

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS and CHRISTINE)
BOWSER,)
)
Plaintiffs,)
)
v.)
)
PATRICK MCCRORY, in his capacity)
as Governor of North Carolina, NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS, and JOSHUA HOWARD,)
in his capacity as Chairman of the North)
Carolina State Board of Elections,)
)
Defendants.)

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO
EXCLUDE IN PART TESTIMONY BY DR. HOFELLER**

Plaintiffs' motion to exclude certain testimony of Dr. Thomas Hofeller should be denied. For the reasons stated below, the Court should allow all of the testimony by Dr. Hofeller and then give it the weight to which it is entitled after the Court has heard Dr. Hofeller's testimony and the rest of the evidence in this case.

- 1. Because this case is set for a bench trial, the Court is the final decision maker regarding both findings of facts and legal conclusions, and there is no risk that a jury might be confused by any testimony concerning the applicable legal principles.**

Motions to exclude expert testimony are mainly focused on the need to protect juries and ensure that any expert testimony "is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). In jury trials, the district court

functions as a “gatekeeper whose role is to keep experts within their proper scope lest . . . [their] testimony carry more weight with the jury than it deserves.” *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000).

The concern that unreliable expert testimony will confuse a jury is not present “where a district judge sits as the trier of fact in the place of a jury.” *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000). Contentions that testimony by an expert might be unreliable “are of lesser impact” in a bench trial. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002). In a bench trial, should the trial court find the case for admissibility of expert testimony to be weak – after the court has heard the testimony – the evidence can be given little weight even though it has been admitted. *SmithKline Beecham Corp v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (*rev’d on other grounds*). There is no jury in this case who might be confused by Dr. Hofeller’s testimony regarding his understanding of the applicable law.

2. Dr. Hofeller is fact witness who must be allowed to testify on the criteria he followed in drawing Congressional Districts 1 and 2.

In addition to being proffered as an expert witness, Dr. Hofeller is a fact witness because he was engaged by the General Assembly to lead and monitor the drawing of redistricting maps including the 2011 Congressional Plan. He has repeatedly been questioned by plaintiffs’ counsel to explain the criteria he followed in drawing these districts. The criteria he followed were given to him by the co-chairs of the General Assembly’s Joint Redistricting Committee, Senator Bob Rucho and Representative David Lewis. In most respects, the criteria were based upon relevant decisions by the United

States Supreme Court and, in the case of legislative districts, the North Carolina Supreme Court. Dr. Hofeller cannot explain the criteria he followed without giving his understanding of these cases. Thus, Dr. Hofeller should be allowed to testify on his understanding of these cases as it relates to the criteria he followed in drawing redistricting plans. *United States v. Erickson*, 75 F.3d 470, 475-76 (9th Cir. 1996); *Janich Bros. Inc. v. Am. Distilling*, 570 F.2d 848, 861 (9th Cir. 1977). In his role as a fact witness, Dr. Hofeller is not testifying as an expert on the meaning of the law but instead only giving his understanding of the criteria established by the relevant court decisions for purposes of explaining how he drew the two challenged districts.

3. As an expert witness, Dr. Hofeller may explain his understanding of the law without purporting to give expert opinions as to what the law is.

Under Rule 704, Fed. R. Evid., an expert witness is permitted to testify in the form of an opinion as to an “ultimate issue of fact.” *United States v. Zipkin*, 729 F.2d 384, 386-87 (6th Cir. 1984). In giving their testimony on an ultimate issue of fact, expert witnesses may explain their own understanding of the law without purporting to give expert opinions as to what the law is. *Donnelly Corp. v. Gentex Corp.*, 918 F. Supp. 1126, 1137 (W.D. Mich. 1996). Thus, it is appropriate for an expert to state his understanding of the law without opining on whether the law has or has not been violated. *Snyder v. Wells Fargo Bank, N.A.*, 2012 WL 4876938, at *4 (S.D.N.Y. Oct. 15, 2012); *State Control Components, Inc. v. Lexmark Int’l, Inc.*, 2007 WL 7083655, at *6 (E.D. Ky. May 12, 2007). Again, defendants are not offering Dr. Hofeller as an expert in law. His understanding of the law, however, is relevant to any expert testimony by Dr.

Hofeller related to his criticisms of plaintiffs' experts. The Court should give Dr. Hofeller's expert testimony the weight to which it is entitled after the Court has heard all the evidence.

4. Under plaintiffs' argument, the testimony of plaintiffs' expert should be excluded.

Plaintiffs intend to offer the expert testimony of Dr. Stephen Ansolabehere. In his report, Dr. Ansolabehere opines that the 2011 versions of Congressional Districts 1 and 12 "are substantially less compact" than the 2001 version and that race was "the predominant factor in configuring these districts." Pls.' Trial Ex. 17, Expert Report of Stephen Ansolabehere (12/24/13). Under plaintiffs' theory, both of these statements are legal conclusions for the Court to render, not Dr. Ansolabehere. Using plaintiffs' argument, Dr. Ansolabehere's testimony is "one species of legal conclusion masquerading as expert opinion." Dr. Ansolabehere's reports are just as "rife" with "precisely this improper content" as plaintiffs have incorrectly ascribed to Dr. Hofeller. Therefore, to the extent plaintiffs have correctly described the law as to the admissibility of Dr. Hofeller's testimony regarding his understanding of the applicable law, these same arguments require the exclusion of Dr. Ansolabehere's testimony.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to exclude certain aspects of Dr. Hofeller's testimony should be denied and Dr. Hofeller's testimony should be admitted and accorded whatever weight the Court may deem appropriate.

This 1st day of October, 2015.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
*Co-counsel for Defendants North Carolina
State Board of Elections and Joshua Howard,
in his capacity as Chairman of the North
Carolina State Board of Elections*

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Defendants' Response to Plaintiffs' Motion to Exclude in Part Testimony by Dr. Hofeller** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

PERKINS COIE LLP
John M. Devaney
jdevaney@perkinscoie.com
Marc E. Elias
melias@perkinscoie.com
Kevin J. Hamilton
khamilton@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
MElias@perkinscoie.com
Attorneys for Plaintiff

POYNER SPRUILL LLP
Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Local Rule 83.1 Attorney for Plaintiffs

This the 1st day of October, 2015.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Telephone: 919.787.9700
Facsimile: 919.783.9412
thomas.farr@odnss.com

*Co-Counsel for Defendants North Carolina
State Board of Elections and Joshua Howard,
in his capacity as Chairman of the North
Carolina State Board of Elections*

22537641.1