

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

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY
RELATORS/COUNTER-DEFENDANTS
Vs.
STATE FARM MUTUAL INSURANCE
COMPANY DEFENDANT/COUNTER-
PLAINTIFF, et al.

CASE NO. 1:06cv433-LTS-RHW

RELATORS' MOTION FOR RECONSIDERATION

Comes Now Relators, by and through their counsel, and move this Court for reconsideration of its ruling disqualifying them as counsel, and in support thereof state as follows:

1. This Court, in rendering its opinion disqualifying counsel for the Rigsbys, made certain factual assumptions that were neither true nor supported by the record. Among those assumptions, the Court:
 - a. Assumed that Relators' counsel were aware of the payment arrangement between SKG and the Relators in advance of the public disclosure of that payment arrangement, which occurred according to media reports on August 26, 2006.
 - b. Assumed that the Relators' counsel was aware that the payment arrangement between the Relators and SKG was a sham arrangement in advance of the Court's determination of that fact. The facts clearly show otherwise.

- c. Assumed that Relators counsel, who were not admitted in McIntosh and had no affiliation whatsoever with the SKG group that actually made the payments to Relators, were aware of facts that would have imposed on them a duty to make inquiry.
 - d. Assumed that counsel in a separate case have a legal or ethical duty to inquire into the relationship between other counsel and their client to determine the nature of that relationship when those lawyers have no joint venture agreement. No such duty exists in case law or by rule.
2. In addition to assuming the aforementioned facts and legal conclusions, the court overlooked the actions of counsel for defendant State Farm and applied a different legal standard to their conduct than to the Relators counsel in that:
- a. State Farm made allegations that the failure to take remedial action regarding the payment of witnesses in the McIntosh case (a case where neither of the Relators were parties and that their lawyers never entered an appearance in) operates to disqualify the Relators' lawyers in this case because Relators' lawyers supposedly knew of a purported ethical breach but took no action in a timely manner to cure the supposed ethical violation¹.
 - b. The court applied this standard in ordering disqualification, but overlooked the fact that if the law is such that counsel in an unrelated case has an ethical duty to report this misconduct or inquire further into it, then State Farm breached that same duty in McIntosh. This because:

¹ As set forth in the Relators' response to the motion to disqualify, this action was under seal until August 2007, and the relators' attorneys could not have broken the seal by discussing this case or any aspect of it. As further set out, the relators' lawyers have no interest in the McIntosh case, were not entered in it, and had no duty to State Farm or to the litigants in that case to raise an issue that touched only that case and did not affect the False Claims Act case.

- i. State Farm had actual knowledge of the payment of these witnesses on August 26, 2006, based on their use and citation to the article by Sun Herald Reporter Anita Lee (See docket # __, Exhibit __).
 - ii. This knowledge, if it created a duty to inquire or act to cure the alleged ethical misconduct, imposed upon State Farm's own lawyers and its retained counsel an ethical duty on August 26, 2006, to take positive action on behalf of their client, State Farm Insurance, to disqualify the McIntosh counsel and those witnesses at that time or within a reasonable time after August 26, 2006.
- c. By Order issued on September 12, 2007, this Court, in the McIntosh case, found that State Farm had delayed bringing a motion to disqualify, and that the motion to disqualify was brought for a tactical purpose after, but only after, State Farm had settled scores of cases with the Katrina Litigation Group. This Court's decision in McIntosh is binding on the Court, is the law of the case, and creates a presumption that State Farm's own counsel should be disqualified.
- d. State Farm's lawyers at issue in this case represented State Farm in the McIntosh case.
- e. Each of those attorneys had a duty to their client to protect its interests, and a duty to the Court in McIntosh not to tolerate ethical misconduct.
- f. In spite of knowing about what they now claim were improper payments to witnesses since at least August 26, 2006, the attorneys representing State Farm did not take any action to disqualify the other attorneys, but instead, continued to work with them.

- g. State Farm's attorneys withheld taking action on the purported ethical violation because they believed it gave them leverage in dealing with the McIntosh party's lawyers.
 - h. Those lawyers, in an attempt to force settlement on favorable terms for their client, asserted the threat of disqualification as a "tactical nuclear" option, in violation of MPRC 4.4.
 - i. When that threat did not bear fruit, those lawyers then filed their motion to disqualify which this Court overruled and the Fifth Circuit, on appeal by extraordinary writ, upheld.
3. The Court also imposed a higher duty on Relators' counsel in this *qui tam* case than it undertook itself in reviewing the record in McIntosh. In that case the Court initially undertook a review of State Farm's motion to disqualify the Scruggs Katrina Group and although presented with essentially the same facts as those presented after Mr. Scruggs pleaded guilty, concluded that the delay in making the application estopped State Farm from disqualifying Scruggs. The court never conducted the same searching inquiry it claims that Relators' counsel should have conducted. This is critical here because:
- a. The court was reviewing the record compiled by the same attorneys who represent State Farm here, in a case where these Relators counsel were neither entered nor parties. All the facts and the parties in McIntosh were before the Court; the same cannot be said for the Relators' counsel.
 - b. The court was aware of the facts that it now claims tainted the payments made to the Relators at that time it made its first ruling in McIntosh. Although aware of these payments by the SKG firm, this Court did not conduct a further or more serious

inquiry into the fundamentals of that relationship even though it was on notice by State Farm's pleadings that State Farm considered the matter potentially dispositive in that case.

- c. How can this Court, in imposing a duty of inquiry on Relators' counsel in a separate case, where counsel for Relators were not parties, and indeed, were not even in the state or knowledgeable about the details of the consulting arrangement entered into between SKG and the Relators, impose a duty on Relators' counsel that is more stringent than the level of inquiry the Court displayed in initially ruling on the motion for disqualification? Said another way, if it was reasonable for this Court, in its initial ruling, to believe that there was nothing improper in the payments or the relationship between SKG and the Relators, such that it could base its ruling on the appearance of tactical disqualification, how can it be proper to impose a more stringent duty on Relators' counsel here?
4. Unlike Relators' counsel in this case, the attorneys representing State Farm in this case were always and actively involved in the McIntosh case, knew of the alleged ethical violations at a time when such ethical violations could have been addressed in a timely manner, and yet failed to take timely remedial action.
5. As set forth in the declarations of counsel, which this Court accepted as true for the purposes of deciding the motion to disqualify, Relators counsel did not know of the payment arrangements until after the payments had already been made, and any ethical issue raised by those payments had already been created.
6. The only explanation for the failure of State Farm's attorneys to take action is that State Farm's attorneys were intending to wait until the Katrina Litigation Group had invested

substantial time and resources in the matter and had the most to lose in order to pressure those lawyers to make a settlement that disadvantaged their clients at the expense of State Farm.

7. Since State Farm asserted this fact pattern as grounds for dismissal against lawyers who were not representing the McIntoshes, who were not entered in the case, who did not participate in the depositions, and who were never in a position (by virtue of a court order holding the case under seal) to notify the Court or take other remedial action in a case where they had no legal interest, then surely this Court must recognize that State Farm's own lawyers, whose client had a direct and substantial interest in the litigation, who were entered in McIntosh, who did participate in the depositions in that case, who apparently read the media reports of the Rigsby's employment at the time they came out in the media, and who had a direct and independent duty to their client to alert this honorable Court at the earliest opportunity to an ethical breach, at the worst used the breach as a threat to extort settlement and at the very least acquiesced in the payment arrangement for nearly 11 months before taking any action to disqualify counsel².

8. Graves, Bartle & Marcus are equally aggrieved by the Court's order. Like the attorneys from BFRG, they did not learn about any relationship between the relators and Scruggs until after it was publicly disclosed. For the same reasons as set forth above, they cannot be properly disqualified on that basis.

² State Farm's counsel is also subject to disqualification for improper use of the disqualification as a threat to coerce settlement in McIntosh in violation of MPRC 4.4.

WHEREFORE, for good cause shown, Relators respectfully request that this Court reconsider its prior ruling disqualifying relators counsel, and for such other and further relief as this Court deems just and proper. Relators respectfully request that they be afforded a hearing on this motion.

BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.

Dated: June 3, 2008

/s/ Anthony L. DeWitt

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Certificate of Service

I hereby certify that on June 3, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel registered on ECF, and I hereby certify that I have mailed by United States Postal Service the document to non CM/ECF participants.

/s/ Anthony L. DeWitt