

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

THOMAS C. and PAMELA McINTOSH,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY
COMPANY and FORENSIC ANALYSIS &
ENGINEERING CO., et al.,

Defendants.

CIVIL ACTION NO.: 1:06-CV-1080-LTS-RHW

**DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL
CORI AND KERRI RIGSBY TO ANSWER DEPOSITION QUESTIONS**

State Farm Fire and Casualty Company (“State Farm”) respectfully submits this memorandum in support of its motion to compel Cori and Kerri Rigsby to answer deposition questions regarding non-privileged factual matters. Despite this Court’s prior unambiguous rulings to the contrary, the Rigsbys still refuse to testify on key issues in this case. At the direction of their and plaintiffs’ counsel, the Rigsbys have yet again steadfastly refused to answer questions regarding their unauthorized use of State Farm computers and documents they admittedly stole from State Farm. In an ongoing effort to thwart State Farm’s right to obtain critical discovery in this matter, baseless assertions of privilege that have already been rejected by this Court are again being routinely interposed in response to entirely relevant and proper deposition questions. State Farm moves this Court for an order overruling these objections and again compelling the Rigsbys to provide State Farm this non-privileged discovery. The Rigsbys’ willful disregard of this Court’s discovery rulings must stop.

I. THIS COURT HAS ALREADY RULED THAT INFORMATION CONCERNING THE RIGSBYS’ UNAUTHORIZED USE OF STATE FARM COMPUTERS AND ADMITTEDLY STOLEN DOCUMENTS IS FULLY DISCOVERABLE

In connection with State Farm’s previous motion to, *inter alia*, overrule assertions of privilege and to compel Cori and Kerri Rigsby to fully testify as to non-privileged matters regarding this and other Katrina-related matters (Doc. 111), this Court overruled unfounded privilege objections and ordered that State Farm was entitled to reconvene the Rigsbys’ depositions. *See* October 1, 2007 Order at 7 (Doc. 563). The depositions of Cori and Kerri Rigsby were reconvened on November 19 and 20, 2007, respectively. Despite this Court’s clear ruling, the Rigsbys attempts to block State Farm’s right to conduct discovery continue unabated.

At their depositions, the Rigsbys admitted that on a number of occasions in early 2006, and in the presence of third parties, they met with members of what has since become formerly known as the SKG as well as other attorneys bringing claims against State Farm for the purpose of allowing them to access information regarding their clients’ claims directly from State Farm databases. The Rigsbys also

admitted under oath that the purpose of these meetings was to provide the SKG with State Farm confidential material for plaintiffs and their counsel in this and other Katrina-related lawsuits against State Farm. According to the Rigsbys, they brought their State Farm issued laptops to various meetings in order to provide plaintiffs' counsel with confidential documents, which the Rigsbys admittedly accessed from State Farm's proprietary computer system.

Throughout their depositions, however, the Rigsbys – at the behest of counsel – repeatedly refused to answer questions regarding their misuse of State Farm's computers and their funneling of confidential documents to the SKG at these meetings. The following testimony from Kerri Rigsby's deposition – which includes exchanges amongst Christine Lipsey and James Hibey (counsel for E.A. Renfroe), Sidney Backstrom (former plaintiffs' counsel),¹ William Taylor, III (Ms. Rigsby's counsel) and Ms. Rigsby – is but one example of the many instances in which the Rigsbys continue to stonewall State Farm's right to obtain discovery on these issues. Indeed, groundless assertions of privilege were so frequent that it was impossible for State Farm to depose the Rigsbys in a meaningful manner with respect to this information.

Ms. Lipsey:

Q. The meeting that occurred -- the first March or April 2006 meeting at Cori's house.

A. The second meeting at Cori's house?

Q. Yes.

A. The second --

Q. Yeah, okay.

A. The first one in March or April?

¹ Mr. Backstrom – who has since been indicted on federal charges and withdrawn from this action – officially appeared on behalf of the McIntoshs. However, Kerri Rigsby testified that Mr. Backstrom represented her at the deposition as well. *See* K. Rigsby Tr. at 473:7-11.

Q. In February, yeah.

* * *

Q. Okay. And were there documents present at that meeting?

A. Yes. I believe there were.

Q. What about a computer?

A. I think there was a computer present. I know there was a computer present at our first meeting.

Q. And by "the first meeting," you mean the February 2006 meeting?

A. February. And I believe there was a computer present at our second meeting, as well.

Q. That occurred at Cori's house?

A. Yes.

Q. Let's go back to the February 2006 meeting. . . .

* * *

Q. Okay. And whose computer was there?

A. It could have been mine or Cori's. It wasn't uncommon for us to bring our computer home.

Q. Okay. And was the computer accessed during the course of the meetings?

Mr. Backstrom:

Let me object and instruct not to answer as to any materials reviewed during that meeting.

Ms. Lipsey:

I don't believe that's what I'm asking for.

Q. I'm just asking if a computer was accessed during that meeting?

A. Was accessed?

Q. Yeah. Did somebody get on the computer in the course of the meeting?

A. Yes.

Q. And who was that?

A. I know Cori did, and I believe I did as well.

Q. Okay. And was State Farm information accessed at that meeting?

Mr. Backstrom:

I'm going to object and instruct not to answer.

Ms. Lipsey:

Q. The computers that were at the meeting, I think you said it may have been either perhaps both your computer and Cori's computer. Both of these computers are laptops, right?

A. Yes.

Q. And both of these were State Farm computers, right?

A. Yes.

Ms. Lipsey:

And, Counsel, Ms. Rigsby is being instructed not to answer questions concerning the State Farm laptops?

Mr. Backstrom:

As to what information was reviewed, that's right.

Ms. Lipsey:

I'm not asking – well, I'm asking if State Farm information was accessed.

Mr. Backstrom:

Yeah.

Ms. Lipsey:

And the instruction is not to answer?

Mr. Backstrom:

Right.

Ms. Lipsey:

And that's attorney-client privilege?

Mr. Backstrom:

Uh-huh, and work product.

Ms. Lipsey:

Were there --

Mr. Hibey:

Excuse me. I just want to understand, even the general question as to the category, as opposed to the specific documents, you're instructing her not to answer?

Mr. Backstrom:

That's right.

Mr. Hibey:

Are you her lawyer, or are you instructing her, Mr. Taylor.

Mr. Taylor:

We're complying with Mr. Backstrom's --

Mr. Hibey:

-- request.

Mr. Taylor:

-- wise counsel, wise counsel. It is his law firm's work product at issue. So he has a perfect right to instruct overall for his work product, and I think he's right. The subject matter of the meeting, what happened at the meeting is all bound up in the attorney-client relationship. And what they did to prepare for litigation or other kinds of things seem to be classic work product. We could argue about it, but that's our position.

K. Rigsby Tr. at 626:6-630:15 (emphasis added).

Likewise, Cori Rigsby's deposition was also plagued by repeated and equally unfounded assertions of privilege. The following testimony is demonstrative.

Mr. Robie:²

Q. [Dickie Scruggs] called you?

A. I don't know if he called me or if he called my mother, but he set up the meeting.

Q. All right. You brought your laptop?

A. Yes, I did.

Q. Did he ask you to do that?

² James Robie is counsel for State Farm.

A. I don't think so.

Q. Did Kerri bring her laptop as well?

A. No.

Q. Did you have a Wi-Fi card?

A. A Wi-Fi card?

Q. Yeah, to get into the State Farm system.

A. Oh, the dial-up card?

Q. Right.

A. Yes.

Q. Okay. And did you furnish any documents at that meeting?

A. I don't believe I furnished any documents at that meeting, no.

Q. Why did you log into your computer at that meeting?

A. Tony wanted --

Mr. Backstrom:

Let me object to the extent that calls for a mental impression of counsel and instruct you not to answer.

Mr. Robie:

Did he tell you why you should log into the computer?

Mr. Backstrom:

Same objection, same instruction.

Mr. Robie:

Did you have an understanding what it is you were trying to accomplish by logging into that computer with this crowd?

Mr. Backstrom:

Same objection, same instruction.

Mr. Robie:

Once you logged in -- I assume you're following your counsel's instruction?

A. Yes.

Q. Once you logged into the computer, what records did you access?

Mr. Backstrom:
Same objection, same instruction.

Mr. Robie:
Q. *You'll decline to answer?*

A. Yes.

Q. Did you give them sort of a tour of what was available on the State Farm system?

Mr. Backstrom:
Same objection, same instruction.

Mr. Robie:
What is the basis for the objection? I just want to make sure the record's clear.

Mr. Backstrom:
Mental impression of counsel, work product.

Mr. Robie:
It's a work product privilege?

Mr. Backstrom:
Work product, attorney-client privilege.

Mr. Robie:
And that's true for all of this line of questioning about the computer in Dick's trailer?

Mr. Backstrom:
For all those I made it for.

C. Rigsby Tr. at 396:1-398:17 (emphasis added). State Farm requests that these and similarly improper work product and attorney-client privilege objections be overruled.³

³ See also K. Rigsby Tr. at 460:15-461:9; 462:21-464:13; 465:8-469:19; 471:15-473:4; 474:12-19; 614:10-615:5; C. Rigsby Tr. at 398:18-403:7. Cori and Kerri Rigsbys' deposition transcripts are attached hereto as Exhibits A and B respectively.

Although not clearly articulated, it appears that the Rigsbys and their counsel are attempting to act as if this Court's October 1, 2007 Order simply never happened. It is entirely improper to now resurrect previously rejected claims of privilege with respect to information concerning their unauthorized use of State Farm computers and documents. After "caution[ing]" that the Rigsbys' "claims of privilege will be subjected to close scrutiny," this Court's October 1 Order makes crystal clear that State Farm is entitled to full discovery regarding this precise information.

This Court expressly holds that SKG's taking on representation of the Rigsbys, hiring them as "litigation consultants," and filing a *qui tam* lawsuit on their behalf should not, and will not, be allowed to transform everything they learned and the things they physically took from their employer into privileged information available only to SKG as their attorney and/or present employer. In defending itself in the present action, State Farm may fully explore the Rigsbys' knowledge of the McIntosh case and pertinent documents gained through their employment relationship with Renfroe/State Farm. . . .

October 1 Order at 3. This Court further held that "State Farm is entitled to know the basis for the Rigsbys' charges of wrongdoing." *Id.* at 5. (emphasis added). It is difficult to fathom how this Court could have been any clearer.⁴

Similarly, by Order dated December 11, 2007 (Doc. 911), this Court squarely denied plaintiffs' motion for a protective order / motion to quash the noticed depositions of Richard and Zach Scruggs in part because State Farm is entitled to question the Scruggses about documents misappropriated from State Farm by the Rigsbys and provided to the SKG.

Defendants understandably desire to question [the deponents] about . . . 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. . . . The Court is of the opinion that Defendants should be allowed to pursue this information"

⁴ Subsequent to the October 1 Order, this Court ordered the Rigsbys to produce numerous documents that they stole from State Farm. *See* December 14, 2007 Order (Doc. 919). Without exception, this Court rejected the Rigsbys' claims of privilege.

Id. at 4.

Rather than address once again what are no more than recycled and unfounded arguments of privilege – which this Court has already considered and ruled on – State Farm respectfully incorporates its prior briefing with the same force and legal effect as if set forth at length herein (*see* Docs. 111, 112, 452, 559, 703, 783, 898). Here, at bottom, the Rigsbys are attempting to convert non-privileged information into privileged matter ostensibly because it was given to a lawyer – an approach that courts have rejected for decades.

II. EVEN IF A PRIVILEGE EXISTED, IT WAS WAIVED BY THE PRESENCE OF THIRD PERSONS AT THE RIGSBYS' MEETINGS WITH THE SKG

The Rigsbys freely admit that third persons with no interest in *this* matter attended some, if not all, of the Rigsbys' meetings with the SKG in early 2006. For example, Kerri Rigsby testified that her mother – Pat Labrano – attended one of the SKG meetings in February 2006, one in March 2006, another in April 2006, and still others in early 2006 the timing of which Ms. Rigsby could not precisely recall. *See* K. Rigsby Tr. at 613:6-614:8; 615:17-23; 624:6-625:2. When asked why the presence of a third party did not effect a waiver of the purported privilege now asserted by the Rigsbys, Mr. Backstrom asserted that the privilege somehow survives because Ms. Labrano “was a client” of the SKG. *Id.* at 615:25-616:9. When asked, however, Mr. Backstrom refused to identify even in general terms the nature of the SKG's representation of Ms. Labrano. *Id.* at 616:11-17.

Even more perplexingly, Mr. Taylor speculated that Ms. Labrano's presence at numerous SKG meetings with her daughters did not waive the purported privilege because “she was also playing the role of representative or facilitator [for Cori and Kerri] which,” in Mr. Taylor's view, “would bring her within the privilege.” *Id.* at 616:18-617:10. There is no such thing as a so-called “representative” or “facilitator” privilege that would prevent waiver of the privilege that the Rigsbys attempt to assert here. But even if there were, Ms. Labrano was not the only third person present at the SKG meetings. Indeed,

Kerri Rigsby testified that Ms. Labrano's husband – Bill Labrano – also accompanied the sisters at SKG meetings. *Id.* at 633:3-17.

It is axiomatic that the sharing of otherwise privileged information with third persons waives any privilege that could attach. Indeed, “the disclosure of an otherwise privileged communication to a third person . . . eliminates the intent for confidentiality on which the privilege rests.” *Martin v. Am. Employers’ Ins. Co.*, 115 F.R.D. 532, 536 (S.D. Miss. 1987) (finding waiver of the attorney-client privilege) (citations omitted). Whether or not the SKG may have represented the Labranos in some other matter does not bring them within the fold of the attorney-client or work product privileges here. It is equally plain that even if both Ms. Labrano and her husband were acting in some sort of inexplicable representative capacity on the Rigsbys’ behalf at the SKG meetings that the privilege would still be waived. Accordingly, even if the information that the Rigsbys most recently seek to withhold was privileged (and it clearly is not), the presence of third parties at the SKG meetings in question would constitute a clear waiver of any claim of privilege.

III. EVEN IF A PRIVILEGE EXISTED, IT WAS VITIATED BY THE CRIME FRAUD EXCEPTION

As State Farm has previously demonstrated at length in prior papers submitted to this Court, *see, e.g.*, Doc. 559 at 15-25; Doc. 898 at 4-8, any privilege that might otherwise have applied to these activities (and this Court has already ruled that none did) is vitiated by virtue of the crime-fraud exception. Indeed, the very activities that are the subject of this line of questioning violate, on multiple levels, the federal Computer Fraud and Abuse Act, 18 U.S.C. sec. 1030, et seq. *See, e.g., Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1123-24, 1126-27 (W.D. Wash. 2000). Consequently, counsel’s directions not to answer these questions must, once again, be overruled, and the Rigsbys must provide the information that they possess about their misappropriation of State Farm’s documents and information, as this Court has previously ordered them to do.

IV. STATE FARM IS ENTITLED TO RECOVER ITS ATTORNEYS FEES AND COSTS IN CONNECTION WITH THIS MOTION AND NECESSITATED BY RECONVENING THE RIGSBYS' DEPOSITIONS

Federal Rule 37 provides that if State Farm's motion to compel "is granted . . . the court *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorneys fees." Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). The Supreme Court has admonished that "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763 (1980) (citation omitted) (alteration in original). In that the issues raised in this motion have already been addressed and ruled on by this Court on two separate occasions, an award of attorneys fees and costs is particularly warranted in this instance.

CONCLUSION

For the foregoing reasons, State Farm respectfully requests that this Court: (i) overrule the objections interposed by the Rigsbys' and plaintiffs' counsel at the Rigsbys' November 19 and 20, 2007 depositions and order them to fully respond to questions concerning their misuse of State Farm laptops and documents that they stole from State Farm and funneled to the former SKG; (ii) grant State Farm an additional hour to reconvene the deposition of Cori Rigsby and an additional hour to reconvene the deposition of Kerri Rigsby in order to get full and complete answers on these issues; and (iii) award State Farm its attorneys fees and costs in connection with this motion and necessitated by reconvening the Rigsbys' depositions. In addition, State Farm reserves its right to reconvene the Rigsbys' depositions with respect to documents that they have yet to produce.

Dated: December 21, 2007

Respectfully submitted,

/s/ John A. Banahan

John A. Banahan (MSB #1731)
H. Benjamin Mullen (MSB #9077)
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN
4105 Hospital Road, Suite 102-B
Pascagoula, Mississippi 39567
(228) 762-6631

Dan W. Webb (MSB #7051)
Rochelle R. Morgan (MSB #100621)
WEBB, SANDERS & WILLIAMS, PLLC
363 N. Broadway Street
Tupelo, Mississippi 38802-0496
(662) 844-2137
*Attorneys for State Farm Fire and
Casualty Company*

CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing with the Clerk of Court using the ECF system which sent notification of such filing to the following to:

Larry Canada, Esquire
Katherine Breard, Esquire
GALLOWAY, JOHNSON, et al.
701 Poydras Street, Suite 4040
New Orleans, LA 70139

David A. Norris, Esquire
H. Hunter Twiford, III., Esq.
Christine Lipsey, Esquire
MCGLINCHEY, STAFFORD
P.O. Drawer 22949
Jackson, MS 39225

Marshall H. Smith, Jr.
BARRETT LAW OFFICES
P.O. Box 987
Lexington, MS 39095

Dewitt M. Lovelace, Esquire
LOVELACE LAW FIRM, P.A.
36474 Emerald Coast Parkway, Suite 4202
Destin, FL 32541

Derek A. Wyatt, Esquire
NUTT & MCALISTER, PLLC
605 Crescent Blvd., Suite 200
Ridgeland, MS 39157

Michael C. Moore
PHELPS DUNBAR
P.O. Box 23066
Jackson, MS 39225

George Shaddock, Esquire
707 Watts Avenue
Pascagoula, MS 39567

Michael R. Smith, Esq.
William W. Taylor, III., Esq.
ZUCKERMAN, SPAEDER

DATED, this the 21st day of December, 2007.

/s/ John A. Banahan
JOHN A. BANAHAN

H. BENJAMIN MULLEN (9077)
JOHN A. BANAHAN (1731)
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
Post Office Drawer 1529
Pascagoula, MS 39568-1529
Tel.: (228)762-6631
Fax: (228)769-6392