

**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 CO.,
et al.,

Defendants.

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

**MEMORANDUM OF LAW SUPPORTING CORI RIGSBY AND KERRI RIGSBY'S
MOTION FOR LEAVE TO INTERVENE TO PROTECT PRIVILEGES**

This case is brought by State Farm policyholders against State Farm and other defendants for mishandling a property claim made after Hurricane Katrina. The Rigsbys were claims adjustors who brought the mishandling to light by providing their attorney, Richard Scruggs, with information and documents. *See* Exhibit A (transcripts showing Scruggs was the Rigsbys' lawyer when they provided documents to him and sought advice concerning them). On behalf of the Rigsbys, Mr. Scruggs provided the information and documents to state and federal law enforcement authorities, filed in this Court a *qui tam* action against State Farm and others on behalf of the United States (No. 1:06cv433), which was also a victim of the claims mishandling, and later contacted the press, which notified the public about claims mishandling and led the plaintiffs in this case to file suit.

The Rigsbys are witnesses in this case. As the docket sheet reflects, the Rigsbys have been deposed for hours, and more depositions are in the offing. State Farm has sought and obtained their bank records and the tax and other records held by their accountant. The Rigsbys have produced to State Farm the documents they provided to Mr. Scruggs. State Farm has produced computer records showing that it can trace to the microsecond just exactly when the Rigsbys accessed State Farm documents, and what they accessed. So far as we are aware, there never has been any dispute in this case regarding the authenticity of any of those documents, including the well-known sticky note.

Another of the defendants in this case, E.A. Renfroe & Co., Inc., previously sought in other litigation to depose the Rigsbys' attorneys, including the Scruggs, regarding their interaction with the Rigsbys and the documents obtained from them. On December 3, 2007, the United States District Court for the Northern District of Mississippi quashed subpoenas to those attorneys for deposition testimony and documents. (No. 3:07-mc-00036). In this case, however, on December 11, 2007, Magistrate Judge Walker denied a motion to quash similar subpoenas to Richard and Zach Scruggs. The Rigsbys seek to intervene to obtain review of that December 11th ruling because it erroneously disregards attorney-client and work product privileges.

Judge Walker appears to have intended to confine the attorney depositions to non-privileged material. Judge Walker explained his ruling as follows:

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 his case presents sufficiently unusual circumstances to justify allowing the depositions of Richard and Zach Scruggs.

Order, at 5-6 (emphasis added); *see id.*, at 5 (State Farm may question attorneys about "relevant, unprivileged matter"). Nowhere in the order did Judge Walker suggest that he found the absence

of privilege or that he intended to disregard privileges. Consistent with the restriction of discovery to non-privileged information, Judge Walker indicated that State Farm could question the Rigsbys' lawyers about such matters as chain of custody of documents and the employment relationship between the Rigsbys and the attorneys. Order, at 4.

Notwithstanding restriction of discovery to non-privileged information, however, Judge Walker identified areas of permissible testimony that would breach attorney-client and work product privileges, apparently concluding erroneously that these areas did not involve privileged material. These areas include, for example, testimony about the Rigsbys' delivery of a particular engineering report to Richard Scruggs and what he did with it thereafter, including apparently exploration of which law enforcement agencies received the report from Mr. Scruggs. Order, at 5. As another example, Judge Walker indicated that State Farm could question Zach Scruggs concerning his receipt of certain State Farm documents from the Rigsbys. Order, at 4.

While these rulings do not permit examination into explicit communication between the Rigsbys and their attorneys, they do permit inquiry into implicit communication, and into work undertaken in anticipation of litigation. These implicit communications involve the Rigsbys communications regarding what they believe is evidence of claims mishandling, including their selection and organization of it, as well as communications concerning the subject matter as to which they sought legal advice. It is one thing to ask the plaintiffs in this case to produce documents that originated from State Farm and that they or their attorneys hold, which could identify possibly relevant evidence. It is quite different to ask witnesses like the Rigsbys or their attorneys to describe, even implicitly, how they went about preparing for litigation, to identify which documents they used as the framework and subject matter of attorney-client

communications, and when and where the communications occurred. Such inquiry involves more than just nibbling around the edges of the privilege.

Judge Walker also denied the motion for a protective order as to a notice of deposition that included document requests, ruling that he could not grant a protective order without first receiving a privilege log. State Farm has asserted that denial of the protective order means that documents must be produced. Exhibit B hereto. Those requests include material that, based on the face of the requests, obviously is privileged. For example, Request No. 1 seeks production of “any and all documents constituting or referring to communications in any form between” the Rigsbys and Richard Scruggs, Zach Scruggs or any lawyer in their form or associated with them. This is not different from a request for all privileged documents.

In these circumstances, the Rigsbys, the holders of the privileges that are in issue, should be able to intervene to assert and protect them.

Rule 24(a) permits intervention of right where the putative intervenor claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, which is not adequately represented by others. Here, the Rigsbys’ interest is in the privilege issues that are before the Court. A ruling that permits a violation of those privileges impairs that interest. Privilege issues ultimately are those on which attorneys cannot adequately represent clients because appellate review by an attorney of adverse rulings regarding privileges generally may not be had absent a willingness to be held in contempt. A non-party holder of the privileges is entitled to appeal immediately. *See Conkling v. Turner*, 883 F.2d 431, 433-34 (5th Cir. 1989). For these reasons, it is well-established that the holder of a privilege may intervene to protect it and is not required to depend on others, including his attorney, to protect it. *In re*

Grand Jury Subpoena, (Newparent, Inc.), 274 F.3d 563, 570 (1st Cir. 2001) (“Colorable claims of [a]ttorney-[c]lient and [w]ork [p]roduct [p]rivilege qualify as sufficient interests to ground intervention of right” under Rule 24(a.); *In re Grand Jury Matter (ABC Corp.)*, 735 F.2d 1330, 1331 (11th Cir. 1984) (same).

The Supreme Court has stated that intervention aims to protect interests which are "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." To be protected by means of intervention, the interest must be "a legal interest as distinguished from interests of a general and indefinite character" Privileges such as the work product privilege satisfy this definition of legal interest and can be directly lost through the operation of a discovery order. Without the right to intervene in discovery proceedings, a third party with a claim of privilege in otherwise discoverable materials could suffer "the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard."

United States v. AT&T, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (citation omitted); *see Church of Scientology v. United States*, 506 U.S. 9, 11 (1992) (noting intervention by privilege holder to protect privilege).¹

Accordingly, the Rigsbys motion to intervene should be granted.

Respectfully submitted,

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¹The Rigsbys also are entitled to intervene permissively under Rule 24(b). As to the privilege issues to be addressed on intervention, the questions of law and fact raised by the Rigsbys would share a commonality with those otherwise before the Court, and the Rigsbys' intervention to assure full and fair litigation of privilege issues would prejudice no party.

and

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CERTIFICATE OF SERVICE

I certify that on December 27, 2007, I caused to be served via ECF a copy of the foregoing Memorandum of Law Supporting Cori Rigsby and Kerri Rigsby's Motion for Leave to Intervene to Protect Privileges on counsel of record as follows:

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