

In Virginia, expert testimony is permitted when it will assist the judge or jury in understanding matters that are beyond the common knowledge or understanding of the public. In many complex civil cases, the successful defense of a case rises or falls on the admissibility of expert testimony. In particular if a parties expert witness can be prevented from testifying in whole or in part the ultimate outcome of a case might be radically different.

With the adoption of rules of procedure more closely aligned with the Federal Rules of Civil Procedure, the Virginia Supreme Court has taken the opportunity to issue several new rulings dealing with the admissibility of expert witnesses in Virginia civil proceedings.

One such ruling, **John Crane, INC. v. Wanda T. Jones, Administratrix of the Estate of Garland F. Jones, Jr.**, Va. \_\_\_\_\_, 650 S.E. 2d 851 (2007) addresses the scope of expert testimony under Virginia's Supreme Court Rule 4:1 (b) (A) (i) (Discovery Rule).

Virginia Supreme Court Rule 4:1(b)(4)(A)(i) states:

A party may through interrogatories require any other party to identify each person whom the party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

The **Crane** case involved the appeal of a jury award of \$10.4 million dollars for a wrongful death claim arising out of alleged asbestos exposure. The trial took place in the Circuit Court for the City of Newport News. Id. at 650 S.E. 2d 853. Among other assignments of error, Crane who was responsible

for \$3.4 million dollars of the verdict, claimed that the trial judge improperly limited the testimony of defendants expert witnesses (Dr. Roggli and Henry Ruccigross). Id. at 856.

Framing the issue as to Roggli the Supreme Court stated:

The trial court sustained the Estate's objection to Dr. Roggli's testimony regarding his opinion on the amount of asbestos in the ambient air and its relationship to the cause of mesothelioma **because this opinion was not disclosed pursuant to** Rule 4:1(b)(4)(A)(i). We have not previously examined the degree of specificity required by Rule 4:1(b)(4)(A)(i). Nevertheless, any application of this rule begins with determining whether the opinion at issue was disclosed in any form. See, e.g., Griffett v. Ryan, 247 Va. 465, 468, 443 S.E.2d 149, 151 (1994) (reviewing trial court decision to allow expert testimony by first examining content of the pretrial disclosure). Id. (Emphasis added)

Reciting defendant Crane's expert disclosures the Virginia Supreme Court noted:

Dr. Roggli will testify as to the pathological diagnosis and the testing performed by him and others at Duke University to determine if a mesothelioma exists. Dr. Roggli may testify as to the association between asbestos (including the various types) and the alleged disease process involving the plaintiff. Dr. Roggli may testify as to the contribution, if any, of exposures to John Crane's products and products of other companies in the causation of plaintiff's asbestos-related disease. Finally, Dr. Roggli will testify as to the burden of asbestos (including the various types) in plaintiff's lungs and its contribution, if any, in causing plaintiff's asbestos-

related disease if any. Dr. Roggli's reports have already been or will be provided.

Crane subsequently provided the Estate with a report containing the results of Dr. Roggli's examination of tissue samples taken from Garland Jones' lungs. The report did not contain any reference to levels of asbestos in the ambient air. Crane argues that in excluding Dr. Roggli's testimony, the trial court interpreted Rule 4:1(b)(4)(A)(i) too strictly. According to Crane, Dr. Roggli's opinions including those regarding asbestos in the ambient air, were "well known" to the Estate because it questioned Dr. Roggli about the opinions during his deposition. **Thus, even if the disclosures were insufficient, according to Crane, the error was cured at Dr. Roggli's deposition.**

**[13] Nothing in Crane's disclosure reveals that Dr. Roggli might testify about asbestos in the ambient air. Furthermore, a party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert.** Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert's testimony. We reject this reading of Rule 4:1(b)(4)(A)(i).

Id. (Emphasis added).

Rejecting the defendant's argument the Court affirmed the trial Court's ruling:

Accordingly, the trial court did not abuse its discretion in



ruling that Dr. Roggli's opinion testimony regarding asbestos in ambient air was inadmissible because Crane failed to comply with the disclosure requirement of Rule 4:1(b)(4)(A)(i).

Id.

Regarding Henry Ruccigross and his testimony the Supreme Court held:

Crane argues, as it did to the trial court, that **regardless of its failure to provide Buccigross' report, the Estate knew the substance of Buccigross' testimony because the Estate's counsel had cross-examined Buccigross "at trial about his reports going back to the '90s."** Crane also pointed out that the Estate had failed to depose Buccigross or to ask Crane for representative samples of Buccigross' testimony, either of which would have allowed the Estate to ascertain the actual substance

of the testimony.

Rule 4:1(b)(4)(A)(i) **requires that the substance of opinions to be rendered be disclosed.** Here, while Crane did disclose the topic of Buccigross' testimony, Crane did not disclose the substance of Buccigross' opinions in the disclosure or through Buccigross' report. Crane thus failed to comply with the Rule and the trial court did not err by excluding the testimony. As we stated when considering Crane's challenge to the trial court's ruling on the admissibility of Dr. Roggli's testimony, an opponent's ability to depose an expert or familiarity with such expert through prior litigation does not relieve a party from complying with the disclosure requirements of Rule 4:1(b)(4)(A)(i).

Id. at 857.

Clearly the lesson to be learned from **Crane** is that Circuit Courts have the power to limit the testimony and even

exclude the testimony of experts based upon a failure to strictly comply with Supreme Court Rule 4:1 (b)(4)(A)(i). The fact that the opposing side may be aware of all the facts and proposed testimony was not of any significance to the Virginia Supreme Court.

Since this is a new ruling the degree to which the Circuit Courts of Virginia will strictly apply the Supreme Courts ruling to limit or exclude expert testimony remains to be seen; in the interim prudent counsel will insist upon careful and complete expert disclosure under the Rule.



*KALBAUGH, PFUND & MESSERSMITH, P.C. wishes to thank our clients and friends for allowing us the opportunity to earn your business. If you are not currently a client of our firm and would like more information on our progressive and aggressive approach to the practice of law, please call or e-mail Bill Pfund at 804-320-6300 or bill.pfund@kpmllaw.com. We also invite you to visit our website at www.kpmllaw.com for valuable information and links.*

This publication is intended for general information only and is not intended to serve as legal advice. For legal questions the reader should consult legal counsel to determine how applicable law relates to specific facts or situations. While all articles are thoroughly researched, no warranty is given for their accuracy.

ADDRESS SERVICE REQUESTED

Serving Virginia, Washington, D.C., and Metro Maryland.



◆ Central Virginia Office  
901 Moorefield Park Drive, Suite 200  
Richmond, Virginia 23236  
(804) 320-6300

◆ Northern Virginia Office  
4031 University Drive, Suite 300  
Fairfax, Virginia 22030  
(703) 691-3331

◆ Eastern Virginia Office  
555 East Main Street, Suite 1200  
Norfolk, Virginia 23510  
(757) 461-4445

◆ Southwestern Virginia Office  
2840 Electric Road, Suite 111A  
Roanoke, Virginia 24018  
(540) 776-3583

