

No. SC89671

IN THE MISSOURI SUPREME COURT

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

Relator,

v.

THE HONORABLE GARY E. RAVENS,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY ORDER IN PROHIBITION FROM THE
SUPREME COURT OF MISSOURI TO THE HONORABLE GARY E. RAVENS,
CIRCUIT JUDGE OF THE CIRCUIT COURT OF SULLIVAN COUNTY,
MISSOURI

BRIEF OF RELATOR CROWN POWER AND EQUIPMENT COMPANY, L.L.C.

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JURISDICTIONAL STATEMENT

This is an original proceeding for a Writ of Prohibition pursuant to Supreme Court Rule 84.24 and Supreme Court Rule 97. Prohibition is sought to prohibit Respondent from sustaining Plaintiff Norfolk Southern's Motion to Compel and overruling Relator's Motion for Protective Order to prohibit Respondent from compelling the production of Dr. Thomas Beisecker's entire file and the continuation of his deposition.

Relator filed a Petition in Prohibition on October 20, 2008. Suggestions in Opposition to Petition for Writ of Prohibition were filed on October 30, 2008. On November 25, 2008, this Court directed Respondent to show cause why a Preliminary Writ of Prohibition should not issue, in that the requested discovery was moot or precluded by the first sentence of Supreme Court Rule 56.01(b)(4)(b). On January 27, 2009, this Court entered a Preliminary Writ of Prohibition and directed Respondent to file a written return to the Petition and to show cause why a writ of prohibition should not issue prohibiting Respondent from doing anything other than vacating Respondent's Order of September 18, 2008, sustaining Plaintiff's Motion to Compel and overruling Relator's Motion for Protective Order. An Answer was filed on behalf of Respondent on or about March 12, 2009.

This Court has jurisdiction because this proceeding is brought to obtain a Writ of Prohibition. Pursuant to Article V, Section 4, of the Missouri Constitution, this Court is authorized to determine and issue remedial writs.

STATEMENT OF FACTS

Plaintiff Norfolk Southern Railway Company (hereinafter Norfolk) brings the underlying action alleging that Relator Crown Power & Equipment Company (hereinafter Crown) was negligent in causing or contributing to cause a railroad grade crossing accident in Keytesville, Chariton County, Missouri on March 24, 2006. The case proceeded to jury trial on May 20, 2008. Before completing its *voir dire*, Norfolk moved for a mistrial on the grounds that, based upon answers given by certain venire persons, the railroad could not receive a fair trial. Respondent granted Norfolk's motion. (Appendix, A110-A111)

Norfolk, after the mistrial, filed a Motion for Change of Venue claiming that the inhabitants of Chariton County were prejudiced against Norfolk and that Crown had undue influence over them. (Appendix, A153-A156) Norfolk retained jury consultant Lisa Dahl to conduct a venue study and survey of Linn, Sullivan and Platte Counties. Dahl was designated to testify as an expert at a hearing on the Motion for Change of Venue and opined in the deposition that Chariton County was a venue unfair to Norfolk and that the case should be tried elsewhere, recommending Sullivan County based upon her venue study. (Appendix, A143-Deposition Page 143, line 22 to page 144, line 13) Crown, in response to Norfolk's Motion for Change of Venue, designated Thomas Beisecker, PhD., as an expert for the sole purpose of analyzing and critiquing Norfolk's venue study, based upon his education, training and experience in the fields of communication and jury science. Crown had previously engaged Dr. Beisecker as a non-testifying consultant in May, 2007, to conduct focus groups and formulate trial strategy

and address jury selection issues unrelated to venue. (Appendix, A90-A101) Crown never designated Dr. Beisecker as an expert witness expected to testify at the trial of this cause.

Crown, at Norfolk's request, agreed to produce Dr. Beisecker for his deposition on August 5, 2008. Shortly after 4:00 p.m. on August 4, 2008, Norfolk served Crown by fax a Notice to Take Video Deposition. (Appendix, A22-A25) Crown forwarded the notice to Dr. Beisecker by e-mail upon Crown's counsel's return to the office the next morning. Dr. Beisecker did not actually see the Notice to Take Video Deposition until his deposition because he did not go to his office to pick up the e-mail notice before leaving for Kansas City and the deposition. Crown's counsel had previously requested Dr. Beisecker to bring to the deposition his entire file of any work he performed with respect to the venue issue.

During Dr. Beisecker's deposition, Norfolk questioned him about other work he had done for Crown. Crown contemporaneously objected to the questions on the grounds that Dr. Beisecker's work unrelated to venue was protected from disclosure as attorney work-product and thus beyond the scope of permissible examination. (Appendix A63-A65) Crown thereafter instructed Dr. Beisecker not to testify or produce documents pertaining to non-venue related matters and he declined to do so. (Appendix A63-A65) Norfolk attempted to reach Respondent by telephone from the deposition, but was unable to do so. The parties agreed that Norfolk would formally raise the issue with Respondent.

Norfolk then caused a *subpoena duces tecum* to be served on Dr. Beisecker through a Kansas State Court and, in response, Crown filed a Motion to Quash. (Appendix, A90-A101). The parties thereafter agreed to table Crown's Motion to Quash pending Respondent's ruling on Norfolk's Motion to Compel.

Norfolk and Crown, in due course, filed a Motion to Compel and Motion for Protective Order. (Appendix A4-A6 and A7-A21)

At a hearing on September 4, 2008, Crown withdrew its opposition to Norfolk's Motion for Change of Venue and acceded to Norfolk's request for a change of venue from Chariton County to Sullivan County, Missouri, the county Norfolk's expert Linda Dahl recommended, rendering Norfolk's venue motion moot. (Appendix A102-A108) Respondent then sustained Norfolk's Motion for Change of Venue and ordered the case sent to Sullivan County. (Appendix A109)

At the conclusion of the hearing on September 4, 2008, and after ordering a change of venue to Sullivan County, Respondent asked if there was anything else and, in response, Norfolk indicated it wanted to pursue its Motion to Compel (Appendix A105-A107) On September 18, 2008, the Respondent, at the Railroad's request, granted Norfolk's Motion to Compel the deposition of Dr. Beisecker and the production of his file and denied Crown's Motion for Protective Order. (Appendix A1-A3)

Relator filed its Petition in Prohibition in Missouri Court of Appeals, Western District on September 25, 2008 (Appendix A147-A151). The Missouri Court of Appeals, Western District issued an Order denying Relator's Petition on October 10, 2008 . (Appendix 152)

On October 20, 2008, Relator filed its Petition in Prohibition in this Court. This Court entered on November 25, 2008, an Order for Respondent to show cause why a preliminary Writ of Prohibition should not issue because the requested discovery was moot or precluded by the first sentence of Rule 56.01(b)(4)(b). This Court entered its Preliminary Writ of Prohibition on January 27, 2009. The Respondent thereafter filed an Answer to the Petition for Writ of Prohibition on March 12, 2009.

POINTS RELIED ON

RELATOR CROWN POWER & EQUIPMENT IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM COMPELLING THE DEPOSITION OF DR. THOMAS BEISECKER AND THE PRODUCTION OF HIS ENTIRE FILE IN THAT ANY CONSULTATION BETWEEN DR. THOMAS BEISCKER AND CROWN POWER & EQUIPMENT'S COUNSEL AND DOCUMENTS UNRELATED TO THE ISSUE OF VENUE IS PROTECTED FROM DISCOVERY BY THE ATTORNEY WORK-PRODUCT PRIVILEGE.

Brown v. Hamid, 856 S.W.2d 51, 54 (Mo. banc 1993)

State ex rel. Boone Retirement Ctr., Inc., v. Hamilton, 946 S.W. 2d 740, (Mo. banc 1997)

State ex rel. Tracy v. Dandurand, 30 S.W.3d 831, (Mo banc 2000)

Missouri Supreme Court Rule 56.0(b)(4)

II. RELATOR CROWN POWER & EQUIPMENT IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM COMPELLING THE DEPOSITION OF DR. THOMAS BEISECKER AND THE PRODUCTION OF HIS ENTIRE FILE BECAUSE CROWN POWER & EQUIPMENT'S CONCESSION TO THE CHANGE OF VENUE ON SEPTEMBER 4, 2008, TWO WEEKS PRIOR TO RESPONDENT'S SEPTEMBER 18, 2008 ORDER GRANTING PLAINTIFF NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO COMPEL, RENDERED THE MOTION TO COMPEL MOOT.

State ex rel Tracy v. Dandurand, 30 S.W.3d 835, (Mo. banc 2000)

Missouri Supreme Court Rule 56.01(b)(4)(b)

III. 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 A EXPERT WITNESS EXPECTED TO TESTIFY AT TRIAL IN ACCORDANCE WITH MISSOURI RULE OF CIVIL PROCEDURE 56.01(b)(4)(b).

Missouri Supreme Court Rule 56.01(b)(3)

Missouri Supreme Court Rule 56.01(b)(4)(b)

ARGUMENT

I.

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.

Crown seeks protection against Norfolk's discovery of Crown's attorney work-product that Dr. Beisecker performed at Crown's request, unrelated to whether a change of venue was necessary or appropriate in this case. Prohibition is an appropriate remedy in this case to determine whether Respondent is exceeding its jurisdiction and to determine if the consultation of Dr. Beisecker and his file are privileged. As stated by this Court in *State ex rel. Boone Retirement Ctr., Inc., v. Hamilton*, 946 S.W.2d 740, 741 (Mo. banc 1997) quoting *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 408 (Mo. banc 1996):

"When a party claims material that it has been directed to produce is privileged, a writ of prohibition is appropriate to determine whether the privilege claimed in fact covers the materials demanded. This is because 'the damage to the party against whom discovery is sought is both severe and irreparable' if the privileged material is produced and this 'damage cannot be repaired on appeal.'"

In its original Notice of Video Deposition (Appendix, A22, paragraph 2), Norfolk requested Dr. Beisecker bring “all materials provided to him...considered and relied upon in gathering facts and formulating any opinion and conclusion in this case upon which he relies.” Crown, as mentioned, designated Dr. Beisecker solely to opine about the issue of venue. Dr. Beisecker produced his entire file on the subject of venue and testified fully and completely about his opinions on venue at his August 5, 2008 deposition.

When Norfolk began questioning Dr. Beisecker at his August 5, 2008, deposition about matters unrelated to venue and which delved into his prior work, Crown objected and instructed him not to answer. (Appendix, A63-A65) Whatever consultation Dr. Beisecker may have done at Crown counsel’s request, unrelated to venue, is clearly work-product. *Brown v. Hamid*, 856 S.W.2d 51, 54 (Mo. banc 1993) held information utilized by an expert with whom a party’s attorney has consulted is shielded by work-product privilege, waived only when a party *designates the expert as a witness for trial* (emphasis added). Crown has never designated Dr. Beisecker to testify at trial.

Norfolk thereafter served a new notice to take Dr. Beisecker's deposition and caused a *subpoena duces tecum* to be served on Dr. Beisecker in Kansas state court (Appendix, A86-A89), necessitating Crown's filing a Motion to Quash in Kansas state court. (Appendix, A90-A101). Crown's Motion to Quash specifically sought protection from disclosure of the following:

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 plaintiff's 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 Tyr1 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 4 and 5.
8. Oral communications between Crown's counsel and Dr. Beisecker regarding the work he was asked to perform and his subsequent case assessment and recommendations for purposes of trial. (Appendix, A96)

The parties thereafter agreed to table Crown's Motion to Quash pending Respondent's ruling on Norfolk's Motion to Compel.

Respondent, in granting Norfolk's Motion to Compel, misconstrued the holding in *State ex rel Tracy v. Dandurand*, 30 S.W.3d 831(Mo. banc 2000) in several respects. First, Rule 56.01(b)(4)(a) provides that when a party *designates an expert as a witness at trial*, that party must disclose the general nature of the subject matter to which the expert is expected to testify. (emphasis added). Thus, the rule expressly provides that the

designation of an expert as a trial witness triggers the process of waiving privilege. Id., 30 S.W.3d at 834 (emphasis added); *See also Brown, supra.* Rule 56.01(b)(4)(b) provides that an opposing party may discover by deposition the facts and opinions to which the expert is expected to testify. Second, in *Dandurand*, the documents claimed to be privileged were part of the expert's file produced at his discovery deposition. About a month to six weeks later, when the party who retained the expert was taking a video deposition of the expert for trial due to expert's unavailability to appear in person at the trial, the issue of the privileged documents came up. After the trial deposition of the expert, the party hiring the expert filed a motion for protective order to retrieve the documents.

Crown never designated, and does not intend to call Dr. Beisecker as a witness at trial. His sole function, as far as discovery related to Norfolk's Motion for Change of Venue is concerned, was to offer opinions on the propriety of venue selection. Even if the never held hearing on Norfolk's Motion for Change of Venue could be characterized as a "trial" – which it is not – any consultation Dr. Beisecker performed at Crown's request but unrelated to venue has nothing to do with any fact known or opinion expressed by him on the subject of venue; this is in direct contrast to the facts in *Dandurand* . Dr. Beisecker never produced any of his file from his earlier work for Crown nor did he testify about what he did other than it was not related to venue.

Norfolk also directed Respondent's attention to *State ex rel. American Economy Insurance v. Crawford*, 75 S.W.3d. 244 (Mo. banc 2002) as supporting the proposition that Crown waived *all* work-product protection once Dr. Beisecker was designated as an

expert on venue selection. Respondent again misconstrued when and under what circumstances waiver of work-product protection occurs.

In *Crawford*, plaintiff designated an accident reconstruction expert as a trial witness in an earlier case in Kansas state court. Plaintiff also produced the expert for his deposition and disclosed his report. Plaintiff subsequently dismissed the Kansas case and re-filed in Missouri state court, therein designating the accident reconstruction witness as a consulting expert. When defendant sought discovery of the expert's opinions formed in the prior case, plaintiff objected and moved to quash defendant's deposition subpoena. The trial court granted plaintiff's motion finding that because he had withdrawn the expert's designation as a witness for trial in the Missouri case, the work-product privilege remained in effect. *Id.* Defendant subsequently filed a petition in prohibition seeking to overturn the respondent's protective order. Writing for a unanimous Court, Justice Limbaugh stated, "[This Court holds that plaintiff waived the work-product privilege in this case *by disclosing the testifying expert's opinion in the earlier Kansas case*, and the waiver is effective despite plaintiff's re-designation of the expert as a non-testifying consultant." *Id.*, at 246, 247. (emphasis added). Put simply, once plaintiff designated the expert for trial *and* produced him for deposition *and* disclosed his report *and* produced the witness for his deposition, the work-product privilege was irretrievably waived.

Crown's work-product privilege – except as to venue – has never been waived. Indeed, Crown never designated Dr. Beisecker to testify on any subject but venue, never allowed Dr. Beisecker to testify about any subject but venue and never produced any of

his non-venue related reports. It was and is improper for Norfolk, under the guise of seeking venue-related discovery and after a change of venue has been ordered, to delve into other matters about which Crown and Dr. Beisecker may have consulted.

Lest there be any doubt about Norfolk's intentions, its second deposition notice *duces tecum* (Petition in Prohibition, Exhibit 4, Crown's Suggestions in Opposition and Cross-Motion for Protective Order, p. 12, paragraph 2) is conspicuously broader than the first, demanding Dr. Beisecker to produce "all materials...used in the matter *Norfolk Southern Railway v. Crown Power & Equipment Company*." In contrast to Norfolk's original deposition notice which was limited to matters concerning which Dr. Beisecker was designated to testify (i.e., venue), the railroad now clearly showed its intent to engage in discovery of privileged and protected matters beyond the purview of Rule 56.01(b)(4), *supra*. Under such circumstances, Respondent should have granted Crown's cross-motion and issued an order protecting Crown from producing materials sought. *See* Rule 56.01(c) (upon motion, and for good cause shown, the Court may make any order justice requires to protect a party, including that the discovery not be had). Crown is thus entitled to an order from this Court prohibiting Respondent from compelling the deposition of Dr. Thomas Beisecker and production of his entire file.

II.

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.

Crown's concession to a change of venue at the September 4, 2008 hearing rendered moot Norfolk's venue motion. (Appendix A104-A105, A109). Respondent nevertheless ruled on Norfolk's Motion to Compel. Respondent's September 18, 2008 Order granting Norfolk's Motion to Compel Dr. Beisecker's deposition and production of his file permitted the railroad to obtain discovery of *all* consulting work done by him at Crown's request. (Appendix A1-A3) In so doing, Respondent relied on the following passage from *Dandurand*:

If the party's attorney, in preparing the expert for deposition, finds that privileged documents have been mistakenly provided to the expert, the attorney presumably has the option of withdrawing the expert's designation prior to deposition. The attorney can claim work-product protection as to that retained expert, since the expert will not be called for trial.

But here the expert has been provided the materials, was designated to testify, has had his deposition taken, and has provided opposing counsel with the documents that [counsel] gave to him. It is simply too late to withdraw his designation in order to make the documents secret again. Once the expert's testimony is taken, the deposition is available for use

by a party, subject to Rule 57.07. The bell has been rung and cannot be un-rung.

All materials given to the 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.” 30 S.W.3d at 835, 836. (Appendix, A2, paragraph 5).

Nothing like what occurred in *Dandurand* happened in this case. Crown timely objected at Dr. Beisecker’s August 5, 2008 deposition to Norfolk’s questioning unrelated to venue and instructed the witness not to answer. Crown never produced to Norfolk *any documents* given to or received from Dr. Beisecker dealing with any matter other than venue. Therefore, no waiver of the work-product privilege – except as to venue – therefore occurred.

Moreover, once Crown conceded to a change of venue, Norfolk’s Motion to Compel also became moot. Such concession had the practical effect of withdrawing Crown’s designation of Dr. Beisecker as a witness for any purpose, precisely as contemplated in *Dandurand*:

"The attorney presumably has the option of withdrawing the expert’s designation prior to deposition. *The attorney can claim work-product protection as to that retained expert, since the expert will not be called for trial.*" Id at 836 (emphasis added).

Rather than risk the discovery of Dr. Beisecker's work unrelated to venue, Crown conceded the change of venue request of Norfolk in order to maintain the work product privilege.

III.

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).

It would be an incongruous result, not to mention a violation of Rule 56.01(b)(4)(b), if a consulting expert not designated for trial should thereafter have the entirety of his consulting work laid bare, simply because he opined about selection. This would entirely eviscerate the work-product privilege under the circumstances where no protected materials have ever been disclosed. It follows that the so-called “**bell**” was **never rung**, and will never be, because Crown never designated Dr. Beisecker as an *expert witness at trial*. Rule 56.01(b)(4)(b).

To that end, Rule 56.01(b)(3) further provides:

Subject to the provisions of Rule 56.01(b)(4), a party may obtain discovery of documents and tangible things ...prepared in anticipation of litigation or for trial by or for another party...including an attorney [or] consultant...only upon a showing that the party seeking discovery has substantial need

of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, *the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.* (emphasis added).

Norfolk has not shown substantial need to discover non-venue related work-product in the preparation of the case for trial. Norfolk obtained a change of venue to Sullivan County. Even if such a showing was made, mental impressions, conclusions, opinions, or legal theories of the defense must be protected from disclosure. Because Dr. Beisecker's consulting work, unrelated to the issue of venue, consists entirely of work-product protected matter (materials and information obtained in consultation with Crown's attorneys), Respondent's granting of Norfolk's Motion to Compel and denial of Crown's Motion for Protective Order was error. The only adequate remedy is for this Court to prohibit Respondent from compelling Dr. Beisecker's deposition and production of his entire file.

CONCLUSION

In retrospect, Crown would never have considered using Dr. Biesecker to review Norfolk's venue expert's (Lisa Dahl) venue study if the possibility of his prior consulting work for Crown would be open to discovery. Logically, the use of Dr. Biesecker made sense because he was already familiar with the case and jury consulting and venue studies are within his field of expertise; he was also familiar with Lisa Dahl's work, having had her as a student and also having worked together with her on other venue projects. However, contrary to the facts in *Danderand*, there has been no disclosure of any of the work product by Dr. Biesecker in consultation with Crown's attorneys. Under the guise of pursuing the moot venue issue, Norfolk seeks the results of Dr. Biesecker's unrelated work from 2007 and early 2008, completed before the venue issue ever arose on May 20, 2008. Respondent should be prohibited from compelling Dr. Biesecker's testimony or the production of his file since the venue issue is now moot and Dr. Biesecker has never been designated as an expert witness expected to testify at trial in accordance with Rule 56.01(b)(4).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 84.07, on this 9th day of April 2009, two copies of Relator's Brief and Appendix addressed to: Richard E. McLeod and Jeff Heinrichs, McLeod & Heinrichs, 1100 Main Street, Suite 2900, Kansas City, MO 64105 were hand delivered to said attorney and placed in the U.S. Mail to the Honorable Gary E. Ravens, Circuit Court Judge of the 9th Judicial Circuit, 109 North Main Street, Milan, MO 63556.

I further certify that a copy of Relator's Brief was served by e-mail to Richard E. McLeod and Jeff Heinrich.

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(b), I hereby certify that this Relator's Brief meets the typed volume limitation and that it contains 4669 words according to the word counting feature of Microsoft Word software used to create Relator's Brief. In addition, Relator's Brief complies with Rule 84.06(a) and that the text of the body of Relator's Brief is in 13 point Times New Roman font.

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

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