

STATE OF WISCONSIN : CIRCUIT COURT : OZAUKEE COUNTY
BRANCH I

NORTHERN OZAUKEE SCHOOL DISTRICT,

Plaintiff,

Case No. 11-CV-144

v.

Code No(s). 30301 (Money Judgment
Greater than \$5,000)
30405 (Other Real Estate)

KENDALL J. THISTLE and CARLA G. THISTLE,

Defendants.

**NOTICE OF MOTION AND MOTION *IN LIMINE* OF
PLAINTIFF, NORTHERN OZAUKEE SCHOOL DISTRICT**

Authenticated/Filed
Ozaukee County Circuit

TO: Atty. Elizabeth G. Rich
Elizabeth Gamsky
Rich & Associates, S.C.
435 E. Mill Street
Plymouth, WI 53073-1850

Atty. Corrado Cirillo
Olsen, Kloet, Gunderson & Conway
602 North 6th Street
Sheboygan, WI 53081-4695

AUG 14 2013

Mary Lou Mueller
Clerk of Circuit Court/
Register in Probate

NOTICE

PLEASE TAKE NOTICE that the above-named Plaintiff, Northern Ozaukee School District ("District"), by its counsel, Godfrey & Kahn, S.C., will move the Court, the Honorable Paul V. Malloy presiding, on August 20, 2013 at 3:30 p.m., or as soon thereafter as counsel may be heard, in accordance with the Amended Scheduling Order on file in the above-entitled action for an Order *in Limine* as set forth below.

MOTION

Plaintiff, Northern Ozaukee School District, by its counsel, Godfrey & Kahn, S.C., hereby moves the Court for an Order *in Limine* as follows, the basis and grounds for which are set forth below:

1. To preclude testimony or references by any of the Defendants' witnesses that the District, the developer(s), or any other party caused or contributed to the alleged flooding to the

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Defendants' property. Establishing causation in this context requires expert testimony because surface water drainage issues, including the impact of topography, the landscape and any action taken that may impact surface water drainage, are beyond the realm of ordinary experience and lay comprehension. *See Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996) (citations omitted).

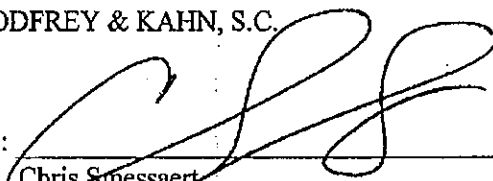
The Defendants' expert witness, Roger G. Miller, P.E., provided only an "opinion of the potential for the berm to present a safety risk to students," but failed to provide any substantive opinion or analysis about who or what may have caused or contributed to the alleged flooding to the Defendants' property. Because the Defendants failed to provide an expert witness to opine on causation, the Court should preclude any testimony or references by the Defendants' witnesses regarding the same.

Dated this 14th day of August, 2013.

GODFREY & KAHN, S.C.

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By:


Chris Smessaert
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Attorneys for Plaintiff, Northern Ozaukee School District

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Plaintiff, Northern Ozaukee School District, by its counsel, Godfrey & Kahn, S.C., hereby moves the Court for an Order *in Limine* as follows, the basis and grounds for which are set forth below:

1. To prevent testimony regarding or references to the construction practices or any alleged lack of compliance in those practices by the developer who developed the land to the

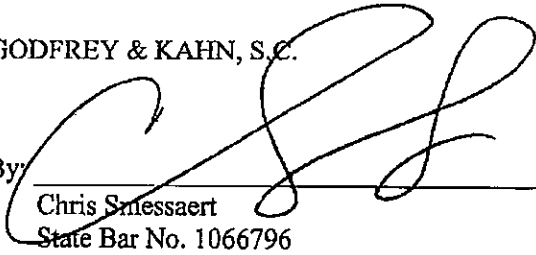
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west and north of the Defendants' property because such information is irrelevant and would mislead the jury and cause confusion regarding the issues. *See County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 410, 588 N.W.2d 236 (1999) (evidence must be relevant to be admissible at trial); Wis. Stat. § 904.01 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); Wis. Stat. § 904.03 (even if relevant, any questioning about these matters should be inadmissible because it would cause unfair prejudice, confusion of the issues, undue delay, waste of time, or will mislead the jury).

The developer's construction practices are irrelevant to the fact the Defendants built a berm that caused the District's property to flood. Furthermore, the Defendants failed to provide an expert who can opine on what effect, if any, the developer's actions had on the alleged flooding to the Defendants' property. Any references to the developer's construction practices would only serve to mislead the jury and create confusion regarding the issues in this case which relate only to the District's nuisance claims against the Defendants. Therefore, the Court should preclude any testimony about or references to the developer's construction practices.

Dated this 14th day of August, 2013.

GODFREY & KAHN, S.C.

By  _____
 Chris Smessaert
 State Bar No. 1066796

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Plaintiff, Northern Ozaukee School District, by its counsel, Godfrey & Kahn, S.C., hereby moves the Court for an Order *in Limine* as follows, the basis and grounds for which are set forth below:

1. To prevent testimony about or references to the fact Paul Krause, the President of the District School Board, purchased land from the developer who developed the land to the west

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and north of the Defendants' property because such purchase is irrelevant, would be unfairly prejudicial and would mislead the jury. *See County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 410, 588 N.W.2d 236 (1999) (evidence must be relevant to be admissible at trial); Wis. Stat. § 904.01 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); Wis. Stat. § 904.03 (even if relevant, any questioning about these matters should be inadmissible because it would cause unfair prejudice, confusion of the issues, undue delay, waste of time, or will mislead the jury).

Mr. Krause's land purchase is completely irrelevant to the fact the Defendants built a berm that caused the District's property to flood. Moreover, the Defendants' have levied unsupported allegations against Mr. Krause suggesting his land purchase was improper and that the District somehow benefited from it. The Defendants' statements demonstrate they are simply trying to unfairly prejudice the District and mislead the jury. Therefore, the Court should preclude any testimony about or references to Mr. Krause's land purchase.

Dated this 14th day of August, 2013.

GODFREY & KAHN, S.C.

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Plaintiff, Northern Ozaukee School District, by its counsel, Godfrey & Kahn, S.C., hereby moves the Court for an Order *in Limine* as follows, the basis and grounds for which are set forth below:

1. To prevent testimony about or references to the fact the District School Board considered and/or approved legal action against the developer who developed the land to the

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west and north of the Defendants' property because such approval is irrelevant and would be unfairly prejudicial. See *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 410, 588 N.W.2d 236 (1999) (evidence must be relevant to be admissible at trial); Wis. Stat. § 904.01 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); Wis. Stat. § 904.03 (even if relevant, any questioning about these matters should be inadmissible because it would cause unfair prejudice, confusion of the issues, undue delay, waste of time, or will mislead the jury).

Regardless of who the District Board considered pursuing action against in this case, the fact remains that the District is pursuing the nuisance claims against the Defendants because they built a berm that caused the District's property to flood. Suggesting the District could have or should have pursued action against anyone else in this case is irrelevant and serves to unfairly prejudice the District and mislead the jury. Therefore, the Court should preclude any testimony about or references to any District consideration and/or approval regarding who it might pursue legal action against.

Dated this 14th day of August, 2013.

GODFREY & KAHN, S.C.

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Chris Smessaert
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Plaintiff, Northern Ozaukee School District, by its counsel, Godfrey & Kahn, S.C., hereby moves the Court for an Order *in Limine* as follows, the basis and grounds for which are set forth below:

1. To prevent testimony about or references to legal fees incurred by the District to prosecute this matter because such fees are irrelevant and would be highly prejudicial. See *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 410, 588 N.W.2d 236 (1999)

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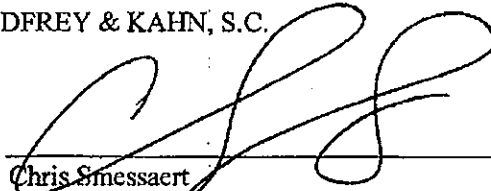
(evidence must be relevant to be admissible at trial); Wis. Stat. § 904.01 (relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”); Wis. Stat. § 904.03 (evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

Legal fees incurred by the District to prosecute this matter are irrelevant to proving or defending the nuisance claims in this matter, which claims relate specifically to the Defendants’ construction of a berm that caused the District’s property to flood. Moreover, the Defendants and/or their counsel have stated on multiple occasions that they disagree with the District’s decision to use tax payer-related funds to prosecute this case and that they believe the public agrees with them. Therefore, any reference to the legal fees would only serve to unfairly prejudice the District by suggesting any harm to the District regarding this case is less than the total legal fees the District incurred to prosecute the case. Accordingly, the Court should preclude any testimony about or references to legal fees the District has incurred to prosecute this case.

Dated this 14th day of August, 2013.

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