

**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 ABSENCE OF WITNESSES  
[DOCKET NO. 1293]**

E. A. RENFROE & COMPANY, INC. (“Renfroe”) files this, its *Response to Plaintiffs’ Motion in Limine Directed Toward Commenting on the Absence of Witnesses* [Docket No. 1293].

Plaintiffs have filed a motion in limine, seeking to preclude counsel for either of the Defendants from commenting on the absence of certain unnamed witnesses from trial, or their failure to testify. Plaintiffs claim that the “missing witness rule” is both antiquated and inapplicable, that the absence of certain witnesses is irrelevant, and that any reference to missing witnesses would be unduly prejudicial.

As an initial matter, Plaintiffs do not identify the anticipated absent witnesses who are the subject of their motion. On this basis alone, the motion should be denied, because this Court cannot conduct the necessary analysis to determine whether the missing witness rule might apply, without knowing who the witnesses are, and cannot rule in a vacuum that any reference to any absent witness would be impermissible. *See, e.g., Rivera v. Salazar*, 2008 WL 2966006, \*4 (S.D. Tex. July 30, 2008) (denying motion to exclude reference to absent witnesses where the motion did not identify the witnesses).<sup>1</sup>

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<sup>1</sup> The district court in *Rivera* noted that although the Fifth Circuit has described the “missing witness rule” as having no place in the context of the Federal Rules of Civil Procedure (citing *Herbert v. Wal Mart*

Nonetheless, based on language in Plaintiffs' motion alluding to former counsel and stolen documents, Renfroe could assume that Plaintiffs are referring to Cori and Kerri Rigsby. If that is the case, Renfroe represents to the Court that, as to those absent witnesses only, Renfroe does not intend to invoke the missing witness rule so as to draw an adverse inference from their absence at trial. Renfroe, however, reserves the right to make such reference to Cori or Kerri Rigsby as may be necessary to oppose any effort by Plaintiffs to somehow rely on the Rigsbys' testimony or statements, or on any excluded document of which a missing witness may have knowledge, despite the orders of this Court to the contrary.

This Court's Order dated April 4, 2008 [Docket No. 1173] disqualified both Cori and Kerri Rigsby as witnesses in this action. The April 4 Order also provided that any documents supplied by the Rigsby sisters to the SKG or the KLG shall be excluded from evidence, unless the Plaintiffs can show that the documents were obtained through ordinary methods of discovery. Consistent with that Order, on April 14, 2008 [Docket No. 1080] this Court granted Renfroe's *Motion in Limine No. 1 to Exclude Use of or Reference to Exhibit "C" to First Amended Complaint* (the "sticky note document") [Docket No. 1030], and denied without prejudice the Plaintiffs' *Motion to Use "Exhibit C" to First Amended Complaint* [Docket No 540], subject to the same qualification. Although the Plaintiffs have listed the "sticky note document" in their draft pretrial order provided to the Defendants, the Plaintiffs have not demonstrated that the document has been obtained through ordinary methods of discovery; therefore, it is and continues to be excluded from evidence.

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*Stores, Inc.*, 911 F. 2d 1044, 1046 (5<sup>th</sup> Cir. 1990)), the Fifth Circuit went on to say in *Herbert* that "the rule has so frequently been either applied or referred to in dicta in this circuit since, as well as before, the adoption of the Federal Rules of Evidence, that it might be considered the law of the circuit." *Id.* at \*4. Deciding whether to apply the rule in *Rivera*, the district court noted that a party is not equally available merely because either party could compel his or her presence (as the plaintiffs here have alleged), but that other factors, "including relationship to the parties," may place such a witness particularly under one side's control." *Id.*

At this time, and based on the current state of the record, Renfroe does not anticipate that it will attempt to introduce any testimony by either Cori or Kerri Rigsby at trial. Nor does Renfroe intend, based on the current state of the record, to introduce or rely on any documents that were not otherwise obtained through ordinary discovery. Further, assuming neither the Rigsbys nor the previously excluded documents are referenced or relied upon by any other party in any way at trial, Renfroe does not intend to refer to the absence of the Rigsby sisters as witnesses or seek an inference from their absence.

That said, should Plaintiffs attempt, in any way, to rely on the testimony or statements of Cori or Kerri Rigsby at trial or on any of the document not otherwise obtained through ordinary discovery, Renfroe specifically reserves and should be granted the right to make whatever statements are necessary to oppose such reliance, whether before the Court or the jury. Similarly, should Plaintiffs attempt to introduce, make reference to or otherwise rely on the “sticky note document” or any other previously excluded document, Renfroe reserves the right to make whatever statements are necessary to oppose such reliance, including any necessary reference to Cori or Kerri Rigsby. Renfroe also reserves the right to respond as necessary to the introduction of or reference to the Rigsbys, the “sticky note document” or any other document not otherwise obtained through ordinary discovery by any party at trial.

WHEREFORE, PREMISES CONSIDERED, Renfroe respectfully requests that the Plaintiffs’ motion be denied in its entirety.

THIS, the 4<sup>th</sup> 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  
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H. HUNTER TWIFORD, III

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