

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CASE NO: 1:22-CV-00031-CRH

Charles Walen, an individual; and Paul)
Henderson, an individual.)

Plaintiffs,)

vs.)

DOUG BURGUM, in his official capacity)
as Governor of the State of North)
Dakota; ALVIN JAEGER in his official)
Capacity as Secretary of State of the)
State of North Dakota,)

Defendants,)

and)

The Mandan, Hidatsa and Arikara)
Nation, Cesar Alvarez, and Lisa Deville)

Defendant-Intervenors.)

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION REQUESTING STAY**

Plaintiffs Charles Walen and Paul Henderson submit this Memorandum in Opposition to Defendants' Motion Requesting Stay of Order Regarding Discovery Dispute Pending Decisions on Appeal and Request for Expedited Decision. Because Defendants have failed to demonstrate the likelihood that they will succeed on the merits of their appeal, the Motion Requesting Stay should be denied.

INTRODUCTION AND FACTUAL BACKGROUND

This dispute arises out of Plaintiffs' repeated attempts to obtain copies of transcripts from public legislative hearings in the possession of Defendants Doug Burgum and Alvin Jaeger. Defendants object to producing the transcripts from the public hearings claiming they are "materials prepared in anticipation of litigation and for use at trial." Simply put, transcripts of public hearings are not attorney work product materials, and they are not privileged.

The transcripts contain the legislative record of committee meetings and floor debate of the Legislative Redistricting Committee which are at issue in this case. There is no dispute the transcripts are relevant to the case, as they contain all the facts and evidence considered by the Legislative Assembly for implementing the at-issue subdistricts. The facts and evidence considered by the Assembly, are wholly reflected in the transcripts, and the transcripts from these public hearings are dispositive to the case because they contain all facts and evidence the Court must weigh to determine whether the Legislative Assembly violated the Equal Protection Clause.

The transcripts at issue arise from the 2021 hearings. This action did not commence until 2022. The mental impressions, conclusions, strategies, analyses or input from Defendants' Counsel are not reflected in any of the transcripts. Rather, the transcripts only contain testimony and discussions from public legislative hearings that occurred a year before the commencement of this lawsuit and the involvement of Defendants' Counsel.

On December 12, 2022, the Court held a discovery conference with the Parties and allowed them to make their arguments. Subsequent to the discovery conference, the Court

allowed the Parties to submit position paper setting forth the law and argument in support of their position. On December 23, 2022, Defendants submitted a position paper setting forth their argument why they believed the 2021 Legislative Redistricting Committee's transcripts constituted attorney work product. On January 3, 2023, this Court issued its Order concluding the transcripts are not protected under the attorney work product doctrine.

LAW AND ARGUMENT

In deciding whether to grant a motion to stay an order pending appeal, the court considers the following four factors: (1) the likelihood of the movant's success on the merits of the appeal; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of the stay would substantially injure the non-moving party; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Eighth Circuit explained that, in considering the four factors, the likelihood of success on the merits is most significant. S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992) (denying a stay pending appeal when the moving party has failed to demonstrate the likelihood that it will succeed on the merits).

I. Defendants have failed to demonstrate they will succeed on the merits.

The most significant factor in determining whether Defendants' motion for stay should be granted is whether they have demonstrated a likelihood on success on the merits. Id. Defendants have failed to set forth any rational basis to establish that the transcripts are protected attorney work product. Therefore, Defendants' Motion for Stay should be denied.

Defendants do not dispute the transcripts from these public legislative hearings contain the facts, testimony, and evidence that are relevant to the claims and defenses in this case. These transcripts are not protected attorney work product, and as such, Defendants are required to produce them transcripts. See Biben v. Card, 119 F.R.D. 421, 428-29 (W.D. Mo. 1987) (holding that transcripts obtained specifically for litigation are not subject to protection or privilege).

Rather than present any new arguments supporting their position, Defendants simply regurgitate the same erroneous arguments that were previously rejected by this Court. In their Brief, the Defendants cite the same cases that were distinguished and rejected by this Court in its Order. Defendants fail to cite any additional caselaw to support their argument or to contradict the cases relied upon by the Court in its Order. Most importantly, the Defendants continue to fail to present any rational argument that the transcripts at issue reveal the mental impressions or strategies of Defendants' counsel.

The Defendants' chief argument is one of semantics arguing the Court erred in stating, "The recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." The Defendants' argument completely misses the Court's point. The Court was distinguishing the recordings of conversations in Riddell, with the recordings of the Legislative Assembly's proceedings at dispute in this case. The Court's statement is correct and does not form the basis for any error that would cause its opinion to be overturned.

II. The Defendants will not be irreparably harmed absent a stay.

The Defendants fail to establish they will be irreparably harmed if the stay is not

granted. In support of their position on this factor, Defendants cite Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund, for the proposition that appeals of pre-trial discovery orders are permitted “only in exceedingly narrow circumstances, such as when the discovery order would compel the production of allegedly **privileged information**.” 425 F.3d 1087, 1093 (8th Cir. 2005) (emphasis added). The Borntrager Court further stated that “pre-trial discovery orders are almost never immediately appealable.” Id. (citing Tenkku v. Normandy Bank, 218 F.3d 926, 927 (8th Cir.2000)).

The Borntrager opinion does not support Defendants’ argument and, instead supports denial of Defendants’ Motion for Stay. The Defendants are not alleging the transcripts of public proceedings contain “privileged information” which, if disclosed, would support an irreparable harm argument. To the contrary, Defendants acknowledge the transcripts are readily available to the public. There is no irreparable harm in disclosing public documents.

This entire dispute is over Defendants request that Plaintiffs pay half the costs of the transcripts. Defendants previously offered to produce them if they were paid half the costs. Defendants’ prior position demonstrates there is no “privileged” information that would cause irreparable harm to the Defendants if disclosed.

III. The issuance of the stay would substantially injure the Plaintiffs.

A stay and further delay of the production of the transcripts would substantially injure the Plaintiffs. Plaintiffs have requested the transcripts from the Defendants since the outset of this litigation. The transcripts will be the critical piece of evidence for the Plaintiffs’ summary judgment motion. The summary judgment deadline is February 28,

2023. Any stay would prevent Plaintiffs from having access to the transcripts to support their summary judgment motion, which is the real reason Defendants continue to refuse to produce them.

Defendants again contend the Plaintiffs can pay to obtain their own transcripts. Two individuals who have arguably had their constitutional rights violated by the State should not have to incur significant costs, especially when a party is already in possession of the relevant documents. In its Order, this Court agreed the Plaintiffs should not be required to bear the cost of transcripts that already have been obtained by the State. Courts have routinely found that the Federal Rules of Civil Procedure require a producing party to bear its own costs to produce discoverable materials. See e.g., Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (“[u]nder the Federal Rules of Civil Procedure, the presumption is that the responding party must bear the expense of complying with discovery requests.”).

IV. Public interest favors denying the stay.

Defendants erroneously argue their could be no conceivable harm in staying production because the video recordings are publicly available. Contrary to the Defendants’ argument, the transcripts of the Legislative proceedings is the best evidence that will assist the Court in deciding this case. Thus, public policy supports having the case decided on the best evidence.

In the May 26, 2022, Order denying Plaintiffs’ Motion for a Preliminary Injunction, this Court highlighted the importance of the legislative record:

What the record contains today are isolated comments from legislators during the reapportionment process that suggest race motivated the decision to subdivide two house districts. We do not know whether those sentiments outweighed the other race-neutral criteria that lawmakers considered over more than 40 hours of committee hearings and floor debates . . . The limited record before us cannot satisfy the difficult burden to prove that race predominantly motivated the subdivision of Districts 4 and 9.

Doc. #37 at 7-8. Production of the transcripts in Defendants' possession would put all the relevant facts, evidence, and testimony directly before the Court. The transcripts would eliminate any doubt as to what exactly the Legislative Assembly considered when it enacted the challenged subdistricts. The transcripts are not just important to Plaintiffs' claims, they are substantial to the Court's consideration of the outcome of this case, which is in the public's interest.

CONCLUSION

The four factors this Court must consider in deciding Defendants' Motion for Stay all weigh in favor of denial of their Motion. Most importantly, Defendants have failed to establish a likely success on the merits. For the foregoing reasons, Defendants' Motion for Stay should be denied.

Respectfully submitted this 13th day of January, 2023.

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