No. 20-_____

IN THE

SUPREME COURT OF THE UNITED STATES

George Matthews and Nina Matthews

Petitioners,

vs.

David Merbaum and Andrew Becker

Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Pro-Se Petitioners

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-15001

GEORGE MATTHEWS, NINA MATTTHEWS *Plaintiffs*

v.

STATE FARM FIRE & CASUALTY COMPANY Defendant

Andrew J. Becker
David Jason Merbaum Appellees

Filed: June 2, 2020

OPINION

Before: BRANCH, FAY and HULL, Circuit Judges

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-15001
Non-Argument Calendar

D.C. Docket No. 1:10-cv-01641-SCJ

GEORGE MATTHEWS,
NINA MATTHEWS,

Plaintiffs-Appellants,

versus

STATE FARM FIRE & CASUALTY COMPANY,

Defendant,

ANDREW J. BECKER,
DAVID JASON MERBAUM,

Interested Parties-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 2, 2020)

Before BRANCH, FAY and HULL, Circuit Judges.

PER CURIAM:

This appeal stems from a 2010 suit that the plaintiffs-appellants, George Matthews and Nina Matthews ("the Plaintiffs"), filed against their homeowners insurance company, State Farm Fire and Casualty Company ("State Farm"). The appellees, David Merbaum and Andrew Becker ("the M&B Attorneys") initially represented the Plaintiffs but eventually withdrew due to a fee dispute. In 2012, the Plaintiffs' State Farm suit ended when this Court affirmed the district court's entry of summary judgment in favor of State Farm.

Several years later, in 2019, the Plaintiffs filed a pro se motion to hold the M&B Attorneys in civil contempt for their alleged failure to follow a 2010 court order about the fee dispute in the State Farm suit. The Plaintiffs also filed a motion to recuse District Court Judge Steve Jones from presiding over the contempt proceedings based on his previous involvement in the State Farm suit and his receipt of an "extrajudicial document," namely a grievance the Plaintiffs filed about Judge Jones with the Georgia Attorney General. District Court Judge Jones denied both motions. The Plaintiffs now appeal those rulings. After review, we conclude the district court properly denied both motions and affirm.

I. BACKGROUND[1]

A. Plaintiffs' 2010 State Farm Suit & M&B Attorneys' First Motion to Withdraw

In April 2010, the Plaintiffs filed their suit against State Farm for breach of contract and bad faith based on its alleged failure to pay the full loss amount caused by tree damage to their home. While the Plaintiffs initiated the suit in state court, State Farm removed it to federal court on the basis of diversity jurisdiction. The case was assigned to District Court Judge Willis Hunt.

The Plaintiffs retained M&B Attorneys Merbaum and Becker who were with the Merbaum Law Group, PC ("Merbaum Law"). According to their original Attorney-Client Contract, the Plaintiffs were to pay the M&B Attorneys on an hourly basis for all work performed in the State Farm matter, as well as a $1,500 retainer and any out-of-pocket expenses.

During the discovery phase of the litigation, communications between the Plaintiffs and the M&B Attorneys broke down, and the M&B Attorneys filed their first motion to withdraw from representation. The Plaintiffs objected to the withdrawal.

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[1]The M&B Attorneys object to documents in the Plaintiffs' Appendix that were not submitted to the district court. We agree and decline to consider those documents. See 11th Cir. R. 30-1(a) (providing that, generally, "under no circumstances should a document be included in the appendix that was not submitted to the trial court").

B. District Court's October 25, 2010 Oral Order

At an October 25, 2010 hearing, the parties notified the district court of their inability to reach a fee agreement and their disagreements on how to proceed in the suit against State Farm. The parties explained that the M&B Attorneys began representing the Plaintiffs pursuant to an hourly fee agreement. After the retainer and first bill were paid, however, the Plaintiffs asked to switch to a contingency basis. The parties failed to reach a new contingency fee agreement, and the Plaintiffs' outstanding bill of almost $20,000 for legal services rendered thus far went unpaid. At one point, the M&B Attorneys sent the Plaintiffs a letter offering to settle all amounts owed for only $500 in out-of-pocket fees if the Plaintiffs would consent to the Attorneys' withdrawal ("Settlement Letter").

District Court Judge Hunt stressed his preference that the parties reconcile, stating that the parties needed to "agree on contingency, work that out, and see if you can't take a few depositions and at least have mediation and see where you are there." Judge Hunt instructed that, if the parties could not come to a resolution by the end of the week, they should notify the court. If unable to reconcile, Judge Hunt stated that he would grant the M&B Attorneys' motion to withdraw on the conditions stated in the Settlement Letter, that "aside from some out-of-pocket costs—there would be no additional charge to the plaintiffs." Judge Hunt reiterated, "[b]ut I do want you to have this meeting between the parties to see if

there isn't some way you can get along." Judge Hunt instructed the M&B Attorneys to report back by October 29, 2010.[2]

On October 28, 2010—just three days after the hearing—the parties executed an Amendment to their original Attorney-Client Contract ("the Amendment"). The Amendment stated that: (1) the Plaintiffs agreed to pay $7,500 for all legal work performed through October 27, 2010; (2) all work performed after October 27 would be billed at an hourly rate of $225; and (3) the Plaintiffs' $1,500 retainer would be applied to their prior bill.

On November 5, 2010, based on the parties' reconciliation, the M&B Attorneys withdrew their first motion to withdraw.

C. M&B Attorneys' Second Motion to Withdraw & Summary Judgment

Subsequently, the Plaintiffs incurred additional attorney's fees, which they failed to pay. On December 23, 2010, the M&B Attorneys filed their second motion to withdraw. Over the Plaintiffs' objection, Judge Hunt granted the M&B

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[2]Judge Hunt's instruction went as follows:

> . . . I want you to agree . . . that the Matthews[es] come by your office before the end of this week, give them at least an hour's time, talk to them, and if at the end of that time you cannot get out, let us know. I will then relieve the lawyers of their responsibility on the conditions set forth in their letter, and that is that there be no additional—aside from some out-of-pocket costs—there would be no additional charge to the plaintiffs. And then they can go and get a lawyer maybe who will agree to take it on a contingency and move forward.
>
> But I do want you to have this meeting between the parties to see if there isn't some way you can get along.

The hearing minutes indicated that the court "ordered [the parties] to make another attempt to reconcile their differences."

Attorneys' motion to withdraw and stayed discovery while the Plaintiffs sought new counsel. The order said nothing about the parties' fee arrangement or the conditions in the Settlement Letter.

In March 2011, the case was reassigned to District Court Judge Steve Jones. State Farm moved for summary judgment, which the now pro se Plaintiffs opposed.

In 2012, Judge Jones granted State Farm's summary judgment motion on all claims, dismissed the Plaintiffs' suit, and awarded State Farm its costs. The Plaintiffs pro se appealed, and this Court affirmed. Matthews v. State Farm Fire & Cas. Co., 500 F. App'x 836, 837, 843 (11th Cir. 2012).

D. M&B Attorneys' 2015 Lawsuit Against Plaintiffs in State Court

In 2015, Merbaum Law sued the Plaintiffs in state court to recover their outstanding bills. Plaintiff George Matthews received a discharge in bankruptcy court and was dismissed from the state court suit in 2017. In August 2017, the state court entered judgement in favor of Merbaum Law and against Plaintiff Nina Matthews for $39,902.66 in attorney's fees and expenses plus interest and late fees. Nina Matthews filed unsuccessful challenges to the state court judgment.

E. Plaintiffs' 2019 Motions for Contempt and Recusal in Federal Court

In July 2019—six years after this Court affirmed the district court's judgment in favor of State Farm—the Plaintiffs filed a motion for civil contempt

against the M&B Attorneys and a motion to recuse District Court Judge Jones from presiding over the contempt proceedings.

In their motion for contempt, the Plaintiffs alleged that the M&B Attorneys intentionally violated District Court Judge Hunt's October 25, 2010 oral order. The Plaintiffs claimed that, at the October 25 hearing, Judge Hunt ordered the M&B Attorneys to either (a) reconcile with the Plaintiffs by creating a contingency contract or (b) withdraw from the case with no additional charges beyond $500 in out-of-pocket costs under the terms of their Settlement Letter. The Plaintiffs asserted that the M&B Attorneys violated that oral order by withdrawing from the case and by making numerous attempts to collect attorney's fees beyond the $500 out-of-pocket fees.[3] The Plaintiffs additionally requested that the district court remove the state court and bankruptcy judgments against the Plaintiffs, impose sanctions and a "coercive daily fine" against the M&B Attorneys, reprimand them, and consider filing for their disbarment.

In their motion to recuse and supporting affidavits, the Plaintiffs asserted that District Court Judge Jones "pose[d] a threat to an objective ruling" on their contempt motion for two reasons. First, the Plaintiffs claimed that, in the

[3]The Plaintiffs alleged that the M&B Attorneys: (1) filed a notice of attorney lien in state court for $18,251.90 plus interest for legal fees in the State Farm litigation; (2) sent the Plaintiffs an email demanding $20,000 and threatening further litigation; (3) filed a claim in George Matthew's bankruptcy proceeding and obtained an order for $19,928.83; (4) brought a breach-of-contract action in state court and obtained a judgment for $39,902.66; and (5) filed a garnishment in state court stating that Nina Matthews owed them $57,226.20.

underlying State Farm suit, Judge Jones allowed State Farm to admit allegedly fabricated documents and relied upon those documents in granting summary judgment for State Farm.

Second, the Plaintiffs claimed they sent Judge Jones an "extrajudicial source" of information, to wit their grievance filed with the Georgia Attorney General. The grievance accused Judge Jones of relying on the allegedly fabricated documents and of failing to punish State Farm's counsel. The grievance also stated that the M&B Attorneys withheld information and documents from the Plaintiffs and described the Attorneys' alleged violations of District Court Judge Hunt's October 25 oral order. The Plaintiffs attached their grievance and the Georgia Attorney General's rejection of the grievance. The Plaintiffs argued that "Judge Jones's ruling history over this case and preconceived opinions that may have been developed after being sent the grievance . . . would cause anyone . . . to reasonably doubt [his] impartiality to preside over this contempt hearing."

Opposing the Plaintiffs' contempt motion, the M&B Attorneys emphasized that they had not violated any order. The M&B Attorneys argued that: (1) Judge Hunt's October 25 oral order merely instructed the parties to attempt to reconcile, which they did by executing the Amendment to the Attorney-Client Contract; and (2) the Plaintiffs were abusing the court system in an attempt to avoid execution of the state court judgment.

F. District Court's Order Denying Plaintiffs' Motions

In November 2019, District Court Judge Jones denied the Plaintiffs' motions to recuse and for contempt. As to the recusal motion, Judge Jones determined that the Plaintiffs' grievance, alone, did not warrant recusal and stated that he "approache[d] each of [his] cases with integrity, professionalism, and impartiality."

As to the contempt motion, Judge Jones found no evidence that the M&B Attorneys did not comply with Judge Hunt's October 25 oral order, "which was for the parties to essentially make an attempt at reconciliation." Judge Jones found that the Amendment to the Attorney-Client Contract and the withdrawal of the M&B Attorneys' first motion to withdraw indicated that the parties had reconciled. Therefore, the latter part of Judge Hunt's order that was contingent on the parties' failure to reconcile never became effective. While recognizing that the reconciliation later fell apart and that the M&B Attorneys successfully filed a second motion to withdraw, Judge Jones determined that these circumstances were irrelevant because they "were not within the contingency of" Judge Hunt's October 25 oral order.

This is the Plaintiffs' appeal.

II. MOTION TO RECUSE

On appeal, the Plaintiffs argue that Judge Jones abused his discretion by failing to recuse himself based on: (1) his previous involvement in the case; and

(2) his receipt of the Plaintiffs' "extrajudicial" grievance complaining of his and the M&B Attorneys' conduct.[4] The Plaintiffs assert that these circumstances called Judge Jones's impartiality into question.

Recusal is governed by two statutes—28 U.S.C. §§ 144 and 455. Under § 144, a party may seek the presiding judge's recusal by filing a "timely and sufficient affidavit" showing that the judge "has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. The party "must allege facts that would convince a reasonable person that bias actually exists." Christo v. Padgett, 223 F.3d 1324, 1333 (11th Cir. 2000). The party's properly pleaded facts in his § 144 affidavit must be taken as true. Id.

Under § 455, a judge must recuse himself when "his impartiality might reasonably be questioned" or when "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a), (b)(1). In reviewing a judge's decision not to recuse, we ask whether an objective, disinterested, and fully informed lay observer

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[4]This Court reviews a judge's decision not to recuse himself for an abuse of discretion. Jenkins v. Anton, 922 F.3d 1257, 1271 (11th Cir. 2019). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." F.T.C. v. Nat'l Urological Grp., Inc., 785 F.3d 477, 481 (11th Cir. 2015) (quotation marks omitted).

On appeal, the Plaintiffs make no mention of their other basis for recusal—that Judge Jones admitted and relied upon State Farm's allegedly fabricated documents during the summary judgment proceedings. Thus, they have abandoned any challenge for recusal on that basis.

would entertain a significant doubt about the judge's impartiality. Jenkins v. Anton, 922 F.3d 1257, 1271 (11th Cir. 2019).

Under either §§ 144 or 455, the nature of the alleged bias must be personal, rather than judicial. United States v. Meester, 762 F.2d 867, 884 (11th Cir. 1985). In other words, the bias must stem from "extrajudicial sources," or "the judge's acts [must] demonstrate such pervasive bias and prejudice that it unfairly prejudices one of the parties." United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999) (quotation marks omitted).

The Plaintiffs have failed to demonstrate how District Court Judge Jones abused his discretion in this case, under either §§ 144 or 455. Judge Jones's prior involvement in the underlying State Farm suit is not a personal, extrajudicial bias. See Christo, 223 F.3d at 1334 (providing that recusal is not required simply because the particular judge "presided over previous . . . civil trials involving the same parties"); see also Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994) (explaining that a judge's opinions formed based on facts or events occurring during present or past proceedings do not support recusal, unless those opinions reflect "a deep-seated favoritism or antagonism that would make fair judgment impossible").

Nor is the Plaintiffs' filing of a grievance against Judge Jones sufficient to warrant his recusal. See In re Evergreen Sec., Ltd., 570 F.3d 1257, 1265 (11th Cir.

2009) ("The mere filing of a complaint of judicial misconduct is not grounds for recusal."). While the Plaintiffs claim that the grievance contained specific information about the M&B Attorneys' actions relevant to the contempt proceedings, they do not allege which information, if any, the grievance contained that was beyond or different from what was revealed to Judge Jones during the contempt proceedings (i.e., through the Plaintiffs' motion for contempt, the M&B Attorneys' response, and the parties' attached documents).

The Plaintiffs' motion alleged no further facts that would cause Judge Jones's impartiality to reasonably be questioned, that showed personal bias or prejudice, or that demonstrated he had personal knowledge of disputed evidentiary facts concerning the proceeding. See 28 U.S.C. §§ 144, 455. Accordingly, Judge Jones did not abuse his discretion in declining to recuse himself from the contempt proceedings.

III. MOTION FOR CIVIL CONTEMPT

Next, the Plaintiffs argue that District Court Judge Jones abused his discretion, and denied them due process, when he denied their motion for contempt without ordering the M&B Attorneys to show cause.[5] The Plaintiffs assert that,

[5]This Court reviews for an abuse of discretion the district court's ruling on a motion for civil contempt. Nat'l Urological Grp., 785 F.3d at 481. This Court also reviews for an abuse of discretion a district court's interpretation of its own orders. In re Managed Care, 756 F.3d 1222, 1234 (11th Cir. 2014).

because they made a prima facie showing that the M&B Attorneys violated Judge Hunt's October 25 oral order, the burden shifted to the Attorneys to show cause that they did not violate the order.[6]

"Courts have the inherent power to enforce compliance with their orders through civil contempt." U.S. Commodity Futures Trading Comm'n v. Escobio, 946 F.3d 1242, 1255 (11th Cir. 2020). Upon filing a motion for civil contempt, the movants—here, the Plaintiffs—bear the initial burden of proving, by clear and convincing evidence, the alleged contemnors' noncompliance with a prior court order. Thomas v. Blue Cross & Blue Shield Ass'n, 594 F.3d 814, 821 (11th Cir. 2010). "The clear and convincing evidence must establish that: (1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator[s] had the ability to comply with the order." Ga. Power Co.

[6]The Plaintiffs contend that Judge Hunt entered ten "orders" during the October 25 hearing and that those orders were "suppressed" and "never entered [onto] the court [docket]." The Plaintiffs identify the ten "orders" in a chart they prepared. The Plaintiffs assert that the "records were tampered [with] in the [district] court record by recording only a partial order," which allowed the M&B Attorneys to argue "an alternative conclusion than what Judge Hunt [actually] ordered."

There is simply no record evidence supporting the Plaintiffs' claims of suppressed orders and transcript tampering, nor have they provided any such evidence. The transcript of the October 25, 2010 hearing is available on the district court docket, and there is no indication from the face of the transcript that it has been tampered with. Moreover, the only order by Judge Hunt that is relevant to this appeal—that the parties meet and attempt to reconcile—was an oral order that is sufficiently reflected in the transcript and in the hearing minutes. There is no indication that Judge Hunt made or entered a written order on this matter. Thus, there was no such written order to "suppress." The remaining alleged nine "orders" identified by the Plaintiffs were merely statements Judge Hunt made to the parties during the hearing in relation to its ultimate oral order, and each of those nine statements was included in the transcript of the hearing.

v. N.L.R.B., 484 F.3d 1288, 1291 (11th Cir. 2007) (emphasis omitted). Once the movants make a prima facie showing of a violation, the burden shifts to the alleged contemnors—here, the M&B Attorneys—to produce evidence explaining their noncompliance at a show cause hearing. Thomas, 594 F.3d at 821.

To determine whether a party is in contempt of a district court's order, the order is subject to reasonable interpretation and may not be expanded beyond the meaning of its terms without notice and an opportunity to be heard. Ga. Power Co., 484 F.3d at 1291. This Court construes any ambiguities or uncertainties in the court order in the light most favorable to the party charged with contempt. Id. We look not to the subjective beliefs or intent of the alleged contemnor in complying with the subject order, but to whether in fact the alleged contemnor complied with the order. Id.

Here, the district court did not abuse its discretion in denying the Plaintiffs' contempt motion. See F.T.C. v. Nat'l Urological Grp., Inc., 785 F.3d 477, 481 (11th Cir. 2015). As an initial matter, Judge Jones did not abuse his discretion in construing Judge Hunt's October 25, 2010 oral order as an order "for the parties to essentially make an attempt at reconciliation." See In re Managed Care, 756 F.3d 1222, 1234 (11th Cir. 2014). At the October 25 hearing, Judge Hunt stressed his preference that the parties reconcile and ordered the parties to confer and attempt to reconcile by the end of the week. In fact, Judge Hunt instructed that he wanted

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Here, the district court did not abuse its discretion in denying the Plaintiffs' contempt motion. See F.T.C. v. Nat'l Urological Grp., Inc., 785 F.3d 477, 481 (11th Cir. 2015). As an initial matter, Judge Jones did not abuse his discretion in construing Judge Hunt's October 25, 2010 oral order as an order "for the parties to essentially make an attempt at reconciliation." See In re Managed Care, 756 F.3d 1222, 1234 (11th Cir. 2014). At the October 25 hearing, Judge Hunt stressed his preference that the parties reconcile and ordered the parties to confer and attempt to reconcile by the end of the week. In fact, Judge Hunt instructed that he wanted

the parties to meet at the M&B Attorneys' office, talk for "at least an hour's time," "have this meeting," and "see if there isn't some way you can get along." Even the hearing minutes reflected that Judge Hunt's oral order was that the parties "make another attempt to reconcile their differences." Only if the parties were unable to come to a resolution were they to notify the court and was the court to take further action (i.e., grant the M&B Attorneys' motion to withdraw on the conditions stated in the Settlement Letter).

The Plaintiffs contend that Judge Hunt's October 25 oral order went beyond merely requiring them to reconcile, and rather required that either (a) the parties agree to a contingency fee arrangement in particular or (b) the M&B Attorneys withdraw and recover only $500 in out-of-pocket costs. However, the transcript of the October 25 hearing evidences that Judge Hunt's oral order was not this definitive.

While Judge Hunt did make one statement that the parties needed to "agree on contingency," he did so in the context of the parties' indications that they wished to reach a contingency fee agreement but had been unable to do so. This single statement cannot reasonably be construed as an order that the M&B Attorneys could only continue representation on a contingency basis, regardless of any subsequent agreement between the parties. Rather, the overall import of Judge Hunt's oral order was simply that the parties needed to meet "to see if there isn't

some way [they] c[ould] get along." In any event, we must construe any ambiguities or uncertainties in Judge Hunt's October 25 oral order in the light most favorable to the M&B Attorneys. See Ga. Power Co., 484 F.3d at 1291. Thus, to the extent there is any ambiguity, we read Judge Hunt's oral order as directing the parties to meet and attempt to reconcile as to the fee arrangement, not to require the M&B Attorneys to either agree to a contingency fee arrangement or withdraw with only $500 recompense.

Nor did Judge Jones abuse his discretion in determining that the M&B Attorneys did not violate Judge Hunt's October 25, 2010 oral order. The record evidences that, just three days after the October 25 hearing, the parties did meet and confer as to a fee agreement. While the parties did not agree to a contingency fee arrangement in particular, the M&B Attorneys proposed the Amendment to the parties' Attorney-Client Contract (proposing a flat rate for all work performed through October 27 and an hourly rate for work performed after that date), and the Plaintiffs signed and executed the Amendment on October 28, 2010. The Plaintiffs concede that they did in fact confer and agree to this fee arrangement on October 28, and they have never challenged the validity of the Amendment. Additionally, neither party returned to the district court by October 29, or anytime thereafter, to notify Judge Hunt that they had not come to a resolution. Rather, the M&B Attorneys withdrew their first motion to withdraw, further evidencing their

October 28 reconciliation.

Therefore, the record shows that the parties complied in fact with Judge Hunt's October 25 oral order "to essentially make an attempt at reconciliation." See id. And, as Judge Jones determined, the parties' post-reconciliation and post-Amendment breakdown in communication was no longer subject to the October 25 oral order, with which the parties had already complied.

Because the Plaintiffs failed to make a prima facie showing that the M&B Attorneys violated either Judge Hunt's October 25 oral order or any other order, the burden never shifted to the M&B Attorneys to explain their noncompliance at a show cause hearing. See Thomas, 594 F.3d at 821. Accordingly, Judge Jones did not abuse his discretion, or deprive the Plaintiffs of due process, in denying the Plaintiffs' contempt motion without issuing a show cause order.

IV. CONCLUSION

Because the district court did not abuse its discretion in denying the Plaintiffs' motions to recuse and for contempt, we affirm.[7]

AFFIRMED.

[7]The M&B Attorneys' request for sanctions against the Plaintiffs, made only in passing in their merits brief and not as a separate motion, is denied. See Fed. R. App. P. 38 (providing that, upon a motion, this Court may award just damages and costs to the appellee if we determine that the appeal is frivolous); 11th Cir. R. 38-1 & I.O.P. (providing that motions for damages and costs pursuant to Rule 38 should be filed separately, not contained in an appellee's brief); Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 682 (11th Cir. 2014) (explaining that a party abandons an issue by referencing it only in passing or burying it within properly presented arguments).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:10-CV-1641

GEORGE MATTHEWS, NINA MATTTHEWS *Plaintiffs*

v.

STATE FARM FIRE & CASUALTY COMPANY Defendant

Andrew J. Becker
David Jason Merbaum Respondents

Filed November 12, 2019

ORDER

Before: Steve C. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE MATTHEWS AND NINA MATTHEWS, Plaintiffs, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	CIVIL ACTION FILE NO. 1:10-CV-1641-SCJ

ORDER

This matter appears before the Court on the Motion for Recusal (Doc. No. [112]) and Motion for Contempt filed by Plaintiffs George Matthews and Nina Matthews against their former attorneys David Merbaum and Andrew Becker (Doc. No. [111]).

The Court will address the pending motions in turn.

I. Motion for Recusal

In their motion for recusal, Plaintiffs state that they "believe that recusal is warranted due to the fact that [the undersigned judge] poses a threat to an objective ruling" on their motion for contempt proceedings. Doc. No. [112], p. 5. Plaintiffs base their motion on a grievance (extrajudicial document) that they filed against the undersigned judge with the Office of the Attorney General. Id. at p. 6. Plaintiffs also attached a January 2018 letter addressed to the Court in which they state: "[w]e believe you have intentionally harmed us by writing a false order for State Farm after being presented with facts that State Farm had presented fraud to the court." Doc. No. [112], p. 12. Plaintiffs also attach affidavits in support of their motion. Doc. Nos. [112-1 and 112-2].

After review, the motion for recusal is **DENIED** as the Eleventh Circuit has held that "[t]he mere filing of a complaint of judicial misconduct is not grounds for recusal . . . . [Furthermore], it would be detrimental to the judicial system if a judge had to disqualify himself anytime someone filed a complaint about his conduct. A party would only have to file a complaint to get a different judge." In re Evergreen Sec., Ltd., 570 F.3d 1257, 1265 (11th Cir. 2009). The Eleventh Circuit has also held that "[a] party's complaints regarding 'judicial rulings. . .

are not sufficient to require recusal.'" Brown v. U.S. Patent & Trademark Office, 226 F. App'x 866, 869 (11th Cir. 2007) (citing Liteky v. United States, 510 U.S. 540, 556 (1994)). Furthermore, the Court approaches each of its cases with integrity, professionalism, and impartiality. This case is no different.

II. Motion for Contempt

In their contempt motion, Plaintiffs request that their former attorneys, David Merbaum and Andrew Becker (hereinafter "Respondents"),[1] be held in contempt and that this Court "reprimand the attorneys for their false attempt to collect money never owed to them and their years of harassment for a false claim." Doc. No. [111], p. 11. Plaintiffs also recommend that this Court "consider filing for disbarment of their [former attorneys'] law licenses for the years of deceit and false statements made before the courts and to the [Plaintiffs]." Id.

In their opposition brief, Respondents state that "[t]here is no basis for the Court to conclude that Respondents are in contempt because there is no order adjudicating the amount owed to Respondents for services rendered." Doc. No.

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[1] Attorneys David Merbaum and Andrew Becker were never parties to this case. Nevertheless, because the pending motion involves an order of the court issued in this case, the Court will consider the motion and the attorneys will be referred to as respondents.

[115], p. 1. Respondents state that "[t]he evidence presented and the record before this Court reflects that the only order issued by this Court was to attempt reconciliation." Doc. No. [115], p. 9. Respondents state that "Plaintiffs and Respondents reconciled, executed [a contract] [a]mendment, and withdrew the motions to withdraw that were pending at the time of the Hearing." Id. Respondents also state that "the same issue has been previously litigated between the same parties, the doctrines of res judicata and collateral estoppel apply to prevent Matthews from litigating the issue yet again." Id. at p. 11. Respondents also state that they "respectfully request that the Motion be denied and that this Court enter an award of attorney fees for abusive litigation . . . as a deterrent to . . . cease filing . . . wasteful, self-serving motions which are only intended as a delaying tactic to avoid paying [an already final state court judgment] and which frivolous actions waste precious judicial resources on spurious, nonsensical arguments." Doc. No. [115], p. 12.

"Courts have inherent power to enforce compliance with their lawful orders through civil contempt." Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991). To prevail on a civil contempt motion, a plaintiff must demonstrate, by clear and convincing evidence, that "1) the

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allegedly violated order was valid and lawful; 2) the order was clear, definite and unambiguous; and 3) the alleged violator had the ability to comply with the order." McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000) (internal quotations omitted). If Plaintiff makes this *prima facie* showing, the burden of production shifts to Defendant to produce evidence explaining its noncompliance. Watkins, 943 F.2d at 1301.

The order at issue was pronounced by the Honorable Willis B. Hunt at an October 25, 2010 hearing on the Respondents' October 6, 2010 motions to withdraw as counsel of record (Doc. Nos. [25], [26]) for the Plaintiffs. Doc. No. [105].[2] At the conclusion of the hearing, in a verbal order, Judge Hunt stated:

> THE COURT: YOU MAY HAVE A SEAT OVER THERE.
>
> HERE IS WHAT I AM GOING TO DO. AFTER WHAT I HAVE HEARD THIS MORNING, I AM GOING TO TRY TO MEDIATE THE DISPUTE

[2] On March 7, 2011, this case was reassigned from Judge Hunt to the undersigned judge. See Doc. No. [73].

BETWEEN THE TWO OF YOU, THE TWO SIDES. FIRST LET ME SAY THAT, TO THE MATTHEWS'S, AT THIS POINT IN A CIVIL CASE -- IT'S NOT A CRIMINAL CASE. IT WOULD BE DIFFERENT IF IT WERE A CRIMINAL CASE -- I HAVE A HARD TIME REFUSING THEIR DESIRE TO GET OUT. YOU KNOW, IF WE WERE FURTHER ALONG IN THE CASE WHERE EVERYTHING WAS READY FOR TRIAL, THAT WOULD BE ANOTHER MATTER. BUT AT THIS POINT IN TIME, FRANKLY, IT WOULD BE DIFFICULT FOR THE COURT TO HOLD THEM IN, BOTH AT THEIR EXPENSE AND AT YOUR EXPENSE UNDER THE CIRCUMSTANCES.

BUT I DO FEEL THAT NOW THAT Y'ALL ARE SITTING HERE TOGETHER IN THIS COURTROOM, AND FROM WHAT I HAVE HEARD TODAY, I DON'T SEE WHY YOU CAN'T MAKE ONE MORE STAB AT TRYING TO GET TOGETHER ON WHAT NEEDS TO BE DONE IN THIS CASE. I AM GOING TO RECESS NOW BECAUSE I'VE GOT ANOTHER MATTER TO ATTEND TO AT 11:30, BUT WHAT I WANT YOU TO DO, I WANT YOU TO DO ONE OF TWO THINGS. I WANT YOU TO EITHER TALK WITH EACH OTHER RIGHT HERE IN THE COURTROOM THIS MORNING AND SEE IF THERE IS ANY WAY YOU CAN RECONCILE THE DIFFERENCES. AND TO DO THAT, MS. MATTHEWS, YOU ARE GOING TO HAVE TO BACK OFF OF SOME OF THE INSISTENCE ON YOUR DEMANDS, LISTEN TO YOUR LAWYERS, AND BE WILLING TO GO ALONG WITH THEIR VIEW OF HOW IT SHOULD PROCEED, BECAUSE THAT IS WHY THEY ARE ENGAGED.

AND IT IS VERY DIFFICULT -- I MEAN, I MYSELF WAS A LAWYER ONCE. IT'S VERY HARD TO HAVE A CLIENT THAT KEEPS TELLING YOU WHAT YOU OUGHT TO DO IN THE CASE. I MEAN, YOU

KNOW, YOUR RESPONSE TO THAT IS, HEY, GET SOMEBODY ELSE, OR DO IT YOURSELF IF, YOU KNOW -- IF YOU HAVE TO ANSWER ALL OF THESE QUESTIONS. SO YOU HAVE TO BACK OFF SOME.

SO, AT THE SAME TIME, IT SOUNDS LIKE TO ME THAT THE LAW FIRM IS DOING GOOD WORK, IS WELL-QUALIFIED TO DO THIS KIND OF WORK. AND IT'S AT A POINT WHERE IF THEY -- YOU KNOW, YOU NEED TO AGREE ON CONTINGENCY, WORK THAT OUT, AND SEE IF YOU CAN'T TAKE A FEW DEPOSITIONS AND AT LEAST HAVE MEDIATION AND SEE WHERE YOU ARE THERE.

OR, IF YOU DON'T WANT TO MEET IN THE COURTROOM TODAY, THEN WHAT I WANT YOU TO AGREE IS, SO THAT THE MATTHEWS'S COME BY YOUR OFFICE BEFORE THE END OF THIS WEEK, GIVE THEM AT LEAST AN HOUR'S TIME, TALK TO THEM, AND IF AT THE END OF THAT TIME YOU CANNOT GET OUT, LET US KNOW. I WILL THEN RELIEVE THE LAWYERS OF THEIR RESPONSIBILITY ON THE CONDITIONS SET FORTH IN THEIR LETTER, AND THAT IS THAT THERE BE NO ADDITIONAL -- ASIDE FROM SOME OUT-OF-POCKET COSTS -- THERE WOULD BE NO ADDITIONAL CHARGE TO THE PLAINTIFFS. AND THEN THEY CAN GO AND GET A LAWYER MAYBE WHO WILL AGREE TO TAKE IT ON A CONTINGENCY AND MOVE FORWARD.

BUT I DO WANT YOU TO HAVE THIS MEETING BETWEEN THE PARTIES TO SEE IF THERE ISN'T SOME WAY YOU CAN GET ALONG. IT SOUNDS LIKE TO ME, FROM HEARING MR. BECKER, THAT AN AWFUL LOT HAS BEEN DONE IN THIS CASE, AND IS READY TO BE DONE, THAT REALLY MEETS YOUR DEMANDS. IT IS JUST THAT THAT IS NOT

AN UNDERSTANDING BETWEEN THE TWO SIDES HERE AS TO THAT FACT.
ANYWAY, THAT IS WHERE I AM GOING TO LEAVE IT. I APPRECIATE IT. AND I WILL LOOK TO HEAR FROM MR. MERBAUM AT THE END OF THE WEEK TO SEE WHETHER THERE IS ANY CHANCE THAT Y'ALL CAN GET BACK TOGETHER OR NOT. THANK YOU VERY MUCH. I AM SORRY YOU HAVE HAD THIS MUCH DIFFICULTY, BUT I APPRECIATE YOU COMING THIS MORNING. WE ARE IN RECESS.
(END OF HEARING AT 11:10 A.M.)
* * * * *

Doc. No. [105], pp. 39–42.

After the hearing, on November 5, 2010, Respondents withdrew their motions to withdraw as counsel of record. Doc. Nos. [34], [115-7]. For purposes of the pending contempt motion, Respondents filed a document showing that the Plaintiffs entered into an amended attorney client agreement on October 28, 2010 (three days after the hearing with Judge Hunt). Doc. No. [115-6], p. 1. This amendment provided *inter alia* for payment of $7,500 for all work performed up to October 27, 2010 and an hourly rate of $225 for all work performed after October 27, 2010. Id.

After review, the Court finds that there is no evidence that shows that the Respondents have not complied with Judge Hunt's order, which was for the

parties to essentially make an attempt at reconciliation. The evidence of the Respondents' withdrawal of their motions to withdraw as attorneys of record and the amendment of the attorney-client agreement shows that the parties did reconcile. Judge Hunt's order also contained a contingency – in that if there was no reconciliation, Judge Hunt would relieve the attorneys of their responsibility to represent Plaintiffs with no additional charge to the Plaintiffs (other than some out-of-pocket costs). Because the record shows that there was a reconciliation, the latter part of Judge Hunt's order never became effective. The language that Judge Hunt utilized, *i.e.*, "I will then . . . ." also indicates that Judge Hunt intended to take additional action to make the contingency part of his order effective. The facts that the reconciliation fell apart and there was a later motion to withdraw (Doc. No. [55]) filed December 23, 2010 and order of the Court on January 5, 2011 (Doc. No. [57]) are not relevant as the later motion to withdraw and order were not within the contingency of Judge Hunt's October 25, 2010 verbal ruling.

Accordingly, Plaintiffs' motion for contempt (Doc. No. [111]) is **DENIED**.

CONCLUSION

Plaintiffs' Motion for Recusal (Doc. No. [112]) and Motion for Contempt (Doc. No. [111]) are **DENIED**. Respondents' request for attorneys' fees is **DENIED**; however, Plaintiffs are cautioned and warned that any future filings *that are without a plausible legal basis* in the case *sub judice* (that has been closed since 2012) may be subject to monetary and other sanctions deemed appropriate by this Court and applicable rules/law.

IT IS SO ORDERED this 12th day of November, 2019.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:10-CV-1641

GEORGE MATTHEWS, NINA MATTTHEWS *Plaintiffs*

v.

STATE FARM FIRE & CASUALTY COMPANY Defendant

Filed February 3, 2012

ORDER SUMMARY JUDGMENT

Before: Steve C. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE MATTHEWS AND NINA MATTHEWS,	:	
	:	CIVIL ACTION NO.
Plaintiffs,	:	1:10-CV-1641-SCJ
v.	:	
STATE FARM FIRE AND CASUALTY COMPANY,	:	
Defendant.	:	

ORDER

This matter comes before the Court on the Defendant's Motion for Summary Judgment [Doc. No. 86].

I. Factual Background

On April 13, 2010, Plaintiffs, George and Nina Matthews, filed a Complaint for Breach of Contract, Bad Faith, and Attorney's fees in the Superior Court of Cobb County, Georgia against Defendant, State Farm Fire and Casualty Company (hereinafter "Defendant" or "State Farm"). Doc. No. 1-1. On May 27, 2010, Defendant removed this case to the Northern District of Georgia under the diversity and removal jurisdictional provisions of 28 U.S.C. § 1332 and 28 U.S.C. § 1441.

In their Complaint, Plaintiffs indicate that they were insured by a State Farm

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Homeowner's Insurance Policy which was in full force and effect on May 1, 2009. Plaintiffs state that on May 1, 2009, two large oak trees located on the property fell upon their home causing damage. Doc. No. 1-1, 4.

The Plaintiffs filed an insurance claim with State Farm and it appears that neither party is contesting that May 1, 2009 incident was a covered loss. Issues arose between the parties as to the nature of the damage and the amount of the loss, resulting in the Plaintiffs filing this civil action.

Three engineers have inspected the Plaintiffs' home - (1) Philip Chapski, retained by State Farm; (2) Bill Creeden retained by Plaintiffs; and (3) Pete Craig, who came into the matter after the Plaintiffs contacted the Georgia Office of Insurance and Safety Fire Commissioner (hereinafter "DOI").

Mr. Chapski's report was prepared on June 10, 2009. Doc. No. 1-1, 5, Compl. ¶21. Plaintiffs notified State Farm that they disputed and rejected Chapski's report because Mr. Chapski's firm Cerny & Ivey Engineers, Inc., was not in good standing with the Georgia Secretary of State; Mr. Chapski's license had lapsed; and the report failed to acknowledge clear and obvious damage to the property. Doc. No. 1-1, 5, Compl.¶ 22.

Mr. Bill Creeden's engineering report was submitted to the Plaintiffs on June 22, 2009. Doc. No. 86-6, 1. Mr. Creeden's original report included an estimate for the

cost to make repairs to the home for the tree related damage, which totaled $9,400. Doc. No. 86-6, 3. At his deposition, Mr. Creeden testified that he was asked to prepare a supplemental report, providing more details on the repairs. Doc. No. 86-5, 6, Creeden depo., p. 23, lines 20-22. Mr. Creeden also indicated in an errata sheet to his deposition that the Matthews requested that he remove the costs opinion in his supplemental report. Doc. No. 86-5, 14. Prior to writing the supplemental report, the Matthews sent Mr. Creeden a list of items that they wished to have included in the report. Id. at depo. p. 27 - 28 and Doc. No. 86-8, 1-2. On July 11, 2009, Creeden forwarded the Plaintiffs his supplemental report, which detailed the repairs outlined in his initial report. However, Mr. Creeden did not include all of the items on the list requested by the Matthews. In his correspondence to Mrs. Matthews, Mr. Creeden stated: "[a]s we discussed before, some items on your list I cannot associate to the tree strike without losing credibility." Doc. No. 86-8, 5. As shown in the affidavit of State Farm's adjuster, Mr. Van Westmoreland, on June 25, 2009, the Plaintiffs submitted to State Farm the report prepared by Bill Creeden that did not contain an estimate for the cost of the repairs outlined in Creeden's report. Doc. No. 86-2, ¶ 9. As further stated by Mr. Westmoreland, upon receipt of the Revised Creeden Report and Mr. Chapski's report, State Farm agreed to adjust the claim based upon the scope of work described by Mr. Creeden in his supplemental

report as necessary to repair the damages associated with the tree striking the house. Id. at ¶11. State Farm's adjuster (Mr. Westmoreland) prepared an estimate dated June 29, 2009, which calculated the cost to make the repairs recommended in the Creeden report to be $14,702.01. This figure included the cost of the tree removal. Doc. No. 86-2, 4, ¶ 11.

The third engineer, Mr. Pete Craig issued his report to Carol Clark of the Department of Insurance based upon his inspection of the house. Craig Aff., Doc. No. 86-14, ¶ 7. Mr. Craig outlined the scope of the damages that were in his professional opinion associated with the tree impact to the house. Id. at ¶ 8. Mr. Craig concluded that there was no structural damage to the house that was a result of the tree impact at the property, with the exception of possible minor damage to the twostory rear wall of the great room of the home. Id.[1]

State Farm prepared estimates based on the Creeden engineering report and on two instances in July 2009, State Farm sent the Plaintiffs a check in the amount

[1]The Plaintiffs also raise concerns regarding Mr. Craig and allege conflict of interest between State Farm and the DOI, due to evidence in the record showing that the DOI deemed it proper for an independent engineer to review the property; however, State Farm's counsel was the one who originally contacted Mr. Craig to serve in this capacity and State Farm actually drafted correspondence and findings for the DOI to send to the Plaintiffs. Craig Depo., Doc. No. 88-5, 46 - 47, depo. p. 14 -15, lines 2 - 8; Def. Counsel, correspondence, Doc. No. 88-9, 6 - 7; Oni depo., Doc. No. 88-7, 19 -21, depo. p. 42, lines 14-18 and p. 44, lines 22-25. It is important to note that this Court does not regulate Georgia's Office of Insurance and Safety ("DOI"); however, this Court will address Plaintiffs' arguments in the context of the bad faith analysis at the conclusion of this order.

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of $11,002.01. Westmoreland depo., Doc. No. 86-2, 4, ¶ 12. This amount represented the net difference between Westmoreland's estimate ($14,702.01) and the $1,000.00 deductible and $2,700.00 advance issued to Plaintiffs by State Farm following the loss to cover the cost of the tree removal. Id. State Farm also paid the Plaintiffs $1,979.00 to cover the damage to their personal property associated with the tree collapse and to reimburse them for the cost of Mr. Creeden's services. Id.

Plaintiffs obtained estimates for repairs at their home from Jerry Lockhart of LMS Construction and Mr. James Michael McCune of AAA Restoration. The Lockhart estimate totaled $184,018.62 and the AAA Restoration estimate totaled $187,030.69. Doc. No. 88-9,32 and Doc. No. 88-10, 22. Mr. Lockhart did not appear for his deposition and accordingly, there is no direct testimony as to his training and experience and/or what he based his estimate upon.[2] Mr. McCune of AAA Restoration appeared for deposition on April 6, 2011. Doc. No. 88-9, 41. Mr. McCune testified that he has not been retained as an expert by the Plaintiffs. Doc. No. 88-9, McCune depo., pp. 27-28 and p. 64. Mr. McCune testified that he does not have an engineering degree and does not hold himself out as an engineering professional. Id. at depo. p. 7. Mr. McCune also testified that the AAA Restoration

[2]On page of the Lockhart estimate, there is a note which states: "My finding was based on damages done to house/also I cross reference findings by AAA Restoration & Engineer Report and find their findings accurate . . . ." Doc. No. 88-10, 22.

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estimate was based on "what Mr. and Mrs. Matthews wanted to have included in the estimate" and that the estimate was not limited to repairs that were necessary as a result of the tree hitting the Plaintiffs' home. Id. at depo. p 17, lines 20-21 and p. 19. When asked to prepare a revised estimate based upon Mr. Craig's engineering report, Mr. McCune refused to do so and has had no further involvement in this matter. McCune depo., Doc. No. 86-9, 8, depo. p. 26, line 6 and p. 27, lines 2 - 6.

In addition to the May 2009 report, two water damage reports were made by Plaintiffs to State Farm in September of 2009 and March 2010.

On May 3, 2011, State Farm filed a Motion for Summary Judgment. State Farm's motion is based upon the following asserted grounds: (1) Plaintiffs' breach of contract claims against State Farm fail as a matter of law; and (2) Plaintiffs' claim for bad faith penalties fails as a matter of law.

The Plaintiffs filed a Response and Brief in Opposition to State Farm's Motion for Summary Judgment on May 26, 2011.[3]

Pursuant to Local Rule 56.1, State Farm has filed a Statement of Material Facts to which the Plaintiffs filed disputes as to certain paragraphs and failed to admit

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[3]The Court notes that Plaintiffs' response exceeds the twenty-five page limit of Local Rule 7.1D. The Court cautions the Plaintiffs as to the page limitations. See L.R. 7.1(D) ("Absent prior permission of the court, briefs filed in support of a motion or in response to a motion are limited in length to twenty-five (25) pages."). In the absence of objection, the Court will exercise its discretion to consider Plaintiffs' response in its entirety.

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and/or object to other paragraphs. In accordance with Local Rule 56.1(B)(2), in the absence of objection from Plaintiffs, the Court has deemed said unobjected to paragraphs admitted for purposes of the undisputed facts.

II. Motion for Summary Judgment

A. Legal Standard

Federal Rule of Civil Procedure 56(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law."[4]

A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).

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[4]On December 1, 2010, an amended version of Rule 56 of the Federal Rules of Civil Procedure became effective. The amendments to Rule 56 "are intended to improve the procedures for presenting and deciding summary-judgment motions" and "are not intended to change the summary-judgment standard or burdens." Committee on Rules of Practice and Procedure, Report of the Judicial Conference, p. 14 (Sept. 2009). Farmers Ins. Exch. v. RNK, Inc., 632 F.3d 777, 782 n.4 (1st Cir. 2011). "[B]ecause the summary judgment standard remains the same, the amendments 'will not affect continuing development of the decisional law construing and applying' the standard now articulated in Rule 56(a). Adv. Comm. Notes to Fed. R. Civ. P. 56 (2010 Amends.). Accordingly, while the Court is bound to apply the new version of Rule 56, the undersigned will, where appropriate, continue to cite to decisional law construing and applying prior versions of the Rule." Murray v. Ingram, No. 3:10-CV-348-MEF, 2011 WL 671604, at *2 (M.D. Ala. Feb. 3, 2011).

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The moving party bears the initial burden of showing the court, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party's burden is discharged merely by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996). Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). All reasonable doubts should be resolved in the favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine [dispute] for trial." Id. (citations omitted).

B. Breach of contract

Defendant, State Farm, argues that summary judgment is proper because Plaintiffs' breach of contract claims against State Farm fail as a matter of law. Defendant argues that Plaintiffs cannot prove that State Farm breached the insurance policy at issue. Doc. No. 86-1, 21.

Under Georgia law, "[i]n an action to collect on an insurance policy, the insured must show that the occurrence was within the type of risk insured against to make a prima facie case." Pennsylvania Millers Mut. Ins. Co. v. Heule, 140 Ga. App. 851, 852, 232 S.E.2d 267, 268 (1976). "To recover in a suit on a contract, the complaining party must establish both a breach of the contract and resulting damages." Graphics Products Distributors, Inc. v. MPL Leasing Corp., 170 Ga. App. 555, 555, 317 S.E.2d 623, 624 (1984). "A contract is breached by a party to it who is bound by its provisions to perform some act toward its consummation and who, without legal excuse on his part and through no fault of the opposite party, declines to do so." CCE Federal Credit Union v. Chesser, 150 Ga. App. 328, 330, 258 S.E.2d 2, 4 (1979).

In Count One of their Complaint, Plaintiffs allege that despite the event of loss that was covered under the policy, Defendant State Farm has failed and refused to properly and completely perform its obligations to Plaintiffs under the insurance

policy issued to Plaintiffs. Doc. No. 1-1, 9. The Court notes that Plaintiffs do not cite to a specific contractual term of the insurance policy to which they allege breach and/or failure to perform obligation. The Court further notes that there is only a partially legible copy of the insurance policy at issue in the record. The lack of citation to a specific contractual term and the absence of a fully legible insurance policy in the record hinders the summary judgment review process as to the Court's ability to know the exact elements upon which Plaintiffs seek recovery.[5] The Court recognizes that the burden is the Plaintiffs to this regard. See Newton's Crest Homeowners' Ass'n v. Camp, 306 Ga. App. 207, 213, 702 S.E.2d 41, 47 (2010) ("the party asserting the existence of a contract has the burden of proving its existence and its terms.").[6]

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[5]Plaintiffs state that they attached a "true and accurate" copy of the insurance policy to the Complaint as Exhibit 1. A review of Exhibit 1 (at Doc. No. 1-1, 11 - 25) shows that it is only partially legible. Several pages are blurred. Cf. Pennsylvania Millers Mut. Ins. Co. v. Davis, 186 Ga. App. 301, 301, 367 S.E.2d 91, 92 (1988) (considering fact in the appellate court context that insurance policy was not admitted into the record and further considering the merits of the arguments in the policy's absence, but recognizing that "[t]he burden is upon the party alleging error to show it affirmatively by the record."). The Court further notes that there is a declarations page found at Doc. No. 1-1, 116 and an amendatory endorsement in the record at Doc. No. 1-1, 118 - 123. Both of these documents are legible.

[6]The Court also recognizes that Plaintiffs are pro se. The Eleventh Circuit has held that a party's pro se status does not give a court "license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action." Alford v. Consol. Gov't of Columbus, Ga., 438 F. App'x 837, 839 (11th Cir. 2011).

The Court notes that in their response to State Farm's motion for summary judgment, Plaintiffs raise additional arguments regarding their allegations of breach as follows. Plaintiffs argue that summary judgment is not appropriate because: (1) "State Farm admittedly [has] not repaired damage on claims filed with them for which Plaintiffs were covered and met their contractual obligation"; (2) "State Farm has underpaid Plaintiff[s] for repair amounts owed and continues to evade appropriate payment to repair damaged property where liability has [sic] of damage is reasonably clear"; (3) State Farm has "refused to work with any contractor in 'good faith' to reconcile any differences that may exist between estimates"; and (4) State Farm breached their contract by not paying for the September 21, 2009 covered loss after a report of a leak in Plaintiffs' family room. Doc. No. 88-1, 21, 24, and 28. The Court will use these allegations of breach in performing its analysis.

1. Alleged failure to repair

As stated above, the Plaintiffs argue that "State Farm admittedly [has] not repaired damage on claims filed with them for which Plaintiffs were covered and met their contractual obligation." Doc. No. 88-1, 24. The Court concludes after review of the legible portions of the insurance policy that there is nothing in the record to show that State Farm has undertaken a duty to repair the Plaintiffs' property (as opposed to a duty to provide payment to cover loss). Accordingly,

summary judgment is warranted as to this allegation of breach, as it appears that the issue between the parties involves whether there has been proper insurance coverage of the loss through monetary amounts.

2. Alleged underpayment for repair amounts

As stated above, Plaintiffs further argue that "State Farm has underpaid Plaintiff[s] for repair amounts owed and continues to evade appropriate payment to repair damaged property where liability has [sic] of damage is reasonably clear." Doc. No. 88-1, 24.

In its motion for summary judgment, State Farm argues that it "acted at all times in accordance with the terms and conditions of the policy" and that it issued "more than adequate" payment to cover the damages that resulted from the May 1, 2009 loss. Doc. No. 86-1, 18. State Farm agues that Plaintiffs have no admissible evidence to support their position that State Farm's previous payments to them were not sufficient to cover the repairs necessary as a result of the May 1, 2009 tree loss. Doc. No. 86-1, 21. State Farm also argues that "Plaintiffs cannot prove that the May 1, 2009 tree loss at their property caused damages in any amount in excess of what State Farm has paid." Doc. No. 86-1, 20. State Farm further argues that "Plaintiffs cannot . . . prove that the scope of damage caused by the tree loss was greater than the scope previously determined by the three engineers [Chapski, Creeden, and

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Craig] who inspected the house." Doc. No. 86-1, 20. State Farm argues that the majority of the damages alleged in the Complaint are not associated with the May 1, 2009 tree loss. State Farm argues that Plaintiffs have no expert who will testify that the damages caused by the tree exceed the scope of the damages outlined in the Revised Creeden report, upon which State Farm based its payments. Doc. No. 86-1, 21.

After review of the record, the Court finds that State Farm has met its initial burden of "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). This burden was met through State Farm's showing of an absence of evidence from an expert who will testify that the damages caused by the tree exceeded the scope of the damages outlined in the Revised Creeden report, upon which State Farm based its payments.[7] As stated above, once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec.

[7]The Court notes that it is reflected on the minute entry (at Doc. No. 82) for the April 1, 2011 hearing on Defendant's motion for sanctions before this Court that Plaintiffs designated Jerry Lockhart and Mike McCune as their experts. The Plaintiffs now deny designating these two individuals as their experts. See Pls. Response, Doc. No. 88-2, 8, ¶16.

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Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In response to State Farm's motion, Plaintiffs argue that expert testimony is not needed because the case concerns matters of common knowledge. Doc. No. 88-1, 17. The Plaintiffs cite the Wisconsin case of Racine Cnty v. Oracular Milwaukee, Inc., 317 Wis. 2d 790, 767 N.W.2d 280 (2009) in support of their argument.

The Court first notes that the Wisconsin case cited by the Plaintiffs is not binding upon this Court. In general, absent an express contractual provision to the contrary, "[a] federal court in a diversity case is required to apply the laws, including principles of conflict of laws, of the state in which the federal court sits." O'Neal v. Kennamer, 958 F.2d 1044, 1046 (11th Cir. 1992); see also Cook v. Trinity Universal Ins. Co. of Kansas, 297 F. App'x 911, 914 (11th Cir. 2008) ("'Under Erie Railroad v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188] (1938), a federal court in a diversity action must apply the controlling substantive law of the state.' 'The construction of insurance contracts is governed by substantive state law.'") (citations omitted). This Court sits in the Northern District of Georgia. Neither party has cited an express contractual provision prohibiting the application of Georgia law and/or raised a conflict of law issue. Accordingly, the Court will apply Georgia contract law to the contract at issue.

The Court further finds that even in considering the Wisconsin case, the Court

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is unable to uphold Plaintiffs' argument. In Racine Cnty v. Oracular Milwaukee, Inc., 317 Wis. 2d 790, 767 N.W.2d 280 (Wis. App. 2009), the county appealed from a circuit court's decision that the computer consulting contract at issue was a contract for professional services, requiring the county to prove professional negligence and also holding that expert testimony was required as a matter of law. In reversing the circuit court, the appellate court concluded that computer consultants are not professionals and that the agreement between the county and the computer consultants was not a contract for professional services. The appellate court further held that "[e]xpert testimony is only required when the issue is esoteric and complex . . . ." Id. at 812. The appellate court also stated a general rule that "expert testimony will generally be required to satisfy this standard of care as to those matters which fall outside the area of common knowledge and lay comprehension." Id. at 811.

The Court agrees, as stated by Defendant State Farm, that "[d]etermining the cause of structural damage at a dwelling is a complex and esoteric matter, and a necessary step to determining what scope of damage is covered by the insurance contract, such that a professional engineer's opinion testimony is appropriate." Doc. No. 89, 11. See also Coursey Bldg. Assoc. v. Baker, 165 Ga. App. 521, 523, 301 S.E.2d 688, 690 (1983) ("Moreover, testimony as to causation is a proper matter for expert

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testimony."); cf. Newman v. Travelers Ins. Co., 143 Ga. App. 757, 240 S.E.2d 139 (1977) (indicating that expert's testimony was relevant to inquiry of whether damage to roof had been caused by tree or by defective construction).

In addition to Georgia law, this Court is bound by the Federal Rules of Evidence. Rule 701 of the Federal Rules of Evidence provides that "[i]f the witness is not testifying as an expert (i.e., a lay witness), the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." "[L]ay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" Fed. R. Evid. 701 Adv. Comm. Notes to Fed. R. Civ. P. 701 (2000Amends.). According to Rule 702 of the Federal Rules of Evidence, only a qualified expert witness may offer testimony related to scientific, technical or other specialized knowledge.

The Court finds that testimony regarding inquiries into allegations of structural damage at a home falls within specialized knowledge and is the proper subject of expert testimony – to which Plaintiffs have failed to designate an expert.

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To the extent that Plaintiffs appear to argue that they can identify an expert at a later date, the Court finds that now that discovery has closed and in the absence of a showing of substantial justification and/or no harm to their opposing party, such late designation is not permitted. More specifically, Federal Rule of Civil Procedure 26.2 and Local Rule 26.2 provide timing sequences for the proper designation of experts prior to the close of discovery. These rules further provide that the result of failure to designate an expert in accordance with the federal and local rules means that the failing party "shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified." Local Rule 26.2(C); see also Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

Separate from (but related to) the nature of the damage issue is the issue of costs of repair. Under Georgia law, in considering whether there was sufficient evidence of the costs of repair for a house that had been damaged by arson, the Georgia Court of Appeals stated: "[o]ne need not be an expert or dealer in the article, but may testify as to value if he has had an opportunity for forming a correct

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opinion. " Mayfield v. State, 307 Ga. App. 630, 633, 705 S.E.2d 717, 720 - 721 (2011).

Here, the Plaintiffs have not presented a witness who will testify as to his/her opinion of the repair costs amounting to underpayment. The Court recognizes that there are estimates in the record from Jerry Lockhart and Just Decks; however, submission of only a repair estimate of proof is inadmissible hearsay and accordingly, insufficient to establish the amount of the repair. See Groover v. Groover, 279 Ga. 507, 508, 614 S.E.2d 50, 52 (2005) ("The estimates were hearsay because the preparers of the estimates did not testify."). The Court also recognizes that the Plaintiffs cite the AAA Restoration estimate of Mr. McCune; however, as correctly noted by State Farm, at his deposition, Mr. McCune indicated that the AAA Restoration estimate was not limited to the damages associated with the tree loss. Doc. No. 86-1, 22.[8]

Georgia Courts have further held that "[t]he owner of property is considered to be qualified to state his opinion as to value" when based upon a proper foundation. Mayfield, 307 Ga. App. at 633.[9] The Plaintiffs do not provide any cites

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[8]Plaintiffs also cite the Court to an email correspondence with Mr. McCune which contains the following statement: "The damage that was caused by the tree is a timely and costly repair." Doc. No. 88-9, 40. In reading this statement and the deposition testimony together, the Court is unable to conclude that this statement establishes that the estimate Mr. McCune gave was solely due to the damage from the tree.

[9]See also John Deere Constr. Co. v. Mark Merritt Constr., 297 Ga. App. 743, 744, 678 S.E.2d 183 (2009) ("Opinion evidence as to the value of an item, in order to have

to their deposition testimony in the record to this regard. The Court's review of the record shows that Mr. Matthews testified at his deposition that "[w]ith me being a contractor, I know for sure I could not fix none of this stuff . . . for $9400." Doc. No. 92, 109, lines 2-4.[10] This testimony does not establish the costs of the repair. Doughty v. Simpson, 190 Ga. App. 718, 720, 380 S.E.2d 57, 60 (1989) ("Determination of whether the witness has established sufficient opportunity for forming a correct opinion, and a proper basis for expressing his opinion, is for the trial court."). "A jury must be able to calculate the amount of damages from the data furnished and it cannot be placed in a position where an allowance of loss is based on guesswork." Horne's Pest Control Co. v. Elliott, 190 Ga. App. 351, 352, 378 S.E.2d 734, 736 (1989). Without more, the testimony of Mr. Matthews leaves the jury to guesswork as to the costs of repair and also does not establish causation.

The Court finds that the Plaintiffs have not met their burden of coming

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probative value, must be based upon a foundation that the witness has some knowledge, experience or familiarity with the value of the property in question or similar property and he must give reasons for the value assessed and also must have had an opportunity for forming a correct opinion.").

[10]Mrs. Matthews deposition testimony also does not establish repair costs or causation. She testified that she does not have any engineering, contracting, or estimating experience. Doc. No. 91, 20. When asked about numbers, she replied indicating that "I'm not a contractor." Doc. No. 91, p. 48, line 25 and p. 54, lines 12-13. See Hutto v. Shedd, 181 Ga. App. 654, 656, 353 S.E.2d 596, 598 (1987) (holding that there was no rational basis for owners value opinion where owners were not familiar with building costs or procedures).

forward with specific, admissible facts showing a genuine dispute so as to survive the present motion for summary judgment.

3. Alleged refusal to reconcile differences in the estimates

Plaintiffs also argue that State Farm has "refused to work with any contractor in 'good faith' to reconcile any differences that may exist between estimates." Doc. No. 88-1, 28. Plaintiffs argue that they have identified several instances where damages that exist to the home that will not be repaired in accordance with present estimates. Doc. No. 88-1, 17. Plaintiffs argue that "notable line items are missing from both estimates created." Doc. No. 88-1, 8. Plaintiffs argue that the deposition testimony identifies "repair processes" not in the estimates as follows. Id.

Repair of the wall - Plaintiffs state that there is no line item or process identified in either of State Farm's estimates that would accomplish paying for the task of jacking out an eighteen-story [sic][11] wall. Doc. No. 88-1, 8-9. Plaintiffs go on to reference the testimony of State Farm's adjuster, Van Westmoreland, which states that his $705 line item would accomplish the test. Doc. No. 88-4, 50, Westmoreland depo., p. 139, line 19.[12] The Plaintiffs offer no evidence that this line item is incorrect.

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[11]The Court notes that in other places in the record, the wall is described as two stories. See e.g., Craig report, Doc. No. 88-5, 7.

[12]The Plaintiffs use the number "$705." Doc. No. 88-1, 9. The deposition contains the number "$703." Doc. No. 88-4, 50, Westmoreland depo. page 139, line 19.

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The Court finds that State Farm has met its summary judgment burden. The Court is unable to conclude that the Plaintiffs have met their burden of coming forward with specific facts showing a genuine dispute as to breach of contract by refusal to reconcile differences in the estimates to this regard.

Rear deck - Plaintiffs argue that Mr. Westmoreland's estimate "does not address the impact the deck has sustained from being forced inward . . . . and therefore [the] repair estimate is deficient." Doc. No. 88-1, 9. Plaintiffs cite to the Just Decks quote/estimate for a new deck/replacement that they received to this regard. Doc. No. 88-5, 31 - 32. As stated above, the Just Decks quote is inadmissible hearsay. Additional review of the record shows State Farm's adjuster, Mr. Westmoreland, had seen the Just Decks estimate and did not agree with it in that based on the engineer's report, removal of the old deck and reconstruction of a new deck was not warranted. Doc. No. 88-4, 49, depo, p. 134, lines 1 - 5. Mr. Westmoreland further testified that he thought the Creeden report recommended replacements of two supports and the handrail. Id. at depo p. 135, lines 2-4. The Court finds that State Farm has met its summary judgment burden. The Court is unable to conclude that the Plaintiffs have met their burden of coming forward with specific facts showing a genuine dispute as to breach of contract by refusal to reconcile differences in the estimates to this regard.

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Other areas - Plaintiffs state that a review of the deposition of Mr. Craig shows that Mr. Craig "identifies damage or processes that would be standard methods of repair for repairing damage to areas in the Plaintiff's property" which are absent from Mr. Westmoreland's estimate of repairs. Doc. No. 88-1, 10. The focus of the argument appears to be as follows.

In paragraphs 13 and 14 his affidavit, Mr. Craig averred:

> I have reviewed Mr. Westmoreland's estimate, and believe that the scope of the repair work delineated in the estimate is in line with the repairs necessary to repair the damages caused by the tree striking the house as outlined in my report, with one possible exception. In my report, I recommended that, if the exterior sheathing of the home was rigid foam material, then the exterior siding on a portion of the rear wall of the home should be removed and reinforced using straps on both faces of the studs. This was recommended solely for precautionary reasons and to upgrade the structural capacity of the wall. If, on the other hand, the sheathing was OSB, and extended across any joints present, then the straps on the exterior face of the studs would be unnecessary.
>
> Based upon my review of Mr. Westmoreland's estimate, it does not appear that the estimate included any siding removal and/or reinforcement of the exterior face of the studs on the rear great room wall. However, if State Farm was able to confirm that the sheathing on the rear exterior of the home was OSB, and extended across any joints present, then this additional repair would not be necessary, and would not need to be included in the estimate." Doc. No. 86-14, 4 - 5, ¶ 13 and ¶ 14.[13]

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[13]Plaintiffs also argue that Mr. Craig's deposition and affidavit testimony are contradictory and prohibit summary judgment. Doc. No. 88-1, 11. Plaintiffs cite a non-

In his affidavit, Mr. Westmoreland averred:

> Before preparing the estimate, I determined that the exterior sheathing of the home was OSB material, which extended across the joints present on the rear great room wall of the home. Thus, as outlined in the Craig report, the recommended straps on the exterior face of the studs were unnecessary. Accordingly, I did not include any siding removal and/or reinforcement of the exterior face of the studs on the rear great room wall in my estimate." Doc. No. 86-2, 5, ¶ 17.

The evidence in the record shows that Mr. Westmoreland's estimate determined the type of material for the sheathing of the rear of the home, which rendered additional straps recommended by Mr. Craig, unnecessary - Mr. Craig also acknowledged that additional repair would not be necessary upon proper determination of the sheathing material. The Court finds that State Farm has met

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binding Ohio case in support of their argument. In response to Plaintiffs' argument, Defendant states that contrary to Plaintiffs' argument, Craig's "affidavit testimony does not contradict his deposition testimony." Doc. No. 89, 12. Defendant states that Craig's "knowledge regarding the estimate simply changed from the time he was deposed to the time he executed the affidavit." Doc. No. 89, 13.

The Georgia Court of Appeals has recently indicated that when a non-party's deposition and affidavit conflict, such is not an issue for the court to resolve at summary judgment. Naik v. Booker, 303 Ga. App. 282, 692 S.E.2d 855 (2010). The Georgia Court of Appeals has also held that a court is not permitted to apply Georgia's contradictory testimony rule to exclude the testimony of a non-party witness at the summary judgment stage. Rodrigues v. Georgia-Pacific Corp., 290 Ga. App. 442, 661 S.E. 2d 141 (2008). This rule only applies in the party context. See Prophecy Corp. v. Charles Rossingnol, Inc., 256 Ga. 27, 343 S.E. 2d 680 (1986). In light of this precedent, this Court will not exclude Mr. Craig's deposition and/or affidavit testimony for purposes of considering the pending motion for summary judgment.

its summary judgment burden. The Court is unable to conclude that the Plaintiffs have met their burden of coming forward with specific facts showing a genuine dispute as to breach of contract by refusal to reconcile differences in the estimates to this regard.

4. September 21, 2009 event

Plaintiffs further argue that Defendant breached their contract by not paying for the September 21, 2009 covered loss after a report of a leak in Plaintiffs' family room. Doc. No. 88-1, 21.

In their Complaint, Plaintiffs state that or about September 21, 2009, they reported a leak in their family room to State Farm for which "Plaintiffs contend. . . is a result of the original event of loss. Doc. No. 1-1, 8, ¶ 40 and 42.

The Court notes that Plaintiffs argue that they made a claim by notifying State Farm of the leak on September 21, 2009 and reference a State Farm letter in the record (dated September 25, 2009), which state: "You have asserted a new claim for water damage." Doc. No. 88-10, 25. The letter then states that State Farm will need to conduct a visual inspection of the home to determine whether this is a covered loss or related to a previous loss. The record also shows that for various reasons, a period of time passed before the inspection took place. The record further shows that after the inspection, Plaintiffs were notified (via a letter from Defense Counsel

dated April 8, 2010) that State Farm did not believe that "this damage is connected to the tree hitting the house, but the result of water entering the home around the chimney chase." Doc. No. 88-10, 43. Defense Counsel further stated: "[t]here may be coverage for these damages if you wish to submit a separate claim. Should you wish for State Farm to open a separate claim associated with the water damage in the two-story family room, please notify me, and I will alert State Farm immediately." Id. In support of its motion for summary judgment, State Farm attached the affidavit of its adjuster, Van Westmoreland, who averred that "Plaintiffs never filed a claim for this damage." Doc. No. 86-2, 7, ¶ 21.

While the Court recognizes the claim language in the September 25, 2009 letter cited by Plaintiffs, the Court also recognizes the specific instructions to Plaintiffs provided in the April 8, 2010 letter from Defense Counsel regarding the opening of a separate claim. In the absence of evidence showing compliance with Defense Counsel's instructions to notify him of whether Plaintiffs wished to open a separate claim and in the absence of specific citation by Plaintiffs to language in the insurance policy to the contrary, the Court finds that State Farm has met its summary judgment burden. The Court finds that Plaintiffs have not met their summary judgment burden of showing breach for failure to pay for the September 21, 2009 loss.

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C. Bad faith penalties

Defendant further argues that summary judgment is proper because Plaintiffs' claim for bad faith penalties fails as a matter of law.

In Count Two of the Complaint, Plaintiffs allege that more than sixty days have passed since their July 20, 2009 and July 31, 2009 demands for payment associated with the event of loss and "said refusal to pay is in bad faith" entitling Plaintiffs to damages and attorney's fees as defined in O.C.G.A. § 33-4-6. Doc. No. 1-1, 9. O.C.G.A. § 33-4-6(a) provides in relevant part:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $ 5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer.

"To prevail on a claim for an insurer's bad faith under O.C.G.A. § 33-4-6, the insured must prove: (1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer within 60 days prior to filing suit, and (3) that the insurer's failure to pay was motivated by bad faith." Bayrock Mortg. Corp. v. Chicago Title Ins. Co., 286 Ga. App. 18, 19, 648 S.E.2d 433 (2007); O.C.G.A. § 33-4-6. In regard to the three elements for recover of bad faith penalties, there

appears to be no dispute as to the first element, i.e., that the claim is covered under the policy. In regard to the second element, i.e., demand, in their Complaint, Plaintiffs state that they made a July 20, 2009 demand and a July 31, 2009 demand for payment. Doc. Nos. 1-1, 79 and 89-1, 2. This lawsuit was filed on April 13, 2010. The Georgia Court of Appeals has held that "[n]o specific language is required [to make the demand]; however, '[the language used must be sufficient to alert] the insurer that it is facing a bad faith claim for a specific refusal to pay so that it may decide whether to pay the claim.'" BayRock Mortg. Corp., 286 Ga. App. at 20, 648 S.E.2d at 435. A review of the July 20 and July 31, 2009 letters in the record shows that they do not contain language indicating that State Farm is facing a bad faith claim for refusal to pay.

In regard to the third element of a claim for bad faith, i.e., whether there has been a failure to pay motivated by bad faith, the Court notes that the Georgia Court of Appeals has established that "[b]ad faith is shown by evidence that under the terms of the policy under which the demand is made and under the facts surrounding the response to that demand, the insurer had no 'good cause' for resisting and delaying payment." Ga. Intl. Life Ins. Co. v. Harden, 158 Ga. App. 450, 454(2), 280 S.E.2d 863 (1981). The Court of Appeals has further held that although the question of good or bad faith is ordinarily for the jury, the insurer is entitled to

judgment as a matter of law if it has reasonable grounds to contest the claim or the question of liability is close. Atlantic Title Ins. Co. v. Aegis Funding Corp., 287 Ga. App. 392, 393, 651 S.E.2d 507, 508 (2007). More specifically, "[p]enalties for bad faith are not authorized[, however,] where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact." Assurance Co. v. BBB Svc. Co., 259 Ga. App. 54, 58(2), 576 S.E.2d 38 (2002). "In reaching this determination a court should carefully scrutinize any claim of a contest in facts to preclude the reliance by an insurance company on fanciful allegations of factual conflict to delay or avoid legitimate claims payment." Rice v. State Farm Fire & Cas. Co., 208 Ga. App. 166, 169, 430 S.E.2d 75, 78 (1993).

State Farm argues that none of the prerequisites for an award of bad faith penalties has been met in that it has complied with the terms and conditions of the policy and never refused to issue payment on the Plaintiffs' claim. Doc. No. 86-1, 24. State Farm argues that it has acted in good faith to resolve this matter by issuing a payment based on the scope of damages outlined in the engineering report submitted by Plaintiffs. Doc. No. 86-1, 25. State Farm argues that there was no bad faith in refusing to issue payment based on Plaintiffs' July 20, 2009 request for payment because the Plaintiffs' estimate for repairs clearly exceed the scope of the damages outlined in the engineer's report and related to the May 1, 2009 loss. Doc.

No. 86-1, 25.

In response to Defendant State Farm's arguments, Plaintiffs argue that bad faith is shown through State Farm hiring an engineering firm with a lapsed business and engineering license. Doc. No. 88-1, 26. In response, State Farm argues that Chapski's professional engineering license was not lapsed at the time of inspection, and this is immaterial as State Farm did not base its payments to Plaintiffs on Chapski's assessment. Doc. No. 89, 7-8.

The Court agrees that the status of Mr. Chapski's license is an immaterial and collateral matter to the Plaintiffs' bad faith claim. As stated above, the test for bad faith involves whether the insured had reasonable grounds to contest Plaintiffs' claim or question liability. Here, the record shows that Mr. Chapski's report was not used to derive the estimate for which State Farm issued payment to Plaintiffs. Without more, Plaintiffs argument regarding Mr. Chapski's licensure status fails.

Plaintiffs also argue differences between the Craig and Creeden engineering reports as evidence of bad faith. Doc. No. 88-1, 25. State Farm argues that this is immaterial because its payments were based upon the damages and repairs outlined in the Creeden report. Doc. No. 89, 8. The Court agrees.

Plaintiffs argue the failure to pay the September 21, 2009 leak. Doc. No. 88-1, 26. However, as noted above, there is nothing in the record showing that Plaintiffs

complied with Defense Counsel's instructions for opening a separate claim for the September 2009 leak (or that they made a demand for payment,[14] as the July 20 and July 31, 2009 letters would not be applicable to the September 2009 leak). The Court is unable to uphold the Plaintiffs' bad faith argument to this regard.[15]

Plaintiffs argue violation of the Georgia Unfair Claims Practices Act. By the plain language of the Act, O.C.G.A. § 33-6-37, there is no private cause of action in Georgia under the Unfair Claims Settlement Practices Act. See O.C.G.A. § 33-6-37 ("Nothing contained in this article shall be construed to create or imply a private cause of action for a violation of this article."). Plaintiffs have also not pled such a violation in their Complaint. The Court is unable to uphold the Plaintiffs' argument to this regard.

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[14]Cf. Stedman v. Cotton States Ins. Co., 254 Ga. App. 325, 328, 562 S.E.2d 256, 259 (2002) ("The letter makes no reference to a demand for payment and simply acknowledges receiving a notice of claim, which is not the same as a demand for payment.").

[15]Plaintiffs also argue efforts to dissociate the May 1, 2009 covered event and the September 2009 leak. The Court notes that Plaintiffs have not cited to evidence in the record showing that the events are related.

Plaintiffs also state that State Farm has notified them of reversal of a decision to cover a loss in regard to the study/office and family room water leaks and this refusal to pay constitutes bad faith. Doc. No. 88-1, 22. The Plaintiffs have not cited the Court to evidence showing a reversal of decision. Without more, the Court is unable to uphold this argument. See Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir. 1991) ("The party opposing the motion must present specific facts in support of its position and cannot rest upon allegations or denials in the pleadings.")

The crux of Plaintiffs' bad faith arguments involves the alleged conflict of interest between Defendant State Farm and Georgia's Office of Insurance and Safety ("DOI"). As stated above, the Court deems it important to note that it does not oversee and/or regulate Georgia's Office of Insurance and Safety, a state agency. Plaintiff also cites to a California case, Sprague v. Equifax, Inc., 166 Cal. App. 3d 1012 (Cal. App. 2. Dist 1985) through which it appears that Plaintiffs are essentially arguing bad faith due to motive and intent, as illustrated by underpayment. The Court notes that California law is not binding on this Court.

In reviewing the Plaintiffs' arguments, it also appears to the Court that the Plaintiffs are arguing bad faith under general contractual principles, as opposed to the more narrow test of O.C.G.A. § 33-4-6 which Plaintiffs allege in Count Two of their Complaint. Said test is set out above and as applied in Georgia courts, it focuses on the insurer's reasonable grounds to contest the claim and/or question liability. While the Court notes that an issue of material fact may arise for the jury if it were considering bad faith in the general context in regard to the conduct of both parties in this matter, a jury issue does not arise under the present factual circumstances as to the narrower definition of bad faith under O.C.G.A. § 33-4-6. See Great Southwest Exp. Co. v. Great Am. Ins. Co., 292 Ga. App. 757, 665 S.E.2d 878 (2008) (citing authority recognizing that damages for bad faith denial of insurance

proceeds cannot be recovered under general contract or tort law). The Court finds that State Farm had reasonable grounds to refuse the larger payment amounts demanded by Plaintiffs. The reasonable grounds are found in State Farm's use of the report of the engineer retained by Plaintiffs for purposes of preparing State's Farm's estimates and payment drafts to Plaintiffs for the loss. Reasonable grounds are also found in the absence of direct evidence from AAA Restoration and LMS Construction as to whether their construction estimates were based on actual damage from the tree strike. In focusing on the reasonable grounds test alone, the Court finds that State Farm is entitled to judgment as a matter of law. See Pennsylvania Millers Mut. Ins. Co. v. Davis, 186 Ga. App. 301, 302, 367 S.E.2d 91, 92 (1988) ("We have reviewed the entire trial transcript . . . and find that defendant refused to pay plaintiffs' claim because of an expert's exhaustive opinion that plaintiffs' air conditioner was not damaged by lightning . . . .Under these circumstances, we find the award of attorney fees under O.C.G.A. § 33-4-6 cannot stand . . . ."); cf. Georgia Farm Bureau Mut. Ins. Co. v. Mikell, 126 Ga. App. 640, 191 S.E.2d 557 (1972) (physical precedent) (considering wide range of loss estimates, fact that defendant made a bona fide settlement offer, and other factors to find that trial court should not have submitted bad faith question to jury).

D. Attorney's fees

In Count Three of their Complaint, Plaintiffs seek attorney's fees alleging that

"Defendant State Farm has caused Plaintiffs unnecessary trouble and expense and has been stubbornly litigious for which Plaintiffs are entitled to attorney fees." Doc. No. 1-1, 10. The Court notes that Plaintiffs are proceeding pro se in this action. The Georgia Court of Appeals has held that "a pro se litigant who was not an attorney, [is] not entitled to recover attorney fees . . . ." under the statutory provision allowing for attorney's fees in the event of bad faith and stubborn litigiousness. Demido v. Wilson, 261 Ga. App. 165, 169, 582 S.E.2d 151, 155 (2003). Accordingly, attorney's fees are not awarded as a matter of law.

III. Conclusion

Defendant's Motion for Summary Judgment [Doc. No. 86] is hereby **GRANTED**.

IT IS SO ORDERED, this 13th day of February, 2012.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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Appendix D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 11-63910

MERBAUM LAW GROUP, *Movant*

v.

GEORGIA E. MATTHEWS III, *Respondent*

Filed September 16, 2015

ORDER LATE PROOF OF CLAIM

Before: Judge Barbara Ellis-Monro

IT IS ORDERED as set forth below:

Date: September 16, 2015

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
GEORGE E. MATTHEWS III,	CASE NO. 11-63910-BEM
Debtor.	CHAPTER 13
MERBAUM LAW GROUP, P.C.,	
Movant,	
v.	Contested Matter
GEORGE E. MATTHEWS III,	
Respondent.	

ORDER

Movant's Motion to Allow Late Filed Proof of Claim (the "Motion") [Doc. No. 57] and Debtor's Objection to the Motion [Doc. No. 58] came before the Court for hearing on September 15, 2015. Andrew Becker appeared on behalf of Movant. Debtor appeared pro se. At

the hearing, Debtor withdrew his opposition to the Motion. Accordingly, it is ORDERED that the Motion is GRANTED.

END OF ORDER

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Appendix E

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

No. 15-1-3498-51

MERBAUM LAW GROUP, *Plaintiff*

v.

NINA MATTHEWS, Defendant

Filed August 4, 2017

ORDER AND FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before: Judge Reuben M. Green

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

Merbaum Law Group, P.C.,
Plaintiff

v.

Civil Action File Number
15-1-3498-51

Nina Matthews,
Defendant

ORDER AND FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On July 17, 2017, the Court heard oral argument on Plaintiff's Motion for Summary Judgment. Plaintiff appeared and represented itself through David Merbaum and Defendant appeared *pro se*. Both parties had previously submitted briefs in support of their respective positions. After reviewing the pleadings, the entire record and considering oral argument, the Court **GRANTS** Plaintiff's Motion for Summary Judgment as set out more fully below.

The Court finds that Plaintiff and Defendant entered into a written attorney client agreement ("Contract") dated March 30, 2010 wherein Plaintiff agreed to provide legal services to Defendant at an hourly rate of $275.00. The Contract provides that the Defendant was also responsible for all out of pocket expenses incurred by the Plaintiff. The Contract further provide that payment was due upon receipt of monthly invoices, and that payments not made in a timely fashion are subject to $25.00 per month late fee as well as interest at the rate of 1.5% per month. The Contract provides that the failure to pay an invoice when due could result in [Plaintiff] filing a motion to withdraw and the costs associated with said motion were part of the fees that would be due under the Contract. The Contract also provide that if [Plaintiff] initiated a suit to collect fees under the Contract that [Plaintiff] would be entitled to all costs and expenses of collection including attorney fees even if [Plaintiff] chose to pursue collection as its own attorney. The Contract details the methods of billing time increments as well. Finally the Contract specifically provides that the [Defendant] read the contract, understands that it is a legal agreement, had a full and complete opportunity to ask any questions about the Contract and that only the terms set forth in the Contract are part of the contract.

The undisputed evidence in the record is that the parties entered into an amendment to the Contract ("Amendment") on October 28, 2010 wherein the Defendant agreed to pay $7,500.00 for all legal work prior to October 27, 2010 as well as expenses incurred prior to that date that had not yet been billed to the Defendant. Defendant agreed to pay $500.00 per month beginning November 10, 2010. The Amendment also provided that all legal work performed after October 27, 2010 would be billed at the rate of $225.00 per hour. Invoices were sent to the Defendant.

Summary judgment is proper under O.C.G.A. §9-11-56 where a party demonstrates that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the non-moving party, warrant judgment as a matter of law. *Hipes & Norton, P.C. v Pye Automotive Sales of Chattanooga, Inc.* 254 GA. App. 360 (2002). A Defendant may not rest on its defenses in its pleadings or conclusory statements but must come forward with facts showing a genuine issue remains to be triad. *Id.* Applying these well-established principals of law, Plaintiff is entitled to a summary judgment.

The Defendant did not introduce any evidence to create a genuine issue of material issue of fact as to whether she signed the Contract and the Amendment or that she had any defense to the enforceability of the Contract and the Amendment. Defendant submitted her own affidavit in support of her response in opposition to Plaintiff's Motion but said affidavit did not contain any facts to create a genuine issue of material fact.

The Plaintiff provided undisputed evidence that the Defendant made two $500.00 payments toward the amounts owed pursuant to the Amendment but did not make any payments for legal services provided after October 27, 2010. Defendant's failure to make payments as agreed upon constitute a breach of the Contract and the Amendment. A contract between attorney and client for legal services is valid and binding on the parties where it complies with the usual rules of contract and is consistent with the attorney's fiduciary and ethical responsibilities to the client. *Browning v Alan Mullinax & Assocs., P.C.* 288 Ga. App. 43 (2007). "As in any suit on account for services rendered, after a lawyer presents evidence of the terms of the contract, the services provided and accepted and the amount left unpaid, the burden in opposing the summary judgment shifts to the client..." *Hipes & Norton, P.C. v Pye Automotive Sales of Chattanooga, Inc.* 254 GA. App. 360 (2002). Here, once the Plaintiff met its burden, the Defendant offered no evidence which created a genuine issue of material fact which would preclude the granting of a summary judgment for the Plaintiff.

Accordingly, the Court granted Plaintiff's motion for summary judgment as to liability on July 17, 2017 and directed the parties to return to Court on July 18, 2017 for a hearing on damages.

On July 18, 2017 the parties appeared at 9:00 a.m. for a hearing on damages. Defendant appeared *pro se*. Plaintiff submitted the testimony of counsel for Plaintiff, David Merbaum, who testified that he graduated Emory Law School and has been practicing law since 1988. He testified that he is experienced in civil litigation having handled hundreds of civil cases and many cases in which his clients have sought to recover damages from insurance companies. Counsel for Plaintiff testified as to the Agreement, the Amendment and all attorney fees and expenses incurred and stated that in his expert opinion the attorney fees were fair and reasonable and were necessary for the pursuit of the case when representing the Defendant. Merbaum further testified that he has personal knowledge of the work that was performed, that the time entries on the billing statements sent to the client represented the work that was performed and that the bills were maintained in the ordinary course of business and it was the ordinary course of business for the Plaintiff to maintain the billing records. Merbaum further testified that the costs and expenses incurred in pursuing collection were fair and reasonable and that the rate of $225.00 per hour for such work was more than reasonable for both the work performed for the Defendant after October 27, 2010 and for the collection efforts against the Defendant. Invoices detailing the services provided were tendered into evidence and admitted.

Defendant did not offer any expert evidence to contest that the work was performed or that the time and charges for said work was not reasonable. Defendant admitted that she is not an attorney and does not have legal training. Moreover, Defendant admitted that she did not have any personal knowledge regarding payments made toward the amounts owed to the Plaintiff. Defendant offered no evidence to create a genuine issue of material fact as to the attorney time incurred, the charges made or the reasonableness of such time and charges.

Plaintiff introduced evidence that the after applying all payments and credits, the principal amount due for attorney fees and expenses was $13,470.88 up to the point that the Plaintiff was permitted to withdraw as counsel for Defendant on January 4, 2011. The evidence determined that interest due at the rate of 1.5% per month until July 2017 totals $15,962.74 and late fees at the rate of $25 per month up to July 2017 totals $1,975.00. The Plaintiff introduced undisputed evidence that attorney fees and expenses of $9,108.82 were incurred in trying to collect the amounts due from the Defendant. Attorney fees incurred to collect amounts due from a former client are recoverable even if attorney pursues collection using his own services. *Sprewell v Thompson & Hutson,*

South Carolina, LLC 250 Ga. App, 312 (2003); *Vaughters v Outlaw* 293 Ga. App. 620 (2008). Plaintiff stated that he included a credit of $120.00 against the total amount due which he represented that based on his best recollection, was the amount that was received from the bankruptcy court of the Defendant's husband who was a former defendant in the above action. Defendant introduced a ledger from the bankruptcy court showing that the actual payment to Plaintiff was $614.16. Accordingly an additional credit of $494.16 (the difference between the $120.00 credit that the Plaintiff applied toward the amounts claimed and the $614.16 actual payment from the bankruptcy court) was applied by the Court against the total amount due to the Plaintiff.

Based on the above, Plaintiff's motion for summary judgment is **GRANTED** and THE Court enters a JUDGMENT in the amount of $39,902.66 for which execution shall issue. This amount is comprised of a principal amount of $22,579.08 (attorney fees and expenses) and interest and late fees of $17,323.58.[1]

So ordered this ~~the~~ 2nd day of August, 2017.

Reuben M. Green
Judge, Superior Court of Cobb County

Order prepared by

David Merbaum
Attorney for Plaintiff

Copies to: David Merbaum, Esq.
Nina Matthews

[1] The $614.16 recovered from the bankruptcy court has been applied against accrued interest. All other payments and credits were applied toward the principal amount due.

Appendix F

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

No. 15-1-3498-51

MERBAUM LAW GROUP, *Plaintiff*

v.

NINA MATTHEWS, Defendant

Filed December 12, 2019

FINAL ORDER DISMISSING CASE WITHOUT PREJUDICE

Before: Judge Reuben M. Green

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MERBAUM LAW GROUP,	)	
	)	
Plaintiff,	)	**CIVIL ACTION FILE NO.**
	)	
v.	)	**15-1-3498-51**
	)	
NINA MATTHEWS,	)	
	)	
Defendant.	)	

FINAL ORDER DISMISSING CASE WITHOUT PREJUDCE

This matter was set to come before the Court for a final hearing on Plaintiff's request for attorney's fees on December 12, 2019. Prior to the call of the calendar, Petitioner contacted the Court indicating its intent to withdraw its request for attorney's fees in connection with its Motion to Compel Post-Judgment Discovery and remove the case from the Court's calendar. Respondent was copied on Plaintiff's request and did not respond. Absent the agreement of the parties, the case remained on the calendar. Neither party appeared in Court on December 12, 2019. Therefore, it being apparent to the Court that Plaintiff has withdrawn its request for attorney's fees the Court hereby **ORDERS** that the above-styled action be **DISMISSED** without prejudice. Accordingly, the Clerk of Court is hereby instructed to mark the above-styled case as **"CLOSED."**

SO ORDERED, this the 12 day of December, 2019.

HONORABLE REUBEN M. GREEN
CHIEF SUPERIOR COURT JUDGE
COBB JUDICIAL CIRCUIT

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:10-CV-1641

GEORGE MATTHEWS, NINA MATTTHEWS *Plaintiffs*

v.

STATE FARM FIRE & CASUALTY COMPANY Defendant

Filed: April 12, 2012

TRANSCRIPT OF MOTIONS HEARING FOR OCTOBER 25, 2010

Before: Willis B. Hunt, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE MATTHEWS)
NINA MATTHEWS,)
)
PLAINTIFFS,)
) CIVIL ACTION
VS.) FILE NO. 1:10-CV-1641-WBH
)
) ATLANTA, GA
STATE FARM FIRE AND) OCTOBER 25, 2010
CASUALTY COMPANY,) 10:10 A.M.
)
DEFENDANT.)
)

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE WILLIS B. HUNT, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: DAVID MERBAUM
ANDREW BECKER
ATTORNEYS AT LAW

LORI BURGESS, OFFICIAL COURT REPORTER
(404) 215-1528

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY CAT.

EXHIBIT
19

RIGHTLY OR WRONGLY, THAT AT SOME POINT I AM GOING TO BE A DEFENDANT IN A MALPRACTICE ACTION. I AM NOT COMFORTABLE WITH THAT. AND I AM NOT COMFORTABLE CONTINUING TO REPRESENT THEM. AND THAT'S ALL THERE IS TO IT.

THE COURT: IS THERE ANY SORT OF FEE ISSUE INVOLVED?

MR. MERBAUM: THIS STARTED OUT AS AN HOURLY RATE CASE. I HAVE A WRITTEN AGREEMENT. AFTER THE FIRST BILL WENT OUT, WHICH THE MATTHEWS'S CAME TO ME AND SAID, WE WOULD LIKE TO CONVERT IT TO A CONTINGENCY. I SAID, FINE. THERE WAS A DELAY IN ME GETTING A NEW AGREEMENT TO THEM, WHICH I SUBSEQUENTLY DID, WHICH HE OBJECTED TO. I THINK THE PRIMARY OBJECTION WAS, I HAD A PHRASE IN THERE THAT PROVIDED FOR PAYMENT OF ATTORNEYS FEES TO ME OF 100 PERCENT IN THE EVENT THAT I EVER HAD TO FILE A MOTION, OR THE OTHER SIDE DID SOMETHING THAT MADE ME SPEND A LOT OF EXTRA TIME AND EFFORT, WHICH I FEEL I SHOULD BE COMPENSATED FULLY FOR, AND NOT SPLIT ON A CONTINGENCY BASIS. BUT AS OF TODAY, THEY HAVE NOT SIGNED A NEW AGREEMENT. I AM OUT ALMOST, TIME-WISE, MONEY-WISE, ALMOST $20,000. SO THAT'S THE ONLY DISPUTE.

AT SOME POINT I AM GOING TO DO WHAT I NEED TO DO TO GET PAID OR PROTECT MYSELF. BUT THERE IS ONE SIGNED HOURLY FEE AGREEMENT AT THIS POINT.

THE COURT: AT THIS POINT IN TIME, IS IT YOUR POSITION THEN THAT THE FIRM DOES NOT OWE THEM ANY MONEY? IN

OTHER WORDS, THEY HAVE NOT PAID YOU MONEY FOR WHICH YOU HAVE DONE NO WORK?

MR. MERBAUM: NO. NO. THEY GAVE ME A SMALL EXPENSE RETAINER, WHICH I THINK HAS BEEN EXHAUSTED. NOT THAT I AM AWARE OF. I THINK IT WAS $150. AND WE SPENT IT ON SUBPOENAS AND MILEAGE, POSTAGE, AND THINGS LIKE THAT.

THE COURT: IS THAT ALL THEY HAVE PAID?

MR. MERBAUM: AND JUST THE FIRST HOURLY BILL, WHICH WAS I THINK ABOUT $2200.

THE COURT: HOW LONG AGO WAS THAT?

MR. MERBAUM: THREE MONTHS AGO, AT LEAST.

THE COURT: TELL ME ABOUT THIS SITUATION THAT WE HAVE NOW BEEN MADE PRIVY TO THROUGH THE PAPERS THAT HAVE BEEN FILED IN THIS CASE ABOUT THE ISSUE, IF THERE IS ONE, AS TO WHETHER THERE IS AN OBLIGATION TO DISCLOSE THE IDENTITY OF THIS SO-CALLED EXPERT WHOSE OPINION IS UNFAVORABLE TO THE PLAINTIFFS? WHAT DOES THAT DO TO THE COURT, IF ANYTHING, BY VIRTUE OF OUR KNOWLEDGE OF THAT? AM I IN A SITUATION WHERE I SHOULD NOT BE IN THE CASE? WHAT DO YOU SAY ABOUT THAT?

MR. MERBAUM: I DON'T KNOW WHY THE MATTHEWS'S CHOSE TO PROVIDE ALL OF THAT INFORMATION TO YOU. I THINK -- BUT CERTAINLY, THAT IS SOMETHING WITHIN ATTORNEY/CLIENT PRIVILEGE. IT IS THEIR PRIVILEGE IF THEY CHOSE TO PRESENT THAT TO THE COURT. THEY HAVE DONE THAT. IT IS TOO LATE. WHEN THE CASE FIRST STARTED, AS TYPICALLY I DO -- I DO A LOT

OF CONSTRUCTION LITIGATION. IN CASES OF THIS NATURE, I BRING SOMEBODY OUT TO TAKE A LOOK AT IT AND SORT OF GIVE ME ANOTHER OPINION OF WHAT IS GOING ON HERE SO I CAN GET A GOOD BALANCE FROM THEIR OWN EXPERT OBSERVATION, AND MAYBE WHAT THE OTHER SIDE IS SAYING. AND I TOLD THEM ABOUT AN INDIVIDUAL, ROBERT KLINE, WHO I HAVE USED IN THE PAST, WHO CAME OUT WITH ME. WE WALKED AROUND -- I THINK HE WAS OUT THERE BEFORE I EVEN GOT TO THE HOUSE. AND WE CHATTED BRIEFLY ABOUT THE CASE, AND I DID NOT RETAIN HIM. I DID NOT PAY HIM. I SORT OF TENDERED HIM TO THE MATTHEWS'S. I SAID, THAT IS OKAY. AND HE ASKED FOR MONEY, THAT IS YOUR DEAL, AND IF YOU WANT ME TO BRING HIM OUT. AND HE CAME OUT. I DON'T KNOW IF THEY SIGNED ANY DOCUMENTS WITH HIM. I DON'T THINK SO. AND I DON'T THINK HE HAS BEEN PAID.

BUT MY UNDERSTANDING FROM THE RESEARCH WE DID, AND THERE IS NOT A DIRECT CASE IN THIS CIRCUIT THAT WE'VE SEEN, BUT HE IS WHAT THEY CALL AN INFORMALLY CONSULTED EXPERT. AND WE OBJECTED TO THE INTERROGATORY WHERE HE MIGHT HAVE NEEDED TO HAVE BEEN DISCLOSED. BUT HE HAS NOT BEEN DISCLOSED. AND I BELIEVE, AT THIS POINT, WE DON'T EVEN HAVE TO REVEAL HIS NAME OR THE FACT THAT WE'VE CONSULTED WITH HIM. I THINK THE OBJECTION ON ITSELF WOULD STAND, AND WE DON'T HAVE TO GIVE AN EXPLANATION FOR THE OBJECTION THAT WE EVEN CONSULTED WITH HIM WAS HE'S AN INFORMALLY CONSULTED EXPERT.

DISCOVERY DISPUTE WITH EFI INSURANCE AND DEPARTMENT OF INSURANCE ARE EXPLAINED IN A THREE OR FOUR-PAGE LETTER. I BELIEVE THE MATTHEWS'S PRODUCED THAT LETTER AS PART OF --

THE COURT: DO YOU THINK THAT YOU HAVE ENOUGH, OR BOTH SIDES, HAVE ENOUGH INFORMATION IN THE CASE TO MAKE ANY SORT OF MEDIATION PROFITABLE AT THIS TIME?

MR. BECKER: YOUR HONOR, I DON'T KNOW THE FINAL NUMBER THAT WAS ASKED FOR BY THE MATTHEWS'S IN THEIR SETTLEMENT LETTER, BUT I BELIEVE THE GULF IS JUST TOO MUCH. THERE IS --

THE COURT: WELL, DOES THEIR EXPERT SUPPORT WHAT THEY WANT?

MR. BECKER: IT IS THE AMOUNT OF DAMAGE. IT'S NOT --

THE COURT: OH, HE JUST TELLS YOU WHAT IS WRONG, HE DOESN'T SAY HOW MUCH IT COSTS?

MR. BECKER: IT IS THE CONTRACTORS THAT DIFFER. THEIR CONTRACTOR IS 180,000 SOMETHING. STATE FARM IS SAYING TO FIX THE DAMAGE IS 11,000. AND THAT GULF, I BELIEVE, YOUR HONOR, IS -- NEVER MIND ANY OTHER CLAIMS AND ANY MONETARY SETTLEMENT THAT THE MATTHEWS'S MIGHT WANT.

THE COURT: YOUR VIEW IS THAT DISCOVERY WOULD HAVE TO BE COMPLETED BEFORE ANY SORT OF SETTLEMENT DISCUSSIONS WOULD BE WORTH DOING?

MR. BECKER: MY BELIEF, YOUR HONOR, IS WE WOULD

HAVE TO GO THROUGH DISCOVERY. BOTH SIDES WOULD HAVE TO SEE EACH OTHER'S EVERYTHING, EVERYBODY BE DEPOSED, INCLUDING, I THINK, THE DEPOSITION OF THOSE CONTRACTORS IS PROBABLY KEY TO A MEDIATION IN THE FUTURE. I DON'T THINK STATE FARM WOULD BE INTERESTED IN MEDIATING WITHOUT DEPOSING THE MATTHEWS'S CONTRACTOR.

THE COURT: I AM NOT INTERESTED WHETHER STATE FARM WANTS TO. IF I THOUGHT IT WOULD BE EFFECTIVE TO DO IT, THEY WOULD PARTICIPATE BECAUSE WE TELL THEM TO PARTICIPATE.

MR. BECKER: YOUR HONOR, I JUST DON'T THINK WITH --

THE COURT: BUT WHAT I GATHER FROM YOU, AND WHAT I PERCEIVE IN GENERAL FROM WHAT I HAVE HEARD THIS MORNING, IT'S TOO SOON. AND IF -- I MEAN, THE MEDIATOR WOULD NOT HAVE ENOUGH TO BE ABLE TO EVALUATE WHERE A FAIR SETTLEMENT WOULD LIE. EVENTUALLY, THAT CAN HAPPEN, BUT THERE HAS TO BE A COMPLETION OF SOME OF THESE EVENTS, AND THAT IS TO SAY THE DEPOSITION OF THE PARTIES, THE DEPOSITIONS OF THE WITNESSES, THE EXPERT WITNESSES, AND THEN MEDIATION MIGHT WORK OUT.

HAVE YOU GOT ANYTHING ELSE THAT YOU WANT TO TELL US?

MR. MERBAUM: NO, SIR.

THE COURT: YOU MAY HAVE A SEAT OVER THERE.

HERE IS WHAT I AM GOING TO DO. AFTER WHAT I HAVE HEARD THIS MORNING, I AM GOING TO TRY TO MEDIATE THE DISPUTE

BETWEEN THE TWO OF YOU, THE TWO SIDES. FIRST LET ME SAY THAT, TO THE MATTHEWS'S, AT THIS POINT IN A CIVIL CASE -- IT'S NOT A CRIMINAL CASE. IT WOULD BE DIFFERENT IF IT WERE A CRIMINAL CASE -- I HAVE A HARD TIME REFUSING THEIR DESIRE TO GET OUT. YOU KNOW, IF WE WERE FURTHER ALONG IN THE CASE WHERE EVERYTHING WAS READY FOR TRIAL, THAT WOULD BE ANOTHER MATTER. BUT AT THIS POINT IN TIME, FRANKLY, IT WOULD BE DIFFICULT FOR THE COURT TO HOLD THEM IN, BOTH AT THEIR EXPENSE AND AT YOUR EXPENSE UNDER THE CIRCUMSTANCES.

BUT I DO FEEL THAT NOW THAT Y'ALL ARE SITTING HERE TOGETHER IN THIS COURTROOM, AND FROM WHAT I HAVE HEARD TODAY, I DON'T SEE WHY YOU CAN'T MAKE ONE MORE STAB AT TRYING TO GET TOGETHER ON WHAT NEEDS TO BE DONE IN THIS CASE. I AM GOING TO RECESS NOW BECAUSE I'VE GOT ANOTHER MATTER TO ATTEND TO AT 11:30, BUT WHAT I WANT YOU TO DO, I WANT YOU TO DO ONE OF TWO THINGS. I WANT YOU TO EITHER TALK WITH EACH OTHER RIGHT HERE IN THE COURTROOM THIS MORNING AND SEE IF THERE IS ANY WAY YOU CAN RECONCILE THE DIFFERENCES. AND TO DO THAT, MS. MATTHEWS, YOU ARE GOING TO HAVE TO BACK OFF OF SOME OF THE INSISTENCE ON YOUR DEMANDS, LISTEN TO YOUR LAWYERS, AND BE WILLING TO GO ALONG WITH THEIR VIEW OF HOW IT SHOULD PROCEED, BECAUSE THAT IS WHY THEY ARE ENGAGED.

AND IT IS VERY DIFFICULT -- I MEAN, I MYSELF WAS A LAWYER ONCE. IT'S VERY HARD TO HAVE A CLIENT THAT KEEPS TELLING YOU WHAT YOU OUGHT TO DO IN THE CASE. I MEAN, YOU

KNOW, YOUR RESPONSE TO THAT IS, HEY, GET SOMEBODY ELSE, OR DO IT YOURSELF IF, YOU KNOW -- IF YOU HAVE TO ANSWER ALL OF THESE QUESTIONS. SO YOU HAVE TO BACK OFF SOME.

SO, AT THE SAME TIME, IT SOUNDS LIKE TO ME THAT THE LAW FIRM IS DOING GOOD WORK, IS WELL-QUALIFIED TO DO THIS KIND OF WORK. AND IT'S AT A POINT WHERE IF THEY -- YOU KNOW, YOU NEED TO AGREE ON CONTINGENCY, WORK THAT OUT, AND SEE IF YOU CAN'T TAKE A FEW DEPOSITIONS AND AT LEAST HAVE MEDIATION AND SEE WHERE YOU ARE THERE.

OR, IF YOU DON'T WANT TO MEET IN THE COURTROOM TODAY, THEN WHAT I WANT YOU TO AGREE IS, SO THAT THE MATTHEWS'S COME BY YOUR OFFICE BEFORE THE END OF THIS WEEK, GIVE THEM AT LEAST AN HOUR'S TIME, TALK TO THEM, AND IF AT THE END OF THAT TIME YOU CANNOT GET OUT, LET US KNOW. I WILL THEN RELIEVE THE LAWYERS OF THEIR RESPONSIBILITY ON THE CONDITIONS SET FORTH IN THEIR LETTER, AND THAT IS THAT THERE BE NO ADDITIONAL -- ASIDE FROM SOME OUT-OF-POCKET COSTS -- THERE WOULD BE NO ADDITIONAL CHARGE TO THE PLAINTIFFS. AND THEN THEY CAN GO AND GET A LAWYER MAYBE WHO WILL AGREE TO TAKE IT ON A CONTINGENCY AND MOVE FORWARD.

BUT I DO WANT YOU TO HAVE THIS MEETING BETWEEN THE PARTIES TO SEE IF THERE ISN'T SOME WAY YOU CAN GET ALONG. IT SOUNDS LIKE TO ME, FROM HEARING MR. BECKER, THAT AN AWFUL LOT HAS BEEN DONE IN THIS CASE, AND IS READY TO BE DONE, THAT REALLY MEETS YOUR DEMANDS. IT IS JUST THAT THAT IS NOT

AN UNDERSTANDING BETWEEN THE TWO SIDES HERE AS TO THAT FACT.

ANYWAY, THAT IS WHERE I AM GOING TO LEAVE IT. I APPRECIATE IT. AND I WILL LOOK TO HEAR FROM MR. MERBAUM AT THE END OF THE WEEK TO SEE WHETHER THERE IS ANY CHANCE THAT Y'ALL CAN GET BACK TOGETHER OR NOT. THANK YOU VERY MUCH. I AM SORRY YOU HAVE HAD THIS MUCH DIFFICULTY, BUT I APPRECIATE YOU COMING THIS MORNING. WE ARE IN RECESS.

(END OF HEARING AT 11:10 A.M.)

* * * * *

REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

LORI BURGESS
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

DATE: APRIL 12, 2012

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:10-CV-1641

GEORGE MATTHEWS, NINA MATTTHEWS *Plaintiffs*

v.

STATE FARM FIRE & CASUALTY COMPANY Defendant

Filed: January 5, 2011

Order Withdrawal

Before: Willis B. Hunt, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE and NINA MATTHEWS, Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 1:10-CV-1641-WBH
STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	:	

ORDER

This matter is before this Court for consideration of Plaintiffs' Counsel's motion to withdraw, [Doc. 55], and Plaintiff's motion to stay discovery, [Doc. 56]. Plaintiffs George and Nina Matthews have written a letter to the undersigned in apparent response to their lawyers' motion to withdraw. However, that letter does not indicate that they oppose the withdrawal, and counsel's motion to withdraw, [Doc. 55], is thus **GRANTED**.

Likewise, in the absence of opposition, Plaintiffs' motion to stay discovery, [Doc. 56], is **GRANTED**. Discovery in this matter is **STAYED** from December 23, 2010 until January 21, 2011, which should give Mr. and Mrs. Matthews ample opportunity to secure new counsel.

IT IS SO ORDERED, this 4 day of January, 2011.

WILLIS B. HUNT, JR.
UNITED STATES DISTRICT JUDGE

AO 72A
(Rev.8/82)

Appendix I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 11-63910

MERBAUM LAW GROUP, *Movant*

v.

GEORGIA E. MATTHEWS III, *Respondent*

Filed November 15, 2015

ORDER RELIEF FROM AUTOMATIC CO-DEBTOR STAY

Before: Judge Barbara Ellis-Monro

IT IS ORDERED as set forth below:

Date: November 10, 2015

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
GEORGE E. MATTHEWS, III,	CASE NO. 11-63910-BEM
Debtor.	CHAPTER 13
MERBAUM LAW GROUP, P.C.,	
Movant,	
v.	Contested Matter
GEORGE E. MATTHEWS III and NINA MATTHEWS,	
Respondents.	

ORDER

Movant's Motion for Relief From Automatic Co-Debtor Stay Pursuant to 11 U.S.C. § 1301(c)(2) [Doc. 56] came before the Court for hearing on September 15, 2015, October 20, 2015, and November 10, 2015. Having considered the facts, the supplemental briefs provided by the parties, and the legal authorities, it is

ORDERED that the Motion is GRANTED to allow Movant to pursue its rights and remedies against the co-debtor to the extent Debtor's plan does not propose to pay Movant's claim.

END OF ORDER

2I

Distribution List

George E Matthews, III
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Mary Ida Townson
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Suite 2200
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Atlanta, GA 30303-1740

No. 20-_____

IN THE

SUPREME COURT OF THE UNITED STATES

George Matthews and Nina Matthews

Petitioners,

vs.

David Merbaum and Andrew Becker

Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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