

MOTION PRACTICE IN BAD FAITH CASES FROM THE PLAINTIFF'S PERSPECTIVE

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I. Introduction

Whether one is responding to a motion, or filing a motion of one's own, certain basic principles apply. The first principle is to always keep in mind one's audience. Consider whether one's brief will be viewed by a seasoned trial judge familiar with the law at issue or whether it will be first screened by a law clerk. Consider also the work load the individual deciding the case has – brevity and clarity are both essential and appreciated. The second principle is to write to the appropriate reviewing standard. Are the allegations of the pleadings taken as true, as in a motion to dismiss, or is substantial evidence required, as in a summary judgment motion? Is a discretionary standard of review involved? The third principle, which creates tension with the first principle, is to be complete. Remember that on appellate review, the appellate court will consider only the evidence presented to the trial court. A fourth, but very important principle is to follow all procedural and technical requirements. Many federal courts and some state courts now have automatic response deadlines for certain kinds of motions, formatting requirements and page limits, among other things. It is crucial to keep these procedural and technical requirements and deadlines in mind and to plan sufficient time to meet them. Violation of such requirements can cause the entire brief to be stricken.

In light of these principles, this paper will focus on three basic classes of motions – motions which question the sufficiency of the pleadings, procedural motions and motions for summary judgment, which question the sufficiency of the evidence.

II. Sufficiency of the Pleadings – Motions to Dismiss

In both state and federal courts, motions to dismiss for the failure to state a claim upon which relief can be granted, generally fall under Rule 12(b)(6). However, the standards under which such motions are evaluated differ slightly between state and federal courts.

A. Procedural Considerations

Many federal courts have begun to place automatic deadlines for responding to dispositive motions under Fed. R. Civ. P. 12(b)(6). Currently, in Alabama, only the Southern District of Alabama has an automatic response time and page deadline for Fed. R. Civ. P. 12(b) motions. Unless otherwise ordered, Local Rule 7.1(a) provides that an opposing party has 10 days to respond to a 12(b) motion to dismiss. A recent change to the Federal Rules of Civil Procedure did away with the “non-counting” provision for intervening Saturdays, Sundays and legal holidays, *see*, Fed. R. Civ. P. 6(b), so 10 days means exactly 10 days, except that Fed. R. Civ. P. 6(d) also provides an additional three days if service of the motion is done by any method, including e-filing, besides hand-delivery. At this time, neither the Northern nor the Middle Districts of Alabama have any such automatic deadlines for 12(b) filings.

In Alabama state court, each circuit court has its own way of doing things. Many counties do not require a response to a 12(b) motion until it is set for hearing by a trial judge, either specially set or as part of a motion docket; other counties have different procedures. The best course of action once a state court motion to dismiss is received is to check with the clerk’s office about that particular county’s procedure.

B. Standard of Review

1. Federal Court Standard

Until quite recently, the standards of review in state and federal court for motions to dismiss for failure to state a claim were identical. However, with the United States Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the federal standard of review changed. Bell Atlantic required "more than labels and conclusions and a formulaic recitation of the elements of a cause of action" but "only enough facts to state a claim to relief that is plausible on its face." Bell Atlantic, 550 U.S. at 555, 570. Bell Atlantic's effect on bad faith claims appears to be minimal.

For example, in the case of Clark v. Transcontinental Ins. Co., 2009 WL 387129 (M. D. Ala. 2009), Judge Albritton denied a motion to dismiss a bad faith claim in a commercial setting. Greg Clark Roofing & Construction was a sub-contractor at a job site for the general contractor Standard-Taylor Industries. Greg Clark's employee, Robyn Lawrence, died when she fell through a skylight while working at the site. Transcontinental had issued a worker's compensation policy to Standard-Taylor, and Greg Clark alleged that he and his business were covered under the policy through a coverage endorsement for which he paid a premium. However, Transcontinental told Ms. Lawrence's family that they were not due any worker's compensation benefits because she was not employed by Standard Taylor. After some further settlement maneuvers between Ms. Lawrence's family, Standard Taylor and Transcontinental, to which Greg Clark was not a party, Mr. Lawrence filed suit against Greg Clark in state court, and Transcontinental refused to defend or indemnify him in that suit. In the state

court suit, a judgment of \$ 1.3 million was entered against Clark, who then filed a complaint against Transcontinental which included a bad faith claim.

Judge Albritton first explained the standard under which a motion to dismiss should be evaluated.

In evaluating a motion to dismiss, the court accepts the plaintiff's allegations as true, Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), and construes the complaint in the plaintiff's favor, Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir.1993). To survive a motion to dismiss, a complaint need not contain 'detailed factual allegations.' Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2007). The complaint must contain 'only enough facts to state a claim to relief that is plausible on its face.' Twombly, 544 S.Ct. at 1974. The factual allegations 'must be enough to raise a right to relief above the speculative level.' Id. at 1965. '[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.' Id. at 1964-65.

Clark, p. 2.

Judge Albritton continued, observing that, under Alabama law, two forms of bad faith claims exist: "normal" bad faith claims, and "abnormal" bad faith claims. Clark, p.

2. A "normal" bad faith claim requires a plaintiff to show 1) the existence of an insurance contract, 2) an intentional refusal to pay the claim and 3) the absence of any lawful basis for the refusal and the insurer's knowledge of that fact. Clark, p. 2.

In an 'abnormal' bad faith claims case, bad faith may consist of any of the following: '(1) intentional or reckless failure to investigate a claim, (2) intentional or reckless failure to properly subject a claim to a cognitive evaluation or review, (3) the manufacture of a debatable reason to deny a claim, or (4) reliance on an ambiguous portion of a policy as a lawful basis for denying a claim.'

Id., p. 3, quoting State Farm Ins. Co. v. Slade, 747 So. 2d 293, 306-307 (Ala. 1999).

Judge Albritton then listed the portions of the complaint which were sufficient to allege claims for both normal and abnormal bad faith. In particular, Judge Albritton found that the following factual allegations in the complaint were sufficient to support the “inference” that Transcontinental both was aware of its legal duty to pay the insured’s claim and did not believe that it had a reasonable basis to refuse to pay the underlying claim:

The Complaint alleges that Clark and its employees were insured under a workers' compensation policy, and that at the time of the accident Robyn Lawrence was an employee of Clark. Compl. at ¶¶ 6-7. The Complaint also repeatedly alleges that Transcontinental excluded the insured from its negotiations with Lawrence regarding his wife's workers' compensation claim, and that Clark was not included in any of the agreements or releases negotiated by the Defendants in violation of the terms of the insurance contract. Compl. at ¶¶ 10-15. The Complaint further alleges that Transcontinental instructed Lawrence to lie to the Ombudsman or to any lawyers about his wife's employment with Clark, to represent that his wife was employed by Standard-Taylor at the time of the accident, and that failure to do so would result in a forfeiture of his \$49,676.16 settlement. Compl. at ¶ 9. It is also alleged that Transcontinental was intentional in its refusal to protect Clark. Compl. at ¶ 16.

Clark, p. 4.

Transcontinental also claimed that the complaint did not allege that Transcontinental intentionally failed to pay the claim, but Judge Albritton found that allegations in the complaint that the “defendants refused to defend or indemnify the plaintiffs in any way or at any point” and that “Clark repeatedly requested that Transcontinental defend Lawrence’s claims against him and that Transcontinental denied those requests” were sufficient to allege intentional non-payment. Clark, p. 4. Judge Albritton also observed that “[w]ith respect to the Plaintiff’s abnormal bad faith claims for failure to investigate and failure to submit the claim to a cognitive review, an

allegation that Transcontinental acted either intentionally or recklessly is sufficient to support the claims.” Id., p. 4.

Judge Albritton’s analysis shows that if a review of the complaint before filing demonstrates that basic facts sufficient to infer the elements of the cause of the action have been alleged, the complaint will survive a challenge under Fed. R. Civ. P. 12(b)(6).

The case of Sanders Hyland Corp. v. Amerisure Ins. Co., 2009 WL 1537872 (S. D. Ala. 2009) is also instructive. It shows how a motion to dismiss based upon an affirmative defense in federal court is handled. In Sanders, the issue was whether a motion to dismiss should be granted on the basis of the statute of limitations. Sanders Hyland, the tile sub-contractor on a Baldwin County condominium project, filed a suit against Amerisure Insurance Company and Michigan Mutual Insurance Company for breach of contract and bad faith based upon those companies’ refusal to defend or indemnify it on claims against it by the general contractor of the project, W. G. Yates & Sons. The complaint alleged that Sanders was served with a demand for binding arbitration related to the project on May 23, 2003, and that eventually an order from the United States District Court for the Middle District compelling arbitration was issued on April 7, 2008. Sanders filed suit against the two insurance companies on December 15, 2008, and Amerisure filed a Rule 12(b)(6) motion to dismiss the bad faith claims against it on the basis of the statute of limitations.

The trial court explained the controlling legal standard to be applied as follows:

‘Dismissal under Federal Rule of Civil Procedure 12(b)(6) on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred.’ Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 (11th Cir.2005) (citations and internal quotation

marks omitted); accord Brotherhood of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp., Inc., 522 F.3d 1190, 1194 (11th Cir.2008). ‘When considering a motion to dismiss, all facts set forth in the plaintiff’s complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.’ Tello, 410 F.3d at 1288 n. 12 (quoting Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir.2000)(internal quotation marks omitted)).’

Sanders, p. 1.

After observing that, under Alabama law, “the cause of action for bad faith refusal to honor insurance benefits accrues upon the event of the bad faith refusal, or upon the knowledge of facts which would reasonably lead the insurance to a discovery of the bad faith and refusal” and that “[t]he accrual of the tort of bad faith is a question of fact to be determined by the circumstances of each case,” Id., p. 2, quoting Safeco Ins. Co. of America v. Sims, 435 So. 2d 1219, 1222 (Ala 1983), the trial court went on to hold that because the date of accrual of the Plaintiff’s bad faith cause of action could not be determined from the pleadings, the motion to dismiss was due to be denied. Sanders, p. 2.

2. Alabama State Court Standard

While the federal standard has changed, the reviewing standard for a motion to dismiss under the Alabama Rules of Civil Procedure has not.

A ruling on a motion to dismiss is reviewed without a presumption of correctness...This Court must accept the allegations of the complaint as true...Furthermore, in reviewing a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail.

Pontius v. State Farm Mutual Automobile Ins. Co., 915 So. 2d 557, 563 (Ala. 2005).

Stated in another way:

The appropriate standard of review is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief; in making this determination, this Court does not consider whether the plaintiff will ultimately prevail but only whether [the plaintiff] may possibly prevail.

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993).

Because the tort of bad faith is relatively well-established, there is very little current case law regarding motions to dismiss bad faith claims in the Alabama appellate courts. One relatively recent exception is the case of Jones v. Alfa Mutual Ins. Co., 875 So. 2d 1189 (Ala. 2003), which involved the appeal of a trial court's dismissal of a bad faith claim based upon the statute of limitations. The trial court had held that the bad faith action accrued once the property damage upon which the claim was based occurred. The Alabama Supreme Court disagreed, relying upon essentially the same law as that relied upon by the federal court in the Sanders case. *See, Jones*, 875 So. 2d at 1193.

The one apparently unsettled bad faith area under state law involves bad faith claims under uninsured motorist coverage. The Alabama Supreme Court's review of such bad faith claims, however, relies not upon Ala. R. Civ. P. 12(b)(6), but on a different procedural basis, as the cases of Pontius v. State Farm Mutual Automobile Ins. Co., 915 So. 2d 557 (Ala. 2005) and Ex parte Safeway Ins. Co. of Alabama, Inc., 990 So. 2d 344 (Ala. 2008) both demonstrate.

In both Pontius and Safeway, the issue was when an insurer can become liable under an UM policy for bad faith in the failure to pay a claim. In Pontius, suit was filed against the alleged tortfeasor and his parents, then State Farm, the UM carrier, file a motion

to intervene. Following the motion to intervene, the plaintiff added State Farm as a party, and asserted claims for breach of contract and bad faith. State Farm filed a motion to dismiss, arguing that there must be a conclusive determination of liability and damages before the UM carrier can be liable for either breach of contract or bad faith. The Alabama Supreme Court agreed, holding that “[w]ithout a determination of whether liability exists on the part of the underinsured motorist and the extent of the plaintiff’s damages, a claim of bad-faith failure to pay or breach of contract is premature.” Pontius, 915 So. 2d at 564. However, the Alabama Supreme Court also ruled that such claims by State Farm amounted to an argument that the plaintiff’s claims were not ripe for adjudication, and therefore the dismissal did not operate as an adjudication on the merits. Id. at 564. This holding meant that the plaintiff was free to re-file her claims against State Farm for any of State Farm’s conduct which arose after the tortfeasor’s liability was established and damages fixed. Id. at 565.

The Safeway holding was similar, although it further explained that evidence could be introduced in support of, or in opposition to, such a motion to dismiss based upon ripeness. In Safeway, Michelle Galvin’s automobile was struck by an uninsured motorist driving while intoxicated. Safeway was Ms. Gavlin’s uninsured motorist insurance carrier. Ms. Galvin’s initial complaint contained bad faith and breach of contract claims against Safeway. When Safeway filed a motion to dismiss on the basis of ripeness, Ms. Galvin’s attorney included in the response an affidavit stating that the case was one of clear liability, that Ms. Galvin had incurred \$15,884 in medial bills, that the attorney made an initial settlement offer on August 31, 2006, that Safeway did not

respond until October 4, 2006 with an offer of \$10,000 and that Safeway never made any additional offers. Safeway, 990 So. 2d at 346-347. In response, Safeway filed its own affidavit explaining why it believed that the damages were contested and that the plaintiff had not provided it with all of the documents it had requested. Id. at 347-348. No counter-affidavit was filed. The Alabama Supreme Court held that “Galvin did not present any evidence refuting [Safeway’s representative’s] statement that she had not provided all the documents requested by Safeway or indicating that Safeway had not contested the extent of damages.” Id. at 352. Accordingly, Safeway was held entitled to a dismissal without prejudice of the bad faith claim on the grounds that the claim was not ripe for adjudication. Id. at 352.

III. Non-Dispositive Motions

Non-dispositive motions are essentially any motions that can be filed in the course of a case that do not involve a final resolution of a claim. Because this topic is hopelessly broad, this paper will only lightly touch upon two topics, motions to compel discovery and motions to bifurcate.

A. Motions to Compel Discovery

A motion to compel discovery is, of course, a motion to compel the other side to produce something or answer questions it has refused to answer. As with any other motion, there are procedural considerations as well as differing standards involved. However, decisions on discovery are reviewed, in both state and federal courts, on an abuse of discretion standard.

The procedural requirements in Alabama federal courts for discovery motions are not as detailed as requirements for dispositive motions. In the Southern District, the 30 page limit for principal briefs and the 15 page limit for reply briefs remains intact; however, since a motion to compel is non-dispositive, a party is not required to file a brief in support of the motion to compel. The Middle District's lone special requirement for motions to compel is the following:

Any discovery motion filed pursuant to Fed. R. Civ. P. 26 (c) and 37 shall include, in the motion itself or in an attached memorandum, a verbatim recitation of each interrogatory, request, answer, response and objection which is the subject of the motion or a copy of the actual discovery document which is the subject of the motion.

Local Rule 37.1, Middle District of Alabama.

One procedural requirement that is common to both state and federal courts is the requirement that the party filing the motion to compel must have attempted to work out the problem prior to filing the motion.

Ala. R. Civ. P. 37(a)(2) provides that “[a] motion relating to discovery issues shall be accompanied by a statement of the attorney for the moving party stating that the attorney, before filing the motion, has endeavored to resolve the subject of the discovery motion through correspondence or discussions with opposing counsel or, if the opposing party is not represented by counsel, with the opposing party.” Similarly, Fed. R. Civ. P. 37(a)(1) requires the motion to include “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an attempt to obtain it without court action.”

A final consideration in motions to compel is to keep in mind the appropriate discovery standard. As with the standard for motions to dismiss, the standard for discovery in state and federal courts has recently diverged. In Alabama, the standard remains that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party....It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Ala. R. Civ. P. 26(b)(1). By contrast, in federal court, the standard for discovery is that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). However, the federal rules do allow a court “[f]or good cause...[to] order discovery of any matter relevant to the subject matter involved in the action.” Id. In addition, as with the state rules, “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Id.

B. Motions to Bifurcate

A motion to bifurcate is a request to the Court for separate trials either as to parties or as to issues. While such motions are most commonly filed with respect to automobile accidents where claims for negligence against a driver are combined with claims for negligent entrustment against an owner or an employer, some defendants have filed motions to bifurcate with respect to bad faith claims. Such a motion will typically

request that the Court try the issue of breach of contract first, then if, and only if, a verdict is reached against the defendant on breach of contract, a second trial be held on the issue of bad faith.

Such motions fall under Ala. R. Civ. P. 42(b). A trial court's power to order separate trials under Rule 42(b) is a discretionary power. Fox v. Hollar Company, Inc., 576 So. 2d 223, 225 (Ala. 1991). The width of that discretion is quite broad, as evidenced by the cases of Wilder v. DiPiazza, 481 So. 2d 1091 (Ala. 1985) and Rice v. Blackmon, 559 So. 2d 1070 (Ala. 1990). In these cases, two trial courts made diametrically opposed rulings based on Rule 42(b), one trial court ordering separate trials for negligence and negligent entrustment and the other trial court refusing to order separate trials, but relying on limiting jury instructions instead to ensure evidence was properly considered by the jury. The Alabama Supreme Court upheld both decisions. However, there must be some finding by the trial court in ordering bifurcation that the separation will serve one of the enumerated purposes of Rule 42(b). Ex parte Palughi, 494 So. 2d 404 (Ala. 1986); Ex parte Skelton, 459 So. 2d 825 (Ala. 1984). There are three such purposes: furtherance of convenience, to avoid prejudice and when separate trials are conducive to expedition and economy.

While it is difficult to envision how any of the three purposes could be filled by bifurcating breach of contract from bad faith claims, the strongest argument against separate trials, if such a motion is encountered, is that under Alabama law, the normal course of action is to try both claims together. In the case of Ex parte Alfa Mutual

Insurance Company, 799 So. 2d 957, 964 (Ala. 2001), the Alabama Supreme Court concluded the following:

Finally, we take this opportunity to recommend that Instruction 20.37, Alabama Pattern Jury Instructions: Civil (2d ed. 1993), the pattern jury instruction for a bad-faith claim, be amended to avoid the recurring confusion now leading to inconsistent jury verdicts on breach-of contract and bad-faith claims. We believe the confusion could easily be eliminated by adding the following sentence to Instruction 20.37:

In order to find for the plaintiff on his/her bad-faith count, you must have found for the plaintiff on his/her breach-of-contract count.

No prejudice could result from the court's giving such an instruction, because the jury currently must find for the plaintiff on the contract claim in order to find for the plaintiff on a bad-faith claim. This sentence, if added to the instruction, will simply provide clear and concise directions to the jury so as to avoid an inconsistency due to oversight or to confusion among the jurors. There is no reason to avoid directly apprising jurors, in words they can understand, of the interrelationship under Alabama law of a breach-of-contract claim and a bad-faith claim.

IV. Motions for Summary Judgment

Motions for summary judgment are almost inevitable in a bad faith action. Both filing and responding to them require attention to detail, an intimate knowledge of the case and a firm foundation in case law.

A. Procedural Requirements

In both state and federal courts, Rule 56 of the appropriate rules of civil procedure govern summary judgment motions. While the two rules are similar, procedural differences exist.

1. Federal Courts

Fed. R. Civ. P. 56(a) and (b) permit both plaintiffs and defendants to file summary judgment motions for all or part of the claims in the litigation. Rule 56(c) sets out time filing requirements, “unless a different time is set by local rule or the court orders otherwise.” Under Rule 56(c), a summary judgment may be filed at any time until 30 days after the close of all discovery, a party opposing the motion must be filed within 21 days after the motion is served and the movant may file a reply brief 14 days after the response is served. However, in Alabama, the local rules or scheduling orders for each district contain differing requirements. For example, in the Middle District, it is the normal practice to require summary judgments to be filed 90 days before the pre-trial conference, even though the discovery deadline may not have passed. Many of the scheduling orders in both the Middle District and the Northern District contain detailed formatting requirements. For example, a standard scheduling order in the Northern District can contain an Appendix setting forth summary judgment and response requirements in detail. These requirements include a statement of undisputed facts with one fact per separate numbered paragraph for the movant. The respondent must file a response to that statement, a statement of additional undisputed facts and a statement of facts that are disputed, each in separate numbered paragraphs as part of the response. Some judges in the Middle District require that testimony excerpts be listed by deposition page and line number. In the Southern District, Local Rule 7.2 governs summary judgment responses. It requires that a motion for summary judgment be accompanied by “a brief in support of the motion, together with suggested Determinations of Undisputed

Fact and Conclusions of Law, appropriately designated, stated in separately numbered paragraphs with all findings of fact appropriate referenced to the supporting...documents...together with a proposed order of judgment, all in such form as counsel shall deem sufficient to sustain his position on appeal...” The non-movant is to respond within 30 days, “or as otherwise ordered” with a brief as well as a list of the disputed facts appropriately referenced to...supporting...documents.” Id.

Regardless of local rules, a summary judgment should only be rendered “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2).

2. State Courts

Although there are a few exceptions, for the most part, state court summary judgment procedure is standardized across the state by Ala. R. Civ. P. 56. The deadlines for both filing and responding to motions are significantly different from federal court. A motion for summary judgment, with all supporting materials, must be served at least ten days before a hearing scheduled on the motion. Ala. R. Civ. P. 56(c)(2). A court may conduct a hearing with less than ten days notice if all of the parties consent. Id. Generally, any opposition to the motion for summary judgment must be served at least two days before the hearing. Id. However, under Ala. R. Civ. P. 6(a), neither the ten days nor the two days include intermediate Saturdays, Sunday and legal holidays, so, for example, if a hearing is set for a Monday, the response is due on the preceding Thursday.

Ala. R. Civ. P. 56(c)(1) requires a motion for summary judgment to “be supported by a narrative summary of what the movant contends to be the undisputed material facts.” The narrative summary, which can be included in the motion or attached as an exhibit, must be supported by specific references to “pleadings, portions of discovery materials or affidavits and may include citations to legal authority.” Id. All supporting materials not on file must be attached as exhibits. Id. Basically, if the evidence being relied on is not part of the file at the time a ruling is appealed, for appellate purposes it does not exist. The opposing party likewise is required to file “and serve a statement in opposition supported in the same manner” if it contends that material facts are in dispute. Ala. R. Civ. P. 56(c)(1). It is extremely important to note that materials filed either in support of, or in opposition, a motion for summary judgment must consist of admissible evidence.

Inadmissible evidence is not to be considered as substantial evidence that would create a genuine issue of material fact to defeat a summary-judgment motion. Rule 56(e), Ala. R. Civ. P.; Perry v. Mobile County, 533 So.2d 602 (Ala.1988). Inadmissible evidence can be considered if the party against whom the evidence is offered does not object by moving to strike the evidence. Perry, supra. If the consideration of the inadmissible evidence would cause a ‘ ‘gross miscarriage of justice,’ ’ then that evidence will not be considered, regardless of whether there was an objection. Id. at 604-05 (quoting Charles Alan Wright *et al.*, Federal Practice and Procedure: Civil 2d § 2738 (1983)). *See also* Ex parte Diversey Corp., 742 So.2d 1250 (Ala.1999).

Smith v. Smith, 778 So. 2d 189, 191 (Ala. Civ. App. 1999).

As in federal court, a summary judgment shall only be rendered if the materials together with the affidavits show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Ala. R. Civ. P. 56(c)(3).

B. Mattiace and Slade

When deciding a summary judgment motion, both state and federal courts are required to view the record in the light most favorable to the non-moving party, to accord the non-moving party all reasonable inferences from the evidence, and to resolve all reasonable doubts against the moving party. *See, e.g., Ex parte Yancey*, 8 So. 3d 299, 304 (Ala. 2008); *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 157 (1970). While defeat or victory with respect to a summary judgment motion ultimately rests upon the facts of the case, solid case law supporting a parties' position is also invaluable.

The strongest cases to use to support arguments with respect to bad faith on summary judgment are generally those cases where verdicts were affirmed or trial court rulings overturned by the appellate courts. Two of the more interesting cases are *Loyal American Life Insurance Co., Inc. v. Mattiace*, 679 So. 2d 229 (Ala. 1996) and *State Farm Fire & Casualty Co. v. Slade*, 747 So. 2d 293 (Ala. 1999). These cases also provide excellent examples of the type of evidentiary detail needed to prevail in a bad faith claim.

In the case of *Loyal American Life Ins. Co., Inc. v. Mattiace*, the central issue was the manner in which a life insurance policy was underwritten. This was a "normal" bad faith claim; that is, the plaintiff was required to show that she was entitled to a directed verdict on the breach of contract claim. Joseph Mattiace applied for an life insurance policy from Loyal American, and in response to a question about whether the applicant had been arrested or convicted of DUI in the past 5 years, Joseph answered "no." Less than one month later, Mr. Mattiace was killed in an automobile accident. At the time of his death, he was found to be legally intoxicated, and Loyal American discovered that he

had been convicted of a DUI 8 months before he applied for his policy. When Mrs. Mattiace, Joseph's mother and beneficiary, made a claim under the policy, Loyal American denied the claim on the grounds that Mr. Mattiace had not been truthful in his application. Loyal American claimed that had Mr. Mattiace been truthful, it would not have issued the policy or would have charged a higher premium. Mrs. Mattiace's attorney then sought an explanation from Loyal American of its underwriting practices that would justify the claims denial. In response, the vice president of claims attached a page from a Loyal American underwriting manual that supposedly showed that extra premium would have been charged because of the prior DUI. However, not only was there no such thing as a Loyal American underwriting manual, but also the page enclosed showed that a DUI conviction within a year of the policy application would not have caused a rate increase. Mrs. Mattiace filed suit against Loyal American for breach of contract and bad faith, among other things, and won a jury verdict against Loyal American. Loyal American appealed.

Loyal American's main contention on appeal was that it had proved at trial that a DUI conviction was material to the risk underwritten and that it followed a "standard procedure" of rating such a policy. Mattiace, 679 So. 2d at 235. However, both the trial court and the appellate court found that Loyal American operated its underwriting department in a "loose and inconsistent manner" and so Loyal American had no such standard procedures. Mattiace, 679 So. 2d at 236. The appellate court went on to explain why this "loose and inconsistent manner" of operation mandated a finding that Mrs. Mattiace had met her burden of proof.

In response to this argument by Loyal American, the trial court stated: '*I think the case [law] is also clear that a defendant can't create its own fairly debatable reason. You know that is the Catch 22 in your argument.*' (Emphasis added.) We believe the trial court's comment indicates that for the purpose of determining whether Sue Mattiace met the 'directed verdict on the contract claim' standard, given the abundant evidence of inconsistency in the underwriting process, the court did not allow Loyal American's after-the-fact promises that it solely relied on the 'Hudson' manual to evaluate "driver criticisms" to create its legitimate, debatable reason for denying the claim for policy benefits.

In Blackburn v. Fidelity & Deposit Co. of Maryland, 667 So.2d 661, 669 (Ala.1995), we stated that 'an insurer's subjective belief that a portion of its insurance contract precludes coverage is not an absolute defense to a bad faith claim.' We also stated that if an insurer's subjective interpretation of an insurance policy could create the fairly debatable reason needed to defend a bad faith claim, then insurers would be encouraged to write ambiguous insurance policies. Id.

Similarly, if an insurer is allowed to intentionally create an atmosphere in its underwriting department where no standards are binding on its underwriters and when a claim for policy benefits is received an underwriter can pull off a shelf underwriting standards that are stricter than those that were used when the policy was issued, then the insurer would be creating its own debatable reason for denying the claim. We cannot condone such action and let self-created uncertainty as to underwriting standards defeat a claim of bad faith where that uncertainty is the very basis of the allegation of bad faith. Thus, we hold that Loyal American cannot rely upon its chosen method of 'subjective underwriting' to create its own legitimate reason for denying a claim, and we conclude that Sue Mattiace presented substantial evidence in support of each element of an action for bad faith.

Mattiace, 679 So. 2d at 237-238.

While Mattiace required the plaintiff to engage in a detailed exploration of the insurer's underwriting processes, State Farm Fire & Casualty Co. v. Slade, 747 So. 2d 293 (Ala. 1999) required an intricate examination of property damage due to a lightning strike. In Slade, a homeowner's retaining wall collapsed when lightning struck it during a severe storm, causing the ground around the homeowner's pool to give way, resulting

in extensive damage to the pool area. State Farm paid for the damage to the pool area, and paid for soil to be replaced up to three feet from the corner of the house, but did not have any soil replaced under the slab area of the home. Two months after the lightning strike, the homeowners, the Slades, noticed cracking in the ceilings and interior and exterior walls of their house. They told State Farm about the cracking, and a week later a claims adjuster came and examined the cracks. Mr. Slade told the adjuster that he attributed the cracking to the lightning strike to the retaining wall, which would cause the damage to be covered under the terms of their policy. The contractor who had fixed the pool area had already contacted three firms to determine the cause of the cracking and to give repair estimates. Each of the three firms came back with reports finding that the damage was caused by soil shifting, causing the foundation to move, and that the soil movement was due to the retaining wall collapse after the lightning strike. At some point, State Farm decided that there might be a question of coverage if the lightning strike and the earth movement were concurrent causes of the cracking, but the principal adjuster did not inform the Slades of this fact. State Farm procured an engineer to investigate the theory that earth movement was responsible for the home damage, but did not tell the engineer about the lightning strike. In addition, the engineer was not qualified to investigate whether the damage was due to a lightning strike. Slade, 747 So. 2d at 300-301. Although State Farm hired other engineers to inspect the home, it did not hire a single engineer who was qualified to conduct an investigation regarding possible lightning damage. Id. at 301. It was not until August 29, 1994 that State Farm sent the Slades a formal denial letter regarding the policy.

The Slades sued on a number of theories, including bad faith adjustment of their claim, and obtained a jury verdict. State Farm appealed. The Alabama Supreme Court held that the Slades had shown that State Farm committed bad faith because it never investigated the possibility that lightning directly struck their dwelling, which created a question of fact as to whether State Farm properly investigated their claim. Slade, 747 So. 2d at 315.¹ The Alabama Supreme Court was particularly troubled by State Farm’s argument that it could not be held liable “because it believes it properly investigated noncovered events and found evidence that noncovered events caused the Slades’ loss.” Slade, 747 So. 2d at 315. This argument was “unacceptable” because “[a]n insurance company’s duty to investigate does not extend only to those events that are not covered...[A]n insurance company has ‘responsibility to marshal all .. facts’ necessary to make a determination as to coverage ‘before its refusal to pay.’” Slade, 747 So. 2d at 316. (Emphasis in original.)

V. Conclusion

Careful attention to procedural requirements, a knowledge of the audience being written to and an extensive knowledge of one’s pleadings, evidence and appropriate case law are all essential to a plaintiff’s bad faith motion practice. Focusing on these essentials will greatly increase the practitioner’s chances to bring a bad faith claim before that greatest of all American legal institutions, a jury.

¹ The case was, however, remanded for a new trial because of other inconsistencies in the jury verdict related to other claims by the Slades.