IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

This document relates to Case No. 16-CV-8940

REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO BAR DEFENDANTS' PROPOSED EXPERT WITNESS CELESTE STACK

Plaintiffs Ben Baker and Clarissa Glenn reply to Defendants' response regarding their proposed expert Celeste Stack, stating as follows:

INTRODUCTION

Ms. Stack is an alleged expert on certificates of innocence (COIs) but she is one without any opinions as it relates to this case. When asked her opinion on the COIs in these Plaintiffs' case in a prior deposition during the *Waddy* matter, Ms. Stack said she couldn't provide one. Dkt. 296-2 at 22. And the Defendants' subsequent Rule 26(a)(2)(C) disclosure in this actual case does not articulate any—a "self-inflicted wound" that disqualifies the witness. *Martinez v. Garcia*, 2012 WL 12878716, at *2 (N.D. Ill. Nov. 5, 2012). Ms. Stack should be barred on that basis alone. To the extent this Court can cobble together any case-specific opinions or more general opinions about COIs from the disclosure, Ms. Stack is not qualified to give them and her opinions are otherwise improper, speculative, unsupported, or a combination thereof. This Court should bar Ms. Stack as an expert witness.

ARGUMENT

I. Ms. Stack does not articulate opinions related to this case, and to the extent one can be inferred, it is not a relevant or proper opinion.

Plaintiffs specifically argued Defendants' disclosure does not comply with Rule 26(a)(2)(C) and cited a variety of cases noting that this type of disclosure from a non-retained expert requires a statement of the "facts and opinions to which the witness is expected to testify." Dkt. 296 at 5 (citing cases that there must be an actual disclosed opinion and not just an assertion that the witness has an opinion). The Defendants make a confusing argument that the cases are irrelevant because they don't lie in *Daubert*, or otherwise shift the blame to Plaintiff for not inferring Ms. Stack's opinions or taking her deposition. Their arguments fail.

Plaintiffs' Motion was very clear: Ms. Stack should be barred because the Defendants' Rule 26(a)(2)(C) disclosure was inadequate and did not identify Ms. Stack's opinions. Dkt. 296 at 6-8. The cases cited by Plaintiff in support all apply this Rule of Civil Procedure. *See, e.g.*, *DeLeon-Reyes v. Guevara,* 2023 WL 358834, at *3 (N.D. Ill. Jan. 23, 2023) ("Turning to the adequacy of the disclosures, the Court finds that they do not meet the requirements of Rule 26(a)(2)(C)."). Although it is true Plaintiffs made alternative arguments that a *Daubert* analysis also precludes Ms. Stack's testimony, contrary to the Defendants' contention, that does not make Plaintiffs' Rule 26(a)(2)(C) argument, and the case law in support, "irrelevant." *See* Dkt. 329 at 3. *Daubert* arguments or not, the Defendants are required to comply with the Rules of Civil Procedure and provide at least a "brief account of the [expert's] main opinions." *Sec. & Exch. Comm'n v. Nutmeg Grp., LLC,* 2017 WL 4925503, at *3 (N.D. Ill. Oct. 31, 2017). They did not.[1]

[1] If the Defendants' argument is that this Court is only interested in hearing the parties' positions on why experts should be barred pursuant to the *Daubert* admissibility standard at this time—and any and all other grounds for barring experts need to be presented at another time—well, that is not how Plaintiffs interpret this Court's scheduling order. Plaintiffs, instead, interpret the reference to "*Daubert* motions" as a shorthand

The Defendants argue that Ms. Stack's memorandum "strongly implies" her opinion. Dkt. 329 at 6. Plaintiffs disagree, as when their undersigned counsel asked Ms. Stack about her opinion in these Plaintiffs' cases at a different deposition in October 2023 (the *Waddy* case) both at the time she wrote the memorandum in December 2015 and then at the time of the *Waddy* deposition, Ms. Stack could not articulate one. Dkt. 296-2 at 21-22 (explaining that, originally, she was "bothered" by her supervisors' decision to vacate Plaintiff Baker's conviction, but "I learned a lot more in the time remaining that I had in the office, which was maybe, like, a year before, you know, I retired. . . . So I guess what I'm trying to say, in a long-winded way, is that my opinion on the case was fluid, and I'd be hesitant to try and pinpoint what it was at any time in that journey, you know, because I can't remember."); *Id.* at 22 (when asked what her opinion was now, Ms. Stack said, "I've never looked at the big picture…. I really don't know what's evolved.").

Regardless, it is not the burden of Plaintiffs to infer Ms. Stack's opinion, and "no party may fairly require an adversary to engage in guesswork, rather than particularizing the witness's proposed testimony." *Martinez*, 2012 WL 5748357, at *2. And contrary to the Defendants' argument, which they make without citing any authority, Dkt. 329 at 6, there is no requirement that Plaintiffs depose Ms. Stack (again) to figure out her opinions. Indeed, the decision on whether to depose experts at all is a strategic one that is widely debated. *See e.g.*, DEPOSING THE OPPOSING EXPERT: DISCOVER OR DESTROY?, 2 ANN.2001 ATLA-CLE 2553 (highlighting the diversity of opinions on whether to depose the adverse parties' disclosed expert). Plaintiffs chose not to do so (again) here, and "[i]t is not the job of the opposing party to make a record of the factual basis of the expert's testimony by way of deposition." *Martinez v. Aerovias de Mexico, S.A. de C.V.*, 2023 WL 5748358, at *3 (N.D. Ill. Sept. 6, 2023).

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for all arguments to bar experts. If Plaintiffs' interpretation is incorrect, Plaintiffs will re-raise the inadequate disclosure argument during the motion *in limine* schedule.

The Defendants argue that Rule 26(a)(2)(C) disclosures do not have to be as detailed as retained expert reports. That is true, but they still must articulate a clear opinion and its factual basis, which is missing here. What's more, the motivation for the "disclosure-lite" rule—as it has been called—is not because the other side is less entitled to full notice but rather because "these witnesses have not been specially retained and may not be as responsive to counsel as those who have." Fed. R. Civ. Pr. 26, Advisory Committee Notes, 2010 Amendment. Needless to say, that rationale does not apply here, as Ms. Stack is an employee of the law firm representing the Defendants. Accordingly, it would not be difficult for Defendants to ascertain her opinions on this matter if she actually had any. But Defendants did not do so.

Defendants nevertheless insist that Ms. Stack's opinion related to Plaintiffs' COI is articulated in her memorandum, and the opinion is, in short, "had the Court known what she knew, Certificates of Innocence for Mr. Baker and Ms. Glenn would not have been granted." Dkt. 329 at 7. Defendants go on and say the point of her disclosure is what Ms. Stack's opinion was when Plaintiffs got their COIs, and not what her opinion is at any later time, and again that opinion is articulated in her memorandum.[2] Dkt. 329 at 7. There are a myriad of problems with this position.

For one, as stated above, Ms. Stack herself called her opinion "fluid" and when specifically asked about her opinion at the time she wrote the memo, she refused to "pinpoint what [her opinion] was at any time in that journey." Dkt. 296-2, at 22. If Ms. Stack herself can't pinpoint the time frame of her fluid and changing opinions, how can Plaintiffs be expected to infer it at a specific time?

[2] Plaintiffs note that while Baker got his two COIs in the February and April 2016, respectively, Glenn did not get her COI until 2018. The memorandum was written in December 2015, before any of the COIs were even filed.

Second, Ms. Stack's December 2015 memorandum concerned only Plaintiff Baker's petition to vacate the conviction stemming from his March 2005 arrest—it had nothing to do with the December 2005 arrest, for which Plaintiffs Baker and Glenn also received Certificates of Innocence. Indeed, the December 2005 case and Ms. Glenn at all are not mentioned in the memorandum beyond a brief notation on page one of the memorandum that the convictions exist. Dkt. 296-3, at 1. So how the memorandum could conceivably explain Ms. Stack's opinion that the court would have denied Ms. Glenn a COI, as Defendants' assert, Dkt. 329, at 7, is hard to fathom.

Third, the overwhelming majority of the memorandum merely summarized Plaintiff Baker's post-conviction petition, the exhibits attached in support thereof, and the trial record stemming from that March 2005 arrest.[3] There are no opinions readily apparent from that discussion.

Fourth and finally, to the extent there are any opinions articulated in that memo, they are that Plaintiff Baker did not provide adequate "new evidence" in support of vacating his conviction. Dkt. 296-3, at 13 ("The issue is whether *new* evidence exists, especially in light of Watts' conviction, to support the defense that Nichols and company framed Baker at the behest of Watts. ... There is no *new* evidence.") (Italics added.) Significantly, however, the Defendants insist that Ms. Stack is disclosed to comment on COIs, and there is no "new" evidence requirement for a COI to be granted. *See* 735 ILCS 5/2-702(g) (articulating the criteria to be awarded a certificate of innocence). Accordingly, to the extent Ms. Stack's opinion is that Baker did not marshal enough "new" evidence to overturn his conviction—an opinion with which neither her supervisors nor the Circuit Court of Cook County agreed—that opinion is irrelevant to COIs anyway. It would, therefore, not aid the trier-of-fact in this matter.

[3] Ms. Stack acknowledged she did not do any independent investigation. Dkt. 296-6.

Lastly, regarding their disclosure, Defendants state they agree an expert cannot offer legal conclusions, but, according to Defendants, that prohibition only applies to legal decisions that "determine the outcome of the case." Dkt. 329, at 8. But that is not the law: The law is that "[a]s a general rule, an expert cannot offer legal opinions or conclusions." *Sanders v. City of Chicago* Heights, 2016 WL 1730608 (N.D. Ill. May 2, 2016), at *7. There is no caveat to conclusions that only go to the outcome of the case. *See also Client Funding Solutions Corp. v. Crim,* 943 F. Supp. 2d 849, 863 (N.D. Ill. 2013) ("Opinions that amount to legal conclusions do not assist the trier of fact."). Ultimately, an expert may offer an opinion "relevant to applying a legal standard," but the expert is limited to describing sound professional standards and identifying departures therefrom. *Jimenez v. City of Chicago*, 732 F.3d 710, 721 (7th Cir. 2013). That is not what is going on here. Ms. Stack is literally saying the adjudicator of the COI got it wrong, and if the adjudicator knew what she knew, he would have changed course and denied the COIs. Beyond the fact that Ms. Stack doesn't identify what she knew that the adjudicator didn't—she didn't do any independent investigation, Dkt. 296-6—this is both an inappropriate legal conclusion and pure speculation that should be barred whether Ms. Stack has the requisite experience to opine or not.

II. Ms. Stack's remaining opinions on the significance of the Cook County State's Attorney's lack of intervention, and the legislative intent or purpose of the COI statute, should be barred.

The defense argues that Ms. Stack should be able to opine that the jury in this civil case should not consider the COI because the legislature did not intend that. In so doing, however, Defendants merely address Plaintiffs' second argument on this point—that an expert should not testify about legislative history. Dkt. 296 at 10; Dkt. 329 at 9-11 (attempting to distinguish the case law Plaintiff cites for that). However, the Defendants ignore and do not address Plaintiffs' primary argument: The Court decides what is admissible for the jury to hear, including the issue of the

COI's admissibility, and if this Court allows the COI into evidence, it would be exceedingly odd and inappropriate to present an expert to tell the jury that she disagrees with this Court's evidentiary rulings. The Defendants offer no counter. This Court, of course, will make its decision and instruct the jury on what consideration, if any, to give the COIs. Ms. Stack (nor anyone else) should be permitted to comment to the jury as to her opinion on that ruling. The holdings in the cases of *In re Bank*, 481 F.Supp.2d 892 (N.D. Ill. March 16, 2007), and *Patrick v. City of Chicago*, 974 F.3d 824 (7th Cir. 2020)—the latter of which specifically holds it was proper to admit the COI into evidence in that matter given the state law malicious prosecution claim (a claim also raised here)—certainly provide further support to bar Ms. Stack's proposed testimony to the contrary.

As far as Ms. Stack's opinions on the significance (or lack thereof) of the CCSAO's non-intervention in the COI proceedings, Plaintiffs stand by their arguments in their Motion. Dkt. 296 at 10-12. In short, Plaintiffs' position is that whatever relevance Ms. Stack's opinions on this topic have, she violates *Daubert* because she lacks foundation for her standard and does not reliably apply it. *See* Fed. R. Evid. 702(c), (d) (noting that the expert opinion must be based on reliable principles and methods that are "reliably applied" to the facts of the case). Ms. Stack claims that there is a difference between the CCSAO's lack of intervention and the CCSAO affirmatively joining a COI petitioner, but, as noted, Ms. Stack could point to no example of the CCSAO affirmatively joining a COI—and, indeed, noted that Plaintiffs' case was the first in her experience the CCSAO chose not to intervene, which was very significant to her. Dkt. 296-2 at 42-43. Further, Ms. Stack provided no evidence of a lack of resources was the reason for the CCSAO's lack of intervention (indeed she, herself, appeared on the COIs in the matter), as she opined could be the case for a lack of intervention. Further, Ms. Stack insists that she, herself, diligently reviewed the matter and wrote a 14-page memo, so she herself rebuts that the CCSAO had inadequate time for

the review to come up with an affirmative position. Accordingly, Ms. Stack does not reliably apply her own principles and methods, and that is why her opinions should be barred on this topic.

Finally, Plaintiffs maintain that whatever experience qualified Ms. Stack previously to render opinions about COIs or the CCSAO, her lack of experience with COIs or the CCSAO over most of the last decade make her unqualified to render opinions today. Plaintiffs stand on their position as stated in their Motion on this topic. Dkt. 296 at 12-13.

CONCLUSION

For the reasons stated herein, this Court should bar the defense from calling Celeste Stack as an expert.

Respectfully submitted,

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