

1 THE COURT: You don't have any objection
2 to that, Mr. Smessaert?

3 MR. SMESSAERT: Your Honor, no. The
4 comment that I was making earlier is that Attorney
5 Rich was suggesting that we stipulated to provide
6 all this information. Well, to the extent that it
7 exists, we'll certainly provide it.

8 And we also need to inquire about
9 the e-mail communications in this particular case
10 to see what it's going to cost to even think about
11 producing that information. It's e-discovery which
12 hasn't even been discussed early in this case. I
13 know Attorney Rich has also allegedly received
14 hundreds and hundreds of e-mails already. So we
15 will certainly put forth that information to
16 Attorney Rich about how much it may cost to move
17 forward with that.

18 MS. RICH: So that means we have to come
19 back or can we just order that he provide it?

20 THE COURT: I'm going to order that the
21 material be provided that is outlined in that
22 letter. What is the date on that letter, is it the
23 one that was attached?

24 MR. SMESSAERT: I believe it was the 14th.

25 MS. RICH: Yeah.

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THE COURT: Okay. Let me just find it. I have the 15th. Would that be it?

MR. SMESSAERT: I don't believe -- I believe I received communication from Attorney Rich on the 13th. I responded the next day on the 14th. She filed a motion to compel that day.

THE COURT: Okay.

MR. SMESSAERT: I believe. Yes, it's actually -- it's the 15th to you, and it was the 14th to her.

THE COURT: Let me just take a look at that then, okay? It's this attached e-mail form letter, is that what we're talking about?

MS. RICH: Yes.

THE COURT: Okay. Well, we've taken care of No. 1, taken care of the open records item that's listed in No. 2; and the e-mails apparently are going to be looked at, and we'll have to apparently await the district's position on that. But I certainly think e-mails that are done by employees and officers of the school district are going to be discoverable.

MR. SMESSAERT: Well, Your Honor, in that particular case, we've already provided a number of documents, including hard copies that the district

1 had. The concern here is that we're talking about
2 an issue from long -- from several years back; and
3 in speaking with the superintendent, there's going
4 to need to be a review of the archives done by IT,
5 and he anticipates it costing thousands of dollars
6 to go that route.

7 THE COURT: Yeah. It might have to be
8 done, and that's what happens when this kind of
9 litigation has developed. Those are public
10 records, and they're supposed to be maintained.
11 I know that people dump them if they know for sure
12 that the school district would be maintaining the
13 original or that they're personal e-mails that
14 don't contain any public material. But the other
15 ones are supposed to be maintained.

16 So there's got to be a search to
17 determine exactly what's out there and what can be
18 provided. And Ms. Rich is going to have to somehow
19 correlate what you've given her with what other
20 people have given her. I guess it comes hand in
21 hand with litigation when you get yourself involved
22 in a litigation situation, and you have to comply
23 with it.

24 MR. SMESSAERT: Well, perhaps Attorney
25 Rich and I can discuss after the fact to see what

1 search terms --

2 THE COURT: All right.

3 MR. SMESSAERT: -- she may be looking for.

4 THE COURT: Okay. I'm fine with that.

5 And then this former Superintendent Habron, his
6 binder, does anybody know where that is?

7 MS. RICH: He said he left it in the
8 superintendent's office when he left office.

9 MR. SMESSAERT: I've spoken with the
10 superintendent several times. And in fact, after
11 this -- Attorney Rich's e-mail came through, I
12 forwarded it on immediately. And I glanced at
13 the e-mail over the last day, and he has reviewed
14 every file multiple times throughout this case over
15 the last several months and does not see a binder.
16 And frankly, I think we've produced every single
17 thing that the district has found.

18 THE COURT: Okay. You'll have to put that
19 out there that you've searched; they've done a due
20 and diligent search; and it might become a spoli-
21 ation instruction or something along that line.
22 I don't know what's in there, but that could be an
23 issue coming down the line.

24 And then Paragraph 6 relates to maps
25 and photographs, and you've indicated that you've

1 produced everything you think they have; but you'll
2 have to put it in the proper form so we can deal
3 with that.

4 MS. RICH: Your Honor, the former super-
5 intendent said he had personally observed many maps
6 and aerial photos, topographical maps and other
7 maps and aerial photos in Roger Sinnen's office.
8 And I specifically asked about those at the
9 document production on October 2nd. And he also
10 said that Paul Krause had independently made an
11 investigation, obtained old photographs.

12 THE COURT: Who is Paul Krause?

13 MS. RICH: The president of the school
14 board.

15 MR. SMESSAERT: Your Honor, I'm going to
16 address that particular issue. I've spoken with
17 Mr. Krause. The information that's being referred
18 to had to do with a historical search for infor-
19 mational purposes when he acquired property in the
20 village. It has absolutely nothing to do with this
21 lawsuit.

22 THE COURT: All right. You can put that
23 on the document -- in your reply. And who is Roger
24 Sinnen?

25 MR. SMESSAERT: He is the building and

1 grounds director for the district. And again, I
2 have followed up with the superintendent, and he
3 has searched and searched; but I will formalize
4 that after I've had a chance to review his recent
5 response.

6 THE COURT: Okay. Did I give you the
7 outline of what I'm expecting pretty clearly?

8 MS. RICH: Yes, Your Honor. And just,
9 I guess I'd like to agree that we're using the
10 standard that's articulated in *Lane* and *Juneau* --

11 THE COURT: Sounds like it.

12 MS. RICH: -- for what's being redacted.
13 "Protect communications from the attorney to a
14 client only if disclosure of the attorney-to-client
15 communications would directly or indirectly reveal
16 the substance of the client's confidential communi-
17 cations to the attorney." Communications from the
18 attorney to the client are not privileged unless
19 those communications in turn would review -- would
20 reveal communications from the client to the
21 attorney.

22 THE COURT: So you have the ground work
23 or, you know, the ground plan of I guess what
24 you're looking with the *Lane* decision. You both
25 agree that's what it is, and I think you can work

1 from there.

2 MR. SMESSAERT: I would agree, Your Honor.
3 I'd add too that still, *Lane* discusses attorney-
4 client privilege. I think attorney work product,
5 to the extent that the billing entries discuss
6 strategies, mental impressions, thoughts, show time
7 spent on certain issues that certainly may reveal
8 strategy, litigation strategy and would be subject
9 to redaction as well.

10 THE COURT: Okay. And then, you know, if
11 it comes down to it, it may be something I have to
12 do an in-camera inspection on. I'm not exactly
13 jumping up and down with anticipation of doing
14 this, but it may be something that we need to do.
15 All right?

16 MS. RICH: Can we have a finding that the
17 dollar amounts on the bills are not privileged?

18 THE COURT: The dollar amounts are
19 definitely not privileged.

20 MS. RICH: Thank you. Did we set a date?
21 Is November 30th going to work?

22 MR. SMESSAERT: I want to go back to the
23 dollar entries. Your Honor, in thinking about it,
24 simply from an attorney work product perspective to
25 the extent that certain work performed on behalf of

1 the district reflects certain time, whether it's
2 more or less spent, may actually be subject to work
3 product because it may reveal what strategies are
4 being explored more rather than others.

5 THE COURT: I think that's getting pretty
6 inferential out to the limit there. It's been my
7 experience any time you're dealing with numbers,
8 hourly rates, how much it costs, that's a public
9 record issue. And that is not going to flush
10 with attorney-client material or it's not going to
11 disclose a work product issue. It's not your
12 mental impression; it's time. It's time multiplied
13 by the hourly rate. And so no, the numbers need to
14 be disclosed. All right?

15 MS. RICH: Thank you.

16 THE COURT: Will one of you submit an
17 order to this effect?

18 MS. RICH: I will.

19 THE COURT: All right. Thank you very
20 much.

21 MR. SMESSAERT: And Your Honor, to go
22 back, we discussed -- I know there was just a
23 November 30 -- I thought I heard Attorney Rich say
24 November 30th. I thought --

25 THE COURT: She was trying to get this

1 done by the 14th. But you know, there is nothing
2 magic in the 14th, other than I'm going to put this
3 on for a trial. I can give you another month if
4 that gives you time to go through this stuff,
5 Ms. Rich.

6 MS. RICH: Okay. So we don't need to
7 provide jury instructions then, trial briefs?

8 THE COURT: No. Not on my final pre-
9 trials. The way I do this, I really want you to be
10 able to tell how long we're going to be in trial
11 so I can find a date in my calendar for the final
12 pretrial. And then I really, because I kind of
13 bifurcate my scheduling orders, I will give you a
14 cut-off for discovery after that. So I can give
15 you a month out if you want to do that. We can
16 give you another date other than December 14th.

17 MS. RICH: That's fine.

18 THE COURT: Okay. Shila, why don't you
19 look for something in mid January.

20 MS. RICH: I have a jury trial, five-day
21 jury trial starting January 7th, but any time after
22 that is fine.

23 THE COURT: Okay. Five weeks?

24 MS. RICH: Five days.

25 THE COURT: Oh, okay.

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THE CLERK: Starting what day?

MS. RICH: January 7th.

THE COURT: All right. Thank you, folks.

MS. RICH: Thank you, Judge.

MR. SMESSAERT: Thank you.

THE COURT: All right.

MR. SMESSAERT: So 30 days, Your Honor,
then, the redacted bills?

THE COURT: Sure. The 21st I'd like those
to Ms. Rich. Okay? Thank you. Everybody have a
good Thanksgiving.

MR. SMESSAERT: You too. Thank you.

(Proceedings adjourned at 4:34 p.m.)

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STATE OF WISCONSIN)
) SS
OZAUKEE COUNTY)

I, Terri A. Knowles, RMR, CRR, and Circuit Court Reporter, hereby certify that I reported the proceedings had in the matter of Northern Ozaukee School District v. Kendall J. Thistle, et al., at Port Washington, Wisconsin, before the Honorable Paul V. Malloy, Ozaukee County Circuit Judge; and I further certify that the foregoing pages constitutes a true, correct and accurate record of said proceedings, all done to the best of my skill and ability.

Terri A Knowles

Terri A. Knowles, RMR, CRR
Circuit Court Reporter