The Admissibility of Former Testimony After *Rich v. Kaiser-Gypsum*

By: Jennifer Reisler

In a unanimous decision, the Fourth District Court of Appeals recently held that a defendant manufacturer could introduce testimony from witnesses unavailable for cross-examination by the plaintiff consumer. The sole issue discussed on appeal was Defendants' use of former testimony by two witnesses from prior cases, without plaintiffs having an opportunity for cross-examination. The opinion focused on whether the trial court properly classified the witnesses as "predecessors in interest" to the plaintiffs under Florida Statute § 90.804(2)(a). Since the enactment of Section 90.804(2)(a), there have been no appellate decisions in Florida defining the term "predecessor in interest." *Rich v. Kaiser Gypsum, Inc.*, 2012 WL 5232177 at *2 (Fla. 4th DCA 2012).

On appeal, plaintiff claimed that the trial court erred by allowing defendants to use the former testimony of unavailable witnesses without establishing that the plaintiffs, or their predecessors in interest, had an opportunity to examine the witnesses. *Id*. at *1. Prior to the enactment of Section 90.804(2)(a), the admissibility of former testimony over a hearsay objection was governed by Florida Statute § 92.22. Section 92.22 required, among other things, that the party against whom the evidence is being offered, "or his privy" be a party to the proceedings where the evidence was initially taken. The Third District Court of Appeals narrowly construed the privity requirement, insisting upon a "mutual or successive relationship to the same right or property." *Kaiser Gypsum, Inc.,* 2012 WL 5232177 at *3 (quoting *Osburn v.*

Stickel, 187 So. 2d 89, 92 n. 2 (Fla. 3d DCA 1966)). *Osburn* remained the law in Florida on this issue until the enactment of Section 90.804(2)(a). *Id*.

Florida revised the Evidence Code in 1978 when it enacted Section 90.804(2)(a). Section 90.804(2)(a) amended the former rule to require a predecessor in interest, rather than a privy. *Id*. at *2-3. While the Law Revision Council cited to *Osburn*, they made no clear statement of an intention to depart from its holding, noting only that some legal scholars believed strict privity should not be required. *Id*. at *3. This amendment left Florida courts with little guidance for determining the significance of the change in language. Indeed, the Council noted that, "The question remains whether strict identity or privity should continue as a requirement with respect to the party against whom the testimony is offered."

Though never cited by the Law Revision Council, Federal Rule of Evidence 804(b)(1) was enacted shortly before Florida revised the Evidence Code to add Section 90.804. *Id*. at *4. This is important because the pertinent language in Rule 804(b)(1) mirrors Section 90.804(2)(a). Further, the Florida Supreme Court recognizes that Florida courts may rely upon the federal courts' interpretation of the Federal Rules of Evidence as persuasive authority when interpreting the corresponding provisions of the Florida Evidence Code. *Id*. (citing *Yisrael v. State,* 993 So. 2d 952, 957 n. 7 (Fla. 2008)).

Federal courts have been reluctant to interpret "predecessor in interest" narrowly, choosing instead to use a broad interpretation which focuses on the similarity of the motives for examination. *Id.* at *5. The Third and Sixth Circuits interpreted Rule 804(b)(1) to require that: (1) the declarant be unavailable; (2) the former testimony was taken at a hearing, deposition, or civil action or proceeding; and (3) the party against whom the testimony is now offered must have had an opportunity and similar motive to develop the testimony by direct, cross, or redirect

examination. *Id.* at *5 (citing *Kirk v. Raymark Indus., Inc.*, 61 F. 3d 147, 164 (3d Cir. 1995)). Since then, other circuits have agreed that "predecessor in interest" does not require direct privity. *See, e.g., Murphy v. Owens-Illinois, Inc.*, 779 F. 3d 276, 283 (4th Cir. 1993); *New Eng. Mut. Life Ins. Co. v. Anderson*, 888 F. 2d 646, 651-52 (10th Cir. 1989).

Relying on this interpretation of predecessor in interest, the Fourth District held in *Kaiser Gypsum* that Section 90.804(2)(a) does not require strict privity between a party and his predecessor in interest. *Id*. at *6. Adopting the Third Circuit's reasoning, the Fourth District agreed that "if it appears that in the former suit a party having a like motive to cross-examine about the same matter as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." *Id*. (citing *Lloyd v. American Export Lines, Inc.*, 580 F. 2d 1179, 1187 (3d Cir. 1978)). Here, the plaintiffs objected to the depositions of both former witnesses, arguing that they did not share a similar motive for cross-examination with the plaintiffs in the former cases. *Id*. at *2.

The Fourth District disagreed, holding that the plaintiff in one of the former trials was the Riches' predecessor in interest. Finding that the Riches shared a similar motive for examination with the party that examined the witness in the former trial, the Court noted that the two cases shared the same defendant, the same ingredient, the same product, the same injury, and the same issues regarding the defendants' general use of asbestos. *Id*. at *7. The Court found that the parties shared a substantially similar interest in cross-examining the witness on the topics of his testimony. *Id*. Accordingly, the trial court acted well within its discretion when it admitted said witness's deposition under Section 90.804. *Id*. As this was the first Florida appellate decision addressing the issue, the Fourth District's broad interpretation of "predecessor in interest" is

certain to help defendants in personal injury cases, especially those large manufacturers facing a bevy of identical suits.