UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' APPEAL

Pursuant to D.N.D. Civ. L. R. 72(D)(2), Plaintiffs Charles Walen and Paul Henderson submit this Memorandum in Response to Defendants' Appeal of the Magistrate Judge Order Regarding Discovery Dispute. Because the Magistrate Judge's order was not clearly erroneous or contrary to the applicable law, the Defendants' appeal 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.

It is important to set forth the factual background for context of the present appeal. Plaintiffs filed their Complaint against the Defendants on February 16, 2022. (Doc. #1). On March 7, 2022, Defendants' counsel, David Phillips, called Plaintiffs' counsel and requested an extension of time to answer the Complaint because the State was in the process of preparing transcripts of the underlying legislative hearings. See Ex. A (Affidavit of Attorney Paul Sanderson). Mr. Sanderson indicated to Mr. Phillips that Plaintiffs had been considering preparing transcripts as well and inquired if the State would provide copies of the transcripts when received. Id. Mr. Phillips stated he would provide copies of transcripts when received. Id. Subsequently, during the Parties' Rule 26(f) scheduling conference on June 9, 2022, Plaintiffs' counsel asked Mr. Phillips when he expected to produce the transcripts. Id. Mr. Phillips responded that he would produce the transcripts if a party made a request for them. Id. Plaintiffs' counsel stated during the telephone conference that Plaintiffs were requesting copies of the transcripts. Id.

On December 5, 2022, Plaintiffs' counsel wrote to Mr. Phillips in an attempt to resolve the

dispute without the need for a Rule 37 motion. Id. The letter referenced Mr. Phillips' agreement to produce the transcripts. Id. It also set forth the law explaining why transcripts of public hearings are not attorney work product. Id. On December 7, 2022, the Parties held a Rule 37 meet and confer conference. Id. During the conference, Mr. Phillips all but abandoned the work product argument and explained the Attorney General's office would turn over the transcripts if Plaintiffs agreed to pay for half of the costs. Id. Mr. Phillips sent an e-mail to counsel the following day stating:

> Counsel,
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> In follow-up to our meet and confer yesterday, the total cost of the transcripts at issue in our discovery dispute with Plaintiffs was $24,181.45.
>
> I have a breakdown of the costs by individual invoice number, but I do not yet have a breakdown by cost per specific transcript/hearing. I have requested that the Attorney General's office provide that information and I will pass it along when I get it. Once we have that information, Plaintiffs could select which transcripts they wish to pay half of the cost of, if they choose to do so.

Id. On December 12, 2022, Plaintiffs' counsel sent a letter to Mr. Phillips explaining that the rules of civil procedure do not require a party to pay an opposing party to produce relevant documents. Id.

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 papers setting forth the law and argument in support of their position. On December 23, 2022, Defendants submitted a position paper setting forth their argument that the 2021 Legislative Redistricting Committee's transcripts constitute attorney work product. On December 29, 2022, Plaintiffs submitted their position paper explaining that the transcripts are not attorney work product and Plaintiffs have a substantial need and could not obtain the transcripts without undue hardship. On January 3, 2023, the Magistrate Judge issued an Order concluding

the transcripts are not protected under the attorney work product doctrine. (Doc. 77).

LAW AND ARGUMENT

Where a party appeals a Magistrate Judge's non-dispositive order on a discovery dispute, the district court is to apply the clearly erroneous standard of review under D.N.D. Civ. L. R. 72(D)(2). Auto Club Grp. v. Wimbush, No. 3:05-CV-105, 2007 WL 9724048, at *1 (D.N.D. May 8, 2007). An order is clearly erroneous when factual findings are unsupported by substantial evidence, where an order is based on an erroneous conception of the applicable law, United States v. Motor Vessel Gopher State, 614 F.2d 1186, 1187 (8th Cir. 1990), or when the court is left with the definite and firm conviction that a mistake has been committed. McAllister v. United States, 348 U.S. 19, 20 (1954).

I. The Magistrate Judge's conclusion that transcripts of public legislative proceedings are not attorney work product was not clearly erroneous.

The transcripts do not reveal Defendants' attorneys' mental impressions and strategies. Additionally, the transcripts merely document public proceedings and do not contain any information that is privileged or protected. The Magistrate Judge's conclusion that transcripts of public legislative hearings are not protected under the work product doctrine is not erroneous.

The work product doctrine was created to ensure that an attorney may properly prepare his client's case with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Hickman v. Taylor, 329 U.S. 495, 510–511 (1947). It is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and protects (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that other party's representative, protecting the mental impressions, conclusions, or legal theories of a party's attorney concerning the litigation. Fed.R.Civ.P. 26(b)(3). The paramount concern serving as the

foundation upon which the work product doctrine rests is the preservation of an attorney's mental impressions, conclusions, opinions, and litigation strategies. Hickman, 329 U.S. at 510–11.

The work product doctrine does not extend to documents in an attorney's possession that were prepared by a third party in the ordinary course of business and that would have been created in essentially similar form irrespective of any litigation anticipated by counsel. In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002, 318 F.3d 379, 384–85 (2d Cir. 2003). The Advisory Committee Note to Rule 26(b)(3) said in part: "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." See also 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024 at p. 343–46 (2d ed.1994) (noting there is no work–product immunity for documents prepared in the regular course of business rather than for purposes of the litigation); Solis v. Food Emps. Lab. Rels. Ass'n, 644 F.3d 221, 232 (4th Cir. 2011) (stating materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes do not constitute documents prepared in anticipation of litigation protected by work product privilege).

The Magistrate Judge properly concluded the transcripts of public legislative hearings were not protected from disclosure under the work product doctrine. As an initial matter, there is no dispute that the underlying video recordings of the legislative hearings were not prepared in anticipation of litigation and, as such, the recordings of the legislative hearings themselves are not protected by the work product doctrine. See 8 Federal Practice and Procedure § 2024 at p. 343–46; see also Solis, 644 F.3d at 232. The Magistrate Judge also correctly noted that the legislative hearing transcripts at issue do not reveal Defendants' attorneys' mental impressions, conclusions,

or legal strategies. See Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994) (explaining the transcription process is entirely devoid of analysis or synthesis, thus it is beyond the work product immunity). Absent any intrusion into Defendant attorneys' mental impressions, conclusions, opinions, and litigation strategies, there is no basis for invoking the attorney work product protection. See Hickman, 329 U.S. at 510–11; see also Simon v. G.D. Searle & Co., 816 F.2d 397, 402 (8th Cir. 1987) (holding the purpose of the work product doctrine—that of preventing discovery of a lawyer's mental impressions—is not violated by allowing discovery of documents that do not incorporate a lawyer's thoughts); Kushner v. Buhta, 322 F.R.D. 494, 498 (D. Minn. 2017) (explaining the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions).

The Defendants' chief argument is that the Magistrate Judge erred in concluding "[t]he recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." Contrary to Defendants' argument, the Judge's conclusion is factually correct. The Judge was analyzing the underlying recordings of the legislative hearing, which is the appropriate analysis in considering work product protection. See 8 Federal Practice and Procedure § 2024 at p. 343–46; see also Solis, 644 F.3d at 232. The video recordings of the legislative hearings were created to memorialize public proceedings and, therefore, do not constitute attorney work product. See Simon, 816 F.2d at 401 (holding materials assembled in the ordinary course of business or for other nonlitigation purposes are not protected from disclosure under the work product doctrine). Defendants' argument that the transcripts constitute work product because they prepared them in anticipation of litigation is an erroneous view of the law. See In re Grand Jury Subpoenas, 318 F.3d at 384–85 (explaining documents do not become work product simply because they are in an attorney's possession).

The Magistrate Judge properly analyzed the law cited by the Parties regarding whether transcripts are discoverable. See Riddell, 158 F.R.D. at 559–60; see also 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). The Judge cited the Riddell Court for the proposition:

> [T]he collection of evidence, without any creative or analytic input by an attorney or his agent, does not qualify as work product. . . . "At its core, the work-product doctrine exists to shelter the attorney's preparation and analysis of the case. . . ." [T]he transcription process . . . is entirely devoid of analysis or synthesis and so is beyond the work product doctrine.

Riddell, 158 F.R.D. at 559. In Biben, the defendants obtained transcripts of testimony given before the Securities Exchange Commission. 119 F.R.D. at 423. During the discovery process, the plaintiffs sought to obtain copies of the transcripts through requests for production. Id. The defendants objected to disclosure on the grounds that the transcripts were prepared as litigation materials or otherwise were attorney work product. Id. at 428. The Biben Court rejected the defendants' assertion of privilege and required disclosure of the transcripts, stating the work product rule exists to protect written statements, private memoranda, and personal recollections prepared by an adverse party's counsel in the course of their legal duties and the transcripts simply do not fit this description and are, therefore, not shielded from discovery under the attorney work product rule. Id. at 428-29.

The Magistrate Judge's conclusion that the public legislative hearing transcripts were not protected under the work product doctrine was not clearly erroneous or contrary to law. Accordingly, Defendants' appeal should be denied.

II. The Magistrate Judge's conclusion that Plaintiffs would be substantially burdened by bearing the cost of obtaining second transcripts was not clearly erroneous.

The Magistrate Judge held that, even if the transcripts were considered work product, plaintiffs established they would be substantially burdened by bearing the cost of obtaining second

transcriptions." (Doc. 77, p. 8). Defendants argue this holding is clearly erroneous because it lacked evidentiary support.

The Magistrate Judge found the Plaintiffs are private citizens who reside in the subdistricts and have alleged a violation of their constitutional rights because the redistricting resulted in illegal gerrymandering. The Judge also cited Federal Rule of Civil Procedure 1, which directs the parties and the court to work toward the inexpensive determination of every case. The Judge concluded these two private citizens should not be required to incur the substantial cost of obtaining transcripts when such transcripts are already in the possession of the Defendants.

Defendants continue to argue they should not be required to produce the transcripts because the recordings of the proceedings are public and available to Plaintiffs. However, federal courts have routinely rejected arguments against disclosure which claim that such transcripts are publicly obtainable. See Riddell, 158 F.R.D. at 557 (stating the fact that information is publicly available does not place it beyond the bounds of discovery).

There is also no dispute as to Plaintiffs' substantial need for the transcripts. 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, which is due February 28, 2023. 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 substantial to Plaintiffs' claims, they are substantial to the outcome of this case.

The Magistrate Judge's holding that plaintiffs would be substantially burdened by bearing the cost of obtaining second transcripts was not clearly erroneous.

III. The Magistrate Judge's rejection of Defendants' request to require Plaintiffs' to share the costs of the transcripts was not clearly erroneous.

Lastly, Defendants argue the Magistrate Judge's order denying their request for cost sharing was clearly erroneous. The Judge correctly rejected the Defendants' proposal when they failed to provide any good cause to require Plaintiffs to bear the cost of document production.

The Magistrate Judge correctly found federal courts routinely hold that the Federal Rules of Civil Procedure require a producing party to bear its own costs to produce discoverable materials. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (explaining under the Federal Rules of Civil Procedure, the presumption is that the responding party must bear the expense of complying with discovery requests); Superior Indus., LLC v. Masaba, Inc., 2011 WL 13138106 (D. Minn. 2011) (finding that a party, which advised it would only produce documents if the requesting party paid the costs of production, was required to pay the requesting party's costs and fees for bringing a motion to compel); Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474, 487 (D.S.D. 2012) (noting the Rules require parties to bear their own costs to produce discoverable documents); Minter v. Wells Fargo Bank, N.A., 286 F.R.D. 273, 277 (D. Md. 2012) (explaining the general presumption is that the producing party should bear the cost of responding to properly initiated discovery requests); Barnes v. Alves, 10 F. Supp. 3d 391 (W.D.N.Y. 2014) (noting the federal rules do not require the requesting party to share the costs of production with the producing

party).

The Judge noted that it may for good cause order an allocation of expenses between the Parties, but Defendants made no showing of good cause. The Defendants provided no justification why the Judge should depart from the general rule that a producing party bears the cost of production. Absent justification establishing good cause, the Judge's conclusion rejecting Defendants' proposed cost sharing was not clearly erroneous.

CONCLUSION

For the foregoing reasons, Defendants' appeal should be denied.

Respectfully submitted this 24th day of January, 2023.

EVENSON SANDERSON PC
Attorneys for Plaintiffs
1100 College Drive, Suite 5
Bismarck, ND 58501
Telephone: 701-751-1243

By: */s/ Paul Sanderson*
Paul R. Sanderson (ID# 05830)
psanderson@esattorneys.com
Ryan J. Joyce (ID# 09549)
rjoyce@esattorneys.com

Robert W. Harms
Attorney for Plaintiffs
815 N. Mandan St.
Bismarck, ND 58501
Telephone: 701-255-2841

By: */s/ Robert W. Harms*
Robert W. Harms (ID# 03666)
robert@harmsgroup.net