

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY
BRANCH 1

NORTHERN OZAUKEE SCHOOL
DISTRICT,
Plaintiff,

vs.

Case No. 11-CV-144

KENDALL J. THISTLE and
CARLA G. THISTLE,

Defendants.

TRANSCRIPT OF PROCEEDINGS: MOTIONS IN LIMINE

DATE: August 20, 2013

TIME: 3:30 p.m.

BEFORE: Hon. Paul V. Malloy
Circuit Court Judge

APPEARANCES:

GODFREY & KAHN, S.C. by CHRISTOPHER G. SMESSAERT,
Attorney at Law, appeared on behalf of the Plaintiff,
Northern Ozaukee School District.

ELIZABETH GAMSKY RICH, Attorney at Law, and
CORRADO CIRILLO, Attorney at Law, appeared on behalf
of the Defendants, KENDALL J. THISTLE and CARLA G.
THISTLE, who appeared in person.

Reported by Terri A. Knowles, RMR, CRR
Official Reporter

COPY

1 THE COURT: Good afternoon. I'll call
2 Northern Ozaukee School District versus Kendall J.
3 Thistle, Case 11-CV-144. Can I have appearances,
4 please?

5 MR. SMESSAERT: Attorney Chris Smessaert
6 appearing on behalf of the Northern Ozaukee School
7 District. Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MS. RICH: Elizabeth Rich appearing on
10 behalf of the defendants, Kendall and Carla
11 Thistle. Joining me is Corrado Cirillo as co-
12 counsel.

13 THE COURT: Good afternoon.

14 MR. CIRILLO: Good afternoon, Judge.

15 THE COURT: All right. We're here on a
16 number of motions in limine and an amended
17 scheduling order. Let's take them -- all right,
18 the first is to prevent testimony or references
19 about the District School Board considered or
20 approved legal action against the developer -- I
21 think it's called MirroCraft -- who developed the
22 land west and north of the defendant's property as
23 it's irrelevant and unfairly prejudicial. Anything
24 on that one?

25 MR. SMESSAERT: Your Honor, if I may.

1 Based on occurrences in this case, it's become
2 clear that the defendants are going to engage in a
3 number of smear tactics to really steer the jury
4 away from what is clearly defendant's responsi-
5 bility as it relates to constructing a berm in the
6 middle of a natural drainage way.

7 And the issue in this case is a
8 natural drainage way that was blocked by the
9 defendant's berm that caused flooding on the
10 District property. The board in this particular
11 case chose to pursue action against the defendants
12 in this case. They've moved forward. This case
13 has moved forward for two-and-a-half years; and
14 frankly, whether the board considered suing anyone
15 else or not is irrelevant to the case.

16 The fact is, is that the defendants
17 did construct a berm. The plaintiff's expert in
18 this case concluded, unquestionably, that the berm
19 blocked the drainage way and caused the pond.
20 There is absolutely no need to raise any issue
21 about who the board did or did not consider suing
22 as it's completely irrelevant and is clearly just
23 intended to mislead the jury in this case.

24 THE COURT: All right. Ms. Rich, any-
25 thing?

1 MS. RICH: Yes, Your Honor. We -- in our
2 response to the plaintiff's motions in limine, we
3 arranged them in a slightly different order. The
4 reason for that is because some of these things do
5 build on each other, but the concern we had is that
6 the plaintiff's case is going to rest -- there's
7 two issues here. The plaintiff's case is going to
8 rest on the rule of reason. That's the Deetz
9 standard. And we need to measure the utility of
10 his conduct versus the gravity of the harm.

11 The plaintiffs in their amended
12 complaint raised a negligence claim and that of
13 necessity raises the issue of what others might
14 have contributed to the harm that the plaintiff
15 alleges they suffered.

16 It's been our contention from the
17 beginning that really the source of this problem
18 was 200 extra rooftops, 200 extra driveways. It's
19 clear that that changed surface and ground --
20 surface and storm water flow across the affected
21 areas. And it was the developer, Mastercraft, that
22 constructed those rooftops. So in order to tell
23 the whole story, we need to look at the entire
24 picture.

25 THE COURT: Did the DNR impose a

1 forfeiture on Mastercraft of \$200,000 for failure
2 to abide by their storm water management or the
3 grading plan there?

4 MS. RICH: That's right. Yes. And an
5 additional 78,000 on the party, the subcontractor
6 that did the excavation work for Mastercraft.

7 MR. SMESSAERT: Your Honor, I have no idea
8 if that's true. I just noticed that reference in
9 Attorney Rich's pleadings.

10 THE COURT: I did too. So I don't know
11 if that's true. I mean here's how I see this, and
12 I take a look at whether or not the rule -- whether
13 there's the rule of reason if you have a developer
14 and the developer commits to a grading plan, the
15 grading plan requires certain grades and they're
16 not abided by; and all of a sudden the water flow
17 is across -- if it's my lot or across somebody
18 else's lot, that's gone from a manageable amount
19 to substantially more and nobody's assisting me
20 by putting a catch basin or anything like that in
21 there to drain the water, then I have the choice of
22 either taking some action to regulate that or, in
23 the alternative, lose a significant part of my
24 property.

25 So I think it is somewhat relevant

1 here to the actions taken whether or not the
2 grading plan was enforced. I mean it does, in my
3 mind, go to whether or not the School District
4 essentially failed to hold this excavator and this
5 developer to the standards that they were supposed
6 to apply. And then they, by doing that, the
7 question is who creates this nuisance and what was
8 reasonable under the circumstances.

9 So the water flow, if somebody is
10 going to say there was always water there but it
11 was increased ten-fold, I think that -- and that
12 exceeded anybody's expectation and that the
13 District didn't hold the developer to the standards
14 that they applied, I think that's reasonable; and
15 I'm going to allow it.

16 MR. SMESSAERT: Well, Your Honor, if I
17 may. There are actually two issues that you raise,
18 and I don't think they go exactly to the point of
19 the motion in limine. The motion in limine, from
20 my perspective, is to preclude any references to
21 the fact that the District considered legal action
22 against another party. Now, I think that's
23 separate and distinct from what we just discussed.

24 If the defendants in this case can
25 produce an expert to testify about those very

1 issues you just mentioned, which I don't believe
2 they can or they have, that's a separate issue.
3 Now, I don't disagree that if there was something
4 going on in the neighboring properties it is
5 relevant to the extent that there is testimony that
6 can be produced for that. But whether the District
7 considered suing the defendants or other parties is
8 irrelevant. The fact is we have a case against the
9 defendants.

10 THE COURT: I guess I'll firm that up.
11 The fact that they didn't sue this defendant --

12 MS. RICH: Your Honor?

13 THE COURT: Yes.

14 MS. RICH: They voted to sue the
15 developer.

16 MR. CIRILLO: They voted to sue.

17 THE COURT: Well, then they're on record.
18 That's a public document.

19 MR. CIRILLO: They voted in public forum
20 to sue Mastercraft. They voted to sue them.

21 THE COURT: For violating --

22 MR. CIRILLO: Exactly. Exactly. And we
23 raised failure to join all necessary parties.

24 THE COURT: Why didn't you guys bring
25 MasterCraft in?

1 MS. RICH: Money.

2 MR. CIRILLO: Money.

3 THE COURT: Money?

4 MR. CIRILLO: Our clients are of limited
5 resources, Your Honor, so --

6 THE COURT: Okay. Well --

7 MR. SMESSAERT: We're in a situation now
8 where this, the matter has progressed. To the
9 extent there was any action taken some time ago, it
10 is irrelevant to the claims here. It's absolutely
11 irrelevant. And with the defendants --

12 THE COURT: Well, I don't know. If the
13 School District authorized them to sue Mastercraft,
14 and then for some reason they didn't -- and of
15 course this dovetails with apparently the president
16 of the School District there. Is there any dispute
17 that he was negotiating to combine a couple lots
18 for a bigger lot in the background? That smells
19 bad.

20 MR. SMESSAERT: That is -- that is
21 completely unsubstantiated, and it is mere
22 speculation. It is an attempt to smear Mr. Krause.
23 The fact is Mr. Krause did purchase a lot --

24 THE COURT: Okay.

25 MR. SMESSAERT: -- in the subdivision.

1 There was absolutely no wrongdoing. There is no
2 evidence. It's a complete smear campaign, And it's
3 again irrelevant and intended to mislead the jury.
4 The fact is --

5 THE COURT: Depends what he's going to
6 say. What has he said in his depositions, was he
7 negotiating to combine a lot?

8 MR. CIRILLO: Your Honor, he did combine
9 two lots. The original plat map called for ten
10 lots there. Because of the negotiations entered
11 into Mr. Krause, the developer ended up only having
12 eight lots left over. By combining these various
13 lots, he was able to obtain a 7.5-acre lot in a
14 prime subdivision for \$129,000, when other people
15 were buying three-quarter acre lots for \$79,000.
16 So I don't know. I --

17 MS. RICH: We know.

18 THE COURT: Well, you may know. I don't
19 know, but I'm just saying he is a public official.
20 If he's working some sort of business deal with
21 this developer, he should have abstained because
22 he's not similarly situated from everybody else.
23 And all of a sudden -- I mean I'm looking at this
24 objectively and saying, okay, this sounds like
25 something I would read in the Chicago Tribune

1 versus the Fredonia -- or Ozaukee Press; is that
2 you got a school board president that somebody is
3 telling me is able to work with this school
4 district and -- or participate in deliberations on
5 whether or not they want to pursue Mastercraft,
6 Thistles, or both, and he's negotiating some kind
7 of deal where he is getting -- I don't know if
8 they're remnant lots. I don't know what they are.

9 But right now my reaction is that I
10 would allow the testimony, but I'd allow voir dire
11 before the testimony goes forward on that. I think
12 that -- You know, I did municipal work. And if I
13 knew somebody was negotiating with a developer to
14 buy a couple lots and combine them, it probably --
15 it would have been my advice probably to step down
16 from discussing that, you know.

17 And so, okay, that would be the ruling
18 on that, is that I would allow that testimony; but
19 there will be some voir dire before that.

20 MR. SMESSAERT: Your Honor, did we come to
21 a decision yet on the suing -- contemplating suing
22 another party?

23 THE COURT: You know what? I'll allow
24 that they -- Here's how I see this. They had the
25 facts presented to them. They took a vote. They

1 authorized legal action. And unless you tell me
2 there was some settlement or something, then I'm
3 going to want to know why they didn't follow
4 through on it. Why didn't they, do you know?

5 MR. SMESSAERT: I don't know.

6 MR. CIRILLO: I asked.

7 MR. SMESSAERT: In fact, I don't know even
8 know if those accusations are absolutely true.

9 THE COURT: Well, Ms. Rich, you seem
10 convinced there was a vote.

11 MS. RICH: We have a recording, Your
12 Honor.

13 THE COURT: Why didn't they follow
14 through, did any discovery show?

15 MR. CIRILLO: I was able to depose Mr.
16 Krause here about a week and a half ago, and I
17 asked him that very question and whether or not
18 they have plans to sue them in the future, and he
19 couldn't tell me.

20 MR. SMESSAERT: Your Honor, if I may.

21 MR. CIRILLO: And you were there, Chris.

22 MR. SMESSAERT: If -- well, I can't recall
23 exactly what Mr. Cirillo is referring to. But you
24 know, as I recall -- I don't even know if the
25 developer was still in business. It was my

1 understanding during this case that the developer
2 had gone out of business. The lots are bank owned;
3 so the developer, the Regency Hills, LLC, is no
4 longer a viable entity. So you know, whether that
5 plays in, I don't know.

6 THE COURT: Did they have a letter of
7 credit? Did they release the letter of credit?
8 Usually with a developer you're going to have a
9 letter -- a line of credit or some sort of security
10 for when the property is developed. Now, admitted-
11 ly, this is a smaller municipality. They may not
12 do things that way. But usually we would require
13 that there be a letter of credit in the amount of
14 the project to protect the village's interest in
15 the cost of restoring.

16 MR. SMESSAERT: I think that also goes to
17 the smaller community, also goes to the purchasing
18 of a lot in a subdivision, a small desirous
19 community. Anyway --

20 THE COURT: I don't know. I mean I'm not
21 trying to be difficult about this, but at face
22 value you have a subdivision that went in. This is
23 what's been told to me. Is that the developer,
24 MirroCraft [sic] and its subcontractor -- Or first
25 there's a 10-acre for a 4.5-acre swap. That

1 doesn't surprise me at all.

2 And then the grading plan is
3 apparently not followed; and as a result, nobody's
4 told me whether the water flow across the Thistle
5 property went from manageable -- I'm assuming from
6 what I've been told that there was some water
7 flowing that way previously, because it sounds like
8 it was the natural current to under 57. But that's
9 just an assumption on my part reading the file.

10 Then the property is graded. So you
11 change the grade, put the impervious surfaces in
12 there. That's going to increase your storm water
13 flow, and so that's why you have a storm water
14 management plan on file, is to -- either you're
15 going to have retention ponds to slow the flow or
16 you direct it to an area that can handle it for
17 water discharge. And if the contractor doesn't
18 fulfill it and nobody comes forward and says, well,
19 we'll work on this with the property owner, the
20 property owner's got some options. And I think
21 that's going to be the argument.

22 So I think that an acknowledgement
23 that the School District was prepared to take legal
24 action against the developer essentially recognizes
25 that the developer's grading plan -- if this all

1 pans out, that they didn't do what they were
2 supposed to do. I want to know more about Mr.
3 Krause and what the situation is.

4 But I've represented a lot of
5 municipal board, and that just doesn't sound right
6 to be passing on -- on the one hand, passing on
7 what we're doing with this developer, but on the
8 other hand, working to combine a couple lots. I
9 don't know. I would think that would have to be
10 the Village of Fredonia or Town of Fredonia. I'm
11 not sure which it's in. Mr. Thistle, are you in
12 the Town?

13 MR. THISTLE: My property is in the
14 township. The Mastercraft subdivision --

15 THE COURT: Was annexed to the Village?

16 MR. THISTLE: Village of Fredonia, yes.

17 THE COURT: Okay. So you would have had
18 to change the plat and get that approved. But I
19 mean it seems to me that you have to be very
20 careful. You know, it just doesn't sound -- I
21 would want to hear more about that; but I'm not
22 going to say it's out. I'm not granting that
23 request to limit that testimony. I'll listen to
24 it and decide how relevant it is.

25 The next one is preclude testimony or

1 references by the defendants' witnesses that the
2 District, the developers, or any other party caused
3 or contributed to the alleged flooding of the
4 defendant's property.

5 MR. SMESSAERT: Your Honor, if I may on
6 that one?

7 THE COURT: Sure.

8 MR. SMESSAERT: The previous comments, I
9 guess, segue probably perfectly into this. Now,
10 just to start off, we certainly recognize that the
11 defendants in this case did experience some
12 flooding. Our motion goes to the fact that the
13 defendants have failed to name an expert who's
14 provided a report that addresses substantively
15 causation at all.

16 Now, looking back at the original
17 scheduling order in this case, both parties were
18 required to identify expert witnesses and produce
19 reports. The plaintiff produced a report in April
20 2012 by their expert. I believe it was October
21 2012 -- or it was actually July 2012 the defendants
22 produced an expert report as well.

23 If you look at the expert report, and
24 I quote, it says: "In order to develop my opinion
25 of the potential for the berm to present a safety

1 risk to students, I performed a site inspection on
2 July 5th and surveyed the elevation of the ground
3 at key locations."

4 The report is a page, page and a half
5 report that addresses whether the expert believes
6 that the pond itself is a danger to students. It
7 makes one passing reference to possible filling in
8 of the wetland, but it does not at all address
9 causation in this case.

10 So based on the scheduling order,
11 based on the prejudice that would result to the
12 plaintiff in this case by relying on the expert
13 report the defendants produced a year plus ago, we
14 believe that any expert testimony about causation
15 should be absolutely off limits.

16 Now, we understand that, again, the
17 defendants have experienced some flooding. They
18 can certainly testify as to their experiences; but
19 the expert provided by the defendants has provided
20 absolutely no opinion whatsoever about causation in
21 this case. And now just on the eve of trial in the
22 response to the motions in limine, the defendants
23 suggest that they have an expert witness who's
24 going to address this issue.

25 THE COURT: Okay.

1 MR. SMESSAERT: And Your Honor, if you
2 don't have a copy, I have a copy of the expert
3 report if you'd like to see it.

4 THE COURT: I don't know that I have a
5 copy. I want to take a look at it. Thank you.

6 MR. SMESSAERT: And that goes to the very
7 heart of this issue, is that the defendants have
8 failed to identify an expert who can testify on
9 causation in this case or testify at all about the
10 developer's impact on any of the flooding. There
11 is absolutely no witness, and the report itself is
12 extremely limited; and we have relied on that to
13 this day.

14 THE COURT: Okay.

15 MS. RICH: Your Honor, nothing that we
16 were saying is any surprise. We've been talking
17 for a year and a half about what we think the cause
18 of the flooding is in front of you, in mediation,
19 and amongst ourselves. There's no surprises.

20 THE COURT: All right. I'll deal with
21 this one last, because I have some other issues
22 that might play into how I rule on this. So all
23 right, and then legal fees by the District. I
24 don't think that that's relevant unless you can
25 tell me some basis for -- I read the article in

1 the paper. I just don't know, you know --

2 MR. CIRILLO: Your Honor, I'll address
3 this one.

4 THE COURT: All right.

5 MR. CIRILLO: I think it is relevant for
6 this reason. It has been in the paper. I mean
7 there's been news stories on this. It's been in
8 the Ozaukee Press, it was in the Milwaukee Journal
9 Sentinel. It's my understanding recently there
10 was a television station at the Thistle property
11 regarding this very issue. People in Ozaukee have
12 read about this story.

13 THE COURT: But that doesn't make it
14 relevant.

15 MR. CIRILLO: I understand that, Your
16 Honor. It makes it relevant for at least the
17 purposes of voir dire to determine --

18 THE COURT: Oh, voir dire. But not the
19 dollar amounts.

20 MR. CIRILLO: To do --

21 THE COURT: I handle a lot of my voir
22 dire.

23 MR. CIRILLO: Understood, Judge.

24 THE COURT: Okay.

25 MR. CIRILLO: And the reason why, I think

1 some jurors may hold a grudge against Mr. and Mrs.
2 Thistle for putting the School District through
3 this, and then some may hold a grudge against the
4 School District for being somewhat wasteful in
5 spending over a hundred thousand dollars to chase
6 down \$8600. I think we need to explore that at a
7 bare minimum on voir dire.

8 MR. SMESSAERT: Judge, if I may.

9 THE COURT: Yes, Mr. Smessaert.

10 MR. SMESSAERT: I'm sorry. I think the
11 defendant's response to this issue and their
12 response to the motions in limine strikes exactly
13 what we've been saying the whole time. They are
14 attempting to smear the School District. If I have
15 the caption in front of me, "Motion to exclude any
16 reference to legal fees in excess of a hundred
17 thousand dollars incurred by the School District to
18 prosecute this \$8,343.13 claim."

19 If that doesn't speak volumes, I don't
20 know what does. And they fail to address the
21 relevancy argument in their response. And I think
22 as it relates to voir dire, to the extent that we
23 do ask the jury some questions, I think you can
24 ask the questions generally about whether anything
25 was seen or read in the media that may bias

1 decision-making abilities.

2 So I think it's completely irrelevant.
3 I think they concede it, and I think there are
4 other ways if there is a concern about somebody
5 being biased to address the issue.

6 THE COURT: Any response on this, Mr.
7 Cirillo?

8 MR. CIRILLO: Your Honor, again, this is
9 stuff that's matter of a public record. Anybody
10 can make a public record request to get this type
11 of information directly from the School District
12 itself.

13 THE COURT: All right.

14 MR. CIRILLO: And I think this plays a
15 role in how people look upon this case. And the
16 last thing I want is not to discover this from the
17 jurors and all of a sudden, you know, we learn
18 later that there should have been a mistrial
19 because what the jury is thinking in the back about
20 who spent what on who.

21 THE COURT: Well, I think what I would do
22 is with voir dire I would handle that. It's been
23 in the Press. I don't think the dollar numbers
24 have to be floated out there. You know, I'll tell
25 you, I represented Ozaukee County in 1992 or '93

1 at a jury trial, and my recommendation was they
2 settle it. They didn't want to settle it. It's a
3 municipal body or board, and they spent probably --
4 I think they spent the whopping sum of \$10,000 to
5 have me try it, and it should have been -- could
6 have been settled for \$5,000.

7 My job as the lawyer was to tell them,
8 you know, you should settle this. The fact that
9 they chose not to for policy reasons or whatever
10 reasons there are doesn't make that number
11 relevant. And really, I see how it could cut
12 both ways. They could say the Thistles should have
13 been more cooperative with the school board. They
14 could say nobody -- if the school board was paying
15 this with their own money, the members, they never
16 would have done this; they would have approached
17 this like a business decision.

18 But I think the way to handle the
19 fallout from that is just to make it a situation
20 where the voir dire -- and like I said, I handle
21 most of my voir dire, where talk about it being in
22 the Press. I wish it hadn't been in the Press; but
23 it was on the front page of the paper, things like
24 that. You're going to have to deal with that. I
25 wouldn't let you go into that. It would be

1 prejudicial. It's not probative of much. I
2 wouldn't do it.

3 Okay. Any others that I've missed?
4 Anything else?

5 MR. SMESSAERT: I think the construction
6 practices.

7 THE COURT: Which one is that?

8 MR. SMESSAERT: I don't know if you kind
9 of wrapped that in --

10 THE COURT: Which one?

11 MR. SMESSAERT: The prevent testimony
12 regarding the reference to the construction
13 practices or any lack of compliance thereof
14 in those practices by the developer.

15 THE COURT: I think that's a huge issue
16 here, because what may have started out as just a
17 very workable project, due to sloppy grading or a
18 sloppy infrastructure, whatever you want to say,
19 because they just didn't follow the grading plan
20 may have really contributed to a major problem
21 here. And I think that is relevant as to what was
22 reasonable in response.

23 MR. SMESSAERT: Well, Your Honor, if I
24 may.

25 THE COURT: Okay.

1 MR. SMESSAERT: And I know you've still
2 held your decision in abeyance yet with respect to
3 the expert; but that goes -- that dovetails into
4 this whole expert issue. The defendants do not
5 have an expert witness that can testify to what was
6 done or what was not done.

7 You know, based on the argument that
8 I made earlier, this entire case has gone on for
9 two and a half years, and the defendants have
10 failed to provide a report on anything related to
11 causation. So without an expert, none of that --
12 all of that should be off limits.

13 THE COURT: All right. Well, this comes
14 kind of as a little bit of a bombshell. The
15 problem I have is that I have two cases scheduled
16 for next week, and neither one of them looks like
17 they're close to resolving. I don't know if this
18 one will become close to resolving. It seems
19 people are pretty entrenched. But the other one --

20 And I've been moving things around on
21 my calendar due to some changes here that have been
22 kind of -- were unanticipated. So I am thinking
23 you will have plenty of time to address that
24 expert's report. It's much more important to me
25 to get it right the first time, and I probably am

1 going to have to take the other trial. But I'm
2 going to let everybody know as soon as I know, and
3 I should know in a day or so which one is going to
4 go. But so that will -- that objection should fall
5 by the boards.

6 And then if there needs to be an
7 amendment to the scheduling order on other issues,
8 I would do that. But it's more important to me to
9 get this trial done right. And I would really
10 urge -- I can't -- I'm not going to put out a gag
11 order on this or anything like that; but I would
12 urge people to kind of dial it down a little bit
13 because it's not going to make it any easier to
14 try.

15 MR. SMESSAERT: Well, on that note, Your
16 Honor, I'm sure you'll be curious to hear that
17 Fox 6 has now been poking around and will be airing
18 a special on that. So clearly there's a full
19 all-out media blitz, so on that particular note.
20 But addressing --

21 THE COURT: That's kind of the world we
22 live in. You know, they need to fill that hour
23 between nine and ten at night.

24 MR. SMESSAERT: Of course.

25 THE COURT: So I don't have anything that

1 I can -- this isn't the kind of case that I would
2 issue a gag order on. It's just -- but it isn't
3 going to make it any easier. This is a small
4 county. It's been on the front page of the paper.
5 Stricture of time is not going to hurt to let that
6 dissipate. I'm sure you can understand.

7 MR. CIRILLO: Judge, I can speak for
8 myself. I have not called any of the members of
9 the press to say go make a story out there or
10 anything like that. I'm quite sure Ms. Rich would
11 say the same. I mean that's something that's
12 sometimes uncontrollable; and it's based on, you
13 know, what appears to be a David and Goliath type
14 fight with --

15 THE COURT: Right. And my point is, and
16 you both know from trying this, and Mr. Smessaert
17 knows from trying this, is it doesn't make it any
18 easier to get this into a battle posture from a
19 public relations standpoint and then try to pick a
20 jury. So I'm going to let it pass a little bit.

21 And I thought about it. I wasn't
22 happy when I saw the article in the paper because
23 I think it complicates what we need to do here.
24 Okay? And that's to find a fair jury that isn't
25 exposed. Like you say, Mr. Cirillo, one party may

1 say, well, you know, the Thistles are responsible.
2 That could have funded a teacher and a half for a
3 year with benefits and everything. They may say
4 the school board should have been more reasonable
5 and acknowledged their responsibility, fix this
6 with an outfall from whatever the pond is, under
7 57, and the problem goes away and everybody goes on
8 with their life. Instead, they spent a hundred
9 thousand dollars and that took money out of, you
10 know, that we have for the kids.

11 So I see it cutting both ways. And I
12 think most likely this would be the one -- I think
13 as between the two of them which one I'd rather
14 try, I'd rather try this one. Between the one that
15 I think I need to try, it may be the other case.
16 Yes?

17 MR. SMESSAERT: Your Honor, if I may. So
18 if this trial does move forward next week, what is
19 the status -- do you have a decision on the --

20 THE COURT: I think it's doubtful that
21 your case is going to go. On the other hand, if
22 you are requesting -- you want time to have your
23 expert look at that report, I would grant that too.

24 MR. SMESSAERT: I'm not requesting
25 additional time.

1 THE COURT: You don't want --

2 MR. SMESSAERT: No, we want this to move
3 forward. But the fact is if we're forced to go
4 forward next week given the scheduling, the
5 defendants have not provided an opinion, an expert
6 opinion that can address any of these issues. And
7 I think that is key and something that needs to be
8 addressed.

9 THE COURT: All right. You're right, and
10 that's a fair point.

11 MS. RICH: Your Honor, it doesn't take an
12 expert. We can produce the groundskeeper from the
13 school who can say I witnessed, I observed 24
14 inches of water on the defendants' property, I saw
15 it. So --

16 THE COURT: I agree.

17 MS. RICH: It's not --

18 THE COURT: I agree. And that goes to --
19 You know, I think in my mind you could probably do
20 that, depending on how it came. Somebody who
21 has -- I mean you deal with people who have been
22 on farmland forever, and my experience with them is
23 they will be able to tell you where the drainage
24 ways are, where the French drains are, things of
25 that nature.

1 And they would be able to tell you,
2 you know what, I have farmed 85 of the 100 acres;
3 the other 15 acres were never tillable. This came
4 in, and I'm now not able to till 40 of it, and
5 nothing has changed other than that. There's no
6 hundred-year floods, no -- You know, we get
7 hundred-year storms that seem to come every other
8 year now.

9 So I think that I will, because of
10 that issue and because of my scheduling issue, I'm
11 not going to lay this plainly on the plaintiffs.
12 I'll take this off the calendar so you're free to
13 release your witnesses, and you can -- I'll adjust
14 that scheduling order so that that defense can have
15 time to address that report. Okay?

16 MS. RICH: Okay.

17 THE COURT: All right. Do you want me to
18 do that right now?

19 MR. CIRILLO: That sounds good, Judge.

20 THE COURT: Pardon?

21 MR. CIRILLO: That sounds good, Judge.

22 THE COURT: While you're here. Debbie,
23 can you get the calendar?

24 MR. SMESSAERT: Your Honor?

25 THE COURT: Yes.

1 MR. SMESSAERT: The plaintiff would like
2 time then to file a rebuttal.

3 THE COURT: Absolutely. Absolutely. I'm
4 only going to try -- I don't like trying cases
5 twice, so -- Are the parties still talking about
6 resolving this, or is it just at loggerheads?

7 MR. CIRILLO: I actually about a week and
8 a half ago when we were here for the deposition --

9 THE COURT: Is that when I walked out --

10 MR. CIRILLO: Yes. Exactly.

11 THE COURT: Or I walked in and you were
12 walking out.

13 MR. CIRILLO: That's correct. That's
14 correct, Your Honor. That's the day.

15 THE COURT: All right.

16 MR. CIRILLO: Me and plaintiff's counsel
17 did have discussions, and he was supposed to get me
18 back some type of offer. I haven't heard anything
19 yet. I don't know if --

20 THE COURT: Well, when you deal with a
21 board you have to --

22 MR. CIRILLO: He did indicate that it
23 would take some time to get an offer, and then we'd
24 have to do a quick turn-around and we'd let them
25 know one way or another as to which way we're

1 going.

2 MR. SMESSAERT: Well, that's a mis-
3 communication, because we discussed the status of
4 where settlement was at because you weren't aware
5 of it at that point. I didn't say that we would be
6 coming forth with an offer. But why don't -- just
7 to deal with this, why don't we meet after this
8 hearing, and we'll talk about it in a conference
9 room.

10 THE COURT: I can't get involved in that,
11 and I'm not going to.

12 MR. SMESSAERT: No, no. We'll talk
13 outside.

14 THE COURT: But I think the thing to do
15 is, one, if you want to depose Mr. -- the engineer.
16 I'm looking for it in this file.

17 MR. CIRILLO: Roger Miller.

18 THE COURT: Right. If you want to depose
19 Roger Miller on that issue. I'm not going to
20 reopen this to entire discovery because you're so
21 close to the trial. Everything is pretty well set.
22 But if you want to depose Roger Miller and do a
23 response with an expert, and you can depose that
24 expert if you wish. And we'll look for a trial
25 date. Debbie, what would be the earliest?

1 MR. SMESSAERT: So I'm clear, Judge, then
2 the defendants are not required to produce an
3 expert report on causation?

4 THE COURT: They have it now is my
5 understanding.

6 MR. SMESSAERT: They have not.

7 THE COURT: Then they have to --

8 MR. SMESSAERT: If you take a look at
9 their report, it does not address it at all.
10 There's a passing reference to it.

11 THE COURT: All right. I see what you're
12 saying, Ms. Rich, is that you don't have to
13 necessarily have an expert to say, you know, what
14 increased the flow of water onto the Thistle
15 property. If you choose to rest without that, then
16 you need to let Mr. Smessaert know. Okay?

17 MS. RICH: Yes, Your Honor. I think what
18 makes sense is we'd issue an amended report; and as
19 he proposed, they can issue a rebuttal.

20 THE COURT: Here's what I want. I want
21 that amended report to Mr. Smessaert by the 30th
22 of September. I'll give Mr. Smessaert -- do you
23 think 30 days would allow you to get your expert
24 report or do you want a little -- How about the
25 15th of November?

1 MR. SMESSAERT: Yeah. Let's do that just
2 in case. I don't know schedules.

3 THE COURT: The 15th of November. Debbie,
4 do we have anything in December? Would anybody be
5 available the 11th and 12th of November? Are we
6 talking two days, three days?

7 MR. CIRILLO: Your Honor, you've just
8 given the --

9 THE COURT: I know. I'd have to re-do
10 some of these dates. I know that. I didn't
11 realize -- I'm trying to get you guys back in
12 before the end of the year if I can.

13 MS. RICH: Deer hunting is later?

14 MR. SMESSAERT: Well, November is tough.
15 I think especially with reports and depositions,
16 November is very tough unfortunately.

17 THE COURT: Okay. So stick with those
18 dates then. Look and see if there's anything in
19 December. You have to understand -- this is more
20 for Mr. and Mrs. Thistle. We had a new judge come
21 on, and we have been shifting cases all around due
22 to that change, and I'm not laying that on his
23 doorstep. That happens whenever a new judge comes
24 in. But it hasn't been the optimal calendar
25 control on my part that I would like.

1 THE CLERK: I don't see anything for two
2 or three days because you --

3 THE COURT: What about December 16th,
4 17th, and 18th?

5 MR. SMESSAERT: When is this?

6 THE COURT: December 16th, 17th, and 18th?

7 MR. CIRILLO: Judge, I just realized I did
8 not bring my calendar, and I apologize.

9 THE COURT: Do you want to call your
10 office?

11 MR. CIRILLO: May I call my office?

12 THE COURT: Sure.

13 MR. SMESSAERT: Well, I'm just saying from
14 a witness-client perspective, given the fact that's
15 a week before Christmas, I just don't know if there
16 is going to be travel --

17 THE COURT: It's hard to set a jury in
18 there. I've done it, but --

19 MR. SMESSAERT: Obviously I'd like to get
20 this resolved as soon as possible, but it seems
21 like your options are challenging ones.

22 MR. CIRILLO: November and December are
23 two of those months that are difficult, I guess.

24 THE COURT: All right. If my four-day
25 trial falls off next week, I'm not --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. SMESSAERT: Going to be happy?

THE COURT: I'll be stuck with that block of time with nothing.

THE CLERK: How about the 27th, 28th and 29th of January?

THE COURT: That would be fine if that works for everybody.

MR. CIRILLO: I got a feeling that would work.

MS. RICH: That works for me.

MR. SMESSAERT: Yeah, that --

THE COURT: Will that be all right?

MR. CIRILLO: I'm waiting for my phone, Judge. I'm pretty sure that's going to be good, 27, 28, 29 of January. I'm pretty sure that's going to work, but let me check and make sure.

THE COURT: Ms. Rich, will September 30th give you enough time to evaluate whether or not you're getting a report and provide the report on the causation if you decide that's how you're going to proceed?

MS. RICH: Yes. We will get the report, and we're meeting with the expert tomorrow. So that will work out fine.

THE COURT: And then November 15th for

1 the school board's report. Both those experts will
2 be -- and the only other people that have been --
3 will be available for depositions because the
4 depositions should have been completed. And then I
5 would like discovery to close the 20th of December,
6 so everybody needs to be done by then.

7 MR. SMESSAERT: Just so I'm clear, the
8 only discovery that is still remaining would be
9 the expert reports and the depositions of those
10 experts?

11 THE COURT: Right, correct.

12 MR. SMESSAERT: Nothing else. No late
13 discovery at all.

14 THE COURT: Am I clear on that? And
15 that's fair.

16 MS. RICH: Yes.

17 THE COURT: Anything else at this point
18 then? Just waiting for Mr. Cirillo's phone.

19 MR. CIRILLO: It just came up, Judge.
20 Thank you very much for your patience.

21 THE COURT: No problem.

22 MR. SMESSAERT: Your Honor, there was one
23 other pending motion. I'm not sure if it's really
24 moot at this point. We can address it later.

25 THE COURT: What is that?

1 MR. SMESSAERT: The defendant's motion for
2 jury view. Should we address that?

3 THE COURT: Yeah. I would -- I thought
4 that probably would be a good idea in this case.
5 What's your thought on that? I thought we had
6 talked about that before.

7 MR. SMESSAERT: I think Attorney Rich had
8 suggested it. I think from the District's
9 perspective, we'd certainly object. I mean from
10 our perspective it's going to be unfairly
11 prejudicial. The jury is going to show up, and
12 what they're going to see is a berm, a grassy
13 field, and no pond. That's the big problem. The
14 pond in this case was the major issue, not to
15 mention the other --

16 THE COURT: Where did the pond go?

17 MR. SMESSAERT: The District had to drain
18 it. That's what this case is about.

19 THE COURT: Okay.

20 MR. SMESSAERT: Recovering the money to
21 drain the pond.

22 THE COURT: I got it. I thought it was
23 going to cost \$8,000 to put an outfall in.

24 MR. SMESSAERT: That I think it's also
25 misleading because what the District's actually

1 seeking in this case is not only recovery of the
2 expenses incurred for the drainage --

3 THE COURT: That's right, okay.

4 MR. SMESSAERT: -- but to remove the berm
5 to restore the natural drainage.

6 THE COURT: Okay. All right.

7 MR. SMESSAERT: I mean not to mention
8 they'll have distractions.

9 THE COURT: You'll have pictures. Ms.
10 Rich, what's your position on that?

11 MS. RICH: Well, what we said in our
12 motion, Judge, is that there's really no -- the
13 pictures, we have many pictures. We have aerial
14 photos. There is no substitute for standing and
15 seeing the lay of the landscape. And the reason,
16 and the District's big beef was that this was
17 dangerous to the children because of proximity to
18 the play areas; and it really is quite distant.
19 It's a 50-acre property. And to get that -- it's
20 hard to get that impact from the photographs. You
21 have to stand and see, wow, this is a really long
22 ways away from anything that's going on at the
23 school.

24 THE COURT: I'll take this one under
25 advisement. I'm going to think about it. I was

1 inclined to go ahead with it. I was thinking the
2 pond was still there in a marshy form and that you
3 would see the impoundment. Mr. Cirillo?

4 MR. CIRILLO: Yeah. Well, Your Honor, the
5 thing is the pond is in a place where the school
6 planned to build a pond. So I'm not sure what the
7 issue is here as far as -- I mean they can see
8 where the pond was going to be that the school
9 approved.

10 MR. SMESSAERT: Your Honor, if I may. In
11 this case, and I think that's one reason why the
12 land exchange worked, is the District was looking
13 for additional property so it could expand or
14 renovate its campus in the future. Over the past
15 eight or nine years there have been some plans
16 considered, and a pond was part of that considera-
17 tion. However, what's clear --

18 THE COURT: What kind of pond, like a
19 storm water retention pond?

20 MR. SMESSAERT: Well, that's it.
21 There's -- Don't know. It's --

22 THE COURT: Okay.

23 MR. SMESSAERT: And aside from that, it
24 would be a managed pond that the District chose on
25 its property. I think what's also missing, the

1 defendants fail to recognize is that regardless,
2 their berm created a one-acre, seven-foot deep pond
3 on the District's property.

4 THE COURT: Okay.

5 MR. CIRILLO: Your Honor, if I may
6 approach, I can give you an idea where this pond
7 that --

8 THE COURT: Well, I know the area. I
9 drive by it all the time on the way up to --

10 MR. CIRILLO: I'm talking about the pond,
11 the plan that they approved --

12 THE COURT: Okay.

13 MR. CIRILLO: -- in their five-year plan.
14 I can go show you schematics.

15 THE COURT: Let me think about that. I
16 had been inclined to go along with a view, but I
17 was thinking that the pond was still there. I
18 didn't realize that it had been -- What did you
19 do, did you pump it, or was it --

20 MR. SMESSAERT: No.

21 THE COURT: It had to have some sort of
22 outflow.

23 MR. SMESSAERT: Well, we -- the District
24 engaged a contractor, in fact, the same contractor
25 that built the Thistle's berm, to create a drainage

1 ditch. The District had to enter into a drainage
2 easement agreement to drain it into ultimately the
3 storm water retention or the swail off the
4 property, and that's another concern in this case.

5 THE COURT: Is that the one that goes
6 under 57 in this case?

7 MR. SMESSAERT: Ultimately to the old
8 developer's property. There's a swail, and then
9 there's a storm water retention pond a little bit
10 to the east of the drainage ditch. And that's
11 another issue in this case because the developer
12 doesn't own that land anymore. So the District
13 ultimately might be forced to do something else to
14 drain that water. So that's another significant
15 consideration.

16 THE COURT: Did he get permission from the
17 developer to drain it over there?

18 MR. SMESSAERT: They have a drainage
19 easement agreement, correct.

20 THE COURT: Then the buyer buys subject to
21 the easement, doesn't --

22 MR. SMESSAERT: I don't know specifically
23 all the language or the negotiations. It's
24 possible.

25 THE COURT: Yeah, well, I mean --

1 MS. RICH: Well, it's in the document. It
2 runs with the land, yeah.

3 THE COURT: Usually an easement will run
4 with the land unless it's a limited, you know,
5 something for construction or something like that.
6 But you know, I don't know. I'm not going to test
7 my real estate knowledge without having seen the
8 thing, so -- But any luck on getting your office?

9 MR. CIRILLO: I was listening to argument,
10 Judge. I didn't want to interrupt anyone by me --

11 THE COURT: All right.

12 THE CLERK: Do you want to set a final
13 pretrial right away?

14 THE COURT: We will.

15 MR. SMESSAERT: Are we talking pretrial?

16 THE COURT: She's just checking.

17 MR. SMESSAERT: Why don't we see -- this
18 one is little tight, would have been a little tight
19 for final pretrial. So why don't we try to do
20 maybe a week, week and a half ahead of time this
21 next one.

22 THE COURT: Okay.

23 MS. RICH: Yeah, or a couple. We have
24 plenty of time.

25 THE COURT: Will that work?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CIRILLO: That will work.

THE COURT: That will go in the book. And Debbie, about a week ahead of time a final pre-trial and leave an hour for that.

THE CLERK: How about the 17th of January at nine o'clock?

MR. CIRILLO: 17th of January at nine o'clock.

MS. RICH: That's all right with me.

MR. SMESSAERT: That's fine.

MR. CIRILLO: Those are good.

THE COURT: Okay with everybody?

MR. SMESSAERT: That's fine with me, Your Honor.

THE COURT: Very well. Once again, I apologize to the school board and to the Thistles for taking it off. It just somehow got overbooked. But in the long run, I think this will give the parties a chance to get whatever they want on that drainage issue. Thank you.

MR. CIRILLO: Thank you, Judge.

MR. SMESSAERT: Thank you.

(Proceedings adjourned at 4:20 p.m.)

* * *

