



State Farm by the Brunsons after their house sustained roof damage and interior water damage during a local hail storm on May 31, 2006. State Farm initially denied the Brunsons' insurance claim for hail damage to their roof, but it offered to pay for the interior water damage. The Brunsons proceeded to replace the roof at their own expense and then filed suit against State Farm in the General Sessions Court of Shelby County, Tennessee. After a trial on the matter, the Brunsons were awarded damages in the amount of \$24,999.99, which consisted of \$4,475.00 in compensatory damages and \$20,524.99 in punitive damages. State Farm appealed the judgment to the Circuit Court, and the Brunsons sought to have the action certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure. State Farm subsequently removed the case to federal court.

On March 19, 2008, State Farm filed a motion to strike the Brunsons' class allegations. (See Motion to Strike, Doc. No. 32, Mar. 19, 2008.) Duncan's affidavit was attached to State Farm's memorandum in support of its motion to strike. (See *id.* Ex. A ("Duncan Aff.")) Duncan has been employed as a claim representative with State Farm for six years, and he visited the Brunsons' home and visually inspected their roof on July 19, 2006. (Def.'s Mem. Opp'n 2; Pls.' Mem. Supp. 1-2.) During the previous trial in General Sessions Court, Duncan testified under direct examination as a witness for the Brunsons. (Def.'s Mem. Opp'n 3.)

In their motion, the Brunsons argue that Duncan's affidavit contains both improper hearsay and improper expert opinions. (Pls.' Mem. Supp. 1-2.) Specifically, the Brunsons allege that paragraph 3 of the affidavit contains hearsay. Paragraph 3 states the following: "Another State Farm claim representative inspected the roof of [the Brunsons'] home on or about June 6, 2006. A physical inspection of [the Brunsons'] roof revealed that the shingles on their roof were old, but showed no characteristics of hail damage." (Duncan Aff. ¶ 3.) The Brunsons also contend that paragraphs 4 and 5 contain inadmissible statements of personal belief, conclusions, and opinions. (Pls.' Mem. Supp. 2-3.) Paragraph 4 states: "After [the Brunsons] complained about this evaluation, I conducted a second evaluation of [the Brunsons'] roof, on or about July 19, 2006. Based on my visual inspection of [the Brunsons'] roof, I also found no evidence that the shingles had been damaged by hail." (Duncan Aff. ¶ 4.) Paragraph 5 states: "Accurate determination of whether hail has damaged shingles on a roof, and if so, whether or not it can be repaired or warrants replacement, can only been [sic] accomplished by visually examining the individual roof." (Duncan Aff. ¶ 5.) Lastly, the Brunsons argue that State Farm's failure to make proper initial disclosures regarding Duncan under Rule 26(a)(1) should preclude it from using him as a witness in any form. (Pls.' Mem. Supp. 6-9.)

In opposition to the motion, State Farm argues that it has

made all proper initial disclosures regarding Duncan. (Def.'s Mem. Opp'n 7.) It also contends that all of the facts in paragraph 3 are undisputed and that the opinions in paragraphs 4 and 5 are not impermissible expert opinions. (*Id.* at 3, 5-6.)

#### ANALYSIS

When a motion relies on facts outside the record, affidavits may be used as evidence. FED. R. CIV. P. 43(c). An affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." FED. R. CIV. P. 56(e)(1). Affidavits containing hearsay do not satisfy this requirement and must be disregarded. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968 (6th Cir. 1991). As such, a court may "strike portions of affidavits which are not made upon the affiant's personal knowledge, contain inadmissible hearsay[,] or make generalized and conclusory statements." *Hollander v. Am. Cyanamid Co.*, 999 F. Supp. 252, 254 (D. Conn. 1998)(citations omitted).

The Duncan Affidavit submitted in support of State Farm's motion to strike class allegations is only comprised of five paragraphs. After examining the affidavit, it is clear that paragraph 3 is hearsay. Hearsay is "a statement, other than one made by the declarant . . ., offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Paragraph 3 simply restates what Duncan was told by another State Farm claim

representative, which is inadmissible hearsay. Furthermore, the court notes that there is a lack of any appropriate factual basis establishing how Duncan is qualified to make the statements and conclusions contained in paragraphs 4 and 5.<sup>1</sup> Therefore, based upon the inclusion of inadmissible hearsay and lack of supporting factual background, this court finds that the Duncan Affidavit should be stricken.

The Brunsons also ask that State Farm be precluded from presenting any further evidence from Duncan. They argue that this is appropriate under Rule 37(c)(1) because of State Farm's failure to make adequate initial disclosures as to Duncan. The Brunsons had previously filed a motion challenging the sufficiency of State Farm's initial disclosures, and State Farm responded. (See Mot. Compel, Doc. No. 29, Mar. 19, 2008; Def.'s Resp., Doc. No. 35, Mar. 27, 2008.) This court will not preclude State Farm from using further evidence from Duncan when the sufficiency of its disclosures was a challenged issue with a motion still pending at the time the present motion was filed. The court points out that State Farm will be free to re-file an affidavit executed and sworn to by Duncan that is properly supported and does not contain hearsay.

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<sup>1</sup> The information provided in State Farm's response about the number of roofs that Duncan has inspected over the years is an example of the type of information that would help establish a proper background for Duncan's statements in paragraphs 4 and 5. (See Def.'s Mem. Opp'n 5-7.)

CONCLUSION

For the reasons stated above, the Brunsons' motion to strike the affidavit of Elmickyo Duncan is GRANTED. The Brunsons' request to preclude State Farm from using further evidence from Duncan is DENIED.

IT IS SO ORDERED this 18th day of June, 2008.

s/ Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE