

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

<p>Charles Walen, an individual, et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>Doug Burgum, in his official capacity as Governor of the State of North Dakota, et al.,</p> <p style="text-align: center;">Defendants,</p> <p style="text-align: center;">and</p> <p>Mandan, Hidatsa, & Arikara Nation, et al.,</p> <p style="text-align: center;">Defendant-Intervenors.</p>	<p>ORDER</p> <p>Case No. 1:22-cv-31</p>
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Defendants Doug Burgum, in his official capacity as Governor of the State of North Dakota, and Michael Howe, in his official capacity as Secretary of State of the State of North Dakota (the “State”), appeal a discovery order of United States Magistrate Judge Alice R. Senechal. Doc. No. 85. Plaintiffs Charles Walen and Paul Henderson oppose the appeal. Doc. No. 91. For the reasons below, the discovery order is affirmed, and the appeal is denied.

I. BACKGROUND

This case involves the redrawing of certain North Dakota legislative districts pursuant to the legislative redistricting plan in House Bill 1504. Walen and Henderson allege that race was the predominate factor behind the redistricting legislation, resulting in illegal gerrymandering, in violation of the Equal Protection Clause of the Fourteenth Amendment. Doc. No. 1.

Shortly after litigation began, the State arranged to have transcripts made of the video recordings of thirteen legislative committee meetings and two legislative floor sessions. Doc. No.

81. These committee meetings and floor sessions were open to the public, and the video recordings of the same are publicly available at the North Dakota Legislature’s website. Id. From the outset, Walen and Henderson asked the State for copies of the transcripts. But the State refused, arguing the transcripts were privileged and protected under the work product doctrine.

After working with the parties through status conferences and position papers, Judge Senechal issued a written order directing the State to disclose the transcripts to Walen and Henderson. Doc. No. 77. Judge Senechal specifically concluded that (1) the transcripts were not protected work product; (2) even if the transcripts were work product, Walen and Henderson would be substantially burdened by bearing the cost of obtaining second transcriptions; and (3) the State did not show good cause to require Walen and Henderson to bear the cost of production of the transcripts. Id.

II. LAW AND DISCUSSION

Under Federal Rule of Civil Procedure 72(a) and District of North Dakota Civil Local Rule 72.1(B), a magistrate judge is permitted to hear and determine non-dispositive matters in a civil case. Any party may appeal the determination to the district court judge assigned to the case who “must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); see also D.N.D. Civ. L. R. 72.1(D)(2). “A district court conducts an ‘extremely deferential’ review of a magistrate judge’s ruling on a nondispositive issue.” Carlson v. BNSF Ry. Co., No. 19-CV-1232, 2021 WL 3030644, at *1 (D. Minn. July 19, 2021). As such, a magistrate judge’s decision will not be disturbed unless it is “clearly erroneous” or “contrary to law.” See Fed. R. Civ. P. 72(a).

On appeal, the State challenges Judge Senechal’s three conclusions. After careful review of the case law and the parties’ arguments, these conclusions are not clearly erroneous or contrary

to law. As to the work product conclusion, Judge Senechal considered the controlling authority and precedent regarding ordinary work product and opinion work product. Doc. No. 77, p. 4 (citing Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000)). The State asserts that Judge Senechal erred in finding that, “The recordings of the Legislative Assembly’s proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings.” Id. at 7. This finding is indisputable on the record—the video recordings were created to memorialize the public proceedings prior to the commencement of litigation. The issue is more appropriately framed as whether the act of transcribing the already public video and audio recordings transforms the transcripts into protected work product. That it does not is apparent. The purpose of the work product doctrine is “to prevent unwarranted inquiry into the files and mental impressions of an attorney and recognizes that it is essential that a lawyer work with a certain degree of privacy[.]” Simon v. G.D. Searle & Co., 816 F.2d 397, 400 (8th Cir. 1987) (quotations and citations omitted). Nothing in the act of transcribing represents a file or mental impression of an attorney or the attorney’s staff. It is a mechanical act involving no exercise of judgment or discretion. The Court is not “left with the definite and firm conviction that a mistake has been committed,” Dixon v. Crete Med. Clinic, P.C., 498 F.3d 837, 847 (8th Cir. 2007), and the determination that the transcripts are not protected by the work product doctrine is not clearly erroneous or contrary to law.

The two remaining conclusions in the discovery order are also neither clearly erroneous nor contrary to law. As Judge Senechal concluded, on these facts, there is no reason for Walen and Henderson (two individuals claiming a violation of their constitutional right) to bear the cost of obtaining a second set of transcripts. And the “substantial need” for the transcripts is established, given the importance of having the full and complete legislative record available for the efficient

presentation of the case. Judge Senechal's conclusions are neither clearly erroneous nor contrary to law.

III. CONCLUSION

The Court has carefully reviewed the discovery order, the parties' filings, the applicable law, and the entire record. Judge Senechal's discovery order is not clearly erroneous or contrary to law. Accordingly, the discovery order (Doc. No. 77) is **AFFIRMED**, and the State's appeal (Doc. No. 85) is **DENIED**. The State is **ORDERED** to produce the transcripts to Walen and Henderson within two (2) business days of the date of this order. Given this order, the State's appeal of Judge Senechal's order denying a stay (Doc. No. 94) is also **DENIED**.

IT IS SO ORDERED.

Dated this 6th day of February, 2023.

/s/ Ralph R. Erickson
Ralph R. Erickson, Circuit Judge
Eighth Circuit Court of Appeals

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court