LIFE WITH *JOHN CRANE*

MEET *JOHN CRANE.*

It has now been almost two years since the Virginia Supreme Court issued its ruling in *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007), *cert. denied*, 76 U.S.L.W. 3439 (2008), and although the opinion did not really announce a dramatic shift in the law regarding the requirements of expert disclosures, it is clear that the decision did bring the rules concerning disclosure into sharper focus for many practitioners and has ushered in a change in the way expert disclosures are presented under Va. Sup. Ct. Rule 4:1 (b) (4) (A) (i). Indeed, if the past two years of life with *John Crane* and its attendant mixed-bag of circuit court results teach us anything about how to prepare such disclosures, it is this: be specific, be thorough, and amend and supplement earlier rather than later. That appears to be the best way to make sure you are in compliance with *John Crane* and the provisions of Rule 4:1 (b) (4) (A) (i), which require a party responding to discovery "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*." (emphasis added).

With the watch-words "be specific and thorough" in mind, it is appropriate to reacquaint ourselves with *John Crane* and the effect the decision has had over the past two years in terms of the specificity of expert disclosures under Virginia's discovery rules.[1]

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[1] In addition to the *John Crane* case itself, portions of the discussion herein about the facts of the case and its specific holdings have been adapted, incorporated, and, in fact, lifted wholesale (with author's permission) from two excellent articles on the potential impact of the *John Crane* case by Richmond lawyer Roger T. Creager. *See* 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).

Any attempt to sort out the "sufficiency" of disclosures in light of the opinion must begin, of course, with a summary of the facts and holding of *John Crane*. The plaintiff, Garland F. Jones, Jr. was employed from 1963 to 1967 as a machinist at Newport News Shipbuilding & Dry Dock Company. In January 2005, he was diagnosed with malignant mesothelioma, a cancer in the lining of the lung caused by exposure to asbestos dust or fibers. Jones filed suit against John Crane, Inc. ("Crane") and other companies, alleging Crane manufactured and/or sold asbestos-containing products to his employers, and the products caused his cancer. Jones subsequently died and the personal representative of his estate (the "Estate") filed an amended motion for judgment adding a wrongful death count.

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 (generally circulating 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 these aspects of these experts' 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 upheld that ruling as well under the abuse-of-discretion standard.

And the *John Crane* holding did not announce new standards or new requirements governing the sufficiency of expert disclosures. The standard that the Court applied to the expert disclosures of Crane was the standard that has long been contained in Rule 4:1(b)(4)(A)(i), which 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 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 of each opinion." Rule 4:1(b)(4)(A)(i).

The Supreme Court reviewed the expert disclosures regarding Roggli, however, and found: "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, however, 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. Worth noting is the fact that the circumstances 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 Buccigross "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 on 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 *de facto* knowledge of an expert's prior testimony sufficiently 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 therefore. The Court only held that the trial court did not abuse its discretion in excluding the testimony.

Based on the *John Crane* opinion, therefore, a litigant who completely fails to disclose an expert opinion or the substance of the expected expert testimony faces the possibility of exclusion of the testimony. Obviously, litigants should do all they can to avoid this risk. At the same time, opposing counsel cannot necessarily assume that insufficiently disclosed expert testimony will ***always*** be excluded at trial. Exclusion seems less likely, for example, if the insufficient expert disclosures are formally amended and supplemented prior to the trial, an opportunity for supplemental deposition questioning is offered, and the proponent's course of discovery has been generally forthcoming. Although these corrective measures may not *require* the trial court to allow the expert testimony at trial, they may lead to such a ruling in some cases.

EMBRACE *JOHN CRANE.*

There is nothing new (or particularly frightening or ominous) about the rulings of law in *John Crane*. There were no startling movements of the tectonic plates of precedent, and there was no reversal of the magnetic poles. First, the Supreme Court simply applied the abuse of discretion standard of review concerning the trial court's decision to exclude the expert testimony, citing cases such as *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 465 (1995). *See John Crane*, 650 S.E.2d at 856. Second, based on that standard, the Court concluded that the trial court *had not* abused its discretion in excluding the subject expert testimony because of Crane's failure to properly disclose it under the plain terms of Rule 4:1 (b) (4) (A) (i).

And the requirements of disclosure under Rule 4:1 (b) (4) are contained within the Rule itself and would seem to be fairly self-explanatory. In responding to an interrogatory requesting disclosure of experts, the party responding must: (1) **identify** each person the party expects to call as an expert witness at trial; (2) state the **subject matter** on which the expert is expected to testify; (3) state the **substance of the facts and opinions** to which the expert is expected to testify; and (4) state a **summary of the grounds** for each opinion. Neither the Rule nor *John Crane* require a verbatim recitation of precisely what the expert will say at trial. They just require disclosure of the "substance" of the facts and opinions, and a "summary of the grounds" for the opinions.

The "substance" of the facts and opinions of the expert does not mean a verbatim script of what the expert will say or a detailed accounting of every opinion or scrap of knowledge that the expert might have concerning the case. It does mean, however, the

"essence" of his or her proposed testimony.[2] The purpose of such pre-trial expert disclosure, of course, as with virtually all of the provisions regarding pre-trial discovery, is to prevent trial by ambush. *See Bryant v. Cochran,* 1996 Va. Cir. LEXIS 584 at *1-2 (Roanoke City Cir. Ct. Apr. 18, 1996) ("The discovery process is designed to allow both sides to see and investigate their own and the opposing case in order to facilitate settlement, resolve evidentiary and law issues, and to insure the orderly progress of the trial. *It is predicated on the theory that a civil case should not be conducted as a trial by ambush,* but rather as a smooth presentation of evidence, culminating in a determination of the truth. *The rules of discovery can be summarized in the phrase, 'fundamental fairness'"*) (emphasis added).

The teaching of *John Crane*, and one that can be embraced by plaintiff's and defendant's counsel alike, is that fundamental fairness, at the very least, requires a party to state in writing the "substance" of the proposed expert testimony and a summary of the grounds for each opinion – and when a party fails to do so, it is within the trial court's discretion to prevent the expert from testifying concerning matters that were left out of the statement of the "substance" and "summary" of the opinion. Beyond the examples addressed in the *John Crane* case itself ("[n]othing in Crane's disclosure reveals that Dr. Roggli might testify about asbestos in the ambient air" and the defendant completely failed to attach an expert's report that was referred to in the disclosure), the Supreme Court has not really offered any further guidance on "the degree of specificity required by Rule 4:1 (b) (4) (A) (i)." *John Crane*, 650 S.E.2d at 856. So far, the degree of specificity required is being left to the trial courts, under the abuse of discretion standard.

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[2] *See* www.merriam-webster.com/dictionary/substance ("substance" means: "a : essential nature : essence b : a fundamental or characteristic part or quality").

As noted by Virginia Court of Appeals Judge D. Arthur Kelsey, in commenting on the *John Crane* case and its possible effects, he was "unmoved" (as was the Supreme Court) by Crane's arguments in the case that the experts' opinions had been thoroughly explored in depositions. *See* P. Vieth, "Enforce The Rules: Kelsey Takes Strict Line on Procedure," *Virginia Lawyer's Weekly* (May 5, 2008); http://valawyersweekly.com. Judge Kelsey has stated:

> It's a subtle principle, but I personally believe it to be a legitimate principle, an important principle. The reason for expert disclosures is not to tell the other side what the expert believes, what the expert's opinions are, what the expert has done in his life. The reason is *to tell the other side what portion of that huge mass of information that the litigant is going to offer, advocate, defend and insist upon at trial. I want to know what the jury's going to be told. Just tell me that straight*. And, *John Crane* says you've got to do that.

Id. (emphasis added).

And Judge Kelsey has further emphasized that the *John Crane* opinion did not necessarily require the same result in all circuit court decisions – that the Supreme Court ruled only that the trial judge in that case had not abused his discretion – and the appellate courts properly defer to the "battlefield commanders," or the trial judges, in such matters. *Id.* So, whether the disclosure is specific enough, and whether one party is telling it sufficiently "straight" to the other party, are matters that are left to the sound discretion of the trial courts in control of the discovery process.

WHEN IN DOUBT, INCLUDE IT.

As yet, there has not been a systematic collection of the results of the various "John Crane" circuit court hearings that have taken place over the past two years, but anecdotal evidence suggests that several circuit courts, including Richmond, are strictly

applying and enforcing *John Crane* to exclude or limit the testimony of experts whose proposed opinions have not been thoroughly set forth in detail in a Rule 4:1 (b) (4) (A) (i) disclosure. In other words, some courts have bought into the "strict application" arguments of counsel that experts should *not* be allowed to testify about anything not specifically included in the Rule 4:1 (b) (4) disclosure. Under such a restrictive reading of the Rules and *John Crane*, the expert's disclosure might become something akin to a "script" of his proposed testimony, from which he will not be allowed to depart. No extemporaneous riffs allowed.

Other courts, like some of those in the 26th Judicial Circuit in the Shenandoah Valley, have taken a practical, common-sense approach to the problem, as demonstrated by Judge John E. Wetsel, Jr., in his standing order memorandum on discovery, wherein he offers the following guidance as to what is required:

> The answers to interrogatories about experts should be detailed, so that the opposing side knows what your expert will be testifying about from reading your answer. Your answer must include the subject matter, the substance of the facts and opinions to which the expert will testify, and a summary of the grounds of each opinion. If these required elements are not in your answer, then your answer is insufficient. *John Crane, Inc. v Jones*, 274 Va. 581, 591-93 (2007); *see generally Handling Products Liability Cases in Virginia*, Virginia CLE (1994), p. III-2. Parties very frequently fail to adequately state the "substance of the facts," the "opinions," and "a summary of the grounds of each opinion." While there is no talismanic form for an answer, in a typical personal injury action, the following would be an adequate answer with respect to an orthopedic surgeon who had treated the plaintiff (IF IN DOUBT, ERR ON THE SIDE OF INCLUSION):
>
> > Name and Address:
> >
> > Substance of the Facts: Attached are the treatment records of Dr. X., who is a board certified orthopedic physician licensed to practice in Virginia, who treated the Plaintiff, and who will testify about his examinations and his treatment as shown on these records.

> Summary and Grounds of Opinions: Based on his examination, consultations, and treatment of the Plaintiff, Dr. X will testify that:
>
> 1. In the accident of October 1, 2006, the Plaintiff sustained a comminuted fracture of his left tibia.
>
> 2. As a result of his injury, the plaintiff had to be off from work from October 1, 2006 - December 31, 2006.
>
> 3. The fracture resulted in a shortening by 5 mm of the Plaintiff's left leg, as a result of which he has suffered a 5% loss of use of the lower left leg. His physical restrictions caused by his injury are that he is restricted to walking not more than five miles a day, and has problems walking on uneven surfaces.
>
> 4. The Plaintiff was charged $900.00 by Dr X for his treatment as shown on the attached bills, which are reasonable in amount and were necessarily incurred as a result of the injury sustained in the October 1, 2006 accident. (If Dr X will testify as to the need for future treatment and its cost, set it out in particular.)

(Standing Order Memorandum on Discovery, Wetsel, J., at 8-9 (October, 2008) (emphasis in original).

Even under this "common-sense" and "here is what is adequate" approach to such disclosures, however, as noted by Judge Wetsel: "If in doubt, err on the side of inclusion." Or, as stated by one commentator: "Be specific, be exhaustive, and be detailed." *See* R. Tweel, "Expert Witness Disclosures – Malpractice Trap," *The Journal of the Virginia Trial Lawyers Association*, Vol. 20, No. 1 at 2 (2008). After two years, that still appears to be good advice about life with *John Crane*.