

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

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

Plaintiffs,

vs.

CASE NO. 08 CA 11315

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.

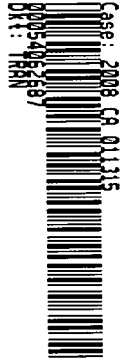
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2010 OCT -5 AM 11:58  
CLERK OF THE CIRCUIT COURT  
MANATEE CO. FLORIDA

FILED FOR RECORD  
R.B. SHORE

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Janette Dunnigan, Judge of  
said Court, Twelfth Judicial Circuit of Florida at  
a hearing held at the Manatee County Courthouse,  
Bradenton, Florida in the above-styled cause on  
September 27, 2010, commencing at 11:37 a.m.



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PROCEEDINGS

1  
2 THE COURT: You may start.

3 MR. CARROLL: Thank you, Your Honor. Pleasure  
4 being back before Your Honor.

5 THE COURT: Thank you so much.

6 MR. CARROLL: This is a motion by the  
7 individual defendants who are no longer a part of  
8 the case and are nonparties. Each of the  
9 individual defendants -- I don't know if Mr.  
10 Salerno physically got one yet, but the other three  
11 individual defendants or former individual  
12 defendants received a subpoena duces tecum to  
13 attend the trial and to bring with them the  
14 settlement agreement that was between the  
15 plaintiffs and the individual defendants. And  
16 while we have no objection to appearing and being  
17 witnesses in the case, it's the duces tecum portion  
18 that we need a protective order on, Your Honor.

19 Certainly there is a private agreement between  
20 the plaintiffs and the individual defendants. It  
21 was reached in the confines of a mediation, Your  
22 Honor, so it -- not only is it a confidential  
23 agreement, it is a mediated confidential agreement.  
24 And we believe very strongly that it is improper  
25 for this agreement to be turned over and, because

1 of that, we have moved for the protective order.

2 And, Your Honor, I would readily believe that,  
3 you know, if we start violating the confidentiality  
4 of mediation, the whole point of mediation goes  
5 away. And so on principle, we also need to look at  
6 this very strongly.

7 I believe Mr. Hennessy also has some words he  
8 wants to --

9 THE COURT: Additional argument?

10 Why don't -- Mr. Hennessy, why don't you wait  
11 and let me hear from Trailer Estates as to why they  
12 believe should have it.

13 MR. LEE: Judge, the reason why we think we  
14 should have it is not to establish liability, which  
15 is what is generally the prohibition to getting  
16 settlement agreements. But in this case, Judge, we  
17 haven't seen it, so I don't know what might be in  
18 there. But if, for example, there's some agreement  
19 as to how the individual defendants might testify,  
20 whether or not they might be concerned about any  
21 subsequent litigation with plaintiffs' counsel, I  
22 can't tell the Court exactly how the agreement  
23 might be used other than to note that the rule  
24 which prohibits using the agreement as part of  
25 liability doesn't apply here.

1           What would apply here, it would seem to me to  
2           be 90.408, which always lets in, you know, evidence  
3           to show that a witness might be biased. This isn't  
4           a true Mary Carter agreement type situation because  
5           obviously these folks aren't parties to the  
6           litigation anymore. But it certainly would seem to  
7           bear on their testimony and to the veracity thereof  
8           to know what they agreed to. You know, again, it's  
9           not being used for liability, it's just what type  
10          of sword of Damocles is holding -- is over these  
11          four defendants' heads.

12          We went through two years of litigation,  
13          which -- you know, and then in the complaint it  
14          says all sorts of negative and adverse things about  
15          what these four folks did. And then on the eve of  
16          trial they're dismissed with prejudice and just  
17          say, oh, well, nobody can know what the deal is.

18          It seems to us, Judge, that we should be  
19          allowed to see what the settlement agreement is.  
20          And then if it's pertinent, for example, if it says  
21          that they're going to say things or not say things  
22          and it has penalties out there, if it's going to do  
23          anything to adversely affect their testimony, we  
24          should be able to use that during our examination  
25          of the witnesses under one of the rules other than

1 90.408.

2 THE COURT: All right. Mr. Hennessy, did you  
3 want to make any remark?

4 MR. HENNESSY: Briefly, Your Honor. I'll just  
5 provide you with a copy of the case that I believe  
6 is right on point, Your Honor, which is a Supreme  
7 Court case, Saleeby versus Rocky Elson  
8 Construction, Inc. It's a 2009 Supreme Court  
9 Florida case that, frankly, follows many other  
10 district court cases saying -- holding that it was  
11 error to admit evidence of a former defendant's  
12 settlement and who was dropped before trial during  
13 cross-examination. It's error even for impeachment  
14 purposes, which is, I believe, what is being argued  
15 by counsel for the District.

16 Frankly, they received my memorandum on this  
17 point and responded to it with a Law Review article  
18 saying the Supreme Court was wrong. I don't think  
19 we get that privilege here no matter how many law  
20 professors don't like the Supreme Court's ruling.

21 THE COURT: Okay.

22 MR. LEE: Judge, may I address -- unless the  
23 Court's already read the memo.

24 THE COURT: I have.

25 MR. LEE: Okay.

1 THE COURT: The Motion for Protective Order is  
2 granted as to both the individual plaintiffs.

3 MR. HENNESSY: That's actually four  
4 individuals.

5 THE COURT: The individuals who were formerly  
6 defendants.

7 MR. LEE: Well, Judge, might I ask the Court to  
8 at least look at the agreement to see whether it's  
9 going to color their testimony?

10 THE COURT: No. Okay. Thank you.

11 MR. CARROLL: Thank you, Your Honor. I'll  
12 prepare an order, if that's okay with the Court.

13 THE COURT: Okay. What did you find out about  
14 your mediation?

15 MR. LEE: Good to go for tomorrow, Your Honor,  
16 at eight o'clock in Lucente's offices. Mr.  
17 Larsen's giving us 8:00 to 1:30. He's got  
18 something in the afternoon, but he's indicated he's  
19 willing to come back afterwards and finish it up.  
20 It's just a matter of --

21 THE COURT: I wish you all luck.

22 MR. LEE: Thank you, Judge.

23 MR. HENNESSY: Your Honor, with regard to the  
24 other issue, that of providing counsel with  
25 exhibits, I think what would be best to ensure that

1           there's no issue is that we come back to Your  
2 Honor's office to cover what was submitted to you  
3 and make a copy of exactly what's submitted to the  
4 Court.

5           THE COURT: Oh, it's already been done?

6           MR. HENNESSY: That was done last Friday, Your  
7 Honor.

8           THE COURT: Okay. Yes, let's do exactly that.

9           MR. HENNESSY: I'll have someone come by your  
10 office.

11          THE COURT: Okay. Yes, let's do exactly that.  
12 That'll make things a lot easier.

13          MR. HENNESSY: Thank you, Judge.

14          THE COURT: Okay. Thank you.

15          (Thereupon, this hearing was concluded at 11:45  
16 a.m.)

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CERTIFICATE

STATE OF FLORIDA )

COUNTY OF MANATEE )

I, ALLYSON C. BROWN, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

Dated this 29th day of September, 2010.

Allyson C Brown

ALLYSON C. BROWN, Court Reporter

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