

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

2021 DEC 29 P 4:20

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., et al.,

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, et al.

Defendants.

WAKE CO., C.S.C.

**COMMON CAUSE AND HARPER
PLAINTIFFS' JOINT
MOTION TO STRIKE
SEAN P. TRENDE AFFIDAVIT**

Pursuant to North Carolina Rules of Civil Procedure 26(b)(4)(f) and 37, North Carolina General Statute, Section 8C-1, Rules 702, 703, and 705, *Common Cause* and *Harper* Plaintiffs jointly move to strike the affidavit submitted by Sean P. Trende on December 28, 2021 on behalf of Legislative Defendants, including its Exhibit A "rebuttal report", because it (1) does not contain any expert analysis; (2) is an improper rebuttal report because it does not contain any actual rebuttal evidence; and (3) is untimely pursuant to the Court's December 13, 2021 Case Scheduling Order to the extent it is considered an expert report.

ARGUMENT

A. The Trende Affidavit Contains No Actual Expert Analysis.

The affidavit submitted by Sean P. Trende (“Trende Affidavit”) does not qualify as an expert report under North Carolina’s rules because it does not contain Mr. Trende’s opinions or analysis, nor does it offer any specialized knowledge to assist the Court. Mr. Trende did nothing more than review the Complaints in this case, and create a colorful demonstrative purporting to show which districts were mentioned by each Plaintiff in their respective Complaints. Such a demonstrative could have been completed by counsel.

In Exhibit A, Mr. Trende states that he “created [] images” by “examin[ing] the Complaints filed by plaintiffs in this action” and “examined whether districts were challenged as either partisan gerrymanders or districts that diluted minority voting power.” Trende Aff., Ex. A ¶ 27. Based solely on the information contained in the Plaintiffs’ Complaints, Mr. Trende states that he then “color-coded the districts by plaintiff groups, based upon who challenged which districts.” Trende Aff., Ex. A ¶¶ 28, 29. This is the entirety of his “expert rebuttal report.” It does not contain any analysis or expertise; it is simply a color-coded summary of information purportedly contained in the Plaintiffs’ Complaints.¹

The “examination” performed by Mr. Trende is not an expert opinion, but only actually required reading the Plaintiffs’ Complaints. Simply put, this “examination” requires no opinion or expertise. Mr. Trende provides no opinion in Exhibit A, and the facts he purports to recount about which districts are mentioned by each Plaintiff are readily available by simply reading Plaintiffs’ Complaints. He does not offer any scientific, technical or other specialized knowledge that can assist the Court to understand the evidence or to determine a fact in issue. N.C. Gen. Stat.

¹ To be clear, this Motion does not concede that Mr. Trende’s summary is accurate.

§ 8C-1, Rule 702. There is, therefore, no colorable argument that the Trende Affidavit is an expert report, and should therefore be stricken.

B. The Trende Affidavit Contains No Rebuttal Evidence.

While Mr. Trende attests to submitting a “rebuttal report attached to this affidavit as Exhibit A,” the Exhibit contains no mention, let alone any rebuttal, of any evidence in any of Plaintiffs’ expert reports or any other evidence exchanged on December 23, 2021.

On December 23, 2021, pursuant to the Court’s December 13, 2021 Case Scheduling Order, Plaintiffs submitted to the parties and the court several expert witness reports including reports by Professor Daniel Magleby, Professor James Leloudis, Dr. Jonathan Mattingly, Dr. Jowei Chen, Dr. Christopher Cooper, Dr. Wesley Pegden, and Dr. Moon Duchin. North Carolina Rule of Civil Procedure 26(b)(4)(f)(2) allows rebuttal reports to be admitted if they are “intended solely to contradict or rebut evidence on the same subject matter identified by another party.” Legislative Defendants submitted the Trende Affidavit on December 28, 2021 as a “rebuttal report.” *See* Trende Aff. ¶ 3 (attesting that he has “personally prepared the rebuttal report attached to this affidavit as Exhibit A”). However, Exhibit A does not address or mention any of Plaintiffs’ experts’ opinions, much less attempt to rebut, contradict, or disprove any of Plaintiffs’ experts’ opinions. Rather, Exhibit A includes over five pages of “Expert Credentials” (Trende Aff., Ex. A ¶¶ 5-25) followed by less than a page of “Summary of Work Performed” (Trende Aff., Ex. A ¶¶ 26-29), which simply describes how Mr. Trende “color-coded” certain districts mentioned by Plaintiffs in their Complaints based entirely on information contained in Plaintiffs’ Complaints and disclosed well before December 23.

Nothing contained in the Trende Affidavit contradicts, rebuts, or even mentions Plaintiffs’ evidence or any opinions contained within the expert reports submitted by Plaintiffs on December

23, and nothing in the Affidavit relies on any information that was not fully available before December 23. The Trende Affidavit is, therefore, not a proper rebuttal report and should be stricken.

C. Mr. Trende's Affidavit is Untimely.

Because the Trende Affidavit is not a rebuttal report, it needed to be disclosed by December 23, and it should be excluded as untimely (even assuming it qualifies as proper "expert" opinion). In the Court's December 13, 2021 Case Scheduling Order, the Court clearly set forth the schedule for "the purpose of efficient management of these matters." Order at 1. The Order set the "Deadline for parties' exchange of evidence (in the form of expert witness reports, fact witness affidavits, and exhibit lists)" as December 23, 2021. Order at 5. All parties must abide by scheduling orders regarding expert disclosures. N.C. R. Civ. P. 26(b)(4)(f). Accordingly, the Defendants had until December 23 to submit expert witness reports. Instead, the Trende Affidavit was submitted on December 28, five days later.

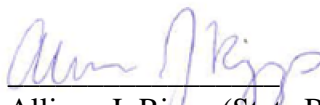
The Court should accordingly exclude the Trende Affidavit as untimely. Where a party "fails to provide timely disclosure under [Rule 26], the court may, upon motion, take such action as it deems just, including ordering that the party may not present at trial the expert witness for whom disclosure was not timely made." N.C. R. Civ. P. 26(b)(4)(f)(2). Legislative Defendants never sought an extension of time to designate Mr. Trende as an expert and have not offered an explanation for the late designation. In such circumstances, the exclusion of the Trende Affidavit is proper. See *Briley v. Farabow*, 348 N.C. 537, 547-548, 501 S.E.2d 649, 655-656 (1998); *Myers v. Myers*, 269 N.C. App. 237, 255-256, 837 S.E.2d 443, 456 (2020) (court has inherent authority to exclude expert testimony due to untimely disclosure); *In re Pedestrian Walkway Failure*, 173

N.C. App. 254, 264–65, 618 S.E.2d 796, 803–04 (2005) (affirming trial court’s enforcement of court ordered deadlines and exclusion of expert due to late disclosures).

Given the truncated trial schedule, and the limited time that the parties have to conclude depositions and prepare for trial, each day matters. Legislative Defendants submitted the Trende Affidavit five days late, when many of the experts had already been scheduled for depositions, and offered no explanation for the untimely submission. Plaintiffs would suffer harm and prejudice if the untimely (and inaccurate) Trende Affidavit was permitted into the record and Mr. Trende were permitted to testify at trial as an untimely disclosed expert. It is therefore proper to strike the Trende Affidavit as untimely and to preclude Mr. Trende from testifying at trial.

Common Cause and *Harper* Plaintiffs respectfully request that, in light of (1) the absence of actual expert opinion or analysis in the Trende Affidavit, (2) the absence of *any* rebuttal evidence in the affidavit, which was filed as a “Rebuttal Report,” (3) and the fact that the affidavit was not timely disclosed as an affirmative expert report, the Court strike and exclude the Trende Affidavit and its Exhibits as improper and in violation of the Court’s December 13 Order and North Carolina’s rules for expert reports.

Respectfully submitted, this the 29th day of December, 2021.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day submitted a copy of the foregoing document in the above titled action by mail and/or electronic mail, in the manner requested, to the following parties:

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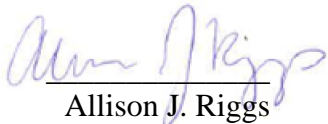
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This the 29th day of December, 2021.



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