UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & COMPANY, INC. PLAINTIFF

v. CIVIL ACTION NO.
2:06-CV-01752-WMA
2:08-MC-00908-LSC

CORI RIGSBY and KERRI RIGSBY DEFENDANTS

NON-PARTY STATE FARM FIRE AND CASUALTY COMPANY'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRIVILEGED TESTIMONY AND FOR SANCTIONS (DOC. 321)

Non-Party State Farm Fire and Casualty Company ("State Farm") respectfully submits this Opposition to Defendants' Motion to Compel Testimony of Witnesses and for Sanctions (Doc. 321). As grounds for this Objection, State Farm states as follows:

I. NON-PARTY WITNESS JOHN DEGANHART WAS PROPERLY INSTRUCTED NOT TO VIEW DOCUMENTS SUBJECT TO THIS COURT'S PRELIMINARY INJUNCTION UNTIL RECEIVING FURTHER GUIDANCE FROM THE COURT

On December 8, 2006, this Court granted Plaintiff E.A Renfroe & Company, Inc.'s ("Renfroe") Motion for a Preliminary Injunction, finding, *inter alia*, that Defendants Cori and Kerri Rigsby had "clandestinely copied approximately 15,000 confidential documents off of State Farm's computer and turned them over to [their then-attorney Richard F. Scruggs ('Scruggs')]." (Doc 60 at 8.) Rather than ordering that these purloined documents be returned to Renfroe or State Farm, the Court entered a protective order providing that the documents be returned to

Renfroe's counsel. The protective order further expressly precluded counsel from "sharing [the documents] with State Farm." (*Id.* at 9.) This condition was agreed to by Renfroe as an accommodation to the Attorney General of Mississippi, who intervened in this action – with the full support of the Rigsbys and Scruggs – and asserted that permitting either Renfroe or State Farm to view the purloined documents would (somehow) compromise his criminal investigation of State Farm. (*Id.*) Although the Court has subsequently expressed great skepticism regarding the bona fides of the Attorney General's argument (Doc. 145 at 21), the Court's directive not to share these restricted documents with State Farm or its personnel is currently in full force and effect.

On October 10, 2007, the Preliminary Injunction was modified by the entry of a Consent Order (Doc. 172). The Consent Order allowed for the examination of the restricted documents by "witnesses while under examination in connection with this case," (Doc. 172 ¶ (c) at 2), but unambiguously stated that "persons permitted to view the Documents may not disclose their contents to anyone not specified as permitted to view them." (Doc. 172 ¶ (e) at 3.)

On May 15, 2008, the Rigsbys' counsel, Robert Battle, deposed State Farm Catastrophe Team Manager John Deganhart. During the course of the deposition, Mr. Battle indicated that he was going to show Mr. Deganhart documents that fell squarely within the Court's preliminary injunction. State Farm's counsel, Michael B. Beers, objected to inquiries that related to or touched upon these restricted

documents. Mr. Beers expressed two concerns. First, given that the whole purpose of the restriction in preliminary injunction is to prevent State Farm personnel, such as Mr. Deganhart, and counsel representing State Farm, from viewing the restricted documents, there is substantial uncertainty as to whether Mr. Deganhart and counsel attending the deposition could even review and inspect the restricted documents. (Dep. of John Deganhart, 93:11-23; 94:1-8 (statement of M. Beers).)[1]

Second, Mr. Beers informed Mr. Battle that, even assuming that the Consent Order did, in fact, permit Mr. Deganhart and counsel representing State Farm to view the restricted documents, it imposed restrictions that State Farm could not agree to without further clarification from this Court. In particular, the Consent Order stated that "persons permitted to view the Documents may not disclose their contents to anyone not specified as permitted to view them." (Doc. 172 ¶ (e) at 3.) The black letter application of this Consent Order could place Mr. Deganhart, who is or may be a material witness in the defense of a *qui tam* action brought by the Rigsbys against State Farm in the Southern District of Mississippi, in a potentially untenable position. For instance, the Consent Order does not specifically address the situation where Mr. Deganhart is shown a restricted document in this litigation that is also a relevant document in the Rigsbys' *qui tam* action.

[1] All deposition excerpts are attached as exhibits to the Rigsbys' Motion. (Doc. 321)

Viewing the restricted documents pursuant to the Consent Order further places State Farm's retained counsel, Mr. Beers, and State Farm's Corporate Law Counsel, Tamarra Rennick, in a double bind. Both Mr. Beers and Ms. Rennick were in attendance at Mr. Deganhart's deposition and would have arguably been "persons permitted to view the Documents" under the Consent Order. However, Mr. Beers and Ms. Rennick are also State Farm's counsel in the *qui tam* action. Clearly, counsel could not agree "not [to] disclose [the] contents" of the restricted State Farm document used in this case when the same document could also be evidence in the *qui tam* action, or any number of other cases against State Farm.

Notably, the Rigsbys' current motion to compel and for sanctions is wholly unnecessary. At the deposition, Mr. Beers succinctly explained State Farm's position to Mr. Battle (Deganhart Dep. at 93:5-95:17), and further assured him that State Farm would rescind its objections to reviewing the restricted documents once State Farm had an opportunity to seek guidance from this Court. (*Id*. at 96:18-23.)

In short, faced with a situation that could have had serious unintended consequences in other State Farm cases, State Farm's counsel took the reasonable position of maintaining the status quo while permitting the parties to seek guidance from this Court as to the application of its preliminary injunction and Consent Order. Counsel's action was indisputably prudent and in no way sanctionable.

II. INFORMATION REGARDING STATE FARM'S INTERNAL INVESTIGATION IS PRIVILEGED

The Rigsbys also seek to overrule counsel's objections to questions seeking to obtain information regarding State Farm's internal investigation. This investigation was conducted at the direction of counsel in response to litigation, both threatened and already filed, including pending state and federal criminal investigations, and is clearly covered by the attorney-client privilege and work-product doctrine. Therefore, State Farm's objections should be sustained.

The attorney-client privilege attaches to a communication made: (1) in confidence; (2) in connection with the provision of legal services; (3) to or from an attorney; and (4) in the context of an attorney-client relationship. *See United States v. BDO Seidman*, *LLP*, 492 F.3d 806, 815 (7th Cir. 2007), *cert. denied sub nom. Cuillo v. United States*, 128 S. Ct. 1471 (2008); *see also United States v. Noriega,* 917 F.2d 1543, 1550 (11th Cir. 1990) (same); Ala. R. Evid. 502(b) (2008). Additionally, the broader work-product doctrine affords protection to "documents and tangible things . . . prepared in anticipation of litigation or for trial" by a party or for a party, or by a party's representative. Fed. R. Civ. P. 26(b)(3). "Material that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, is referred to as 'opinion work product.'" *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir.), *opinion modified on other grounds*, 30 F.3d 1347 (1994). For a party to obtain disclosure of work product other than opinion work product, it must demonstrate a "substantial need for the materials to

prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3). In contrast, "'opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.'" *Cox,* 17 F.3d at 1422 (quoting *In re Murphy,* 560 F.2d 326, 336 (8th Cir.1977)). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court made clear that an attorney's notes and memoranda of a witness's oral statements are considered to be opinion work product. *See id.* at 399-400. Applying this reasoning, one federal district court distinguished between interrogatories seeking discoverable facts and those seeking attorney work product, finding a "distinction between asking the identity of persons with knowledge, which is clearly permissible, and asking the identity of persons contacted and/or interviewed during an investigation, which is not." *Commw. of Mass. v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 152 (D. Mass. 1986); *see also Strauss v. Credit Lyonnais*, 242 F.R.D. 199, 231 (E.D.N.Y. 2007) (same).

Similarly, in *Morgan v. City of New York,* No. 00 Civ. 9172, 2002 WL 1808233, at *3 (S.D.N.Y. Aug. 6, 2002), the court compelled plaintiff to answer an interrogatory requesting the identity of "every person whom Plaintiff believes has knowledge of any facts concerning Plaintiff's claims in this litigation[,]" but not an

interrogatory requiring plaintiff to "[i]dentify every person whom Plaintiff or her agents have contacted, interviewed or communicated with concerning Plaintiff's allegations in this case." *See also Seven Hanover Assocs., LLC v. Jones Lang LaSalle Americas, Inc.,* No. 04 Civ. 4143, 2005 WL 3358597, at *1 n.1 (S.D.N.Y. Dec. 7, 2005) ("Defendant is free to ask for the names of persons with knowledge of the facts, but it is not entitled, through plaintiffs, to the identification of who among such knowledgeable individuals may have been interviewed by plaintiffs' attorney.").

In this case, State Farm's investigation was conducted at the direction of counsel in response to litigation, both threatened and already filed, including pending state and federal criminal investigations. Mississippi Attorney General Hood filed suit against State Farm within two weeks of Katrina's landfall. There was no investigation that occurred independent of either the civil or criminal litigation. *See Shipes v. BIC, Corp.,* 154 F.R.D. 301, 305 (M.D. Ga. 1994) ("Documents which were produced in anticipation of litigating one case remain protected in a separate case, at least where the cases are closely related."); *accord Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 691 (M.D. Fla. 2005).

Furthermore, the Rigsbys have made no showing of substantial need or hardship prohibiting them from conducting their own investigation. Indeed, their requests, in part, demand that State Farm identify the documents the Rigsby's

admittedly stole from State Farm. Given the current injunction preventing State Farm from viewing such documents, the Rigsbys are clearly in the best position to identify them. "Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." *Upjohn Co.*, 449 U.S. at 396. Accordingly, the strategies, efforts, interviews and tactics used by State Farm and its attorneys in conducting any investigation are privileged not only under the attorney-client privilege but also under the work-product doctrine.

The Rigsbys have, in the past, attempted to circumvent these privileges by arguing that their admitted theft of thousands of State Farm documents was undertaken in an attempt to uncover alleged fraudulent acts. Thus, according to the Rigsbys, State Farm's investigation of their actions is not privileged. The Rigsbys' motivations, however, are irrelevant in determining whether State Farm's prior and subsequent investigation is protected. A party seeking to vitiate the attorney-client privilege or work-product protection based on the crime-fraud exception bears the heavy burden of establishing that the attorney's assistance was "obtained in furtherance of the criminal or fraudulent activity or was closely related to it." *Cox*, 17 F.3d at 1416. By definition, State Farm's investigation to determine the existence or extent of an alleged fraud, or the existence of a third-party's criminal conduct, does not fall within this crime-fraud exception. *See also* Ala. R. Evid. 502(d) & advisory comm. note (further explaining that "[t]he client clearly may consult the attorney about conduct, the legality of which is debatable, and still be

protected if it later proves to be criminal or fraudulent"). Accordingly, State Farm's privilege objections are fully warranted and should be sustained.

III. RECENT CASE LAW FURTHER SUPPORTS THIS COURT'S FINDING THAT THE RIGSBYS HAD NO LAWFUL JUSTIFICATION FOR THEIR ADMITTED THEFT OF THOUSANDS OF STATE FARM CONFIDENTIAL DOCUMENTS

The Rigsbys' principal justification for seeking voluminous discovery from State Farm is their misguided assertion that their admitted theft of thousands of State Farm documents was somehow justified because it allegedly served the "public interest" of exposing what they claimed was insurance fraud. As State Farm noted in its Opposition to Defendants' Motion to Compel, this Court has already rejected the Rigsbys' "public interest" argument, finding "no legal excuse for defendants' violating their employment agreements in the name of the public interest in helping with law enforcement." (Dkt. 60 at 10). The Rigsbys reprised their "public interest" argument for the Eleventh Circuit, which similarly rejected it. *See E.A. Renfroe & Co. v. Moran*, 249 F. App'x 88, 92-93 (11th Cir. 2007) (per curiam).

While State Farm's Opposition to the Rigbsys' Motion to Compel and Motion for a Protective Order was pending in this action (Dkt. 26), three other federal district courts have also implicitly rejected the Rigsbys' "public interest" argument. In *McIntosh v. State Farm Fire & Casualty Co.*, No. 1:06-cv-1080-LTS-RHW, 2008 WL 941640 (S.D. Miss. Apr. 4, 2008) (Senter, J.) ("*McIntosh*

Opinion"),[2] State Farm argued, *inter alia*, that the attorneys and the law firms associated with the former Scruggs Katrina Group ("SKG") and the Katrina Litigation Group ("KLG")[3] should be disqualified for their highly unethical behavior in both using the Rigsbys to illicitly obtain thousands of State Farm confidential documents and hiring the Rigsbys to serve as highly paid sham "litigation consultants." The SKG/KLG lawyers countered that the Rigsbys' conduct was justified because they were acting in the public interest by uncovering what they believed was insurance fraud. Although Judge Senter ultimately disqualified the SKG lawyers based on the sham payments to the Rigsbys (*McIntosh* Opinion at 2), the court implicitly rejected the public interest argument, holding that both the pilfered documents and the Rigsbys' testimony had to be excluded from evidence:

> The Rigsby sisters will be disqualified as witnesses in any actions now pending on this Court's docket against State Farm or Renfroe in which the SKG or the KLG has represented the plaintiffs, and any documents supplied by the Rigsbys sisters to the SKG or the KLG or its associates shall also be excluded from evidence unless the plaintiffs can show that the documents were obtained through ordinary methods of discovery.

2008 WL 941640, at *3; (*McIntosh* Opinion at 3; *see also McIntosh* Order at 1.)

[2] A Copy of the *McIntosh* Memorandum Opinion is attached as Exhibit 1. A Copy of the Disqualification Order is attached as Exhibit 2.

[3] On November 28, 2007, Scruggs, and two of his partners, David Zachary Scruggs and Sidney A. Backstrom, were indicted for conspiracy to bribe a judge. They subsequently withdrew from the *McIntosh* case and the SKG. After Scruggs's withdrawal, the SKG reformed itself as the KLG. Scruggs subsequently pleaded guilty to conspiracy to bribe a judge and is awaiting sentencing.

Two other federal district courts have expressly adopted Judge Senter's ruling in *McIntosh*, holding that: (i) the SKG/KLG lawyers are disqualified as counsel; (ii) the Rigsbys are disqualified as witnesses; and (iii) the pilfered documents are excluded from evidence. *See* April 11, 2008 Order and Reasons Granting Defendant State Farm Fire and Casualty Company's Motion to Disqualify, in *Kreeger v. State Farm Fire & Cas. Co*., No. 1:07-cv-1134-HSO-RHW, 2008 WL 1745197 (S.D. Miss. Apr. 11, 2008) (Ozerden, J.) (Ex. 3); April 16, 2008 Order in *Shows v. State Farm Mut. Auto. Ins. Co*., No. 1:07-cv-00709-WHB-LRA (S.D. Miss. filed June 20, 2007) (Barbour, J.) (Ex. 4).

IV. THE RIGSBYS' DEMAND FOR SANCTIONS IS FRIVOLOUS

Defendants invoke Federal Rules of Civil Procedure 30(d)(2) and 37(a)(5) and request that the Court "award the fees and costs" associated with their motion due to "the improper instructions not to answer given by State Farm's counsel to these witnesses." (Doc. 321 ¶ 10.) The text of these rules makes it clear, however, that sanctions are inappropriate. Although it is true that Rule 30(c)(2) limits counsel's authority to instruct a deponent not to answer a question, it specifically provides that counsel may instruct a deponent not to answer "when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Similarly, Fed. R. Civ. P. 37(a)(5) specifies that a court "*must not* order th[e] payment [of sanctions] if . . . the opposing party's non-disclosure, response, or objection was substantially justified." (emphasis added).

In this case, counsel's instruction not to answer questions regarding State Farm's investigation of the Rigsbys' allegations was a proper assertion of the attorney-client privilege. (*See* Dep. of D. Randel, at 113:22; Dep. of J. Deganhart at 77:23.) Although "such conduct is *generally* inappropriate . . . [c]ounsel may direct the witness not to answer a deposition . . . 'when necessary to preserve a privilege[.]'" *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555, 557 (S.D.N.Y. 1994) (citation omitted) (emphasis added). Moreover, counsel's instruction to Mr. Deganhart to delay the review of certain documents pending a clarification from this Court was substantially justified. The existence of substantially justified dispute precludes sanctions as a matter of law. *See Mapes v. Wellington Capital Group*, No. 8:07CV77, 2008 WL 624471, at *4 (D. Neb. Mar. 4, 2008) (explaining that even in cases where the party loses, sanctions are inappropriate where "'the dispute over discovery between the parties is genuine'" (citing Fed. R. Civ. P. 37(a)(4) 1970 advisory comm. note)).

V. CONCLUSION

For these reasons, the Rigsbys' Motion to Compel and for Sanctions should be denied in its entirety.

RESPECTFULLY SUBMITTED this the 3rd day of June, 2008.

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CERTIFICATE OF SERVICE

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