

IN THE CIRCUIT COURT OF 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,

Defendant.

PLAINTIFFS' MOTION IN LIMINE
REGARDING SEQUESTRATION OF WITNESSES

Plaintiffs, MARY LOU SMITH AND SHARON DENSON, through their undersigned attorneys, Lewis, Longman & Walker, P.A., hereby move this Honorable Court for an Order, *in limine*, addressing the issue of witness sequestration at trial.

In furtherance thereof, Plaintiffs state:

1. Attorney Jennifer Cowan, Esq., and Paralegal Melanie Marken, both of whom represent Plaintiffs, have been identified as witnesses in this action. Attorney Cowan and Mrs. Marken were previously deposed by Defendants. The parties have included them on their witness lists for trial; Plaintiffs anticipate calling them to testify as the first and second witnesses at trial.
2. Based upon communications with defense counsel, Plaintiffs anticipate that Defendants will invoke the rule, requesting the sequestration of all witnesses pursuant to §90.616, Fla. Stat. While Plaintiffs have no

objection to the sequestration of witnesses generally, Plaintiffs object to the sequestration of Attorney Cowan and Mrs. Marken and request that this Court enter an Order, *in limine*, specifically permitting them to remain in the courtroom throughout trial.

3. When a party requests that witnesses be excluded from trial under §90.616, the trial court will exclude those witnesses who do not fall within the exceptions stated within the rule. The reasons for this are straightforward.

The rule is designed to aid in ensuring a fair trial “by avoiding ‘the coloring of a witness’s testimony by that which he has heard from other witnesses who have preceded him on the stand,’ ” *Gore v. State*, 599 So. 2d 978, 986 (Fla.1992) (quoting *Spencer v. State*, 133 So. 2d 729, 731 (Fla.1961)), thereby discouraging “fabrication, inaccuracy and collusion.” *Knight v. State*, 746 So. 2d 423, 430 (Fla.1998) (quoting Charles W. Ehrhardt, *Florida Evidence* § 616.1, at 506 (1998 ed.)).

Chamberlain v. State, 881 So. 2d 1087, 1100 (Fla. 2004).

4. Section 90.616(2)(c) provides that “[a] witness may not be excluded if the witness is . . . [a] person whose presence is shown by the party’s attorney to be essential to the presentation of the party’s cause.” This exception recognized the well-established, common law exception to the rule that permitted a witness to remain in the courtroom when it was “beneficial to the opposing party to have the witness immediately available to give advice and information” and was not prejudicial to the party seeking sequestration. Goodman v. West Coast Brace & Limb, Inc., 580 So. 2d 193, 195 (Fla. 2d DCA 1991) (citation omitted).

5. As explained by the Second DCA in Goodman, a person is essential when the witness has “such specialized knowledge or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness” Id. at 195 (citing Oliver B. Cannon & Son, Inc. v. Fidelity & Cas. Co. of New York, 519 F.Supp. 668, 678 (D.Del.1981)). In Oliver B. Cannon, the court declined to sequester an attorney-witness who previously served as that party's counsel in an underlying action, finding his presence at trial was “essential to [the party's] ability to prosecute its case effectively.” Id. at 679. In so ruling, the court recognized that that he was “the individual most familiar with all of the complex factual details underlying this case[,] . . . without whose presence [the party's] attorney could not effectively represent his client at trial.” Id.
6. Under the exception provided by §90.616(2)(C), the trial court has wide discretion in determining which witnesses are essential. Knight v. State, 746 So. 2d 423, 430 (Fla. 1998) (citing Charles W. Ehrhardt, *Florida Evidence* § 616.1, 506-510 (1998 ed.)). Thus, it was within the court's discretion to allow an investigating detective to remain in the courtroom when he was a fact witness. Knight, supra. See also Randolph v. State, 463 So. 2d 186, 191 (Fla.1984) (as investigator's testimony was not influenced by that of others in the courtroom, he was not required to be sequestered).
7. There is one case regarding the attempted sequestration of co-counsel

who also testified as a witness – Thompson v. Gross, 353 So. 2d 191 (Fla. 3d DCA 1977). In that case, the Third DCA found no abuse of discretion in the trial court’s refusal to apply the sequestration rule to co-counsel, even though counsel testified as a witness. Id. at 192. The case does not explain the Court of Appeals’ rationale, but presumably the Court recognized that co-counsel, being intimately familiar with all of the details of the case, including the testimony of witnesses, would not be influenced in her testimony by what others said in the courtroom. See e.g., Knight, supra; Randolph, supra.


8. Attorney Cowan has been intimately involved in this case from its inception. She has taken and defended depositions of the various witnesses. She has researched, prepared and argued motions before this Court. Paralegal Melanie Marken has been equally involved in this case. In fact, as acknowledged by the District’s counsel at her deposition, Mrs. Marken knows the public records produced and provided by the District better than anyone else, including the District’s Trustees. Depo. Melanie Marken 69:13-69:15. Without question, Attorney Cowan and Mrs. Marken are the individuals most familiar with all of the complex factual details underlying this case. Without their presence and assistance, Plaintiffs would be prejudiced and hindered in their prosecution of their case.
9. To the extent Attorney Cowan and Mrs. Marken are testifying as to their observations and the production of the District’s public records, their

testimony is akin to that of the investigators who were not sequestered in Knight and Randolph.

10. As noted at the outset of this Motion, the purpose behind the sequestration rule and §90.616 is to prevent a witness from changing his testimony in response to the testimony of other witnesses at trial. Such an outcome is not possible here as both Attorney Cowan and Mrs. Marken already know what all of the witnesses are likely to say. In the unlikely event their testimony at trial differs from their prior deposition testimony, Defendant's counsel will have ample opportunity to cross-examine them.
11. As noted above, the rule of sequestration of witnesses is not to be applied as a strict or absolute rule of law, and the trial court has discretion to determine whether a particular witness should be excluded from the courtroom during the trial. Rider v. State, 724 So. 2d 617, 619 (Fla. 5th DCA 1998) (citation omitted). In the Court's application of its discretion, the Court should consider the prejudice that would result to Plaintiffs if these witnesses were sequestered. In stark contrast, the District will be unaffected if they are not sequestered.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order *in Limine*, finding that Attorney Jennifer Cowan and Paralegal Melanie Marken are essential witnesses pursuant to §90.616(2)(c), and permitting them to remain in the courtroom throughout the trial in this matter.


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 22nd day of September, 2010.



KEVIN S. HENNESSY, ESQ.