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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

CASE NO.: 18-cv-80771-RLR

ROBERT W. OTTO, et al.,)
)
Plaintiffs,)
v.)
)
CITY OF BOCA RATON, et al.,)
)
Defendants.)
/

September 12, 2018

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EXCERPT OF HEARING PROCEEDINGS
BEFORE THE HONORABLE BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On behalf of the Plaintiffs:

LIBERTY COUNSEL
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BY: ROGER K. GANNAM, ESQ.
BY: HORATIO G. MIHET, ESQ.

1 APPEARANCES CONTINUED:

2 On behalf of the County:

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8 On behalf of the City:
9 (Telephonic appearance)

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1 (Thereupon, following excerpt proceedings were held:)

2 THE COURT: I think the law is very, very clear that
3 questions of privilege under Rule 501 in a federal case are
4 resolved on federal law and not on state law.

5 The state law may inform at certain levels, but
6 certainly the federal law of work product and attorney/client
7 privilege is robustly developed and that would be the law that
8 would be applied in this case.

9 Let me address each of the points, then, in turn and I
10 guess I will do it backwards since it is fresher in my mind. I
11 do believe that the Plaintiff is entitled to do some discovery
12 about the process by which the Defendants reviewed documents
13 and produced documents for all the reasons that Mr. Gannam
14 said.

15 And I think they are allowed to probe the process by
16 which what was searched for? Where do you keep your records?
17 Well, did you look in all the places that you keep your
18 records? Standard stuff pretty much in 30(b)(6) in document
19 depositions.

20 So the location of records. The process by which the
21 searches were done. What terms were used to search and things
22 like that. I do not know that anybody really objects to that
23 other than burden and I will get to that in a second.

24 In terms of, you know, why didn't you search? Why did
25 you search? If the answer is privileged, then the answer is

1 privileged. Then the parties should lodge the privilege
2 objection at the time.

3 Under our local rule the Plaintiff should, at that
4 point, continue to ask the necessary questions to try to
5 establish whether or not a privilege exists.

6 And as we know, if you study the federal law, just
7 because an attorney does something does not make it privileged.
8 It has to be done for the purpose of providing legal counsel
9 intended to remain confidential, et cetera.

10 So my inclination as -- so as to those sorts of why
11 questions, I am inclined to allow -- I am going to allow those
12 questions to be asked subject to objection.

13 And then, subject to if the Plaintiff believes that
14 the objection is not well-founded or there is no basis for
15 privilege, they can ask the followup questions to try to
16 establish the privilege and our local rule actually goes
17 through how you do that.

18 So I am not ruling that the county has to answer those
19 followup questions if they believe they are objectionable or
20 that the city has to answer the followup questions if they
21 believe they are objectionable, but I am just advising everyone
22 that under the local rule that is the process that should be
23 followed. And that to the point Miss Fahey made of the federal
24 law privilege, both work product and the attorney/client
25 privilege will apply.

1 As to the burden, I did hear kind of implied in Miss
2 Fahey's argument the concern about burden that you have
3 produced a lot of documents. And how do you prepare a witness
4 when you produce thousands and thousands of pages of documents
5 when the Plaintiff could pull out document 712 and go where did
6 you find this?

7 So if that is the concern I hear that concern. I
8 don't anticipate -- as Mr. Gannam said, he's only got seven
9 hours. I do not think he is going to spend a lot of time going
10 document by document.

11 But I do think it would be helpful and I would order
12 that as to topic number 12 that the Plaintiff provide a more
13 detailed categorization of the particular categories of
14 documents or areas of documentation that you are going to
15 request with a goal to minimize the burden that we just talked
16 about.

17 I want the Plaintiff to get the deposition that they
18 are entitled to. I want them to have a witness who can answer
19 the questions that they want to ask, but I want the county to
20 have a fair chance to prep their witness and not waste a lot of
21 time prepping for topics that are not going to be covered.

22 So I will direct the parties to just meet and confer
23 in addition over Paragraph 12, including the city. Miss
24 Flanagan I keep forgetting you because you are not here, but
25 including the city.

1 And Mr. Gannam, I will just ask you to try to narrow
2 that down. Try to focus them. I suspect these are not the
3 type of deposition questions where, you know, surprising the
4 other side with that question is really part of the strategy.

5 So in as much detail as you are comfortable, advise
6 the other parties the general areas you are going to ask about
7 so that you have a witness who can answer your questions.

8 Okay. So that my order as to number 12.

9 I am going to rule on any objections based upon a
10 transcript that is developed, but I will order a narrowing of
11 the request. So I guess I am overruling the objection in part
12 and sustaining the objection in part as to number 12.

13 As to number 8 again, I am not going to rule in a
14 vacuum on hypothetical questions as to the prospective
15 application of the ordinance. How will you do this in the
16 future?

17 I am not sure those are proper questions. I am not
18 sure that the cases that have been cited support wide ranging
19 hypotheticals about will you try to enforce it if we say this
20 or will you try to enforce it if we say that?

21 But I am not comfortable ruling on those in the
22 abstract. I would like to see those questions and deal with
23 them as fully developed on the record. What I do not believe
24 are proper questions would be, what do you determine this --
25 essentially the equivalent of asking a lawyer to interpret a

1 statute. What does this word mean, sorts of questions.

2 And again, if the Plaintiff wants to ask them the
3 Defendants will object. And I will rule as need be, but I am
4 giving the Plaintiff some advance, all parties some advance
5 indication of my general thoughts on that.

6 And again, I think here the problem is that there is
7 no historical pattern to refer to because usually that is where
8 this line of questioning gets developed. Well, in the past you
9 have never enforced it against someone who lives in this
10 neighborhood. Why?

11 And I think that is a fair question, but again will
12 you ever do such a thing? It invites a particular set of
13 answers that may or may not be helpful. So I want to see the
14 questions and see the answers in that regard.

15 So as to number 8, I am going to defer any ruling on
16 that. And again, make your objections on the record. Develop
17 the record as fully as you feel appropriate. And if I need to
18 address those questions, I will address those questions in a
19 subsequent hearing.

20 And again, I think process based questions, what
21 process will the county or the city use if it receives a
22 complaint under this ordinance? And the answer may be we don't
23 know yet. We haven't figured that out. We are waiting to see
24 if the ordinance even lives.

25 I don't know what the answer will be. And I do not

1 want to speculate without hearing what the answer will be, but
2 I would think those sorts of process questions are probably
3 okay but, again, I want to see them in context.

4 Hypothetical questions about what will you do in the
5 future if, kind of advisory opinion type questions I have more
6 concern about but, again, I want to see those in context before
7 I rule. So that is my ruling as to topic number 8. I am
8 deferring, but I am giving you some thoughts on that.

9 And finally, as to topic number 13, discovery as to
10 the other ordinances, I will sustain the objection. I am not
11 sure it is relevant. I do not believe it is relevant to the
12 preemption issue at all.

13 To the extent the inference that wants to be drawn is
14 you say you are concerned about this, but you have never done
15 anything about it before. I am not sure that is a proper
16 inference. I don't know that this discovery really gets you
17 there.

18 And it would otherwise be cumulative from the
19 discovery that I have indicated that they can ask about the
20 staffing and any plans to enforce and those sorts of factual
21 questions.

22 So as to just the general broad based questions about
23 tell us all the other ordinances you have and whether you have
24 tried to enforce them against medical professionals, I will
25 sustain that objection.

1 Any other issues that the Court needs to resolve today
2 as it relates to the discovery memorandum on behalf of the
3 Plaintiffs?

4 MR. GANNAM: Your Honor, before we move to that, may I
5 ask will the Court enter a written ruling along the lines of
6 the last time we were here to guide us in this case?

7 THE COURT: I usually would enter -- I am not going to
8 enter a lengthy opinion, but we will enter a written order of
9 some kind or another, but let me also be a little more fulsome
10 on the record as to my ruling as to number 13 because I suppose
11 that is probably the one you are going to want to pay most
12 concern to and you may want to take issue with. So let me
13 flesh out my ruling a little bit.

14 It has been suggested that the evidence requested in
15 request number 13 is relevant to allow the Plaintiffs to make a
16 number of evidentiary inferences that would be probative in
17 this case.

18 One is that the alleged compelling reason for these
19 ordinances is pretextual. And the inference to be drawn is
20 that because they have not enforced other inference -- they
21 have either not enacted or enforced other ordinances designed
22 to protect minors suggests that this interest being asserted at
23 this time is pretextual.

24 So that is one evidentiary inference that the
25 Plaintiffs have suggested that they want to draw. I do not

1 believe that is a proper inference to be drawn. So I do not
2 believe it is relevant because I do not believe the fact just
3 because they never did it in the past doesn't mean they
4 couldn't have and might not have had a million other reasons
5 not to do it.

6 But, even if it were relevant, I do not believe that
7 the burden of having to go back and produce or prepare a
8 witness to testify about innumerable ordinances that could have
9 applied to the health sciences and preparing the documentation
10 and the witness to address that topic, given the minimal
11 probative value, if any, of that inference is proportional.

12 So I would find it is not proportional. And as I said
13 earlier, I would also find -- so that is my ruling as to that.

14 The argument has also been made that the inference
15 that should be drawn is that the ordinances are either
16 pretextual or not narrowly tailored because they cannot be
17 enforced. That existing staffing, existing resources, and
18 existing expertise are insufficient to make this a meaningful
19 ordinance. And therefore, it is not properly narrowly
20 tailored.

21 I would allow questioning about resources and staffing
22 and training, things of that nature, to try to establish
23 whether there is a current expertise that would allow the
24 enforcement of these ordinances or the ability to enforce these
25 ordinances.

1 I would allow questioning about whether the parties
2 have developed any training or any other plan to try to train
3 enforcement officials, or those who would be enforcing
4 ordinances.

5 So in light of the fact that I am allowing that
6 discovery, I believe the marginal additional discovery of
7 having to actually produce, or identify, or testify about other
8 ordinances would be cumulative and, therefore, not
9 proportional.

10 And as to the preemption issue, which I believe was
11 the third evidentiary inference that the Plaintiffs wanted to
12 draw, given that preemption really turns on the intent of the
13 state the inference that wants to be drawn is that because the
14 city and the county have not ever taken any action to try to
15 regulate in this area, suggests that they have either consented
16 to or acknowledged that the state is preempting this area and I
17 do not believe that is a relevant or proper inference.

18 I believe what the state intends is what the state
19 intends and how the city or the county responds to that is
20 simply not relevant. So I am not going to articulate all of
21 that in a written ruling.

22 I have tried to make it as clear as I can on the
23 record. We will have a transcript available if you want to
24 order the transcript and all parties have reserved all
25 objections to the Court's rulings this morning.

1 Anything further, Mr. Gannam?

2 MR. GANNAM: Just to note for the Court's benefit and
3 this may never come up again, as we indicated in our
4 correspondence with the Court in our papers there were several
5 other matters that we did work through and appear to have
6 resolved.

7 By agreement the supplemental responses from both
8 Defendants were provided yesterday at the time we agreed to.
9 We don't anticipate there would be any problem with those, but
10 if there are still matters to be resolved related to these
11 requests, of course we would just bring those up then.

12 THE COURT: Absolutely.

13 And let me compliment all counsel. I can see in the
14 papers that I am seeing in the process of tracking this case,
15 counsel are working very hard to work together. You have to
16 represent your individual clients.

17 Plaintiffs have to ask for things. Defendants have to
18 say no. Defendants have to ask for things. Plaintiffs have to
19 say no and then you work through it. I see compromise. I see
20 professionalism. I see outstanding lawyering on both sides of
21 this case.

22 So I am here to do my job, which is to resolve these
23 sorts of issues. So you never have to apologize or be
24 squeamish about bringing issues to my attention. This is what
25 I am paid to do. I am happy to do it. I am happy to do it

1 with excellent lawyers like you who make my job easy by framing
2 the issues for me.

3 So when is the 30(b)(6) depositions scheduled?

4 MR. MIHET: They were scheduled for Monday and
5 Tuesday.

6 THE COURT: Of next week?

7 MR. MIHET: Of next week, but by agreement we have
8 decided to do them on Thursday and Friday instead.

9 THE COURT: Wonderful.

10 Okay. So if issues come up -- I will tell you in
11 advance, except in dire emergencies, I really do not like to
12 rule during the deposition and be contacted. The witnesses are
13 here. Counsel are here.

14 I know counsel for the Plaintiff have come in from
15 other parts of the state, but it is not like you are flying in
16 from another country. If we have to reconvene the deposition
17 after I rule, I do not think that would be unduly burdensome.

18 So if it is an absolute emergency and you need to call
19 me during the depositions, I will entertain it, but it is rare
20 that I will do that, but if after the depositions there are
21 issues that have arisen and objections that need to be ruled
22 upon, feel free to do what you did in this case.

23 Contact us. We will set a date. We will do a joint
24 discovery memo and I will rule.

25 Okay. Anything further from the Plaintiffs?

1 MR. GANNAM: No, Your Honor.

2 THE COURT: From the county?

3 MS. FAHEY: No, Your Honor.

4 THE COURT: Miss Flanigan, on behalf of the city?

5 MS. FLANIGAN: No, Your Honor. Thank you.

6 THE COURT: All right. Thank you all very much.

7 Excellent work in this case and we will be in recess.

8 Thank you.

9 MR. GANNAM: Thank you.

10 (Thereupon, the proceedings concluded.)

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CERTIFICATE

I hereby certify that the foregoing transcript is an accurate excerpt transcript of the proceedings in the above-entitled matter.

09/13/18

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