

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

WILLIAM DAWS, JR., OUIDA GERSHON,
BILL I. HINES, REGINA HINES, HERSHAL
O. HOLT, KAREN A. HOLT, ALAN E. JOINER,
MONICA L. JOINER, MARY B. KING, SARA
KING, BETTY TOLBERT, RICKY W. TOLBERT,
and JERRY VARNADORE,

Plaintiffs,

vs.

Case No. 2014-CA-2951

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Defendant.

PLAINTIFFS' NOTICE OF FILING
TRANSCRIPT OF HEARING HELD ON NOVEMBER 1, 2017

Plaintiffs WILLIAM DAWS, JR., OUIDA GERSHON, BILL I. HINES, REGINA HINES,
HERSHAL O. HOLT, KAREN L. HOLT, ALAN E. JOINER, MONICA L. JOINER, MARY B.
KING, SARA KING, BETTY TOLBERT, RICKY W. TOLBERT, and JERRY VARNADORE, by

and through their undersigned counsel, hereby file the Transcript of the Hearing held on November 1, 2017.

RESPECTFULLY SUBMITTED this 2nd day of November 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the *ePortal* system and served a copy thereof via Electronic Mail to:

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on this 2nd day of November 2017.



DAVID A. THERIAQUE, ESQUIRE

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

WILLIAM DAWS, JR., OUIDA GERSHON,
BILL I. HINES, REGINA HINES, HERSHAL
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CASE NO.: 2014-CA-2951

FLORIDA FISH AND WILDLIFE,
CONSERVATION COMMISSION,

Defendant.

IN RE: HEARING
TAKEN BEFORE: HONORABLE KAREN GIEVERS
DATE: November 1, 2017
TIME: Commenced at: 8:00 a.m.
Concluded at: 8:30 a.m.
LOCATION: Leon County Courthouse
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Tallahassee, FL 32301
REPORTED BY: CLAVETTE A. DONNELL, RPR
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PROCEEDINGS

1
2 THE COURT: Good morning, everyone. Let's go ahead
3 with the appearances.

4 MR. THERIAQUE: David Theriaque for the Plaintiffs,
5 Your Honor.

6 MS. DAVIS: Rebekah Davis and Mr. Tracey Hartman for
7 the Defendant.

8 THE COURT: Okay. We're here on the Plaintiffs'
9 renewed motion --

10 MR. THERIAQUE: Yes, Your Honor.

11 THE COURT: -- for contempt and sanctions. You may
12 proceed.

13 MR. THERIAQUE: Thank you, Your Honor.

14 As Your Honor may recall the Plaintiffs filed a
15 motion for contempt and sanctions because the general
16 counsel for the FWC disclosed the confidential and
17 privileged settlement offer that the Plaintiffs presented
18 during the court ordered mediation during the FWC's
19 February 9th public meeting. It was broadcast on TV and
20 live streamed and remains on the Internet. We contended
21 and the court found that that was an intentional and
22 willful disclosure of the court ordered mediation
23 settlement offer. And the Court structured a sanction
24 rather than striking the pleadings. The Court lifted the
25 automatic stay in part based upon the mediation

1 violation.

2 The FWC appealed or actually they filed an appeal
3 and they filed a motion at the First DCA to review the
4 lifting of the automatic stay. The First DCA overturned
5 the lifting of the automatic stay stating that this Court
6 did not have the authority to lift the stay as a sanction
7 for the violation of the mediation. So, we have renewed
8 our motion for sanctions to ask the Court to reconsider
9 what type of sanctions should be imposed for the
10 violation of the mediation requirements under Florida law
11 and Florida statute.

12 There are no cases that either side was able to cite
13 to the Court where a defendant disclosed confidential
14 mediation settlement discussions. There were a handful
15 of cases where the Plaintiffs had disclosed. And those
16 cases, if Your Honor recalls, the Court struck the
17 pleadings of the Plaintiff and entered a dismissal of the
18 Plaintiff's case.

19 I think what's at issue here is not whether there's
20 prejudice so much to the Plaintiffs, but the sanctity of
21 mediation. In all the cases that we cited to the Court
22 in our original motion, the courts focused in on the
23 sanctity of confidentiality in mediation and not whether
24 or not a Plaintiff suffered a particular injury. And I
25 think all the cases that we cited the courts struck the

1 pleadings of the Plaintiff.

2 We would argue, Your Honor, that even though there's
3 no cases that we cited to or that the FWC was able to
4 find pertaining to a defendant, that the parallel remedy
5 when a defendant violates confidentiality would be to
6 strike the defendant's pleadings, which in this case
7 would be the answer and affirmative defenses. I think
8 there can be no question that the violation occurred. As
9 I said it was on TV, it's still on the Internet. The
10 fact that the general counsel provided this information
11 to his client is irrelevant. It was -- he could have
12 been done so in an executive session in private. But by
13 choosing to disclose a settlement offer during a publicly
14 noticed meeting, I think is a blatant violation.

15 And whether or not the general counsel contends he
16 did not have knowledge that there was a requirement of
17 confidentiality, the general counsel has been an attorney
18 for over 30 years and should be on constructive knowledge
19 of what Florida law requires. And the fact that the
20 general counsel did not attend the mediation, well, both
21 counsel that are present here today attended the
22 mediation. They would have had to have conveyed the
23 settlement offer to the general counsel and they would
24 have been an obligation to instruct the general counsel
25 of the confidentiality requirement of the mediation.

1 So, we request that the Court impose a alternative
2 sanction other than striking the pleadings in light of
3 the First DCA's decision and strike the FWC's answer and
4 affirmative defenses in this case. Thank you.

5 THE COURT: Response?

6 MS. DAVIS: Yes, Your Honor.

7 I think Plaintiffs' counsel kind of procedurally
8 summarized how we got here. Judge, we did, after this
9 Court held several hearings on the issue including an
10 evidentiary hearing regarding the type of sanctions to be
11 entered against FWC, FWC filed both a motion with the
12 appellate court because there's a procedure by which the
13 appellate court can review by motion any time a stay is
14 lifted. So, we filed that motion.

15 We were concerned that there was an argument that in
16 order to preserve our appellate rights, that a second
17 appeal might have been necessary that your order might
18 have been a final order in regards to that sanction. So,
19 we filed that second appeal out of an abundance of
20 caution. It turns out I think that was not necessary.
21 And the First DCA handled everything in the first case.
22 So, we dismissed the second pending appeal and we're now
23 left with just the one appeal that's still currently
24 pending at the First DCA on a temporary injunction issue.

25 The First DCA did enter an order finding that the

1 stay should not have been lifted and for violation of any
2 mediation confidentiality act, the portion of this
3 Court's trial order that entered attorneys' fees and cost
4 and mediation fees to be paid by the defendant I think is
5 still in effect. That was not part of what the appellate
6 court reviewed at this juncture.

7 So, our arguments are, number one, Your Honor, that
8 this Court held hearings and entered an order regarding
9 the sanctions that this Court felt were appropriate.
10 Those were overturned by the First DCA. The Plaintiff
11 argued, I think very adamantly, in favor of this Court's
12 trial decision -- this Court's order to the First DCA and
13 to this Court that what the Court had done was
14 appropriate. They supported the order that was entered.
15 And, so at this juncture I think it would be inequitable
16 and unfair and there's no case law that supports a trial
17 court being able to go back and reenter now additional
18 sanctions against a party when an appellate court
19 overturned just part of it. So, that's our first
20 argument, Your Honor.

21 And our second argument is that the cases that bind
22 where a plaintiff is pursuing damages against a defendant
23 and a plaintiff violates a confidentiality, the
24 confidentiality act that, yes, there are cases that say
25 the striking of the pleadings can sometimes be

1 appropriate and dismissal of the plaintiff's case can
2 sometimes be an appropriate remedy. Our argument is that
3 when it's a defendant, it's a completely different
4 scenario because we are not pursuing any damages against
5 the plaintiff. We don't have any counter claims. We're
6 not trying to gain anything by this litigation. We are
7 the one, the Commission is the one that's being sued.

8 And, so, if this Court were to strike its pleadings
9 and leave the defendant in a scenario where it can't
10 raise its defenses, it can't defend against the
11 Plaintiffs' claims, it can't defend against the amount of
12 damages that are being sought by the Plaintiffs that
13 that's not the same as dismissing a plaintiff's case and
14 dismissing a plaintiff's action. So, we think there's a
15 distinction there. We think there's a reason why there
16 are cases involving a defendant's violation of
17 confidentiality acts out there and because it's a
18 different scenario and it would be unfair and unjust and
19 it's not a parallel situation to strike a defendant's
20 defenses and leave them without the ability to counter or
21 defend against the Plaintiff's claims. So, those are our
22 arguments.

23 THE COURT: This is a very interesting case. I keep
24 thinking that somebody who is -- has been practicing for
25 just six days shy of 39 years having been board certified

1 as a civil trial lawyer since 1985, which is a long time
2 in itself, that I've seen it all, I understand exactly
3 what's going on, and there should not be a lot of area
4 open for discussion. Things get interesting when one of
5 the parties is a state agency with respect to the
6 separate rules that give state agencies an automatic
7 stay that is not available to non-government parties.

8 However, this is the judicial branch of government.
9 Even the legislature has recognized the appropriateness
10 of alternative dispute resolution methods and has placed
11 into the statutes, the procedure for mediation. And in
12 the statute that recognizes the importance to the smooth
13 functioning of our judicial branch of government, the
14 legislature has recognized the importance, from a public
15 policy standpoint, of having parties be able to
16 participate in a confidential matter in mediation.
17 Particularly when mediation is Court ordered rather than
18 just voluntarily and informally agreed to by parties.

19 This Court ordered mediation. The cases talk about
20 the importance of parties complying with the mediation
21 confidentiality, which is, of course, set out in Section
22 44.405. Even if the general counsel himself were
23 ignorant or unaware of the mediation confidentiality, the
24 party, namely the Commission, was not unaware of that
25 because among other things, the Court order, the statute,

1 and the preliminary comments by every mediator that is
2 certified in this state reminds everyone of that
3 confidentiality.

4 We have a clear violation by the Commission, whether
5 one of its people, who was the one chosen to stand up at
6 a public meeting, claims to not be aware that does not
7 get the Commission off the hook of its obligation to
8 comply with the Court's order and the confidentiality
9 that the legislature has put on the statute books to
10 reflect the strong public policy in favor of mediation
11 confidentiality. Not only was the -- was there the
12 initial violation, but to this day nearly some nine
13 months later, the information is still accessible to the
14 public contrary to the confidentiality provision and in
15 violation of the Court's order that ordered mediation
16 consistent with the confidentiality provisions.

17 Lack of fairness, Ms. Davis, would be present if the
18 Commission thought it could ignore the law and the
19 Court's orders and not have sanctions beyond some
20 attorneys' fees and mediator fees that haven't been
21 addressed at the appellate court. Not sure in the unique
22 posture of this case whether entitlement, review of the
23 entitlement that the Court has previously found is stayed
24 or not. And I'm not going to get to the merits where the
25 Plaintiffs think they have property rights under the

1 Constitution that are not able to be provided protection
2 under the unique procedural wrinkles of this case with
3 the initial order from October -- actually late September
4 of 2016 being up on appeal and subject to the stay. The
5 statute, adopted by the legislature, to provide the Court
6 with powers since the courts have no armies to enforce
7 their orders. We are a branch, separate but equal, based
8 on the rule of law, and the legislature has given
9 specific tools to the judicial branch to enforce the
10 confidentiality. 44.406 in the statutes indicates that
11 any mediation participant who knowingly and willfully
12 discloses a mediation communication in violation of the
13 confidentiality provision shall be subject to remedies
14 including, A, equitable relief, which was what I tried to
15 do the last time. And I accept the appellate court
16 saying that lifting of the stay doesn't fit into the
17 equitable relief. So, that's one. B, it provides for
18 compensatory damages. C, attorneys' fees, mediator's
19 fees, and cost incurred at the mediation proceeding. D
20 reasonable attorneys' fees and costs incurred in the
21 application for remedies.

22 The bottom line is, the Court must be able to
23 enforce its orders and parties, including government
24 agencies, who some would argue should be setting the
25 example for our citizens showing that they care about

1 following the law, there must be sanctions.

2 The Court has looked at all of the cases. Every
3 case that has addressed the violation of the mediation
4 confidentiality has recognized the importance that the
5 law be followed. The fact that one piece of sanctions or
6 one attempt at sanctions that the Court attempted to
7 assess has been taken off the list, and I accept that,
8 but that does not mean that the Court is powerless to
9 follow the law. And my job is to follow the law as best
10 I can.

11 Everyone has, of course, the right to seek appellate
12 review. And if the appellate court decides that this
13 time I'm, again, picking the wrong remedy, then they will
14 say so. But there must be a meaningful sanction,
15 especially in light of the nearly nine months -- I think
16 on as of November the 9th, it will be nine months since
17 the violations began and have been ongoing without
18 interruption from what the evidence is before the Court.
19 So, I am going to, for the reasons stated on the record,
20 grant the renewed motion for contempt and strike the
21 sanction -- strike the pleadings of the Commission, which
22 will not end the litigation. Because, of course, there
23 needs to be a determination of the amount of damages.
24 The striking of a defendant's pleadings is just
25 equivalent to entry of a default on liability. And since

1 the first remedy the Court attempted to fashion was found
2 not to be appropriate, the only meaningful remedy the
3 Court has to insist on its rules being followed and the
4 law being followed in this very important area is the
5 striking of the pleadings relative to liability.

6 So, with that, when we had the hearing yesterday on
7 the motion to intervene of the outside dog hunting
8 association group, we discussed talking about a possible
9 trial date and how far down the road that should be. I
10 have some time in December. Knowing human nature, I'm
11 guessing that neither side wants to jump right into a
12 trial that's 32 or 34 days down the road. But let me
13 hear from counsel.

14 MS. DAVIS: We think that -- well, number one, my
15 calendar, Your Honor, is already pretty full for
16 December. And, secondly, our position would be that we
17 would certainly prefer to wait until we get a decision
18 from the appellate court on the remaining issues on
19 appeal before we proceed to trial and damages. Because
20 any decision of the -- once the appellate court issues
21 its decision, that could affect how this case proceeds to
22 trial on damages or if at all.

23 THE COURT: And I understand that. And this case
24 was filed in November of 2014. So, we're coming up on
25 the three-year anniversary of the Plaintiffs having, as

1 they allege, their rights infringed on by the
2 circumstances put in motion by the Commission.
3 Certainly, I would never do anything that would interfere
4 with the ability of the appellate court to review orders.
5 There's nothing in the matter that is presently pending
6 that I see that would be inappropriately interfered with,
7 if we set the damage determination for trial.

8 And, so, at this point my thought is to not force a
9 holiday time trial on anybody. It's not fair to our
10 citizens who serve as the judges of the facts any more
11 than it's fair to trial lawyers who most likely already
12 have holiday plans and so forth. But I want it on the
13 trial docket.

14 So, you've told me you don't want it this year or
15 until the appellate court is done. I have no idea when
16 the appellate court is going to be done, even with the
17 temporary injunction, which is not something that would
18 be dispositive either way. So, given the fact the case
19 is already well outside the Florida Supreme Court time
20 standards, which are 18 months from the time a complaint
21 is filed, that means by, gosh, the middle of 2016 all the
22 trial court level work should have been completed. And
23 clearly that didn't happen. I'm inclined to go ahead and
24 set this on a docket that's -- that meets the
25 requirements of the rules, at least more than 30 days down

1 the road, but also fair with respect to time of year and
2 so forth.

3 I'm thinking January or February, but I want to hear
4 from the Plaintiffs' attorneys first. If you stipulate
5 with Ms. Davis that not setting a trial until the
6 appellate court is done with everything, then --

7 MR. THERIAQUE: Judge, I believe in light of the
8 sanction that the Court has imposed, that even if the
9 First DCA decides that FWC has sovereign immunity on the
10 nuisance claim, I'm not sure if that sets FWC free from
11 damages in light of the sanction. This Court has
12 essentially entered a default judgment on Count I and
13 Count II. So, we're only looking at liability, the
14 extent of the damages, rather, excuse me. And I don't
15 know how the First DCA's decision would somehow supersede
16 the sanction that the Court has imposed.

17 I agree with Ms. Davis, I don't want the jurors to
18 be angry at either FWC or my clients for having a
19 Christmas trial. So, I would share the concern of a
20 December trial. January is tough for me, Your Honor. I
21 have got a trial January 9, 10, and 11. And then I will
22 not be available from January 21st until February 8th.
23 I'm taking my wife to London and Paris for her birthday,
24 and I don't want to lose husband of the year by canceling
25 the trip, Your Honor. But after that, late February

1 would be fine with me, Your Honor.

2 THE COURT: Ms. Davis, do you have any vacations?
3 Because I believe in vacations, and I would never
4 knowingly mess up anybody's vacation.

5 MS. DAVIS: I do have one in February. So, would
6 the Court have some availability in March? Would that be
7 possible?

8 THE COURT: I have two dockets in March. Well, that
9 overlap March. One starts in mid-February on the 19th.
10 It's a three-week docket. It goes through March 9th.
11 And there's a four-week docket from March 19th through
12 April 13th.

13 MS. DAVIS: The March 19th through April 13th, I'm
14 fairly open at this point.

15 THE COURT: Does that work for you, Mr. Theriaque?

16 MR. THERIAQUE: Yes, Your Honor. I think I'll have
17 one three-day trial in there, but it may be canceled.

18 THE COURT: And what are those dates?

19 MR. THERIAQUE: They're still open. It's a DOAH
20 proceeding that the administrative law judge asked us to
21 check late February and early March with our witnesses.
22 That just happened about tow days ago, Your Honor. So,
23 we don't have it firmed up yet.

24 THE COURT: Do you have any conflicts during that
25 time? Ms. Davis?

1 MS. DAVIS: I'm sorry, Your Honor?

2 THE COURT: Do you have any conflicts during that
3 March 19th through April 13th time that I should note in
4 the order?

5 MS. DAVIS: I don't believe so. I was asking
6 Mr. Hartman if he had anything, and he didn't have his
7 calendar on him, so.

8 THE COURT: Okay. The pretrial conference will be
9 February 18 -- February 15th at 8:45. Jury selection
10 will be, at this point is scheduled for March 16th, and
11 then the trial docket itself March 19th.

12 Damages, how long do you anticipate that will take
13 to try, Mr. Theriaque? We have, what, 12 plaintiffs, 11,
14 12?

15 MR. THERIAQUE: Twelve, 13, thirteen plaintiffs,
16 Your Honor. Two and a half to three days, Your Honor.
17 I'm just thinking that number of witnesses getting up and
18 down and getting them on, it will take two and a half
19 days. Have one expert witness.

20 THE COURT: And then a half day for jury selection?
21 That's how you're getting to three?

22 MR. THERIAQUE: Yes.

23 THE COURT: Do you disagree with his estimate,
24 Ms. Davis?

25 MS. DAVIS: No.

1 THE COURT: Okay. You want discovery to cutoff 30
2 or 45 days before jury selection?

3 MR. THERIAQUE: Thirty days, please, Your Honor.

4 THE COURT: And disclosure of witnesses and exhibits
5 if it's -- if it's 90 days, then that would be by roughly
6 mid-December for the Plaintiff and the end of the year
7 for the Defense. Does that work?

8 MR. THERIAQUE: Yes, Your Honor.

9 THE COURT: Ninety and 75?

10 MS. DAVIS: That's fine.

11 THE COURT: The order, it's a standard order, will
12 reflect that the Court expects the parties to complete
13 mediation before the pretrial conference. I know at some
14 point the initial mediation that started in January was
15 going to be carried over. I don't know if that was
16 completed and I don't know if you-all decide that another
17 mediation with more information would be pertinent. I
18 would remind everyone that it's confidentiality for
19 mediation, the statutes apply, and the Court expects full
20 compliance with the law by people on both sides.

21 MS. DAVIS: So, is that the Court is going to order
22 us to mediation again or --

23 THE COURT: The standard language reflects that
24 mediation has to be completed by the pretrial conference.
25 So, if you-all talk and say, well, we've finished it and

1 you have an impasse or whatever from your mediator, I
2 don't make you mediate again.

3 MS. DAVIS: Okay.

4 THE COURT: Also, there will be a requirement that
5 by the Friday before the pretrial conference, you have
6 your staff send through the portal an e-mail to
7 Ms. Underwood the joint pretrial statement. And to
8 accomplish that, there will be a provision that says you
9 have to get together at least 10 days before the pretrial
10 so you can reach agreement on the joint pretrial
11 statement, jury instructions, and verdict form.
12 Questions?

13 MR. THERIAQUE: No, Your Honor.

14 MS. DAVIS: No.

15 THE COURT: Okay. My thought is to -- with respect
16 to the ruling on the renewed motion to make it be very
17 bare bones incorporating the reasons stated on the
18 record. I presume somebody will order the transcript.
19 You have been doing that pretty regularly. But let me
20 see if there's any objection to that approach?

21 MR. THERIAQUE: No objection, Your Honor.

22 MS. DAVIS: No.

23 MR. THERIAQUE: And we will be ordering the
24 transcript and we'll do a notice of filing.

25 THE COURT: Okay. And then, of course, there will

1 be the separate trial order.

2 MR. THERIAQUE: Yes, Your Honor.

3 THE COURT: Ms. Underwood is out ill. So,
4 hopefully -- if I can figure a way to do it all in one
5 order on the Benchmark system, then everything may be in
6 one and you may get it today. Otherwise, you'll get it
7 whatever day Ms. Lynn gets back.

8 MR. THERIAQUE: Yes, Your Honor.

9 THE COURT: Thank you, everyone. Have a nice day.
10 (Proceedings concluded at 8:30 p.m.)

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1 CERTIFICATE

2 STATE OF FLORIDA:

3 COUNTY OF LEON:

4 I, CLAVETTE A. DONNELL, Registered Professional
5 Reporter, do hereby certify that the foregoing proceedings
6 were taken before me at the time and place therein designated;
7 that my shorthand notes were thereafter translated under my
8 supervision; and the foregoing pages are a true and correct
9 record of the aforesaid proceedings.

10 I FURTHER CERTIFY that I am not a relative,
11 employee, attorney or counsel of any of the parties, nor
12 relative or employee of such attorney or counsel, or
13 financially interested in the foregoing action.

14 DATED this 2nd day of November, 2017.

15
16
17 _____
18 CLAVETTE A. DONNELL, RPR
19 NOTARY PUBLIC IN AND FOR
20 THE STATE OF FLORIDA
21 TALLAHASSEE, FLORIDA 32317
22
23
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25