

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

MARY LOU SMITH, an individual,
and SHARON DENSON, an individual

Plaintiffs,

vs.

CASE NO.: 2008 CA 11315

TRAILER ESTATES PARK AND
RECREATION DISTRICT,
an independent special taxing district,
JANET JONES, an individual,
JOHN VANDERMOLEN, an individual,
JOSEPH SALERNO, an individual, and
MARY LOU MCNULTY, an individual

Defendants.

**PLAINTIFFS' MOTION TO COMPEL TESTIMONY FROM
MARK P. BARNEBEY, ESQ.**

COMES NOW Plaintiffs, MARY LOU SMITH and SHARON DENSON, by and through their undersigned counsel, and pursuant to Rules 1.310 and 1.380, Florida Rules of Civil Procedure, hereby files this Motion to Compel Testimony from Mark P. Barnebey, Esq. and state as follows:

1. The Trailer Estates Park and Recreation District ("District") is an independent special taxing district located in Manatee County and was created by the Florida Legislature pursuant to Special Act, Chapter 2002-361 of the Laws of Florida.
2. The District is governed by an elected or appointed Board of Trustees.
3. At issue in this litigation is the District's and certain individual Board of Trustee members' compliance with Florida's Public Records Laws and Sunshine Laws as set forth in Florida Statutes §§ 119.07 and 286.011, respectively.

4. The Plaintiffs properly scheduled, coordinated and noticed the deposition duces tecum of Mark P. Barnebey, Esq., legal counsel for the District to be held on April 17, 2009, at 10:00 a.m. at the law office of Kirk Pinkerton. *See*, attached Amended Notice of Taking Deposition Duces Tecum of Mark P. Barnebey, Esq. attached hereto and incorporated herein at Exhibit 1.

5. Attorney Mark P. Barnebey is the legal counsel for the District.

6. Neither Mr. Barnebey nor the law firm of Kirk Pinkerton currently represent any of the individuals named in this litigation or any of the individual members of the District's Board of Trustees.

7. At the deposition on April 17, 2009, at the direction of litigation counsel for the District, Mr. Barnebey declined to answer questions from the Plaintiffs' counsel about communications he has had with individual Trustees. Mr. Barnebey and the District's litigation counsel objected to these deposition questions asserting that all of Mr. Barnebey's communications with individual Trustees occurred outside of public meetings and were protected by the "attorney-client" privilege. *See*, Excerpts from deposition transcript, attached hereto as Exhibit 2.

8. Further, Mr. Barnebey and litigation counsel for the District also stated that he would not testify to Sunshine Law or Public Records Law violations by individual Public officials because it was protected by the "attorney-client" privilege. *See*, Exhibit 2.

9. The "attorney-client" privilege asserted by Mr. Barnebey and the District's litigation counsel is inappropriate and improper because Mr. Barnebey's client is the District, not any of the Trustees. Accordingly, communications between Mr. Barnebey and Trustees are not protected by attorney-client privilege.

10. Time constraints and the District's litigation counsel's objections and instructions to Mr. Barnebey that the "attorney-client" privilege was applicable has prevented the completion of the deposition and required Mr. Barnebey's deposition to be continued. The date of the continued deposition has not yet been determined.

11. Local government attorneys may only meet with their client when the elected or appointed collegial body is gathered in compliance with the Sunshine Laws. *See, Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985); Fla. Stat. § 286.011. The only communications between an attorney and its government client that may be considered privileged under the Sunshine Laws is when a government attorney and his client meet to discuss pending litigation and only under limited specified conditions that are strictly construed. *See, Fla. Stat. § 286.011(8); City of Dunnellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. 5th DCA 1995) (stating "[t]he clear requirements of the statute are neither onerous nor difficult to satisfy".)

12. There is no general attorney-client privilege for oral communications between a local government attorney and the individual members of the board of the collegial body. *See, Fla. Op. Atty. Gen. 97-61* (Sept. 15, 1997).

13. Mr. Barnebey's communications with individual Trustees is not protected by "attorney-client" privilege under existing Florida law, and the objections and instructions limiting Mr. Barnebey from providing testimony at deposition regarding these communications was improper.

14. The Plaintiffs are seeking to reschedule Mr. Barenby's deposition and in anticipation of the continued deposition, the Plaintiffs seek an order over ruling the District's counsel's objection based upon "attorney-client privilege" and compelling Mr. Barnebey to provide testimony regarding communications he has had with individual Trustees.

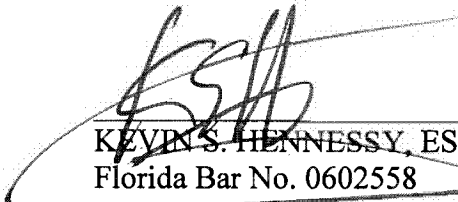
15. Rule 1.380 of the Florida Rules of Civil Procedure states that if a Motion to Compel is granted, the party whose conduct necessitated that motion shall pay the moving party's reasonable expenses, including attorneys' fees. Fla. R. Civ. Pro. 1.380(a)(4).

WHEREFORE, the Plaintiffs move for an Order compelling Mark P. Barnebey, Esq., to provide testimony at his continued deposition on communications he has had with individual members of the Board of Trustees of the Trailer Estates Park and Recreation District; and requests an Order awarding the Plaintiffs its attorneys' fees and expenses associated with the filing of this Motion.

Certificate of Good Faith

Pursuant to Local Rule 5, the undersigned certifies that it has conferred with counsel for Trailer Estates Park and Recreation District in a good faith effort to resolve the issues raised in this motion and that the parties have been unable to resolve the issues raised in this motion.


Respectfully Submitted,



KEVIN S. HENNESSY, ESQUIRE
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to **Hunter Carroll, Esquire**, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, **James D. Dye, Esquire**, Dye, Deitrich, Petruff, & St. Paul, 1111 Third Ave. West, Suite 300, Bradenton, FL 34205, **Robert E. Turffs, Esquire**, 1444 First Street, Suite B, Sarasota, FL 34236, **Robert J. Gill, Esquire**, Ruden, McClosky, Smith, Schuster & Russell, P.A., 1515 Ringling Blvd., Suite 700, Sarasota, FL 34236, **Thomas D. Shults, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by *U.S. First Class Mail*, this 29th day of April, 2009.


JENNIFER R. COWAN, ESQUIRE