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

ROBERT R. GAGNÉ **PLAINTIFF**

VERSUS **CIVIL ACTION NO.: 1:06-CV-00711-LTS-RHW**

STATE FARM FIRE AND CASUALTY COMPANY, and EXPONENT, INC., ET AL. **DEFENDANTS**

PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER DATED DECEMBER 18, 2008 DENYING PLAINTIFF'S MOTION TO COMPEL (EXPEDITED HEARING REQUESTED)

I. INTRODUCTION

Plaintiff, ROBERT R. GAGNÉ, through the undersigned attorney, hereby respectfully files this Motion asking the Court to reverse, in part, Judge Walker's Order (Doc. 476 - Exhibit A) dated December 18, 2008 and issue an order granting the Plaintiff the right to receive the following documentary evidence:

1. The contemporaneous meeting notes taken by the Team Manager (Steve Burke) assigned to Robert Gagné's homeowners (HO) claim that relate to how to typically handle a slab claim. This request is limited to those notes that were taken prior to October 25, 2005 when Mr. Burke was reassigned out of the South Mississippi Catastrophe area and relinquished his role as the Team Manager in charge of the Gagné homeowners claim. Specifically, Plaintiff is aware that notes from meetings conducted on October 4 & 5, 2005 are directly on point and should have been produced as part of State Farm's core discovery.

2. The recently discovered interim/draft/status Exponent engineering reports that were transmitted by Exponent to State Farm, the eventual final report, and any correspondence related

to the transmission of the drafts, revision of such drafts, or the rejection of such drafts (i.e., decision to not issue a report altogether) in the possession of State Farm.

Plaintiff filed a comprehensive Motion to Compel which was ultimately rejected by the Magistrate on December 18, 2008 as untimely under Local Rule 7.2.(2). The Magistrate's Order goes on to suggest that the Plaintiff speculates as to meaning of the existence of draft reports and their connection with his claim. Plaintiff respectfully suggests that the Magistrate's ultimate conclusion – that the draft reports are not related to Plaintiff's claim is a mistake of fact. It is Plaintiff's position that certain parts of the original Motion to Compel touch on evidence of such a probative and relevant nature to the case at bar that the interests of justice require these documents be exempted from the Magistrate's ruling and produced to the Plaintiff. Plaintiff avers that the granting of the relief requested will not require additional discovery or disrupt the scheduled April trial date in this matter.

Plaintiff requests the court to reconsider the Magistrates decision based on the following:

II. ARGUMENT

A. Applicable Legal Standards.

Under Rule 72(a) of the Federal Rules of Civil Procedure, this Court may modify or set aside any portions of the Magistrate's Order if it is clearly erroneous or contrary to law. See Fed. R.Civ.P.(72) (a). *Jones Search v Knostman*, 155 B.R. 699, 702 (S.D.Miss. 1993). A Magistrate's Judge's order is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." 14 James Wm. Moore et al.; *Moore's Federal Practice Sec.72.11(3rd Ed. 2006)*

B. The Magistrate's Ruling Erred as to the Following Facts

1. Request does not violate Local Rule 7.2

Local Rule 7.2(2) provides: Discovery motions must be filed sufficiently in advance of the discovery deadline so as to not affect the deadline. Plaintiff respectfully suggests that the granting of the requested relief does not violate Local Rule 7.2 in that it does not require the reopening of discovery or a re-setting of the Case Management Order. Plaintiff acknowledges not finding any case law interpreting the language in Local Rule 7.2(2) and its relationship with the Courts's duty to preserve and protect the interests of justice. Plaintiff contends that at some point, the probative nature of the evidence would require a looser interpretation of the mandates of Local Rule 7.2(2) particularly when the relief requested will not disturb the Case Management Order. Plaintiff respectfully suggests that when objective (non-testimonial) evidence is discovered that contradicts testimonial evidence, the Court should be hesitant to exclude that evidence under an interpretation of Local Rule 7.2(2).

The Burke Notes are Relevant Objective Evidence that the Finder of Fact is Entitled to Consider

Plaintiff and State Farm have a factual dispute as to circumstances that surrounded the denial of the Gagné homeowners claim. State Farm primarily relies on the testimonial evidence of the Team Manager who took over for Steve Burke on October 25, 2005 – Kirk Angelle and the *absence* of incriminating evidence in their claims file. They also rely on the testimony of State Farm and Exponent personnel to paint a picture of an objective independent search for the cause of loss and a ratification of their original denial via an Exponent generated engineering report. Plaintiff counters with testimonial evidence of State Farm personnel (David Haddock, Dave Randel & Steve Burke), Robert Gagné and objective evidence of communications prior to the Gagné denial that dealt with how to typically deal with slab claims,what the cause of loss was on the Gagné property and communications about how to and whether to write and/or issue

Exponent generated engineering reports.

State Farm asserted in their Motion for Protective Order associated with the Steve Burke deposition that "Mr. Burke ordered payment of policy limits under Plaintiff's flood policy, but was ***not*** responsible for Plaintiff's homeowner's claim. (emphasis in original). See Exhibit B. Steve Burke's testimony was not consistent with this assertion. He testified numerous times that he was the Team Manager who supervised Rachael Savoy. That she was the lone adjuster assigned to the Gagné homeowner's claim. That he was her lone supervisor until October 25, 2005 when he was reassigned outside the CAT area. That he had authority to authorize substantial payments under the Gagné homeowner's policy. See Exhibit C, Burke deposition pg. 37:3 – pg. 38:12; pg. 41:13-15; pg. 42:3-6; pg 47:12; & pg. 48:4.

The Court has already ruled in the case at bar that "the October 4th meetings dealt with general issues of how to adjust slab claims. And that the Gagné[s] (sic) had a slab and, therefore, some of those discussions, at least, would've been relevant to the Gagné claim." See Exhibit C, Burke at pgs. 60-63. Plaintiff simply asserts the notes taken by the Team Manager on the Gagné claim are discoverable and should have been provided to him. State Farm's argument in their original response that Mr. Burke suffers from a learning disability and the notes are of dubious value – is an argument for a trial and not one that should support a denial of the discovery sought. See Exhibit D [DOC 470] at last paragraph of page 5 and finished on pg. 6.

Mr. Gagne's homeowner's claim was denied on November 11, 2005. There is no activity in the claims file for the 48 days preceding the denial.[1] See Exhibit E, HO Activity Log. Steve Burke was the the Team Manager in charge of the claim for 31 of those days. Plaintiff respectfully submits that his impressions and understanding as to how he was to treat slab claims, such as the Gagné claim (and the contemporaneous notes documenting it) are important

1 Except two erroneous entries unrelated to the Gagné claim.

pieces of evidence that the Court should err on the side making sure are available to the finder of fact. These notes show one person's understanding (a key person on the Gagné claim) of how he was to deal with claims such as Robert Gagne's claim.[2]

The Sworn Testimony Denying the Existence of Draft/Interim/Status Reports and the Subsequent Discovery That They Do in Fact Exist - Sheds Light on State Farm's and Exponent's Defenses that Should be Presented to the Trier of Fact.

Plaintiff asked key witnesses and State Farm, under oath whether draft engineering reports existed. Plaintiff was consistently told no. State Farm denied they existed. John Osteraas, Exponent's Vice President in charge of the Katrina engineering assignments and the Senior Engineer who signed off on final engineering reports, denied they existed. Joanna Meldrum, who transmitted the one draft report we have documented, denied they existed. Yet, they do exist. Counsel for Exponent has confirmed that approximately ten non-final reports were transmitted to State Farm. See Exhibit G, Ficenec/Hearin emails.[3] Exponent has asserted they do not involve slab claims and they do not involve claims inspected by the same engineering team that inspected the Gagné property. Exponent has not been able to clarify whether any of the non-final reports involved homes in South Diamondhead, whether reports were ultimately changed as a result of this process and has not been able to clarify why their witnesses have testified that such a process did not existed. If State Farm suggested language changes on another South Diamondhead report prepared by Exponent, such language was changed, and that language ended up in the Gagné report – reasonable minds would have to conclude such activity is probative on key issues associated with the Gagné claim. Plaintiff respectfully suggests that such circumstances (multiple instances of testimony denying the process took place) give just

2 Burke's notes contain references such as “denials,-, start doing now” & “no need for engineer.” See Exhibit F, Dave Randal deposition in Guice v. State Farm at pg. 249:10-14.

3 Counsel for the Plaintiff and counsel for Exponent conferred about these emails and agreed to use a redacted version of one of the emails due to subject matter containing privileged and non-germane materials. The parties agreed to the redaction. Plaintiff does not mean to imply that counsel for Exponent will not take issue with any of the argument proffered as to what these exchanges should mean to the Court or ultimately to a trier of fact.

cause for the request for these documents to be made at this time.

A major component of State Farm's and Exponent's defenses is that they were two independent entities who did not confer at all about the substance of engineering reports prior to issuing them. That Exponent's reports were not influenced by State Farm and therefore they can ratify or justify State Farm's decision to deny the Gagné claim. In fact, upon receipt of Exponent's report, State Farm again denied the Gagné claim and dug their heels in as to their position that his home in South Diamondhead received no wind damage at all and was in pristine condition when it was floated off of its raised pilings nearly 17 feet above mean sea level. Plaintiff contends that such a decision lacked an arguable basis and was not supported by a proper investigation of his claim.

C. New Evidence

a. Objective Evidence Contradicts the Testimony of Joanna Meldrum, John Osteraas, Exponent, Inc. and State Farm Fire & Casualty Company

Plaintiff recently came into possession of a series of emails that indicate the corporate representatives and key witnesses have been misleading Mr. Gagné as to the level of communication about the substance of Exponent generated engineering reports. State Farm supplemented its core discovery on December 11, 2008, after the discovery cut-off with the sequence of emails. The supplementation does not address where the home in question was located and does not address the other draft reports. It simply asserts that the claim referenced is not the Gagné claim and concludes it therefore has no relation to the Gagné claim.[4] See Exhibit H, State Farm Supplement to Core Discovery. On October 19, 2005, Joanna Meldrum of Exponent, Inc. forwarded a "status" report to Mark Wilcox at State Farm. Mark Wilcox then

4 Plaintiff initially produced the email sequence in late October (10/27/08) but was unable to ascertain the relevance during until the exchange of emails with Exponent's counsel on November 12 & 13, 2008. Discovery concluded the very next day on November 14, 2008.

forwarded the email to David Haddock and Sandy Schmidt. David Haddock then forwarded it to Lecky King with the instructions "Please review this report from Exponent." Lecky King apparently reviews the engineering report and emails Mark Wilcox, David Haddock and Dave Randel as follows: "I have some great concerns... Look at the pictures in the file. There is little wind damage to the roof." Clearly Exponent is forwarding drafts to State Farm that are being reviewed substantively by State Farm in October of 2005. (Exhibit J) What happens after they are reviewed by State Farm is unclear, but the evidence that these draft reports were being exchanged is relevant to the Gagné claim. It sheds important light upon State Farm's and Exponent's defenses, and raises significant issues as to the credibility of key witnesses. It also may qualify as other acts evidence with a sufficient nexus to the harm Plaintiff alleges as to be admissible in a punitive damages phase of this matter should the Court ultimately determine that the Plaintiff is entitled to a punitive damages claim instruction.

This objective evidence completely contradicts the tenor of the testimony of John Osteraas, Joanna Meldrum, and State Farm given under oath in the case at bar. This testimony is, at best, misleading. To not allow this limited discovery is to reward the wrongdoer and impinge upon Plaintiff's right to confront and cross-examine key defense witnesses. The fact that there are multiple draft reports going back and forth between the two defendants is relevant because it tends to make it less likely that the testimony denying the existence of such a process was mere oversight.

2. State Farm, Under Oath, Denied the Transfer of Draft Engineering Reports between State Farm and Exponent, Inc.

State Farm's original 30(b)(6) representative denies draft engineering reports or information going back and forth between Exponent and State Farm prior to issuing a final

engineering report:

> Mr. Hearin
> Q Okay, based upon your knowledge of the Gagne claim and your involvement in the Gagne claims, in particular your involvement in complying with the complaint to the Mississippi Insurance Commission, to the best of your knowledge, was State Farm aware of the findings of Calvin Thomas, when he did an inspection on October 6, 2005?
> A. To the extent we had the report that was issued by Exponent following his inspection, we were. But did we know everything that Calvin Thomas compiled, only if it was sent to us.
> Q. So you were unable to tell either way?
> A I think we were aware of Calvin Thomas' field work? Well were were, because we got a copy of the report that, in essence, was based on his field work. So we were aware to that extent.
> **Q. Would there be anything transmitted to State Farm, other than the report, from the engineering firm?**
> **A. No**
> **Q Okay**
> **A No**
> (Emphasis added)

> Q As a practice, when you were working a claim file with, for example, Exponent, would you forward them internal State Farm documents that would, \you know, perhaps related to weather conditions or storm surge, or do--do you recall?
> A No I wouldn't
> Q You wouldn't?
> A I would not
> Q Okay. And how --what would you--would be relying on them to make those determinations as to those factors and their causation in the -- their effect on causation?
> A Yes I would expect them to do the research that would allow them to come to an opinion, and that would be part of the research that I would expect them to do independently.
> **Q Okay And would there be any back and forth between yourself and the engineering firm, a third-party engineering firm, during the evaluation of the claim prior to the report being issued?**
> **A. No, No.**[5]

5 Gagne v State Farm, Deposition of State Farm, July 26, 2007, 76:11-77:8; 79:23-80:18

(Exhibit J)

3. John Osteraas, Under Oath, Denied that Exponent, Inc. Provided Draft Engineering Reports to State Farm

[being asked about the November 30, 2005 report]

> Mr. Hearin
> Q The report was finalized prior to November 11.
> A The report was essentially complete prior to November 11.
> Q Was it finalized?
> A It was not finalized, because it --if it had been finalized, it -- it would have been out the door.
> Q Had the report been provided to State Farm as of November 11, 2005 --
>
> Mr. Foster: Objection; asked and answered
> Q-- whether in final form or in substantially completed?
>
> **A We -- did not provide drafts any of our reports to State Farm.** (emphasis added)[6]

(Exhibit K)

4. Joanna Meldrum of Exponent, Inc., Under Oath, denied Access or Control Over Draft Reports

> Q: In your role, were you privy to draft reports?
>
> Mr. Williams: Objection to form.
>
> A. **No**[7]

(Exhibit L)

This is her testimony, under oath, even though she is the very person who forwarded the draft report that ended up on King's desk and apparently did this approximately ten times. See Exhibit G, Ficenec/Hearin emails. The current ruling would allow the misleading testimony to

6 Gagne v State Farm, Deposition of John Osteraas, June 28, 2007,82:17; 83:7
7 Gagne v State Farm, Deposition of Joanna Meldrum, June 19, 2008, *71: 11-14*

go uncontroverted and would result in a harsh injustice to Plaintiff's rights to a fair trial.

CONCLUSION

Plaintiff's home was reduced to a slab by Hurricane Katrina. State Farm's own activity log entries indicate that a field adjuster inspected the home on September 17, 2005 and requested an engineering inspection "to determine wind versus flood damages."[8] See Exhibit E, HO Activity Log. The official Request for an Engineer annotated "trees twisted" in support of the request. See Exhibit M, Request for Engineer by Gagné HO adjuster Rachael Savoy. That inspection occurred on October 6, 2005. The inspecting engineer concluded in his field notes that "wind caused the catastrophic loss." [9] See Exhibit N, Inspecting Engineer's field notes. On November 11, 2005 State Farm canceled the engineering assignment, denied the wind claim, and sought the investigative materials from Exponent.[10] See Exhibit O, Engineering Assignment Cancellation. The Homeowners activity log reflects no activity from September 25, 2005 until the cancellation/denial on November 11, 2005. See Exhibit E. The claims file does not indicate what transpired during that forty-six (46) day period that provided a basis for the outright denial of the claim.[11] Steve Burke was the Team Manager who supervised Racheal Savoy – the lone adjuster assigned to the Gagné HO claim. He acted in this capacity until he left the CAT site on October 25, 2005. Exponent received a memorandum from State Farm to "not write the report" and "forward the investigative materials" on November 11, 2005. Exponent did not forward the investigative materials (Calvin Thomas' field notes concluding loss due to wind) but instead issued an engineering report 19 days later that ratified State Farm's denial and prompted a second denial letter from State Farm. That report underreported the likelihood of wind damage and gave

8 Doc 365-2
9 Doc 401-10
10 Doc 401-11
11 Doc 365-5

State Farm purported objective evidence to support their original denial. See Exhibit P, Excerpt from Exponent 30(B)(6) deposition.

Outside the claims file, during this key time period, a series of meetings and communications were occurring at State Farm. It is undisputed that some of those meetings and communications involved how to handle all slab claims where a report had not yet issued (including the Gagné claim). The Court has already ruled that such meetings are relevant to the Gagné claim. See Exhibit C. Just recently, Plaintiff was ultimately able to confirm that Exponent, Inc. personnel and State Farm personnel were exchanging draft reports. The one "draft" submission we are privy to was sent from Joanna Meldrum at Exponent, Inc. and ends up on the desk of Lecky King. Once on Ms. King's desk, Ms. King memorializes her displeasure with a finding of wind - indicating a substantive review of the report prior to its issuance. What happens after such exchanges is crucial evidence that bears on the key issues in this litigation. Plaintiff respectfully suggests that two entities do not exchange reports prior to them being finalized unless they are seeking feedback or collaboration.

Plaintiff suggests the foregoing requires this Court to modify the Magistrate's ruling and allow Plaintiff the right to review the Exponent generated draft reports, the accompanying correspondence, and the ultimate final reports to determine if these reviews affected the the content and/or issuance of final reports. Furthermore, Plaintiff alleges that Steve Burke's notes from meeting he attended that dealt with how to typically handle a claim such as the Gagné claim, should be ruled discoverable as well. See Exhibits Q & R, Plaintiff's discovery requests seeking the withheld information.

Respectfully submitted this 7th day of January, 2009.

Robert Gagné, Plaintiff

By: William F. Merlin, Jr.
William F. Merlin, Jr.
Attorney for Plaintiff
Ms. Bar # 102390
Merlin Law Group
777 S. Harbour Island Blvd., Ste 950
Tampa, FL 33602
(813) 229-1000
wmerlin@merlingroup.com

By: /S/ Jesse B. Hearin, III
Jesse B. Hearin, III, PHV
Attorney for Plaintiff
USDC, So. Dist. Bar # 44802
La. State Bar # 22422
1009 Carnation St. Ste E
Slidell, LA 70460
Tel: (985) 639-3377
Fax: (877) 821-8015
jbhearin@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Philip W. Thomas, Esq.
Philip W. Thomas, P.A.
P.O. Box 24464
Jackson, MS 39225-4464
pthomas@Thomasattorney.com
Counsel for Exponent

Wayne Williams, esquire
Webb Saunders & Williams, PLLC
363 North Broadway
Tupelo, MS 38804
Counsel for State Farm
wwilliam@webbsanders.com
Counsel for State Farm

/s/Jesse B. Hearin III, Esquire
Jesse B. Hearin, III, PHV
USDC So. Dist. Bar No.: 44802
1009 Carnation Street
Suite E
Slidell, LA 70460
Telephone: 985-639-3377
Facsimile: 877-821-8015
Jbhearin@gmail.com
Attorney for Plaintiff