

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

THOMAS C. and PAMELA McINTOSH

PLAINTIFFS

vs.

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

**STATE FARM FIRE & CASUALTY COMPANY,
FORENSIC ANALYSIS & ENGINEERING CORPORATION,
and E.A. RENFROE & COMPANY, INC.**

DEFENDANTS

**NOTICE OF MOTION AND MOTION OF NON-PARTIES RICHARD F.
SCRUGGS AND ZACHARY SCRUGGS TO INTERVENE FOR THE
LIMITED PURPOSE OF OBJECTING TO MAGISTRATE'S ORDER
AND MOVING FOR STAY OF MAGISTRATE'S ORDER**

I. INTRODUCTION

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Richard and Zachary Scruggs move the Court to allow them to intervene in the captioned cause for the limited purpose of objecting to United States Magistrate Judge Robert H. Walker's December 11, 2007 order permitting defendants State Farm and Renfroe to depose the Scruggses, and to move that Magistrate Walker stay his order pending resolution of the objections thereto.

II. BACKGROUND

The Scruggses represented the plaintiffs in this action from August 2006 until December 5, 2007. They have represented sisters Cori and Kerri Rigsby since early 2006, when they sought Richard Scruggs out for legal advice about documents and information they had uncovered indicating massive and widespread fraud on the part of State Farm and Renfroe. The Scruggses filed a *qui tam* complaint against State Farm and Renfroe on behalf of the Rigsbys as relators in the Southern District of Mississippi in April 2006.¹ Until this December, The Scruggses also represented numerous other plaintiffs suing State Farm and Renfroe in multiple

¹ *U.S. ex rel. Rigsby v. State Farm, et al.*, S.D. Miss. Case No. 1:06cv433-LTS-RHW.

active cases arising from their fraudulent activity in the denial of Katrina damage claims. In connection with that litigation, the Scruggses also hired the Rigsbys as litigation consultants. Doc. 911, ¶ 2.

In a separate action, Renfroe brought suit against the Rigsbys before Judge William M. Acker in the Northern District of Alabama for allegedly violating a confidentiality agreement and misappropriating trade secrets.² While the Scruggses do not represent the Rigsbys in that action, Renfroe has sought compensatory sanctions for civil contempt against both the Rigsbys and the Scruggses for purportedly violating a preliminary injunction in that case, and Judge Acker has referred criminal contempt charges against Richard Scruggs and the Scruggs Law Firm to private prosecutors.

In this action, on August 28, 2007, State Farm noticed the Scruggses for video depositions, with accompanying document requests. The Scruggses, third parties, were subsequently served with deposition subpoenas but were never served with document subpoenas. The McIntoshes, then represented by the Scruggs Katrina Group, filed a motion to quash and motion for a protective order. Doc. 453. While awaiting a ruling on the motion to quash and motion for a protective order, Scruggs withdrew as counsel for the McIntoshes on December 5, 2007.

On December 12, Magistrate Judge Walker denied the motion to quash and motion for a protective order, stating that “the Court finds merit in Renfroe’s desire to question the Scruggses about the clearly relevant, unprivileged matter[s].” Doc. 911 at 5. Although Magistrate Judge Walker acknowledged the potential privilege issues implicated by the discovery demanded by State Farm, he determined, without explanation, that “this case presents sufficiently unusual circumstances to justify allowing the depositions of Richard and Zach Scruggs.” Id. at 6.

Six days later, on December 18, State Farm re-served deposition notices and document requests on the Scruggses, but still did not serve a document subpoena. State Farm’s discovery seeks a burdensome production of privileged information including: communications between the Scruggses and the Rigsbys; communications between the Scruggses and the parties to other

related actions against State Farm, including the Mississippi Attorney General and the U.S. Attorney's Office; access to any personal or business hard drives "which may contain any of the documents or communications responsive" to these requests; the Rigsbys' employment records; communications between counsel for the Scruggses and other counsel for the Rigsbys; notes of the Scruggses and their staff "prepared after reviewing the documents taken from State Farm by the Rigsby sisters"; communications between the Scruggses, other attorneys for the Rigsbys, and Mike Moore; notes in any form referring to the information taken from State Farm by the Rigsbys.

On December 21, 2007, plaintiffs filed objections to Magistrate Walker's December 11, 2007 order. The Scruggses understand that the Rigsbys will be filing objections to the order today. Filed herewith are the Scruggses' objections to the order and a motion to stay the order pending the resolution of the three sets of pending objections.

III. ARGUMENT

The Scruggses are entitled to intervene in this matter to preserve their attorney work product privilege and the numerous privileges held by their clients, the Rigsbys, privileges that would be eviscerated if the noticed deposition were allowed to proceed. Federal Rule of Civil Procedure 24(a) requires that "the court *must* permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). The Court is obligated to allow the Scruggses' intervention, so long as four factors are present: 1) the application for intervention is timely; 2) the applicant has a sufficient interest under Rule 24; 3) the disposition of the action may, as a practical matter, impair his ability to protect that interest; and 4) the applicant's interest is not adequately represented by the existing parties to the suit. *Ford v. City of Huntsville*, 242 F.3d 235, 239 (5th Cir. 2001). Because the Scruggses can establish each of these factors, the Court must permit their intervention.

² *Renfroe v. Moran*, N.D. Ala. Case No. 2:06-cv-1752-WMA.

A. The Scruggses' Application for Intervention Is Timely

In evaluating the timeliness of an intervenor's motion, the Court is instructed to consider four factors:

(1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known if its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994). The Scruggses' application is timely because these four factors all tilt strongly in favor of the Scruggses.

First, the Scruggses acted within ten business days of the key event—Magistrate Judge Walker's order—that made clear that they needed to intervene to protect their interests. Furthermore, it was only on December 5th that the Scruggses withdraw as counsel in this case.

Second, to the extent that the Scruggses delayed their intervention at all, State Farm has not been prejudiced by any minimal delay. “[T]he relevant prejudice is that created by the intervenor's delay in seeking to intervene . . . not prejudice to existing parties if intervention is allowed.” *Ford*, 242 F.3d at 240. Here, the Scruggses have moved to intervene quickly so there can be no prejudice to State Farm.

Third, the prejudice to the Scruggses if they are not allowed to intervene is serious. The Scruggses would be put to the Hobson's choice of being forced to violate the attorney work product, attorney-client and joint prosecution privileges, or risk contempt. Given the absolute privilege granted to attorney-client communications and attorney work product, *see Upjohn Co. v. United States*, 449 U.S. 383, 389-95 (1981), the potential prejudice to the Scruggses far outweighs any prejudice from delay to State Farm.

Fourth, unusual circumstances are present here. Richard Scruggs and the Scruggs Law Firm face criminal contempt charges arising out of the very facts about which State Farm and Renfroe seek to depose the Scruggses. *See Docs. 707, 874*. The risk that the depositions of the Scruggses will be used to further the contempt case against the Scruggses or Renfroe's separate

case against the Rigsbys highlights the importance of having the Scruggses heard by this Court. In light of these extraordinary circumstances, the Scruggses' motion is timely. *See Ford*, 242 F.3d at 239-40 (holding twenty-three delay timely where intervenors sought to litigate only a limited issue and the risk of prejudice to intervenors was great); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) (intervention motion filed within one month of awareness of interest was timely).

B. The Scruggses Have a Sufficient Interest in the Action to Warrant Intervention

The Scruggses may intervene for the purpose of protecting their own work product and the attorney-client privilege that exists between themselves and the Rigsbys. The applicant for intervention must claim an "interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a). "In the context of intervention, the Fifth Circuit has warned against defining 'property or transaction' too narrowly." *Ford*, 242 F.3d at 240 (citing *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992)). Therefore, it is well-established that "[c]olorable claims of attorney-client and attorney work product privilege qualify as sufficient interests to ground intervention as of right" under Rule 24(a). *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001); *see also U.S. v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003) (same); *United States v. AT&T Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (same).

There can be no doubt that State Farm's and Renfroe's depositions of the Scruggses threaten colorable claims of privilege. As detailed in the Scruggses' Objections to Magistrate's Order filed herewith, this Motion to Intervene seeks to protect four distinct privileges: the Scruggses' attorney work product privilege (the attorney-client privilege between the Scruggses and the Rigsbys), the joint prosecution privilege between the Scruggses, the Rigsbys, and the United States government, and the common-interest privilege between the Scruggses and other attorneys prosecuting actions against State Farm and Renfroe for civil and criminal wrongdoing.

Moreover, the Scruggses also have an "interest relating to the property or transaction which is the subject of [this] action," Fed. R. Civ. P. 24(a), due to the burdens that Magistrate Walker's order will impose uniquely on the Scruggses. As discussed in detail in the Scruggses' objections, the topics on which Magistrate Walker has ordered the Scruggses to testify bear

directly on the criminal contempt case currently pending against Richard Scruggs and the Scruggs Law Firm in the Northern District of Alabama. Moreover, Magistrate Walker's order permits Renfroe, which initiated the contempt proceedings in Alabama, to question the Scruggses on the very issues at the heart of the contempt case. Thus, the outcome of this proceeding will profoundly affect the Scruggses' defense of the criminal case.

Finally, while the December 11, 2007 order does not explicitly require the production of any documents, the procedurally improper document requests served by State Farm would impose an undue burden on the Scruggses and would require the production of plainly privileged material.

C. The Scruggses Will Be Impaired If Intervention Is Not Granted.

The Scruggses' interest in protecting their clients' privileged communications, their own privileged work product, and their ability to defend themselves in the contempt proceeding will be impeded if they cannot intervene and the depositions are allowed to proceed according to State Farm and Renfroe's plans. Unable to protect their interests before this Court, the Scruggses would be subject to unduly burdensome discovery aimed squarely at piercing the attorney-client relationship and the work product privilege as well as advancing State Farm and Renfroe's interests in an entirely separate case in Alabama. This is precisely why courts, including the Fifth Circuit, have universally allowed intervention where privileges would be implicated: "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.'" *AT&T*, 642 F.2d at 1292 (quoting *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 145 (1967) (Stewart, J., dissenting)).

D. The Scruggses' Interests Will Not be Adequately Represented by the McIntoshes

The Scruggses' multiple interests in this proceeding will not sufficiently be protected by the Plaintiffs here. First, the scope of the Rigsbys' attorney-client communications and the work product generated by the Rigsbys extend beyond this case. As Magistrate Walker acknowledged, the Scruggses have represented, and worked with, the Rigsbys on issues

extending far beyond the scope of this case, including the *qui tam* action the Scruggs Law Firm filed on behalf of the Rigsbys against State Farm and Renfroe. Doc. 911, at 2, 3. Magistrate Walker also correctly pointed out that, while the Scruggses did not represent the McIntoshes until August 2006, Richard Scruggs represented the Rigsbys at least as early as April 2006. Thus, the McIntoshes cannot be expected to protect fully the Scruggses interests in privileged communications with the Rigsbys.

Similarly, the Scruggses' interest in their defense of the criminal contempt case pending against Richard Scruggs and the Scruggs Law Firm in Alabama will not be adequately protected by the McIntoshes. The criminal contempt action arises out of the Scruggses' relationship with the Rigsbys and Richard Scruggs's compliance with a request by the Mississippi Attorney General for a copy of State Farm documents obtained from the Rigsbys. Magistrate Walker's order threatens Richard Scruggs and the Scruggs Law Firm's interest in defending themselves against the contempt charges because the topics on which Magistrate Walker has appeared to permit the Scruggses to be deposed are directly related to the subject matter of the contempt case. The McIntoshes, who are neither a party to, nor involved in, the contempt matter, cannot be expected to advance the Scruggses' position on this point.

Finally, State Farm contends that Magistrate Walker's order requires the Scruggses to comply with a truly onerous and unduly burdensome set of document requests, which encompass topics far broader than this case or the Scruggses' representation of the McIntoshes. State Farm seek, among other documents, communications and documents transferred between the Rigsbys and 21 different individuals and entities and access to the computer hard drives on which such documents are stored. These document requests are insufficient to require production by the Scruggses, who are not parties to this action. However, should the Scruggses be ordered to comply with these requests—or even ordered to produce a privilege log—the burden of complying with State Farm's requests would fall solely on the Scruggses, not on the McIntoshes or their current counsel. As such, the McIntoshes cannot represent the Scruggses' interest in obtaining relief from these unduly improper and burdensome requests.

IV. CONCLUSION

For the foregoing reasons, the Scruggses' Motion to Intervene should be granted to allow them the limited relief of asserting objections to Magistrate Judge Walker's December 11, 2007 order and filing the motion for a stay of that order.

Dated: December 27, 2007

/s/ John W. Keker

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CERTIFICATE OF SERVICE

I hereby certify that on ___th day of December, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following counsel of record:

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