

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:
PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL**

DATE: May 21, 2014

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, KENDALL & CARLA THISTLE,
who appeared in person.

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

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THE COURT: Okay. I will call the case entitled Northern Ozaukee School District versus Kendall J. Thistle. That's Case 11-CV-144. Can I have appearances, please?

MR. SMESSAERT: Attorney Chris Smessaert appearing on behalf of the plaintiff, Northern Ozaukee School District. Your Honor, good afternoon.

THE COURT: Good afternoon.

MR. SMESSAERT: And with me I have the Superintendent, Mr. Blake Peuse, who's sitting behind me.

THE COURT: Okay. Good afternoon, sir. You can move up if you want to.

MR. PEUSE: I'm fine right here.

THE COURT: All right.

MS. RICH: Your Honor, Elizabeth Rich appearing on behalf of defendants, Kendall and Carla Thistle, both of whom appear with me in court. Good afternoon, Your Honor.

THE COURT: Good afternoon. Well, we're here on a couple of different issues, the motion to dismiss the lawsuit brought by the School District against the Thistles; the Thistles are seeking some compensation or contribution towards their

1 attorneys' fees. I've reviewed the briefs, except
2 the one that came in today. I just did not have
3 time to take a look at that. Is there anything
4 additional on the School District's --

5 MR. SMESSAERT: Your Honor, I'd encourage
6 you certainly when you have the opportunity to
7 review our reply today. I think it speaks loudly,
8 particularly speaks loudly to the defendants'
9 argument for fees and costs.

10 But initially I really want to set
11 the tone for how this matter has played out over
12 the last several months. And by way of background,
13 I think it's very significant to note the number of
14 communications that have occurred. And you know,
15 dating back to mid, later January, basically we're
16 on the eve of trial here, Your Honor had requested
17 the parties try and resolve the matter.

18 And while the parties weren't able to
19 resolve the matter, Attorney Rich encouraged the
20 District to walk away from the case. And over the
21 coming months, those discussions kind of increased.
22 Late March I reached out to Attorney Rich, asking
23 what her clients' position was on stipulating to
24 dismissal of the lawsuit. And you know, during
25 that time it was made clear to me that the request

1 had to be made formally, i.e., we had to have
2 District authorization to seek dismissal. And on
3 or about April 15th we put forth a request to the
4 Thistles that they stipulate to dismissal.

5 MS. RICH: Your Honor, I have to interject
6 an objection to this extensive discussion of
7 confidential settlement talks. I had mentioned it
8 in my brief. I think it's inappropriate.

9 THE COURT: I think there's an e-mail
10 that's attached, so I have kind of a general
11 feeling as to how this came about. And I'll
12 sustain the objection; I think it's appropriate.
13 I don't want to get involved in the settlement
14 discussions or how this came to be; but if you
15 have anything else, I'm certainly willing to listen
16 to it.

17 MR. SMESSAERT: Your Honor, I just want
18 to make clear too that the defendants have
19 repeatedly actually contacted the media in this
20 case and disclosed these very communications,
21 including letters to the editor of the Ozaukee
22 Press just last week disclosing a number of
23 confidential items from mediation and otherwise
24 directly related to this motion to voluntarily
25 dismiss.

1 But taking your comment in context,
2 Your Honor, the bottom line is is that the
3 defendants have repeatedly requested the District
4 to dismiss its claims. And when we put forth the
5 offer --

6 MS. RICH: I'll renew my objection, Your
7 Honor.

8 THE COURT: Right. Mr. Smessaert, let's
9 not get into that.

10 MR. SMESSAERT: Well --

11 THE COURT: I -- you know what, I'm --
12 I don't want to hear about it. We're at the point
13 where there's a dismissal; and you know, it's a
14 situation where this is a nuisance claim brought
15 by the School District. And it goes to the height
16 of absurdity to think that I'm going to force the
17 School District to proceed with this to a trial
18 over a dismissal when there are no counterclaims.

19 I think that the reality is that I'm
20 not going to make a public entity invest more money
21 in a case they wish to abandon. There's no logic
22 to that. And so I've thought about that, and I
23 just can't -- I can't imagine how I could do
24 anything other than dismiss the action.

25 I think, Ms. Rich, if you wish to make

1 a record on it. I've read the brief. I think
2 you're more concerned about the attorneys' fees is
3 what it appears to me from your brief.

4 MS. RICH: Well, costs and attorneys'
5 fees, Your Honor.

6 THE COURT: Right.

7 MS. RICH: Because we do feel that we
8 would prevail should the litigation proceed, and
9 then we would be entitled to taxable costs.

10 THE COURT: M-hm.

11 MS. RICH: But I believe the applicable
12 law allows us to request more than taxable costs in
13 the event of a voluntary dismissal.

14 THE COURT: Okay. All right. And I've
15 read the case that you cited, and certainly it's
16 borne out in that case. The case is a little old.
17 They're talking about the new rules of civil
18 procedure. Those new rules predated my arrival as
19 a lawyer. So I think they were late '70s. It
20 might be an early '80's case.

21 But I did read it, and it does point
22 out the irony of plowing ahead, and if the Thistles
23 prevailed, they would be entitled to their statu-
24 tory attorneys' fees and costs. But they do say
25 that there are situations where, if you look at the

1 criteria, that actual attorney fees can be awarded.
2 And anything further on that, Counsel? Any response
3 to Ms. Rich's position on that?

4 MR. SMESSAERT: Your Honor, if I may.
5 Actually the reply that we filed today goes
6 directly to the heart of this. The case -- in
7 fact, I think it's the Dunn case is pointed out in
8 the Bishop Court of Appeals case that is later and
9 specifically says that is in a case of dismissal
10 without prejudice.

11 And the Bishop case specifically says
12 that that is inapplicable in a case of dismissal
13 with prejudice for the reasons articulated in the
14 brief and, more importantly, that there's no
15 economic prejudice to the defendants. There's no
16 risk of relitigation. And in fact, here what the
17 defendants are requesting is that, well, if this
18 case moved forward, we would have the opportunity
19 to recover costs. There's no fee shifting agree-
20 ment anywhere, so it'd be statutory costs.

21 It would cost substantially more than
22 the actual costs just to get to that point. And it
23 would be shocking to think that at least something
24 in this case, given its nature and how it's
25 progressed, would not lead to an appeal.

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THE COURT: Okay.

MR. SMESSAERT: And I mean, so I would stand -- Again, I pointed out in the brief and I think it's very critical and completely undermines defendants' argument.

THE COURT: All right.

MS. RICH: Your Honor, if I may.

THE COURT: Sure.

MS. RICH: I don't object to counsel making the record he just made. I do object to the reply brief as being untimely and move to strike it.

THE COURT: Well, it would be untimely if I weren't going to make -- if I were going to make the decision today.

I do think that, for the record, this is a case that was imprudently brought by the School District. And I say that -- And I've thought about this, and I say it because I don't know if you -- other than you say these are elected officials, if this was a board of directors of a corporation and they're authorizing a corporation to bring a lawsuit with the corporation's money or if it were an individual, there is nobody in my mind who would spend the kind of money that was

1 spent here to pursue, at maximum, \$8,000.

2 There's a cost-benefit analysis that
3 anybody needs to go through. And --

4 MR. SMESSAERT: Your Honor, if I may?

5 THE COURT: Yes.

6 MR. SMESSAERT: I don't mean to interrupt,
7 but I think it's also important to note that the
8 District is and has been seeking removal of the
9 berm because the District's position is that you've
10 permanently impeded the natural flow of storm
11 water; and now we've had to dig a ditch across our
12 own property, and we have impacted now our
13 property, and your actions have forced us to do
14 that. But that's in addition because I know the
15 focus has been on \$8,000, but that is a remedy.

16 THE COURT: Well, it's a chicken and the
17 egg argument who did what. I mean who changed the
18 grading plan? Who filled maybe some wetlands with
19 brush and debris? Who did -- And so you know,
20 yeah, remediating the berm might also be there.

21 But regardless, and I say this having
22 been in a case where I represented a public body
23 and the amount of legal fees that they were arguing
24 about were slightly more than \$10,000. And I told
25 them they would spend more money fighting over

1 these than if they worked out a resolution, and
2 they had me go to trial. And sure enough, you
3 know, their net loss was a thousand dollars. They
4 won the case, and they could stand on principle and
5 say they won it, but they still came out a thousand
6 dollars behind.

7 And that's just not -- that's just
8 not something that anybody would do with their own
9 money. I think the attitude has been somewhat
10 cavalier. Now, I suspect there's some very
11 significant interrelationship, hard feelings
12 between Mr. Krause and Mr. Thistle. Maybe that
13 made this more difficult, but it never should have
14 gotten this far.

15 I don't remember a single case that
16 I've had in 13 years where I have urged the parties
17 because of the cost-benefit analysis to consider
18 looking at every option to resolve this. And it
19 just -- it was kind of shouting into the wind.

20 So what I'm going to do -- I think
21 that the Thistles raise a valid point. You know,
22 was this a hard-fought lawsuit? Absolutely. You
23 know, the suit was on the eve of trial. In fact,
24 I wish we had tried it last August, but I had a
25 case that I absolutely felt that I had to try

1 because it involved the possibility of shutting
2 down a business with 80 employees. That's not
3 meant to say this isn't important or anything like
4 that, but I did have to kind of take that as a
5 priority case.

6 There have been motions filed, there
7 have been briefs. It's a complex case for what's
8 at stake because of the watershed contribution had
9 to be figured out; what it was before, what it was
10 after, how did the Thistles' berm --

11 I am really seriously thinking that
12 attorneys' fees should be appropriate. I don't
13 know if I'll give the full amount. I'm going to
14 have Ms. Rich submit an affidavit along with the
15 fees and costs that have been paid. I'm going to
16 review it. I'll take a look at the most recent
17 submission, and I'll give a decision.

18 But I am dismissing the action with
19 prejudice today. I'm taking it off the calendar.
20 And I'll look for that affidavit with your
21 attorneys' fees and costs within -- by the 20th of
22 June. And I'll give you a decision within 30 days.

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

24 MR. THISTLE: Thank you, Your Honor.

25 MR. SMESSAERT: Are you going to give the

1 parties the opportunity to more extensively brief
2 the awarding of fees and costs?

3 THE COURT: You can do a brief objecting.
4 I'm going to limit it to five pages on each side.
5 This needs to be concluded.

6 I just -- I think that the school
7 board needs to answer to their electorate and say,
8 you know, this is -- Because actually, if it was
9 anything other than a school board, and that's what
10 makes me hesitate; if it's a municipality or school
11 board, in essence I'm looking at transferring
12 public funds to pay for litigation. And I've
13 thought of that, and it makes me want to cringe.

14 On the other hand, if I take away the
15 type of entities that are involved, you're still
16 talking about real money. You're talking about
17 real money that was spent on both sides that far
18 exceeded anything that was at stake. And I
19 wouldn't hesitate if it were a private corporation
20 to tack on some of the attorneys' fees and the
21 costs, and I'm not going to do it now just because
22 it's a school board.

23 I feel badly about it. I think the
24 money should be going to students or teachers or
25 whatever the situation is; but they made choices,

1 and now there are consequences. We'll see your
2 brief; and you can respond within -- I'll have your
3 response by the -- If Ms. Rich has hers in, ten
4 days after her response; and then I'll get a
5 decision out. Thank you.

6 MR. SMESSAERT: Your Honor?

7 THE COURT: Yes.

8 MR. SMESSAERT: I'm not clear on the
9 timing.

10 THE COURT: Well, she's got to have hers
11 in not later than the 20th.

12 MS. RICH: That's my brief and my affidavit?

13 THE COURT: Right.

14 MR. SMESSAERT: Brief and affidavit.

15 THE COURT: Five pages. Your affidavit
16 and with stating what your bills are, how many
17 years you've been a lawyer, experience, things of
18 that nature. And then you have ten days to
19 respond, and I -- you know, I will take a look at
20 it. I was in private practice a long time. I
21 think I have a pretty good feel for the costs of
22 litigation.

23 And you know, one thing I want to be
24 perfectly clear, I don't hold the lawyers responsible
25 in this regard. I think the advice given right off

1 the bat was this is probably going to cost more
2 than it's worth. And the school board plowed ahead
3 with it, and I think that might get into that
4 interpersonal play that we have here.

5 So that takes care of it. It's
6 dismissed. Thank you.

7 MS. RICH: Thank you, Your Honor.

8 MR. SMESSAERT: Thanks.

9 THE COURT: Would you submit an order of
10 dismissal also with that? Because it's dismissed
11 subject to my ruling on the attorneys' fees.

12 MS. RICH: You want me to submit that
13 order, Your Honor?

14 THE COURT: Please do.

15 MS. RICH: Okay.

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

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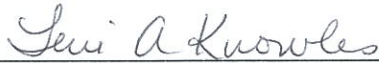
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C E R T I F I C A T E

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 & Carla G. Thistle, 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, RMR, CRR
 Circuit Court Reporter