

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

**NORMAN J. BROUSSARD and
GENEVIEVE BROUSSARD**

PLAINTIFFS

VERSUS

1:06cv6-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISQUALIFY LAW CLERK**

I.

INTRODUCTION

State Farm brings this motion seeking to disqualify the Court's law clerk, Jerry Read, from further participation in this action on the ground that Mr. Read's prosecution of his own insurance bad faith lawsuit following Hurricane Katrina, which raised many of the same issues involved in the instant action, coupled with his substantive participation in key rulings in this action, has created a disqualifying appearance of impropriety. Mr. Read's continued participation as the Court's law clerk in this action is thus improper under 28 U.S.C. § 455(a) and (b) and applicable codes of conduct, and he must be precluded from further involvement in this or any other Hurricane Katrina lawsuit in which State Farm is a defendant.

II.

FACTUAL BACKGROUND

In August 2006, Mr. Read and his wife, acting *pro se*, filed a complaint in this district against their homeowners insurer, Allstate Insurance Co., regarding Allstate's handling of the Reads' Hurricane Katrina claim. *See Read v. Allstate Insurance Co.*, Civil Action No. 1:06cv894-BAF. The Reads' complaint asserted that Allstate had acted in bad faith by "failing to

pay the amount it owes under its policy for property damage [to insured property] from wind and rain, and damage caused by the collapse [of other insured buildings]" *Read Complaint* [*Read 1*] (Exhibit A), ¶ 9. In particular, among other allegations, the Reads alleged that Allstate engaged in bad faith and unfair claims practices in handling their claim because of its "failure to make an unconditional tender of the portion of the policy proceeds that its adjustors determined to be covered losses"; by establishing a "systematic claims handling procedure" designed to "undervalue" all Katrina claims; and by "the use of adjustors and other claims handling employees and representatives who are trained and instructed to follow policies and procedures that are grossly unfair to the policy holders, including the plaintiffs[.]" *Id.*, ¶ 13(A), (D), (F). The Reads sought approximately \$230,000 in benefits allegedly due under the policy, plus an award of "punitive damages sufficient to punish the defendant for its misconduct and to deter such misconduct in the future." *Id.*, ¶¶ 15, 16.

Following the filing of the Reads' complaint, all four of the judges assigned to the case from the Southern District of Mississippi – including this Court and Magistrate Judge Walker – recused themselves from the proceedings *sua sponte*.¹ In their written orders [*Read 2, 3*], both this Court and Judge Walker specifically cited section 455 and the appearance of impropriety as grounds for recusal. Specifically, this Court stated:

In accordance with the provisions of 28 U.S.C. §455(a), because my impartiality in connection with this proceeding might reasonably be questioned, I have decided to recuse myself from this case.

[*Read 2* (Exhibit C)]

Allstate's answer [*Read 4* (Exhibit D)] alleged that "most damage [to the Reads' property] was due to flooding" (*id.* ¶ 8) and asserted, among other defenses, that the Reads' loss was

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See *Read Docket Sheet*, Exhibit B. The Reads' case was reassigned to Judge Bernard A. Friedman in November 2006.

excluded by virtue of the policy's flood exclusion, "weather conditions" exclusion, and special "causation" language (*id.*, p. 4, 7th, 8th, and 10th defenses). Although State Farm's policy is worded somewhat differently than Allstate's, the hundreds of Katrina lawsuits in which State Farm has been named as a defendant likewise center on questions of policy interpretation, particularly including the enforceability of State Farm's water damage exclusion and the anti-concurrent causation language in its policies.

On January 17, 2007, the court entered its Final Judgment of Dismissal with Prejudice [Read 8 (Exhibit E)] based on the parties' representation that "any and all of the [Reads'] claims . . . have been fully compromised and settled by the payment to the [Reads] of a sum of money satisfactory to them"

B. Mr. Read's Participation as a Law Clerk in *Broussard v. State Farm*

In April 2006, some four months before the Reads filed their lawsuit against Allstate, the present action was reassigned to this Court. State Farm has no way of knowing whether or to what extent Mr. Read may have assisted in the Court's resolution of the many pretrial motions filed in the action, including State Farm's motion for summary judgment, motion for change of venue, and numerous in limine motions. During recent trial proceedings, however, it became apparent that Mr. Read was actively seeking to influence resolution of at least one of the key issues, i.e., whether Plaintiffs had met their burden of proving that the contents of their home were damaged by the covered peril of windstorm.

After Plaintiffs rested their case in chief, and again at the close of evidence, State Farm moved for JMOL on Plaintiffs' claim for recovery of damage to their personal property. Trial Transcript ("Tr.") (Exhibit F), 332:9-333:9, 486:4-10. The Court denied both motions and, after erroneously concluding that Plaintiffs had met their burden of proof on this threshold issue,

granted JMOL in their favor. Tr. 338:22-25, 493:2-497:22; *see also Broussard v. State Farm Fire & Cas. Co.*, 2007 WL 113942 (S.D. Miss. Jan. 17, 2007). The premise for the Court's erroneous ruling on the burden of proof was its conclusion that "[t]he parties have stipulated that the plaintiffs sustained a loss of the contents of their dwelling *as a result of* Hurricane Katrina, *a windstorm.*" *Id.* at *2. In fact, the stipulation at issue said only that "[t]he Plaintiffs^[1] home was destroyed *during* Hurricane Katrina leaving only a slab." *See* Pretrial Order [88], p. 5 (emphasis added). In other words, the parties *never* stipulated that Hurricane Katrina "was a windstorm" or that Plaintiffs' personal property was damaged "as a result" of windstorm.

The Court's misunderstanding on this key point was actively encouraged by Mr. Read, who purposefully sought to inject "windstorm" into the discussion. For example, following the Court's oral rendering of the JMOL in Plaintiffs' favor, State Farm's counsel sought clarification of the ruling as it related to Plaintiffs' contents claim:

Mr. Banahan: With regard to the contents coverage under the policy, it was our understanding back from the pretrial, I thought we were all on the same page, that it is Plaintiffs' burden to prove the damage to their contents was caused by a covered loss, in this case wind.

Law Clerk: *And Katrina was a windstorm. . . .*

Mr. Banahan: It said windstorm in the pretrial [order]? . . .

Law Clerk: *It says windstorm in the policy.*

Tr. 504:22-505:11 (emphasis added).

With regard to Plaintiffs' claim for damage to their dwelling, the Court denied State Farm's motion for JMOL/partial summary judgment as to punitive and extracontractual damages, ruling that State Farm had no legitimate or arguable basis "for failing to make any unconditional tender of policy benefits for the wind damage in light of the estimates reported to State Farm by Dr. Gurley."² Opinion on Rule 50 Motions for Judgment as a Matter of Law [106], pp. 3-4, ¶

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Mr. Read also took an active role in the jury instruction conference for the punitive damages phase of the trial, at one point even advising the Court about the way Mississippi's punitive damages statute works. *See* Tr. 514:14-16. The jury ultimately awarded Plaintiffs punitive damages in the amount of \$2.5 million, which the Court later reduced to \$1 million.

14. In post-trial motions that will be filed once the *Broussard* judgment is entered, State Farm will argue that this ruling too is erroneous. Although State Farm does not know the extent to which Mr. Read may have assisted the Court in reaching this faulty conclusion, State Farm notes that the Court's finding closely echoes the allegation in Mr. Read's complaint that Allstate engaged in bad faith and unfair claims practices by its "failure to make an unconditional tender of the portion of the policy proceeds that its adjustors determined to be covered losses." Exhibit A, ¶ 13(A).

III. ARGUMENT

As explained below, Mr. Read's pursuit of his own bad faith lawsuit against Allstate, which involved many of the same issues raised in this action, warrants his disqualification on two separate grounds. First, the fact that Mr. Read was not merely pursuing his own bad faith lawsuit, but directly advocating legal positions that were and will continue to be central to this litigation, creates the appearance of partiality. Second, the lawsuit necessarily gave him a direct financial interest that could be – indeed, perhaps was – substantially affected by the Court's rulings in this case.³

A. Mr. Read's Actual or Apparent Partiality Requires His Disqualification.

28 U.S.C. section 455 sets forth the general standards for the disqualification of a justice, judge, or magistrate judge. Among other circumstances, disqualification is required "in any proceeding in which [the judge's] impartiality might reasonably be questioned." *Id.* § 455(a). The test for determining whether a judge should disqualify himself under § 455(a) is whether a reasonable person knowing all the facts would conclude that the judge's impartiality might reasonably be questioned. *See Hepperle v. Johnston*, 590 F.2d 609, 614 (5th Cir.1979); *accord Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983)

It is well established that the requirements of section 455 apply equally to a judge's law clerk. As the Fifth Circuit has noted: "[T]he clerk is forbidden to do all that is prohibited to the judge." *Hall*, 695 F.2d at 179 (magistrate erred in "failing voluntarily to disqualify himself or to insulate himself from his [law] clerk" after learning that clerk had been member of plaintiff class in discrimination action pending before magistrate and later accepted employment with class counsel); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988) (noting that the clerk is subject to the same constraints as the judge). Thus, "[i]t is the duty of the law clerk 'as

³ State Farm notes in this connection that Mr. Read's lawsuit settled less than a week after the verdict in this action.

much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation." *Hall*, 695 F.2d at 179.

The basis for the Court's ruling in *Hall* was its recognition that the law clerk's unique role places him or her in a position to influence the judicial decision-making process: "Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be." *Id.* Likewise, in *Parker v. Connors Steel Co.*, the Eleventh Circuit acknowledged "the importance that some law clerks play in the decisional process," and stated that "[a] law clerk, as well as a judge, should stay informed of circumstances that may raise the appearance of impartiality or impropriety. And when such circumstances are present *appropriate actions should be taken.*" *Parker*, 855 F.2d at 1525 (emphasis added); *see also Moore v. Brewster*, 96 F.3d 1240, 1244-45 (9th Cir. 1996) (extending absolute judicial immunity to law clerks because "law clerks are probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function"), *cert. denied*, 519 U.S. 1118 (1997).

In addition, the Code of Conduct for Judicial Employees, which has been held to be "legally authoritative and binding on law clerks . . . ," *Monument Builders of Pa., Inc. v. Catholic Cemeteries Ass'n*, 190 F.R.D. 164, 167 (E.D. Pa. 1999), expressly imposes on law clerks restrictions virtually identical to those in section 455. Canon 3(F) of this Code, entitled Conflicts of Interest, provides in pertinent part:

- (1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she . . . might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts

would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A . . . law clerk should not perform any official duties in any matter with respect to which such . . . law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

(iii) he or she . . . has a financial interest in the subject matter in controversy^[4]

(iv) he or she . . . (C) has an interest that could be substantially affected by the outcome of the proceeding[.]

* * *

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict of interest or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such a manner so as to avoid a conflict or the appearance of a conflict of interest.

A publication prepared for federal judicial law clerks, "Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks" (Federal Judicial Center 2002), specifically cautions clerks about the application of the Code of Conduct as it relates to them:

Some rules are more restrictive for law clerks than for other court employees. These restrictions are due to the special relationship between a judge and a law clerk. As the Codes of Conduct Committee stated in Advisory Opinion No. 51:

Among judicial employees, law clerks are in a unique position since their work may have direct input into a judicial decision. Even if this is not true in all judicial chambers, the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge.

4 The definition of "financial interest" in Canon 3 is essentially identical to the definition in section 455 quoted below. See Canon 3(F) (4).

Section 455 requires recusal if "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt about the [judge's] impartiality." *Parker*, 855 F.2d at 1524. Courts have applied section 455 to disqualify a law clerk from further participation in a case when the facts even suggested that his or her impartiality might be open to question. *See Hunt v. American Bank & Trust Co. of Baton Rouge*, 783 F.2d 1011, 1016 (11th Cir. 1986) ("If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified."); *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703, 714 (9th Cir. 1990) ("[W]hen the judge promptly removes the clerk from the case, and avoids further communication with that clerk about the litigation, the appearance of judicial propriety is preserved.").

As section 455(a) suggests, it is immaterial whether Mr. Read *actually* influenced the Court's rulings to date or will attempt to influence them in the future. *See Hall*, 695 F.2d 175, 177, 179-180 (magistrate's "assertion that he had made up his mind immediately after hearing the case, without the law clerk's assistance, is immaterial" because disqualification is required if "a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality"); *see also Parker*, 855 F.2d at 1524 (substantive participation in case by law clerk who was son of partner of firm representing defendant and judge's practice of crediting law clerk in footnote with preparation of opinion violated section 455(a) because such facts "might cast doubt in the public's mind on [the judge's] ability to remain impartial and at a minimum these facts raise the appearance of impropriety").

Mr. Read's complaint asserts that he was subjected to bad faith and unfair claims handling by his own insurer based on many of the same contentions at issue in this lawsuit. As a *pro se* litigant, he directly formulated and advocated legal positions contrary to State Farm's

positions on issues that will be of critical importance in this case. State Farm submits that these facts, coupled with evidence of Mr. Read's active participation in prior key rulings adverse to State Farm, would lead "an objective, disinterested lay observer fully informed of the facts" to question Mr. Read's ability to be impartial toward State Farm. This is precisely the sort of fox-guarding-the-hen-house scenario that section 455 was designed to avoid, and Mr. Read's disqualification is therefore required.

B. The Fact that Mr. Read Had a Direct Financial Interest in Hurricane Katrina Litigation Requires His Disqualification.

Section 455 also requires a judge, and therefore a clerk, to disqualify himself when "[h]e knows that he . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding[.]"⁵ *Id.* § 455 (b)(4). Mr. Read's lawsuit against Allstate created a direct financial interest on his part in the subject matter in controversy in this action. As a result of that interest, section 455(b)(4) and the analogous provisions of the Code of Conduct for Judicial Employees compel Mr. Read's disqualification from any further involvement in this or any other Hurricane Katrina case involving State Farm.

Although State Farm submits that section 455(b)(4) by its terms unequivocally covers the situation here, any doubt on that score was resolved by the United States Supreme Court more than two decades ago in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). In that case, the petitioners challenged on due process grounds a 5-4 decision of the Alabama Supreme Court that allowed certain first party tort actions against insurance companies making partial payment and held that a punitive damage award of \$3.5 million was not excessive. *Id.* at 816. During the more than nine months that Aetna's appeal was pending,

⁵ Section 455 defines "financial interest," in pertinent part, as "ownership of a legal or equitable interest, however small . . ." 28 U.S.C. § 455(d)(4).

the Alabama justice who authored the majority opinion was pursuing his own action in state court against another insurer (Blue Cross), alleging bad faith failure to pay policy benefits and seeking punitive damages. *Id.* at 817. The justice settled his own lawsuit "for a tidy sum" several months after the Alabama Supreme Court ruled against Aetna. *Id.* at 824.

The United States Supreme Court held that the justice's "participation in [Aetna's] appeal violated [Aetna's] due process rights" because his own "very similar" lawsuit gave him a "direct stake" in its outcome:⁶

All of the[] issues [in the Aetna appeal] were present in Justice Embry's lawsuit against Blue Cross. His complaint sought recovery for partial payment of claims. Also the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.

Id. at 823-824.

Applying the principle that "no judge can be a judge in his own case or be permitted to try cases where he has an interest in the outcome," the Court made clear that Aetna's rights were violated regardless of whether the justice "in fact . . . was influenced" by his own lawsuit. *Id.* at 822, 825. Two concurring opinions emphasized that point:

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Although *Lavoie* specifically addressed the due process implications of the justice's participation in Aetna's appeal, the Supreme Court's conclusion applies equally to the analysis under 28 U.S.C. § 455. As the Fifth Circuit has recognized, "section 455 establishes a statutory disqualification standard *more demanding* than that required by the Due Process Clause." *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990) (emphasis added); see *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir.1986). That is because "[t]he Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. Section 455 requires disqualification when others would have reasonable cause to question the judge's impartiality. It is this additional, systemic concern for avoiding the appearance of impropriety that makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause." *Couch*, 896 F.2d 78 at 82.

[E]ven without that [favorable] settlement [of his own case], Justice Embry's participation in this case deprived [Aetna] of due process. The deprivation occurred when Justice Embry took part in the deliberations and decision of the Alabama Supreme Court in this case. . . . I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. That fact too is irrelevant – Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. . . . The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process.

Id. at 830-831 (Brennan, J., concurring) (emphasis in original).

For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking – whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion – posed an unacceptable danger of subtly distorting the decisionmaking process.

Id. at 831 (Blackmun, joined by Marshall, JJ., concurring). *See also Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1030 (5th Cir. 1998) (if judge, spouse, or minor child is member of potential class in class action pending before judge, "there exists a 'financial interest' in the case mandating recusal under section 455(b)(4)" no matter how "paltry" that financial interest may be).

Under *Aetna*, Mr. Read's bad faith lawsuit against Allstate gave him a direct financial stake in the very issues decided in this and other Katrina cases, requiring his disqualification under section 455. That interest necessarily taints his participation in further proceedings in this action, notwithstanding any good faith belief on Mr. Read's part that he will be able to screen out any bias against State Farm. Nor does it matter that the Reads' lawsuit has since resolved: as a *pro se* litigant, Mr. Read was a partisan advocate with respect to issues that will be central to this lawsuit, and he cannot reasonably be expected to divorce himself from those positions simply because he has received a "satisfactory sum" to settle his dispute with Allstate.⁷ Accordingly,

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Moreover, the Fifth Circuit has concurred with the dissent in *Union Carbide Corp. v. United States Cutting Service*, 782 F.2d 710 (7th Cir. 1986), that "the provisions of section 455(b)(4) are absolutist; as soon as a judge [or a clerk]

Mr. Read must be disqualified from any further involvement or participation this case or in any other Hurricane Katrina litigation against State Farm pending before the Court.

IV.

CONCLUSION

Jerry Read's continued participation in this action leads to the appearance of impropriety proscribed by 28 U.S.C. § 455(a) and the Code of Conduct for Judicial Employees. Given his shared experiences with Plaintiffs, there is room for significant doubt as to his ability to remain impartial. The only way to remove that possible taint is to disqualify Mr. Read from any further involvement in the proceedings in this case. State Farm therefore respectfully submits that Mr. Read must be immediately disqualified from any further responsibilities in this and any other Hurricane Katrina litigation against State Farm pending before this Court.

Respectfully submitted,

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becomes aware that she has a financial interest in a case, that judge must disqualify herself immediately." *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1031 (5th Cir. 1998). In other words, "disqualification becomes automatic from the moment a judge discovers her financial interest in the litigation; relinquishment of that interest at any point after discovery is no remedy." *Id.* Although, as the *Tramonte* court acknowledged, Congress has added subsection (f) to modify this "absolutist" standard in certain limited instances, that subsection expressly applies only to the divestment of "a financial interest *in a party (other than an interest that could be substantially affected by the outcome)*," *id.* (emphasis added), and thus is inapplicable here. Accordingly, Mr. Read's financial interest created by his filing action against Allstate required his immediate disqualification, and any after-the-fact "relinquishment" of his interest via settlement thus "is no remedy."

CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAH**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that on February 21, 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:

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