**The New Jersey Appellate Division Reversal of Two Middlesex County Trials**

The New Jersey Appellate Division has reversed, per curiam, two Middlesex County asbestos trials.  One decision favors the plaintiff; the other favors the defendant.

In [**Rowe v. Bell & Gossett Co**](http://NJSBADB.informz.net/z/cjUucD9taT03NzUxMzk2JnA9MSZ1PTExMDg2MDIzODYmbGk9NTYyMzIyMDM/index.html).,  A- 31-2-6789, the Appellate Division stated that it could not "sufficiently stress that allowing the admission of settled defendants’ answers to interrogatories and deposition testimony in prior asbestos matters was hearsay evidence against the plaintiff and not the settling defendants which transformed the statement of the settling defendants into irrefutable admissions to be used against plaintiff, even though plaintiff did not make the statements." During the trial defendant certified the unavailability of corporate representatives of settled defendants, then offered into evidence former deposition testimony and answers to interrogatories of settled defendants, which corporate defendants were not located in New Jersey, in support of the trial defendant’s cross-claims against the settled parties. Proofs were not admitted as to those defendants with corporate offices in New Jersey. The Appellate Division reversed the trial court judge’s admission of this testimony, ordering a new trial on the issue of apportionment of damages. The Appellate Division concern with the admission of this evidence was that "the settling defendants’ evidence went to the issue of credit, not to establishing affirmative claims against the settling defendants."  The court also had an issue with defendant's failure to meet the burden of demonstrating witness unavailability.

The Rowe decision opined that a trial defendant proving a cross-claim against a settled party must demonstrate that the settled defendants’ asbestos product was not merely in the workplace with casual minimal exposure but rather must demonstrate two types of causation: product defect causation and medical causation.  Medical causation being "frequency, regularity, and proximity." Accordingly, in addition to failure to warn, a trial defendant must establish as to each settling defendant that the plaintiff had sufficient exposure to asbestos-containing products for the jury to reasonably infer toxic exposure.  No such proof existed for some of the settled defendants in the Rowe case according to the Appellate Division, despite the “improperly" admitted settling defendant evidence.

If the Rowe decision is not reversed by the New Jersey Supreme Court, it will be extremely difficult to prove cross-claims against settled defendants, unless during the course of each asbestos case there are specific depositions of defendant corporate representatives and unless there are adequate proofs at the plaintiff deposition not only of product identification of a given defendant, but also substantive information regarding frequency, regularity, proximity to each defendant’s product.

In  Condon v.  Advance Thermal Hydronics Inc., A- 3642 – 14T1, a fact-specific analysis by the Appellate Division was critical of the trial judge for failure to grant summary judgment to a cement manufacturer when there was no substantive evidence connecting the cement manufacturer with the products decedent testified being exposed to.  Since the Appellate Division held that the trial judge should have granted summary judgment, it did not address the punitive damage appellate issues raised by the cement manufacturer nor did it address plaintiff’s cross appellate issues.  The Appellate Division stated unequivocally that a non-moving party cannot defeat a motion for summary judgment “merely by pointing to any fact in dispute" if it is not material fact.  The court noted that "liability should not be imposed on mere guesswork" and proof of specific asbestos-containing products at a workplace is insufficient alone, without proof linking those products to the plaintiff's exposure. Further, under the "frequency, regularity and proximity" test, plaintiff who cannot establish direct causation from a specific product must "prove an exposure of sufficient frequency, with a regularity of contact, and with the product in close proximity."  Hopefully, this decision will result in the trial court granting of more summary judgment motions.