

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

MATHIS KEARSE WRIGHT, JR.,

Plaintiff,

v.

SUMTER COUNTY BOARD OF
ELECTIONS AND REGISTRATION,

Defendant.

CIVIL ACTION NO. 1:14-CV-42
(WLS)

**SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION'S REPLY IN
SUPPORT OF MOTION TO EXCLUDE PORTION OF PLAINTIFF'S EXPERT
REPORT AND TESTIMONY**

I. INTRODUCTION

In response to the County's motion to exclude portions of Dr. Frederick McBride's expert report and testimony, Plaintiff attempts to meet the standard of the Supreme Court in *Daubert* and its progeny by reinventing Dr. McBride's experience on socioeconomic conditions in Sumter County. While this motion does not need to be decided prior to the ruling on the County's motion for summary judgment [Doc. 40], if the case goes to trial, the Court should grant the County's motion because Plaintiff has not demonstrated that Dr. McBride is an expert on the socioeconomic conditions in Sumter County.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Credible Evidence Shows that Dr. McBride Lacks Expertise on the Socioeconomic Conditions in Sumter County and Therefore His Testimony on the Topic Should be Excluded.

Faced with his Dr. McBride's deposition admissions about his lack of expertise in socioeconomic conditions in Sumter County, Plaintiff now attempts to modify Dr.

McBride's testimony with a subsequent declaration. Dr. McBride's new declaration about his skills and history directly contradicts his deposition testimony.¹

First, Plaintiff now maintains that Dr. McBride's selection of American Community Survey (ACS) data was not based on someone else's selection of categories, citing Dr. McBride's current assertion that "my selection and use of data from the American Community Survey (ACS) **was not dependent on Cooper.**" [Doc. 43-1, p. 3] (emphasis added). Dr. McBride now also claims to have selected categories from the ACS that were "best suited to address the socioeconomic conditions" in Sumter County. [Doc. 43-1, p. 4]. But in his deposition, Dr. McBride testified about a process that was quite different:

Q: Now, from the American Community Survey, you looked at the education as kind of your first category there. How did you select the categories that you looked at from the ACS data?

A. I looked at previous reports where this information was used in case, provided -- well, previous reports from Bill Cooper, and **I just pretty much followed his method.**

Q. So the categories that you selected were based on the categories Mr. Cooper generally selected?

A. Over the course of a lot of years, yes.

Deposition of Frederick Glenn McBride [Doc. 38] ("McBride Dep."), 54:7-17 (emphasis added). Despite the attempt to change that fact now, Dr. McBride's deposition testimony clearly shows he did not rely on his own expertise or tailor his selections to the issues in Sumter County.

Second, Plaintiff now asserts that Dr. McBride's prior work analyzing Voting Rights Act cases did include socioeconomic analysis. [Doc. 43-1, pp. 2-3]. But in his deposition,

¹ Although the substantive changes in his testimony that Dr. McBride attempts to make in his declaration would not be appropriate for an errata sheet, the County notes that Dr. McBride did not submit a deposition errata sheet, and so his testimony stands.

Dr. McBride testified differently about each of the cases he discusses in his declaration. Regarding the *Wolf Point* case, Dr. McBride testified that he submitted an expert report, but that *Wolf Point* was not a Section 2 case and only involved a failure to redistrict, so there was no totality of the circumstances issue to examine. McBride Dep., 31:8-21. He further agreed that there was “no impacted minority group” in that case. McBride Dep., 31:19-21. Although Dr. McBride states in his declaration that he submitted “socioeconomic data and analysis” in that case, [Doc. 43-1, p. 2], he cites to his report on the demographics of Sumter County in *this* case for that proposition.

Regarding the *Fremont County* and *Lexington County* cases, both Section 2 cases, Dr. McBride now contends that he gathered Census data in those cases. [Doc. 43-1, pp. 2-3]. But in his deposition, Dr. McBride testified that he spent time in Fremont County only to research transcripts of county commission minutes looking for evidence of historical discrimination; he did not mention Census data playing any role in that case. McBride Dep., 29:3-10. Similarly, Dr. McBride testified that he spent time in Lexington County researching the history of discrimination through newspapers and school board minutes, mentioning as an aside that he gathered “some socioeconomic data.” McBride Dep., 29:11-16. Dr. McBride also did not submit an expert report in the either case. McBride Dep., 31:8-15.

In sharp contrast to *Fremont County* and *Lexington County*, Dr. McBride did not spend **any** time in Sumter County analyzing the issues in this case. McBride Dep., 53:21-54:1. The fact that Dr. McBride admittedly had to rely on someone else’s work in *another case* to select ACS categories to consider in *this one* further indicates that he did not gain sufficient experience analyzing the relevant Census data in prior cases.

Third, Plaintiff now argues that Dr. McBride has studied socioeconomic data during his tenure with the ACLU and so has sufficient experience dealing with these types of data. [Doc. 43-1, pp. 1-2]. However, on deposition, Dr. McBride testified that (a) prior to arriving at the ACLU, his work involved alternative election methods, McBride Dep., 19:23-20:8; (b) his original job responsibilities at the ACLU were as redistricting coordinator, presenting maps and discussing potential maps with various groups, *Id.* at 23:21-25:2; and (c) after learning how to draw plans, he provided internal research on the merits of cases based on the *Gingles* factors—not the totality of the circumstances, *Id.* at 25:16-27:5.

Plaintiff does not attempt to change Dr. McBride’s admission that he is not an expert on socioeconomic conditions in Sumter County. Instead, without recanting his prior admission that he could not call himself an expert on the topic, Dr. McBride asserts that he is “knowledgeable” about the conditions, based on the Census data alone. [Doc. 43-1, p. 5], McBride Dep. 54:2-6. In short, Dr. McBride has not changed his testimony on the critical issue—his admission that he is not an expert on socioeconomic issues— and so that testimony should be excluded *See Bowers v. Norfolk Southern Corp.*, 300 Fed. Appx. 700, 703 (11th Cir. 2008) (finding the district court did not abuse its discretion when it “excluded O’Brien’s testimony because he admitted he was not qualified to determine the cause of Bower’s back injuries”).

B. The Fact that Dr. McBride Can Testify About the Statistical Analysis He Provided on the *Gingles* Prongs Does Not Mean He Is Qualified to Offer Opinions on the Socioeconomic Conditions in Sumter County for Purposes of the Totality of the Circumstances Inquiry.

The County agreed that Dr. McBride can testify about the **statistical analysis** he performed for the first three *Gingles* prongs, [Doc. 42-1, p. 5], but never conceded that he has the expertise to testify regarding the socioeconomic conditions in Sumter County. The

County does not challenge Dr. McBride's ability to give testimony regarding the *Gingles* prongs and agrees this Court can take judicial notice of the statistics in the ACS data. *See* [Doc. 42-1, pp. 5-6]. But Dr. McBride cannot offer opinions on Sumter County's socioeconomic conditions because he admittedly lacks expertise on that topic. Dr. McBride's clear deposition testimony was that his Voting Rights Act work was limited to *Gingles* factors and that his selection of ACS categories for use in this case was based on another individual's expertise, not his own.

Plaintiff asserts that Dr. McBride's statements about disparities are not opinions, but simply statements of what the ACS data show. [Doc. 43, p. 5]. While this Court can certainly take judicial notice of the statistics themselves, *Wilson v. Illinois Cent. R. Co.*, No. 09 C 7392, 2012 WL 135446, at *3 (N.D. Ill. Jan. 12, 2012) (collecting cases), Plaintiff has not shown that Dr. McBride is qualified to offer opinion testimony regarding the socioeconomic conditions in Sumter County as required by Fed. R. Evid. 702 and does not distinguish the cases cited by the County demonstrating why Dr. McBride's opinion testimony should be excluded. *See City of Tuscaloosa v. Harcos Chemicals, Inc.*, 158 F.3d 548, 565 (11th Cir. 1998).

III. CONCLUSION

As this brief and the County's Brief in Support of the Motion to Exclude [Doc. 42-1] demonstrate, Dr. McBride admitted he was not an expert on the socioeconomic conditions and that he relied on the expertise of others to determine the correct categories to select for his opinions about Sumter County's socioeconomic conditions. Despite his attempts to change that testimony, this Court should exclude Dr. McBride's opinion testimony regarding the socioeconomic conditions in Sumter County and any opinions derived from

the ACS data because he lacks the necessary qualifications under Fed. R. Evid. 702 to give such testimony.

Respectfully submitted this 13th day of February, 2015.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490
Bryan P. Tyson
Georgia Bar No. 515411
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: 678.347.2200
Fax: 678.347.2210

*Attorneys for Defendant Sumter County Board of
Elections and Registration*

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA**

MATHIS KEARSE WRIGHT, JR.,

Plaintiff,

v.

SUMTER COUNTY BOARD OF
ELECTIONS AND REGISTRATION,

Defendant.

CIVIL ACTION NO. 1:14-CV-42
(WLS)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION'S REPLY IN SUPPORT OF MOTION TO EXCLUDE PORTION OF PLAINTIFF'S EXPERT REPORT AND TESTIMONY with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Laughlin McDonald, Esq.
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303

Chara F. Jackson, Esq.
1900 The Exchange
Suite 425
Atlanta, GA 30339

This 13th day of February, 2015.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490