

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

THOMAS C. and PAMELA McINTOSH

PLAINTIFFS

VS

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

**STATE FARM FIRE & CASUALTY COMPANY,
FORENSIC ANALYSIS & ENGINEERING
CORPORATION, and E. A. RENFROE &
COMPANY, INC. and DOES 1 THROUGH 10**

DEFENDANTS

E. A. RENFROE & COMPANY, INC.’S RESPONSE TO PLAINTIFFS’ MOTION *IN LIMINE* DIRECTED TOWARD COMMENTING ON THE MCINTOSHES’ RECEIPT OF GRANT MONEY [DOCKET NO. 1294]

E. A. RENFROE & COMPANY, INC. (“Renfroe”) files this, its *Response to Plaintiffs’ Motion in Limine Directed Toward Commenting on the McIntoshes’ Receipt of Grant Money* [Docket No. 1294].

Plaintiffs have moved to preclude Defendants from commenting on or eliciting testimony regarding the Plaintiffs’ receipt of almost \$112,000¹ in Homeowner’s Grant funds from the State of Mississippi. They argue that Defendants may not reduce their liability by the amount of grant funds awarded to Plaintiffs to compensate them for their property loss, because (1) the subrogation agreement Plaintiffs executed as a condition of receiving grant funds would require them to pay over to the State of Mississippi any insurance proceeds they are awarded as a result of this lawsuit, and (2) the “collateral source doctrine” prohibits Defendants from benefiting from a third party’s payment to Plaintiffs for their losses. Plaintiffs argue that because a setoff is not permitted, the fact of the grant is irrelevant, and would be unduly prejudicial.

As a threshold matter, whether any kind of economic damages setoff against the grant funds is permissible in this case, and whether the “collateral source doctrine” should be applied with respect to the grant funds, is irrelevant to Renfroe. Plaintiffs are not seeking, and in fact,

¹ See Deposition of Pamela McIntosh, August 21, 2008 at p. 67-68 [Ex. A].

cannot seek, damages from Renfroe based on alleged losses/damage to their real property under Plaintiffs' insurance contract with State Farm. Rather, Plaintiffs seek to recover damages from Renfroe on the separate bases set out in the "claims" section of the pretrial order.² Therefore, any recovery from Renfroe would not compensate Plaintiffs for the same loss as the grant, and is presumably not covered by the language of the subrogation agreement executed by Plaintiffs in favor of the State of Mississippi.

Moreover, the subrogation agreement itself sufficiently alleviates the potential for prejudice that Plaintiffs claim "cannot be cured" if the jury is made aware of the grant funds received by Plaintiffs. There is no danger that the jury will believe that Plaintiffs will reap a windfall if they are awarded additional damages for their property loss, as long as the jury is properly instructed that Plaintiffs would not retain a double recovery because of the subrogation agreement.

Furthermore, the fact that Plaintiffs received the grant is highly relevant to several of Renfroe's defenses in this action, particularly in the area of *non-economic* damages. Plaintiffs seek "compensatory damages for economic and non-economic damages suffered ... as a proximate result [of] the denial of coverage."³ They claim they are entitled to "consequential damages, including but not limited to the amounts Plaintiffs expended or lost in trying to subsist without insurance benefits since August 29, 2005."⁴ Plaintiffs also apparently intend to claim they are entitled to damages for Renfroe's intentional and negligent infliction of emotional distress against them.⁵ Clearly, the Plaintiffs' receipt of substantial grant funds following the

² See submitted draft of Pretrial Order at Section 4.

³ See First Amended Complaint at ¶ 111(D) [Docket No. 194].

⁴ See *id.*

⁵ Plaintiffs have listed negligent/intentional infliction of emotional distress as a claim in their proposed Pretrial Order, to which Renfroe has objected, since the Plaintiffs did not specifically plead such a cause of action in their Amended Complaint, nor have they offered any medical evidence relating to any emotional distress claims in their Pretrial Order. Renfroe does not, by mentioning emotional distress in this Response, waive any of its arguments made elsewhere as to that claim.

hurricane is highly relevant to the question of whether they are entitled to such non-economic damages. Thus, Renfroe is entitled to rely on the fact and amount of the grant to rebut or negate any factual evidence the Plaintiffs might offer that they suffered mental anguish or other consequential damages as a result of financial hardship after they received the grant funds. The relevance of the grant funds in this context is obvious and clearly outweighs any potential for prejudice, which would be effectively cured by an instruction regarding the operation of the Subrogation Agreement.

WHEREFORE, PREMISES CONSIDERED, Renfroe respectfully requests that the Plaintiffs' motion in limine related to their receipt of a grant from the Mississippi Development Authority be denied.

THIS, the 4th day of September, 2008.

Respectfully submitted,

E. A. RENFROE & COMPANY, INC.

BY: s/ H. Hunter Twiford, III
H. Hunter Twiford, III
One of its Attorneys

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CERTIFICATE OF SERVICE

I, the undersigned H. Hunter Twiford, III, McGlinchey Stafford PLLC, hereby certify that on this day, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to all counsel of record.

THIS, the 4th day of September, 2008.

s/ H. Hunter Twiford, III

H. HUNTER TWIFORD, III

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1 from 2003?

2 A. Thereabout.

3 Q. Okay. Have there been any appraisals
4 performed on the house since Hurricane Katrina
5 either in its unrepaired state or in its current
6 state?

7 A. Not that I can recall.

8 Q. In the interrogatory answers that were
9 discussed somewhat yesterday that -- where you and
10 your husband answered some questions, we asked
11 about SBA loans, MDA grants. And there is an
12 answer to that saying that you and Mr. McIntosh
13 applied for an MDA grant and received \$111,898.65.
14 And I'm not asking you to remember that exact
15 amount. But that is correct, is it not, that
16 y'all applied for and received an MDA grant?

17 A. That is correct, yes.

18 Q. Who prepared the paperwork or handled
19 the paperwork for the MDA grant?

20 A. I did.

21 Q. Okay. Did you maintain a copy of that
22 paperwork?

23 A. I feel that I did.

24 Q. Okay. Is that -- would that be kept in
25 your file on the house or in a separate file, or

1 do you know how you maintained that?

2 A. Probably a separate.

3 Q. I don't know how you -- my wife is the
4 bookkeeper in our house, too. Everything is
5 alphabetical. How do you organize your files?

6 A. Not alphabetical.

7 Q. Okay.

8 A. I'm not quite that organized anymore.

9 Q. Well, I'll tell her. She'll be proud.
10 She's got somebody beat.

11 The MDA grant, though, the paperwork
12 that you filled out, the application process, you
13 feel like you would have saved that in a file at
14 the house?

15 A. I feel that I would have.

16 Q. Okay. And also in the answers to
17 interrogatories, it indicates that you and Mr.
18 McIntosh applied for an SBA loan in the amount of
19 \$433,900. It just says applied for. Have y'all
20 received that loan?

21 A. Yes.

22 Q. All right. And was it in that amount?

23 A. The best that I can recall, it was
24 433,000.

25 Q. Okay. The -- who handled the