

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**THOMAS C. McINTOSH and
PAMELA McINTOSH**

PLAINTIFFS

VERSUS

CIVIL ACTION NO. 1:06cv1080-LTS-RHW

**STATE FARM FIRE AND CASUALTY
INSURANCE COMPANY, *et al.***

DEFENDANTS

ORDER

Before the Court are [453], Plaintiffs' motion for protective order/motion to quash noticed video depositions with document requests of Richard F. Scruggs and Zach Scruggs filed September 11, 2007, and Plaintiffs' [715] motion to strike the joinder [707] filed by Defendant E.A. Renfroe in State Farm's response to [453], as well as associated memoranda filed in support of, and opposition to motions [453] and [715].¹ For the following reasons, the Court finds the motion to quash/for protective order and the motion to strike should be denied.

Plaintiffs filed this lawsuit October 23, 2006, seeking insurance benefits for losses sustained in *Hurricane Katrina* on August 29, 2005, and damages for bad faith denial of their claim. Until December 5, 2007, Plaintiffs' attorneys included Richard Scruggs and Zach Scruggs, as well as several other attorneys associated in what was then known as the "Scruggs

¹Plaintiffs filed [453] the motion to quash/for protective order on 9/11/2007, a memorandum [505] in support of [453] 9/18/2007, and a supplemental memorandum [513] in support on 9/20/2007. On 9/21/2007, State Farm filed [516] its initial response to Plaintiffs' [513] memorandum. State Farm filed its complete [559] response to [453] on 9/28/2007. Plaintiffs filed their rebuttal [609] on 10/8/2007. Renfroe filed its [707] joinder in [559] on 10/23/2007, which Plaintiffs moved to strike [715] on 10/24/2007. Renfroe responded [874] to the motion to strike on 11/15/2007, and Plaintiffs filed their rebuttal [875] on 11/16/2007. Plaintiffs filed notice of supplemental authority in support of [453] on December 4, 2007, attaching an order entered by the Magistrate Judge in the Northern District of Mississippi quashing deposition subpoenas served on Richard and Zach Scruggs and the Scruggs firm's financial officer Timothy Cantrell, by E.A. Renfroe & Company, Inc. in Renfroe's lawsuit against the Rigsbys pending in Alabama.

Katrina Group” (SKG) which was formed to pursue claims arising out of *Katrina*.² After Richard and Zachary Scruggs were indicted on federal charges, the Scruggs firm withdrew from this case, and SKG has been reformed into an entity which does not include the Scruggs firm.

Cori Rigsby (Moran) and Kerri Rigsby (the Rigsbys) were E.A. Renfroe employees assigned to work State Farm *Katrina* claims in Mississippi immediately after the hurricane. At least by February 2006, the Rigsbys began copying and/or taking State Farm documents and giving them to Richard Scruggs. While still employed by Renfroe/State Farm, the Rigsbys continued to secretly provide State Farm documents to Scruggs. This conduct continued until June 2006, culminating in what has become known as the “data dump” weekend in early June 2006 when the Rigsbys and some of their friends copied thousands of confidential State Farm documents which they also turned over to Scruggs. Shortly after the “data dump” weekend, the Rigsbys, who have been characterized by Plaintiffs’ counsel as key witnesses in the McIntosh case, were hired by the Scruggs Firm as “consultants” in *Katrina* litigation, at annual salaries of \$150,000.00 each. To further complicate matters, the Rigsbys are also plaintiffs in a *qui tam* action filed under seal by Scruggs on their behalf on April 26, 2006.³ That case remained sealed until August 1, 2007, when the Court ordered the seal lifted. Thus, the Rigsbys are not only material witnesses in this case, they are both employees and clients of the Scruggses. The multiple relationships involved have repeatedly resulted in situations where it became difficult to determine just whose interests the Scruggses were purportedly representing. For instance, the

²According to the docket, other attorneys representing Plaintiffs are Derek A. Wyatt, Mary E. McAlister and David Neil McCarty of David Nutt & Associates; Sidney A. Backstrom, Benjamin H. McGee, III, and Christopher T. Robertson of the Scruggs Law Firm; Dewitt M. Lovelace of the Lovelace Law Firm; Don Barrett and Marshall Smith, Jr. of Barrett Law Offices; and Michael C. Moore of Phelps Dunbar - Jackson.

³*Rigsby, et al. v. State Farm Insurance Company, et al.*, 1:06cv433-LTS-RHW.

Rigsby's were represented by Gregory Hawley and Katherine Brown at their April 30-May 1, 2007 depositions, but Richard Scruggs frequently objected and instructed them not to answer questions on grounds of work product and attorney-client privilege.⁴ Scruggs even went so far as to state he was "wearing two hats" – one as Rigsby's lawyer, and another as her employer during this deposition taken in the McIntosh case.

One of the key issues in this case is the existence of two engineering reports prepared about a week apart in October 2005. Richard Scruggs testified in proceedings in Alabama, that the October 12, 2005 engineering report on the McIntosh property was among the first twenty documents the Rigsbys gave Scruggs in February 2006. Scruggs also testified that there was a sticky note on the McIntosh engineering report he received from the Rigsbys.⁵ This original engineering report on the McIntosh property has become a critical point in this litigation, as it appears to be the linchpin of Plaintiffs' bad faith claims. Scruggs did not represent the McIntoshes when he received the engineering report. Indeed, he did not represent them until some time after the broadcast of an ABC television *20/20* program at the end of August, 2006. However, according to Mr. McIntosh's notes, Joe Rhee, an ABC news producer, contacted Mr. McIntosh on August 21, 2006, prior to the *20/20* broadcast, and stated he (Rhee) had a copy of the McIntosh property engineering report with the sticky note, that there were whistle-blowers (managers) within State Farm who had copied files, including the McIntoshes' file. In a later phone call the same day, Rhee told McIntosh there were two engineering reports on his property,

⁴See, *e.g.*, pages 65, 266, 299-300 of Kerri Rigsby's deposition.

⁵Pages 128, 138-140, transcript of March 19-20, 2007 contempt hearing in Case No. 2:06-CV-01752-WMA, E.A. Renfroe & Company, Inc. v. Cori Rigsby Moran and Kerri Rigsby, U.S. District Court, Northern District of Alabama, Southern Division.

one dated October 12, 2005 which had the sticky note, and another dated October 20, 2005.

When McIntosh asked if Rhee/ABC would stay on the story through completion, Rhee responded affirmatively, stating that they “had worked with Dickie Scruggs before and they respect each other and would stay with us till the end.” [559-3, pp. 5-6] From this, one might reasonably infer that Scruggs was the source of Rhee’s information regarding the McIntosh claim.

A copy of the October 12, 2005 engineering report was filed as Exhibit C to the McIntoshes’ complaint on October 23, 2007, the first page of the exhibit is copied with the sticky note in place, and the second page is a copy without the sticky note. Defendants understandably desire to question Richard and/or Zach Scruggs about the report, as well as other State Farm documents the Rigsbys provided, the circumstances surrounding the receipt of such documents and the chain of custody of the documents after the Scruggses received them. Defendants further desire to question Zach Scruggs regarding his receipt of confidential internal emails which the Rigsbys forwarded to him while they were still in the employ of Renfroe/State Farm. Defendants also want to explore the particulars of the employment relationship between the Scruggses and the Rigsbys, who are material witnesses in the McIntosh lawsuit. The Court is of the opinion that Defendants should be allowed to pursue this information from the Scruggses.

On October 23, 2007, Defendant Renfroe filed its joinder in State Farm’s response to Plaintiffs’ motion for protective order/to quash the Scruggs depositions. Renfroe points out that it was joined as a defendant in the lawsuit by amended complaint filed May 31, 2007, which alleges Renfroe failed to disclose the existence of the October 12, 2005 engineering report to Plaintiffs. Renfroe states the Rigsbys violated their employment agreement in failing to notify Renfroe about the report, instead choosing to give it to the Scruggses to further their own

pecuniary interests. Renfroe seeks to ascertain the extent to which the Scruggses helped conceal from Renfroe the “alleged concerns of the Rigsby sisters, as well as the object of their concerns, the October 12th report.” In light of the fact that Scruggs has testified he received the report in February 2006, and the Rigsbys’ testimony that they did not keep a copy of the document, the Court finds merit in Renfroe’s desire to question the Scruggses about the clearly relevant, unprivileged matter regarding the delivery and receipt of the October 12 report, as well as what was done with it after the Scruggses received it.

Plaintiffs moved to strike Renfroe’s joinder as untimely, which it was, and as being in the nature of a sur-reply since Plaintiffs had already filed their reply memorandum in support of their motion to quash. However, discovery was still ongoing at the time Renfroe joined in State Farm’s quest to depose the Scruggses. Renfroe could have noticed the Scruggses depositions itself, but instead filed the joinder in State Farm’s response to Plaintiffs’ motion. The joinder was the most efficient vehicle for getting Renfroe’s position before the Court, and avoided the duplication which would have ensued with separately filed notices of depositions and undoubtedly repetitive motions to quash. The Court therefore finds the motion to strike should be denied.

With respect to the documents requests which accompanied the deposition subpoenas, the Court notes that the Scruggses have produced no privilege logs, without which the Court cannot evaluate claims of privilege. And the Court declines to accept the Scruggses blanket claims of privilege as to the documents requested.

Although rarely allowed, depositions of a party’s counsel are not altogether prohibited. Where the attorney has non-privileged, relevant information unavailable by other means, such

depositions have been allowed. The Court is of the opinion that the Scruggses may have such information, and that this case presents sufficiently unusual circumstances to justify allowing the depositions of Richard and Zach Scruggs. It is therefore,

ORDERED that [453], the motion for protective order/to quash the notices of deposition of Richard and Zach Scruggs is denied. It is further,

ORDERED that [715], motion to strike joinder, is denied.

SO ORDERED, this the 12th day of December, 2007.

/s/ Robert H. Walker

ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE