

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

OZAUKEE COUNTY

NORTHERN OZAUKEE SCHOOL DISTRICT,

Plaintiff,

AUG 16 2013

Case No. 11-CV-144

v.

KENDALL J. THISTLE AND CARLA G. THISTLE,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTIONS *IN LIMINE*

Defendants Kendall J. Thistle and Carla G. Thistle, by their attorneys, Elizabeth Gamsky Rich of Elizabeth Gamsky Rich & Associates SC and Corrado Cirillo of Olsen, Kloeet, Gunderson & Conway, hereby respond to the Plaintiffs' Motions *in limine* filed on August 14, 2013. Plaintiff's five motions, filed separately with identical captions, are addressed in turn below.

1. Motion to exclude any reference to any party's contribution to the flooding on the Defendant's property.

The legal issues in this case will be evaluated under the "reasonable use doctrine," which has governed surface water flow cases since the Wisconsin Supreme Court adopted it in *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974). *Deetz* further held that "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is

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unreasonable." *Id.* at 14. A logical examination of the reasonableness of the parties' respective actions will require introduction of the evidence the Plaintiff seeks to exclude.

The Defendants contend that the residential development converted the land surrounding their home from adsorptive agricultural land to impervious surfaces. The District also altered the landscape in the same way, and additionally by filling in wetland areas and altering grading of nearby land. These actions caused flooding on the Defendants' property. The Defendants contend that the District bears responsibility for the excess surface and storm water created by the developer because of its actions in accepting that excess water pursuant to a land swap agreement.¹

The crux of this case is whether the actions of the parties met the standard of the reasonable use doctrine. The District bears the additional burden of proving not only that the Defendants' use of their property was unreasonable, but also that their unreasonable use resulted in a public nuisance. Evidence of the flooding on the Thistle property and the contributions to that flooding by the District and the developer are critical to the jury's understanding of the case and to the Thistle's defense.

The Plaintiff cites to *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996), for the proposition that "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." Pl. Motion at 2. That proposition appears nowhere in the *Menick* case, in which the court

¹ Pursuant to that agreement, which has been described in earlier submissions to the Court, the District received 10.4 acres from the developer in exchange for giving the developer 4.5 acres it needed in order to comply with the terms of its Subdivision Agreement with the municipality. Although the original agreement included a stipulation that all surface and storm water from the developer's property would be retained on the developer's property and would not flow onto the District property, that provision was removed in an amendment to the agreement entered into several months later.

evaluated the sufficiency of evidence advanced by the *plaintiff* in her effort to prove causation in a nuisance case. (The plaintiff in *Menick* “failed to provide any expert testimony or to advance any theory of liability supported by specific allegations of negligent actions on the part of the City.”) The case simply recites the basic principle that “[e]xpert testimony is required to prove causation if the matter does not fall within the realm of ordinary experience and lay comprehension.” *Menick* at 748.

In the instant case, the Defendants will present both expert and lay witnesses who will testify regarding the history, nature and extent of the flooding on the Thistle property; the events that occurred prior to and contemporaneously with the flooding; the causes of the flooding; and the actions that the Thistles took in response to the flooding. The evidence sought to be excluded will be essential to an analysis of comparative fault with respect to Plaintiff’s negligence claim. There is no basis for excluding this evidence, and the Plaintiff’s motion should be denied.

2. Motion to exclude any reference to the developer’s non-compliance with legal requirements regarding containment of stormwater during construction of the residential development to the west and north of the Defendant’s property immediately prior to and during the flooding events on the Defendant’s property.

The developer failed to follow legal requirements in the management of storm water at the development adjacent to the District and Thistle property. In fact, the developer’s violations were so egregious, numerous and ongoing that a complaint was filed (and ultimately judgment entered against the developer pursuant to a Stipulation and Consent Order) by the Wisconsin Department of Justice (DOJ) on behalf of the Wisconsin Department of Natural Resources (DNR). The DOJ complaint describes how

the developer's failure to install and/or maintain proper erosion controls, stabilize construction areas, install required outlet structures, maintain silt fences, and numerous other violations caused turbid, sediment-laden water to overwhelm the area and discharge under State Highway 57 and then into Fedonia Creek, Sauk Creek, and adjacent wetlands.

All of this occurred immediately adjacent to the Thistle and District properties during 2007, with impact and disruption to precisely the areas that are the subject of this lawsuit. Certainly, the developer's violations impacted the flow of storm water through its historical drainage way. According to the Plaintiff's Amended Complaint, "[h]istorically, storm water runoff has flowed through a natural drainage way across the District Property and a portion of the Thistle property toward drainage facilities located on the other side of Highway 57." PI's Amended Complaint at ¶7. The Complaint further alleges that the Thistles' berm "prevented storm water runoff from flowing through its natural drainage way across the Thistle property to its appropriate drainage facilities on the other side of Hwy 57." PI's Amended Complaint at ¶9.

The evidence Plaintiff seeks to exclude is critical to respond to the allegations in the Plaintiff's Amended Complaint (including assessment of comparative fault) and to show the jury that the developer created significant impediments to the "historical" storm water flow in the area; therefore, the Plaintiff's motion should be denied.

3. Motion to exclude any reference to District School Board President Paul Krause's personal benefit from and dealings with the developer in connection with a land purchase made during Mr. Krause's tenure as President.

The District's agreement to accept excess storm water from the developer was finalized in the fall of 2006. The developer's problems with DNR enforcement actions at

this location began in 2005, escalated in 2007, and resulted in the imposition of a \$200,000 fine in 2009. During this same period, School Board President Paul Krause spearheaded the District's effort to aggressively pursue the Thistles to recoup approximately \$7,200 for the "drainage fix" that the District had implemented to resolve the ponding issues on its property. Also during this same period, Paul Krause entered into negotiations with the developer to re-survey, re-draw and re-plot the subdivision for the purpose of creating the largest lot in the subdivision (approximately 7 acres, when most of the lots were approximately 1 acre)—which Mr. Krause then purchased at a very attractive price.

Mr. Krause will be a key witness for the Plaintiff, as he was intimately involved with all of the District's actions and decisions regarding the acceptance of the developer's storm water, negotiations with the developer, the flooding on the Thistle property, the implementation of the "drainage fix," and the decision to pursue this lawsuit against the Thistles and not against the developer. His self-dealing and conflict of interest in this matter are relevant to show bias. According to the United States Supreme Court:

Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike or fear of a party, or by the witness' self-interest. *Proof of bias is almost always relevant* because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence [that] might bear on the accuracy and truth of a witness' testimony. (emphasis supplied)

United States v. Abel, 469 U.S. 45, 52 (1984).

Contrary to assertions by the Plaintiff, the Defendants do not intend to introduce this evidence to prejudice the District or mislead the jury. As indicated by the U.S. Supreme Court, proof of bias is nearly always relevant. Indeed, in this case such proof is critical to a complete

understanding of the case. Because this evidence is critical to the jury's ability to properly and fully assess Mr. Krause's testimony, the District's actions, and the totality of the circumstances surrounding the case, the Plaintiff's motion should be denied.

4. Motion to exclude any reference to the fact that the Plaintiff approved legal action against the developer, then failed to take any such action and instead took action only against the Defendant.

The evidence Plaintiff seeks to exclude should be admitted for the reasons stated in ¶3, *supra*. It was Paul Krause who has directed the District's decisions in this lawsuit, and his dealings with the developer, and subsequent decision to direct that no legal action be taken against the developer despite the Board's vote to do so is further evidence of bias. For those reasons, Plaintiff's motion should be denied.

5. Motion to exclude any reference to legal fees in excess of \$100,000 incurred by the School District to prosecute this \$8,343,13 claim.

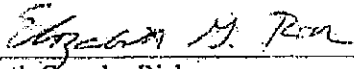
Once again, the evidence Plaintiff seeks to exclude demonstrates the bias of Paul Krause. There is simply no rational explanation for the District's exorbitant expenditure to pursue the Thistles in this matter other than Paul Krause's determination to deflect blame and criticism away from the developer and to protect his own interests in so doing.

Additionally, the "references" sought to be excluded will need to be raised during voir dire. The purpose of voir dire is to ensure the impartiality of the jurors. *See State v. Moats*, 156 Wis. 2d 74, 99, 457 N.W.2d 299 (1990). This case, and particularly the District's legal bills, have been the subject of significant media attention, publicity and community interest. Prospective jurors who are aware of these expenditures might be biased against the District's perceived extravagance during a period of financial hardship. Conversely, they could resent

the Thistles' involvement and perceived "cost" to the District and its taxpayers. Thus, the Court should use its discretion over the voir dire process to meet "the essential demands of fairness" and allow questioning on the subject of the District's expenditures for legal fees and its potential impact on the bias of prospective jurors. *See Hammill v. State*, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979).

For the foregoing reasons, the Plaintiff's motions should be denied.

Respectfully submitted this 16th day of August, 2013.



Elizabeth Gamsky Rich
State Bar # 1019123

ELIZABETH GAMSKY RICH & ASSOCIATES SC
Mill Street Transfer Building
435 E. Mill St.
Plymouth, WI 53073
T: 920.892.2449
F: 866.623.4338
erich@rich-law.com

Corrado Cirillo
State Bar # 1035021
Olsen, Kloet, Gunderson & Conway
602 North 6th Street
Sheboygan, WI 53081
T: 920.458.3701
F: 920.459.2725
c.cirillo@olsenkloetlaw.com