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

THOMAS C. and PAMELA MCINTOSH **PLAINTIFFS**

versus **Civil Action No. 1:06cv1080-LTS-RHW**

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

PLAINTIFFS' MOTION *IN LIMINE* DIRECTED TOWARD COMMENTING ON THE MCINTOSHES' RECEIPT OF GRANT MONEY

Plaintiffs, THOMAS C. and PAMELA MCINTOSH, through the undersigned counsel, hereby move the Court for entry of an order, *in limine,* to preclude the Defendants' counsel from commenting on or eliciting testimony about the McIntoshes' receipt of grant money for hurricane damage to their residence.

The McIntoshes anticipate that counsel for Defendants may attempt at trial to comment on or elicit testimony about the fact that the McIntoshes received a homeowner's grant for hurricane damage from the State of Mississippi. Should the jury award the McIntoshes damages for wind damage to the dwelling, the terms of the grant require the McIntoshes to reimburse the grant program. Therefore, the damages awarded by the jury cannot be reduced by the amount of the grant.

Further, the "collateral source rule" provides that defendants may not benefit from payments to the plaintiff by third parties. Guthrie v. J.C. Penney Co., 803 F.2d 202, 209 (5th Cir. 1986) (citing Bourque v. Diamond M. Drilling Co., 623 F.2d 351 (5th Cir. 1980). "The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from

other sources of compensation that are independent of (or collateral to) the tortfeasor." Trico Marine Assets Inc. v. Diamond B Marine Servs., 332 F.3d 779, 794 (5th Cir. 2003). Under the collateral source rule, State Farm cannot use the McIntoshes' grant payment to offset or reduce its liability in this case.

Any argument or statements concerning the grant payment, therefore, is irrelevant to the issues involved in the currently pending matter, and are, as a result, inadmissible. Fed R. Evid. 401 and 402. *Abramson v. Florida Gas Transmission Co.*, 908 F. Supp. 1376 (E.D. La. 1995) (irrelevant evidence is inadmissible); *Williams v. Board of Regents of the University System of Ga.*, 629 F. 2d 993 (5th Cir. 1980) (to be admissible, evidence must be relevant). Moreover, any statements or arguments regarding the grant payment will merely confuse the jury as to the issues to be decided. These arguments or statements may elicit negative feelings concerning Mr. and Mrs. McIntosh's entitlement to additional insurance proceeds, and will result in prejudice to Mr. and Mrs. McIntosh that cannot be cured. *See* Ballou .v Henri Studios, Inc., 656 F. 2d 1147 (5th Cir. 1981). (otherwise relevant evidence is inadmissible if it fails the balancing test under Fed. R. Evid. 403 so that its probative value is substantially outweighed by the danger of unfair prejudice). Any possible relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the possibility that the jury will be misled, so that any such statements should be precluded.

WHEREFORE, Mr. and Mrs. McIntosh respectfully request that this Court grant their motion and enter an order, *in limine*, precluding Defendants from commenting on and eliciting testimony regarding the McIntoshes' receipt of grant money, and providing such other and further relief as this Court deems just and appropriate.

THOMAS C. and PAMELA MCINTOSH,
PLAINTIFFS

By: */s/ Tina L. Nicholson*

TINA L. NICHOLSON (MS Bar No. 99643)
MERLIN LAW GROUP, P.A.
368 Courthouse Road, Suite C
Gulfport, Mississippi 39507
Telephone: (228) 604-1175
Facsimile: (228) 604-1176
Email: tnicholson@merlinlawgroup.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record in this case.

/s/ Tina L. Nicholson

TINA L. NICHOLSON (MS Bar No. 99643)
MERLIN LAW GROUP, P.A.
368 Courthouse Road, Suite C
Gulfport, Mississippi 39507
Telephone: (228) 604-1175
Facsimile: (228) 604-1176
Email: tnicholson@merlinlawgroup.com
Attorney for Plaintiffs

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

THOMAS C. and PAMELA MCINTOSH **PLAINTIFFS**

versus **Civil Action No. 1:06cv1080-LTS-RHW**

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

PLAINTIFFS' MOTION *IN LIMINE* DIRECTED TOWARD COMMENTING ON THE ABSENCE OF WITNESSES

Plaintiffs, THOMAS C. and PAMELA MCINTOSH. ("Mr. and Mrs. McIntosh"), through the undersigned counsel, hereby move the Court for entry of an order, *in limine,* to preclude the Defendants from having their counsel comment on the absence of certain witnesses from trial, or their failure to testify. As grounds for this motion, Mr. and Mrs. McIntosh state as follows:

Mr. and Mrs. McIntosh anticipate that counsel for Defendants may attempt, at trial, to comment on the absence of certain witnesses, their failure to offer testimony, and the reasons for such absence.

With respect to commenting on the absence of witnesses at trial, such comment is inappropriate and should not be allowed in this case under any circumstances. The only possible way such comment could be allowed is under the so-called "missing witness rule", developed by the United States Supreme Court a century ago. This rule states: "If a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Walls v. Armour Pharmaceutical Co.,* 832 F. Supp. 1505 (M.D. Fla. 1993), *aff'd in part, rev'd in part on other grounds,* 53 F.3d 1184. The *Walls* court acknowledged that the Federal Rules of Evidence were very different at the time when the Supreme Court "embraced" this rule. *Id. citing Jones v. Otis Elevator Co.,* 861 F.2d 655 (11th Cir. 1988). However, in

Herbert v. Walmart Stores, Inc., that court concluded that the rule "has no place in federal trials conducted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure." 911 F.2d 1044 (5th Cir. 1990). Accordingly, since the "missing witness rule" is considered antiquated, it should not be applied in the instant case. Moreover, the rule does not apply in this case because Defendants have equal opportunity to subpoena any witness. Defendants failure to do so preclude them from commenting on any such witness' absence.

Significantly, any argument or statements concerning these issues are irrelevant to the issues involved in the currently pending matter, and are, as a result, inadmissible. Fed R. Evid. 401 and 402. *Abramson v. Florida Gas Transmission Co.,* 908 F. Supp. 1376 (E.D. La. 1995) (irrelevant evidence is inadmissible); *Williams v. Board of Regents of the University System of Ga.*, 629 F. 2d 993 (5th Cir. 1980) (to be admissible, evidence must be relevant). In this lawsuit, the jury will decide whether Mr. and Mrs. McIntosh may recover additional damages from Defendants following Hurricane Katrina. The question of what happened to certain documents or why Mr. and Mrs. McIntosh retained subsequent counsel has no bearing on the matter.

Moreover, any statements or arguments regarding these issues will merely confuse the jury as to the issues to be decided. These arguments or statements may elicit negative feelings concerning Mr. and Mrs. McIntosh's entitlement to additional insurance proceeds, and will result in prejudice to Mr. and Mrs. McIntosh that cannot be cured. *See Ballou .v Henri Studios, Inc.*, 656 F. 2d 1147 (5th Cir. 1981). (otherwise relevant evidence is inadmissible if it fails the balancing test under Fed. R. Evid. 403 so that its probative value is substantially outweighed by the danger of unfair prejudice). Any possible relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the possibility that the jury will be misled, so that any such statements should be precluded.

WHEREFORE, Mr. and Mrs. McIntosh respectfully request that this Court grant their motion and enter an order, *in limine,* precluding Defendants from commenting on the absence of

certain witnesses, and provide such other and further relief as this Court deems just and appropriate.

THOMAS C. and PAMELA MCINTOSH,
PLAINTIFFS

By: */s/ Tina L. Nicholson*

TINA L. NICHOLSON (MS Bar No. 99643)
MERLIN LAW GROUP, P.A.
368 Courthouse Road, Suite C
Gulfport, Mississippi 39507
Telephone: (228) 604-1175
Facsimile: (228) 604-1176
Email: tnicholson@merlinlawgroup.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 29th, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record in this case.

/s/ Tina L. Nicholson

TINA L. NICHOLSON (MS Bar No. 99643)
MERLIN LAW GROUP, P.A.
368 Courthouse Road, Suite C
Gulfport, Mississippi 39507
Telephone: (228) 604-1175
Facsimile: (228) 604-1176
Email: tnicholson@merlinlawgroup.com
Attorney for Plaintiffs

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

THOMAS C. and PAMELA MCINTOSH **PLAINTIFFS**

versus **Civil Action No. 1:06cv1080-LTS-RHW**

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

PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE ANY TESTIMONY, REFERENCE OR MENTION OF ALLEGED "STOLEN" DOCUMENTS OR THE DISQUALIFICATION OF PLAINTIFFS' FORMER COUNSEL

Plaintiffs, THOMAS C. and PAMELA MCINTOSH, through the undersigned counsel, hereby move the Court for entry of an order, *in limine*, to preclude the Defendants from any testimony, reference or mention of allegations that Cori Rigsby and/or Kerri Rigsby "stole" certain documents while they were adjusting claims for State Farm following Hurricane Katrina, as well as to preclude Defendants from eliciting any testimony, reference or mention of the disqualification of Plaintiffs' former counsel.

The McIntoshes anticipate that counsel for Defendants may attempt, at trial, to comment or allude to the fact that Defendants believe that Cori and/or Kerri Rigsby allegedly "stole" documents belonging to State Farm and/or their former employer, while they were working on the adjustment of Katrina claims in South Mississippi. It is also anticipated that the Defendants may attempt to allude to or introduce argument or statements concerning the disqualification of Mr. and Mrs. McIntosh's prior counsel at trial.

Significantly, any argument or statements concerning these issues are irrelevant to the issues involved in the currently pending matter, and are, as a result, inadmissible. Fed R. Evid. 401 and 402. *Abramson v. Florida Gas Transmission Co.*, 908 F. Supp. 1376 (E.D. La. 1995)

(irrelevant evidence is inadmissible); *Williams v. Board of Regents of the University System of Ga.,* 629 F. 2d 993 (5th Cir. 1980) (to be admissible, evidence must be relevant). In this lawsuit, the jury will decide whether Mr. and Mrs. McIntosh may recover additional damages from Defendants following Hurricane Katrina. The question of what happened to certain documents or why Mr. and Mrs. McIntosh retained subsequent counsel has no bearing on the matter.

Moreover, any statements or arguments regarding these issues will merely confuse the jury as to the issues to be decided. These arguments or statements may elicit negative feelings concerning Mr. and Mrs. McIntosh's entitlement to additional insurance proceeds, and will result in prejudice to Mr. and Mrs. McIntosh that cannot be cured. *See Ballou .v Henri Studios, Inc.,* 656 F. 2d 1147 (5th Cir. 1981). (otherwise relevant evidence is inadmissible if it fails the balancing test under Fed. R. Evid. 403 so that its probative value is substantially outweighed by the danger of unfair prejudice). Any possible relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the possibility that the jury will be misled, so that any such statements should be precluded.

WHEREFORE, Mr. and Mrs. McIntosh respectfully request that this Court grant their motion and enter an order, *in limine,* precluding Defendants from any testimony, reference or mention of any alleged "stolen" documents or disqualification of Plaintiffs' former counsel, and provide such other and further relief as this Court deems just and appropriate.

THOMAS C. and PAMELA MCINTOSH,
PLAINTIFFS

By: */s/ Tina L. Nicholson*

TINA L. NICHOLSON (MS Bar No. 99643)
MERLIN LAW GROUP, P.A.
368 Courthouse Road, Suite C
Gulfport, Mississippi 39507
Telephone: (228) 604-1175
Facsimile: (228) 604-1176
Email: tnicholson@merlinlawgroup.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August ____, 2008, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record in this case.

/s/ Tina L. Nicholson

TINA L. NICHOLSON (MS Bar No. 99643)
MERLIN LAW GROUP, P.A.
368 Courthouse Road, Suite C
Gulfport, Mississippi 39507
Telephone: (228) 604-1175
Facsimile: (228) 604-1176
Email: tnicholson@merlinlawgroup.com
Attorney for Plaintiffs