

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN

3 -----
4 UNITED STATES OF AMERICA, et al.,

5 Plaintiffs,

6 -vs-

CASE NO.: 11-CV-236

7 JENNIFER KING VASSEL, et al.,

8 Defendants.
9 -----

10 FINAL PRETRIAL CONFERENCE in the above-entitled
11 matter, held before the Honorable J.P. Stadtmueller, on the 3rd
12 day of December, 2013, commencing at 4:28 p.m. and concluding
13 at 5:10 p.m.

14 A P P E A R A N C E S

15 Law Project for Psychiatric Rights

16 Mr. James B. Gottstein

406 G Street, Suite 206

Anchorage, Alaska 99501

17 Appeared on behalf of the Relator, Dr. Toby Tyler Watson, also
18 present.

Gietman Law, LLC

19 Ms. Rebecca L. Gietman

805 South Madison Street

20 Chilton, Wisconsin 53014

Also appeared on behalf of the Relator.

21 Gutglass, Erickson, Bonville & Larson, S.C.

22 Mr. Paul R. Erickson and Mr. Bradley S. Foley

735 North Water Street, Suite 1400

23 Milwaukee, Wisconsin 53202

Appeared on behalf of the Defendants.

24
25 Mr. Zachary R. Willenbrink, Clerk.

Ms. Sheryl L. Stawski, RPR, Official Reporter.

T R A N S C R I P T O F P R O C E E D I N G S

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2 THE CLERK: The Court calls United States, ex rel,
3 Toby Watson versus Jennifer King Vassel, case number 11-CV-236,
4 for a final pretrial conference. May I have the appearances
5 beginning with the relator.

6 MR. GOTTSTEIN: James B. -- Jim Gottstein.

7 MR. WATSON: Toby Watson.

8 MS. GIETMAN: Rebecca Gietman.

9 MR. FOLEY: Good afternoon. Brad Foley appears on
10 behalf of defendant, Jennifer King Vassel.

11 MR. ERICKSON: Paul Erickson also appearing on behalf
12 of the defendant.

13 THE COURT: Thank you. Good afternoon, Mr. Gottstein
14 and Ms. Gietman and Mr. Watson; and good afternoon to you,
15 Mr. Foley and Mr. Erickson.

16 As Mr. Willenbrink noted, this matter is on the
17 Court's calendar today for a final pretrial conference, the
18 case having earlier been scheduled for a jury trial to begin
19 next Monday.

20 Beginning with you, Mr. Gottstein, do you want to tell
21 me where you are? And then I'll learn from Mr. Foley and
22 Mr. Erickson.

23 MR. GOTTSTEIN: Yes, Your Honor. Thank you. There
24 are a number of issues up in the air which really determine how
25 the trial will progress; so it's pretty hard to know exactly,

1 for example, how long it will take, and where -- you know, what
2 the course of the trial will be; but we will proceed in
3 whatever manner, you know, as best we can, based on Your
4 Honor's rulings on the pending motions in limine, I think, are
5 the main issues, Your Honor, and I guess the jury instructions,
6 as well.

7 THE COURT: All right. Thank you. Mr. Foley,
8 Mr. Erickson?

9 MR. FOLEY: Your Honor, we're ready to proceed. Our
10 witnesses are lined up for next week. As the Court may have
11 noted, we have Dr. King, Dr. Diamond, Mr. Olson and Dr. Rolli
12 scheduled.

13 THE COURT: All right. Well, before we get to talking
14 about next week, we need to go back and take a look at the
15 Court's trial scheduling orders, the first of which dates back
16 to February of last year, the second of which dates back to
17 September of this year.

18 And while I appreciate Mr. Gottstein was not counsel
19 of record until this case got to the Court of Appeals following
20 the Court's decision on motion for summary judgment, he was
21 counsel of record in the Court of Appeals and, obviously, took
22 a look at the trial record as part of his participation in the
23 appeal beginning in December of last year.

24 And the reason that I'm beginning to address all of
25 this is that this case is not in a posture to be tried simply

1 because counsel have not followed the directives of the Court
2 in the trial scheduling order particularly with respect to
3 motions in limine and jury instructions and the verdict form.

4 And what this really signals to Judge Stadtmueller is,
5 for whatever reason this case has not received the attention in
6 the pretrial process that it should. And against my
7 26-and-a-half years as a judge, unfortunately I've had far too
8 many cases in the last five or six years that really should
9 never have been tried; and they have become very, very
10 expensive not only to the taxpayers but to counsel and their
11 respective clients. And I can begin by making a record on
12 several of them, if only to demonstrate to you where it is
13 Judge Stadtmueller is coming from.

14 Eight or nine years ago we had a civil case involving
15 a disgruntled employee at WE Energies who brought an action for
16 employment discrimination. The case came before this branch of
17 the court and was decided on summary judgment favorable to the
18 employer. The case went to the Court of Appeals with different
19 counsel. And the Court of Appeals affirmed Judge Stadtmueller
20 on most everything saving one small issue, and the case came
21 back and was tried. It's *Matthews versus WE Energies*,
22 05-CV-537; and the jury returned a verdict in favor of the
23 employer. And the case went up on appeal a second time. And
24 as a result, the plaintiff and her counsel wound up being stuck
25 with attorney's fees in excess of \$563,000.

1 Same scenario in a second case that went to trial,
2 also an '05 civil case, *Metavante versus Emigrant Bank*.
3 Lawyers for Emigrant Bank decided to get very combative with
4 plaintiff's counsel who were seeking \$1,773,000 in bank
5 processing fees for processing Metavante's online banking
6 transactions. But Emigrant wouldn't let well enough alone and
7 filed a \$241 million counterclaim. The underlying contractual
8 documents only permitted a bench trial in either state or
9 federal court.

10 And as a result of the case going to trial, Emigrant
11 lost entirely on its counterclaim and wound up with a judgment
12 of 1,773,000 plus accrued interest of almost a quarter of a
13 million dollars. But it didn't stop there. The contractual
14 documents provided that the losing party had to pay the actual
15 attorney's fees of the winning party's counsel.

16 In this case, those fees were \$9,998,000, affirmed by
17 the Court of Appeals; but then for purposes of the appeal,
18 there were another \$1,094,000 in attorney's fees added. And as
19 a result, the attorney's fees greatly exceeded the amount
20 recovered by a ratio of almost ten-to-one.

21 If that was not enough, then we had another case
22 involving the dean of the school of arts and sciences at
23 UW-Whitewater who claimed discrimination when he was terminated
24 from his employment. The case went to trial in February of
25 2010, and midstream the plaintiff abandoned the case and wrote

1 out a check for \$1,500 to cover the costs of the State having
2 to defend the case.

3 And then there was Fail-Safe versus A.O. Smith
4 Corporation, another 2008 case that went nowhere other than to
5 run up a lot of attorney's fees and never got to trial; but the
6 costs alone, forgetting the attorney's fees, just the costs
7 were in excess of \$90,000.

8 Another case in which plaintiff sued for wrongful
9 employment discrimination, the plaintiff's counsel must have
10 realized that there was no case and never showed up for the
11 trial; so the case was dismissed and costs taxed if only to
12 cover the jury fees. That was Baker versus Shinseki, an '09
13 case.

14 Then we had *Quad/Graphics versus One2One*
15 *Communications*, an '09 case, in which there was about 4- or
16 \$5 million at stake, and the case had to be tried; but the
17 defense threw up everything in the book. The case went to
18 trial. The jury awarded over \$11 million in damages. The case
19 was appealed, and the jury's verdict affirmed.

20 And so I've raised all of these against the backdrop
21 of what I see in this case, and that is woeful inadequate
22 preparation. And if this Court is going to seriously entertain
23 this case going forward, what I'm going to direct that both
24 sides do is in the next 24 hours sit down and read and reread
25 the Court's trial scheduling order and then go back and take a

1 close look at what both sides submitted to the Court; and you
2 will see in Kodak vibrant color all of the shortcomings of your
3 submission.

4 And if these matters can be corrected and we have
5 another pretrial conference on Friday morning, I'll be happy to
6 give Mr. Watson and Ms. King their day in court. But as I
7 often say, while every litigant is entitled to his or her day
8 in court, they're not entitled to somebody else's day in court.

9 And I'm not going to waste the taxpayer's money, my
10 time or your time dabbling in matters that are inadequately
11 prepared for which there does not appear to be an awful lot of
12 support beyond a lot of theory that is swirling around this
13 case like bees around honey, but that is not the way good
14 litigators try cases.

15 The other option that is still very much on the table
16 is for the Court to invoke our general local rule 83(c)(3) and
17 that is to require that Mr. Gottstein obtain competent local
18 counsel who are familiar with this court's trial schedules and
19 trial protocols to assist in the case; and I appreciate that's
20 a tall order to accomplish between now and next Monday, but I'm
21 not going to go forward with a trial in any case in which there
22 are serious, serious concerns about the state of the
23 preparation.

24 And then we layer on top of that some of the things
25 that have come to light in the last couple of weeks, some of

1 which have begun to surface in the competing motions in limine
2 about the woeful inadequacy of the understanding as to the who,
3 what, when, where, why, how of how the Medicaid program
4 actually functions here in Wisconsin and the role of the state
5 vis-a-vis the role of the federal government, vis-a-vis the
6 role of pharmacies, vis-a-vis the role of treating physicians
7 and the like.

8 And I'm not going to waste anyone's time going through
9 what, in essence, would become a discovery process here in open
10 court. That's what we have pretrial discovery for. And,
11 obviously, lots of folks sat on their hands throughout the
12 course of this case and have only been looking at it with
13 rose-colored glasses and big dollar signs in the kaleidoscope,
14 and that's no way for any seasoned lawyer to approach his or
15 her work.

16 So against that backdrop, Mr. Gottstein and Mr. Foley,
17 the ball is really back in your court as to what you folks
18 would like to do in terms of bringing this case to a conclusion
19 because it's not in a posture to be tried in its current state.

20 MR. GOTTSTEIN: Yes, Your Honor. First, I'd like to
21 say that we actually have worked very hard to prepare for this;
22 and there were many difficulties in that one is kind of the
23 ships passing in the night in terms of the basis of the case
24 and the legal liability which we had to --

25 THE COURT: Well, there isn't an awful lot of

1 authority for a lot of what is going on in this case; and so
2 while I appreciate I've never tried one quite like this -- I
3 don't think anyone associated with this case, including the
4 parties, ever have either -- and so what we really have is the
5 blind leading the blind. And I don't mean that in a
6 disparaging way; it's just a fact of life.

7 MR. GOTTSTEIN: Your Honor, I think -- I believe that
8 you're correct that no other case exactly like this has been
9 tried before, and that's presented difficulties, and we tried
10 to work through those as best that we can.

11 THE COURT: Maybe that suggests, Mr. Gottstein, that
12 the case doesn't have an awful lot of merit. You know, the
13 Department of Justice didn't take a bite out of the apple.
14 Nobody has told Dr. King, hey, you don't submit any more of
15 these prescriptions because they don't track what Medicaid
16 provided for.

17 Similarly, assuming the best case scenario for you and
18 your client, there's another issue that's percolating very
19 significantly beneath the surface here; and that is the role of
20 the federal government in the administration of the whole
21 Medicaid program, an estoppel to allow this conduct to continue
22 such that you come before a jury asking for thousands of
23 dollars for each prescription. That's not going to fly with
24 most reasonable men and women as jurors, particularly when they
25 learn that Ms. King got no direct proceeds out of any of these

1 prescriptions other than to treat her patients as best she
2 could with the resources that were available, that were
3 recognized by the State of Wisconsin and paid.

4 Those are very, very significant issues; and I'm not
5 going to suggest for a moment that you're not going to prevail;
6 but these issues are very, very, very much here and they're
7 serious.

8 And then there's the whole notion of the hereafter. I
9 talk about all these cases that have been tried and gone up on
10 appeal. And unlike vintage wine, they don't get better with
11 age. I'm sorry, but that's a fact of life.

12 And there would be a few of the people on this jury --
13 and when I tell you this, I'm serious because I've had a lot of
14 experience with jurors -- who would come back and say, you
15 know, Jim Gottstein, if you were really serious about this, you
16 would have gone to the people at Medicare and said, look,
17 there's a potential problem here; we need to do something about
18 this.

19 But instead, no, let's it keep going because we're
20 going to get the big bucks for ourselves; and that doesn't fly
21 with the good men and women in Wisconsin. It may fly in Alaska
22 but not in Wisconsin.

23 MR. GOTTSTEIN: Your Honor, if I may, there -- the
24 federal government has gotten very large judgments against the
25 drug companies for inducing --

1 THE COURT: That's a whole 'nother issue, Mr.
2 Gottstein. I read just like you do. It's like mixing apples
3 and oranges. And when you cite all of these newspaper accounts
4 and everything else, none of that is going to see the light of
5 day in this case. I'm sorry, it's irrelevant.

6 What may be relevant -- and I couldn't be more serious
7 about this, too -- what may be relevant to the fact-finding
8 process is just how your client got into all of this, and then
9 how your co-counsel began suing people that had no relation to
10 this, and then when brought to her attention, she declined to
11 back away and wound up now with a judgment against her
12 personally that was endorsed by the Seventh Circuit.

13 So all of those things are very much on the table;
14 and, again, whether they will see the light of day in the
15 testimony, I have no way of knowing, but they're out there
16 lurking.

17 MR. GOTTSTEIN: If I may just add one other thing,
18 Your Honor. We don't dispute that the federal government has
19 not been enforcing this with respect to prescribers. Your
20 assumption that we haven't tried to get them to, actually, is
21 not a correct assumption; and I could -- I mean, we've actually
22 proposed to the federal government a number of times that what
23 they ought to do is announce that these are false claims and
24 that they'll no longer be --

25 THE COURT: See, they're not under Wisconsin law; so

1 that's really -- We have the same issue on the criminal side
2 today with marijuana. I think at last count there are now four
3 states that marijuana is legal. It's not legal under federal
4 law.

5 And so our current Attorney General, Eric Holder, is
6 left to decide, are we going to prosecute people in California
7 or Washington or Oregon for marijuana when it's legal under
8 state law. It's a terrible conundrum, but it's a fact of life
9 that those that we send to the halls of Congress in many
10 states, and clearly in Washington, have found themselves
11 regrettably unable to govern.

12 And so we find ourselves in these continued quagmires
13 like this case presents itself with the effect of inability to
14 govern. That's what this case is all about.

15 The law that underlies this case goes back to long
16 before Judge Stadtmueller was even born, and it hasn't been
17 updated to reflect the modern times. Whether it's favorable to
18 you or favorable to Dr. King, I make no value judgment on that.
19 All I'm addressing today are the serious, serious problems
20 about this case from any way you want to look at it.

21 And so what I'm suggesting to both you and counsel for
22 the defendants, instead of boring down in one another's face is
23 to see if you in the solitude of your own heart and mind can
24 bring this case to a conclusion because if it isn't, whether
25 it's tried next week or next month or six months from now, it

1 isn't going to be over anytime soon because sooner or later we
2 have the State Medical Society now got a toe in the water, the
3 American Medical Association is going to get involved, the drug
4 companies are going to get involved, various states are going
5 to get involved to protect their own interests; this is just
6 the tip of the iceberg.

7 And, yes, there are lots of dollar signs in those
8 rose-colored glasses, but it's going to be a long time before
9 anybody sees any of the money. Meanwhile, who's going to
10 continue to fund this? And then the jury may wonder, well, why
11 do we have Jim Gottstein all the way from Alaska? And then
12 it's going to come out, well, he's the principal spokesperson
13 behind this effort to do something about this.

14 So instead of being an advocate, you're going to be
15 billed as having a vested interest in this beyond the matter of
16 attorney's fees, sort of a nom de plume plaintiff. And how
17 that is all going to play out, the Seventh Circuit already took
18 note of that fact in their opinion.

19 So everyone associated with this case, not the least
20 of which is Judge Stadtmueller, has an awful lot to think about
21 here; but I'm not going to take anyone's time and muddle
22 through this for two, three, four weeks. I don't have the
23 time.

24 Next week I have two trials. The criminal case is
25 going in bench trial. The week after next I have another civil

1 case going to trial that is going to be tried because
2 regrettably in that case through inadvertence the lawyers in
3 the case allowed an exhibit to go to the jury in the trial back
4 in June (sic) that was never received, and it was extremely
5 prejudicial to both sides; and so the Court was left with no
6 alternative other than to declare a mistrial because the jurors
7 thankfully raised a question about the exhibit; otherwise,
8 perhaps, no one would have even noticed it. So that case has
9 to be retried, and it is going to be retried the week after
10 next.

11 And so it is in that context that I think it is very,
12 very, very clear that a lot of work has got to be done.
13 Discovery is over. There's not going to be any more discovery
14 in this case that is before Judge Stadtmueller.

15 If you want to dismiss and start something different
16 against another practicing physician whether for psychotropic
17 drugs or some other pharmaceutical drugs, that's one thing; but
18 this case, if it's going to be tried, is going to be tried on
19 the current state of discovery. There's not going to be any
20 putting the genie back in the bottle or turning back the
21 clocks -- the hands of Mother Time.

22 So these are all considerations that you and Mr. Foley
23 and Mr. Erickson and Mr. Larson and Ms. Gietman are going to
24 have to reckon with and come to a decision real quick.

25 MR. GOTTSTEIN: When would you like us to report back,

1 Your Honor?

2 THE COURT: Well, the only way that Judge Stadtmueller
3 is going to have a further final pretrial conference in this
4 case, if the matters that should have been addressed in the
5 final pretrial report are addressed, we will reconvene on
6 Friday at 11:00. But if for whatever reason you're unable or
7 cannot put the materials together -- and it's a tall order --
8 in fact, it's mentioned in the very last paragraph of the
9 scheduling order. To get prepared in Judge Stadtmueller's
10 court requires a lot of work; and nobody more than I
11 appreciates it because, whether you appreciate it or not, I
12 spent 16-and-a-half years of my career on the other side of the
13 bench, and I didn't get to this side of the bench by being
14 unprepared. Make no mistake about it.

15 And I have far too many cases to deal with beyond
16 trying to deal with lawyers who are not fully prepared to try
17 their case. And I appreciate the fact that you may not have
18 had the trial experience; but if this case is worth what you
19 think it is and what Dr. Watson thinks it's worth, you should
20 have had the best lawyers in the land representing you; not the
21 likes of Rebecca Gietman or the likes of Jim Gottstein.

22 Unfortunately, we can't dismiss the case and get new
23 counsel; but what I can do is require that you, sir, get
24 competent counsel who are conversant in this area of the law to
25 represent the interests of Dr. Watson. More than that, no

1 judge would ever nor could ever ask; and so, again, it's
2 entirely up to you.

3 If you think you have the wherewithal to put all of
4 this together in the next 24 hours such that the Court will
5 have an opportunity at least late in the day on Thursday to
6 review it and come to a proceeding where intelligent
7 conversations can take place, so be it. Honestly, I don't think
8 you can. And I say that against the backdrop of everything
9 that's gone on in this case so far.

10 MR. GOTTSTEIN: If a new final pretrial report is not
11 filed --

12 THE COURT: You don't have to file a new report. You
13 have to file a report that comports with what was required
14 including memorandum of law in support of jury instructions.
15 It appears to the Court that neither you nor Mr. Foley nor
16 Mr. Erickson or Ms. Gietman or Mr. Larson ever spoke to one
17 another about jury instructions; just like there have been no
18 conversations about anything in the case.

19 And I appreciate the fact that you're advocates, and
20 you should be; that's your role in the case. But collectively
21 each of you is an officer of the court. And as officers of the
22 court, you have responsibilities to conform your conduct not
23 only to the code of professional responsibility but to the
24 routine requirements of the orders of the court. I mean, I
25 didn't drop this scheduling order on you ten days ago. The

1 parties had the first one back in, I believe -- to be perfectly
2 clear so we know there's no mistaking it -- it was
3 February 15th of 2012, and the second one shortly after the
4 remand, September 11th of this year.

5 And, again, if reasonable people were really serious
6 about getting a handle on your prospective positions in the
7 case, you would have drilled down into the legal requirements
8 and the jury instructions before the first set of
9 interrogatories was ever sent out or before the first notice of
10 deposition was scheduled or for the first request for
11 production of documents. None of that occurred in this case.

12 We're just going to forge ahead again with the
13 rose-colored glasses with nothing but big dollar signs in them.
14 Wrong approach. And all everyone is doing is digging a deeper
15 and deeper hole from which, ultimately like the parties in
16 Metavante, like the defendant in the Quad/Graphics case, and
17 the list goes on and on, eventually you can't extricate
18 yourself. And then you're buried and then, like Ms. Gietman,
19 saddled with a judgment for costs, perhaps sanctions. And this
20 is serious business. And I don't take umbrage at the
21 genuineness with which, and the fervor with which you pursue
22 this; but at the end of the day, you gotta know where you're
23 coming from, and you gotta be prepared. And I don't see that
24 in this case. I'm sorry.

25 MR. GOTTSTEIN: Yes, Your Honor.

1 THE COURT: Mr. Foley, Mr. Erickson, are there any
2 matters you would like to address this afternoon? I've said a
3 lot.

4 MR. FOLEY: None, Your Honor. We'll confer with
5 plaintiff's counsel.

6 THE COURT: I would suggest, Mr. Gottstein, if you're
7 of the mind to do so, you ought to keep one eye on some of the
8 brightest and best law firms in Milwaukee that might be able to
9 provide assistance to you. And if you're looking for competent
10 counsel, you can start with the Lawyer Information and Referral
11 Service at the Milwaukee Bar Association or the State Bar of
12 Wisconsin.

13 I'm not in the business of recommending lawyers to
14 parties, but I am in the business of ensuring that when cases
15 do come before me, they are adequately prepared in a manner
16 that will allow them to go forward in a way that people can
17 understand. And for the moment, you mentioned earlier both
18 sides ships passing in the night and the like, we have that
19 very issue with regard to the core of the case; exactly who
20 does what, when, where, how and why, whether Dr. King received
21 any training from anybody on the subject of how Medicaid
22 patients are to be dealt with both in terms of policy,
23 procedure, paperwork, and the like.

24 And then when it comes out that the pharmacy more
25 often than not contacts the state who runs an algorithm on

1 particular prescriptions to see if they even qualify, and the
2 pharmacy won't even process it because they know they won't get
3 paid. Dr. King isn't getting any money out of these
4 prescriptions. The only money she gets is the fees that she
5 earns for providing the services, and those are all regulated
6 by Medicaid, as well.

7 And you can argue from now until kingdom come about
8 the efficacy of certain drugs and whether they should or
9 shouldn't be prescribed to individuals who are under the age of
10 18; but the problem is, this has been going on for years. It's
11 one thing if there were one medical malpractice case after
12 another from injuries or life-threatening disability as a
13 result of ingesting certain medications, but there's none of
14 that about this case, at least that the Court has seen.

15 MR. GOTTSTEIN: Your Honor, may I?

16 THE COURT: Certainly.

17 MR. GOTTSTEIN: Actually, there's a very large number
18 of cases about Risperdal causing young children -- boys to grow
19 breasts and lactate, so that is going on. And, Your Honor, we
20 understand that this particular provision of federal law has
21 not been enforced. But the law seems very clear that Congress
22 limited coverage to what it defined as medically-accepted
23 indications. And in our view, once this Court ruled that a
24 prescription that's not for medically-accepted indication is a
25 false claim, which it did in October of last year, then it

1 seems to me that Dr. King meets the knowledge requirement after
2 that time.

3 THE COURT: That's your view. That's for another day,
4 and I'm not going to tiptoe into that venue for today. You may
5 be right, but we're not there. We're not there. Just as we
6 are not there to suggest to the jury the fact that this lawsuit
7 was filed put her on notice that what she was doing was
8 inappropriate. That's not going anywhere either, so.

9 MR. GOTTSTEIN: Would Your Honor entertain a
10 continuance for the date of trial?

11 THE COURT: I think what you and Mr. Foley and your
12 respective clients need to do is have an open frank
13 conversation about where this case is going to go because I
14 don't think anyone whether it's Dr. Watson or Dr. King has the
15 financial wherewithal to continue litigating in the manner that
16 this case has been litigated to this point.

17 And somebody needs to get serious about the fact that
18 at the end of the day because of the totality of facts and
19 circumstances of the conduct that occurred here, including that
20 of your client, may come back to cause considerable angst at
21 the end of the day. And the time has come to seriously
22 evaluate the relative risk of going forward and the benefit of
23 going forward.

24 On the basis of a reasonable risk analysis, I think
25 very, very competent counsel would suggest that there is an

1 alternative to continuing to litigate this case. And that's
2 why I genuinely -- and I underscore the word "genuinely" --
3 believe that you personally need to confer with exceptionally
4 competent counsel who are very familiar with litigation in this
5 area. And I will leave it at that. And I think that's the
6 first order of business. And whether that can be accomplished
7 between now and Friday at eleven o'clock, I've already told you
8 I seriously doubt that it can.

9 MR. GOTTSTEIN: Yes, Your Honor.

10 MR. FOLEY: Your Honor, from a practical standpoint,
11 we will confer with plaintiff's counsel and submit a letter to
12 the Court by Thursday afternoon. As the Court knows,
13 Mr. Larson is in trial in a med mal case in state court in
14 Milwaukee County. So we will endeavor between his breaks to
15 talk to him, but there may be some difficulties except for the
16 lunch hour and after hours to confer; but we will endeavor to
17 do that.

18 THE COURT: Well, as I say, the first order of
19 business is to reread the Court's trial scheduling order, what
20 is required, and then look at what was filed. And I appreciate
21 Mr. Gottstein is up in Alaska. But in the wonderful world of
22 the electronic age, we can communicate with e-mails, PDFs,
23 text messages. You don't even have to go back to the
24 old-fashioned fax anymore.

25 And so even though people are thousands of miles

1 apart, there is no reason that what was required in both of
2 those trial scheduling orders could not have been complied with
3 fully, particularly against the Court's comments not today, but
4 the comments that are in that order.

5 So that's why I say, whether it's Mr. Larson or you,
6 Mr. Foley, or you, Mr. Gottstein, I don't think it's possible
7 for anybody to comply and put together a cogent legal
8 memorandum in support of the instructions that you submitted as
9 against the instructions in verdict form that Mr. Gottstein
10 submitted. I mean, after all, they look -- and, again, I don't
11 say this to be critical -- like they were woven out of whole
12 cloth. There isn't a shred of authority submitted for any of
13 them. It's like somebody sat down and decided, well, this is
14 the way I think I'd like this jury to be instructed. Well,
15 that's not the way the law works.

16 It was pointed out in the trial scheduling order that
17 the Court draws from Seventh Circuit instructions, O'Malley,
18 Modern Federal Jury Instructions; and I appreciate the defense
19 cited to some instructions, but there was never any response to
20 those submitted by Mr. Gottstein, and probably for good reason
21 because you never saw them until you received them in the
22 pretrial report which underscores, again, the principal
23 responsibility for the preparation of the report rests with
24 plaintiff's counsel.

25 He has an obligation to confer with the other side,

1 just as you have an obligation to confer with him on your
2 instructions. And we're not going to try this case by the seat
3 of anyone's pants; whether it's a witness, the lawyers, and,
4 more importantly, the judge.

5 We're going to have all of these things nailed down in
6 advance; and it may well be at the end of the day when you all
7 decide to get serious about what needs to be done, perhaps you
8 can stipulate to all of the facts and there not be a trial in
9 the traditional sense. Rather, you can make the legal
10 arguments on all of these issues that are swirling, as I
11 indicated earlier, like bees around honey. And which are going
12 to control, I have no way of fathoming at five o'clock on
13 Tuesday afternoon, December 3rd, because we're not there yet.
14 And I don't have a full appreciation, much less a thorough
15 understanding, of each side's positions on a lot of these
16 issues; and I assume that that's very much on the present in
17 the case because there ain't much in the way of the law to
18 support anybody's particular vantage point.

19 And I say that against the backdrop of some of the
20 gratuitous -- and I don't mean to be disparaging to Judge
21 Kanne who authored the opinion, but that doesn't begin to
22 address the full panoply of what is, at the end of the day,
23 envisioned in this case.

24 And so you can't come in and wave that opinion and
25 say, I'm entitled to a judgment of a million dollars based upon

1 Judge Kanne's finding in that case. That's not going to cut
2 it. I'm sorry. Mr. Gottstein, you wanted to make another
3 point.

4 MR. GOTTSTEIN: Your Honor, I think that your last
5 comments address it; but I was just going to mention that we
6 did cite to law, and it was primarily the Court of Appeals'
7 decision in support of our jury instructions; and so that was
8 the best that we could do because there was -- there was no
9 other law on that, and we pulled the other jury instructions,
10 as you suggested in your trial scheduling order, from O'Malley,
11 since they weren't in the Seventh Circuit Pattern Instructions.

12 THE COURT: All right. Well, there still needs to be
13 certifications with regard to the motions in limine. Many of
14 them, I don't think, are even relevant anymore; but I will
15 await your further response and your responding to one another
16 following a conference with regard to the matter of jury
17 instructions.

18 MR. GOTTSTEIN: Thank you, Your Honor.

19 THE COURT: Very well. The Court stands in recess.

20 (Proceedings concluded at 5:10 p.m.)
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1 STATE OF WISCONSIN)
2 MILWAUKEE COUNTY) SS:
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4

5 I, SHERYL L. STAWSKI, a Registered
6 Professional Reporter and Official Court Reporter, for the
7 United States District Court, Eastern District of Wisconsin, do
8 hereby certify that the above proceedings were reported by me
9 on the 3rd day of December, 2013, and reduced to writing under
10 my personal direction and is a true, correct and complete
11 transcription of my computer-aided transcription of my
12 stenographic notes.
13

14 Dated at Milwaukee, Wisconsin, this 5th
15 day of December, 2013.
16

17 s/ Sheryl L. Stawski

18 Sheryl L. Stawski
19 Official Court Reporter
20 United States District Court
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22
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