

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

v.

No. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

**PLAINTIFFS' RESPONSE TO THE ASSEMBLY'S NOTICE FILED IN SUR-REPLY
TO THE PLAINTIFFS' MOTION TO COMPEL DEPOSITION AND PRODUCTION OF
DOCUMENTS BY ASSEMBLY SPEAKER ROBIN J. VOS**

On April 26, 2019, Plaintiffs served deposition subpoenas on Adam Foltz and Tad Ottman, both of whom the Wisconsin State Assembly listed as trial witnesses on its Initial Disclosures. This should come as no surprise; both have testified at trial multiple times regarding Act 43, and the Assembly will call on them to testify again at the trial in July. In addition, Plaintiffs recently discovered through the testimony of the Assembly's expert, Professor James Gimpel, that Mr. Foltz was deeply involved in assisting Prof. Gimpel in preparing his expert report. That same day, the Assembly decided that Plaintiffs' subpoenas to Mr. Foltz and Mr. Ottman justified filing a sur-reply to Plaintiffs' motion to compel the deposition of Assembly Speaker Robin Vos, styled as a Notice (dkt. 272, hereafter, the "Notice"). The Assembly's Notice is both superfluous and irrelevant; it essentially repeats arguments the Assembly made in its earlier brief, and adds nothing material to the Assembly's opposition to the Plaintiffs' motion, which should be granted.

I. The Assembly's Initial Disclosures on remand identified Adam Foltz and Tad Ottman as trial witnesses likely to have discoverable information.

The Assembly served its Initial Disclosures under Fed. R. Civ. P. 26(a)(1) on December 13, 2018. *See* Third Declaration of Ruth Greenwood (April 30, 2019) (“Third Greenwood Decl.,” attached hereto as Exhibit 1). In its Initial Disclosures on remand, the Assembly identified only two individuals by name as likely to have “discoverable information that the Assembly may use to support its defenses” at trial: Adam Foltz and Tad Ottman. *Id.* at 2. Consequently, on April 26, as part of Plaintiffs preparation for the July trial, they issued subpoenas to Mr. Foltz and Mr. Ottman to produce any previously undisclosed documents and to testify at deposition. Though both Mr. Foltz and Mr. Ottman have been deposed multiple times about the 2011 redistricting process, their testimony has revealed somewhat different information each time.

Moreover, as the Assembly's expert Prof. Gimpel explained in his deposition on April 18, 2019, much of the knowledge he has of the 2011 redistricting process came from approximately 19 hours of telephone or in-person meetings he had with Mr. Foltz. In those meetings, Prof. Gimpel described how both he and Mr. Foltz ran a series of reports on the level of compliance of Act 43 with traditional redistricting criteria. For example, Prof. Gimpel testified that Mr. Foltz described the drafting of Act 43 as involving considerations of core-retention and consistency with prior districts, concepts that Mr. Foltz has not previously described as being part of the criteria he considered as he drew the Assembly districts in Act 43. If Mr. Foltz is now planning to offer that testimony at trial, Plaintiffs need to understand the scope of the evidence, and why it has not previously been described by Mr. Foltz in his many depositions in this case.

Clearly, Plaintiffs must take discovery of Mr. Foltz's and Mr. Ottman's likely testimony in advance of the July trial, particularly given the U.S. Supreme Court's determination that Plaintiffs must obtain and present certain evidence at the trial on remand (district-specific intent and injury)

that is different than what Plaintiffs presented and provided at the trial in May 2016 (state-wide intent and injury). This discovery is no substitute for discovery of Speaker Vos, nor is it intended to be. It is, instead, an attempt to discover in advance of trial the facts to which Mr. Foltz and Mr. Ottman intend to testify at trial, and documents relevant to the issues at trial.

II. The Notice repeats arguments the Assembly already has presented to the Court.

The main thrust of the Notice simply repeats an erroneous argument the Assembly made in earlier briefing and before this Court: that the information and documents Plaintiffs seek from Speaker Vos may be found through other means of discovery, namely, Mr. Foltz and Mr. Ottman. *See* dkt. 272, at 1; *see also* Speaker Robin J. Vos’s Opp’n to Pls.’ Mot. to Compel Dep. & Produc. of Docs., dkt. 265, at 26-30. But as Plaintiffs explained in their Reply Brief, the testimony of Mr. Foltz is no substitute for that of Speaker Vos, noting that “Mr. Foltz himself has testified that he was not the person making decisions in the regional or individual district meetings.” Pls.’ Reply Br. in Supp. of Mot. to Compel Dep. & Produc. of Docs., dkt. 268, at 13. Plaintiffs further pointed out that the discovery they seek of Speaker Vos is not duplicative of the discovery they seek from Mr. Foltz (or Mr. Ottman, for that matter) because “[i]n addition to the[] problems with the testimony of Mr. Handrick and Mr. Foltz, none of the other witnesses connected to the legislature can testify to the district-specific partisan intent for the 29 challenged Assembly districts because the evidence shows that the decision-maker on the final district boundaries was Speaker Vos.” *Id.*

Simply because Plaintiffs’ document requests to Mr. Foltz and Mr. Ottman are identical to their requests to Speaker Vos does not mean that Mr. Foltz and Mr. Ottman possess the same documents and information as Speaker Vos. Since the Assembly apparently *never* has gathered any documents or information from Speaker Vos in response to subpoenas that Plaintiffs have served on the Assembly and Senate, unless the Court compels the production from Speaker Vos,

Plaintiffs will never know if Speaker Vos has additional responsive materials that Mr. Foltz and Mr. Ottman did not possess and therefore did not produce.

Dated: April 30, 2019.

Respectfully submitted,

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