

Exhibit 3

STATE OF NORTH CAROLINA
WAKE COUNTY

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

2019 JUL 17 AM 8:22

WAKE CO., C.S.C.

COMMON CAUSE, <i>et al.</i>)
<i>Plaintiffs,</i>)
)
v.)
)
Representative DAVID R. LEWIS,)
in his official capacity as Senior)
Chairman of the House Select)
Committee on Redistricting, <i>et al.</i> ,)
<i>Defendants.</i>)

ORDER ON OUTSTANDING
PRE-TRIAL MOTIONS

THIS MATTER comes before the undersigned three-judge panel upon the parties' outstanding pre-trial motions.

A hearing on outstanding pre-trial motions was held on July 10, 2019, and the matters were taken under advisement. After considering the motions and the parties' briefs, submissions, and arguments, and having reviewed the record proper, the Court, in its discretion, rules upon each motion as follows:

I. Plaintiffs' Motion in Limine to Preclude Legislative Defendants from Offering Evidence Related to the Voting Rights Act

Plaintiffs' motion seeks to preclude, pursuant to the equitable doctrine of judicial estoppel, Legislative Defendants from offering evidence or argument relating to the Voting Rights Act based on Legislative Defendants' prior assertions in *Covington v. North Carolina*, No. 1:15-CV-00399 (M.D.N.C.). Legislative Defendants filed a response arguing that judicial estoppel does not apply because Legislative Defendants do not intend to change their position in this litigation from that expressed to the federal court in *Covington*.

The Court, in its discretion, denies Plaintiffs' request at this time; however, Plaintiffs may reassert this objection to evidence or testimony relating to the Voting Rights Act at the time such evidence or testimony, if any, is proffered at trial.

II. Plaintiffs' Motion in Limine to Preclude Legislative Defendants and Intervenor Defendants from Introducing Expert Analysis Not Disclosed in Expert Reports

Plaintiffs' motion seeks to preclude, pursuant to Rule 26 of the North Carolina Rules of Civil Procedure, any Legislative Defendants' or Intervenor Defendants' experts from testifying or presenting evidence concerning any analyses or opinions not disclosed in their expert reports. On July 8, 2019, Plaintiffs filed a supplemental brief in support of their motion after the parties exchanged trial exhibit lists. In their supplemental brief, Plaintiffs argue that Legislative Defendants' exhibit list includes new, undisclosed expert analysis. Specifically, Plaintiffs ask the Court to exclude: 1) testimony from two legislative staffers, R. Erika Churchill and Raleigh Myers, who were never identified by Legislative Defendants as experts in this case; 2) four exhibits identified as figures created by Legislative Defendants' expert Dr. Trey Hood; 3) two exhibits created by Legislative Defendants' expert Dr. Janet Thornton; and, 4) any other exhibits or testimony relating to undisclosed expert analysis or opinions. Legislative Defendants argue in response that the information Plaintiffs seek to exclude does not constitute expert analysis.

A lay witness may testify to facts within their personal knowledge that “can be perceived by the senses.” *State v. Broyhill*, __ N.C. App. __, __, 803 S.E.2d 832, 838-39 (2017) (quoting N.C.G.S. § 8C-1, Rule 602 cmt.). Lay witnesses may state “instantaneous conclusions of the mind as to the appearance, condition . . . or physical state of . . . things, *derived from observation of a variety of facts presented to the senses at one and the same time.*” *Id.* (quoting *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (emphasis in original)). In contrast, North Carolina’s Rule of Evidence 702 provides that an expert may give an opinion “[i]f . . . technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” and if the other requirements of Rule 702 apply. N.C.G.S. § 8C-1, Rule 702(a). Thus, an expert renders an expert opinion when he “moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment ‘to assist’ the jury based on his ‘specialized knowledge.’” *Broyhill*, __ N.C. App. at __, 803 S.E.2d at 839 (quoting *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016)).

Based on the foregoing, the Court, in its discretion, grants in part and denies in part Plaintiffs’ motion, as follows:

- a. Plaintiffs’ motion is denied as to Legislative Defendants’ Trial Exhibits 024-1 through 024-13 (Affidavit of R. Erika Churchill and accompanying Exhibits). The exhibits and testimony presented by Ms. Churchill are a straightforward recitation of facts that are neither derived from specialized knowledge nor the product of assessment or interpretation, and therefore do not constitute expert analysis or opinion.
- b. For similar reasons, Plaintiffs’ motion is denied as to Legislative Defendants’ Trial Exhibits 025-8 through 025-79 (Exhibits 1-15 accompanying the Affidavit of Raleigh Myers).

- c. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 025-81 through 025-397 (Exhibits 16-174 accompanying the Affidavit of Raleigh Myers). These exhibits display certain Geographic Information Systems "GIS" maps purporting to demonstrate, for example, instances where district boundaries dividing a voting district follow a precinct line. Inherent in the creation of such maps is the application of specialized knowledge that moves beyond a mere report of facts observed through the senses because it necessarily requires assessing and transmuting technical data. Moreover, expert assistance would be required to properly interpret the maps. Consequently, these exhibits constitute expert analysis or opinion.
- d. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 141 through 144 (exhibits created by Dr. Trey Hood). These exhibits were not timely disclosed in Dr. Hood's initial expert report dated April 30, 2019, or in his supplemental report dated May 7, 2019, and are therefore excluded for failure to comply with N.C.G.S. § 1A-1, Rule 26(b)(4)(a)(2).
- e. For the same reasons, Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 170 and 171 (exhibits created by Dr. Janet Thornton) because these exhibits were not disclosed in Dr. Thornton's initial expert report or in her rebuttal report dated May 7, 2019.

III. Plaintiffs' Motion in Limine to Preclude Legislative Defendants from Introducing Evidence Under the Sword and Shield Doctrine

The Court entered an order on March 25, 2019, granting Legislative Defendants' February 5, 2019, motion for a protective order as to twelve legislators' and legislative staffers' claim of legislative privilege while also concluding that Legislative Defendants were estopped from withdrawing their prior assertions of legislative privilege for Defendants Lewis and Hise. In that same order, the Court noted that Plaintiffs could seek to be heard prior to trial on related evidentiary matters should Legislative Defendants offer 1) testimony from any of the twelve individuals who had asserted privilege, 2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or 3) evidence or

testimony that otherwise seeks to explain the legislature’s intent in drawing the challenged district plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data. Plaintiffs’ motion seeks to preclude Legislative Defendants from offering such evidence and testimony.

A party cannot use a privilege both as a “shield” to prevent discovery and a “sword” to present evidence or claims that relate to the privileged information. *See, e.g. State v. Buckner*, 351 N.C. 401, 410 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558 (1996). The Court, in its discretion, grants Plaintiffs’ requested relief in this motion as to the twelve legislators and legislative staff encompassed by the Court’s March 25, 2019, order. Legislative Defendants, however, are not precluded from offering evidence or testimony from legislators or legislative staff who have not previously asserted a claim of legislative privilege and will waive such privilege at trial, provided that Legislative Defendants do not offer: 1) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege; or, 2) evidence or testimony that otherwise seeks to explain the General Assembly’s intent in drawing the challenged district plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

IV. Plaintiffs’ Motion in Limine to Exclude Live Testimony from More Than One Intervenor-Defendant

Intervenor-Defendants intend to present testimony through affidavits for three of the Intervenors and through live testimony for the remaining four Intervenors. Plaintiffs’ motion seeks, pursuant to Rules 401 and 403 of the North

Carolina Rules of Evidence, to limit live testimony to at most only one individual Intervenor on the grounds that additional testimony will be irrelevant, likely duplicitous, and will likely cause undue delay.

Under Rule 611 of the North Carolina Rules of Evidence, the Court “shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and] (2) avoid needless consumption of time.” N.C.G.S. § 8C-1, Rule 611. The Court, in its discretion, denies Plaintiffs’ motion; however, Intervenor Defendants are cautioned that the Court will, if necessary, exercise its authority under Rule 611 to limit live testimony from Intervenors to make the presentation of evidence effective for the ascertainment of truth and avoid needless consumption of time.

V. *Intervenor-Defendants’ Motion in Limine to Exclude Evidence of Dismissed Criminal Charges*

Intervenor Defendants’ motion seeks to exclude any and all evidence, references to evidence, testimony, or argument relating to Intervenor Reginald Reid’s dismissed criminal charges. Plaintiffs have responded that Plaintiffs will not offer evidence relating to Intervenor Reid’s dismissed criminal charges at trial. Accordingly, the Court, in its discretion, grants Intervenor Defendants’ motion.

VI. *Plaintiffs’ Emergency Motion to Compel Legislative Defendants to Produce Revised Calculations of Dr. Jeffrey Lewis*

Plaintiffs’ emergency motion seeks to compel revised calculations of Dr. Jeffrey Lewis that Plaintiffs requested from Legislative Defendants immediately

following Dr. Lewis's deposition on June 11, 2019. The Court, in its discretion, grants Plaintiffs' request to compel Legislative Defendants to produce to Plaintiffs the revised calculations of Dr. Lewis without delay.

Plaintiffs also request fees and costs, pursuant to Rule 37(a) of the North Carolina Rules of Civil Procedure, incurred in obtaining an order compelling Legislative Defendants to produce the revised calculations sought in their emergency motion to compel. The Court, in its discretion, declines to award Plaintiffs fees and costs in connection with this motion.


Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS as follows:


1. Plaintiffs' motion *in limine* to preclude Legislative Defendants from offering evidence or argument relating to the Voting Rights Act is DENIED in accordance with the terms of this Order.
2. Plaintiffs' motion *in limine* to preclude Legislative and Intervenor Defendants from introducing expert testimony regarding analysis or opinions not disclosed in expert reports is DENIED in part and GRANTED in part, as follows and in accordance with the terms of this Order:
 - a. Plaintiffs' motion is denied as to Legislative Defendants' Trial Exhibits 024-1 through 024-13.
 - b. Plaintiffs' motion is denied as to Legislative Defendants' Trial Exhibits 025-8 through 025-79 and granted as to Legislative Defendants' Trial Exhibits 025-81 through 025-397.
 - c. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 141-144.
 - d. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 170 and 171.

3. Plaintiffs' motion *in limine* to preclude Legislative Defendants from introducing evidence or testimony under the sword and shield doctrine is GRANTED; however, Legislative Defendants are not precluded from offering evidence or testimony from legislators who have not asserted legislative privilege, provided such evidence and testimony is in accordance with the terms of this Order.
4. Plaintiffs' motion *in limine* to limit Intervenor Defendants to live testimony from only one Intervenor is DENIED in accordance with the terms of this Order.
5. Intervenor Defendants' motion *in limine* to exclude evidence of Intervenor Reid's dismissed criminal charges is GRANTED.
6. Plaintiffs' emergency motion to compel is GRANTED in part, as follows:
 - a. Legislative Defendants shall produce to Plaintiffs by 10:00 a.m. on July 15, 2019, the revised calculations of Dr. Jeffrey Lewis.
 - b. Plaintiffs' request for fees and costs is denied.

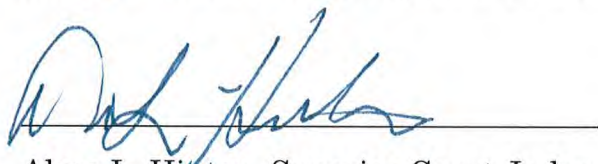
So ORDERED, this the 16 day of July, 2019.



Paul C. Ridgeway, Superior Court Judge



Joseph N. Crosswhite, Superior Court Judge



Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by electronic mail, addressed as follows:

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This the 18th day of July, 2019.



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