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

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

Plaintiffs,

v. CASE NO. 08 CA 11315

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

Defendants.
_______________________________________/

TRAILER ESTATES'S MEMORANDUM IN OPPOSITION TO MOTIONS FOR PROTECTIVE ORDER

Defendant, Trailer Estates Park And Recreation District ("Trailer Estates"), opposes Plaintiffs' Motion For Protective Order and Non-Parties Janet Jones', John Vander Molen's, Mary Lou McNulty's And Joseph Salerno's Motion For Protective Order and, as grounds therefor, states as follows:

BACKGROUND FACTS

After approximately two years of litigation, Plaintiffs, Mary Lou Smith and Sharon Denson, suddenly dropped and dismissed their claims against Janet Jones, John Vander Molen, Mary Lou McNulty, and Joseph Salerno with prejudice.

Trailer Estates seeks, through subpoenas duces tecum, to have the former individual defendants produce the settlement agreement(s) which apparently exist between them and Plaintiffs at the trial of this action.

In seeking protection from the trial subpoenas, the former defendants contend that the agreement with Plaintiffs included a confidentiality provision. Plaintiffs go further and contend that Florida Statutes, §§90.408 and 768.041, as interpreted by the Florida Supreme Court case of *Saleeby v. Rocky Elson Construction, Inc.*, 3 So.3d 1078 (Fla. 2009), require that this Court maintain the confidentiality of the parties' settlement.

For the reasons discussed below, the Court should deny the motions for protective order and require the production of the parties' settlement agreement(s) for the Court's and Trailer Estates's review and inspection at the trial of this cause.

FLORIDA EVIDENCE CODE, §90.408 DOES NOT IMPOSE AN ABSOLUTE BAR TO EVIDENCE OF A SETTLEMENT

The settlement exclusion in Florida Statute, §90.408 is not absolute.[1]

Section 90.408 only bars evidence admitted "to prove liability or lack of liability" regarding the claim that is being litigated. Florida appellate courts have routinely held that if the evidence of a settlement is offered for another relevant purpose, it is not barred by §90.408 and is admissible under the principle of "limited admissibility."[2] Indeed, Florida Statute, §90.107 recognizes that evidence may be admissible for one purpose, but not another. And, §90.608 provides that "[s]howing that the witness is biased" is a proper purpose for the admission of evidence.

Here, the settlement agreement(s) between Plaintiffs and the former individual defendants might show that Plaintiffs and/or the former defendants now have a bias one

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[1] This memorandum takes frequent unacknowledged excerpts from Michael L. Seigel, Robert J. Hauser, and Allison D. Sirica, An Unsettling Outcome: Why The Florida Supreme Court Was Wrong To Ban All Settlement Evidence In Saleeby v. Rocky Elson Construction, Inc., 3 So.3d 1078 (Fla. 2009) (http://works.bepress.com/michael_seigel/3/, accessed September 21, 2010).

[2] *See* C. Ehrhardt, Florida Evidence § 408.1 (2010 Edition).

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way or the other. (It is, of course, impossible to state how the agreements might be used at trial without the Court and Trailer Estates having an opportunity to inspect them.)

FLORIDA STATUTE, §768.041 APPLIES TO TORT ACTIONS INVOLVING PROPERTY DAMAGE, PERSONAL INJURY, AND WRONGFUL DEATH, NOT TO GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS ACTIONS

Section 768.041(3) is not a rule of evidence. Section 768.041(3) is part of the chapter of the Florida Statutes entitled "Negligence." Section 768.041 refers to releases of tortfeasors "for property damage to, personal injury of, or the wrongful death of any person" and then states in subsection (3) that "[t]he fact of <u>such</u> a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury." (emphasis added)

The instant action involves statutory claims based upon alleged violations of Florida's Government-In-The-Sunshine and Public Records laws. This action does not involve "property damage to, personal injury of, or the wrongful death of any person." Thus, Florida Statute, §768.041 is not pertinent to this matter.

<u>SALEEBY</u> IS EASILY DISTINGUISHABLE

Saleeby is not pertinent to this action because it is easily and readily distinguished from this action. *Saleeby* was a personal injury tort case and the court's decision relied upon Florida Statute, §768.041, because of the paraplegic plaintiff's settlement of his claims against one of the two tortfeasors. As aforementioned, the instant action is not a tort case to which §768.041 would apply.

Another important distinction here is that *Saleeby* was tried before a jury whereas this action will be a bench trial. The Court in the instant action can properly apply the

evidence of the settlement agreement(s) at trial (*e.g.*, the Court may decide to apply evidence of a settlement agreement for the limited purpose of showing a witness's bias).

PLAINTIFFS SHOULD NOT BE PERMITTED TO KEEP A SWORD OVER THE FORMER INDIVIDUAL DEFENDANTS OR IMPEDE THE SEARCH FOR TRUTH

The U.S. Supreme Court long ago stated that "[t]he fundamental basis upon which all rules of evidence must rest – if they are to rest upon reason – is their adaption to the successful development of the truth."[3]

The search for the truth may be impeded if there are swords over the heads of the former defendants. Do the secret settlement agreements require Janet Jones to say or not say something at trial? Will John VanderMolen be forced to pay a penalty or be subject to a new claim if he says something Plaintiffs do not like? This litigation caused at least one Trustee to leave the Board: will Mary Lou McNulty be afraid to testify candidly or will she provide nuanced testimony because of the secret agreement? Are the Plaintiffs, who contend that Trailer Estates's trustees have not done everything in the Sunshine, now going to impede the search for the truth because of their secret agreement with Trustee Joe Salerno?

Plaintiffs' attempt to prevent disclosure of the settlement agreement(s) and Plaintiffs' objections to the limited admissibility of the evidence of the settlement agreement(s) contradicts the objectives of Florida's evidentiary rules and infringe upon this Court's ability to ascertain the truth. This infringement will reach its nadir if Plaintiffs attempt to use the statutory provisions designed to protect a tort litigant from the misuse of settlement evidence while making the credibility of a settling defendant an

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[3] *Funk v. United States*, 290 U.S. 371, 381 (1933).

issue in the case by calling such settling defendant as a witness.[4] Central to our system of justice is the notion that a fact finder should be permitted to evaluate each and every witness for potential problems of bias, interest, and prejudice.

For all the foregoing reasons, the Court should deny Plaintiffs' Motion For Protective Order and Non-Parties Janet Jones', John Vander Molen's, Mary Lou McNulty's And Joseph Salerno's Motion For Protective Order and grant Trailer Estates such further and additional relief as this cause and justice may require.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Kevin S. Hennessy, Esquire, Lewis, Longman & Walker, P.A., 1001 Third Avenue West, Suite 670, Bradenton, Florida 34205,Daniel E. Scott, Esquire, Daniel E. Scott, P.A., 2033 Main Street, Suite 408, Sarasota, FL 34237, Robert E. Turffs, P.A.1444 First Street, Suite B, Sarasota, Florida 34236, James D. Dye, Esquire, Dye Deitrich, Petruff & St. Paul, P.L., 1111 3rd Avenue W., Bradenton, FL 34205-7834, and Hunter W. Carroll, Esquire, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, on this 21st day of September, 2010.

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[4] *See* Ehrhardt, at §608.1. ("All witnesses who testify during a trial place their credibility in issue. Regardless of the subject matter of the witness's testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness's testimony [because] the credibility of the witness is always a proper subject of cross-examination."). *See also Russ v. City of Jacksonville*, 734 So. 2d 508, 511 (Fla. 1st DCA 1999) (noting "the credibility, bias or prejudice of witnesses who testify in a case, as well as the weight to be given their testimony, are a matter for the consideration of and determination by the jury").

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