

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

MAY 01 2014


CLERK

OGLALA SIOUX TRIBE and)	CIV. 13-5020-JLV
ROSEBUD SIOUX TRIBE, as)	
<i>parens patriae</i> , to protect the rights)	
of their tribal members; and)	
ROCHELLE WALKING EAGLE,)	ORDER GRANTING
MADONNA PAPPAN, and)	MOTION TO COMPEL
LISA YOUNG, individually and on)	
behalf of all other persons similarly)	
situated,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
LUANN VAN HUNNIK;)	
MARK VARGO;)	
HON. JEFF DAVIS; and)	
LYNNE A. VALENTI, in their official)	
capacities,)	
)	
Defendants.)	

Plaintiffs filed this action asserting defendants' policies, practices and procedures relating to the removal of Native American children from their homes during 48-hour hearings violate the Fourteenth Amendment's Due Process Clause and the Indian Child Welfare Act (ICWA). (Docket 1). On January 28, 2014, the court entered an order granting expedited discovery related to 48-hour ICWA hearing transcripts. (Docket 71). The order required defendants to "provide plaintiffs with a complete list of 48-hour ICWA hearings from January 1, 2010, through the present." *Id.* at p. 13. The plaintiffs were

then responsible for obtaining the transcripts. Id. The court found “[t]he 48-hour ICWA hearing transcripts likely will be determinative of the issue” and found “production of the requested 48-hour ICWA hearing transcripts [was] necessary in this case.” Id. The court engaged in a lengthy analysis regarding the privileged nature of the 48-hour hearing transcripts. Id. at pp. 10-13. The court held the “ ‘[i]ndividual and state privacy interests [though cognizable] must yield to the federal interest in discovering’ whether the defendants in this action have engaged in policies, practices and customs which violate plaintiffs’ constitutional rights.” Id. (quoting Ginest v. Bd. of County Comm’rs of Carbon Cnty., 306 F. Supp. 2d 1158, 1159-60 (D. Wyo. 2004)).

Thereafter, the parties entered into a stipulation and the court entered a protective order safeguarding the state-created privacy interests in each ICWA transcript. (Dockets 77 & 78). Incorporated in the parties’ stipulation was a model order drafted by counsel for Judge Davis which plaintiffs intended to use to obtain each 48-hour hearing transcript. (Docket 77-1).

Pursuant to the expedited discovery order, defendants provided to plaintiffs’ counsel a list of 48-hour hearings and Judge Davis signed the orders in his cases permitting plaintiffs to obtain the 48-hour hearing transcripts. (Docket 85 at p. 3). On March 17, 2014, plaintiffs filed a motion to compel. Id. Plaintiffs contend five judges from the Seventh Judicial Circuit: Judges Eklund, Trimble, Thorstensen, Pfleifle and Mandel, refused to sign the order plaintiffs’

counsel prepared to obtain 48-hour ICWA hearing transcripts.¹ Id. Plaintiffs argue this court has authority to enforce its expedited discovery order by: (1) ordering Judge Davis to sign all the transcript orders as presiding judge of the Circuit; or (2) ordering the non-party judges to sign their respective orders for the transcripts; or (3) ordering the court reporters to produce the transcripts without signed orders from the four remaining judges who refuse to sign plaintiffs' orders. Id. at p. 4.

Judge Davis and non-party Judges Eklund, Trimble, Pfleifle and Mandel filed responses to the plaintiffs' motion to compel. (Dockets 88, 89). Judge Davis asserts he does not have authority to sign the transcript orders on behalf of the non-party judges or "interfere with a pending motion before his fellow circuit court judges." (Docket 88 at p. 6). Judge Davis concludes "[t]he four sitting judges have apparently made the decision that there are no 'compelling reasons' to unseal the transcripts in their cases." Id. (citing SDCL 26-7A-36; Matter of M.C., 527 N.W.2d 290, 294 (S.D. 1995)). Finally, Judge Davis argues "the Rooker-Feldman² doctrine would appear to bar Plaintiffs' Motion with

¹After plaintiffs filed the motion to compel, Judge Davis signed the transcript orders for former Judge Thorstenson. (Docket 88 at pp. 7-9).

²D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fed. Trust Co., 263 U.S. 413 (1923).

respect to the four sitting judges['] unsigned [orders].”³ Id. at p. 10. Judge Davis suggested plaintiffs could properly obtain the transcripts by filing a request for transcripts under Fed. R. Civ. P. 34(c) and 45. Id. at p. 11.

Non-party Judges Eklund, Trimble, Pfliefl and Mandel argue this court lacks authority to order non-party state court judges to enter orders releasing the 48-hour ICWA hearing transcripts, but acknowledge this court may have authority to enter an order requiring the court reporters to produce the transcripts. (Docket 89). The non-party judges contend requiring them to sign the transcript orders “would contravene the traditional notions of federalism and comity.” Id. at p. 6.

The All Writs Act empowers federal courts to issue “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). “Although not a base of jurisdiction, the All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act.” Goss Intern. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 365 n. 6 (8th Cir.

³Judge Davis argues “unsealing four years’ worth of files seems drastic and unnecessary.” Id. at p. 10. Judge Davis also reasserts his argument the court should abstain from this case because it is interfering with ongoing state court decisions. Id. at p. 5. These arguments were previously considered and rejected by this court. (Dockets 69 and 71).

2007) (citing 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3691 (3d ed. 1998)).

For a district court to act, three conditions must be satisfied. “First, ‘the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires.’” Cheney v. United States Dist. Court for Dist. of Columbia, 542 U.S. 367, 380 (2004) (quoting Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U.S. 394, 403 (1976)). “Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable.” Id. at 381 (internal quotation marks omitted). “Third, ‘even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.’” Id. (quoting Kerr, 426 U.S. at 403).

The court finds these conditions are satisfied. Plaintiffs are seeking transcripts of 48-hour ICWA hearings which this court determined plaintiffs are entitled to receive and which are necessary and likely determinative of the issues involved in this case. (Docket 71). Pursuant to the court’s order granting expedited discovery, plaintiffs provided prepared orders to the non-party judges requesting these 48-hour ICWA transcripts. The non-party judges refused to sign the orders. Plaintiffs also served on the non-party judges a request for the transcripts under Fed. R. Civ. P. 34(c) and 45. (Docket 90-1). The non-party judges filed an objection to this request. (Docket 91).

The court finds there is no adequate means for plaintiffs to obtain the 48-hour ICWA hearing transcripts without further action by this court. The court also finds plaintiffs' right to an order pursuant to the All Writs Act is clear and indisputable. See 28 U.S.C. § 1651(a); Goss Intern. Corp., 491 F.3d at 365 n. 6 ("the All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act."). Finally, having considered the arguments made by the parties and the non-party judges in their written submissions, the court finds an order pursuant to the All Writs Act is appropriate under the circumstances. Production of the 48-hour ICWA hearing transcripts is critical to the resolution of the issues in this case.

Given the unique circumstances presented, the court finds it most appropriate to issue an order pursuant to the All Writs Act directing the court reporters to produce at plaintiffs' expense transcripts of the 48-hour ICWA hearings conducted by the non-party judges. Accordingly, it is hereby

ORDERED that plaintiffs' motion to compel (Docket 85) is granted.

IT IS FURTHER ORDERED that court reporters Bridgette R. Banks, Cynthia M. Weichmann, Kathy L. Davis, Kathryn McAlpine, Amy Zoller, Teresa Fink, Kayla Glasshoff and Tracy Binder shall produce transcripts for the highlighted 48-hour ICWA hearings for which you served as court reporter as identified in the sealed attachment to this order. See Exhibit 1.

IT IS FURTHER ORDERED that court reporters Bridgette R. Banks, Cynthia M. Weichmann, Kathy L. Davis, Kathryn McAlpine, Amy Zoller, Teresa Fink, Kayla Glasshoff and Tracy Binder shall provide plaintiffs' counsel with copies of the transcripts as they are produced.

IT IS FURTHER ORDERED that court reporters Bridgette R. Banks, Cynthia M. Weichmann, Kathy L. Davis, Kathryn McAlpine, Amy Zoller, Teresa Fink, Kayla Glasshoff and Tracy Binder shall fully comply with this order by June 1, 2014.

IT IS FURTHER ORDERED that plaintiffs shall be responsible for the expense associated with the production of these transcripts and shall promptly pay the court reporters' invoices upon receipt.

IT IS FURTHER ORDERED that plaintiffs shall serve a copy of this order and Exhibit 1 on court reporters Bridgette R. Banks, Cynthia M. Weichmann, Kathy L. Davis, Kathryn McAlpine, Amy Zoller, Teresa Fink, Kayla Glasshoff and Tracy Binder. The court reporters shall keep the contents of Exhibit 1 confidential.

Dated May 1, 2014.

BY THE COURT:



JEFFREY L. VIKEN
CHIEF JUDGE