

Missouri Supreme Court Addresses Discovery of Jury Research Data

November 17, 2009

Before finishing *voir dire* in a trial involving a railroad grade crossing accident, the plaintiff, Norfolk Southern Railway Company (“Norfolk”), moved for a mistrial on the grounds that it could not empanel a fair jury. The court granted Norfolk’s motion. Norfolk subsequently moved for change of venue and retained a jury consultant to testify as an expert at a hearing on the venue motion. The defendant, Crown Power, informally advised Norfolk that it had retained Dr. Thomas Beisecker as an expert for the purpose of analyzing and critiquing Norfolk’s venue study. Unknown at that time to Norfolk, Crown Power had previously retained Dr. Beisecker in the same case as a non-testifying consultant to conduct focus groups and assist with developing jury selection strategies.

Norfolk took Dr. Beisecker’s deposition in connection with the venue issue. During that deposition, Norfolk’s counsel discovered that Beisecker had done other work in the case, unrelated to the venue issue. Crown Power objected to Norfolk’s questions about that work and instructed Beisecker not to answer the questions. In support of its objections, Crown Power’s counsel cited the attorney work product doctrine.

After his deposition, Norfolk served a subpoena on Beisecker. Crown Power moved to quash the subpoena. Prior to the trial court’s ruling on the motion to quash, Crown Power withdrew its objection to Norfolk’s request for change of venue. Nonetheless, Norfolk pursued its motion to compel from Beisecker testimony and documents unrelated to the change of venue issue. The trial court granted the motion.

Crown Power appealed to the Missouri Supreme Court. The court held that because “Dr. Beisecker

was not designated as a testifying witness for trial, ... he cannot be compelled to disclose all materials provided to him by Crown Power.” *Crown Power and Equip. Co. v. Ravens*, 2009 Mo. LEXIS 535, 540-541 (Mo. November 17, 2009). Distinguishing this case from *Tracy v. Dandurand*, in which this same court held that “[a]ll materials given to a testifying expert must, if requested, be disclosed,” the court noted that, in the present case, Dr. Beisecker was not a “testifying” expert as defined by *Rule 56.01(b)(4)* because Crown Power never designated him as an expert to testify “at trial.” *30 S.W.3d 831, 834 (Mo. Banc 2000)*. The court further stated

that § 490.065.3 of the Revised Missouri Statutes (2000) which states, “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. . .” (emphasis added), does not apply because § 490.065 concerns the admissibility of expert testimony, and the issue in the present case is “discovery

of privileged work product information held by an expert who is not designated to testify at trial” (emphasis in the original). *Crown Power* at 544.

Judge Price dissented, stating: (1) “[t]he distinction indeed by [*Rule 56.01(b)(4)*] is between *consulting* and *testifying* expert witnesses - not between pretrial and trial testifying experts,” and (2) [t]he moment Crown decided to avail itself of the benefits of having its consulting expert testify, it waived the privilege over the materials it provided to him.” *Id.* at 567 and 569. Finally, the dissent commented that “[t]he reality of this case is that Crown made a mistake. It used the same expert witness to perform two functions - to provide focus group jury selection work *and* to give testimony regarding venue selection” (emphasis added). *Id.* at 570.

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