

No. SC89671

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IN THE MISSOURI SUPREME COURT

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STATE OF MISSOURI *ex rel.* CROWN POWER AND EQUIPMENT  
COMPANY, L.L.C,

Relator,

v.

THE HONORABLE GARY E. RAVENS,

Respondent.

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Original Proceeding on Petition for Writ of Prohibition  
to the Sullivan County Circuit Court, 9<sup>th</sup> Judicial Circuit,  
Cause No. 06CH-CC00011, the Honorable Gary E. Ravens, Presiding

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Response Brief of Norfolk Southern Railway Company on behalf of  
Respondent The Honorable Gary E. Ravens

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## Statement of Facts

Norfolk Southern Railway Company (“Norfolk Southern”), on behalf of Respondent, agrees with Relator’s Statement of Facts save one exception. Relator contends it “acceded to Norfolk’s request for a change of venue from Chariton County to Sullivan County.” Brief of Relator, p. 4. This is incorrect. Norfolk Southern attempted to transfer venue from Chariton County to Platte County. (Relator’s Appendix, A103 – A104). In response, Relator stated, “We will agree to a change of venue to Sullivan County. We will not agree to a change of venue to Platte County.” (Relator’s Appendix, A104).

## Argument

### **I. Relator’s First Point Relied Upon: Relator Is Entitled to an Order Prohibiting Respondent from Compelling the Deposition of Dr. Thomas Beisecker and Production of his Entire File in that any Consultation Between Dr. Thomas Beisecker and Crown Power’s Counsel and Documents Unrelated to the Issue of Venue Is Protected from Discovery by the Attorney Work-Product Privilege.**

Relator identified Dr. Thomas Beisecker (“Beisecker”) as the expert it intended to call as a witness at an evidentiary hearing on Norfolk Southern’s application for change of venue. Brief of Relator, p. 2. Relator was served with a Notice of Deposition for Beisecker, which included a list of documents he was to bring, and made no objection. Relator’s Appendix, A22 – A25. Crown Power produced Beisecker for deposition at the offices of its attorneys. Relator’s Appendix, A26. And at the instant Beisecker was placed under oath (Relator’s Appendix, A29), Relator waived the work product

protection for any document or communication sent to, created by, or received from Beisecker in the course of his work for Crown Power. Any argument to the contrary is incongruent with the holdings of *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. Banc 2000), the controlling case on disclosure of documents provided to an expert.

In *Tracy*, the defendant inadvertently disclosed documents protected by attorney-client privilege to an identified testifying expert witness. *Id* at 834. The attorney-client privileged documents were produced to plaintiff but defendant's expert refused to answer questions about them. *Id*. The Missouri Supreme Court noted that, "It may be suggested that materials given to an expert can be withheld from disclosure if the expert did not rely upon them. There is no such exception in the rule or Missouri precedents." *Id* at 835. "All material given to a testifying expert must, if requested be disclosed. This indeed is a 'bright line' rule, as our Rule 56.01(b)(4) requires. It is clear, understandable, and does not require the application of a multi-prong test." *Id* at 836. Despite the clear and forceful language of *Tracy*, Relator now argues that it should be permitted to pick and choose which documents from its expert's file that Norfolk Southern is permitted to view and which of Norfolk Southern's questions its expert will answer.

Relator asserts that it identified Beisecker as a venue expert only. Therefore, any work performed or documents reviewed or created by Beisecker not related to venue are protected by the work product doctrine. Brief of Relator, p. 9. *Tracy* specifically addressed this argument and dismissed it. "Rule 56.01(b)(4) should be read to require production of all of the materials provided to the expert. To hold otherwise would allow the expert witness or the party retaining the expert witness to select which documents to

produce after the expert has reviewed the documents in preparation for the expert's testimony." *Id* at 835. *Tracy* does not permit a party to act as a filter between the flow of information from its designated expert to the opposing party. Relator should not be permitted to do the same.

**II. Relator's Second Point Relied Upon: Relator Is Entitled to an Order Prohibiting Respondent from Compelling the Deposition of Dr. Thomas Beisecker and Production of his Entire File Because Crown's Concession to the Change of Venue on September 4, 2008, Two Weeks Before Respondent's September 18, 2008 Order Granting Norfolk Southern Railway Company's Motion to Compel, Rendered Norfolk's Motion to Compel Moot.**

Relator did not give an unqualified concession to Norfolk Southern's application for change of venue. Relator's Appendix A104. It conceded the application, only if the venue selected by Respondent was the one demanded by Relator. *Id.*

Although the venue motion as to which expert witness Beisecker was testifying has been ruled – partially in Plaintiff's favor – it may still be the subject of an appeal. The motion requested a change of venue to Platte County (Relator's Appendix A103 – A104), and that part of the motion was denied. Relator's Appendix A105. Although Defendant Crown Power may argue that such matters are discretionary with the trial judge, and thus unlikely to be reversed on appeal, how do we know without a complete record? Like all appellate courts, this Court often admonishes parties and counsel to confine their arguments to the record. The corollary to that admonishment is to allow the record to be fully developed.

Sadly, the gamesmanship of expert witness use leads to some slippery conduct from time to time. Note that in this case, expert witness Beisecker had been produced as an expert to rebut the study done by Plaintiff Norfolk Southern's jury research expert. Brief of Relator, p. 2. We now know from Relator's Brief that in early May of 2007 Beisecker had been retained as a consultant to help Defendant formulate trial themes and tactics. Brief of Relator, p. 9. But when he was questioned about when he started work, here is what expert Beisecker said:

DIRECT EXAMINATION

6 BY MR. HEINRICHS:

7 Q Will you please state your name for me?

8 A Thomas David Beisecker.

9 Q There is a doctor at the beginning of that, right?

10 A Doctor, Ph.D. at the end, whatever.

11 Q Full of initials. Dr. Beisecker my name is Jeff

12 Heinrichs, we have met before in this case, and I'm

13 here to take your deposition today regarding any

14 opinions you may have formed at the request of

15 Crown Power & Equipment.

16 I know you have been involved in a lot of

17 depositions and trial work before, so I'm not going

18 to go through all of the rigamarole of what a

19 deposition is and how it works and how things go

20 smoothly. I'm sure Mr. Tyrl has worked with you on

21 that, correct, or you already know?

22 A I already know. I will try to be good.

23 Q I'm not worried. You have been retained in this

24 matter by Crown Power & Equipment, correct?

25 A Correct.

1 Q By Mr. Tyrl?

2 A By Mr. Tyrl on behalf of, yes.

3 ***Q When were you first contacted?***

4 A About this particular matter?

5 Q Yes.

6 ***A I was contacted I believe on May 21, 2008. May***

7 ***have been May 22.***

8 Q Who called you?

9 A Mr. Tyrl.

10 Q What did he tell you?

11 A That there had been an attempt to seat a jury in

12 Chariton County and that the result of that jury

13 selection process was that the judge declared a

14 mistrial.

(Relator's Appendix, A29 – A30 ) (emphasis added)

What we know from Relator's Brief, however, is that Dr. Beisecker had been retained over a year earlier. Here is the list of things Crown Power asks this Court to prohibit Respondent from compelling to be produced:

1. May 8, 2007 letter from Larry Tyrl to Tom Beisecker Ph.D. enclosing written materials for his analysis and counsel's mental impressions regarding plaintiffs legal theories.
2. July 24, 2007 letter from Brian Boos to Dr. Beisecker enclosing selected discovery materials for his analysis.
3. July 25, 2007 letter from Larry Tyrl to Dr. Beisecker enclosing additional written materials for his analysis.
4. July 28, 2007 report of Dr. Beisecker containing his case assessment and recommendations for purposes of trial.
5. March 29, 2008 supplemental report of Dr. Beisecker containing his case assessment and recommendations for purposes of trial.
6. Audio/visual materials prepared by Dr. Beisecker containing his case assessment and recommendations for purposes of trial.
7. Dr. Beisecker's written notes used to generate the reports mentioned in paragraphs four and five.

8. Oral communications between Crown counsel and Dr. Beisecker regarding the work he was asked to perform and his subsequent case assessment and recommendations for purposes of trial.

Brief of Relator, p. 9 - 10.

Frustratingly, Dr. Beisecker continued to be disingenuous in his responses to questions about when he began work on the case.

5 Q So on May 21 or 22 Mr. Tyrl just called and says

6 look, we want you to work on our case, we don't

7 know what that may be right now?

8 A That's correct.

9 Q Reasonable summary?

10 A That's correct.

Relator's Appendix A31.

It continued when Beisecker was asked about documents he had reviewed in his work on the file. At one point, it became apparent that Dr. Beisecker's file did not contain a critical document:

10 Q Do you have a copy of the venue study in your file?

11 A I have a copy of the venue study in my file that I

12 left at my office. I apologize.

13 Q Are there any other documents that you have related

14 to this matter that are not included in the file

15 you brought today?

16 A I sincerely hope not.

17 Q That concerns me.

18 A It concerns me too, because it should have been

19 there.

20 Q Is it possible that there are documents missing in

21 your file that you brought today in addition to the

22 venue study?

23 A No.

Relator's Appendix, A59.

Without limitation, Beisecker said that it was not possible that there were other documents missing in his file that he had not brought to the deposition. *Id.* But it turned out that the materials Beisecker had earlier received from Crown Power's counsel were directly relevant to Beisecker's venue opinions in the case. In his deposition, Beisecker voiced criticisms of the wording of the questions in the venue survey prepared by Norfolk Southern's expert witness, Lisa Dahl. When asked to explain why he criticized the wording, the following colloquy occurred:

20 Q What are your opinions regarding that wording?

21 A The first one, "Sometime later the freight train

22 hit the semi," is indefinite and it could lead to

23 an impression that the truck had been on the tracks

24 for an appreciable period of time, for several

25 minutes up to an hour, who knows. It is my

1 understanding from the facts of the case that the  
2 truck was on the track for approximately five  
3 minutes before the train hit it. And without  
4 making it clear that the truck was on the tracks  
5 for only a short period of time, someone might draw  
6 an incorrect inference.

7 Q Who told you that the semi was on the track for  
8 approximately five minutes?

9 A This is information that I know from the case.

10 Q How did you find it?

11 A I'm sorry?

12 Q I want to know how you know that the semi was on  
13 the tracks for approximately five minutes?

14 MR. TYRL: I'm going to object to the  
15 question other than his statement that it is  
16 information from the case, because it irrelevant to  
17 what he is doing with regard to this voir dire. It  
18 is information that has been provided to him during  
19 the course of --

Relator's Appendix, A62 – A63.

Shortly thereafter, defense counsel revealed that there had been an ongoing consultation with Beisecker about the case, and directed the witness not to answer any further questions.

5 A It is information that I have been provided on a  
6 former assignment.

7 Q (By Mr. Heinrichs) On a former assignment? What  
8 was that?

9 MR. TYRL: I'm going to instruct the  
10 witness not to answer. It doesn't have anything to  
11 do with this venue case. Quite frankly, I have  
12 consulted with him about this case.

Relator's Appendix, A64.

And finally Dr. Beisecker revealed that he had done earlier work on this case:

13 Q Okay. This is not the only aspect, the change of  
14 venue is not the only aspect of this case which you  
15 have been asked to do work in this matter, is it?

16 A That is correct.

17 Q And you have received documents from Mr. Tyrl's  
18 office regarding this case that you have not  
19 included in your file today too, isn't that  
20 correct?

21 A That's correct.

Relator's Appendix, A75.

What information did Dr. Beisecker have that led him to challenge the validity of the venue survey? What impact might it have had on Respondent's choice of alternate venue when it granted Norfolk Southern's motion? Why was Relator willing to concede the application for transfer of venue only if Sullivan County was selected? What impact might it have had on Norfolk Southern's strategy in seeking the venue change, or to what county, or whether to appeal or seek a writ upon the ultimate ruling that was only partially favorable?

We know of one instance that Dr. Beisecker revealed in which he said his opinion was based on his "understanding from the facts of the case that the truck was on the track for approximately five minutes before the train hit it," an understanding that he had "been provided on a former assignment." How many more are there?

All of those questions must be answered from the record, and because the record was truncated by Crown Power's counsel's refusal to allow discovery, we simply do not have a record to consult. The materials discussed are relevant to the specific issue for which Beisecker was produced.

**III. Relator's Third Point Relied Upon: Relator Is Entitled to an Order Prohibiting Respondent from Compelling the Deposition of Dr. Thomas Beisecker and the Production of his Entire File Because Dr. Thomas Beisecker was Never Designated by Crown Power & Equipment as an Expert Witness Expected to Testify at Trial in Accordance with Missouri Rule of Civil Procedure 56.01(b)(4)(b).**

Relator contends that the communications and documents exchanged between an

attorney and an expert witness hired to work on a case are privileged under the attorney work-product doctrine. This privilege is only waived, Relator argues, if the expert witness will testify at a trial. Brief of Relator, p. 9. According to Relator's argument, if the expert witness is designated to testify in a hearing, as opposed to a trial, the attorney and the expert witness may pick and choose to which opinions they will testify and which documents they will disclose. *Id.* In other words, Relator argues that the teachings of *Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. 2000), have no applicability when the expert witness is designated to testify at a hearing rather than a trial.

No distinction between a "hearing" and a "trial" as it pertains to the instant issue can reasonably be drawn. Here, the transcript of Beisecker shows that *Tracy* is directly on point. Beisecker testified the opinion of the opposing expert Lisa Dahl failed to include certain important facts. Relator's Appendix, A62 – A63. When asked what those facts were, he only secretively notes that it was "information I know from the case." Relator's Appendix, A63. Intrigued, plaintiff Norfolk Southern's counsel asked how the information was known. *Id.* There the battle began. Defense counsel objected and instructed the witness to not answer, depriving plaintiff's counsel of examination material clearly relevant to the issue. *Id.* The toothpaste was out of the tube.

As *Tracy* points out, the reason for requiring disclosure of the expert's entire file is so "the opposing attorney [will] be able to intelligently cross-examine the expert concerning what facts he used to formulate his opinion." *Tracy* at 835.

The deposition of Beisecker was conducted to assist Norfolk Southern's counsel in preparing for an evidentiary hearing in which Crown Power intended to call Beisecker to

testify as an expert witness. The fact that Beisecker would testify at a “hearing” and not a “trial”, did not alter the reason Norfolk Southern conducted his deposition. Norfolk Southern conducted Beisecker’s deposition so that it would be prepared to intelligently and effectively cross-examine Beisecker under oath at the hearing. Crown Power’s instructions to Beisecker not to answer some questions and to produce only documents selected by Crown Power stymied Norfolk Southern’s opportunity to prepare for the cross-examination of Beisecker at the hearing.

Admissibility of expert testimony at trial is governed by RSMo. § 490.065, which provides:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

3. *The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.*

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

(emphasis added)

Our enabling statute specifically refers not to a trial but to a hearing, and says the expert may base his opinions on the facts or data “perceived by or made known to him at or before the hearing....” Intelligent and effective cross-examination of the expert performance requires the ability to discover those same matters - the facts or data “perceived by or made known to him at or before the hearing....”

In addition, the first sentence of Rule 56.01(b)(4)(b) reads, “A party may discover by deposition the facts and opinions to which the expert is expected to testify,” and was the focus of this Court’s opinion in *Tracy v. Dandurand*. As Judge Wolff wrote for a unanimous court: “The expert witness in this case had reviewed the documents and gave them to opposing counsel at the witness' deposition, but the trial court entered an order prohibiting use of the documents. Because Rule 56.01(b)(4) allows discovery by deposition of facts known and opinions held by retained experts, and because the party claiming the privilege has waived it by providing the documents to its retained expert, a writ of prohibition is warranted.” *Tracy v. Dandurand*, 30 S.W.3d at 832.

To read the first sentence of Rule 56.01(b)(4)(b) as only allowing the question, “What facts and opinions are you going to testify to?” would gut the rule. The answer might be, “The medical records prove that the defendant doctor committed malpractice.” To stop there, and not allow questions such as, “I see you reviewed a medical treatise sent to you by the plaintiff's lawyer. Did the portion in Chapter 10 not persuade you that it was not malpractice?”, would deprive the examining lawyer of the two most potent tools for cross-examination: showing that the witness is picking and choosing, and showing that the witness has made inconsistent statements before. Both tools require knowing what the witness has seen and what the witness has said. In sum, the facts and opinions to which the expert is expected to testify include the information he is ignoring, spinning, refuting or flip-flopping on.

Acceptance of Relator’s argument would create unacceptable and unfair procedural and evidentiary differences between a hearing and a trial. The integrity of evidentiary hearings would vanish as paid experts could simply choose which questions to answer and which questions to ignore. A hearing to certify a class action would become pointless because the judiciary could not trust the paid experts who testified since no effective cross-examination would be permitted.

### **Conclusion**

Regardless of Relator’s reasons or logic for designating Beisecker as an expert witness, in doing so, Relator waived all privileges it held over the documents disclosed to Beisecker and all work conducted by Beisecker. The fact that Beisecker intended to testify at an evidentiary hearing instead of a trial is immaterial to this matter. For the

above reasons, Norfolk Southern on behalf of Respondent respectfully requests that the Court's Preliminary Order of Prohibition of March 12, 2009 be lifted and allow Respondent's Order compelling the continuation of Beisecker's deposition and production of documents to stand.

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## Certificate of Service

**Signature of this document certifies that it was served on the following persons on the date and in the manner indicated:**

<b>Person Served</b>	<b>Party</b>	<b>Date</b>	<b>Manner</b>
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## Certificate of Compliance

Pursuant to Rule 84.06(b), I hereby certify that this Answer Response meets the typed volume limitation and that it contains 3,505 words according to the word counting feature of the Microsoft Word software used to create this Response. In addition, this Response complies with Rule 84.06 in that the text of the body of the Brief is in 13-point Times New Roman type.

I further certify that the accompanying disk has been scanned for viruses and that it is virus free.

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**Appendix**

1. RSMo. § 490.065 ..... A1

