# Defending Depositions Against Dying Deponents in Asbestos Litigation

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Asbestos litigation typically involves numerous defendants. Suits are filed when the plaintiff knows, or should know, that they have an asbestos-related condition. When the plaintiff is suffering from a terminal asbestos-related condition, such as mesothelioma, the plaintiff's deposition is often expedited to ensure that it is completed before death.

As any attorney who routinely defends asbestos cases knows, it is not uncommon to find a large number of defense attorneys present for the plaintiff's deposition, either in person or via phone. It is common for the injured plaintiff, prior to the deposition, to identify numerous defendants in an affidavit. When liaison defense counsel conducts direct examination of the plaintiff, testimony is often developed that inures to the benefit of the defendants. This can have the effect of curtailing the length of later cross-examination by some defendants. Conversely, plaintiffs counsel on direct examination obtains testimony that will almost certainly require cross-examination by most defense counsel. All of these factors, not the least of which includes the health of the plaintiff, arguably affect the ultimate length of time it will require to complete the deposition.

When it appears that the plaintiff is not gravely ill, defense counsel often weigh the strategic reasons to let the testimony of the plaintiff play out. Depending upon the knowledge or credibility of the plaintiff, the skill of the lead questioner, the strength of cross-examination by co-defense counsel with similarly situated clients, the specific client objectives, the deviation in the plaintiff's testimony from hour-to-hour or day-to-day, and even the energy level of the plaintiff on a given day, among other factors, the defense practitioner may be looking for the right time to obtain the most favorable testimony on cross-examination. As such, there can be a tendency in the defense of asbestos depositions to take a wait-and-see approach.

It is not uncommon for the asbestos plaintiff to be deposed over a period of several days. This is essentially because it may take that much time to lay down all of the testimony and to accommodate questioning by all interested parties. If you are an attorney whose client now has some exposure in a lawsuit due to their identification in the affidavit or witness disclosure, or due to the testimony of the plaintiff, a line of questioning may be required to protect your client's interests. You may be evaluating the plaintiff's testimony during the deposition, while you strategize the optimal time to conduct your cross-examination to achieve maximum effectiveness.

Now imagine the deposition does not conclude before you can conduct your cross-examination, and the plaintiff dies before the deposition can be re-noticed

and completed. You may believe that the court should throw out the testimony because the defense of your client is now prejudiced at the summary judgment stage and potentially at trial. However, in the recent decision in *Kardos v. Armstrong Pumps*, 2019 Pa.Super.324 (Oct. 28, 2019), the Pennsylvania Superior Court held that unfinished deposition testimony, as well as an affidavit, can be used to oppose summary judgment and that noncompleted deposition testimony may be used at trial.

## *'KARDOS V. ARMSTRONG PUMPS'*

In January 2016, Nicholas Kardos was diagnosed with mesothelioma. That March, Kardos filed suit against various manufacturers, suppliers and users of asbestos products at the site of his former employer. A number of defendants filed motions for summary judgment in July 2016 based upon lack of product identification. Thereafter, Kardos executed an affidavit in September 2016 detailing his alleged exposures. Defense counsel noticed Kardos for two separate days of deposition, and he was deposed on Oct. 17, 2016, and Oct. 24, 2016. The defendants then noticed a third day of deposition, which occurred on Oct. 26, 2016. The depositions consisted entirely of cross-examination, and some defendants had not questioned Kardos by the end of the third day. The deposition did not conclude. Kardos died on Nov. 3, 2016, and his estate was substituted as plaintiff.

Following the death of Kardos, some defendants filed or joined motions seeking to preclude his affidavit and deposition testimony on the basis of inadmissible hearsay. The trial court ordered that the plaintiff was precluded from using Kardos' affidavit and deposition in opposition to any party's motion for summary judgment. A number of motions for summary judgment were granted, and the case proceeded to trial against the remaining defendants, all of whom eventually settled.

The plaintiff appealed to the Pennsylvania Superior Court, challenging the earlier preclusion and summary judgment orders. The Superior Court was asked to consider whether Kardos' affidavit and deposition could properly be considered in response to motions for summary judgment and whether the deposition of Kardos was admissible at trial.

The Superior Court, quoting Pa. R.C.P. Rule 1035.1 and its prior ruling in *Burger v. Owens Illinois*, 966 A.2d 611, 620 (Pa.Super. 2009), held that supporting affidavits in response to a motion for summary judgment are acceptable as proof of facts, that the nonmoving party may respond to a motion for summary judgment by relying solely on a proper affidavit to create a genuine issue of material fact, and that the trial court may disregard the affidavit if it determines that it is inconsistent with the plaintiff's testimony.

The Superior Court further held that unfinished testimony can be considered at the summary judgment stage and is admissible at trial pursuant to an exception to the rule of hearsay at Pa. R.E. 804(B)(1), where the plaintiff is unavailable due to his death, where the plaintiff offered testimony during a lawful proceeding, and where the nonmoving party can provide a "plausible avenue for the admission at trial of the hearsay." Here, the Superior Court found that the plausible avenue requirement was satisfied where the defendants merely had an opportunity to question Kardos. The Superior Court thus vacated orders entering summary judgment, reversed the preclusion order, and remanded for further proceedings.

The takeaway from *Kardos* is that in Pennsylvania there is no guarantee that every defendant can question the dying deponent in asbestos litigation, only that defendants be provided an opportunity to participate in the deposition. The *Kardos* case is instructive because most asbestos plaintiffs are in terminal stages of disease, therefore, the probability of unfinished testimony is high. However, there are some steps a defense practitioner can take in light of the *Kardos* ruling.

Members of the defense bar in your jurisdiction should have a standing informal agreement that defense counsel conducting the direct examination of the plaintiff place a statement on the record that counsel is questioning the witness for his or her client(s) only, and not for other defendants. The Superior Court in *Kardos* wrote that Kardos was deposed "for the specific purpose of the current litigation" and that the defendants' questions were focused on "product identification." The opinion did not further analyze the nature of the testimony or which areas of product identification were covered. In addition, the opinion is silent as to whether the Superior Court considered the contention that "product identification" is arguably not one-size-fits-all in asbestos litigation, inasmuch as there are divergent interests among the defendants.

In addition, defense liaison counsel should, wherever practicable, notice the plaintiff's deposition as day-to-day until completed, as opposed to specific, consecutive or nonconsecutive dates. The Superior Court in *Kardos* observed somewhat critically that the third day of Kardos' deposition, which was noticed at the end of the second day, did not occur until two days later and that no party noticed a fourth day at the end of the third day of testimony. Recognizing that there may be local rules, informal customs or otherwise that may prevent the noticing a deposition as day-to-day until completed, defense counsel should at least have the continued deposition immediately noticed and, if postponed, immediately re-noticed.

If all else fails, and you find yourself at a deposition where you will need to question the dying deponent, do not hesitate to put your name in the queue or ask a colleague if you can question the plaintiff next. Recognizing that all defense counsel are present to zealously defend their clients, if you know that time is short, consider cutting the amount of your questions to a number necessary to protect your client's interests. You can always follow up with additional questions if time permits. However, knowing that in Pennsylvania your failure to question the plaintiff may be detrimental to your client's interests at the summary judgment stage or at trial, it is better to ask a few focused questions than none at all.

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