

IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION

CASE NO.: 08 CA 11315
DIVISION: B

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

Plaintiffs,

vs.

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.

DEPOSITION OF MARGARET CUSHMAN
Volume I of I
Pages 1 through 189

Thursday, December 17, 2009
8:29 a.m. to 12:49 p.m.
Kirk-Pinkerton
First Bank Building
1301 6th Avenue West
Bradenton, Florida 34206

Stenographically Reported By:
FRANCES CHIPPENDALE

U.S. Legal Support
(813) 876-4722

1 here in 2009?

2 A. No.

3 Q. Okay. Are you familiar with a prior lawsuit
4 that the District was involved in involving -- or that
5 was referred to as the McNeil case?

6 A. Yes.

7 Q. What is your knowledge of that lawsuit?

8 A. Only that a contractor placed a fence in an
9 objectionable area and was told to remove it and they
10 didn't.

11 Q. Okay. Was the District the plaintiff or
12 defendant in that lawsuit?

13 A. We were the plaintiff.

14 Q. Do you recall the Board authorizing the filing
15 of a lawsuit?

16 A. Doing what?

17 Q. That the Board met and discussed and authorized
18 the filing of a lawsuit in that matter?

19 A. I don't think I was present at that one.

20 Q. Okay. So you believe that the Board did vote
21 and authorize a lawsuit, but that you were not present?

22 A. Yes.

23 Q. Okay. Do you recall the Board going to
24 mediation concerning that lawsuit?

25 A. Yes.

1 Q. Do you recall the Board appointing any specific
2 individual Board member to be its representative at that
3 mediation?

4 A. No, I don't know that.

5 Q. Do you know if the Board was represented by an
6 individual at that mediation?

7 A. I don't know that.

8 Q. Okay. You recall, though, talking to John
9 Vander Molen about that lawsuit?

10 A. Myself?

11 Q. Yes, ma'am.

12 A. No.

13 Q. Do you recall John Vander Molen talking to
14 other Trustees about that lawsuit?

15 A. Not outside of a Board Meeting.

16 Q. Okay. Do you recall any issues that came up
17 concerning the Trustees receipt of the settlement
18 documents from that lawsuit?

19 A. Would you repeat that?

20 Q. Do you recall any issues coming up concerning
21 the Trustees receipt of the written settlement in that
22 lawsuit?

23 A. No, I'm not aware of that.

24 Q. Do you recall receiving a memorandum from John
25 Vander Molen with his recommendation concerning settling

1 that lawsuit?

2 A. I don't recall any memo that I got from John
3 about that.

4 Q. Do you recall John Vander Molen calling you up
5 on the telephone to discuss his recommendation to the
6 Board that they accept the settlement of that lawsuit?

7 A. No, I don't recall.

8 Q. Do you recall speaking to anyone on the
9 telephone concerning the settlement of that lawsuit?

10 A. No.

11 Q. Do you recall anything about the settlement of
12 that lawsuit?

13 A. Right now, no, I don't remember just how it was
14 settled. I know it cost us.

15 Q. What do you mean by that?

16 A. To settle the case, it cost the park some
17 money.

18 Q. The District had to pay?

19 A. I'm not sure of that. I don't know that
20 information.

21 Q. Okay.

22 A. I just know they settled.

23 Q. Okay. Based on your recollection, was the
24 lawsuit not a good thing for the park?

25 A. Again.

1 Q. Based on your recollection, was the lawsuit in
2 the McNeil case not a good thing for the park?

3 A. It was not a good thing for the park. It was
4 not a good thing for anyone.

5 Q. Why is that?

6 A. They went against the Deed Restrictions and
7 they put a fence up where they weren't supposed to put
8 it up, and then they fought the issue, and if you can't
9 make a rule and stand by it, the rule is no good.
10 That's how I feel about that kind of stuff.

11 Q. And based on your prior testimony, is it fair
12 to say you were also upset with the amount of money that
13 the District incurred concerning that lawsuit?

14 A. Absolutely.

15 Q. You were on the Board in 2006?

16 A. Yes.

17 Q. Do you recall Mike Neal being appointed to fill
18 a vacant position on the Board in 2006?

19 A. Yes.

20 Q. Do you know -- recall who made the
21 recommendation that Mike Neal fill that vacant position?

22 A. I don't recall.

23 Q. Do you recall the Executive Committee making a
24 recommendation that Mike Neal fill the vacant position
25 in 2006, vacant Trustee position?

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Are you familiar with the -- a District
newsletter referred to as or called The Tribune?

A. Yes.

Q. Is that something you receive?

A. Pardon?

Q. Do you receive that, The Tribune?

A. I pick it up, yes.

Q. Okay. From the office?

A. Yes.

Q. Do you know who runs The Tribune?

A. No.

Q. Do you know how materials are selected for
publication in The Tribune?

A. No.

Q. Have you ever been asked as a Trustee to
consider whether or not a submission should be printed
in The Tribune?

A. No.

Q. Do you recall the Board of Trustees ever
rejecting a contribution for publication in The Tribune?

MR. ROSS: Object to form.

A. No.

Q. Okay. And you're aware Gail Opper is currently
the Board Secretary?

A. Yes.

1 Q. Okay. And are you aware that Gail Opper
2 testified that The Tribune was the responsibility of the
3 District Secretary?

4 A. No.

5 Q. Have you ever talked to Gail Opper about her
6 responsibilities for The Tribune?

7 A. No.

8 Q. Have you ever -- to your knowledge, was Peg
9 Durham the Secretary before Gail Opper?

10 A. Yes, she was.

11 Q. Did you ever speak to Peg Durham about her
12 responsibilities concerning The Tribune?

13 A. No.

14 Q. Do you know who runs Channel 95?

15 A. Bill Mumford does the video on it or something,
16 but running it, no, I don't.

17 Q. Do you know what the District's responsibility
18 is concerning the content that's placed on Channel 95?

19 A. No.

20 Q. Have you ever been involved in deciding whether
21 or not something would be placed on Channel 95?

22 A. No.

23 Q. All right. Do you know who runs the District's
24 website?

25 A. I really don't know, no.

1 Q. Have you ever participated in putting
2 information on the District's website?

3 A. No.

4 Q. Have you ever participated at all in the
5 District's website committee?

6 A. No.

7 Q. In the seven years you've been on the Board, to
8 your knowledge, has the Board of Trustees ever
9 specifically taken up a matter for consideration and
10 disclosed to the public that prior to its Board
11 discussions, the matter had been discussed by Board
12 members in private, outside of the Sunshine?

13 MR. CARROLL: Form.

14 MR. DYE: Join.

15 MR. ROSS: Join.

16 MR. TURFFS: Join.

17 MR. SCOTT: Join.

18 A. You're going to have to repeat that.

19 Q. Okay.

20 A. You're going in all different directions here
21 as far as my mind is concerned.

22 Q. All right. Let me try to rephrase it for you.

23 A. Please.

24 Q. To your knowledge, at a Board Meeting, has the
25 Board ever specifically taken up a matter for discussion

1 **incorrect?**

2 A. It says here --

3 MR. ROSS: Form.

4 MR. SCOTT: Form.

5 MR. CARROLL: Form.

6 MR. DYE: Form.

7 MR. TURFFS: Form.

8 A. Wait a minute. All the trustees available, and
9 they picked it up. If I weren't available, I didn't
10 pick it up.

11 Q. Okay. But you have no memory here today of
12 either picking it up or somebody coming by and
13 delivering it?

14 A. No.

15 Q. And you don't have any recollection of Mr.
16 Vander Molen contacting you and discussing the
17 Settlement Agreement with you?

18 A. No.

19 Q. Are you saying that it didn't happen or just
20 that you don't recall?

21 A. I don't recall.

22 Q. Do you recall the Board deciding to hire the
23 Kirk-Pinkerton law firm?

24 A. Yes.

25 Q. Do you know why the Board decided to hire the

1 **Kirk-Pinkerton law firm?**

2 A. Because we had been accused of not observing
3 Sunshine Law and open whatever, whatever, and we felt --
4 or the Chairman felt that we needed to have somebody
5 that was onto that kind of procedures, and so they did.

6 **Q. Somebody familiar with Government law?**

7 A. Pardon me? Yes, familiar with Government law.

8 **Q. Okay. And the Chairman at that time was Janet**
9 **Jones?**

10 A. Yes.

11 **Q. Do you recall interviewing the Kirk-Pinkerton**
12 **law firm for the job?**

13 A. Do I recall what?

14 **Q. The Board --**

15 A. I wear a hearing aid, so you're going to have
16 to --

17 **Q. I apologize. Do you recall the Board**
18 **interviewing Mark Barnebey concerning the District**
19 **attorney job?**

20 A. No. I wasn't present.

21 **Q. You were not present for that?**

22 A. I wasn't.

23 **Q. You are aware that it happened, though?**

24 A. It probably did, I don't -- I'm not aware of
25 it, no.

1 Board voting to accept or reject the settlement in the
2 McNeil case?

3 A. Yes. Yes, I do.

4 Q. All right. Did you participate in that
5 meeting, if you can recall?

6 A. In that I was probably there, I would have
7 participated, yes.

8 Q. And do you have a recollection of whether the
9 Board fully discussed the issue and it came to a vote at
10 that meeting?

11 A. Yes, the issue -- I recall now the issue was
12 brought up about the circumstances that were behind that
13 and what they tried to do and it didn't work and so,
14 yes.

15 Q. And was there a discussion of those issues at
16 the meeting, at the public meeting?

17 A. Well, it was just explained to us what had
18 happened. No discussion.

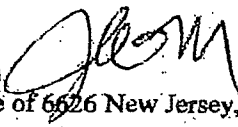
19 Q. Did any of the Board members -- again, if you
20 have a recollection, did any of the Board members ask
21 questions at that meeting?

22 A. I don't recall that.

23 Q. The minutes would reflect that; would they not?

24 MR. HENNESSY: Objection, leading.

25 A. Probably, yes.

TO: Trailer Estates Trustees
FROM: John C. Vander Molen 
SUBJECT: McNeil Fence Case of 6626 New Jersey, Mediated Settlement Agreement
DATE: June 4, 2007

Attached find a copy of the results of the confidential and privileged court ordered mediation session conducted by Mr. Edwin L. Ford, P.A. an Attorney at Law and a Certified Mediator on May 24, 2007. I was in attendance along with Mr. Gaskill our attorney, and Mr. and Mrs. McNeil and their attorney.

In my own terms this is what I understand the agreement contains.

1. This agreement is subject to approval by Board of Trustee Agreement which is anticipated by June 4, 2007 or as soon thereafter as possible and the parties will stipulate to the dismissal of this action, with prejudice (usually considered an adjudication upon the merits and will act as a bar to future action).
2. Mr. McNeil must move the fence in question on the south side of his property outside the four-foot setback no later than September 30, 2007.
3. Each party will bear its own costs and fees.
4. This is a court enforceable agreement.
5. If Mr. McNeil fails to move the fence as stated he would be subject to payments of all of our fees and costs to enforce the above action plus pay to us the sum of \$10,000 in attorney fees and costs that we have already incurred.
6. The agreement becomes a valid and binding agreement under the laws of the State of Florida.
7. If this agreement is not accepted by the Board the agreement will be null and void *ab initio*. (We go back to square one and none of this agreement can be or will be used in the future action).
8. We would then anticipate going to trial on or about September 19, 2007.
9. Our attorney estimated that our legal fees could approach \$25,000 if we go to trial.

Based on the agreement, I was assured that this settlement reconfirms the fact that the Board had the power to enforce deed restrictions and must continue to enforce the restrictions as written without exception. It was said that failure to do so could result in the Board being accused of "selective enforcement" and perhaps lose the ability to enforce restrictions. It was noted that Homeowner Associations and Governing Boards rarely if ever succeed in collection of attorney fees, as it is "just the cost of doing business". However, as written in this agreement is would be "court ordered" that we collect fees and costs if Mr. McNeil fails to move the fence as stipulated. I believe this agreement will achieve our major goal of:

MOVING THE FENCE.

Therefore, I strongly recommend that the Board of Trustees vote to accept this agreement.

Enclosure: McNeil Mediated Settlement Agreement

EXHIBIT

#8
fc 12-17-07

Jun. 01 2007 09:31AM P12

FRX NO.: 9417552937

FROM: TE

TE Resp to RFP 12-12-08 -000016

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

TRAILER ESTATES PARK &
RECREATION DISTRICT,

Plaintiff,

vs.

CASE NO.: 2006-CA-1678

ROBERT W. McNEIL and
BARBARA M. McNEIL,

Defendants.

MEDIATED SETTLEMENT AGREEMENT

May 24, 2007

Having engaged in a confidential and privileged mediation conference on the above-referenced date, the parties hereto agree as follows:

1. **TERMS OF SETTLEMENT.** As consideration for this Mediated Settlement Agreement and conditioned upon approval of this Mediated Settlement Agreement by the Board of Trustees of Plaintiff, Defendants will, by no later than September 30, 2007, move the fence presently situated on the south side of Defendants' property so that it is situated outside the four foot setback. The parties stipulate that, as of the date of this Mediated Settlement Agreement, the only known encroachment into the applicable setbacks on the Defendants' property is the fence on the south side of Defendants' property.

Within ten (10) days of the date of approval of this Mediated Settlement Agreement by the Board of Trustees of Plaintiff which said approval is anticipated by June 4, 2007 or as soon thereafter as possible, the parties will stipulate to the dismissal of this action, with prejudice, each

Page 1 of 4

Jun. 01 2007 09:32AM P13

FRX NO.: 9417552937

FROM: TE

TE Resp to RFP 12-12-08 -000017

party to bear its own costs and fees and the court will be requested to retain jurisdiction of this matter solely for the purpose of enforcing the terms of this Mediated Settlement Agreement.

In the event that the Board of Trustees declines to approve this Mediated Settlement Agreement, then this Mediated Settlement Agreement will be null and void *ab initio*.

2. **ENFORCEMENT/PREVAILING PARTY FEES.** In the event that any party hereto seeks to enforce this Mediated Settlement Agreement in a court of law or equity, the prevailing party shall be entitled to recover from the non-prevailing party its reasonable attorneys' fees and court costs, including paralegal fees, incurred in enforcing this Mediated Settlement Agreement through all appeals. If, in any such enforcement action, Plaintiff is deemed to be the prevailing party, then Plaintiff will also be entitled to collect from Defendants the sum of \$10,000.00 in attorneys fees and costs which Plaintiff has expended as of the date of this Mediated Settlement Agreement in addition to any award of attorneys fees and costs for enforcing this Mediated Settlement Agreement.

3. **COMPLETE AGREEMENT.** This Mediated Settlement Agreement represents the full and complete agreement of the parties hereto relative to the matters addressed herein and may not be modified or altered except by an instrument in writing signed by all parties hereto.

4. **FURTHER ACTION/COOPERATION.** The parties hereto and their legal counsel agree to cooperate with one another and to assist one another to effectuate the intention of this Mediated Settlement Agreement particularly with regard to the prompt preparation of all reasonably necessary instruments and documents.

5. **BINDING AGREEMENT.** This Mediated Settlement Agreement is

Page 2 of 4

Jun. 01 2007 09:32AM P14

FRX NO. : 9417552937

FROM : TE

TE Resp to RFP 12-12-08 -000018

intended to be a valid and binding agreement under the laws of the State of Florida, effective upon its execution despite the need for any further documentation. By executing this Mediated Settlement Agreement, each party hereto acknowledges that they have read and understand this Mediated Settlement Agreement; that they have freely and voluntarily entered into this Mediated Settlement Agreement; and, that they have been represented in this matter by legal counsel of their own selection or have voluntarily declined said representation.

6. **NO ADMISSIONS.** By executing this Mediated Settlement Agreement, the parties hereto expressly deny liability and acknowledge that this Mediated Settlement Agreement constitutes a good faith compromise of disputed claims and termination of the controversies which have given rise to this Mediated Settlement Agreement.

7. **MISCELLANEOUS.** This Mediated Settlement Agreement shall be interpreted and governed by Florida law. No provision of this Mediated Settlement Agreement shall be construed against a party because of draftsmanship of such provision. Headings herein are for convenience of reference only and shall not effect the interpretation hereof. Genders shall be interchangeable as the context so requires.

8. **COUNTERPARTS/FACSIMILE SIGNATURES.** This Mediated Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute a single instrument. Facsimile signatures shall suffice to bind the parties.

9. **MEDIATION FEE.** Mediation fees shall be divided equally between Plaintiff (50%) and Defendant (50%).

TRAILER ESTATES PARK &
RECREATION DISTRICT

By: John Vander Molen
John Vander Molen, authorized
representative of the Board of
Trustees

Jason T. Gaskill
Jason T. Gaskill, Esquire
Attorney for Plaintiff

Robert W. McNeil
Robert W. McNeil

Barbara M. McNeil
Barbara M. McNeil

James J. Spanolios
James J. Spanolios, Esquire
Attorney for Defendants

c:\elf\mediation\general\mediated settlement agreement

TO: Trailer Estates Trustees
FROM: John C. Vander Molen *JCM*
SUBJECT: Release of copies of the Mediated Settlement Agreement of the
Case regarding the McNeil of 6626 New Jersey
DATE: June 4, 2007

I believe the Board of Trustees is entitled to an explanation of why the Settlement Agreement of the McNeil case was not available to them until approximately 2:45 PM Friday June 1, 2007.

My original decision to release the copies of the settlement on Monday June 4, 2007 before this meeting was based on the following information I had available to me.

1. The minutes of the May 7, 2007 Board of Trustees meeting state that Mr. Barnebey said; "We may have to have a meeting outside the Sunshine when John comes back from mediation". This indicated to me the agreement was a confidential matter.
2. A copy of a letter dated May 10, 2007 that our attorney Mr. Jason Gaskill had sent to Janet Jones included information from the mediator and excerpts from MEDIATION ALTERNATIVES TO JUDICIAL ACTION LAWS OF FLORIDA, CHAPTER 44 section 44.405 regarding Confidentiality; privilege; exceptions.
3. Opening statements by the mediator at the court mandated mediation session and the first sentence in the Settlement which speaks to the "confidential and privileged mediation conference".
4. During a telephone conversation with Mr. Gaskill on May 29, 2007 concerning the early release of the mediation documents he agreed that I should hold the release of the Settlement until the June 4, 2007 Board meeting.

Based on the above I was led to believe that the agreement was not a public record until it was voted on and agreed to by the Board of Trustees and should be held until this meeting.

At approximately 2:10 PM Friday June 1, 2007 I received a telephone call at home from Mr. Barnebey. Mr. Barnebey advised me to provide copies of the Settlement Agreement, which had been provided to Mr. Barnebey earlier in the week, to the other trustees so they may be prepared to vote on the settlement at Monday's meeting. When I pressed for a reason as to what prompted this late action he responded that he felt the Settlement was a public record and therefore should be released. He acknowledged he had received a phone call from a Trustee concerning the release. I then requested that Mr. Barnebey put his decision in writing. His fax was received in the TE office at 2:44PM Friday June 1, 2007.

The office manager and I immediately contacted all the Trustees available and they did pick up or had delivered to them a copy of the settlement before 3:00PM. I placed Mr. Featheringill's copy in the US mail at approximately 3:15 PM June 1, 2007.

John C. Vander Molen

EXHIBIT

#9
FC 12-17-09

TE DOCS 7-26-07 PRR00118