

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

MARY LOU SMITH, et al.,

Plaintiffs,

v.

CASE NO. 2008-CA-11315
Division B

TRAILER ESTATES PARK AND
RECREATION DISTRICT, et al.,

Defendants.

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

NOW COME the Plaintiffs, Mary Lou Smith and Sharon Denson, and hereby move this Honorable Court for entry of a Protective Order concerning the duces tecum portion of the Subpoena Duces Tecum for Trial served on Ms. Janet Jones, Mr. John Vander Molen, Ms. Mary Lou McNulty, and Mr. Joseph Salerno, and as grounds therefore state:

1. On or about September 9, 2010, the Defendant, Trailer Estates Park and Recreation District, served its Subpoena Duces Tecum for Trial ("Subpoena") on Ms. Jones, Mr. Vander Molen, and Ms. McNulty ("Former Defendants").
2. Each of the individuals served with the Subpoena were formerly Defendants in this case.
3. On or about September 7, 2010, this Court issued an Order dismissing the Former Defendants from this case with prejudice and dropping them as party Defendants. The Order was in response to a settlement agreement and stipulation reached between the Former Defendants and the Plaintiffs. Thus, the only remaining Defendant in this action is Trailer Estates Park and Recreation District.

4. The Duces Tecum portion of the Subpoena requests the Former Defendants bring with them to trial the following:

- a. Any and all documents which constitute an agreement between you and Plaintiffs, or any one of them, to settle all or part of the claims made against you or which could have been made against you in this action.
- b. Any and all documents which were executed by any of the Plaintiffs, Plaintiffs' agents, or Plaintiffs' attorneys as part of any agreement to settle, in whole or in part, Plaintiffs' claims made against you or which could have been made against you in this action including, but not limited to, releases and indemnification agreements.

5. The Defendant's request improperly seeks evidence of settlement between the Former Defendants and the Plaintiffs in direct conflict with Florida Statutes and case law interpreting those statutes.

6. It is established law that evidence of settlement is generally inadmissible. § 90.408 Fl. Stat., § 768.041 Fl. Stat. The purpose of these statutes is to promote Florida's public policy favoring settlement by excluding such prejudicial evidence of settlement at trial. *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009) (citing *City of Coral Gables v. Jordan*, 186 So. 2d 60, 63 (Fla. 3d DCA 1966)).

7. In *Saleeby*, as here, the witness was a former defendant who settled with the Plaintiff and was dropped as a party to the suit before trial. *Saleeby*, *Supra*, at 1080. The former defendant testified at trial and the trial court permitted the remaining defendant to use evidence of settlement between the plaintiff and the former defendant to impeach the former defendant's testimony. *Id.* The Florida Supreme Court held that the trial court committed reversible error by

allowing evidence of settlement at trial, even for impeachment purposes, and that there are virtually no exceptions to Sections 90.408 and 768.041, Fl. Stat. because the statutes are clear and unambiguous that evidence of settlement is inadmissible. *Id.* at 1086. The Court noted that it was the legislature's intent in enacting the previously mentioned statutes to promote Florida's public policy favoring settlements. *Id.* at 1083. Accordingly, the Florida Supreme Court held that not only is it impermissible to allow evidence of settlement to prove liability, but that it is also impermissible to allow evidence of settlement for impeachment purposes. *Id.* at 1086.

8. Here, the factual situation is almost identical to the situation in *Saleeby*, where one of the defendants settled with the plaintiff before trial and was dropped from the suit and the case continued with respect to the other defendant. The Florida Supreme Court was clear in its opinion in *Saleeby* that permitting the use of evidence of settlement by a defendant to show that it is not liable and for impeachment purposes is contrary to Florida law and public policy and is therefore reversible error. Accordingly, the Defendant's request for the settlement agreements in the *Duces Tecum* portion of its Subpoena is improper and should be quashed as contrary to Florida law and public policy.

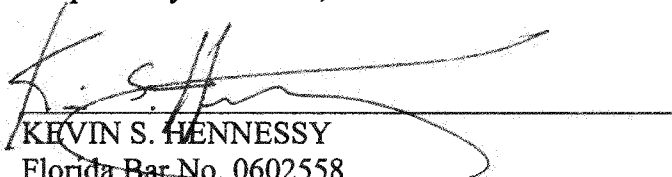
9. Additionally, the settlement agreements between the Plaintiffs and the Former Defendants were entered into as a result of court ordered mediation and at that time the parties agreed that the settlement agreements would be, and remain, confidential.

10. Because the settlement agreements were the result of Court ordered mediation they are governed by the confidentiality provisions of Section 44.405, Fl. Stat. which provides that "there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, *unless the parties agree otherwise*" (emphasis added).

11. Here, the Former Defendants and the Plaintiffs agreed that the settlement agreements entered into as a result of the Court ordered mediation would remain confidential. Therefore, pursuant to Section 44.405(4)(a), Fl. Stat., the settlement agreements cannot be disclosed to the Defendant.

WHEREFORE, the Plaintiff respectfully requests this Honorable Court enter a protective order quashing the duces tecum portion of the Subpoena Duces Tecum for Trial, and grant any further relief the Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Kurt E. Lee, Esquire, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by *Facsimile and U.S. Mail*, this 14th day of September, 2010.



KEVIN S. HENNESSY, ESQ.