

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS C. McINTOSH, *et al.*

PLAINTIFFS

V.

CIVIL ACTION NO. 1:06cv1080-LTS-RHW

STATE FARM FIRE & CASUALTY
COMPANY, *et al.*

DEFENDANTS

**PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE FARM'S *MOTION IN LIMINE*
NO. 9 TO EXCLUDE TESTIMONY OF WITNESSES ASSERTING THEIR FIFTH
AMENDMENT PRIVILEGE, OR TO PROHIBIT PLAINTIFFS FROM DRAWING
ADVERSE INFERENCES AND/OR PRESENTING THAT TESTIMONY IN A
PREJUDICIAL MANNER**

COME NOW Plaintiffs Thomas C. McIntosh and Pamela McIntosh (“Plaintiffs”) and for their Response in Opposition to Motion *in Limine* to Exclude Testimony of Witnesses Asserting Their Fifth Amendment Privilege, or to Prohibit Plaintiffs From Drawing Adverse Inferences and/or Presenting That Testimony in a Prejudicial Manner state as follows:

I. Introduction

State Farm makes a novel argument in the motion in limine at issue. After a strenuous fight to prevent the depositions of Lecky King and Lisa Wachter from occurring at all, and after the two witnesses refused to testify based upon their Fifth Amendment right against self-incrimination, State Farm seeks to suppress all evidence that the depositions ever occurred and that the witnesses refused to testify in response to any question posed by counsel for Plaintiffs. State Farm’s motion is a desperate attempt to avoid the negative consequences that come along with asserting the protection of the Fifth Amendment against self-incrimination. State Farm asks the Court to hide from the jury that fact that these two crucial State Farm employees refused to answer every substantive question posed to them during their depositions. In fact, the only

information provided by the two witnesses was their names. State Farm should not be allowed to hide from the jury the fact that its employees refused to testify in this case.

II. Plaintiffs Are Entitled To Inform The Jury That The Witnesses Refused to Testify

Under well-settled Fifth Circuit precedent, it is entirely proper to allow the jury to make an adverse inference that the witnesses' truthful testimony would have been deleterious to State Farm. *See State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990) ("The... contention that an adverse inference may be drawn from a witness' assertion of her fifth amendment rights in civil cases is correct.") Mississippi courts have long allowed adverse inferences in civil cases as well. *See Morgan v. U.S. Fidelity & Guaranty Co.*, 222 So.2d 820, 828 (Miss. 1969). Adverse inferences apply not only when a party asserts Fifth Amendment protection, but also when a non-party witness does so. *See Pyles v. Johnson*, 136 F.3d 986, 997 (5th Cir. 1998). State Farm cannot dispute the basic point of law that the jury should be allowed to draw an adverse inference when State Farm employees seek the protection of the Fifth Amendment. Instead, State Farm argues that telling the jury about this fact will be unfairly prejudicial in violation of Federal Rule of Evidence 403, which prohibits admission of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Fed. R. Evid. 403.

State Farm's argument is without merit. When presented with a witness who intends to assert Fifth Amendment protections, it is permissible to ask the witness specific questions to ascertain whether they will answer or choose not to answer the specific questions, and that is what Plaintiffs' counsel did in both of the depositions at issue. State Farm argues that the questions posed to Ms. Wachter and Ms. King constitute only the biased testimony of lawyers because the witnesses were powerless to respond. However,

When confronted with the prospect of the video testimony of high-level managerial employees who refuse to answer questions pursuant to their Fifth Amendment right against self-incrimination, any defendant would consider such video testimony unduly prejudicial under Rule 403. As the Court is aware, State Farm made strenuous efforts to prevent the depositions from occurring at all based on the fact that the witnesses would refuse to answer based on their Fifth Amendment rights. The Court refused to prevent the depositions. By filing the current motion in limine, State Farm is making a final desperate attempt to keep the public from knowing that its high-level employees refused to testify in this case. The Court should refuse State Farm's motion, and the jury should be allowed to make a negative inference based upon the witnesses' refusal to testify, as is allowed under the law of the Fifth Circuit.

III. Plaintiffs Should Be Permitted to Show Video Testimony of the Witnesses

Federal Rule of Civil Procedure 32 allows the use of depositions at trial "upon application and notice, that such exceptional circumstances exist as to make it desirable in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." Fed. R. Civ. P. 32(a)(3)(E). The Court is presented with just such an exceptional circumstance, given that the witnesses in question apparently will be prevented from testifying in this case. The interests of justice demand that that Plaintiffs must have some way of exhibiting to the jury the fact that the witnesses asserted their Fifth Amendment protection so that the jury can make the appropriate adverse inference, if it chooses to make such an inference. The jury obviously cannot make the adverse inference that the law provides unless the Court allows the Plaintiffs to provide the jury with the fact that the witnesses took the Fifth in the first place. Since it appears that the witnesses will not appear at trial, using the video depositions at trial, or reading the transcripts into evidence, is the only method by

which the jury may be informed of the fact that the witnesses sought Fifth Amendment protection.

Furthermore, Rule 32(a)(2) allows the introduction of the deposition of a party, or any “officer, director, or managing agent” of a party for any purpose. Given their management roles at State Farm, and particularly their broad authority during Hurricane Katrina, the witnesses fit this criterion. *See Terry v. Modern Woodmen of America*, 57 F.R.D. 141 (W.D. Mo. 1972)(Life insurer’s sales agent was a managing agent because he was in complete charge of negotiation and sale of insurance contracts and had duties and powers of an insurance supervisor). Because their status as “officers, directors, or managing agents” of State Farm, the video depositions of Ms. King and Ms. Wachter are proper for the jury’s viewing at trial.

State Farm should not be allowed to defeat Plaintiffs’ right under Federal Rule of Civil Procedure 32 to show the deposition testimony of these witnesses simply because State Farm would rather the jury not see the video testimony. At its essence, that is the only ground upon which State Farm has filed its motion in limine. If State Farm’s motion is granted, Plaintiffs will be unfairly prejudiced in that they will be deprived of answers to questions posed to these two crucial State Farm employees. Moreover, Plaintiffs would not be allowed the benefit of the adverse inference that arises in a civil case when a witness refused to testify based on his or her Fifth Amendment right against self-incrimination. State Farm’s attempt to “wipe the slate clean” with regard to the testimony of Ms. King and Ms. Wachter should not be allowed. Therefore, the Court should deny the motion in limine at issue.

III. Conclusion

For all of the foregoing reasons, Plaintiffs urge the Court to deny State Farm’s Motion in Limine to Exclude Testimony of Witnesses Asserting Their Fifth Amendment Privilege, or to

Prohibit Plaintiffs From Drawing Adverse Inferences and/or Presenting That Testimony in a Prejudicial Manner.

Dated: January 18, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, I served the foregoing, via the Court's ECF system, to the United States District Court, Southern District of Mississippi, Southern Division, ECF system participants in this case, to include the following:

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