

Client Alert **Product Liability Law**

So You Want to Point the Finger at a Settling Defendant at Trial: A New Jersey Supreme Court Case You Should Know

In September 2018, we circulated a Client Alert discussing a recent decision by the New Jersey Appellate Division that addressed New Jersey evidence rules as they applied to a product liability case where a non-settling defendant sought to shift blame to a settled defendant to reduce its liability at trial. See *Rowe v. Bell & Gossett Co.*, No. A-4530-1472, 2018 N.J. Super. Unpub. LEXIS 1560 (App. Div. June 29, 2018). The New Jersey Supreme Court granted certification, and in 2019, issued an opinion reversing the Appellate Division's decision. In *Rowe v. Bell & Gossett Co.*, 239 N.J. 531 (2019), the New Jersey Supreme Court held that a non-settling defendant can rely on the statement against interest exception to the hearsay rule (*N.J.R.E.* 803(c)(25)) to introduce interrogatory responses and deposition testimony from settled defendants in order to apportion liability at trial.

Case Discussion

In *Rowe*, the decedent worked with various asbestos-containing products during his thirty year career, which allegedly caused his mesothelioma. Plaintiff's initial complaint named twenty-seven defendants that manufactured, supplied or sold the asbestos-containing products to which the decedent was allegedly exposed. Most of those defendants were eventually dismissed from the action and prior to trial, eight other defendants settled with plaintiff. Plaintiff proceeded to trial against the one remaining defendant, Universal Engineering Co., Inc. ("Universal"), which manufactured asbestos-containing furnace cement that the decedent used during his career.

At trial, plaintiff's expert acknowledged that the decedent was exposed to numerous asbestos-containing products during his career, but opined that Universal's cement was the primary cause of decedent's illness. Universal's expert, however, testified that the amount of asbestos contained in Universal's cement was insufficient to cause the decedent's mesothelioma. In addition, Universal sought to introduce evidence establishing that the settled defendants bore liability for the decedent's illness to include

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them on the verdict sheet so the jury could apportion liability amongst them for purposes of a credit. Although Universal served notices in lieu of subpoena to compel live testimony of the settled defendants at trial, the settled defendants took the position that their witnesses were either out of state or were unavailable. Over plaintiff's objections, the trial court permitted Universal to introduce deposition testimony and interrogatory responses from the settled defendants in order to apportion fault. The interrogatory responses and deposition testimony fell into three general categories: (1) successor liability for companies no longer in existence; (2) the fact that the settled defendants' products contained asbestos; and (3) the warnings or lack thereof on the settled defendants' asbestos-containing products.

The jury awarded plaintiff \$1.5M in damages, but only apportioned 20% liability to Universal. The jury apportioned the remaining 80% of liability amongst the eight settled defendants. The trial court molded the verdict and awarded plaintiff \$300,000 against Universal. Plaintiff appealed the verdict to the Appellate Division.

On appeal, Plaintiff argued that the trial court's decision allowing the introduction of the settled defendants' deposition testimony and interrogatory responses violated several evidentiary rules against hearsay. Universal argued that the settled defendants' deposition testimony and interrogatory responses were admissible under several exceptions to the hearsay rule including: testimony from a prior proceeding (*N.J.R.E.* 804(b)(1)); statements by a party-opponent (*N.J.R.E.* 803(b)(1)); and statements against interest (*N.J.R.E.* 803(c)(25)). Ultimately, the Appellate Division rejected Universal's arguments, holding that because Universal introduced the deposition testimony against plaintiff rather than the settled defendants, none of these hearsay exceptions applied. The Appellate Division also rejected Universal's argument that the settled defendants' deposition testimony was admissible because Universal did not sufficiently establish that the settled defendants were "unavailable." The Appellate Division reversed the verdict and remanded the case for a new trial limited to apportionment.

Universal appealed the Appellate Division's ruling to the New Jersey Supreme Court. In a unanimous decision, the Supreme Court reversed. The Court explained that in multi-defendant tort cases, the settlement of fewer than all of the defendants often causes the remaining parties to shift their trial strategies. Plaintiffs are no longer incentivized to cast blame on the settled defendants. Meanwhile, the non-settling defendant, whose interests may have previously been aligned with the settled defendant, may seek to point the finger at the settled defendant. The Court explained that this "tactical realignment poses special challenges for the trial court," in order to allow non-settling defendants to prove the settling defendants' fault within the confines of the evidentiary rules. See *Rowe*, 239 N.J. at 556.

In *Rowe*, the Court held that the interrogatory responses and deposition testimony of the settling defendants were admissible under *N.J.R.E.* 803(c)(25) – the hearsay exception for statements against interest. Under this evidence rule, a statement is admissible if it is "so far contrary to the declarant's pecuniary, proprietary or social interest, or so far tended to subject declarant to civil or criminal liability ... that a reasonable person in declarant's position would not have made the statement unless the person believed

it to be true.” See *N.J.R.E.* 803(c)(25). To be admissible, statements against interest do not require extrinsic proof that the statements are reliable or trustworthy. Moreover, the proponent of the evidence does not need to show that the declarant is unavailable to testify at trial. Indeed, “the declarant need not be a party to the action in which the statement is admitted.” All the proponent must show is that the statement was contrary to the declarant’s interest at the time it was made. Whether a statement qualifies as a statement against interest depends on the facts and circumstances of each case. See *Rowe*, 239 N.J. at 558-60.

Applying *N.J.R.E.* 803(c)(25) to the non-settling defendants’ interrogatory responses and deposition testimony that Universal introduced at trial, the Court held that the evidence was admissible as a statement against interest. The Court noted that the interrogatory responses and deposition testimony were binding on the non-settling defendants since they were provided by corporate officers who had been designated to bind the companies. Accordingly, the Supreme Court reinstated the jury’s verdict. It did not, however, reach the question of whether the interrogatory responses or deposition testimony would have been admissible under *N.J.R.E.* 804(b)(1) (testimony in prior proceedings), *N.J.R.E.* 803(b)(1) (statements by party opponent) or *Rule* 4:16 – 1 (use of depositions).

What Does This Case Mean?

Rowe is an important decision for defendants in multi-defendant product liability and toxic tort cases. Before reaching its ultimate decision, the Court in *Rowe* took the time to provide a historical summary on how the New Jersey Comparative Negligence Act and Joint Tortfeasor Act operate in multi-defendant cases where there are defendants that settle prior to trial and the non-settling defendants seek to shift blame to the settled defendants. The Court’s decision illustrates the impact that settlements on the steps of the courthouse can have on trial strategy. It also highlights the importance of considering the discovery your client will need in the event it is the sole defendant at trial. In short, defendants in multi-defendant product liability and toxic tort cases need to be aware of how hearsay and evidentiary rules may impact their evidence and trial strategy if a co-defendant decides to settle prior to trial.

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