

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

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**THOMAS C. and PAMELA  
McINTOSH,**

**Plaintiffs,**

**v.**

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

**Defendants.**

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**CIVIL ACTION NO.**

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**1:06-CV-1080-LTS-RHW**

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**EMERGENCY MOTION FOR MODIFICATION  
OF JUNE 17, 2008 ORDER [1208] REGARDING CD FROM CORI  
RIGSBY'S COMPUTER, MOTION TO STAY PRODUCTION OF CD, AND  
MOTION FOR PROTECTIVE ORDER REGARDING DOCUMENTS  
WHICH MAY BE SUBJECT TO JUDGE ACKER'S ORDER**

(Expedited Hearing and Decision Requested)

Non-party Cori Rigsby, (“Ms. Rigsby”) by counsel, requests that the Court modify, in one respect, its June 17, 2008 Order [1208] regarding the CD from her computer which was received by Ms. Rigsby’s counsel from the Court on or about May 28, 2008. Ms. Rigsby further requests that the Court stay production of the

CD to State Farm until the Court rules on this Motion so that the issues raised herein are not mooted by the speedy production of the CD to State Farm. Last, Ms. Rigsby moves the Court for a protective order regarding documents Bate-stamped CR129-204 which may be subject to Judge Acker's Order of December 8, 2006.

A. *The Court Should Modify its June 17, 2008 Order [1208] to Allow Ms. Rigsby's Counsel to Produce Only Documents Responsive to State Farm's Subpoena from the CD.*

The Court's June 17, 2008 Order instructs the forensic expert, Jeff Parmat, to delete certain privileged documents submitted by Ms. Rigsby's counsel to the Court along with a privilege log, but holds that "all documents, including CR 129-204, shall be produced." The requested modification is to allow Ms. Rigsby's counsel to provide State Farm with only relevant non-privileged documents from the CD which are responsive to its subpoena.

This was the format used in the production of documents related to the earlier information retrieved from her computer hard drive by Seagate which was produced by Ms. Rigsby's counsel to State Farm on or about April 16, 2008. Further, the modified process requested by Ms. Rigsby herein is consistent with the Court's Order of October 25, 2007 as modified by the Court's November 19, 2007 Order.

As background, the Court issued a text order on October 25, 2007 requiring an expert to retrieve all documents and information from Ms. Rigsby's computer

and provide it to State Farm. The Order provided for a protective order “with respect to all confidential and unrelated information so obtained.” The order did not indicate, however, who would designate the “confidential and unrelated information,” which on Ms. Rigsby’s computer would include, among other things, information related to her health, her divorce, her finances, and her personal life, as well as private information of other family members, including Ms. Rigsby’s mother and step-father who also used the computer. On October 29, 2007, Ms. Rigsby’s counsel filed an Emergency Motion for Clarification or Modification of Order Granting in Part and Denying in Part State Farm’s Motion to Compel Production of Cori Rigsby’s Computer or, Alternative, for a Stay Pending Expedited Appeal.

On November 19, 2007, the Court determined that State Farm should not be permitted to make the determinations about relevance and confidentiality contemplated by the protective order. In this Order, the Court ordered that the expert make two identical Bate-stamped copies of all information extracted from the computer and provide one set to Ms. Rigsby’s counsel and one set to the Court. Subsequently, a set of documents obtained by this expert was provided to Ms. Rigsby’s counsel for review.

On April 16, 2008, Ms. Rigsby’s counsel filed a notice of submission of documents *in camera* and a privilege log. On the privilege log, Ms. Rigsby’s

counsel listed a few documents which it contended were privileged communications and/or contained information protected by the attorney work product doctrine. Ms. Rigsby's counsel also produced the non-privileged documents responsive to the subpoena to State Farm from the documents provided to Ms. Rigsby's counsel by the expert.

On March 27, 2008, the Court appointed a special master to send the computer hard drive to another expert to determine if additional information could be obtained from the hard drive. The forensic expert chosen, Jeff Parmet, provided the Court with a CD with information obtained from Ms. Rigsby's hard drive, which the Court subsequently provided to Ms. Rigsby's counsel. The Court entered an order on May 23, 2008 ordering Ms. Rigsby to provide a privilege log with documents she contended were protected by privilege. Ms. Rigsby provided this privilege log to the Court on June 16, along with the documents it contended were privileged which were not retrieved by the initial expert. The privilege log listed some of the same documents listed in the privilege log provided to the Court on April 16, 2008, along with a few new documents Ms. Rigsby contended were privileged. As with the April 16, 2008, production, Ms. Rigsby also filed a notice of submission of documents *in camera* on June 16, 2008, indicating that she would produce to State Farm any responsive documents from the CD that were not privileged. On June 17, 2008, the Court determined that the documents listed on

the privilege log were privileged and should be deleted by the expert and that all other documents should be produced. This Order is inconsistent with the process used for the previous production of documents retrieved by the initial expert.

As with the April 16, 2008 production, the determination of what non-privileged documents are relevant or confidential should be made by the party with an interest in protecting the confidential and irrelevant information. Not only is the requested modification consistent with the Court's prior orders and Ms. Rigsby's prior production in this matter of documents from her computer, it is also consistent with what courts do when they order a hard drive to be mirrored to assure that relevant documents are produced. For example, in a case relied upon by State Farm in its Reply, *Frees, Inc. v. McMillan*, 2007 WL 184889 (W.D. La. Jan. 22, 2007), *aff'd* 2007 WL 1308388 (W.D. La. May 1, 2007), the Court ordered that defendant's hard drive be mirrored by an expert, but the imaged hard drive was provided only to defendant's counsel in order that she could identify and seek protection for any objectionable privileged or work-product information before the expert searched the computer for responsive material. *Id.* at \*3. Further, after the expert searched the hard drive using keywords and provided a list of file names identified through the searches to counsel for both sides, defendant's counsel was again permitted to object to production of the named files before plaintiff's counsel received any material from the computer. *Id.* See also *Ameriwood Industries, Inc.*

*v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006) (ordering that independent expert mirror defendant's hard drive and provide recovered files only to defendant's counsel who would then produce non-privileged and responsive documents to plaintiff's counsel).

Absent allowing Ms. Rigsby's counsel to review the documents and determine what is not responsive and to object to production of such documents, the Court would, in effect, be declining even to consider objections regarding confidentiality, and relevance. There is no precedent supporting an order to produce all documents without even considering objections by the producing party, nor is there precedent for relying on the receiving party to pick out and protect those documents that it thinks might be confidential or irrelevant.

State Farm should have no problem with the proposed modification because, in various submissions, it has insisted that its demand for Ms. Rigsby's hard drive was made only so that it could obtain documents sought pursuant to subpoena, as enforced by the Court. Further, State Farm did not object to this procedure as it related to the first group of documents retrieved from Ms. Rigsby's computer which were produced in April, 2008. That can be achieved if Ms. Rigsby's counsel is permitted to produce only documents that are responsive. Thus, the Court should modify its June 17, 2008 Order to allow Ms. Rigsby to provide non-

privileged documents from the CD which are responsive to State Farm's subpoena to State Farm.

B. *Alternatively, the Court Should Stay Its June 17, 2008 Order and Allow an Emergency Appeal to Be Decided Before the Issues Are Largely Mooted by Disclosure of the Documents.*

Alternatively, in the absence of a modification of its June 17, 2008, Order, Ms. Rigsby requests a short stay so that she can pursue an emergency appeal that would preserve her ability to articulate objections to the production of specific documents before they are produced. A stay would be particularly appropriate here because Ms. Rigsby is not a party to the above-captioned case. She should have an opportunity to fairly and fully present issues regarding relevancy and privacy. Absent a stay, those issues would be mooted in whole or in part by speedy transfer of documents to State Farm in compliance with the June 17, 2008 Order. Stays are frequently used to permit review of privilege and related issues that otherwise could be mooted by disclosure of the information in issue. *E.g. Judicial Watch v. DOJ*, 432 F.3d 366 (D.C. Cir. 2005). Such a stay is particularly appropriate when the matter remains in the District Court, which has not finally ruled on said issues.

C. *The Court Should Enter A Protective Order Regarding the Documents Which May be Subject to Judge Acker's Order.*

As this Court is aware, on December 8, 2006, in the case of *E.A. Renfroe & Company, Inc. v. Cori Rigsby Moran and Kerri Rigsby*, In the U.S.D.C.; Northern

District of Alabama, Southern Division, Civil Action No: CV-06-WMA-1752-S, the Honorable William M. Acker, Jr., entered a preliminary injunction which required Ms. Rigsby and her counsel to deliver to the Court certain documents. (See Exhibit "A"). Ms. Rigsby and her counsel have made every attempt to comply and believe that they have complied with this Order. The parties and their counsel, along with witnesses who give testimony, may view the documents, as more specifically defined in Judge Acker's Order dated October 10, 2007. (See Exhibit "B"). Additionally, the Mississippi Department of Insurance obtained access to the documents for its investigation, as set forth in Judge Acker's Order of November 19, 2007. (See Exhibit "C")

Upon review of documents on the CD at issue, it appeared that some of the documents recovered by the forensic expert might be subject to Judge Acker's Order. Counsel for Ms. Rigsby returned to this Court the only copy of such documents that were printed from the CD for an *in camera* review as contemplated by the Court's May 23, 2008 Order, which were Bate-stamped CR129-204. However, counsel for Ms. Rigsby still has in its possession the CD provided to them by the Court.

As mentioned in Ms. Rigsby's notice of submission of documents for *in camera* review, the documents contained on the CD Bate-stamped CR129-204 appear to fall within the scope of documents covered by the preliminary injunction.

Under the terms of the protective order, those documents should not be produced to State Farm or anyone else and should be delivered to Judge Acker. Similarly, under the express language of the preliminary injunction, counsel for Ms. Rigsby appears to be obligated to deliver the CD that was received from this Court to Judge Acker. In addition, an interpretation of the preliminary injunction may require the undersigned to attempt to retrieve the documents the undersigned provided to this Court for its *in camera* review to the extent they are subject to Judge Acker's Order.<sup>1</sup>

As it stands, the undersigned is in a position where any action may result in violation of one or more court orders. Specifically, if the documents at issue are not returned to undersigned counsel by the Court, undersigned counsel may be in violation of Judge Acker's Order. Likewise, submission of the CD to Judge Acker would not allow for Ms. Rigsby's counsel to determine what documents are responsive to State Farm's subpoena should the Court determine that Ms. Rigsby may review the documents to determine what non-privileged documents are responsive to State Farm's subpoena as requested in Section A above.

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<sup>1</sup> One might also argue that counsel for Ms. Rigsby was in violation of Judge Acker's Order inasmuch as it delivered to this Court its copy of the documents which may be covered by the preliminary injunction Bate-stamped CR129-204. The undersigned represents that this was not contemplated until after the documents were sent to this Court which, quite frankly, prompted the insertion of this section into this motion.

It is out of an abundance of caution that this relief is sought. Thus, contemporaneous with the filing of this motion, counsel intends to advise Judge Acker of this motion and would respectfully request guidance from both Courts prior to taking any other action with respect to the CD.

*D. Conclusion*

For these reasons, the Court should modify its June 17, 2008 Order so that Ms. Rigsby's counsel may produce non-privileged documents from the CD which are responsive to State Farm's subpoena as was done with the first production of documents. Alternatively, Ms. Rigsby asks for a stay conditioned on filing an expedited appeal. Last, Ms. Rigsby requests that the Court enter a protective order as it relates to documents provided to the Court Bate-stamped CR129-204 which may be subject to Judge Acker's Order.

June 18, 2008

Respectfully submitted,

*s/ Harlan F. Winn, III*

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2008, I electronically filed the foregoing with the Clerk of the Court which will send notification of such filing to the following:

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