

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

MARY LOU SMITH, et. al.,

Plaintiff,

vs.

Case No. 2008-CA-11315

TRAILER ESTATES PARK AND RECREATION
DISTRICT, et. al.,

Defendants.

**DEFENDANT JANET JONES' OBJECTION TO
PLAINTIFFS' SECOND REQUEST FOR PRODUCTION, RESPONSE TO
PLAINTIFFS' MOTION TO COMPEL COMPUTER SEARCH
AND MEMORANDUM IN SUPPORT**

This is Defendant Janet Jones global response to Plaintiffs' attempts to physically invade her private computer, copy it, and perform an invasive and unnecessary search.

Before addressing the specifics, counsel for Ms. Jones advises that Ms. Jones uses "WebTV," which permits her to email and use the internet. Undersigned counsel continues to examine whether Ms. Jones has within her possession, custody, or control a harddrive, CPU, or other devise associated with a traditional computer that can even be searched in the manner proposed by Plaintiffs. Undersigned counsel does not believe such an item exists and will keep Plaintiffs' counsel advised of his findings. This response opposing the search – filed a mere 3 work days after receiving the request – is filed out of an abundance of caution to preserve Ms. Jones' right to be free from this inappropriate search and otherwise to demonstrate she is not delaying the matter. Because of the limited time to respond, certain of the objections listed

below are asserted at this time to preserve those objections should Ms. Jones has a searchable harddrive.

Plaintiffs recently have filed “Plaintiffs Second Request for Production,” which undersigned counsel received on Thursday, August 6. This Second Request unambiguously seeks Ms. Jones to turn over her computer to Plaintiffs’ paid-experts for Plaintiffs to copy it and then search it. Later on Thursday, August 6, Plaintiffs sent what they contend was a “good faith” email regarding “Plaintiffs’ First Request for Production,” which Plaintiffs for the very first time construed as requiring the same thing identified in the Second Request. Even though many months had elapsed since Because both subjects concern the same subject - copying and searching Ms. Jones’ computer - Ms. Jones’ response to both is set forth below.

Response to Plaintiffs’ Second Request

Ms. Jones responds to Plaintiffs’ Second Request as follows:

1. Any and all computers you have used to send, receive, or store emails during January 1, 2006, to the present. The inspection and creation of a forensic image/copy of each of the hard drives of the foresaid will occur at the District’s office on August 12, 2009, at 9am unless a different time is mutually agreed to by the parties. Agile Risk Management, LLC, 2002 N. Westshore Blvd. Suite 200, Tampa FL 33607 will be the expert inspecting, copying and imaging the hard drives of each of the computers produced by the Defendants. Agile Risk Management and its employees agree to maintain in confidence all information and data that is not related to the District and is retrieved from the hard drives of each of the individual defendants. Furthermore, Agile Risk Management and its employees agree to maintain in confidence all information and data that is between Defendants and their respective counsels that is retrieved from the hard drives of each of the Defendants computers.

Response: Ms. Jones’ objects to this request on the bases that it is overbroad; not reasonably calculated t lead to admissible evidence; fails to identify any prerequisite showing of discovery misconduct; invades Ms. Jones’ privacy guaranteed by article I, section 23, Florida Constitution; potentially violates her First, Fourth, and Fifth Amendment rights to the U.S. Constitution; and potentially could invade attorney-client, doctor-patient, and clergy privileges. Ms. Jones moves for an

extension of time to create a privilege log. Moreover, Ms. Jones objects to Plaintiffs' demand that this response be made in less than 30 days.

2. Any and all computers you have used participate in blogs, chat rooms, chalkboards, bulletin boards, instant messages, groups, or other electronic mediums during January 1, 2006, to the present. The inspection and creation of a forensic image/copy of each of the hard drives of the foresaid will occur at the District's office on August 12, 2009, at 9am unless a different time is mutually agreed to by the parties. Agile Risk Management, LLC, 2002 N. Westshore Blvd. Suite 200, Tampa FL 33607 will be the expert inspecting, copying and imaging the hard drives of each of the computers produced by the Defendants. Agile Risk Management and its employees agree to maintain in confidence all information and data that is not related to the District and is retrieved from the hard drives of each of the individual defendants. Furthermore, Agile Risk Management and its employees agree to maintain in confidence all information and data that is between Defendants and their respective counsels that is retrieved from the hard drives of each of the Defendants computers.

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Response to Plaintiffs' Motion to Compel

1. Plaintiffs Amended Complaint *does not allege* a public records violation against Ms. Jones. Plaintiffs only allege violations of chapter 286 (Government in the Sunshine) against Ms. Jones.

2. Plaintiffs First Request does not seek a search – instead, it merely requested the production of documents. Plaintiffs are improperly trying to change their First Request into a demand to search of computers. Plaintiffs' Second Request is the better mechanism in which to pursue their request.

3. Plaintiffs' First Request did not ask for Ms. Jones' computer to be searched. Plaintiffs' First Request unambiguously stated in the first sentence that Ms. Jones was to "produce the following documents" The only reference at all is buried within Plaintiffs' Instructions that said if an email is within the computer memory, that the computer is requested to be produced.

4. Undersigned counsel filed his notice of appearance in late January, and Ms. Jones responded to the First Request on April 3, 2009. Ms. Jones in the second sentence on her response stated: "Defendant Jones object to any Definition or Instruction that purports to increase Defendant Jones' obligations under Florida Rules of Civil Procedure." Ms. Jones also produced the documents as requested.

5. The Instruction Plaintiffs now cite as their authority to demand a computer search under the First Request is defective for at least two reasons. First, this Instruction is confusing. One of several interpretations of this Instruction is that *only if* an email cannot be produced in paper format, then a computer search may be necessary. Here, Ms. Jones produced emails, so there is no need for a computer search. Second, this Instruction, if valid, is so overbroad it would permit Plaintiffs' carte blanche access to Ms. Jones computer, defeating her ability under the Rules of Civil Procedure to object to specific document requests. Just because electronic storage devices are involved does not mean that Plaintiffs are entitled to abandon the discovery rules. For those reasons, Ms. Jones' objected to the Instruction in her response.

6. At no time prior to lunch-time on Thursday, August 6, 2009, did Plaintiffs identify any alleged deficiency with Ms. Jones' response or document production. Interestingly, Plaintiffs' have not even alleged any failure by Jones to cooperate in the discovery process or

alleged or cited any specific documents that Jones failed to produce that are being sought by the computer exam. Instead, Plaintiffs seek an open ended examination – as they do in their Second Request.

7. Plaintiffs’ motion to compel lists no prerequisite reason for the search. Plaintiffs’ motion to compel in paragraph 3 merely stated “Upon information and belief, the Defendants’ have emails contained in their computers’ memory and other non-legible storage that were not produced.” This allegation fails to meet any threshold to perform this invasive search.

8. The trial term is set to begin on September 8.

9. Plaintiffs alleged good faith email at lunchtime on August 6, giving undersigned counsel only a half-day to respond, fails to meet this Court’s local rules for consultation before bringing this motion to compel.

10. There is a substantial privacy issue with requiring a computer exam. A computer exam involves an invasive search that violates several of Jones’ constitutionally protected rights, including her right of privacy. The manner in which the invasive search requested by the Plaintiffs’ to be conducted is contrary to Florida law, especially in the light that Plaintiffs have not alleged that Jones failed to respond to public records requests or violated any discovery requests. Ms. Jones’ conduct in this matter has been exemplary. The Court should note that Ms. Jones has properly complied with all discovery requests and no allegations of any wrongdoing in that regard have been made.

MEMORANDUM OF LAW

Janet Jones, like all citizens of Florida, has a constitutionally guaranteed right of privacy. See art. I, § 23, Fla. Const. As the Florida Supreme Court has explained, “there can be no doubt

that the Florida [privacy] amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others.” See Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533, 536 (Fla. 1987). This privacy right includes an individual’s financial information. See Mogul v. Mogul, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999). The privacy right includes medical information. See Universal City Development v. Williams, 963 So. 2d 351, 355 (Fla. 5th DCA 2007). The privacy right includes “family privacy.” See Tallahassee Memorial Regional Medical Center v. Petersen, 920 So. 2d 75, 80 (Fla. 1st DCA 2006).

Plaintiffs’ Second Request for Production implicates Jones’ First, Fourth, and Fifth Amendments. This request potentially implicates Ms. Jones’ attorney-client, doctor-patient, and clergy privileges..

Here, the Plaintiffs’ Second Request for Production demands to allow the Plaintiffs’ expert to physically enter Jones’ computer to search to determine if there are additional emails or other files that are public records. The Court should note, with respect to Janet Jones, that there is no allegation that she failed to comply with the public records law or that she deleted email from her computer. This is critical because the Second Request for Production seeks an invasive search of Jones’ computer in search of various files.

Plaintiffs’ operative complaint, the Amended Complaint only alleges that Jones violated the Sunshine law. The counts against her do not seek or allege any violations of the Public Records Law. There is no basis in this lawsuit, either by allegation or evidence adduced by Plaintiffs, for there to be any search of Janet Jones’ computer.

The Fourth District’s decision in Menke v. Broward County School Board, 916 So. 2d 8

(Fla. 4th DCA 2005), is instructive here. In Menke, the school board sought access to the home computer belonging to the teacher the school board was attempting to fire, alleging that there would be sexually-explicit emails or instant messages and other derogatory emails. See id. at 9. The administrative law judge permitted the inspection by the school board and imposed certain restrictions on the expert, such as creating a process to filter potentially privileged communications. (These restrictions are very similar to the restrictions Plaintiffs are suggesting in their request.) Menke objected to the inspection on privacy, Fifth Amendment, and attorney client, spousal, accountant, patient, and clergy privilege grounds. See id.

The court quashed the inspection, explaining the impropriety of permitting this privacy invasion. See id. at 10. The Court noted that the examination permitted the school board's agent to comb through "every byte, every word, every sentence, every date fragment, and every document, including those that are privileged or that may be part of privileged communications, looking for 'any data' that may evidence communication[.]" Id. In rejecting the safe guards put in place, the court noted that "those communications are still revealed to a paid representative of the opposing party, as will everything else on the computer, substantially invading the privacy of Menke and his family members." Id. (emphasis added). The court went further, explaining that "[i]n civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation." Id. (emphases added).

Florida law is clear that, ***should a search be necessary in the future***, the party being asked to produce records should be the one to conduct the computer search, not the requesting party. See Strasser v. Yalamanchi, 669 So. 2d 1142 (Fla. 4th DCA 1996). In Strasser, the court

concluded that giving the requesting party access to someone else's computer was legally erroneous and granted the aggrieved party's certiorari petition. That case involved a discovery request that the requesting party said the other party was thwarting. Here, Janet Jones has fully complied with every the discovery request propounded upon her, so there is no basis for Plaintiffs to argue that Janet Jones somehow has not complied with the discovery rules.

The Second Request to Produce in this case seeks to operate the same as the discovery orders in Menke and Strasser. Florida law does not permit Plaintiffs to invade Janet Jones' personal computer, especially at this juncture, where there is no allegation of public record violations against Janet Jones and there has been no discovery violations. The procedural safeguards suggested in the motion have been found by the Fourth District to be inadequate. The Fourth District's decisions in these cases are binding on this Court. See Pardo v. State, 596 So. 2d 665, 666-67 (Fla. 1992).

Other jurisdictions likewise do not permit this type of sweeping invasion of a person's personal computer. See In re Ford Motor Co., 345 F.3d 1315 (11th Cir. 2003) (vacating discovery order requiring Ford to permit Plaintiff direct access to Ford's computer systems); Ferron v. Search Cactus, LLC, 2008 WL 1902499, *2 (S.D. Ohio Apr. 28, 2008) (discovery of electronically stored information stands on equal footing with discovery of paper documents and that opposing parties "are no more entitled to access to [a party's] electronic information storage systems than to [a party's] warehouses storing paper documents"); Diepenhorst v. City of Battle Creek, 2006 WL 1851243 (W.D. Mich. June 30, 2006) (denying request to forensically image hard drive of opponent, explaining that this "court is loathe to sanction intrusive examination of an opponent's computer as a matter of course, or on the mere suspicion that the opponent may be

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by First Class

United States Mail this 11th day of August, 2009, to:

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