

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

HARVEY R. & KAY M. WINGATE

PLAINTIFFS

VS.

**CIVIL ACTION NO.:
1:06cv1283-LTS-RHW**

**STATE FARM FIRE AND CASUALTY COMPANY
AND JOHN DOES 1 THROUGH 10**

DEFENDANT

**MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE, MOTION IN
LIMINE TO EXCLUDE THE VIDEO, AFFIDAVIT, DEPOSITION OR TESTIMONY OF
KEVIN ABRAHAM**

COME NOW, the Plaintiffs, Harvey R. and Kay M. Wingate, (“Plaintiffs”), by and through their attorney of record, THORNHILL & COLLINGS, L.C., and would move this Court to enter a protective order to prevent the taking of the deposition of Kevin Abraham, or in the alternative, to exclude the use of the video allegedly taken by Abraham, or Kevin Abraham’s affidavit, deposition or testimony in the trial of this matter, and in support thereof would show as follows:

1. Plaintiffs would show that on September 19, 2007, counsel for Defendant, State Farm Fire and Casualty Company, filed a Notice of Deposition setting the deposition of its witness, Kevin Abraham, on October 2, 2007. Mr Abraham’s deposition was arbitrarily set without conferring with Plaintiffs’ counsel.

2. Plaintiffs would further show that according to the Defendants this deposition is purportedly to address and/or authenticate a video allegedly taken by Kevin Abraham during Hurricane Katrina.

3. Plaintiffs would assert that the video allegedly taken by Mr. Abraham is highly prejudicial and has absolutely no probative value in the instant cause of action. The video was allegedly taken by Mr. Abraham in a house located at the corner of Keller Avenue and Comfort Place

in Biloxi, Mississippi. The subject insured property belonging to the Plaintiffs is located in Jordan River Estates in Bay St. Louis, Mississippi, which is approximately thirty-five miles from the extremely limited area that can be seen in the video allegedly taken by Mr. Abraham. The Defendant's attempt to introduce a video filmed approximately thirty-five miles from the Plaintiffs' insured property is somewhat ironic, in light of the Defendant's objection to providing information from claim files from properties surrounding the subject insured property. In any event, the video is completely irrelevant to the instant case and the deposition of Mr. Abraham will not provide information that is relevant or reasonably calculated to lead to admissible evidence.

4. Plaintiffs would show that the deposition of Mr. Abraham should not be allowed to proceed and the Court should enter a protective order canceling the deposition and ensuring that said deposition does not proceed.

5. Even if the Court were to allow the Abraham deposition to go forward, Plaintiffs submit that none of the information in the video, Mr. Abraham's affidavit, Mr. Abraham's deposition and/or testimony should be admissible at trial. The Abraham video should not be allowed into evidence as it does not depict events specific to those that occurred at the Plaintiffs' residence during Hurricane Katrina; therefore neither the video, the affidavit or any testimony provided by Mr. Abraham are relevant to the issues in this cause of action. Neither the video nor Mr. Abraham's affidavit constitute facts of consequence relevant to the issues in this cause of action. See F.R.E. 401.

6. Plaintiffs would additionally show that the video's prejudicial value greatly outweighs any probative value it may have, and it is more likely to confuse the jury than assist it. There is also significant danger of unfair prejudice, confusion of the issues, and misleading the jury by allowing the presentation of information that is not relevant to the specific issues in this case. See F.R.E. 403.

7. On June 27, 2007, an Order was entered in *Eleuterius v. State Farm & Casualty*

Company, Case 1:06-cv-00647-LTS-RHW, in which this Court held that the Abraham video should “be excluded because ‘its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, [and] by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403.” See Exhibit “A” - Order filed June 27, 2007, in *Eleuterius v. State Farm & Casualty Company*.

8. Plaintiffs would show that the video cannot be authenticated pursuant to the requirements of Federal Rule of Evidence 901; therefore, the video cannot be admitted into evidence.

WHEREFORE PREMISES CONSIDERED the Plaintiffs pray that the Court will grant the relief sought in this Motion, specifically that this Court will enter a Protective Order canceling the deposition of Kevin Abraham, in accordance with prior rulings of this Court, and further that the Court enter a Protective Order to preclude the taking of any deposition of Kevin Abraham in this cause of action. Plaintiffs further requests the Court to enter an Order excluding the video (videotape, DVD or other recording), Mr. Abraham’s affidavit, or Mr. Abraham’s deposition or testimony, or any other similar evidence, from being used in any form or fashion during the litigation or trial of this cause of action or any other case in which Plaintiffs’ counsel represents parties and in which State Farm Fire and Casualty Company is a party.

Respectfully submitted:

THORNHILL & COLLINGS, L.C.

s/ Tom W. Thornhill

TOM W. THORNHILL # 12776

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CERTIFICATE OF SERVICE

I, Tom W. Thornhill, do hereby certify that on 25th day of September, 2007, I electronically filed the above and foregoing Motion for Protective Order or, in the Alternative, Motion in Limine to Exclude the Video, Affidavit, Deposition or Testimony of Kevin Abraham with the Clerk of Court utilizing the ECF system, which provides notification of said filing to the following:

B. Wayne Williams
Webb, Sanders & Williams P.L.L.C.
P.O. Box 496
363 North Broadway St.
Tupelo, MS 38802-0496
(662) 844-2137

SO CERTIFIED on this the 25th day of September, 2007.

s/ Tom W. Thornhill
TOM W. THORNHILL

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ORIN ELEUTERIUS

PLAINTIFF

V.

CIVIL ACTION NO. 1:06cv647-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

ORDER

This order disposes of Plaintiff's [63] motion *in limine* aimed at video evidence that may be offered by Defendant. The Court has viewed the DVD submitted by Defendant "containing short video clips from the Kevin Abraham video, chosen by our expert witnesses . . . to demonstrate the findings of their reports." Abraham's affidavit is also offered for authentication purposes.

Defendant asserts that it "does not intend to use the video clips to suggest that the images depicted therein are true and correct representations of what occurred at the [Plaintiff's property] on August 29, 2005." Instead, they are intended to serve as demonstrative materials for use by its experts.

The Court has entered a separate order with respect to the exclusion of demonstrative evidence, and it is the Court's determination that the subject video should also be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, [and] by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Accordingly, **IT IS ORDERED:**

Plaintiff's [63] motion *in limine* is **GRANTED** consistent with the above comments. The Kevin Abraham video submitted by Defendant, and any other similar evidence, shall be **EXCLUDED** from any use at trial.

SO ORDERED this the 27th day of June, 2007.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE

