

**Summary of SC89671, *State ex rel. Crown Power and Equipment Company, L.L.C. v. The Honorable Gary E. Ravens***

Proceeding originating in the Chariton County circuit court, Judge Gary E. Ravens  
Opinion issued Nov. 17, 2009

**Attorneys:** Crown Power was represented by Larry J. Tyrl of Tyrl & Bogdan in Overland Park, Kan., (913) 825-4650; and Norfolk Southern Railway was represented by Richard E. McLeod and Jeff Heinrichs of McLeod & Heinrichs in Kansas City, (816) 421-5656.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** After changing venue in accord with both parties suggestions, the trial court ordered the venue expert of one of the parties, who also was consulting with the party about other issues, to disclose portions of his file related to the other issues. In a 5-2 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri issues its writ prohibiting the trial court from entering such an order. The discovery rules require only experts designated as witnesses to disclose all material given to them, and here, the party never designated the expert as a trial witness and has conceded it never will call him to testify at trial. As such, his file is protected work product. In a concurring opinion, Judge Michael A. Wolff suggests Missouri consider changing its rules governing expert discovery to eliminate the need for expert depositions and to reduce the time and money spent in civil litigation. Chief Justice William Ray Price Jr. dissents, arguing this Court's precedent requires that all materials given to an expert who is scheduled to testify must be disclosed on request and noting that neither the rule nor statute governing discovery make any temporal distinction as to when an expert's testimony is offered.

**Facts:** Norfolk Southern Railway Company alleged that Crown Power and Equipment Company LLC was negligent in causing or contributing to cause a March 24, 2006, railroad grade crossing accident in Keytesville. Norfolk moved for a change of venue, claiming Chariton County residents were prejudiced against the railway and that Crown Power had undue influence over them. Crown Power informally advised Norfolk that it had retained Thomas Beisecker, Ph.D., as an expert for the purpose of analyzing and critiquing the venue study by the jury consultant Norfolk had retained. Unknown to Norfolk, Crown Power also had retained Beisecker as a non-testifying consultant to conduct focus groups and assist in trial strategies, including jury selection. During Beisecker's video deposition, Norfolk began to question him about work he had done for Crown Power unrelated to the venue study. Crown Power objected, arguing any of Beisecker's work unrelated to venue was protected from disclosure as attorney work product, and the parties agreed Norfolk would raise the issue formally with the trial court. Norfolk subsequently moved to compel production of Beisecker's file unrelated to venue,

and Crown Power moved for a protective order based on the attorney work-product privilege. Before the court ruled on these competing motions, Crown Power withdrew its objection to Norfolk's request to change venue and agreed to a change of venue from Chariton County to Sullivan County (one of two possible counties Norfolk had requested), eliminating the need for testimony or other evidence. The trial court ordered the case sent to Sullivan County and subsequently ordered production of Beisecker's file. Crown Power seeks this Court's writ prohibiting the latter order.

### **WRIT MADE ABSOLUTE.**

**Court en banc holds:** The trial court may not compel Beisecker to testify or produce his file unrelated to the venue issue. The fact that Crown Power conceded to the change of venue and withdrew Beisecker as a witness for any purpose does not moot Norfolk's motion to compel because the order to compel is outstanding and the venue decision theoretically still may be subject to appeal. This Court's holding in *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. banc 2000) – that experts designated to testify at trial pursuant to Rule 56.01(b)(4) must produce all material given to them – does not apply here. Rules 56.01(b)(4) and (5) provide for the discovery of retained and non-retained experts who are expected to testify at trial, not the discovery of experts who are used as consultants or who may provide testimony at a pretrial hearing not involving the merits of a case. Here, Crown Power never designated Beisecker as a trial witness and has conceded it never will call him to testify at trial. Accordingly, it may claim work product protection of his materials not related to venue. Further, section 490.065.3, RSMo 2004 – which requires disclosure of facts or data when the expert is designated to testify at a hearing – also does not apply because it deals with the admissibility of expert testimony, not, as here, the discovery of privileged work product information held by an expert who is not designated to testify at trial. While the proliferation of the use of expert testimony may make it wise to consider changes to existing rules, it is not appropriate to do so in a court decision because it is important for attorneys and parties to be able to rely on this Court to follow the rules as written.

**Concurring opinion by Judge Wolff:** The author agrees that, because Beisecker was not expected to be called at trial, he is not covered by the language of the rule. He also agrees it may be wise to examine the expert witness discovery provisions in this Court's rules. He suggests that the expert witness rule be rethought entirely, noting that discovery – and discovery disputes over expert witnesses – have escalated the costs of litigation while providing little, if any, benefit in preparing and trying cases, leading to what some commentators have called the “vanishing trial.” The author suggests that Missouri consider adopting a rule that would do two things. First, it would require a party who proposes to use a retained expert's testimony at trial or other hearing to disclose in advance the name of the expert, the expert's resume, a list of materials the expert has reviewed, a summary of each of the expert's opinions and the expert's fees. Second, it would allow any other discovery as to experts only by agreement of all parties whose

interests would be affected by expert testimony. He suggests such a rule would eliminate the need for expert depositions, which he notes essentially result in a party paying its lawyers to educate its adversary's experts; would promote civility among lawyers; and would diminish greatly the time and money spent in civil litigation.

**Dissenting opinion by Chief Justice Price:** The author argues the principal opinion abandons settled Missouri law and the theory behind it, and instead, he would hold that, once Crown Power decided to avail itself of the benefits of having its consulting expert testify, it waived the privilege over the materials it provided him. *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000), states unequivocally the “‘bright line’ rule” that “all materials given to a testifying expert must, if requested, be disclosed.” As such, Rule 56.01(b)(4) requires production of all materials provided to an expert intended to testify; it is not limited to experts expected to be called only at trial. The distinction the rule intends in subsections (a) and (b) is between consulting and testifying expert witnesses, not between experts testifying at pretrial proceedings and those testifying at trial. The time at which an expert witness testifies has nothing to do with whether he should be subject to cross-examination or the discovery process. The principal opinion’s new interpretation of Rule 56.01(b)(4) invites abuse of the discovery process and puts the rule in contradiction to section 490.065(3), RSMo 2000, which makes no temporal distinction as to when an expert’s testimony is offered during the discovery process.