

Dead Men Do Tell Tales: Pennsylvania Permits Decedent Depositions to Sink Summary Judgment

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"Dead Men Tell No Tales" – Captain Jack Sparrow, "Pirates of the Caribbean: Dead Men Tell No Tales" [*Not True: Actually from a poem by the same name by Heniel Long (1888-1956) as found in Modern American Poetry, Untermeyer, ed., 1919.*]

A panel of Pennsylvania's intermediate appellate court recently reiterated that a deceased litigant's testimony may be used not only at trial, but also to defeat a defendant's pretrial Motion for Summary Judgment. The Superior Court's ruling in *Kardos v. Armstrong Pumps, Inc.* underscores the need for thoughtful, experienced defense questioning at key depositions.

Unlike many species of civil tort litigation involving a handful of defendants, most plaintiff attorneys file their clients' asbestos cases against a wide range of companies, deferring the winnowing of targets to the discovery and dispositive motion phase. The list of defendants sued by plaintiffs can be several pages long, and thus the discovery deposition of an asbestos plaintiff can occupy many days as each defendant inquires about its own alleged involvement.

Kardos presented a rather typical context. Shortly after being diagnosed with a form of cancer that can – but is not always – caused by certain – but not all forms of – asbestos fibers, the plaintiff sued numerous manufacturers, suppliers and users of asbestos products. After a site inspection of the plaintiff's former employer, the plaintiff executed an affidavit that identified his alleged exposures to asbestos. Shortly thereafter, the plaintiff testified in a discovery deposition that lasted for three non-consecutive days. Many, but not all defendants posed questions to the plaintiff. The court's opinion emphasizes that at the end of the third day's questioning no defendant served a Notice of Deposition for additional deposition time. Perhaps that decision was strategic, as the plaintiff died eight days later.

Various defendants moved to preclude the plaintiff-decedent's estate from using the plaintiff's deposition testimony. They also moved for summary judgment, contending that there were "no genuine issues of material fact," and that the plaintiff could not make out a *prima facie* case against them due to the lack of "product ID" evidence. The Allegheny County Court of Common Pleas agreed and granted a global motion to preclude the plaintiff-decedent's deposition, granting summary judgment to some defendants who had questioned the plaintiff during his three-day deposition and to three defendants whose lawyers had not posed any questions. "The case proceeded to trial against the remaining [d]efendants, all of whom eventually settled."

The estate appealed. The Superior Court noted that it enjoyed a wide scope of review; it reiterated that summary judgment is appropriate only where the party "who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action." The court reminded that for asbestos plaintiffs to get to go to trial – and more importantly, to get to pretrial settlement negotiations – the plaintiffs must produce evidence that they worked with such frequency, regularity and proximity with respect to each manufacturer-defendant's product such that they inhaled asbestos fibers from those products that caused their specific disease.

The Superior Court restated that plaintiffs may use their own duly sworn affidavits to help make out their *prima facie* case and support their opposition to a summary judgment motion. Likewise, the court reasoned that just as there is a specific rule allowing a decedent's deposition transcript to be used at trial, a similar logic suggests the transcript can be used pretrial to oppose a summary judgment motion. Although the court's opinion does not categorize the plaintiff's deposition as having been incomplete, the court nevertheless

relied on “[p]ersuasive cases from other jurisdictions demonstrate depositions, which are unfinished due to the deponent’s illness or death, are admissible at the summary judgment and trial stages.”

The Superior Court concluded that the trial court was wrong to preclude the decedent’s deposition testimony and affidavit. The court suggested that “[t]he preclusion of [the decedent’s] testimony resulted in significant prejudice” to the plaintiff-estate “as [it] needed this testimony to oppose [motions for] summary judgment [filed] on the ground of lack product identification.” Still, notably missing from the court’s opinion is any discussion of what specific facts the deceased deponent testified about that could have raised the kind of “genuine issue of material fact” to scuttle the summary judgment motions.

The *Kardos* decision sends the case back to the trial court with respect to the defendants who had previously won summary judgment. The parties may either try or resolve the remaining disputes, but for the rest of the defense bar, *Kardos* reminds you that when it comes both to trial and pretrial dispositive motions, dead men can, and do, tell tales.

If you have questions or would like additional information, please contact Bill Kennedy (kennedyw@whiteandwilliams.com; 215.864.6816) or another member of our Product Liability Group.

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