



COURT OF CHANCERY  
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STATE OF DELAWARE

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October 2, 2008

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Re: Stone v. Stant  
C.A. No. 890-VCN  
Date Submitted: September 29, 2008

Dear Counsel:

The trial record of this breach of fiduciary duty and undue influence action is complete except for the trial depositions of the parties' two legal experts. During the first of these trial depositions, the deposition of Plaintiffs' legal expert, George B. Smith, Esquire, a dispute arose as to whether the opinions being expressed by Mr. Smith had fairly been disclosed previously in accordance with the requirements of Court of Chancery Rule 26(e)(1)(B).

The Defendants, early in this litigation, had served a standard expert witness interrogatory on the Plaintiffs. The interrogatory sought, *inter alia*, the identity of any expert, the subject matter on which she would testify, the substance of the expert testimony, and the basis for such testimony. The Plaintiffs produced two reports prepared by Mr. Smith who also gave a discovery deposition.<sup>1</sup>

During his trial deposition, Mr. Smith, according to the Defendants, gave, for the first time, opinions that had not fairly been disclosed in either his reports or his discovery deposition. Defendants seek the exclusion of these newly-presented opinions.<sup>2</sup>

By Court of Chancery Rule 26(e)(1):

A party is under a duty seasonably to supplement the [discovery] response with respect to any question directly addressed to . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.<sup>3</sup>

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<sup>1</sup> The reports were provided on December 31, 2007, and January 14, 2008. The discovery deposition was taken on March 6, 2008. Trial of this matter began on July 28, 2008, and Mr. Smith's trial deposition was taken on August 18, 2008.

<sup>2</sup> The Defendants have not sought to exclude any opinion that might first have been offered during Mr. Smith's discovery deposition. Their concerns about the "new" opinions are two-fold: surprise and the fact that their counter-expert has not been asked to opine on comparable topics.

<sup>3</sup> Failure to comply with Court of Chancery Rule 26(e)(1)(B) may result in exclusion of the undisclosed expert testimony. *See Sammons v. Doctors for Emergency Serv's, P.A.*, 913 A.2d 519, 529 (Del. 2006) (applying Superior Court Civil Rule 26(e)(1)); *see also Williams v. White Oak Builders, Inc.*, 2006 WL 1668348, at \*5 n.80 (Del. Ch. June 6, 2006).

The Plaintiffs do not disagree about their duty “seasonably to supplement” their expert’s opinions; instead, they contend that the opinions offered by Mr. Smith up to, and including, his discovery deposition fairly encompassed, with one exception, the opinions provided during his trial deposition.<sup>4</sup>

The Court turns its attention to the three areas of expert opinion given by Mr. Smith over which the parties disagree.

1. (Page 39, line 7 through Page 45, line 13).<sup>5</sup> Mr. Smith expressed his views on Mrs. Stone’s capacity and (i) whether she was susceptible to undue influence because of dementia or an otherwise weakened intellect and (ii) whether it would have been prudent to have first obtained a medical opinion as to whether she was competent to make decisions before she executed certain estate planning documents. These topics were not squarely addressed by Mr. Smith before his trial deposition. During his discovery deposition, Mr. Smith did consider whether a physician’s determination of incapacity should have been obtained with respect to the substitution of Mrs. Stant for Mrs. Stone as trustee. Although Mrs. Stone’s

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<sup>4</sup> The Plaintiffs concede that Mr. Smith’s testimony regarding the relationship between mental impairment and the ability to form donative intent (Mr. Smith’s Trial Dep., page 52, line 3 through page 55, line 2) was not provided earlier and should be excluded. Accordingly, that portion of Mr. Smith’s trial deposition will be stricken.

<sup>5</sup> Parenthetical references are to Mr. Smith’s trial deposition.

capacity is relevant to both opinions, whether Mrs. Stone should have been allowed to execute estate planning documents is clearly a separate and distinct question from one as to whether her ebbing capacity should have resulted in her replacement as trustee. Mr. Smith's opinions should have been updated to address these specific aspects. Because it was not, the opinions must be excluded.

2. (Page 60, line 6 through Page 62, line 8). Mr. Smith also expressed his opinion as to whether Mrs. Stant, as successor trustee, had a fiduciary duty to supervise the professionals preparing the federal inheritance tax return. Mr. Smith had earlier expressed his views about the reasonableness of the professional fees, but he had not earlier expressed any view about the relationship of the fees to any alleged breach of fiduciary duty. In his discovery deposition, Mr. Smith had testified about whether Mrs. Stant had properly supervised professionals and about what her duties were with respect to work performed for the trust. However, Mr. Smith, during his discovery deposition, expressly stated that he had not considered whether the professional fees paid by Mrs. Stant evidenced a breach of fiduciary duty.<sup>6</sup> The issues are related, but because Mr. Smith expressly stated that he had

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<sup>6</sup> See Mr. Smith's Discovery Deposition at 49.

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not been asked to form such an opinion (and, thus, presumably was not going to give any such opinion), that narrow opinion (i.e., relationship between the failure to supervise the professionals with regard to effort and fees and a breach of fiduciary duty) must be excluded.<sup>7</sup>

3. (Page 77, line 1 through Page 83, line 3). The opinions at issue here involve Mr. Stant's fiduciary obligations with respect to funds held by him as trustee of the Stone Family Trust. Claims involving Mr. Stant's service as trustee were made a formal part of this litigation through an amendment to the complaint approved on May 13, 2008, well after the discovery deposition. Although Mr. Smith briefly discussed day trading by Mr. Stant during his discovery deposition, the substance of his trial deposition regarding Mr. Stant's fiduciary conduct was not fairly presented. The omitted opinions include whether Mr. Stant had sufficient skill to engage in day trading, the reasonableness of the fees he charged as trustee, and the general duties and responsibilities involved in administering a life insurance trust. In short, these opinions should have been included in a "seasonable" update; they were not and, therefore, must be excluded.

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<sup>7</sup> Of course, if the fees were exorbitant, as Mr. Smith has suggested, and if Mrs. Stant as trustee paid them, it is not clear that the Court would benefit from an expert's assessment. That, however, is a question for another day.

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**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

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cc: Register in Chancery-K