

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

ROBERT R. GAGNÉ

PLAINTIFF

VS.

CASE NO.: 1:06CV711-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY, et al.

DEFENDANTS

**STATE FARM FIRE AND CASUALTY COMPANY'S REPLY
MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO
STRIKE PLAINTIFF'S "EVIDENCE" OF OUT-OF-STATE CONDUCT**

INTRODUCTION

State Farm Fire and Casualty Company ("State Farm Fire") respectfully submits this reply memorandum of law in further support of its motion to strike Plaintiff's purported "evidence" of dissimilar, out-of-state conduct. [Doc. 415.] Plaintiff fails to address the substantive arguments raised by State Farm Fire, falling back on the mantra that State Farm Fire's motion is "premature." [Doc. 484 at 1.] Indeed, after State Farm Fire filed the instant motion, this Court recently rejected the same argument in a Katrina case. *Payment v. State Farm Fire & Cas. Co.*, No. 1:07CV1003-LTS-RHW, 2008 WL 5381925, at *2 (S.D. Miss. Dec. 18, 2008) [Doc. 131] (Senter, J.), *corrected on other grounds* by Text Order (S.D. Miss. Dec. 18, 2008) (correcting inconsequential omission).

In *Payment*, the plaintiff made substantially similar arguments as Plaintiff here: that State Farm Fire's motion was "premature" because some evidence of out-of-state conduct might be admissible at trial and because the motion did not discuss specific documents or witnesses. *See Payment*, [Doc. 125 at 1-2.] This Court rejected the prematurity argument outright. "Plaintiff argues that State Farm's motion . . . concerning out-of-state conduct [is] premature. The Court disagrees. Once again, consistent with other rulings on these issues, this evidence is fraught with the danger of unfair prejudice, confusions of the issues, and misleading the jury." *Id.*

This Court should do the same in this case. Indeed, State Farm Fire's motion is more ripe for resolution than the motion in *Payment*. In this case, Plaintiff produced specific documents and witnesses of alleged out-of-state conduct, and State Farm Fire by the instant motion seeks to strike them. Ignoring the formidable obstacles to admitting evidence of out-of-state conduct, Plaintiff contends that State Farm Fire did "not identif[y] with particularity what documents [it] seek[s] excluded." [Doc. 484 at 2.] In fact, State Farm Fire meticulously enumerated each document and witness at issue. [Doc. 416 at 1-2.]

Rather than answer State Farm Fire's objections, Plaintiff requests "the opportunity to argue the

specifics of admissibility" later and prefers to wait until the middle of trial to resolve this motion [Doc. 484 at 4, 8-9], but Your Honor and Judge Ozerden have excluded evidence of out-of-state conduct upon State Farm Fire's motion prior to trial. *See Payment*, 2008 WL 5381925, at *2; *Fowler v. State Farm Fire & Cas. Co.*, No. 1:06CV489-HSO-RHW, 2008 WL 3050417, at *6-7 (S.D. Miss. July 25, 2008) (Ozerden, J.) [Doc. 372], *modified on other grounds, Fowler v. State Farm Fire & Cas. Co.*, No. 1:06CV489-HSO-RHW, 2008 WL 3992672 (S.D. Miss. Aug. 18, 2008) (Ozerden, J.) [Doc. 389]; *Huynh v. State Farm Fire & Cas. Co.*, No. 1:06CV1061-LTS-RHW, 2008 WL 80759, at *1-2 (S.D. Miss. Jan. 7, 2008) (Senter, J.) [Doc. 166]. Plaintiff already had his opportunity to respond, and his response is patently insufficient. State Farm Fire's motion should be granted in its entirety.

I. PLAINTIFF'S PURPORTED EVIDENCE OF OUT-OF-STATE CONDUCT IS INADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE

Plaintiff makes no attempt to defend a single, specific document or witness that State Farm Fire identified as inadmissible. Plaintiff's purported evidence is inadmissible under the Federal Rule of Evidence because it is irrelevant, *see* Fed. R. Evid. 401-402, and is "fraught with the danger of unfair prejudice, confusions of the issues, and misleading the jury." *Payment*, 2008 WL 5381925, at *2; *Fowler*, 2008 WL 3050417, at *6 (citing Fed. R. Evid. 403) ("Evidence of any such conduct, even during a second phase of trial, would not be relevant, and any probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."). On these grounds alone, this Court should grant State Farm Fire's motion in its entirety.

Plaintiff, however, plans to introduce evidence of out-of-state conduct by State Farm Fire and unrelated State Farm entities to prove an unidentified, "historical pattern of denying claims in their entirety during catastrophes." [Doc. 484 at 6; *see id.* at 7.] Yet, by failing to answer State Farm Fire's Rule 401 and 403 objections, Plaintiff has consequently foreclosed using evidence of out-of-state conduct to show an alleged "pattern and practice." While a pattern or "plan" is an exception to the

traditional rule barring improper character evidence, *see* Fed. R. Evid. 404(b), such evidence *remains* subject "to general strictures limiting admissibility such as Rule 402 and 403," lest "unduly prejudicial evidence might be introduced under Rule 404(b)." *Huddleston v. United States*, 485 U.S. 681, 688, 691 (1988). For these reasons, Judge Ozerden rejected the exact argument that Plaintiff makes here. In *Fowler*, State Farm Fire moved to exclude evidence of out-of-state conduct under both the Federal Rules of Evidence and federal constitutional principles, and the plaintiffs argued that they should be permitted to introduce such evidence to show a pattern and practice of fraudulent claims handling. *Fowler*, [Doc. 312 at 1, 25-26.] Judge Ozerden granted State Farm Fire's motion in its entirety under both constitutional and federal evidentiary grounds. *Fowler*, 2008 WL 3050417, at *6-7. The court rejected the plaintiffs' "pattern and practice" contention without comment.

Similarly, the plaintiff in *Payment* sought to introduce evidence of State Farm Fire's out-of-state conduct "to show a pattern and practice" in its "disposition of extraterritorial catastrophic loss claims." *Payment*, [Doc. 125 at 2.] This Court granted State Farm Fire's motion and implicitly rejected the plaintiff's "pattern and practice" argument out-of-hand. *See Payment*, 2008 WL 5381925, at *2. This Court should do the same in this case.

Furthermore, in *Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844 (S.D. Miss. 1990) *aff'd*, 936 F.2d 569 (5th Cir. 1991) (Table), the court held that evidence of denial of other insureds' claims "to prove defendants' alleged course of conduct" (*i.e.*, pattern and practice) was inadmissible because, among other reasons, such evidence "can not be considered at all probative on the issues presented in the cases at bar." *Id.* at 857-58. The court also barred the evidence because the plaintiffs failed to show how the others acts were "similar except, of course, to the extent that those claims were denied by [the insurer]." *Id.* at 858. Such is the case here.

Nor is Plaintiff's purported evidence of out-of-state conduct admissible as habit evidence. [Doc.

484 at 7-8.]¹ Judge Ozerden rejected the same argument involving the same documents and witnesses that are at issue in the underlying motion. The court was not "persuaded that the cases referenced by Plaintiffs are so numerous as to constitute habit or routine as those terms are contemplated by Federal Rule of Evidence 406." *Fowler*, 2008 WL 3050417, at *7. The Fifth Circuit held in a Hurricane Katrina case that "Rule 406's use of the term 'habit' suggests a 'regular response to a repeated specific situation' that has become 'semi-automatic.'" *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 442 (5th Cir. 2007) (quoting *Reyes v. Mo. Pac. R.R. Co.*, 589 F.2d 791, 794 (5th Cir. 1979)), *cert. denied* 76 U.S.L.W. 3375 (U.S. Apr. 14, 2008). Stated differently, "'habit' means 'a specific reaction to a specific set of stimuli that is reflexive, repeated, and invariable in nature.'" *Leonard*, 499 F.3d at 442 (quoting *Purseley v. Dretke*, 114 F. App'x 630, 634 (5th Cir. 2004)). State Farm Fire's alleged "pattern and practice" in responding to calamitous natural disasters hardly answers to these descriptions of reflective, invariable reaction and does not "remotely qualify or quantify as a habit within the meaning [of] Rule 406." *Id.* Accordingly, State Farm Fire's motion should be granted in its entirety.

II. PLAINTIFF CANNOT DEMONSTRATE ANY NEXUS BETWEEN THEIR ALLEGED IN-STATE HARM AND ANY ALLEGED OUT-OF-STATE CONDUCT

Plaintiff carefully avoids any discussion of Plaintiff's specific documents and witnesses that State Farm Fire addressed in its opening papers. Plaintiff does, however, refer to unspecified "evidence" regarding "the 1999 Oklahoma tornadoes." [Doc. 484 at 7.] Yet Plaintiff fails to respond to any of State Farm Fire's extensive objections to Plaintiff's documents and witnesses regarding tornadoes in Oklahoma for numerous federal evidentiary and constitutional reasons. [Doc. 416 at 6-12, 18-19, 23-24.]

Plaintiff must demonstrate a specific "nexus" between the alleged out-of-state conduct and alleged in-state harm. *See, e.g. McIntosh v. State Farm Fire & Cas. Co.*, No. 1:07CV1080-LTS-RHW,

¹ Evidence under Rule 406 is likewise subject to Rules 402 and 403, which independently bar Plaintiff's purported evidence of out-of-state conduct.

slip op. at 1 [1187] (S.D. Miss. Apr. 24, 2008) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)); *Fowler*, 2008 WL 3050417, at *6. Here, Plaintiff has made it clear that no such nexus could exist. According to Plaintiff, "this case is unique," both "due to the geographic location" of Plaintiff's property and other "unique" factors, including the "evidence" related to Plaintiff's insurance claim. [Doc. 484 at 8]. Thus, the documents and witnesses of out-of-state conduct at issue are necessarily dissimilar and lack any nexus to Plaintiff's "unique" case. The Due Process Clause mandates that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Campbell*, 538 U.S. at 422-23. Here, Plaintiff admittedly offers only evidence of dissimilar acts from other states that can have no possible nexus to any "unique" in-state harm.

Plaintiff's apparent intent to inject into this case documents and witnesses relating to litigation involving tornadoes in Oklahoma has nothing to do with Plaintiff's claims here. The specifics of tornado damage in another state and of State Farm Fire's investigation and adjustment of those claims has no nexus to Plaintiff's admittedly "unique" in-state harm. Accordingly, State Farm Fire's motion should be granted in its entirety.

III. PLAINTIFF'S UNTIMELY DESIGNATED "EXPERTS" SHOULD BE STRUCK

In addition to the inadmissible documents Plaintiff produced concerning out-of-state conduct, Plaintiff also improperly attempted to designate two "experts" to opine regarding out-of-state conduct: Tim Ryles and Stephen Strzelec. *See* [Doc. 416 at 2, 28-29.] State Farm Fire demonstrated that Plaintiff's untimely designation violated this Court's Case Management Order and the Federal Rules of Civil Procedure. *Id.* Plaintiff has no response. Accordingly, this Court should strike Plaintiff's untimely witnesses under the CMO and the Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons in addition to those in State Farm Fire's opening papers, this Court should grant State Farm Fire's motion in its entirety.

RESPECTFULLY SUBMITTED, this 9th day of January, 2009.

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CERTIFICATE OF SERVICE

I, Dan W. Webb one of the attorneys for the Defendant, State Farm Fire and Casualty Company, do hereby certify that I have this date electronically filed the foregoing, with the Clerk of the Court using the ECF system which sent notification of such filing to the following ECF participants:

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THIS, the 9th day of January, 2009.

BY: /s/ Dan W. Webb
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