The Trouble with Dying Declaration Affidavits in Asbestos Litigation: a Case Study

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In asbestos litigation, often times a plaintiff's sole evidence of product identification takes the form of an affidavit created shortly before the claimant passes away. Typically called a “dying-declaration” affidavit, the document preserves the plaintiff's written testimony for trial, thereby preserving his cause of action against the individuals and entities he believes were responsible for causing his illness.

Such affidavits are problematic for defendants for a variety of reasons, principally because the affidavits are frequently created in the short window between a litigant's diagnosis and his death, which may pre-date the filing of suit. Under these circumstances, there is patent prejudice inflicted on defendants whose products are identified in the affidavits. The defendants are denied the right to place the written identification testimony through the crucible of cross-examination, a fundamental right that is generally afforded to defendants in all litigation.

The prejudice inflicted on the decedent-plaintiff, however, is equally patent, if the affidavits are excluded from evidence. The plaintiff may be the only source of product identification evidence available to his estate, and to deny the admission of a dying declaration affidavit may deny the plaintiff a viable cause of action.

Courts facing the dilemma posed by a dying declaration affidavit recognize the competing rights and interests of the litigants, and often look to the circumstances under which the document was created. A recent decision in the Rhode Island Superior Court, *Pisano v. Alfa Laval, Inc.,* C.A. No. PC-13-5868 (November 2, 2016) (Gibney, J.), weighed the competing interests with the language of the operative rule of evidence, and came down on the side of the plaintiff, admitting three affidavits executed less than two months prior to the plaintiff's death, and before he could be deposed, for the purposes of defeating a defendant's summary judgment motion.

In *Pisano*, a defendant moved for summary judgment asserting, among other things, insufficient product identification, where the evidence was limited to the plaintiff's three affidavits. The plaintiff had been diagnosed with mesothelioma on September 27, 2013, and executed the three affidavits in two separate bunches, one on October 25, 2013, and the other two on November 1, 2013. The plaintiff passed away on December 16, 2013, one month after suit had been filed, and before he could be deposed by the defendants. In the first October 25, 2013 affidavit, the plaintiff stated that he cut and installed asbestos-containing flooring tiles with his neighbor in the basement of his home in 1964; he described the tiles as being 10” x 10” and speckled black and white. In the second affidavit, executed November 1, 2013, the plaintiff reiterated the events in the first affidavit, and further stated that the tiles were in fact 9” x 9”, black and white in color, and of the type he had circled in defendant's catalog, which was attached as an exhibit to the affidavit. In the third affidavit, dated November 1, 2013, the plaintiff stated that he installed ceiling tiles in his home sold by the defendant, and again attached a section of the defendant's catalog in which he circled the alleged product. Both the floor and ceiling tiles purportedly contained asbestos, to which the plaintiff was exposed.

The defendant challenged the admissibility of the affidavits for the purposes of product identification, arguing, in part, that the affidavits did not satisfy the “dying declaration” exception to the rule against hearsay because they were executed more than a month before the plaintiff passed away and therefore were not made under the belief of impending death. The trial court, Gibney, J., disagreed. Recognizing that in order to be relied on at the summary judgment stage, affidavits must contain information that would be deemed admissible at trial, the court turned to Rhode Island Rules of Evidence 804(b) [1] to analyze the affidavits.

Under Rule 804(b), an unavailable declarant's statements are admissible if made under belief of impending death, and relate to the declarant's perceived cause or circumstances of his death. The declarant's state of mind can be proven by direct or circumstantial evidence, including through statements made *to* the declarant about his medical condition. The dying declaration exception to hearsay is justified by the belief that the declarant's impending death likely removes any motivation to make false claims. In analyzing the *Pisano* affidavits, the court noted that, under existing case law, no time limit applies to terminal illness cases when defining the phrase "impending death" under 804. In fact, the court referred to a previous decision in which it considered the fact that statements made by a declarant after being told that his condition was incurable and inoperable constituted a dying declaration for purposes of the rule. The *Pisano* plaintiff represented, in his second affidavit, that he provided his statements "with the understanding that [he] may not be well enough to survive through the time of a deposition or trial." The court was therefore satisfied that the plaintiff sufficiently established his belief of impending death through his express statements, and deemed the affidavits admissible for product identification purposes under Rule 804.

Pisano follows the universal policy courts favor throughout the nation of resolving issues, evidentiary or otherwise, in a manner that permits the plaintiff a decision on the merits of his case. Defendants must be vigilant in exploring not only the content of dying declaration affidavits, but the circumstances of their creation in order to posture for their exclusion from evidence both at the summary judgment stage and at trial.

[1] Rule 804 of the Rhode Island Rules of Evidence is functionally identical to Rule 804 of the Federal Rules of Evidence; both address the dying declaration exception to the rule against hearsay, among others.