex. B, Claim File at Bonds | SF 000019.)

19. Mr. Wallace observed wind damage to 16 shingles in the front, left, and

[3] An EagleView report provides historical satellite images of an insured's property. (Ex. C, Trotter Dep. 73:10–22.) This report is used by State Farm to determine the measurements of an insured's roof. (Ex. C, Trotter Dep. 73:10–22.) For instance, the photograph depicting the aerial view of Plaintiffs home at Paragraph 4 of this brief was obtained from EagleView. (*See supra* Section II.A.)

rear slopes of the roof and on the ceiling near the window on the second floor, which Plaintiff had previously observed. (Ex. A.6 at Bonds | SF 000203–208; Ex. B, Claim File at Bonds | SF 000019.)

20. On May 18, 2021, Mr. Wallace prepared an estimate of $1,443.20 to pay to repair the covered damage observed to the 16 shingles damaged by wind and the interior damage to the ceiling. (Ex. A.6 at Bonds | SF 000203–208, 000365.) That same day, State Farm sent Plaintiff a letter, enclosing State Farm's repair estimate and explaining that, after completing its evaluation of the claim, it "determined your loss does not exceed your $5,525.00 deductible. Therefore, we are unable to make a payment on this claim." (Ex. A.6 at Bonds | SF 000365.) Mr. Wallace also spoke with Plaintiff to explain State Farm's determination, including that the loss fell below the deductible under the Policy. (Ex. B, Claim File at Bonds | SF 000018.)

E. State Farm Continued to Investigate Plaintiff's Insurance Claim After His Contractors Provided Additional Information.

21. After State Farm's inspection, Terry Phillips with Phillips Roofing provided State Farm with five photographs of the roof in early July of 2021. (Ex. E, Phillips Dep. 69:22–71:10; Ex. E.4; Ex. B, Claim File at Bonds | SF 000097–101.) State Farm reviewed those photographs and determined that they showed signs of wear and tear and noted specifically that the "[s]hingles show extensive signs of wear." (Ex. B, Claim File at Bonds | SF 000016.) Richard Davis, State Farm's Team

Manager overseeing Plaintiff's claim, also reviewed the photographs on July 5, 2021 and determined that a second inspection was not warranted based on this information. (Ex. B, Claim File at Bonds | SF 000016.)

22. Around August 2, 2021, Eddie Woods with Craft Roofing submitted additional photographs to State Farm. (Ex. F.4 at Bonds 0024–31.) State Farm reviewed the photographs submitted by Mr. Woods and, after determining that these photographs did not warrant a second inspection, closed the file. (Ex. B, Claim File at Bonds | SF 000015.)

23. Mr. Woods later submitted an estimate to Plaintiff to "remove and replace the old roof," which was "in the later stage of life." (Ex. F, Woods Dep. 144:16–20, 154:8–9; Ex. F.5.) In late October of 2021, Terry Phillips with Phillips Roofing replaced Plaintiff's worn-out roof for approximately $18,740. (Ex. E, Phillips Dep. 68:269:1; Ex. E.3 at Bonds 0021.)

24. According to Mr. Phillips—who replaced the roof—the roof was badly "worn out" and deteriorated "all over." (Ex. E, Phillips Dep. 77:15–22.) Specifically, he observed that he roof had granule loss "everywhere" and that "granule loss is just sometimes the result of just a roof getting old." (Ex. E, Phillips Dep. 64:15–66:10.) Mr. Phillips told Plaintiff, "man, your roof's wore out." (Ex. E, Phillips Dep. 78:8–9.)

F. The Policy Excludes Damage Consisting of Wear and Tear.

25. The Policy covers accidental direct physical loss to Plaintiff's home that occurs during the policy period:

> **COVERAGE A – DWELLING**
>
> ***We*** will pay for accidental direct physical loss to the property described in Coverage A, unless the loss is excluded or limited in **SECTION I - LOSSES NOT INSURED** or otherwise excluded or limited in this policy. However, loss does not include and will not pay for, any ***diminution in value***.

(Ex. D, Policy, Section I – Losses Insured, Coverage A – Dwelling at 12.)

26. But the Policy excludes coverage for any loss that consists of wear and tear:

> **SECTION I – LOSSES NOT INSURED**
>
> 1. ***We*** will not pay for any loss to the property described in Coverage A that consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through m. below, regardless of whether the loss occurs abruptly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> ***
>
> g. wear, tear, decay, marring, scratching, deterioration, inherent vice, latent defect, or mechanical breakdown

(Ex. D, Policy, Section I – Losses Not Insured at 14–15) (emphasis added.)

27. This provision is at the heart of the case because, as established below, the Policy did not require State Farm to pay for the replacement of the worn-out roof.

III. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "To obtain summary judgment, the movant must demonstrate that all material facts are undisputed and entitle [it] to a judgment on the merits." *Ware v. Columbus Life Ins. Co.*, No. 3:21-CV-1281-LCB, 2022 WL 16821660, at *3 (N.D. Ala. Nov. 8, 2022). This does not require the moving party to disprove the opponent's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Instead, the movant meets its burden simply by pointing to the absence of evidence in support of the non-moving party's claims or defenses. *Id.* at 325. A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

After the movant has shown that it is entitled to judgment as a matter of law, the burden shifts to the non-movant to create a "genuine" dispute of fact. *McCay v. Drummond Co.*, 823 F. Supp. 2d 1221, 1233 (N.D. Ala. 2011), *aff'd*, No. 2:08-CV-1978-VEH, 2012 WL 13089021 (N.D. Ala. Apr. 6, 2012), *aff'd*, 509 F. App'x 944 (11th Cir. 2013). In order to do so, the non-movant must present "substantial

evidence" that there is a genuine dispute of material fact. *Powrzanas v. Jones Util. & Contracting Co.*, No. 2:17-CV-00975-TMP, 2019 WL 2338556, at *6 (N.D. Ala. June 3, 2019), *aff'd*, 834 F. App'x 500 (11th Cir. 2020). "Substantial evidence" has not been presented if the non-movant speculates that it is possible in theory to find a dispute of fact. *Id*. Instead, the evidence presented must be of sufficient "weight" and "quality" that "reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusions." *Thompson v. City of Birmingham*, No. 2:12-CV-00623-TMP, 2014 WL 12607847, at *1 (N.D. Ala. May 14, 2014) (quoting *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989)). There can be "no genuine issue as to any material fact" where the nonmovant is unable, after adequate discovery, to "make a showing sufficient to establish the existence of an element essential to [his] case" under the applicable substantive law. *Brown v. Crawford*, 906 F.2d 667, 669 (11th Cir. 1990); *Celotex Corp.*, 477 U.S. at 322. Dispensing with just one legal element of the non-movant's claim "necessarily renders all other facts immaterial," in which case "the plain language of Rule 56(c) mandates the entry of summary judgment." *Celotex Corp.*, 477 U.S. at 322–23.

Applying these principles to this case, State Farm is entitled to summary judgment.

IV. ARGUMENT

Because the damage to Plaintiff's roof was excluded under the Policy, he cannot establish that State Farm breached the insurance contract by not paying to replace the worn-out roof. He also cannot establish that State Farm acted in bad faith because "[w]ithout breach of contract, there can be no bad faith," *Davis v. State Farm Fire & Cas. Co.*, No. 2:15-CV-02226-JHE, 2017 WL 4038407, at *11 (N.D. Ala. Sept. 13, 2017), and because State Farm had a reasonably legitimate or arguable reason for the refusal to pay to replace the old roof. Accordingly, State Farm is entitled to summary judgment on Plaintiff's claim for breach of contract (Count I) and bad faith (Count II).

A. Plaintiff Cannot Establish The Elements of His Claim for Breach of Contract.

To prevail on his breach-of-contract claim, Plaintiff must prove (1) the existence of a valid contract binding the parties, (2) his own performance under the contract, (3) State Farm's non-performance, and (4) damages. *See Jones v. Alfa Mut. Ins. Co.*, 875 So. 2d 1189, 1195 (Ala. 2003). An insurance contract is like all other contracts, and "[g]eneral rules of contract law govern an insurance contract." *Safeway Ins. Co. of Ala., Inc. v. Herrera*, 912 So. 2d 1140, 1143 (Ala. 2005); *iMedEquip, LLC v. Pharmacists Mut. Ins. Co.*, No. 2:20-CV-683-GMB, 2022 WL 364021, at *3–4 (N.D. Ala. Feb. 7, 2022). "The court must enforce the insurance policy as written if the terms are unambiguous." *Herrera*, 912 So. 2d at 1143.

1. Plaintiff cannot establish that State Farm failed to perform under the Policy.

Plaintiff cannot establish that State Farm failed to perform under the Policy by not paying to replace the worn-out roof. This was excluded under the Policy, and Plaintiff does not have substantial evidence that the damage was covered.

a. *The damage was excluded under the Policy's "wear and tear" provision.*

Under the Policy, damage consisting of wear and tear is not covered:

SECTION I – LOSSES NOT INSURED

1. ***We*** will not pay for any loss to the property described in Coverage A that consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through m. below, regardless of whether the loss occurs abruptly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

***

g. wear, tear, decay, marring, scratching, deterioration, inherent vice, latent defect, or mechanical breakdown

(Ex. D, Policy, Section I – Losses Not Insured at 14–15) (emphasis added.)

As Couch on Insurance[4] explains, "[d]amage resulting from normal 'wear and tear' is often excluded from coverage because it is another type of nonfortuitous

[4] Couch on Insurance is "one of the authoritative treatises on insurance law." *Lemuel v. Admiral Ins. Co.*, 414 F. Supp. 2d 1037, 1057 (M.D. Ala. 2006), *aff'd sub nom. Lemuel v. Lifestar Response of Alabama, Inc.*, No. 06-11155, 2007 WL 57097 (11th Cir. Jan. 9, 2007).

loss." *See* § 153:77. Latent defect, inherent vice, wear and tear, and similar perils, 11 Couch on Ins. § 153:77. Indeed, exclusions for damage consisting of wear and tear are common, and they are routinely and consistently enforced under Alabama law. *See, e.g.*, *Padgett v. State Farm Fire & Cas. Co.*, 714 So. 2d 302, 304 (Ala. Civ. App. 1997) ("State Farm denied further payment of [the plaintiff's] claim because her policy did not cover loss from wear, tear, deterioration, latent defect, or defect in materials used in construction or repair."); *Travelers Prop. Cas. Co. of Am. v. Brookwood, LLC*, 283 F. Supp. 3d 1153, 1161 (N.D. Ala. 2017) ("to the extent faulty workmanship, inadequate maintenance, and/or wear and tear caused the roof damage, they are excluded causes of loss."); *Walker v. Auto-Owners Ins. Co.*, No. 5:16-CV-448-CLS, 2017 WL 4810699, at *7 (N.D. Ala. Oct. 25, 2017) ("While the policy would have provided coverage for roof damage caused by wind, it did not cover roof damage caused by wear and tear, deterioration, or shrinking of the roofing material."); *Dashtpeyma v. Liberty Mut. Grp.*, 569 F. App'x 886, 887 (11th Cir. 2014) ("the policy excluded all losses caused by '[w]ear and tear, marring, [or] deterioration.'").

For instance, in *Padgett v. State Farm Fire and Casualty Company*, the Alabama Court of Civil Appeals affirmed summary judgment in favor of State Farm after it denied the plaintiff's claim, in part, because the damage to the roof was excluded by a similar wear and tear provision. *Padgett*, 714 So. 2d at 303–04. In

Padgett, part of the insured's roof was damaged by wind. *Id.* After State Farm inspected the property, it paid the insured to repair the portions of the roof damaged in the storm. *Id.* State Farm did not pay for a full roof replacement, in part, "because [the plaintiff's] policy did not cover loss from wear, tear, deterioration, latent defect, or defect in materials used in construction or repair." *Id.* The court affirmed summary judgment in favor of State Farm, noting that "the policy obligates State Farm to pay only for the damaged portion of the roof and the replacement of shingles in that area" and it was "not obligated to pay to replace the entire roof." *Id.*

Here, it is undisputed that the damage on Plaintiff's roof consisted of wear and tear.[5] Plaintiff admitted that the composition shingle roof was installed in February of 2004 as part of the original construction and was never replaced or repaired until after his claim in November of 2021, nearly two decades after its original installation. (Ex. A, Bonds Dep. 22:19–23:11, 24:6–21, 46:2–11, 86:3–10.) After State Farm inspected the roof, it determined that it showed "extensive signs of wear." (Ex. B, Claim File at Bonds | SF 000016.) State Farm was not alone in its conclusion that the roof was worn. In no uncertain terms, Terry Phillips, the

[5] It is also undisputed that State Farm found 16 shingles that were damaged by wind and drafted an estimate to replace those shingles and to repair the interior water leak. (Ex. A, Bonds Dep. 80:14–82:2; Ex. A.6 at Bonds | SF 000203–208, 000365; Ex. B, Claim File at Bonds | SF 000019.) Because the repair estimate fell below Plaintiff's deductible, and the deductible had to be met before State Farm could issue any payments, State Farm did not make a payment to Plaintiff as a result of his claim. (Ex. A, Bonds Dep. 80:14–82:2; Ex. A.6 at Bonds | SF 000365; Ex. B, Claim File at Bonds | SF 000019.)

contractor that Plaintiff hired to inspect and replace the roof, testified that the roof was badly worn out and deteriorated:

15	Q. So you recommend that he replaced the
16	roof. You knew that it was worn out roof --
17	A. Oh, yeah. He has to replace it.
18	Q. -- and that he had a lot of
19	deterioration --
20	A. Yes, sir.
21	Q. -- and that it was all over.
22	A. Yes, sir.

(Ex. E, Phillips Dep. 77:15–22.) According to Mr. Phillips, Plaintiff's roof had granule loss "everywhere" and "granule loss is just sometimes the result of just a roof getting old." (Ex. E, Phillips Dep. 64:15–66:10.) Mr. Phillips even testified that he told Plaintiff "man, your roof's wore out." (Ex. E, Phillips Dep. 78:8–9.)

Similarly, Eddie Woods, the roofing contractor who inspected the roof after State Farm and Mr. Phillips, also testified that Mr. Bond's roof was worn. Indeed, Mr. Woods provided Plaintiff with an estimate to "remove and replace the old roof," which he testified was "in the later stage of life." (Ex. F, Woods Dep. 144:16–20. 154:8–9; Ex. F.5) (emphasis added.) According to Mr. Woods, "you are fortunate" if "you get fifteen years out of [a roof]" because composite shingle roofs "fall[] off the cliff" after 15 years, even if the roof was installed as a 30-year roof, and Plaintiff's roof had already been on the home for over 16 years. (*See* Ex. F, Woods Dep. 56:1–22, 144:16–20; *see also* Ex. A, Bonds Dep. 22:19–23:4, 24:16–21; Ex. B, Claim File at Bonds | SF 000019.) Mr. Woods further explained that roofs

exposed to direct sunlight "wear out" and "deteriorate" faster and that "direct sunlight is the worst enemy of . . . composition shingles because they dry them out." (Ex. F, Woods Dep. 145:9–20.) He also testified that Plaintiff's roof was exposed to direct sunlight because there were "[n]o trees around" the house but that it was in a "big old, open yard" and he "has not got anything hanging over his roof." (Ex. F, Woods Dep. 146:8–18, 148:19–22.) Mr. Woods's testimony confirms what the what the aerial photograph at Paragraph 4 of this brief shows. *See supra* Section II.A.

As the undisputed evidence in this case establishes, the damage to Plaintiff's roof consisted of wear and tear. This damage was clearly excluded under the Policy. (*See* Ex. D, Policy, Section I – Losses Not Insured at 14–15.) Thus, State Farm did not fail to perform under the insurance contract by not paying Plaintiff to replace the worn-out roof.

b. *Plaintiff does not have substantial evidence that the damage was covered under the Policy.*

Under Alabama law, "the insured bears the burden of establishing coverage by demonstrating that a claim falls within the policy, while the insurer bears the burden of proving the applicability of any policy exclusion." *Ware v. Nationwide Ins. Co.*, No. 7:11-CV-4272-LSC, 2013 WL 1680514, at *5 (N.D. Ala. Apr. 12, 2013) (citing *Colonial Life & Accident Ins. Co. v. Collins*, 194 So. 2d 532, 535 (Ala. 1967) and *U.S. Fidelity. Guar. Co. v. Armstrong*, 479 So. 2d 1164, 1168 (Ala. 1985)). However, "the insurer's burden to prove the applicability of an exclusion

does not shift the general burden of proof from plaintiff to defendant." *Id.* (internal quotation marks and revisions omitted). When, like here, the defendant "has offered evidence showing prima facie that the case is one of specified nonliability, the burden of showing a case within the operation of the policy remains upon the plaintiff." *Id.* (quoting *Belt Auto. Indem. Ass'n v. Ensley Transfer & Supply Co.*, 99 So. 787, 790 (Ala. 1924)). As the Eleventh Circuit explained in *American Safety Indemnity Company v. T.H. Taylor, Inc.*,

> allocation of the burden of persuasion [is] compounded against [the plaintiff] in this instance because [the plaintiff] was defending a motion for summary judgment. While it is correct under Rule 56 of the Federal Rules of Civil Procedure that the non-moving party is entitled to all favorable inferences to be drawn from the evidence in determining whether a genuine issue of fact exists, once the movant has demonstrated that the facts of record warrant judgment in its favor, the party having the burden of proof at trial must come forward with evidence and argument to sustain that burden.

Am. Safety Indem. Co. v. T.H. Taylor, Inc., 513 F. App'x 807, 814 (11th Cir. 2013) (citing *Celotex Corp.*, 477 U.S. at 317 and *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1315 (11th Cir. 2011)).

Here, Plaintiff has the burden to prove that the claimed damages are covered under the Policy (i.e., arising from "accidental direct physical loss"). But he cannot meet this burden. Indeed, State Farm and both roofing contractors that inspected the property—including the contractor hired by Plaintiff to replace the roof—observed

that the roof was worn and deteriorated. *Ware*, 2013 WL 1680514, at *5 (granting summary judgment when insurer "offered sufficient evidence of nonliability pursuant to the Policy's water damage exclusion"); *Dashtpeyma*, 569 F. App'x at 887 (affirming grant of summary judgment when insurer presented evidence that loss was excluded by similar wear and tear provision).

What is more, Plaintiff did not disclose a roofing expert[6] as required to provide evidence of a covered cause of loss and to counter State Farm's evidence that the damage consisted of wear and tear. This is yet another reason why Plaintiff cannot establish that the damage was covered and the roof should have been replaced. As the court in *Ware v. Nationwide Insurance Company* explained, "[a] lay witness is not capable of testifying about whether roof damage arose due to a product defect, poor workmanship, natural wear and tear, storm damage, or some

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[6] The only expert disclosed by Plaintiff was Mr. Ivey Gilmore, an "insurance bad faith" expert. But Mr. Gilmore plans to offer the (incorrect and inadmissible) legal conclusion that State Farm acted in bad faith. Mr. Gilmore specifically plans to offer the following legal opinion:

> Opinion: State Farm breached the duty of good faith owed to Mr. Bonds by denying his hail damage claim. State Farm failed to fulfill its obligation to Mr. Bonds by failing and/or refusing to pay a valid and legitimate claim. State Farm's conduct during the claims process is tantamount to bad faith.

(ECF No. 26-1 at 143, Gilmore Dep. Ex. 19 at 5.) State Farm disclosed Mr. Charles Levy to rebut these opinions.

Because Mr. Gilmore's opinion encroaches the Court's role to make legal determinations, and among other reasons, State Farm filed a motion to exclude his opinions. (*See* ECF No. 26.) Mr. Gilmore does nothing more than opine about the law, and his opinions are not discussed in this brief beyond this footnote.

other cause" because "expert testimony would be required" on those topics. *Ware*, 2013 WL 1680514, at *6 (citing Federal Rule of Evidence 701(c) and noting that a "lay witness opinion must 'not [be] based on scientific, technical, or specialized knowledge withing the scope of Rule 702.'").

To survive summary judgment, Plaintiff must provide substantial evidence to create a jury question regarding whether his damage is covered under the Policy. Plaintiff has no such evidence. Because damage consisting of wear and tear is excluded under the Policy, Plaintiff cannot establish that State Farm failed to perform under the insurance contract when it refused to pay for excluded damage. Accordingly, State Farm is entitled to judgment as a matter of law on the claim for breach of contract.

B. Plaintiff Cannot Establish The Elements of His Claim for Bad Faith.

State Farm is also entitled to summary judgment on Plaintiff's claim for bad faith.

Under Alabama law, a claim for bad faith may consist of bad faith failure to pay an insurance claim or bad faith failure to investigate such claim. *Walker v. Life Ins. Co. of N. Am.*, 59 F.4th 1176, 1187 (11th Cir. 2023) (applying Alabama law). Although there are two methods of establishing bad faith, "there is only one tort of bad-faith refusal to pay." *See State Farm Fire & Cas. Co. v. Brechbill*, 144 So. 3d 248, 257–58 (Ala. 2013). To succeed on a claim for bad faith, the plaintiff must

establish (1) the existence of an insurance contract; (2) the insurer's breach of the contract; (3) an intentional refusal to pay the claim; and (4) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason). *Ex parte Alfa Mut. Ins. Co.*, 799 So. 2d 957, 962 (Ala. 2001); *Brechbill*, 144 So. 3d at 258; *Houser v. Allstate Ins. Co.*, No. 2:20-CV-01661-ACA, 2022 WL 390897, at *2 (N.D. Ala. Feb. 8, 2022).

In addition to these four elements, to establish "normal" bad faith, the plaintiff must also prove the insurer's actual knowledge of the absence of a debatable reason for the refusal. *Alfa Mut. Ins. Co.*, 799 So. 2d at 962. And to establish "abnormal" bad faith, the plaintiff must also prove any of the following in addition to the four elements above: (a) intentional or reckless failure to investigate the claim, (b) intentional or reckless failure to evaluate or review the claim, (c) creation of a debatable reason to deny the claim, or (d) reliance on an ambiguous part of the policy as a lawful basis to deny the claim. *Nat'l Ins. Ass'n v. Sockwell*, 829 So. 2d 111, 129–30 (Ala. 2002).

Applying these principles, Plaintiff cannot establish "normal" or "abnormal" bad faith.

1. Plaintiff's failure to establish a breach of contract is fatal to his claim for bad faith.

As an initial matter, Alabama law is clear that "the defendant's breach of contract is an essential element" of a claim for bad faith. *Kulovitz v. Aspen Specialty*

Ins. Co., No. 1:21-CV-307-ACA, 2021 WL 5300929, at *3 (N.D. Ala. Nov. 15, 2021) (citing *Brechbill*, 144 So. 3d at 247); *Jackson, Key & Assocs., LLC v. Beazley Ins. Co., Inc.*, No. 1:18-CV-00322-KD-C, 2018 WL 6710041, at *6 (S.D. Ala. Nov. 30, 2018), *report and recommendation adopted sub nom. Jackson, Key & Assocs., LLC v. Beazley Ins. Co.*, No. CA 18-00322-KD-C, 2018 WL 6706689 (S.D. Ala. Dec. 20, 2018); *Alabama Space Sci. Exhibit Comm'n v. Markel Am. Ins. Co.*, 557 F. Supp. 3d 1199, 1211 (N.D. Ala. 2021), *aff'd*, No. 21-13313, 2022 WL 1667904 (11th Cir. May 25, 2022).

Plaintiff's claim for bad faith fails as a matter of law because he cannot establish a claim for breach of contract. *See supra* Section IV.A. And "[w]ithout breach of contract, there can be no bad faith." *Davis*, 2017 WL 4038407, at *11 (citing *Brechbill*, 144 So. 3d at 257–58). Accordingly, State Farm is entitled to summary judgment on Plaintiff's claim for bad faith.

2. Plaintiff cannot establish that State Farm lacked a reasonably legitimate or arguable reason in choosing not to pay to replace the worn-out roof.

"Bad faith . . . is not simply bad judgment or negligence. It imports a dishonest purpose and means breach of known duty, i.e., good faith and fair dealing, through some motive of self-invest or ill will." *Davis*, 2017 WL 4038407, at *11 (quoting *Brechbill*, 144 So. 3d at 257–58). For this reason, "[t]o defeat a bad faith claim, the defendant does not have to show that its reason for denial was correct, only that it

was arguable." *Liberty Nat. Life Ins. Co. v. Allen*, 699 So. 2d 138, 143 (Ala. 1997). "Even if [the insurer] improperly omitted some aspects of a complete investigation, more than bad judgment or negligence is required in a bad-faith action." *Brechbill*, 144 So. 3d at 259 (internal quotation marks omitted). Moreover, "[a] bad-faith-refusal-to-investigate claim cannot survive where the trial court has expressly found as a matter of law that the insurer had a reasonably legitimate or arguable reason for refusing to pay the claim at the time the claim was denied." *Id*. at 260; *see Staten v. Fed. Ins. Co*., No. 2:19-CV-01446-AMM, 2021 WL 4458875, at *20 (N.D. Ala. Sept. 29, 2021).

Plaintiff's burden to establish the absence of a debatable reason for insurance denial represents a high bar: "[i]f any one reason for denial of coverage is at least arguable, [a] court need not look any further, and a claim for bad faith refusal to pay will not lie." *Weaver v. Allstate Ins. Co*., 574 So. 2d 771, 774 (Ala. 1990) (emphasis added and internal quotation marks omitted) (holding that to succeed at summary judgment, the insurer maintains merely the burden of demonstrating "that it had a legitimate or arguable basis for the denial of the claim."). A debatable reason for denying a claim is "an arguable reason, one that is open to dispute or question." *Nat'l Sec. Fire & Cas. Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982).

Even if Plaintiff could prove breach of contract (he cannot), the bad faith claim still fails because State Farm had a reasonably legitimate and arguable reason for not

paying to replace the worn-out roof. Indeed, the Policy excluded damage for wear and tear, and State Farm determined that the damage to the roof (other than the 16 wind-damaged shingles) consisted of wear and tear. This created at least an arguable reason for State Farm's decision.

For example, the court in *Peoples v. Property and Casualty Insurance Company of Hartford* held that the Hartford had "debatable reasons to deny [the] [p]laintiffs' claim" because the "independent adjustors who examined the damage determined that it was due to normal 'wear and tear' and not storm rain and winds." *Peoples v. Prop. & Cas. Ins. Co. of Hartford*, No. 2:11-CV-3788-JHH, 2013 WL 1767796, at *8 (N.D. Ala. Apr. 18, 2013). There, the plaintiffs filed a claim after they noticed a few damaged shingles on the roof and an interior water leak. *Id.* at *5. The plaintiffs then paid a contractor to make repairs some minor to the roof. *Id.* The Hartford deployed an independent adjuster to inspect the property, and the adjuster determined that the damage to the roof was the result of wear and tear. *Id.* The Hartford then paid the plaintiffs for the interior water damage after applying the policy's deductible, but it did not pay for any repairs to the roof. *Id.* The court granted summary judgment in favor of the Hartford, noting that "Hartford has established that it had debatable reasons to deny Plaintiffs' claim—independent adjustors who examined the damage determined that it was due to normal 'wear and tear' and not

storm rain and winds." *Id.* at *8.

Akin to *Peoples*, State Farm had a debatable reason to deny Plaintiff's claim in this case. First, Plaintiff's roof was installed in 2004 and had not been replaced since its original installation. (Ex. A, Bonds Dep. 22:19–23:11, 24:6–21, 46:2–11, 86:3–10.) Second, the State Farm independent adjuster inspected the roof and determined that the roof was "in poor condition" and had "wear." (Ex. B, Claim File at Bonds | SF 000019.) Third, State Farm reviewed photographs submitted by Mr. Phillips and Mr. Woods, which showed "extensive signs of wear." (Ex. B, Claim File at Bonds | SF 000016.) Fourth, Mr. Phillips and Mr. Woods testified that the roof was "worn out" and deteriorated "all over," was "old," and was "in the later stage of life." (Ex. E, Phillips Dep. 77:15–22; Ex. F, Woods Dep. 144:16–20.) And, finally, the Policy excluded damage consisting of wear and tear. (Ex. D, Policy, Section I – Losses Not Insured at 14–15.) All of this undoubtedly formed at least a debatable or reasonably legitimate reason not to pay to replace the worn-out roof.

3. Plaintiff cannot establish that State Farm engaged in "abnormal" bad faith.

Plaintiff also cannot establish that State Farm failed to properly investigate his claim. He simply cannot establish any intentional or reckless failure to investigate or review his claim, the creation of a debatable reason to deny the claim, or reliance on an ambiguous part of the policy. *Sockwell*, 829 So. 2d at 129–30.

State Farm immediately began investigating Plaintiff's claim after he filed it

on May 7, 2021. (Ex. B, Claim File at Bonds | SF 000002.) The same day that Plaintiff made his claim, State Farm obtained weather data from AccuWeather to determine if there were any weather events near Plaintiff's home on the March 17, 2021 date of loss. (Ex. B, Claim File at Bonds | SF 000022.)

On May 10, 2021, Kyle Wallace, State Farm's independent adjuster, spoke with Plaintiff and inquired about the damage to the home to prepare for the inspection. (Ex. B, Claim File at Bonds | SF 000021.) That same day, Plaintiff scheduled and inspection to take place on May 15—less than one week later. (Ex. B, Claim File at Bonds | SF 000020.) In preparation for the inspection, Mr. Wallace also requested and obtained an EagleView report to determine the measurements of the home, including the roof. (Ex. B, Claim File at Bonds | SF 000019.)

During the inspection, Mr. Wallace met with Plaintiff at the property and conducted an inspection of the home, including the roof, the exterior, and the interior, as well as of the metal shed on Plaintiff's property.[7] (Ex. B, Claim File at Bonds | SF 000018–19.) Mr. Wallace also took numerous photographs of what he inspected. (Ex. B, Claim File at Bonds | SF 000102–141, 000143–190.) Based on his inspection, Mr. Wallace noted that the roof was "in poor condition" and had "wear." (Ex. B, Claim File at Bonds | SF 000019.)

[7] Notably, Mr. Wallace did not find any damage to the metal shed. (Ex. B, Claim File at Bonds | SF 000016.) None of the contractors that inspected Plaintiff's property inspected the metal shed. (Ex. A, Bonds Dep. 84:23–85:4.)

On May 18, 2021, Mr. Wallace prepared an estimate of $1,443.20 to pay to repair the covered damage observed to the 16 shingles damaged by wind and the interior damage to the ceiling. (Ex. A.6 at Bonds | SF 000203–208, 000365.) That same day, State Farm sent Plaintiff the estimate and Mr. Wallace called Plaintiff to discuss the scope of the estimate and to inform him that the loss fell below the deductible. (Ex. B, Claim File at Bonds | SF 000018.) Even after all of that, State Farm continued to review photographs submitted by Terry Phillips and Eddie Woods and ultimately reached the conclusion that the information submitted by the contractors confirmed its prior decision that the damage to the roof consisted of excluded wear and tear. (Ex. B, Claim File at Bonds | SF 000015–16.)

In other words, there was no intentional or reckless failure to investigate or review Plaintiff's claim. Rather, State Farm relied on the thorough inspection of an independent adjuster, reviewed the information provided by Plaintiff's contractors as it came in, and relied on an unambiguous policy provision to determine that replacing the worn-out roof was not required under the Policy. Plaintiff simply cannot "adduce sufficient evidence of 'dishonest purpose' or 'breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will'" to survive summary judgment. *Singleton v. State Farm Fire & Cas. Co.*, 928 So. 2d 280, 286–87 (Ala. 2005). Under these undisputed facts, Plaintiff cannot establish that State Farm engaged in bad faith. *Sockwell*, 829 So. 2d at 129–30.

Because State Farm did not breach the Policy and had a reasonably legitimate or arguable reason for its refusal to pay for a full roof, Plaintiff cannot establish the elements for his bad faith claim. State Farm is therefore entitled to summary judgment on Plaintiff's claim for bad faith.

V. CONCLUSION

Plaintiff cannot establish his claims for breach of contract (Count I) or bad faith (Count II), and State Farm is entitled to judgment as a matter of law under the undisputed facts of this case. Accordingly, State Farm respectfully requests summary judgment in its favor on all of Plaintiff's claims.

Respectfully submitted this the 14th day of July, 2023.

/s/ A. David Fawal
A. David Fawal (ASB-4593-W82A)
David.Fawal@butlersnow.com
Jorge A. Solis (ASB-2144-A14T)
Jorge.Solis@butlersnow.com

Counsel for
State Farm Fire and Casualty Company
(*Defendant*)

OF COUNSEL:
BUTLER SNOW LLP
One Federal Place, Suite 1000
1819 5th Avenue North
Birmingham, Alabama 35203
Telephone: (205) 297-2200
Facsimile: (205) 297-2100

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on all parties to this action by e-file using the Court's CM/ECF system, electronic mail and/or by depositing a copy of the same in the U.S. Mail, first-class postage prepaid and properly addressed as follows:

Mr. Eric J. Artrip
MASTANDO & ARTRIP, LLC
301 Washington St., Suite 302
Huntsville, Alabama 35801
artrip@mastandoartrip.com

Mr. Matthew K. Carter
FULLER, WILLINGHAM, & CARTER, LLC
413 1st Avenue SW
Cullman, Alabama 35055
matt@fandwlaw.com

Counsel for Thomas Bonds
(*Plaintiff*)

Done this the 14th day of July, 2023.

/s/ A. David Fawal
OF COUNSEL