

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

OZAUKEE COUNTY

NORTHERN OZAUKEE SCHOOL
DISTRICT,

Plaintiff,

vs.

Case No. 11-CV-144

KENDALL J. THISTLE and
CARLA G. THISTLE,

Defendants.

**TRANSCRIPT OF PROCEEDINGS:
DEFENDANTS' MOTION TO COMPEL DISCOVERY**

DATE: November 21, 2012

TIME: 4:00 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.

ELIZABETH GAMSKY RICH, Attorney at Law, appeared
on behalf of the Defendants.

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

1 THE COURT: I will call the case entitled
2 Northern Ozaukee School District versus Kendall J.
3 Thistle, and that is Case 11-CV-144. Can I have
4 appearances, please?

5 MS. RICH: Elizabeth Rich appearing on
6 behalf of the defendants, Your Honor.

7 THE COURT: Good morning -- good after-
8 noon. It just feels like morning.

9 MR. SMESSAERT: Chris Smessaert,
10 S-M-E-S-S-A-E-R-T, appearing on behalf of the
11 plaintiff, Northern Ozaukee School District.

12 THE COURT: First, I apologize for not
13 being able to accommodate schedules, but I couldn't
14 get this back on in a reasonable amount of time,
15 so I had to insist on doing this this afternoon.
16 I'm usually more accommodating, but I don't have
17 anywhere to go. I need to take care of this.

18 We have a discovery request here,
19 a motion to compel; and it looks to me like it
20 primarily centers on the billing statements from
21 the law firm to the school district and an open
22 records response. Am I correct in that?

23 MS. RICH: I think that the plaintiffs
24 have agreed to provide the response to the open
25 records request.

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THE COURT: Okay.

MS. RICH: It's my understanding that they've agreed to provide everything we asked for, except document production request No. 7, which includes legal bills, expert bills, and other expenses of the lawsuit.

THE COURT: Okay.

MR. SMESSAERT: And Your Honor, if I may, I don't know if that's entirely accurate. The correspondence that I did send to Attorney Rich a week or so ago addressed how the district would respond to her discovery concerns. The district is still looking into some issues.

I have received some information recently from the district that I haven't had a chance to review yet because I have been out of town. As soon as I review that information I will provide updated responses, but I do believe the only outstanding issue really that we need to address are the attorney billing records today.

THE COURT: Okay.

MS. RICH: Well, Your Honor, that confuses me I guess. I understood the letter to say that everything was going to be provided. If that's not the case, then maybe we do have other issues.

1 THE COURT: Well, all right. Here's
2 what -- I looked at -- Anything on the billing
3 request? Might as well do it while you're both
4 here. Ms. Rich? I've read the briefs, so --

5 MS. RICH: Did you have an opportunity to
6 see the supplemental one I sent in? I know it came
7 kind of late.

8 THE COURT: I don't believe I did. I got
9 tied up doing something that I had to do, and I was
10 a half an hour late getting back; and it was here,
11 but I --

12 MS. RICH: I just became aware of some
13 other authority, and I just wanted to put it before
14 the Court. But very briefly, Your Honor, I agree
15 with counsel that the *Lane* case is instructive
16 here. I also included the *Juneau* case in the
17 supplement that I gave to you. The reason I didn't
18 include that one initially was because it's an o
19 pen records case not a discovery case. But in
20 reviewing it, they relied heavily on the *Lane*
21 analysis, which was a discovery case. And I think
22 the issue of evaluating whether documents are
23 protected by the attorney-client privilege is the
24 same under either statute.

25 THE COURT: Okay. Did that open records

1 request request the billing statements too? I
2 couldn't tell if it was the Thistles who filed that
3 personally.

4 MS. RICH: Yes.

5 THE COURT: It looked like it was. Did
6 that request those billing statements?

7 MS. RICH: I don't recall.

8 MR. SMESSAERT: Your Honor, if I may.
9 I believe it did, but -- at least requested some
10 billing; but that open records request goes back to
11 February of 2011 and was I think filed two weeks
12 before this lawsuit was even filed.

13 THE COURT: All right. Anything --

14 MS. RICH: But Your Honor, if I may.
15 What's very -- what's made very clear in *Lane* and
16 *Juneau* is that a blanket assertion of the privilege
17 is not justified. And that's what's happening
18 here. I had offered many times to counsel to
19 provide the invoices with redacted material, but
20 I maintained that the dollar amounts were not
21 privileged, and that's a part of what I want to
22 see.

23 THE COURT: All right. Mr. Smessaert?

24 MR. SMESSAERT: Your Honor, I will
25 certainly agree that *Lane* is instructive in this

1 case. And as opposed to asserting a blanket privi-
2 lege as Attorney Rich supposes, we are actually
3 following what Lane says. In fact, I quote:

4 "The attorney billing records dis-
5 puted here contain detailed descriptions of the
6 nature of the legal services rendered to the
7 defendant. Producing the attorney billing records
8 would therefore reveal the substance of the
9 lawyer-client communications between the parties.
10 Accordingly, we conclude that the attorney billing
11 records are protected by the lawyer-client privi-
12 lege."

13 The billing records of our law firm
14 are detailed descriptive narratives. They're not
15 simply just basic line items. They're detailed and
16 descriptive.

17 THE COURT: Okay.

18 MR. SMESSAERT: So we believe that *Lane* is
19 absolutely instructive in the fact that our billing
20 records would be subject to the attorney-client
21 privilege as held in *Lane*. Moreover, the billing
22 records are subject to the attorney work product
23 doctrine which, as I'm sure, Your Honor, you're
24 well aware, states that any material that contains
25 information, mental impressions, and strategies

1 compiled in preparation for litigation are pro-
2 tected by the attorney-client work product.

3 THE COURT: All right.

4 MR. SMESSAERT: So we further believe that
5 that doctrine in and of itself will also bar the
6 production of those records in this particular
7 case.

8 THE COURT: All right.

9 MR. SMESSAERT: And I think, third, which
10 is very important as well, is these are discovery
11 requests we're addressing today; and there is
12 absolutely no relevancy whatsoever between the
13 claims in this case and the attorney billing
14 records being requested.

15 THE COURT: Well, that's one thing I was
16 going to -- it's got to be reasonably calculated.
17 Ms. Rich, I don't know exactly, I was trying to
18 think of what you -- what would be the end goal of
19 these? What are they calculated to provide you
20 with? That there might be consultations a long
21 time ahead of this property swap or -- I was trying
22 to think of that too.

23 MS. RICH: Yes. I do think there is a
24 great deal of fact finding that remains to be done,
25 in part because we have had so much trouble with

1 the discovery process. And, Your Honor, frankly,
2 there's something going on here. I don't know what
3 it is yet, but I intend to get to the bottom of it.
4 You don't spend a hundred thousand dollars to
5 collect 7200. That's just -- and it's taxpayer
6 money, and there's something going on.

7 I think, you know, he -- I note also
8 that -- well, there is some question about Mr.
9 Krause, the president of the school board. It's
10 obvious that he has a personal grudge against my
11 clients. But in addition, there were some -- there
12 was some involvement on his part with the developer.
13 He obtained his residence on a lot that he bought
14 in this subdivision from the developer. There was
15 a great deal of money spent to reconfigure the lot,
16 and I think there may have been some use of the
17 district's attorney in that transaction. I'm
18 looking for that.

19 And I also think that Mr. Krause may
20 have done some self-dealing and may have behaved
21 in an inappropriate manner; but I can't get him to
22 cooperate with a deposition, and I haven't been
23 able to obtain these documents that I need.

24 THE COURT: Okay. Mr. Smessaert?

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

1 have absolutely no knowledge of anything that
2 Attorney Rich is asserting; and to me it's all
3 speculation and innuendo and Mr. Krause's personal
4 business completely aside from the matter at hand
5 here.

6 And in fact, if you look back at the
7 motion to compel, Attorney Rich identifies the real
8 reasons why she's seeking the billing records, to
9 determine the district's motives for filing and
10 pursuing the lawsuit. Well, the complaint and the
11 amended complaint are clear that the district is
12 trying to recover moneys that it had to spend to
13 deal with a pond that the Thistles created on
14 their -- on the district's land and for removal of
15 the berm. It's not simply to recover some money.
16 Even if it was, that's the district's prerogative.
17 But it's also to seek removal of the berm.

18 Secondly, Attorney Rich states that to
19 help support the affirmative defenses of waiver and
20 latches. Those affirmative defenses, the attorney
21 billing records have absolutely nothing to do with
22 the affirmative defenses of waiver and latches.
23 So those reasons right there, they're completely
24 irrelevant to this case and the billing records.

25 THE COURT: All right. Here's what I'm

1 going to order, that the redacted version of that
2 bill be provided and that the open records response
3 be also provided. Apparently that's being done
4 voluntarily.

5 I am a little skeptical that there's
6 that much in those billing statements that would
7 disclose attorney-client privilege, but I'll give
8 a shot that it be -- that the redacted versions be
9 provided; and possibly that will suffice for the
10 defendants' purposes.

11 I mean I did municipal law for 15
12 years before I got on this bench, and I always
13 viewed those bills in preparing them as public
14 record material that anybody could take a look at.
15 And it would detail the who, the what, the where,
16 the when and the how of what I did; but it cer-
17 tainly was in no form, in my opinion, attorney-
18 client material. That I think you have to
19 recognize when you work for a public entity that
20 the documents can be received and --

21 But there may be things in there. I
22 don't know, maybe Mr. Smessaert's better at detail-
23 ing what he did than I did. So if it becomes a
24 problem once you get the redacted bill, then I will
25 take a look at it. All right?

1 MR. SMESSAERT: Your Honor, if I may, on
2 that note, since you are instructing the district
3 to provide redacted bills, could we suggest to the
4 Court that the district do so subject to a con-
5 fidentiality and attorney's eyes only protective
6 order with the documents being returned at the end
7 of this litigation?

8 MS. RICH: I would object to that.

9 THE COURT: I don't think you have the
10 standing to do that because it's a public document.
11 If this was a private entity, I would say sure; but
12 they're a public document, so I don't think that
13 that's necessary. And I mean, in my opinion,
14 Ms. Rich or her clients could walk in and get those
15 documents and could arguably try to force them to
16 be, by writ of mandamus to be an unredacted version
17 and bring that before the Court.

18 So I don't think I have the ability to
19 force that issue on them, and I won't order that.
20 If it were private entities, I'd certainly look at
21 it then, but not with public entities.

22 MR. SMESSAERT: And Your Honor, just so
23 I'm clear on the order. The redactions, we will
24 then, according to the Court's order, redact both
25 attorney-client privilege and work product doctrine

1 information.

2 THE COURT: Correct. And if there's a
3 dispute, Ms. Rich can send them in, and we'll get
4 you another date.

5 MS. RICH: For the record, Your Honor, I
6 think that *Lane* expressly overturned the notion
7 that attorney bills were subject to the work
8 product doctrine. So I'll just put that on the
9 record and review the bills.

10 THE COURT: All right.

11 MS. RICH: Could we put a --

12 THE COURT: You review them, and if
13 they're -- I'd like them sent out within 30 days.

14 MS. RICH: Could we make it -- well, I was
15 going to actually ask --

16 THE COURT: You're trying to tie this into
17 the 14th of December.

18 MS. RICH: I was trying to prepare for the
19 final pretrial, yeah. So I was hoping by the 30th
20 because I didn't think it was that burdensome to
21 pull the information together. I would also
22 appreciate an order for the compliance that's
23 reflected in the letter from Attorney Smessaert
24 that he provided to the Court on November 14th,
25 that information.