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

HENRY KUEHN and JUNE P. KUEHN **PLAINTIFFS**

VERSUS **No. 1:08-cv-577-LTS-RHW**

STATE FARM FIRE & CASUALTY COMPANY, et al. **DEFENDANTS**

STATE FARM'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION [36] TO DISQUALIFY COUNSEL

State Farm respectfully submits this response in opposition to Plaintiffs' motion [36] to disqualify counsel. Plaintiffs have filed a barebones motion consisting of five sentences, without a supporting memorandum, seeking to disqualify the law firm of Hickman, Goza & Spragins, PLLC, which represents State Farm in this matter. Plaintiffs' motion should be denied.

The five cryptic sentences that comprise Plaintiffs' motion are devoid of fact or argument. [36] at 1-2. Plaintiffs did not file a supporting memorandum of authorities, as required by Local Rule 7.2(D), and their motion should be denied on that basis alone. Moreover, Plaintiffs' failure to provide a legal brief or any supporting facts or argument puts this Court as well as State Farm in the disadvantaged position of having to divine Plaintiffs' argument from the sparse hints contained in their threadbare motion. Plaintiffs assert in a vague and conclusory fashion that "it [is] clear that certain attorneys employed by Hickman, Goza & Spragins, PLLC (and potentially other employees as well), will, at the very least, be necessary and material witnesses in this action." [36] at 1. Not only is it far from "clear," but it is also false as a matter of fact and law.

State Farm surmises that Plaintiffs contend that Lawrence "Lucky" Tucker, Esq., and Scot Spragins, Esq., of Hickman, Goza & Spragins may be necessary witnesses at a trial because they had certain communications with the appraiser appointed by State Farm, John Minor, and thus must be disqualified pursuant to Mississippi Rule of Professional Conduct ("MRPC") 3.7. Plaintiffs are wrong.

Any communications between State Farm's counsel and Mr. Minor are irrelevant to the dispositive question of the actual impropriety of the conduct and scope of the appraisal process and

award, as this Court has already recognized in its March 27, 2009 Order [61]. Nor would State Farm's counsel be the only sources of this information even if were relevant (which it is not). Thus, none of State Farm's counsel is a "necessary witness." Moreover, by its terms, MRPC 3.7 applies only when the lawyer will be a "necessary witness" "at a trial" and a disqualification under Rule 3.7 is not imputed from a lawyer to his law firm. Thus, none of State Farm's counsel should be disqualified from participating in the pre-trial proceedings in this case or at trial, and no other lawyer from Hickman, Goza & Spragins should be disqualified.

It is beyond serious dispute that motions to disqualify counsel are subject to improper strategic or tactical abuse and are disfavored by the law for several reasons. "Courts considering disqualification motions have long recognized their potential for abuse as litigation tactics. A lawyer's disqualification can be extremely burdensome to a client, who must incur the additional costs and delays involved in obtaining substitute counsel, as well as the intangible cost of losing longtime counsel with an intimate knowledge of the case.… Accordingly, disqualification has been deemed a 'drastic measure,' to be imposed only when 'absolutely necessary.'" American Bar Association, *Annotated Model Rules of Professional Conduct* 363 (6th ed. 2008). The Mississippi State Bar has similarly acknowledged "that the lawyer witness rule has been historically subject to tactical abuse and should be subject to strict scrutiny." Miss. State Bar, Op. No. 164 (June 23, 1989).

Here, Plaintiffs have no legally cognizable basis to disqualify State Farm's counsel and raised this issue for tactical purposes only after State Farm discovered evidence that the appraisal process had been tainted on multiple levels. As this Court has previously recognized, "In their effort to make this case about the conduct of State Farm's attorneys, Plaintiffs have lost sight of the central issue presently before the Court; i.e. whether the appraisal should be enforced and the extent to which damage to Plaintiffs' property is covered by their homeowner's policy." Mar. 27, 2009 Order [61] at 3.

I. PLAINTIFFS' BARE MOTION IS DEFICIENT AND SHOULD BE DENIED

Local Rule 7.2(D) requires that a motion "shall" be accompanied by a memorandum of authorities "[a]t the time the motion is served." The Rule expressly provides that "[f]ailure to timely submit the required motion documents may result in the denial of the motion." *Id.* Plaintiffs' deficient motion, unaccompanied by a memorandum of authorities, amply demonstrates the policy underlying the requirement of a legal brief – particularly on an issue as weighty as the disqualification of opposing counsel, which carries a heavy burden and requires proper evidentiary support.

Indeed, because of the serious nature of the relief, courts impose "a 'substantial burden'" on a party seeking to disqualify opposing counsel, and will deny a motion for "lack of evidentiary support." *Sutherland v. Jagdmann*, 2005 WL 5654314, at *1-2 (E.D. Va. Oct. 31, 2005). "[T]he proponent of disqualification bears a 'heavy burden' of proof to show that disqualification is necessary, and 'mere speculation will not suffice.'" *A.V. ex rel. Versace v. Versace*, 160 F. Supp. 2d 657, 663 (S.D.N.Y. 2001) (citations omitted), *abrogated in part on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Thus, courts "must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory trial tactic" and require that "the moving party must also present evidence that the testimony of the lawyer is 'necessary' and that it goes to an 'essential fact' of the movant's case." *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App. 2000).

Plaintiffs' abject failure to submit a legal brief, or anything more than the five conclusory sentences that comprise the totality of their motion, or any evidentiary support, inexorably leads to the conclusion that Plaintiffs have woefully failed to satisfy their substantial and heavy burden on a motion to disqualify opposing counsel, just as they have failed to satisfy Local Rule 7.2(D).

This Court has denied motions for failure to comply with Rule 7.2(D). For example, in *McAdams v. USAA Casualty Insurance Co.*, 2007 WL 2694313 (S.D. Miss. Sept. 10, 2007), this Court denied a motion "containing no argument and legal authority, and unaccompanied by a supporting

memorandum." *Id.* at *1. The Court noted that Rule 7.2(D) "can be dispensed with when the motion bears some semblance to a legal brief," but denied the motion as "fall[ing] woefully short" of even that minimal threshold. *Id.* So, too, in *Jordan v. American Suzuki Motor Corp.*, 2007 WL 1521521, at *1 n.3 (S.D. Miss. May 22, 2007), the court denied a motion that failed to cite any authorities and was not accompanied by a legal brief, and stated that "[f]or that reason alone, the court is inclined to deny the motion." Likewise, in *Crum v. Mississippi Municipal Service Co.*, 1998 WL 94936, at *2 (N.D. Miss. Jan. 12, 1998), the court denied a motion filed without a memorandum of authorities because "[w]ithout knowing precisely what the plaintiffs seek or why they do so, this court cannot say that the plaintiffs" were entitled to the relief sought. In short, Plaintiffs' failure to provide a memorandum of authorities does not comply with Rule 7.2(D), and their motion should be denied for that reason alone.

Further, Plaintiffs' self-imposed limitation on the support for their motion necessarily precludes them from raising new grounds or new arguments on reply. "[I]n the interest of fairness, [a party] should not be allowed to raise new grounds for the first time in its rebuttal to which [the party opposing the motion] will not have the opportunity to provide an adequate response." *McDaniel v. Miss. Baptist Med. Ctr.*, 869 F. Supp. 445, 453 (S.D. Miss. 1994). Thus, "'a court generally will not consider arguments raised for the first time in a reply brief.'" *Stuckey v. Miss. Trans. Comm'n*, 2009 WL 230032, at *2 (S.D. Miss. Jan. 29, 2009) (quoting *Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 773 (M.D. Tex. 2008)). Accordingly, Plaintiffs should not be permitted to backfill the missing support for their motion for the first time on rebuttal.

II. STATE FARM'S COUNSEL ARE NOT NECESSARY WITNESSES

Plaintiffs have presented no well-taken grounds for the disqualification of State Farm's counsel. Plaintiffs conclusorily cite MRPC 3.7, which describes the circumstances in which a lawyer may not serve as both "advocate at a trial" and as a "necessary witness":

> (a) A lawyer shall not act as advocate ***at a trial*** in which the lawyer is likely to be a ***necessary witness*** except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the value or nature of legal services rendered in the case; or

(3) disqualification would work a substantial hardship on the client.

MRPC 3.7(a) (emphasis added). MRCP 3.7 only requires disqualification when an attorney will be a "necessary witness" "at a trial." This standard requires substantially more than mere relevance. Rather, the lawyer's testimony must be unavailable from other sources and crucial at trial.

- A lawyer whose testimony would be merely cumulative of other witnesses is not a necessary witness. *United States v. Starnes*, 157 Fed. App'x 687, 693-94 (5th Cir. 2005).[1]

- "'A necessary witness is not the same thing as the 'best' witness. If the evidence that would be offered by having an opposing attorney testify can be elicited through ***other means***, then the attorney is not a necessary witness. In addition, of course, if the testimony is ***not relevant*** or is only marginally relevant, it certainly is not necessary.'" *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411, 418 (Ind. Ct. App. 2007) (citation omitted) (emphasis added).

- "A necessary witness is not just someone with relevant information … but someone who has material information ***that no one else can provide***. … 'Testimony may be relevant and even highly useful but still not ***strictly necessary***. … A party's mere declaration of a call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony.'" *Mettler v. Mettler*, 928 A.2d 631, 633-34 (Conn. Sup. Ct. 2007) (citation omitted) (emphasis added).

[1] "'[M]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.'" *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992) (emphasis and citation omitted). When deciding motions to disqualify, federal courts in the Fifth Circuit look to both "state and national ethical standards" governing attorney conduct. *Id.* This Court has adopted the MRPC. *See* Loc. R. 83.5. Mississippi, in turn, has adopted the American Bar Association Model Rules of Professional Conduct. *See United States v. Starnes*, 157 F. App'x 687, 693 (5th Cir. 2005), *cert. denied*, 127 S. Ct. 1992 (2007). Because of this uniformity, Mississippi courts frequently rely on cases interpreting analogous rules in other jurisdictions. *See, e.g., Am. Airlines*, 972 F.2d at 619-20; *Doe v. A. Corp.*, 709 F.2d 1043, 1047-48 (5th Cir. 1983); *Owens v. First Family Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 846 n.2, 850 n.7 (S.D. Miss. 2005) (explaining that "particular rules of the Mississippi Code of Professional Responsibility [and] the rules of the ABA Model Code of Professional Conduct are effectively the same," and relying on out-of-state cases to determine whether a certain rule applies to non-lawyer employees of lawyers). Therefore, opinions from other jurisdictions are relevant both to the governing federal standard, and the interpretation of the applicable Mississippi ethical standards.

- "'[A]ttorneys are not necessary witnesses if the substance of their testimony can be elicited from ***other witnesses*** and the party seeking disqualification did not previously state an intent to call the attorney as a witness.'" *Aleynu, Inc. v. Universal Prop. Dev. & Acquisition Corp.*, 564 F. Supp. 2d 751, 757 (E.D. Mich. 2008) (citation omitted) (emphasis added).

Against these standards, Plaintiffs have not shown in their barebones motion, nor can they show, that any of State Farm's counsel will be a necessary witness at a trial.

First, as to the requirement that the lawyer must possess evidence that no one else can provide, this Court's finding that "***other means exist*** to obtain the information" regarding communications between State Farm's counsel and Mr. Minor negates any possibility that State Farm's counsel are necessary witnesses. *See* Mar. 27, 2009 Order [61] at 2 (emphasis added). Moreover, Mr. Minor testified that all written communications between him and State Farm's counsel have been produced through discovery, Minor Dep., Ex. A at 45:9-16, 117:8-118:12l; Mar. 27, 2009 Order [61] at 2, and Plaintiffs have previously and freely admitted that Mr. Minor has been "thoroughly" deposed regarding his communications with State Farm's counsel. [57] at 6.

Second, as to the requirement that the evidence possessed by the lawyer must be strictly necessary – and thus more than relevant or even highly useful – this Court has likewise ruled otherwise. This Court has already unambiguously held that "the information that Tucker or Spragins might possess is ***not relevant*** to the ultimate issue of whether to enforce the appraisal award," Mar. 27, 2009 Order [61] at 2 (emphasis added),[2] and that "even if information from Spragins and Tucker were deemed relevant, it is ***not*** '***crucial*** to the preparation of this case.'" *Id.* at 3 (citation omitted) (emphasis added).

A. This Case Is About the Actual Conduct and Impropriety of the Appraisal Award

What is relevant and material is the actual "conduct, scope, and propriety of the appraisal," which is "the dispositive issue" in this case. *Id.* at 1. The propriety of that appraisal award turns on

[2] Nor is any information possessed by State Farm's counsel relevant to any issues relating to the underlying adjustment of Plaintiffs' insurance claim, a process in which State Farm's counsel here played no role.

what the appraisers actually did and what damage their award encompasses, not on communications with State Farm's counsel. As recent discovery has emphatically confirmed, the appraisal process and award went far beyond the narrow confines of assigning a dollar value to damage that was incontrovertibly caused by a covered peril. Determining the cause of loss by appraisal is not only contrary to the policy language, but is also unconstitutional under Mississippi law. *Munn v. Nat'l Fire Ins. Co. of Hartford*, 115 So. 2d 54, 57 (Miss. 1959).

1. The Appraisal Process Cannot Be Used To Determine Liability or Cause

For fifty years, *Hartford Fire Ins. Co. v. Jones*, 108 So.2d 571 (Miss. 1959), and *Munn*, 115 So.2d 54, have been the leading Mississippi Supreme Court cases addressing appraisal. As this Court recognized in *Kuehn v. State Farm Fire & Casualty Company*, No. 1:06-cv-723-LTS-RHW, 2007 WL 184647, at *1 (S.D. Miss. Jan. 19, 2007) (Senter, J.) ("*Kuehn I*"), *Munn* is "Mississippi's leading case on this issue ...."[3] Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), this Court is bound to follow that precedent. *See, e.g., Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986).

In *Hartford Fire*, the Mississippi Supreme Court provided "a splendid discussion of the effect of an appraisal in Mississippi." *Munn*, 115 So.2d at 56. The *Hartford Fire* court noted that "appraisement is an agreed method of ascertaining value or amount of damage, stipulated in advance, ... with the object of preventing future disputes, rather than settling present ones. ***Liability*** is ***not*** fixed by means of an appraisal; there is ***only*** a finding of value, price, or amount of loss or damage." 108 So.2d at 572 (emphasis added) (quoting 3 Am. Jur., Arbitration and Award, § 3, at pp. 830-31); *accord Munn*, 115 So.2d at 56-57 (same). Indeed, this Court has already recognized that "appraisal is not a method of adjudicating liability under a casualty insurance policy." *Kuehn I*, 2007 WL 184647, at *1; *accord* Mar. 31, 2009 Order [62] at 1.

[3] At the time of *Kuehn I*, State Farm alerted this Court of Plaintiffs' intention to have causation determinations made improperly through the appraisal process. Unfortunately, State Farm's prior concerns have now been realized.

In *Munn*, the Mississippi Supreme Court unambiguously "concluded that the appraisers have ***no*** power to determine the ***cause*** of the damage." 115 So.2d at 55 (emphasis added). Expressly disapproving of what the appraisers in *Munn* had done, *i.e.*, formed a causation opinion as to damage to the walls of a residence, *id.*, the court explained, "If the appraisers have the power to look at the property and determine the cause of the damage, in addition to the extent thereof, they possess a power to arbitrarily say whether the insurance company is liable. That is just what was done in the case at bar." *Id.* at 57. The *Munn* court indicated that before the appraisal process – which is merely used "to value the property damage," *id.* at 56 – can value any damage whose cause is not undisputed, the court "should have judicially determined what force caused" the damage, *id.* at 58, because "[i]f some force or agency other than those mentioned in the policy caused the damage then the insurance companies are not liable." *Id.* at 57; *see also Jefferson Davis County Sch. Dist. v. RSUI Indemn. Co.*, 2009 WL 367688, at *2 (S.D. Miss. Feb. 11, 2009) ("This court must ***first*** determine the Policy's coverage of the losses and Defendant's liability for those losses, ***before*** the matter can be submitted for appraisal of the value of those losses." (emphasis added)). Thus, in short, only "[i]f that damage was the result" of a covered peril, then and only then should appraisal be used "to estimate the value of loss occasioned by" the covered damage. *Munn*, 115 So.2d at 58; *see also Salinas v. State Farm Lloyds*, 267 F. App'x 381, 385-86 (5th Cir. 2008) (applying Texas law) (appraisal is "limited to determining *the amount of loss*, not questions concerning cause and/or liability" and not questions of coverage or policy interpretation) (emphasis in original). Moreover, to use the appraisal process to determine issues of causation and liability – as the appraisal process did here – would deprive parties of their "constitutional rights to have determined in a court of justice the liability of an insurer." *Munn*, 115 So.2d at 57.

2. <u>The Relevant Facts Concern the Actual Conduct and Scope of the Appraisal</u>

As the foregoing analysis demonstrates, the facts that will be "of consequence to the determination of the action," and therefore relevant, Fed. R. Evid. 401, are those concerning the conduct

and scope of the appraisal process and the propriety of the appraisal award. Recent discovery has confirmed that the appraisal panel grossly exceeded its lawful charge and purported to determine causation and liability. Plaintiffs cannot make the requisite showing that State Farm's counsel are necessary witnesses at a trial, let alone that State Farm's counsel is the only source for the information they purportedly seek.

B. The Appraisers Possess the Information That Is Relevant and Crucial This Case

Plaintiffs cannot show that State Farm's counsel are the only source of any information, let alone any relevant or material information, and consequently Plaintiffs cannot carry their burden to show that State Farm's counsel are necessary witnesses at a trial.

1. State Farm's Counsel Are Not the Only Source of Information

First, as to the requirement that State Farm's counsel be "necessary witness[es]," MRPC 3.7, possessing "material information that no one else can provide," *Mettler*, 928 A.2d at 633-34, this Court has already determined that "other means exist to obtain the information." Mar. 27, 2009 Order [61] at 2. To this end, John Minor, State Farm's representative on the appraisal panel, Edward O'Leary, Plaintiffs' representative on the appraisal panel, and John Voelpel, the appraisal umpire, are the most obvious alternative sources of the information Plaintiffs ostensibly seek. Messrs. Minor, O'Leary, and Voelpel have already been deposed. Plaintiffs freely admit that "counsel for State Farm had done a thorough direct examination [of Mr. Minor] regarding the issues," [57] at 6, and that Plaintiffs' counsel then "thoroughly exhausted John Minor's recollection of the communications with Tucker and Spragins." [57] at 6. In support of these propositions, Plaintiffs cited thirty-eight pages of their examination of Mr. Minor, *id.*, which amply demonstrates that these communications have been robustly addressed and – fatally to the MRPC 3.7 analysis – that State Farm's counsel are not the only sources of this information. Further, Mr. Minor testified that all written communications between him and State Farm's counsel have already been produced in discovery, Ex. A at 45:9-16; 117:8-118:12; Mar. 27,

2009 Order [61] at 2. Thus, other witnesses were available to Plaintiffs, who already possess ample testimony from Mr. Minor about his communications with State Farm's counsel. As a matter of law, Plaintiffs cannot show that State Farm's counsel are necessary witnesses at a trial, who possess information that no one else can provide. This Court need not go any further to deny the motion to disqualify. Yet Plaintiffs' motion fails for the additional reason that State Farm's counsel possess no information that is strictly necessary to this case.

2. Communications With State Farm's Appraiser Are Not Strictly Necessary

Second, State Farm's counsel does not possess any information that is strictly necessary to the trial of any issues in this case. State Farm's counsel possess no independent information as to what the appraisers actually did. Whatever discussions State Farm's counsel may have had with Mr. Minor are not relevant (let alone strictly necessary) to this case in light of Mr. Minor's testimony that he simply did ***not*** understand Mr. Tucker and did ***not*** change the appraisal in any way on the basis of anything State Farm's counsel said. Further, any such communication "is not relevant to the ultimate issue of whether to enforce the appraisal award." Mar. 27, 2009 Order [61] at 2.

Mr. Minor repeatedly testified that "I never understood a single thing Lucky said from the day he hired me," Ex. A at 153:17-18, "[a]ll of the direction that I received verbally from Lucky was – I didn't have any idea," *id.* 45:19-23, "I didn't understand what he was talking about," *id.* at 46:14-15, he "never made any sense to me," *id.* at 102:16-17, and he "talks in circles." *Id.* at 106:2-3; 106:18. Mr. Minor further testified that "I didn't feel like I got any additional marching orders with my discussions with Lucky," *id.* at 106:20-21, and that his communications with State Farm's counsel had no affect on the conduct or the outcome of the appraisal.

> Q. Did any question that Mr. Tucker ask you in his e-mails or on the telephone change the job that you did?
>
> A. ***No***.
>
> …

> Q. I guess the bottom line, is there anything that happened in any of this correspondence, verbal, e-mail, letter, whatever that changed the way you did the appraisal in this case on the Kuehn file?
>
> A. ***No***, I did it – I did it – no. And it never will. I'll never change.

Id. at 176:12-16, 177:4-9. In the absence of any understanding of those discussions and in the absence of any impact on the appraisal, none of the communications with State Farm's counsel has any relevance to this case, because it did not factor in to the appraisal process. Moreover, not only is such information not relevant to the issues in this case, but it is also not strictly necessary to a trial.

What is material and crucial to this case is the manner in which the appraisal was actually conducted and the scope of the appraisal panel's award. Testimony by Messrs. O'Leary, Minor, and Voelpel, and related discovery demonstrate that the appraisal process was fundamentally inconsistent with the policy's language and governing law, regardless of any information State Farm's counsel might have. As that discovery now starkly reveals, the appraisal process was tainted and the panel did precisely what *Munn* prohibits – it independently determined the cause and coverage of Plaintiffs' damages.

As a threshold matter, even before the appraisal process began, Mr. O'Leary described to Plaintiff how he would "never pass a chance to create even more of an edge wherever possible" and "go full bore" and "set out how and where water got in" and argue causation. Ex. D at 1. Mr. Minor testified that Mr. O'Leary did precisely that during the appraisal and that, for example, "he would want to argue the windows on the first floor and say that the wind got there before the flood." Ex. A at 120:13-21. So, too, before Mr. O'Leary could have learned there was any difference of opinion between him and State Farm's appraiser, Mr. O'Leary told Plaintiff how he would pursue "a series of credibility 'dings' I will put in my counterpart's armour" that would be designed to "hurt him in the umpire's eyes" and to be "the ticket we need for success." Ex. D at 1. As Mr. Minor testified, there were many such extended monologues from Mr. O'Leary to the umpire, John Voelpel. Minor Dep., Ex. A at 88:23-

89:12.

Those tactics, engaged in by Mr. O'Leary with the full knowledge and acquiescence of Plaintiffs, call the appraisal process and award into complete question. The policy's appraisal provision, which was recited in the Chancery Court's Order directing the appraisal to take place, requires each side to identify a "competent, disinterested appraiser." *See* Apr. 24, 2007 Order, Ex. E, at 1. That Order also memorialized the parties' agreement "to have an appraisal as provided by the policy language," *id.* at 2, and ordered the appraisal to "proceed in accordance with the terms of the State Farm insurance policy." *Id.* As the Fifth Circuit stated more than seventy-five years ago, "the agreement in the policy was to submit the matter to 'competent and disinterested appraisers,' which ... excludes not merely pecuniary interest but also bias and prejudice, and is designed to secure a tribunal acting in a quasi judicial capacity free from partisanship and seeking to do equal justice between the parties." *Phoenix Assur. Co., Ltd. of London v. Davis*, 67 F.2d 824, 825 (5th Cir. 1933) (applying Texas law) (citation omitted). These same essential standards remain in effect today. *See, e.g.*, 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 211:33 & n.17 (2008) (citing Fifth Circuit's decision in *Davis* as primary authority). Mr. O'Leary – who confided in Plaintiffs his plans to "never pass a chance to create even more of an edge wherever possible," to "go full bore," to attack the "credibility" of State Farm's appraiser, and to "hurt him in the umpire's eyes," as the premeditated "ticket we need for success," Ex. D at 1 – can hardly be said to be "disinterested" and "free from partisanship and seeking to do equal justice between the parties."

Beyond employing those tactics, Mr. O'Leary further and repeatedly made clear that he saw it as his role, and the role of the appraisal panel, to make causation determinations as to wind damage.

> Q. And y'all – and y'all went out there, and this appraisal on the Kuehn appraisal, and made determinations of what would fall with regard to wind.
>
> A. That's right.

O'Leary Dep., Ex. B at 61:24-62:2. In describing the appraisal process in general, Mr. O'Leary stated

that "***we can't not address causation***," *id.* at 23:23-24:6, and that the appraisers make causation decisions, *see id.* at 30:25-31:15, even if it means ignoring the parties' list of damaged items and independently assigning the cause to wind. *See id.* at 41:16-25; 54:19-22; 61:24-62:2; 62:10-16. Thus, Mr. O'Leary freely admitted that he "would ***definitely be addressing causation*** in my consideration, absolutely." *Id.* at 84:20-86:1. He further stated that the appraisal panel made exactly the same causation determinations in this case, but "in a grander scale" for Plaintiffs' entire claim. *Id.* at 86:2-4.

Mr. Minor also testified that the appraisal panel went well beyond the valuation of undisputed covered damage, and independently determined causation in creating a "wind appraisal." Minor Dep., Ex. A at 43:17-21. Mr. Minor stated that he exceeded that undisputed scope, made an independent causation determination, and "paid the flood line up" as "wind items." *Id.* at 81:9-18. He further confirmed that the "consensus" he reached with Mr. O'Leary was the wholesale acceptance of Mr. O'Leary's unauthorized causation determination to value "items that were above the flood line and could have only been wind." *Id.* at 161:1-11.

Mr. Voelpel likewise testified that the appraisal panel "focus[ed] in on what would be covered under the policy and … put an amount on there." Voelpel Dep., Ex. F at 46:4-22. The panel attempted to determine the "proportion of the square footage and attributed it to wind and a portion of the square footage and attributed it to water." *Id.* at 25:16-26:5; *accord id.* at 26:6-11 Based on the second-story flood line, the panel decided that "75 percent of the upstairs area was damaged by wind," *id.* at 29:10-21 – a methodology that Mr. Voelpel could not recall using in other appraisals. *Id.* at 103:10-16. The panel even attempted to adjust for wind damage below the flood line.

> Q. In your mind, did y'all – did you try to adjust only something that would have been above 24 to 28 inches wherever the water line was determined on the second floor of the structure?
>
> A. No.
>
> Q. Okay. What did you do?

A. ***Tried to determine what would have been damaged by the – by the wind.***

Q. Okay. And was that a – was that something that you observed through conversations with Mr. O'Leary and Mr. Minor that all three of you were participating in?

A. Yes, sir.

Id. at 36:13-37:1. The appraisers "all tried to assess the damage in the best possible light and ***what it really was***." *Id.* at 88:15-19.

Not only did the appraisal panel violate *Munn* by purporting to determine the cause of the damage to Plaintiffs' dwelling, rather than assigning a dollar value to damage to the dwelling that was undisputedly caused by wind, but they also made determinations and awards for other coverages, such as those for personal property, law and ordinance, and alternative living expenses ("ALE").

This expansive strategy was laid out by Mr. O'Leary before the appraisal process even began. Indeed, Mr. O'Leary explained to Plaintiff that doing so would cover his costs and more.

> Developing such a contents list is a major league pain in the ass. However, the extra amount of dollars won from the development of such an intimidating document alone will cover my cost and then some. Normally, it will double the amount of the contents award and this amount in your case is a lot of money.

Ex. D at 1. As we now know, this strategy was, in fact, then implemented during the appraisal process.

A. We went beyond just the physical property damages. I think this attests to that, doesn't it? There's personal property on there.

….

A. We addressed [law and] ordinance issues.

O'Leary Dep., Ex. B at 73:21-74:3. Mr. Voelpel testified that the appraisal panel appraised personal property damages "just like you would the dwelling." Ex. F at 45:22-46:3. So, too, Mr. Minor testified that Mr. O'Leary injected other coverages, beyond dwelling damage, into the appraisal by providing personal property receipts and a statement of purported ALE, and that the appraisal award also included amounts to bring Plaintiffs' property up to the residential building code. Ex. A at 55:17-56:2, 59:22-60:7, 90:18-23, 91:22-93:2.

These improper and unauthorized causation determinations were not simply the result of a misunderstanding of the role of an appraiser. Mr. O'Leary was aware of any number of other appraisal approaches that would have complied with *Munn*. Indeed, he testified that the appraisal panel could have appraised only the value of damages that the parties did not dispute were caused by wind. *See* Ex. B at 60:16-20; 76:4-8. But that is decidedly not what they did.

In short, Plaintiffs cannot carry their burden to show that State Farm's counsel possess any necessary information that would make them necessary witnesses at trial. Messrs. Minor, O'Leary, and Voelpel have testified at length and are independent sources of any information Plaintiffs could want about the appraisal panel's activities, and Mr. Minor specifically testified about his communications with State Farm's counsel. Moreover, this extensive testimony from the appraisers amply demonstrates that any information State Farm's counsel may have about the appraisal or communications with Mr. Minor is neither relevant nor strictly necessary to the trial of this case. Mr. Minor testified that any instructions from Mr. Tucker simply had no effect on the appraisal process, and Messrs. Minor, O'Leary, and Voelpel amply testified to the patent impropriety of the appraisal process, thus further negating the necessity of any information that State Farm's counsel may have. For all these reasons, though any one of them will suffice, this Court should deny Plaintiffs' motion to disqualify.

3. State Farm's Counsel Did Not Concede The Disqualification Issue

Rather than providing legal argument or factual support for their motion to disqualify, Plaintiffs instead insinuate that State Farm's counsel somehow "recognized" that they will be necessary witnesses. [36] at 1. State Farm's counsel recognized no such thing. State Farm's counsel halted the first deposition of Mr. Minor in response to Plaintiffs' counsel's threats and out of an abundance of caution, and not due to any acknowledgment that State Farm's counsel would be necessary witnesses. At the deposition, Plaintiffs' counsel asserted that "we all realize at this point that your firm is going to be witness in this," Minor Dep. Vol. 1, Ex. G at 29:14-16, to which State Farm's counsel responded that "if

you feel, and you've identified our firm as a witness, then I need to stop right here." *Id.* at 31:15-17. Plaintiffs' counsel threatened consequences to the continuation of the deposition, and State Farm's counsel discontinued it in response to that threat, rather than out of any recognition as to the merits *vel non* of Plaintiffs' contentions.

MR. DENHAM: I'm not going to tell you you can't. You just do it at your peril.

MR. SPRAGINS: Yeah, all right. We're ending the deposition.

Id. at 32:3-6. State Farm then promptly retained additional counsel who resumed deposing Mr. Minor, where it became abundantly clear, as discussed above, that State Farm's counsel are not necessary witnesses. State Farm's counsel are not necessary witnesses and have never "recognized" that factually and legally unfounded assertion.

4. <u>Plaintiffs' Arguments Would Also Mandate Disqualification of Plaintiffs' Counsel</u>

While State Farm is not currently seeking the disqualification of Plaintiffs' counsel, their motion for disqualification is not well-taken given that their arguments of purported influence over the appraisal apply with even more force to Plaintiffs' own counsel. Indeed, courts have denied a plaintiff's motion to disqualify defendant's counsel based on prior involvement in the case when plaintiff's counsel was equally involved, because "if [defendant's counsel's] purported involvement makes her a potential witness, it follows that both [plaintiff's] attorneys are potential witnesses." *Jones v. City of Albuquerque*, No. 04-174 JH/LFG, at *1-2 (D.N.M. Dec. 28, 2005) (Ex. H). "[I]t is ironic for [plaintiff] to argue that it is impermissible for [plaintiff's] counsel … to continue as an advocate in this case and yet offer no explanation why it is permissible for [plaintiff's] own attorney to be a witness in this proceeding without being disqualified." *Id.* at 2.

Here, the evidence reveals that Plaintiffs' counsel and Mr. O'Leary discussed strategy for the appraisal. Mr. O'Leary contacted Plaintiffs' counsel to discuss when it would be most strategically advantageous to be named as the appraiser, so that they would not "tip [their] hand first" and to keep

State Farm from "call[ing] North Carolina" and "find[ing] out what they are dealing with." Ex. C. Plaintiffs' counsel agreed with that suggested strategy and further instructed Mr. O'Leary that after the appraisal he planned "to sue the insurance company for bad faith, so be sure no release is made of that claim." *Id.*

III. MRPC 3.7 DOES NOT REACH PRE-TRIAL PROCEEDINGS OR HICKMAN, GOZA & SPRAGINS

Even if Plaintiffs could show a factual and legal predicate for disqualifying Messrs. Tucker or Spragins, which they cannot, the applicable ethical standard would not support disqualifying them from pre-trial proceedings in this case, nor would it support disqualifying the firm of Hickman, Goza & Spragins.

First, the plain language of MRPC 3.7 limits only a lawyer's ability to serve as "advocate ***at a trial*** in which the lawyer is likely to be a necessary witness." Thus, the Rule "does not prevent an attorney from representing a client through the entire course of a litigation, but merely prohibits representation 'at *a trial*.'" *Geeslin v. Nissan Motor Acceptance Corp.*, 1998 WL 527111, at *4 (N.D. Miss. 1998) (emphasis in original). Even if Plaintiffs could show that Messrs. Tucker or Spragins were necessary witnesses, which they cannot, the Rule does not support disqualifying them from pre-trial proceedings.

Second, just as Plaintiffs cannot show that Messrs. Tucker and Spragins should be individually disqualified, so too do they fail to articulate any grounds for the disqualification of Hickman, Goza & Spragins. Rule 3.7 specifically states that disqualification of a single lawyer who is a necessary witness does not impute to the lawyer's firm.

> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest: General Rule] or Rule 1.9 [Conflict of Interest: Former Client].

MRPC 3.7(b). While Plaintiffs cursorily cite Rules 1.7 and 1.10 to assert that "Hickman, Goza & Spragins, PLLC, must be disqualified as counsel in this action," [36] at 2, but offer no argument or

evidence of any conflict of interest. Thus, Plaintiffs have in no way demonstrated that the entire firm of Hickman, Goza & Spragins should be disqualified.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion in its entirety, together with such other and further relief as to this Court may seem just and proper.

Dated: April 15, 2009

Respectfully submitted,

/s/ John A. Banahan

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CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have on this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, April 15, 2009.

/s/ John A. Banahan
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