UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *Parens patriae,* to protect the Rights of their tribal members; And ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their Official capacities, Defendants.	)	Civ. 13-5020-JLV **DEFENDANT JUDGE DAVIS'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL**

Defendant Judge Davis, as explained below, does not have possession, custody or control over the transcripts of ICWA cases that were presided over Judges Trimble, Mandel, Pfeifle, and Eklund. Possession, custody or control is the nexus of compelling the production of documents under Fed.R.Civ.P. 34(a), and that nexus does not exist with regard to ICWA cases presided over by other Judges. As such, Plaintiffs' Motion to Compel and Motion to Expedite (Docket 85) must be denied, and Plaintiffs should be required to follow Rule 34(c) and Rule 45 to obtain the transcripts of these cases from the non-party judges.

INTRODUCTION

Plaintiffs' Motion for Expedited Discovery, which the Court granted, asked for a list of ICWA cases in Pennington County for the past five years. (Docket 6. p. 4.) In granting Plaintiffs' Motion for Expedited Discovery, the Court explained,

> [p]laintiffs are not requesting defendants turn over the transcripts. Rather, plaintiffs specifically request that defendants create a list of ICWA hearings conducted in Pennington County since January 2010. After the list is created, defendants can either choose to contact the court reporter for each case and request an electronic transcript, or defendants can provide plaintiffs with this information and plaintiffs will order the transcripts.

(Docket 71 at 10.) (hereinafter, the "Discovery Order") Consistent with the Court's Discovery Order, that list was timely provided. The Court's Discovery Order did not require defendants to produce the transcripts, only the list that has been produced.

Indeed, production of the list was specifically requested by Plaintiffs. In counsel's email, which is incorporated into Plaintiffs' Motion for Expedited Discovery, Plaintiffs' stated "Defendants only need to create a list based on existing court records and then order every third transcript at Plaintiffs' expense . . ." (Docket 6 at 4.) There is no credible dispute that Judge Davis has fully complied with the Court's Discovery Order and provided the requested list and ordered every third transcript for his files.

In order to implement the purpose of Plaintiffs' Motion, i.e. obtaining the 48-hour transcripts for the listed cases, Judge Davis, through his attorney, reminded Plaintiffs that child abuse and neglect cases are sealed, and that the court reporters producing the transcripts would require an order from the judge presiding over the file before they would transcribe the hearing. A model order was drafted, and approved by all parties and the Court. (Docket 78.) Judge Davis has signed all appropriate orders in the cases over which he has presided, even though the Court's Discovery Order did not require it. Defendant Davis presumed that Plaintiffs would compel the production of transcripts from cases presided over by other Judges, if necessary, using the authorities for the discovery of documents from non-parties as set forth in Fed.R.Civ.P. 34(c) and 45.

Despite Judge Davis's efforts, Plaintiffs allege that the "Court's Discovery Order is being undermined in large measure by Judge Davis, who is refusing to sign transcript orders in any

cases but his own." (Docket 85 at10.) This is simply not the case. In fact, Judge Davis has done everything within his authority to facilitate the Court's Discovery Order. He has signed all Orders in his cases, and agreed to produce corresponding documents for his files. He merely lacks jurisdiction to review the decisions made by his colleagues.

Judge Davis, through his attorney, explained this problem to Plaintiffs' counsel when he requested Judge Davis sign the orders that Judges Eklund, Trimble, Pfeifle, and Mandel (the "four sitting judges") had refused to sign. *Affidavit of Nathan R. Oviatt in Support of Judge Davis's Response to Plaintiffs' Motion to Compel* ("Oviatt Aff."), Exhibit "A." Judge Davis stated that he lacked jurisdiction for such a review, and cited to Article 5, Section 5 of the South Dakota Constitution. *Id.* Judge Davis's position is not that "he is not permitted to order a transcript in any case in which he is not the presiding judge." (Docket 85 at 3.) Judge Davis's firm position from the inception of this issue has been that he cannot *overrule* the decision of his fellow circuit court judges and sign orders that they have *refused* to sign. *Id.* Judge Davis pointed out that such an action would amount to a de facto, ad hoc appeal of those judges' decisions. *Id.* The South Dakota Constitution vests limited appellate jurisdiction on circuit court judges, and reviewing decisions of fellow circuit court judges is beyond Judge Davis's jurisdiction. S.D. Const. Art. 5, § 5. Plaintiffs never responded to Judge Davis's cited authority.

Despite Plaintiffs' characterization of the four sitting judges' refusal to sign Plaintiffs' orders as "ministerial," those decisions were apparently made after careful consideration of Plaintiffs' motion.[1] Those decisions must be appealed to a court with jurisdiction to hear such appeals -- the South Dakota Supreme Court. S.D. Art. 5, § 5. The Court's Discovery Order does not bestow upon Judge Davis appellate jurisdiction over his colleagues' decisions. Nor does that appear to have been the Court's intent.

[1] Plaintiffs' correctly note that the four sitting judges have not, to date, explained their refusal to sign Plaintiffs' Motions. (Docket 85 at 3.) Therefore, determining the basis for their refusal is only speculative at this point.

In addition, Plaintiffs' flatly misstate Judge Davis's position with respect to Judge Thorstenson. As Judge Davis has explained *repeatedly*, ordinarily a presiding judge, as chief administrator, would have the authority to sign a former judge's orders if he is assigned to that former judge's cases. *Oviatt Aff.*, Ex. A. *See* also SDCL 15-12-32. However, under South Dakota law, if the presiding judge is unable to assign himself to the former judge's cases then the Chief Justice of the South Dakota Supreme Court must appoint a substitute for the former judge. SDCL 15-12-35.

In this case, Judge Davis has expressed his ethical concerns to Plaintiffs' counsel about appointing himself to Judge Thorstenson's cases, and signing orders for her cases *only* because he is a named defendant. *Oviatt Aff.*, Ex. A. Judge Davis has a duty as both a jurist to be fair and impartial, and a litigant to comply with the Court's orders. These twin duties can come into conflict. To remedy this, and to facilitate the Court's Discovery Order, Judge Davis requested written authorization to sign Judge Thorstenson's orders from her attorney.

On March 14, 2014, Judge Thorstenson's attorney advised Plaintiffs' attorney that Judge Thorstenson would be unavailable to grant Judge Davis such authorization until March 19, 2014. Oviatt Aff., Ex. B, Anderson email, March 14, 2014. Rather than wait two days to receive Judge Thorstenson's approval, Plaintiffs filed the instant Motion to Compel and represented to the Court the half-truth Judge Davis was refusing to sign Judge Thorstenson's orders. (Docket 85 at 3.) Plaintiffs' knew and understood that if Judge Davis were to receive this authorization, he would sign the orders, and produce the accompanying documents. Judge Davis's proposal is omitted from Plaintiffs' Motion to Compel.

On March 20, 2014, counsel for Judge Thorstenson authorized Judge Davis to sign her orders. *Oviatt Aff.*, Ex. C, Anderson email, March 20, 2014. Consistent with all of Judge Davis's prior representations, Judge Davis has executed those orders, and delivered them to

Plaintiff's counsel on March 27, 2014. Plaintiffs' Motion with respect to Judge Thorstenson's orders was premature and unnecessary.

In his Memorandum of Law in Support of his Motion to Dismiss, Judge Davis explained that he has no personal or unique "policy or procedure" with respect to the processes followed by he and his colleagues in abuse and neglect cases. Judge Davis further argued that the Court should abstain from this case because it is necessarily interfered with ongoing state court decisions. (Docket 34 at 3-4, 22-27.) Plaintiffs' Motion to Compel evidences the merits of both those arguments, which are incorporated herein by reference.

LEGAL ANALYSIS

The basis for Plaintiffs' motion is unclear. It is titled as a "Motion to Compel and Motion to Expedite," but it is not brought pursuant to Rule 37 of the Federal Rules of Civil Procedure. Nor is there a certification of Plaintiffs' good faith effort to resolve this issue without the Court's involvement. *See* Fed. R. Civ. P. 37(a)(1); D.S.D. LR 37.1.

Instead, it appears that Plaintiffs are asking the Court to find Judge Davis in contempt of court for failing to comply with the Court's Discovery Order. (Docket 85 at 5.) In their motion, Plaintiffs' cite to, but do not explain, the standard for contempt. *Id.* (citing *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 736 (8th Cir. 2001)). Presumably, Plaintiffs do not argue for a contempt order because they recognize that Judge Davis has fully complied with the orders of this Court. Thus, no basis for contempt exists.

This is simply not a matter of Judge Davis ignoring the orders of this court. There is no credible dispute that he has *fully* complied with every order issued by the Court to date. Nor is it a matter of a state statute frustrating the intent of the Court's Discovery Order. The problem raised in Plaintiffs' motion goes directly to the scope of authority vested in the office of presiding circuit court judge. As Judge Davis has repeatedly explained to Plaintiffs' counsel, Judge Davis cannot do what he cannot do.

1. Judge Davis lacks authority to sign the orders relative to the four sitting judges.

In their Motion, Plaintiffs argue that, as presiding judge of the circuit, Judge Davis "must have the authority to sign an order directing the production of a transcript in all cases decided in the Seventh Circuit." (Docket 85, pg. 3.) If such authority exists, Plaintiffs should have referenced it to counsel to avoid inconveniencing the Court with the instant motion. Judge Davis knows of no authority which would permit him to interfere with a pending motion before his fellow circuit court judges.

The four sitting judges have apparently made the decision that there are no "compelling reasons" to unseal the transcripts in their cases. *See* SDCL 26-7A-36; *Matter of M.C.*, 527 N.W.2d 290, 294 (S.D. 1995) (affirming the trial court's decision to deny newspaper's request for redacted transcript of juvenile hearing). The right to review of the four sitting judges' decisions, belongs to the South Dakota Supreme Court. S.D. Const. Art. 5, § 5.

The South Dakota Constitution provides that "circuit courts have such appellate jurisdiction as may be provided by law." *Id.* The South Dakota legislature has prescribed that "[t]he circuit court has jurisdiction of appeals from all final judgments, decrees, or orders of all courts of limited jurisdiction, inferior officers, or tribunals, in the cases prescribed by statute." SDCL 16-6-10; see e.g. SDCL 62-7-19. Pursuant to the South Dakota legislature, Judge Davis's office grants him administrative authority, not appellate authority, over his circuit. SDCL 16-2-21. The office of presiding judge is without jurisdiction to review the decisions of his fellow circuit court judges.

As a consequence, even if Judge Davis wanted to review the decisions of his colleagues, he could not. "'Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is *known to the judge,* no excuse is permissible.'" *Wipf v. Hutterville Hutterian Brethern, Inc.*, 2013 S.D. 49, ¶ 33, 834 N.W.2d 324 (emphasis in original). Here, Judge Davis

recognizes that he lacks jurisdiction to review the decisions of the four sitting judges. Even though Judge Davis does not object to the production of the judges' transcripts, he cannot usurp the South Dakota Supreme Court's appellate jurisdiction. Because of the jurisdictional limitations placed on Judge Davis, it is impossible for him to reverse the decisions made by the four sitting judges.

Judge Davis has no legal right to order transcripts in judges' file, when that judge has refused to sign a litigant's motion. "Federal courts have consistently held that documents are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has actual possession, custody or control, or has the legal right to obtain the documents on demand." *In re Bankers Trust Co.,* 61 F.3d 465, 469 (6th Cir. 1995). Control is the "legal right, authority or ability to obtain upon demand documents in the possession of another"; some courts have also added "practical ability" as well. *Prokosch v. Catalina Lighting, Inc*., 193 FRD 633, 636 (D. Minn. 2000). Because Judge Davis lacks the legal right to interfere with the decisions of the four sitting judges, he lacks the requisite control of the transcripts to compel their production.

This is not an impediment created by state statute; this is a limitation inherent to Judge Davis's office. Even if the Court were to grant Plaintiffs' Motion for a supplemental decree, Judge Davis would still not have the authority to supplant the South Dakota Supreme Court's exclusive jurisdiction in appellate review of circuit court decisions because the body which created his office has not bestowed upon the office this authority. The presiding judge of the circuit is not an intermediate appeals court. Consequently, Plaintiffs' Motion with respect to Judge Davis must be denied.

2. Judge Davis has already agreed to sign the orders relative to Judge Thorstenson.

As discussed, Judge Thorstenson's orders are different from those of the four sitting judges. When a judge leaves the bench, some other judge must fill the void left by the former judge's departure. The procedure for this situation is set forth in SDCL 15-6-63.

> If by reason of death, sickness, or other disability or separation from office, a judge before whom an action has been tried is unable to perform the duties to be by him performed after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may, in his discretion, grant a new trial.

In interpreting SDCL 15-6-63, the South Dakota Supreme Court has held that a "successor judge has no authority to render a decision in a case where he has not heard the testimony, unless the parties so stipulate." *Hinman v. Hinman*, 443 N.W.2d 660, 661 (S.D. 1989). In this case, no such stipulation has been entered by the parties in Judge Thorstenson's cases, and at the time of Plaintiffs' Motion, no substitute judge had been appointed on the subject cases.

Nevertheless, the circumstances of this case are decidedly unique. Unlike most cases where the Court would consider the evidence and issue findings of fact and conclusions of law based on those considerations, the only evidence considered by the ex parte motions *is* the request for the transcripts of Judge Thorstenson's 48-hour hearings.

However, Judge Davis expressed his ethical concern about appointing himself to Judge Thorstenson's cases only because he is a named defendant in this case. On the one hand, Judge Davis has a duty as a jurist to be fair and impartial, and he must abstain from even the appearance of impropriety.

> A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity, impartiality and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

SD ST CJC APP CH 16-2 Canon 1. On the other hand, as a litigant, Judge Davis has a duty to ensure that the Court's Discovery Order is followed.

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

SD ST CJC APP CH 16-2 Canon 2. Were Judge Davis to appoint himself to Judge Thorstenson's cases and sign her orders merely because he is a named defendant, it could lend itself to a conflict of these interests, and the appearance of impropriety. The Canon's of Judicial Conduct forbid this.

Caught in this dilemma, Judge Davis, through his attorney, proposed a solution to Plaintiffs' counsel. Unfortunately, that proposal was omitted from Plaintiffs' Motion to Compel. In order to avoid the potential conflict, and facilitate the Court's Discovery Order, Judge Davis offered to sign Judge Thorstenson's if her attorney would consent in writing. Oviatt Aff., Ex. A. On March 14, counsel for Judge Thorstenson explained that she would be unavailable to discuss Judge Davis's proposal until March 19th. On March 17th, Plaintiffs' filed this Motion, without any reference to Judge Davis's offer, or Judge Thorstenson's response.

On March 20th, Judge Davis received authorization from Judge Thorstenson's attorney, and has since signed Judge Thorstenson's Orders. Those orders were sent to Plaintiffs' counsel on March 27th. There was absolutely no need to ask the Court to compel what Judge Davis had already agreed to do. In any case, Plaintiffs' Motion on this point is moot.

3. Plaintiffs alternatives are unworkable.

Plaintiffs alternatively ask the Court to order the four sitting judges to sign the orders in their cases, or the court reporters to transcribe the transcripts without orders from the judge presiding over the individual cases. As to these alternatives, Judge Davis would only note that SDCL 26-7A-36 provides, "[a]ll hearings in actions under this chapter and chapter 26-8A, 26-8B, or 26-8C are closed unless the court finds compelling reasons to require otherwise." This means that prior to a court reporter's transcription of a sealed file he or she needs an order from the presiding judge.

The Court's Discovery Order did not unseal the individual abuse and neglect case files. The form motion and order attached to the Stipulated Protective Order was designed to

accomplish that. In order to obtain the transcripts, the judge presiding over the case must make a finding of a "compelling reason" to unseal the record. *Matter of M.C.*, 527 N.W.2d 290, 294 (S.D. 1995). In this case, as to the four sitting judges, Plaintiffs apparently have not made that showing. Thus, if the Court were to grant Plaintiffs' Motion, as it relates to the court reporters, it would require the unsealing of confidential abuse and neglect files in mass.

Given that Plaintiffs' allegations go to "ongoing policies, procedures and customs," unsealing four years' worth of files seems drastic and unnecessary. It would seem that because Plaintiffs' allege certain violations are ongoing, the most recent 48-hour hearings would be the most germane to Plaintiffs' claims. Those hearings dating back to January of 2013 would likely provide the best evidence of the validity or fallacy of Plaintiffs' claims.

Additionally, Judge Davis would note that the *Rooker-Feldman* doctrine would appear to bar Plaintiffs' Motion with respect to the four sitting judges unsigned motions.

> The *Rooker-Feldman* doctrine forecloses not only straightforward appeals but also more indirect attempts by federal plaintiffs to undermine state court decisions. Thus, a corollary to the basic rule against reviewing judgments prohibits federal district courts from exercising jurisdiction over general constitutional claims that are "inextricably intertwined" with specific claims already adjudicated in state court. A general federal claim is inextricably intertwined with a state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it." In such cases, "where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Lemonds v. St. Louis County, 222 F.3d 488, 492-93 (8th Cir. 2000) (internal citations omitted.) As this Court noted in its Order Denying Defendants' Motion to Dismiss, "The *Rooker-Feldman* doctrine is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." (Docket 69 at 14.) (citing *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 281 (2005)).

Here, as to the four sitting judges, *Rooker-Feldman* would appear to apply to Plaintiffs' Motions for Transcripts. As Plaintiffs note, the four sitting judges are not parties to this action. Therefore, their decisions to deny Plaintiffs' motions were rendered before any district court proceedings were commenced against *them*. Plaintiffs' Motion to Compel directly seeks "review and rejection" of those judges' decisions. Thus, *Rooker-Feldman* may bar Plaintiffs' motion, as it relates to the four sitting judges.

4. The Federal Rules provide Plaintiffs' a remedy.

Despite the flaws in Plaintiffs' motion, they are not without a remedy. In fact, that remedy brings the matter directly before this Court. Federal Rule of Civil Procedure 34, regarding the production of documents, is generally limited to the parties to the action. *See* Rule 34(a) ("A party may serve on any other party"); *Miner v. Punch*, 838 F.2d 1407, 1409 (5th Cir. 1988); *Henderson v. Zurn Industries, Inc.*, 131 F.R.D 560, 565-567 (S.D. Ind. 1990) (because Rule 34 is limited to parties, nonparty insurer not subject to document discovery).

For the above reasons, Judge Davis does not have possession, custody or control over the transcripts of cases that were assigned to and presided over by other judges. Documents are deemed to be within the possession custody or control for purposes of Fed.R.Civ.P. 34 if the party has actual possession, custody or control, or the legal right or practical ability to obtain the documents upon demand. *Prokosch v. Catalina Lighting, Inc.*, 193 FRD 633, 636 (D. Minn. 2000)(citing cases). Judge Davis, as explained above, has none of that.

However, Rule 34(c) is the portion of the rule directly addressing production requests to non-parties. It states: "As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection." Thus, through Rule 45, a subpoena could be issued, requiring the production of the transcripts. This procedure brings the non-parties who are directly responsible for the issuance of orders for the transcripts over which they

have sole authority, before this court. Of course, this would not include Judge Davis, who has already signed his orders.

CONCLUSION

As it relates to Judge Davis, Plaintiffs' Motion to Compel is misdirected. He has made the finding Plaintiffs have requested, and ordered the production of the transcripts for the files over which he presides. However, there are limitations innate to the office he holds which preclude him from reviewing, and reversing the decisions of his colleagues. He lacks the jurisdiction to provide the relief requested. Therefore, he lacks the requisite control of the documents to produce them. As such, Judge Davis respectfully requests the Court deny Plaintiffs' Motion to Compel, as it relates to Judge Davis, and require Plaintiffs to comply with the Federal Rules for non-party production.

Dated this 28th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2013, I electronically filed **DEFENDANT JUDGE DAVIS'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL** with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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