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JOHN CRANE PAIN

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Roughly two years ago, the Virginia Supreme Court issued its decision in *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007), *cert. denied*, 76 U.S.L. W. 3439 (2008). Virginia lawyers who handle cases involving expert witness testimony have felt its impact ever since. Though *John Crane* has been the subject of considerable analysis and discussion, much misinformation remains about the scope of the Virginia Supreme Court's holding. To illustrate, consider the following quiz.

> **TRUE or FALSE?** The *John Crane* decision constituted a paradigm shift in Virginia jurisprudence concerning the issue of expert disclosures.
>
> **TRUE or FALSE?** The *John Crane* decision imposed expert disclosure requirements in Virginia tantamount to Federal practice.
>
> **TRUE or FALSE?** Under the *John Crane* decision, if an expert opinion, or any component thereof, is not specifically disclosed in accordance with a court's scheduling order and/or the Rules of the Supreme Court of Virginia, then the expert shall be prohibited from testifying on those matters at trial.

A cursory reading of the opinion might suggest that the answers to all of these questions are TRUE. However, a closer inspection of the Supreme Court's holding and an analysis of the circuit court opinions that have interpreted it suggests that the truth of the following statements may be more telling:

> **TRUE or FALSE?** The *John Crane* decision has created a flood of litigation involving post-designation/pre-trial motions to exclude purportedly "undisclosed" expert opinions.
>
> **TRUE or FALSE?** The *John Crane* decision has made plaintiff and defense lawyers alike more careful and more thorough in disclosing the opinions of their trial experts.
>
> **TRUE or FALSE?** The *John Crane* decision has made us all a little uncomfortable at one time or another.

The *John Crane* Shufflle

Anecdotes about the impact of *John Crane* on trial practice abound. Most of us who handle cases involving expert testimony have done the dance by now. Does the following scenario sound the least bit familiar?

You work hand-in-hand with your expert to be as thorough as possible in listing the opinions she holds in the written designation. Once again, you re-read the Rules of the Supreme Court of Virginia and carefully track the language of Rule 4:1 and provide a complete description of every basis for every opinion. You incorporate by reference every document produced in discovery and all deposition testimony that has already been given and is expected to be given in the future. You flyspeck the final draft of the document. You ask your partners to read it and scrutinize it for completeness. You explain to the expert one more time that Virginia law requires litigants to comprehensively disclose her opinions. You explain to her that if she raises a "new" opinion after the designation deadline that

there is a possibility she will be precluded by the Court from offering that opinion at trial. Your expert assures you that the designation accurately sets forth the entirety of her opinions and that it is, without a doubt, comprehensive. She bills you for the hours she spends with you creating and vetting the designation. Convinced that you have done your due diligence, you finally serve the designation on opposing counsel.

Fast forward thirty days. You have spent a considerable amount of money taking a pre-dawn flight to meet your expert face-to-face for the first time to prepare her for her deposition. She is late to your prep meeting, and you're not 100% positive she knows who you are or why you are there. Fortunately, you have just enough time before opposing counsel walks into the room to remind her to stick to the opinions that you previously discussed and that you included in the designation. She assures you that she has been deposed as an expert many times and that everything will be fine.

The deposition begins. After covering preliminary matters, opposing counsel slides the designation across the table and asks your expert to verify that she has seen and had an opportunity to review it before. She frowns and flips through the document, looking at it like it is written in Sanskrit. She hands it back and says that it looks somewhat familiar, that she probably saw an earlier draft of it, and that her quick once-over confirmed it to be a somewhat accurate summary of her opinions. Opposing counsel raises his eyebrows at you.

During questioning, she explains and when asked to do so, expands on her opinions. Maybe she uses a different choice of language than you used when you wrote the designation (using the phrasing she told you to use). Maybe she is asked to define the limits of her opinion, and today those limits go further than she was willing to embrace when you asked her to do so while you were preparing the designation. Maybe she merely answers a series of hypothetical questions.

Opposing counsel then hands the designation back to the expert and snidely asks her to point out where in the 10 pages of written text *that* portion of her opinion appears. You are then treated to the following exchange and declaration on the record:

> "*You had a chance to review this document before it was finalized, didn't you doctor? And you would agree with me that the opinion you just shared with me is not anywhere in those pages, don't you doctor? Well doctor, it's not your fault and I mean no disrespect to you. I'm not sure how things work in all the other states where you've testified, but in Virginia we have certain laws that require that expert opinions be fully described by a certain deadline. You didn't do anything wrong, my comments are directed at Mr. Petty over there*."

Then somewhat louder and more authoritatively:

> "*For the record, the defendant moves to strike Dr. Smith's previously undisclosed opinions that she, for the first time, has shared with us today. The defendant had no prior notice that she would be addressing these opinions, which were not included in the designation, attached as Exhibit A, that was served on all parties thirty days ago. We have been blindsided by this new opinion and have been deprived of the opportunity to discuss it with our experts or to properly prepare for cross-examination. We will proceed with the deposition and questioning concerning this subject matter out of an abundance of caution, but we reserve the right to move in limine to exclude any and all such undisclosed opinions at trial."*

Co-counsel, of course, astutely adds: "We join."

The next step in the process involves you facing the threatened motion *in limine*. Such is the life of a trial lawyer in a post- *John Crane* world.

This writer actually argued a motion to preclude an expert in a medical malpractice case from offering an opinion regarding the defendant physician's response to a patient's symptom of "nausea." What was the basis of the motion? *The fact that we had designated an opinion regarding the response to the symptom of "nausea and vomiting*." The moving lawyer spent ten minutes arguing to the Court that *JohnCrane* demanded that the nausea opinion be excluded because there is a significant medical distinction difference between "nausea" and "nausea and vomiting." While the lawyer conceded that the "nausea" opinion had been fully explored during deposition, and that no further discovery on the subject would be necessary, he argued that *John Crane* stood for the proposition that opinions disclosed in deposition must be excluded if they are not in the written designation. Fortunately, with a sigh and a chuckle, the Court overruled the motion.

Will the Real *John Crane* Please Stand Up?

In order to grasp the true scope of *John Crane,*[1] it is necessary to review the facts underlying the decision. The original plaintiff was employed from 1963 to 1967 as a machinist at a Newport News shipyard. In January 2005, he was diagnosed with malignant mesothelioma. The plaintiff filed suit against John Crane, Inc. ("Crane") and other companies, alleging that the asbestos contained in their products caused his cancer. After the plaintiff's death, the Estate filed an amended motion for judgment adding a claim for wrongful death.

[1] Full and complete credit for this entire section of the article, including the cogent description of the *John Crane* case, goes to the following authors who graciously gave their permission to borrow **heavily** from their excellent articles: Richmond lawyers John C. Shea and Mark Lindensmith of Marks & Harrison and Roger T. Creager of The Creager Law Firm. See J. Shea et al., "Life With John Crane"; R. Creager, "Has *John Crane* Run Astray?" *The Virginia Bar Association News Journal* at 19 (Oct. – Nov. 2008); and R. Creager, "Assessing the Probable Impact of John Crane" (Monograph 2008)

The trial **court** excluded certain testimony of two of the defendant Crane's expert witnesses, Dr. Victor Roggli ("Roggli") and Henry Buccigross ("Buccigross"). The Estate objected to the opinion testimony by Roggli regarding the amount of asbestos in the ambient air and its relationship to the cause of mesothelioma. The Estate also objected to testimony by Buccigross about tests he had conducted on asbestos-containing products made by other manufacturers. The Estate argued that this testimony should be excluded because the opinions were not disclosed by Crane as required by Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia. The trial court excluded the challenged testimony.

On appeal, the Supreme Court upheld the trial court's rulings. The Supreme Court reviewed the trial court's exclusionary rulings under an abuse-of-discretion standard. The application of this standard is not a change in the law. The Court's ultimate holding in *John Crane*, therefore, was **only** that the trial court did not abuse its discretion in excluding the testimony. It seems possible that if the trial court had allowed the testimony, subject to certain measures to protect the plaintiff against prejudice, the Supreme Court might have reviewed that ruling as well under the abuse-of-discretion standard.

The *John Crane* holding did not create new standards or new requirements governing the sufficiency of expert disclosures. The standard that the Court applied to Crane's expert disclosures was the standard that has long been contained in Rule 4:1(b)(4)(A)(i). This rule requires a "party to identify each person whom the party expects to call as an expert witness at trial, to state the subject matter on which 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 of which opinion." Rule 4:1(b)(4)(A)(i).

With respect to the disclosure of Dr. Roggli's opinions, The Supreme Court found that: "Nothing in Crane's disclosure reveals that Dr. Roggli might testify about asbestos in the ambient air." *John Crane,* 274.Va. at 592, 650 S.E.2d at 856.

Thus, the Roggli testimony that was excluded was testimony regarding opinions that were **not disclosed at all**. If the disclosure requirements of the Rule mean anything, they must mean that the trial court has the authority in certain circumstances to exclude expert testimony about opinions that were completely undisclosed.

Crane argued that the trial court erred in excluding the testimony because the plaintiff's counsel had learned of and questioned Roggli about the opinions during his deposition. The Supreme Court rejected this reading of the Rule's requirements stating: "[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." *Id .*

It should be noted that the Court did **not** hold that a trial court would necessarily abuse its discretion if it admitted a challenged opinion that had already been disclosed and addressed during a deposition. Rather, the Court only held that *in the circumstances of this particular case*, the trial court did not err in excluding the opinion. It is noteworthy that the circumstances of this particular case included untruthful prior discovery responses on behalf of Crane. *John Crane*, 274 Va. at 590, 650 S.E.2d at 855.

The Supreme Court also upheld the trial court's exclusion of the challenged testimony by Buccigross. Prior to trial, Crane disclosed that Buccigross would offer testimony on his "research and/or his testing of various asbestos insulation products." *John Crane*, 274 Va. At 590, 650 S.E.2d at 855. Although the disclosure referenced a report by Buccigross on his testing of other asbestos insulation products, the report was not attached to the disclosure and apparently was never provided. The trial court refused to allow Buccigross to testify about the tests he

had conducted on certain other products because the Estate had not received Buccigross' report relating to this subject.

Crane argued that the Estate knew the substance of Buccigross' testimony because the Estate's counsel had cross-examined him "at the trial about his reports going back to the '90's." Presumably this meant that the Estate's counsel had cross-examined Buccigross about his opinions at previous trials, although the opinion is not entirely clear at this point. The opinion does later refer, however to "familiarity with such expert through prior litigation, "274 Va. at 593, 650 S.E.2d at 857, which supports the view that the cross-examination took place at previous trials. Crane also observed 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.

The Supreme Court rejected the notion that either the ability to depose an expert or the *de facto* knowledge of an expert's prior testimony necessarily cures a deficient Rule 4:1(b)(4)(A)(i) disclosure so as to require the trial court to admit the insufficiently disclosed opinion at trial. Once again, however, it is important to note that the Court did **not** hold that it would necessarily constitute an abuse of discretion for a trial court to admit challenged expert testimony because the opponent's counsel in fact had extensive previous familiarity with the expert's opinions and the grounds underlying those opinions. The Court only held that the trial court did not abuse its discretion in excluding the testimony *in this particular case.*

The *John Crane* Fallout

In the two years since John Crane, both plaintiff and defense lawyers alike have been guilty of reading disclosure requirements into the Supreme Court's opinion that simply are not there. Several very experienced and skilled trial lawyers consulted for this article have asked, rhetorically, why even have

depositions at all if the litigants mutually insist on a Federal level of comprehensiveness in expert disclosures? It is a point well taken.

Fortunately, an inspection of the Circuit Court opinions and orders that have been issued since *John Crane* reveals that the trial judges do not necessarily share the zeal with which lawyers have attacked the sufficiency of each other's disclosures. An encouraging letter opinion[2] issued by Hon. Timothy Fisher of the Circuit Court of Newport News describes both the limited scope of the *John Crane* holding and the over-use of that holding by litigants. It is an opinion written by a trial judge quite apparently weary of hearing *John Crane* motions.

At issue, of course, is a motion to exclude certain "non-disclosed" expert opinions. Judge Fisher writes:

> The initial line in defendant's motion states as follows:
>
> *The Supreme Court of Virginia held that if the required expert opinion is not disclosed in accordance with the Rules of Virginia and the scheduling order then that expert shall not be permitted to testify on those matters at trial.*
>
> There is no page number cited from the opinion in Crane for that quite and the court is unable to locate that quote in the court's decision in John Crane. **That's because it is not in the opinion**.

See Appendix 1, p. 6. (Emphasis in original).

The opinion goes on to analyze *John Crane,* and emphasizes both the abuse-of-discretion standard and the fact-specific scope of the opinion. Judge Fisher does not mince words in clarifying that the Supreme Court's opinion did not create a

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[2] Christie Richards, Adm. 0f Estate of Kenn eth Edward Richards, dec. v. Lee O. Butterfield, M.D. et al., Circuit Court of the City of Newport News, Case No. CL05-39491. *See* Appendix 1, pp. 5-8.

"bright line" rule. He notes the absurdity of requiring a litigant to recite, word for word, what exactly an expert's testimony will be. Whether a trial court should exclude an expert opinion depends on the facts and circumstances underlying the opinion. The sufficiency of the disclosure or non-disclosure of the opinions, and whether to permit or exclude those opinions, are questions that rest, and have always rested, within the sound discretion of the trial court. Judge Fisher concludes his point succinctly:

> *I say the foregoing with only faint hope that plaintiffs and defendants will actually see* John Crane *for what it is and not assume that it imposes upon any court a requirement to parse every single word of an expert designation and compare it to a deposition in order to approve all the testimony to be given by any expert at every trial.*

Reading between the lines, this is not the first John Crane motion that Judge Fisher has entertained. His sigh of frustration is almost audible.

The *John Crane* Takeaway

The *John Crane* opinion highlights the potential consequences of failing to thoroughly reveal the opinions of expert witnesses. Certainly trial lawyers are now on notice that their designations should be precise and comprehensive. As a practical matter, the days of expecting as a matter of course to be able to cure any deficiency in the written disclosure at the time of deposition are probably over.

That being said, notwithstanding *John Crane*, the law controlling litigants' obligations vis a vis expert disclosures is the same as it ever was. Lawyers are cautioned not to overstate the Supreme Court's holding in arguing for the exclusion of an opponent's expert's opinion. The lawyer who is careful and thorough, who is familiar with both the caselaw and Rule 4:1, and who approaches expert discovery with a reasonable supply of common sense should be able to navigate the post *John Crane* world of litigation without too much trouble.