

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

THOMAS C. & PAMELA MCINTOSH

PLAINTIFFS

VERSUS

1:06-CV-1080-LTS-RHW

**STATE FARM FIRE AND CASUALTY COMPANY
and E. A. RENFROE & COMPANY, INC., et al**

DEFENDANTS

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION TO COMPEL
PRODUCTION OF STATEMENT OF BRIAN FORD**

COMES NOW, the Defendant, State Farm Fire and Casualty Company (State Farm) and files this, its Memorandum of Law in Support of Emergency Motion to Compel Production of Statement of Brian Ford, and would show unto the Court as follows, to-wit:

FACTS

Brian Ford was an employee of Forensic Analysis and Engineering Company (Forensic) at the time of Hurricane Katrina.¹ State Farm contracted with Forensic in the aftermath of Katrina to investigate and prepare engineering reports on insured properties which were damaged by Katrina. As a part of this arrangement, Mr. Ford was assigned to investigate the loss at the home of the Plaintiffs, Chris and Pamela McIntosh. Mr. Ford investigated and prepared the original October 12, 2005 report on the McIntosh property, which this Court has already recognized “has become a critical point in this litigation, as it appears to be the linchpin of Plaintiffs’ bad faith claims.” 12/11/2007 Order at 3 (Doc. 911).

In May, 2006, Mr. Ford gave a statement to Darren Versiga for the purpose of providing Dickie Scruggs information “to see if there was a reason to meet.” *Videotaped Deposition of Brian Ford*, October 10, 2007, pp. 12: 1-20; 206:20-207:5 (All relevant excerpts of Mr. Ford’s

¹Forensic, once a defendant to this action, has been dismissed by the Plaintiffs.

deposition are attached as Exhibit 1). Upon information and belief, this statement is currently in the possession of counsel for Plaintiffs.²

At the deposition, Mr. Ford admitted that he had no objection to State Farm (or any other defendant) receiving a copy of this statement taken by Mr. Versiga.

Q [By Mr. Webb] All right. Did you get a copy of that statement yourself?

A [By Mr. Ford] No.

Q Okay. Did you ever ask for one?

A No.

Q Okay. Do you have any objection to the other Defendants, specifically my client, seeing what you said in that statement?

A No.

Brian Ford Dep. at 207:6-14.

Since the deposition, and as recently as January 2, 2008, attorneys for Plaintiff have received authorization from Mr. Ford through his personal counsel to forward the statement to State Farm. *See Exhibit 2.* State Farm has requested the statement several times from Plaintiffs' counsel, Derek Wyatt. To date, no statement has been received.

Mr. Ford's deposition is noticed for Friday, January 11, 2008. In light of the upcoming deposition, it is imperative that State Farm receive the statement prior to the deposition.

²Scruggs and his firm have since withdrawn and Plaintiffs are now represented by the remaining firms comprising the Katrina Litigation Group (KLG).

LAW AND ARGUMENT

I. BRIAN FORD IS ENTITLED TO HIS STATEMENT

A non-party witness may obtain a statement made concerning the action that was made by that person. Fed.R.Civ.Proc. 23(b)(3). Both parties and non-parties are entitled to secure production of any statements they have given without any special showing. *Chaney v. Kansas City Ry. Co.*, Slip Copy, 2007 WL 2463311 (E.D.La., August 27, 2007). Mr. Ford has an uninhibited right to his statement that Darren Versiga recorded pertaining to this matter. During his deposition on October 10, 2007, Mr. Ford stated that he had no objection to any of the Defendants, including State Farm reviewing the statement. *See Brian Ford dep.* at 207:6-14.

Mr. Ford, through his attorney, has given authorization to Plaintiffs' counsel, Derek Wyatt, to produce to State Farm the statement taken by Mr. Versiga. *See Exhibit 2.* Thus, State Farm has the same right to Mr. Ford's statement as does Mr. Ford. State Farm has requested the statement taken by Mr. Versiga several times from Plaintiffs' counsel, Derek Wyatt, and as recently as January 2, 2008. *See Exhibit 3.* And as recently as this afternoon, January 7, 2008, Mr. Wyatt, rather than producing the statement, asks State Farm to look elsewhere. *Id.* Plaintiffs have failed to respond to State Farm's request and have neither identified this document as privileged or as work product, nor have they produced the statement.

II. MR. FORD'S STATEMENT IS DISCOVERABLE

A non-party witness's statement is discoverable as a matter of right. *Miles v. M/V Mississippi Queen*, 753 F.2d 1349, 1351 (5th Cir., 1985). "[A]ny verbatim non-party witness statements are neither privileged nor work product and must be produced." *Schipp v. Gen. Motors Corp.*, 457 F.Supp.2d 917, 924 (E.D.Ark., 2006). *See also Johnson v. Bryco Arms*, 2005

WL 469612 (E.D.N.Y.) [affirming Magistrate Judge's ruling ordering production of non-party witness statement].

Even should the Plaintiffs attempt to claim the statement as work product, to the extent that the statement contains facts, it is not work product. *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306-7 (E.D.Mich., 2000). Similarly, a witness statement secured in anticipation of litigation is not afforded protection under the work product doctrine. A sister court reasoned as follows:

Granted, [the plaintiff] secured these statements [of third-party witnesses] in anticipation of litigation. However, if it now suggests that it may interpose the work product doctrine because it then put words in the mouths of those third-party affiants as part of its litigation strategy, it misperceives the nature of the doctrine. [The defendant] seeks no more than factual statements of these non-party witnesses. It should not be frustrated in its ability to test the perception and credibility of these persons.

Id. citing *Milwaukee Concrete Studios, Ltd. v Greeley Ornamental Concrete Products, Inc.*, 140 F.R.D. 373, 379 (E.D.Wis.,1991).

State Farm is entitled to receive Mr. Ford's statement. It is of the utmost importance that State Farm receives the statement prior to the noticed deposition of Mr. Ford on this Friday, January 11, 2008.

CONCLUSION

For the foregoing reasons, State Farm respectfully requests that the Court grant its Emergency Motion to Compel and Order the statement of Brian Ford produced prior to the deposition of Mr. Ford set for Friday, January 11, 2008.

Respectfully submitted this the 8th day of January, 2008.

STATE FARM FIRE AND CASUALTY
COMPANY, Defendant

/s/ Matthew E. Perkins
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CERTIFICATE OF SERVICE

I, **MATTHEW E. PERKINS**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing Memorandum of Law in Support of Emergency Motion to Compel Production of Statement of Brian Ford with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, this the 8th day of January, 2008.

/s/ Matthew E. Perkins
MATTHEW E. PERKINS

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