

**IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT**

FRANCIE HUNT, TELISE TURNER, and GARY
WYGANT,

Plaintiffs,

v.

CASE NO. 22-0287-IV

Chancellor Perkins

Chancellor Maroney

Judge Sharp

WILLIAM LEE, as Governor of Tennessee, in his
official capacity; TRE HARGETT, as Tennessee
Secretary of State, in his official capacity; and MARK
GOINS, as Tennessee Coordinator of Elections, in his
official capacity,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF THE MOTION
TO STRIKE UNTIMELY AFFIDAVIT AND REBUTTAL EXPERT REPORT FILED
AS EXHIBIT O TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND FOR
EVIDENTIARY SANCTIONS**

Defendants William Lee, Tre Hargett, and Mark Goins, in their official capacities only, submit this memorandum in support of their Motion to Strike Untimely Affidavit and Rebuttal Expert Report Filed as Exhibit O to Plaintiffs' Motion for Summary Judgment and for Evidentiary Sanctions and state as follows:

INTRODUCTION

Rather than letting the Court sort out how to address the present state of the trial record, Plaintiffs pressed on. Plaintiffs would have the Court believe that Dr. Cervas fixed his error by "reconnecting the web address" to the original Map 13d_e, but this simply created a second spoliation—the only detailed copy of Map 13d_e and the only copy of Map 13d_e2 previously introduced in the record have been destroyed. The purported Map 13d_e, now hyperlinked through Dave's Redistricting App 2020 ("DRA 2020"), cannot be verified because Plaintiffs failed to

introduce another detailed version into the record before spoliating the original Map 13d_e.

Even more troubling, though, is that Dr. Cervas’ sworn affidavit cannot be accurate. Each URL generated in DRA 2020 is unique to that map. The map at the other end of the URL hyperlink in Exhibit O has always been the same map—Dr. Cervas has just modified it twice now after Defendants filed their motion for summary judgment. Plaintiffs’ problems are not fixed. They have compounded.¹

FACTUAL AND PROCEDURAL BACKGROUND

After the close of discovery, Plaintiffs submitted a supplemental expert report titled Response to Defendants’ Expert Depositions Regarding Tennessee State House Reapportionment (the “Supplemental Report”) on January 9, 2023 and offered to reopen Dr. Cervas’s deposition. (Attachment A-January 9, 2023 Resp. to Defs’ Expert. Depos.). The Supplemental Report contained a URL hyperlink² on page 1, footnote 2 that linked to Cervas Map 13d_e on Dave’s Redistricting website. (See Supplemental Report, pg. 1, n. 2 “. . . See Map13d_e, [URL hyperlink]”). As Defendants argued in their Motion to Disqualify Jonathan Cervas or in the Alternative Strike His Untimely Supplemental Expert Report, the untimely Map 13d_e remained non-contiguous and therefore unconstitutional. The Supplemental Report was part of Exhibit O that Plaintiffs filed with their Motion for Summary Judgment on January 20, 2023. (See P’s Mot. for Sum. J., Ex. O). Plaintiffs filed no further expert reports.

While preparing Defendants’ Reply in support of their Motion to Disqualify, Defendants’

¹ In the response, Plaintiffs seem to take offense at Defendants’ decision to file the pending motion. Defendants have taken pains to present the issue as neutrally as possible and to avoid assuming the source or rationale of the problem. Defendants attempt to do the same here. But this issue requires the Court’s intervention—the original version of a map is apparently gone, and its replacement which *was* in the record, now has also been removed and replaced with a purported correction. Only the Court can solve these record issues.

² <https://davesredistricting.org/join/ab9f8923-5638-45d1-98f6-e01318aa81ca>

counsel clicked on that same URL hyperlink in Dr. Cervas' Supplemental Report, expecting to again see the unconstitutional Map 13d_e in DRA 2020. That URL hyperlink now led to a previously undisclosed map: Cervas Map 13d_e2. After the parties filed their summary judgment motions, Dr. Cervas spoliated the only version of Map 13d_e in the record and modified it into the new Map 13d_e2 on Dave's Redistricting. (Cervas Aff. ¶ 6). Defendants were never given notice. Neither was the Court. According to Dr. Cervas, neither was Plaintiffs' counsel. (Cervas Aff. ¶ 6). In response to discovering this, but before Dr. Cervas submitted his affidavit, Defendants filed their "Motion to Strike Untimely Affidavit and Rebuttal Expert Report Filed as Exhibit O to Plaintiffs' Motion for Summary Judgment and for Evidentiary Sanctions" on February 22, 2023. (*See* Defs' Mot. to Strike).

After Defendants filed their Motion, Dr. Cervas spoliated another alternative map in the record by editing and overwriting Map 13d_e2 and replacing it with an unverifiable map he purports to be Map 13d_e. Dr. Cervas claims he "corrected this routing issue" by "reconnecting the web address" from the Supplemental Report "to the original Cervas House Map 13d_e" even though the original Map 13d_e in the record was destroyed. (Cervas Aff. ¶ 8).

ARGUMENT

I. Discovery Sanctions for Spoliation.

Trial judges have the authority to take such action as is necessary to prevent discovery abuse. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004). Tenn. R. Civ. P. 34A.02 provides that "Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence." The sanctions available under Rule 37 include dismissing the action or proceeding or any part thereof, *see* Tenn. R. Civ. P. 37.02(C); an order designating that certain facts shall be taken to be established for the purposes of the action,

see Tenn. R. Civ. P. 37.02(A); an order refusing to allow a party to support or oppose certain claims or to introduce certain matters into evidence, *see* Tenn. R. Civ. P. 37.02(B); an order staying the proceedings, *see* Tenn. R. Civ. P. 37.02(C); and contempt of court, *see* Tenn. R. Civ. P. 37.02(D). *See Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 744 (Tenn. 2015).

Though intentional misconduct is not a prerequisite for the imposition of sanctions for spoliation of evidence, the analysis for the imposition of sanctions for spoliation should be based upon the totality of the circumstances. *Tatham*, 473 S.W.3d at 745-46. Factors which are relevant to the trial court's consideration include:

- (1) the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or fraudulent intent;
- (2) the degree of prejudice suffered by the non-spoliating party as a result of the absence of the evidence;
- (3) whether, at the time the evidence was destroyed, the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation; and
- (4) the least severe sanction available to remedy any prejudice caused to the non-spoliating party.

Id. at 747.

II. The Actions Dr. Cervas Describes in his Sworn Affidavit Are Impossible.

Dr. Cervas's Affidavit describes his actions after being notified by Plaintiffs' counsel of Defendants' Motion. (Cervas Aff. pg. 4). In his sworn Affidavit, Dr. Cervas claims that after this issue was brought to his attention, he "corrected this routing issue by reconnecting the web address from [his Supplemental Report] to the original Cervas House Map 13d_e." (Cervas Aff. ¶ 8). That is simply impossible. A user of DRA 2020 cannot reroute a URL to a different map.

After receiving Dr. Cervas's affidavit and suspecting inaccuracies, Defendants' counsel

contacted Dave’s Redistricting regarding DRA 2020’s Share URLs³ and “Dave” himself, David G. Bradlee. Dr. Bradlee confirmed that each Share URL is unique to the particular map for which it was generated. (*See* Affidavit of David G. Bradlee, attached hereto as Exhibit A, ¶ 1). Dr. Cervas could not have rerouted the URL in the Supplemental Report to a different map as he described. *Id.* at ¶ 2. Dr. Bradlee’s affidavit only leaves one explanation: **Dr. Cervas modified the map itself.** Dr. Cervas’s assertion in his affidavit that he just rerouted the web address to the “original Cervas House Map 13d_e” is impossible as described and raises serious questions as to the accuracy of his sworn Affidavit.

III. Plaintiffs Have Now Twice Spoliated Dr. Cervas’s Maps in the Record.

In his Affidavit, Dr. Cervas admitted to modifying the original Map 13d_e that was linked in Exhibit O into Map 13d_e2. (Cervas Aff. ¶ 6). Therefore, the only detailed copy of Map 13d_e to which the Defendants and the Court were given access was overwritten and destroyed. Unless the Court exported Map 13d_e, it cannot verify any claimed duplicates or remakes.

After realizing Map 13d_e2 was in the record⁴ as Defendants noted in their Motion, Plaintiffs decided to remove Map 13d_e2, destroying the only copy of Map 13d_e2, which until Dr. Cervas edited it, *was* in the record. (Cervas Aff. ¶ 9); *see* “Plaintiffs’ Notice of Filing Affidavit of Jonathan Cervas,” pg. 2 (“The new map that prompted Defendants to cry foul is not in the record”).

But as discussed *supra*, a unique URL on Dave’s Redistricting cannot be rerouted by a user to a different map. Since each URL is unique to each map, the only way a URL can point to a

³ To generate a shareable URL for a map in DRA 2020, the user clicks on the “share” function and the URL appears in a form that can be copied.

⁴ Plaintiffs cannot argue Map 13d_e2 was not in the record. If Map 13d_e2 being hyperlinked to a footnote in their expert’s report does not constitute being in the record, then none of Plaintiffs’ alternative maps are in the record in a form that can be analyzed.

different map is to modify the map it originally pointed to. As Plaintiffs admitted in their Notice of Filing, the only copy of Map 13d_e2 in the record was destroyed and overwritten as well. And while it is true that Defendants moved to strike Map 13d_e2 from the record, only the Court can perform that task. This means that Dr. Cervas spoliated evidence again—but this time, intentionally.

Plaintiffs could have potentially avoided this situation by submitting block assignment files or even shapefiles of Dr. Cervas’s alternate maps to the Court and Defendants alongside his expert reports. However, Plaintiffs decided to only provide the Court and Defendants with their expert’s maps in this case by utilizing URLs in footnotes hyperlinked to each alternative map in Dave’s Redistricting App 2020.⁵ Plaintiffs always risked spoliation of Dr. Cervas’s alternate maps if the hyperlinks were disrupted or if the specific maps associated with each hyperlink were altered. The first instance of spoliation by Dr. Cervas was negligent. The second was deliberate.

The Court and Defendants cannot verify that Map 13d_e that is linked to the URL in Dr. Cervas’ Supplemental Rebuttal Report is the same Map 13d_e that existed before he modified it to Map 13d_e2. The only thing one can say for certain is that he re-modified the *label* on the map from “TN House 13d_e2” back to “TN House 13d_e.” It is also possible that Dr. Cervas manually edited district boundaries in an attempt to “re-create” Map 13d_e, or he could have imported an unverified and undisclosed block assignment file or shapefile onto the unique map connected to the URL in question. But either method would have modified the map itself yet again. More importantly, the result of either method cannot be verified to have restored Map 13d_e to its

⁵ In his Supplemental Report, Dr. Cervas embedded a picture of Map 13d_e. The picture of that map, however, is too small to analyze beyond the regional level and obviously cannot be analyzed for population deviation, contiguity at the precinct or block level, or many other redistricting criteria.

original condition because no other detailed copy of Map 13d_e or Map 13d_e2 exists in the record. If a URL hyperlink in Dr. Cervas's report leads to a map and that particular map is modified and saved over, the original is destroyed. And, as noted, any "duplicate" or re-uploaded file—like the purported version of Map 13d_e now hyperlinked in the record—cannot be verified. It is now too late for Plaintiffs to provide Defendants or the Court verifiable shapefiles or block assignment files of two of their expert's alternative maps.

Once Dr. Cervas overwrote Map 13d_e with Map 13d_e2, Plaintiffs had no way to "unspoliate" Map 13d_e. They should have waited for the Court to determine the appropriate remedy to protect the record, rather than try to hastily correct the spoliation. And when Dr. Cervas overwrote Map 13d_e2 with the new purported Map 13d_e, he ended up spoliating Map 13d_e2 as well, only this time by choice.⁶

CONCLUSION

Defendants noted in their memorandum that this was a "difficult bell to unring." (*See* Defendants' Memorandum in Support of Motion to Strike Untimely Affidavit and Rebuttal Expert Report Filed as Exhibit O to Plaintiffs' Motion for Summary Judgment and for Evidentiary Sanctions," pg. 6). Plaintiffs tried to unring the bell and instead have rung it twice. The Court is now left with two spoliated alternative maps—one intentionally destroyed after a pending motion for evidentiary sanctions—and a purported expert whose sworn Affidavit claims he took actions that are impossible as stated.

For the foregoing reasons, Defendants move the Court to issue evidentiary sanctions as

⁶ And this is critical. The appellate courts rely upon a true, unadulterated record of everything filed in the trial court. Once Map 13d_e2 was introduced through a previously-filed URL, it became part of the record. To be sure, it should not have been, but an accurate description of the trial court proceedings is paramount if only to permit meaningful review of the Court's resolution of the pending motions and to preserve all issues for any appeal.

necessary to ameliorate the prejudice to the Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically upon the following on this 1st day of March, 2023:

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