

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ERIC PAULSEN	*	CIVIL ACTION NO.: 06-9546
versus	*	
STATE FARM INSURANCE COMPANY et al	*	SECTION: I MAG. 1

**REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION TO STATE FARM
MOTIONS TO EXCLUDE WITNESSES AND EXHIBITS**

MAY IT PLEASE THE COURT:

As one reviews this Motion one must keep in mind that plaintiff is claiming in this matter that he has presented a satisfactory proof of loss and that he is entitled to more money under his Homeowners policy for damages related to wind. He claims that State Farm is in bad faith for its handling of the claim. Plaintiff has failed to cooperate and provide witnesses, whom he added to his witness list in 12/07. He also wants to now be able to present evidence in the form of witness testimony and exhibits that he failed to and/or outright refused to provide to State Farm voluntarily or during the discovery process.

Subsequent to receipt of plaintiff's witness list wherein he listed Shane Gates and Carl Finley as witnesses, defense counsel sent a letter to Mr. Abel requesting their deposition on 12/11/07. At the conclusion of Mr Paulsen's deposition on 12/12/07, defense counsel again requested the depositions of Gates and Finley be scheduled. The date of 12/20/07 was discussed by all counsel. Mr. Abel was to check on the availability of Gates and Finley. Undersigned counsel Baumgartner followed up with Abel and confirmed the deposition date. At that time she

specifically requested whether a subpoena would be necessary for these witnesses to appear. She was advised by Abel that a subpoena would not be necessary. She confirmed this conversation in writing. (See RD#106 Exh. C.) At no time did Abel ever advise counsel that she was mistaken, that the witnesses were unavailable or that she would need to issue a subpoena to insure their attendance at the deposition. If such information had been communicated, counsel would have obtained the addresses of the witnesses and issued the subpoenas.

In addition to being together for the depositions on 12/12/07, all counsel were together for depositions on 12/13/07 as well as on 12/18 and 12/19/07. It was not until the afternoon of 12/19/07 when Baumgartner began to discuss the two depositions scheduled for the next day, that Abel advised for the first time that he had not talked to the two witnesses and they would not attend without a subpoena. It should be noted that plaintiff's refusal to voluntarily produce Gates and Finley, came after defense counsel, pursuant to discussions with counsel and Magistrate Shushan agreed to voluntarily bring in three out of state witnesses for plaintiff to depose. For some reason, after counsel for State Farm volunteered to produce these three witnesses, Plaintiff then attempted to issue subpoenas to these three individuals through Baumgartner.¹ The three claims representatives that Plaintiff's counsel requested to depose were produced in Louisiana at defendant's costs subject to defendant's right to file a Motion to Recover Costs. Without defendant agreeing to do so Abel would have been traveling to three different states in order to accomplish the depositions. His complaints make no sense.

¹ The deposition dates were verified and confirmed in a minute entry, RD#63 See Exh. SF 1, Letter from Baumgartner to Abel dated 12/11/07 advising that these witnesses could not be subpoenaed through Baumgartner but that she had already agreed to voluntarily produce them in Louisiana.

Plaintiff's opposition memorandum is the first time that counsel has been told Mr. Finley is or was out of the country. Nowhere in affidavits, responses to discovery or any other documents was the contact information for either Gates or Finley provided. Abel disputes defendant's assertion in RD #106 that Gates was under plaintiff's counsel control and could have easily been produced for deposition. Abel states in opposition that neither Finley or Gates are the employees of either Plaintiff or Abel and neither witness is under "Paulsen's or Abel's control. (See RD # 141 page 3 (Second ¶)). Unfortunately this statement is disingenuous to say the least and can be disputed by numerous documents found in the public record.

First, Plaintiff and Shane Gates (also known as Shane L. D'Antoni) are creditor/mortgagee and debtor/mortgagor on the very property as issue in this lawsuit, 56345 McManus Road in Slidell, Louisiana.² Thus when Baumgartner questioned Plaintiff at his deposition regarding his "unusual relationship" with Gates and why Gates seemed to be living at the McManus Road Property, Plaintiff's reply that "Gates made a few mortgage payments" for Plaintiff has a whole new set of implications in light of the unearthing of the Bond for Deed, a transaction that has never been disclosed to State Farm or its counsel during the adjustment and lawsuit over this claim.³ Certainly in Plaintiff's position as creditor/seller to Gates of the McManus Property, Plaintiff could have produced Gates for deposition and clearly knew at the

² See SF Exh. 2. Bond for Deed contract between Shane D'Antoni and Eric Paulsen executed October 1, 2002 before Daniel Abel and recorded on October 10, 2002).

³ Additionally as set forth on pages 7 through 10 of State Farm Exh. 3, the Article from the Weekly Standard Magazine dated March 20, 2006 entitled "Will the Good Time Ever Roll Again?", a question arises as to the amount of insurable interest Plaintiff still has on the McManus Road property given Gates' interview with the writer of the article and the terms of the bond for deed. Plaintiff, Gates and Abel have registered various corporations of which they members, directors or agents using the McManus Road Address. See State Farm Exh. 4, records from the Louisiana Secretary of State's Database.

outset when initial disclosures and discovery was made that Gates would be a witness in these proceedings.

As for Abel's contention that "he has no control over Gates or Finley" the Weekly Standard interview given by Gates, Abel and Finley evidences that all three are the best of friends, that Abel employs Gates, "his distant cousin", as his legal assistant and has done so since 1998 when Abel was one of the plaintiff's counsel in the City of New Orleans' products liability lawsuit against Smith and Wesson. As State Farm Exh. 4 demonstrates, Abel is a member and agent of the New Orleans Motorcoach, LLC corporation of which Gates is a member and Gates/D'Antoni is the registered agent for Omibibulean Society of New Orleans, La, LLC a corporation of which Abel and Gates are members.

Further, Abel has represented and continues to represent Gates in 42 U.S.C. § 1983 civil rights lawsuits. See *Shane D'Antoni v. City of New Orleans, et al*, No. 96-cv-03083, *dismissal affirmed*. No. 97-3087 (5th Cir. 1998). On 10/17/07, Abel filed a §1983 action on Gates' behalf against St. Tammany Parish Jack Strain, the Louisiana Heart Hospital of Lacombe and others. See *Gates v. Strain*, No. 07-cvb-06983. On 11/27/07, Abel filed a medical malpractice on Gates' behalf with the Patient Compensation Fund. See 22nd JDC No. 2007-16650. For Abel to claim that he has no control over Gates is preposterous. Gates has been and apparently continues to be employed by Abel, his email address is provided in connection with Abel's in the records of this Honorable Court, and notification of every document filed with the court in this lawsuit is copied to both Abel and Gates. Gates and Abel are in business together and Gates is represented by Abel in ongoing litigation filed in this court and in the 22nd Judicial District Court.

Likewise, Abel has recently served as counsel for Mr. Finley in a personal injury lawsuit. See *Finley v. ABC Ins. Co.*, 946 So.2d 330 (5th Cir. 12/27/06). Finley and Abel are also co-counsel in several cases filed in this court.⁴

Undersigned counsel relied on Abel's word as confirmed in correspondence that it would not be necessary to issue a deposition subpoena to Finley and Gates. See RD 106, Exhibits D and E. Given the relationship between Gates, Finley, and Abel, undersigned counsel should have been able to rely on Abel's representations that he would produce these witnesses, his close friends and co-workers. At no time did Abel communicate to either counsel for State Farm that he would be unable to produce Gates and Finley and that State Farm should issue a subpoena for their depositions and provide an address at which they could be served. Further, in an attempt to resolve this discovery dispute over the depositions, on 12/20/07, counsel Baumgartner wrote Abel requesting he provide other dates to reschedule the two depositions. (See SF Exh. 5) Abel has never responded.

There can be no other conclusion than the fact that plaintiff has obstructed defendants' attempt to conduct discovery and has not made a good faith effort to assist in the taking of the deposition of Gates and Finley. These two witnesses should be struck from plaintiff's witness list and prohibited from testifying at the trial.

Subsequent to the filing of defendants' Initial Motion to Strike Witnesses and Exhibits, defense counsel received several discs from plaintiff in response to the order of Magistrate

⁴ As counsel for the plaintiff in *Shannon D'Antoni v. Allstate Ins. Co.*, et al No. 05-06615 and *Sampson v. City of New Orleans*, No. 04-cv-01052; and as defense counsel for Carr & Associates in *Lynch v. Liberty Mutual Ins.*, No. 06-cv-09837.

Shushan. These discs were dropped off at defense counsel Baumgartner's office on Friday, January 11, 2008 after 5:30 with no cover letter or pleading attached. The discs were labeled as follows:

1. Paulsen v. SF Paulsen Wind/Flood Docs
2. Paulsen v. SF McManus Property Pictures
3. Paulsen v. SF DE1#14518
4. Paulsen Mc Manus and Jefferson Ave.
5. McManus Property Pre-Katrina
6. McManus Property Post Katrina Sept. 1, 2005
7. Paulsen – Shushan Order Supplemental Discovery Answers
8. Mc Manus Photographs Plantation 1 & 2

None of the documents produced by plaintiff have been bates stamped by plaintiff for identification as produced by plaintiff or contain any description, title or other documentation despite Magistrate Judge Shushan's Order. (See RD # 90) Up until the delivery of the discs on 1/11/08, the only documents previously produced by plaintiff were attached to his Rule 26 disclosures and to the deposition of Mr. Paulsen. (Note Exhibit "R" of the Rule 26 disclosures was not attached and has not been produced despite written request to plaintiff's counsel) Neither of the two sets of documents previously produced were bates stamped for identification.

After review of the photographs and videos of the McManus property produced by the plaintiff to undersigned, it is obvious that that these photographs were taken prior to Katrina and post Katrina. There is no good reason why plaintiff should not have produced these photographs prior to the end of discovery. These photographs were discoverable. Plaintiff's failure to produce them during discovery precluded defendant from determining the photographer or photographers, when they were taken, and ascertain what information the photographs provided

which may be relevant to the case. For instance, several of the photographs appear to depict a level or similar instrument in a room believed to be inside the McManus Road property. The photograph is not dated, there is no indication in which room the photograph was taken or what information the photograph intends to depict. It should be noted that pictures taken by Plaintiff's engineering expert, Mr. Cressy as well as those photographs provided to him, were thoroughly discussed with Mr. Cressy in his deposition. (See RD 95 SF Exh. 3, 4, & 5).

The production of scores of photographs only a few weeks before trial and subsequent to the discovery cut off has severely prejudiced State Farm's defense and preparation for trial. None of these photographs produced on 1/11/08 were available to be utilized by defendants in discovery. Plaintiff who failed to produce the photographs in a timely manner should not be able to withhold evidence from State Farm and then use it to support his case for any purpose whatsoever. In fact, it flies in the face of any claim for bad faith for plaintiff to have withheld this documentation.

Pursuant to the documents attached to Plaintiff's Rule 26 disclosures and the documents and photographs received pursuant to a subpoena to the public adjusting firm of Carr and Associates, State Farm noticed the deposition of Emmett Dufrene of Carr and Associates for 12/13/07. Prior to Mr. Dufrene's deposition, Mr. Abel advised counsel that he would not be calling Mr. Dufrene as a witness in this case and was withdrawing Carr and Associates as well as any and all documents and photographs received from Carr and Associates from evidence in this litigation. This was confirmed on the record at the beginning of the deposition of Eric Paulsen. (See State Farm Exh. 6 Dep. Page 5.) As a result of Abel's representation, the deposition of

Emmett Dufrene was canceled. Plaintiff has now attached photographs of the roof of the McManus Property in the materials submitted on 1/11/08. These photographs were obtained pursuant to a subpoena issued by counsel for State Farm to Carr & Associates. As Plaintiff has decided against calling Carr and Associates as a witness in these proceedings and has withdrawn any documentary evidence obtained from Carr and Associates, Plaintiff should be precluded from using the photographs under any circumstances at trial.

In addition to the disks containing photographs, Abel provided two videos. The two videos have also been available to plaintiff since 2005. However, Plaintiff and Abel failed to produce the videos to counsel for State Farm prior to 1/11/08. Plaintiff should not be able to withhold evidence which he clearly had an obligation to disclose and then be able to use such evidence at trial. The photographs and videos were requested in discovery, a letter was sent and conferences were had concerning this evidence. Additionally a Motion to Compel and a Motion for Sanctions were filed. These photographs should have been provided prior to the discovery cut off.

With respect to the McManus property in Slidell, Plaintiff has failed to provide any reports, estimates or evidence documenting the work performed by Bob Rosine and/or the amount charged for this work by Mr. Rosine. Plaintiff makes demands for policy limits under the homeowners policy yet when questioned as to his support for this demand, Plaintiff's counsel's response is that he has witnesses who will testify as to the work done, what the damages were caused by and the costs. Plaintiff only listed Bob Rosine as a witness on the witness list filed on 12/10/07. Mr. Rosine was never identified as a potential witness in the Rule

26 initial disclosures or discovery responses with respect to the McManus property prior to the filing of Plaintiff's witness list. Plaintiff has yet to this date to provide documentation as to the work provided by Mr. Rosine at the McManus property and the cost of the same. He should not be allowed to come in with documentation or testimony concerning work allegedly done for which there are no records.

Once again, the time to disclose this information was during discovery. It was not until the filing of plaintiff's witness list on 12/10/07 that Bob Rosine and many others were added by plaintiff as potential witnesses. At the depositions of plaintiff and Mr. McCarthy on 12/12/07, counsel for State Farm learned for the first time that the previous eleven page construction proposal of Mr. McCarthy in the amount of \$288,583.58 (Exh. L to Plaintiff's Initial Disclosures) was speculative only and no repair work set forth in the invoice has been performed by Mr. McCarthy. While Plaintiff has produced check stubs and credit card receipts for repairs from retailers such as Lowes and Home Depot, these documents do not answer any of State Farm's questions as to who performed the repair work on the McManus property, what work was completed, and the cost of such repairs. Plaintiff has throughout this litigation provided conflicting information as to who did the work on his two properties and the costs and the charges for the same. He should not now be allowed to produce witnesses to testify about work performed and the costs of the same for which he still cannot provide any documentation or reports with respect to that work. This exclusion should be applicable to any and all witnesses for whom no bills, estimates or reports were timely provided to State Farm.

Another example of Plaintiff's failure to provide accurate documentation as to repairs is the attached correspondence provided by Creative Solutions. (See SF Exh. 7) Plaintiff provided correspondence from Creative Solutions dated 12/9/06. A review of this letter clearly indicates the repairs performed by Creative Solutions are for flood damages. No other documentation was provided or attached to counsel for State Farm. As a result of the initial 12/9/06 letter, counsel for State Farm in its capacity as Plaintiff's homeowners insurer saw no reason to depose Creative Solutions from the standpoint of wind damages. (Note Mr. McCarthy has testified that he related the need to replace all of the siding due to flood damages.) Within the 8 diskettes received from Abel on 1/11/08 was a copy of a 11/1/06 document from Creative Solutions. (See SF Exh. 8). However, this second and previously undisclosed 11/1/06 letter raises issues not previously presented. Further, it provides no costs for the work allegedly done. As this second document was not produced previously to State Farm and defendant was precluded from properly defending against it, this document should be struck and Plaintiff prohibited from using same at trial of this matter.

As well-articulated by Magistrate Judge Shushan in her recent ruling concerning Plaintiff's failure to provide certain discovery documents to her for in camera inspection, trial in federal court is not conducted by ambush. Plaintiff and his counsel's failure to comply with the rules and procedures for discovery in federal court require that Plaintiff forfeit his right to utilize witnesses and evidence produced in contravention of these rules. Plaintiff cannot now use witnesses, documents and photographs he failed to timely produce to State Farm in a case wherein he is claiming that State Farm failed to respond to his alleged satisfactory proof of loss.

Respectfully submitted,

/s/ Adrienne L. Baumgartner

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on February 5, 2008, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Daniel Abel counsel for Plaintiff

The following have been served a copy of the foregoing pleading on counsel via United States mail, properly addressed and first class postage prepaid:

N/A

/s/ADRIANNE L. BAUMGARTNER

