

**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, *et al*,

Defendants.

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**PLAINTIFFS' RESPONSE TO MOTION TO DISQUALIFY**

Plaintiffs, MARY LOU SMITH and SHARON DENSON, through their undersigned attorneys, Lewis, Longman & Walker, PA, hereby submit their Response to the Motion to Disqualify filed by Defendant TRAILER ESTATES PARK & RECREATION DISTRICT ("the District").

**UNDISPUTED FACTS**

1. Mid-afternoon Friday, October 1, 2010, the District's counsel filed a Motion to Disqualify Senior Judge Thomas M. Gallen from this proceeding. As set forth in the Motion, the District asserted as grounds the fact that Judge Gallen more than twenty (20) years ago with an attorney who represented the District many years ago, and that Judge Gallen, while a member of the Florida legislature, had some involvement with the creation of the District.

2. In making this Motion, the District neglected to inform the Court that it had appeared multiple times before Judge Gallen in other cases, including, but not limited to Trailer Estates Park & Recreation District v. Stoner, Manatee County Circuit Civil Court

Case No. 1996 CA 01725, and Trailer Estates Park & Recreation District v. MacDonald, Manatee County Circuit Civil Court Case No. 1996 CA 02847. Copies of the dockets, as well as an Order entered by Judge Gallen, are attached hereto as composite **Exhibit A**. It is likely that during his tenure as a Circuit Court Judge, Judge Gallen presided over other matters involving the District, although such information is not readily available on the Clerk of Court's website.

3. It is clear that the District took no steps in either of these cases to disqualify Judge Gallen because of his purported bias or prejudice. In fact, the docket for the Stoner case reflects that Judge Gallen ruled in favor of the District. Of note is the fact that both of these cases occurred some 14 years ago, considerably closer to the time period when Judge Gallen was in private practice and when he served in the Florida legislature.

4. The timing of this Motion is especially concerning. When this action was continued in March of this year, Judge Dunnigan advised the parties that there was a substantial likelihood that this case would be referred to a senior judge. At no time did Trailer Estates advise the Court that it should not be referred to Judge Gallen because of his purported bias with regard to the District. Unfortunately, this Motion appears to be simply a tactic by the District to continue this trial.

#### **APPLICABLE LAW**

5. A verified motion for disqualification of a judge must contain "an actual factual foundation for the [moving party's] alleged fear of prejudice." Heier v. Fleet, 642 So.2d 669, 669 (Fla. 4<sup>th</sup> DCA 1994). The facts asserted in a motion to disqualify a judge must be reasonably sufficient to create a well-founded fear in the mind of the party that

he or she will not receive a fair trial. Id. at 669-70 (citation omitted). The standard to be applied by the judge is whether a reasonably prudent person would, on the basis of the stated facts, fear that he or she cannot get a fair trial with this judge presiding. Id. at 670 (citation omitted)

6. The moving party carries the burden of showing that he or she has a well-grounded fear that he or she will not receive a fair trial at the hands of the judge. Adkins v. Winkler, 592 So.2d 357, 360 (Fla. 1st DCA 1992). When the verified motion contains insufficient facts to support a party's claim of a well-grounded fear of bias or prejudice that they will not receive a fair trial, then denial of the motion to disqualify is proper. Id. (citations omitted).

7. While Rule 2.330(f) provides that the Court "shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged[,]" this does not mean that the Court is precluded from evaluating the allegations made. As explained by the Florida Supreme Court last year,

The term "legal sufficiency" encompasses more than mere technical compliance with the rule and the statute. The standard for viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. . . . Further, this fear of judicial bias must be objectively reasonable. . . . The subjective fear of a party seeking the disqualification of a judge is not sufficient. . . . Rather, the facts and reasons given for the disqualification of a judge must tend to show "the judge's undue bias, prejudice, or sympathy." . . . Where the claim of judicial bias is based on very general and speculative assertions about the trial judge's attitudes, no relief is warranted.

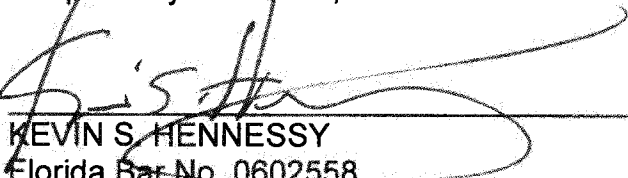
Parker v. State, 3 So.3d 979, 982 (Fla. 2009) (citations omitted).

8. In making this Motion, the District has not alleged any conduct or activity by Judge Gallen which occurred after he presided over MacDonald or Stoner. The fact that the District has litigated cases in front of Judge Gallen previously without any allegation of prejudice or bias demonstrates that the District's fear is neither "well-grounded" nor reasonable as required by Rule 2.330.

9. Under the facts presented by the District and in light of the fact that Judge Gallen has heard cases brought by the District previously, no "reasonably prudent person . . . would fear that he or she cannot get a fair trial with [Judge Gallen] presiding." Heier at 670 (citation omitted). Accordingly, the Motion to Disqualify Judge Gallen must be denied.

WHEREFORE, Plaintiffs respectfully request that this Court deny the Motion on the grounds that it is legally insufficient, and grant such other and further orders and this Court deems appropriate.

Respectfully submitted,



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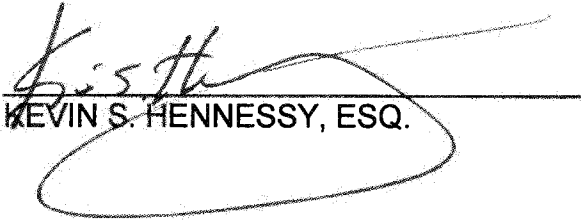
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**Attorneys for Plaintiffs**

**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 on October 2, 2010.

  
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KEVIN S. HENNESSY, ESQ.