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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION **CRAIG CHARLES RICHARDS**, and **GLORIA JEANNE RICHARDS,** his wife. Plaintiffs Below, Appellants, v. **COPES-VULCAN, INC.; FORD MOTOR COMPANY;** and **THE GOODYEAR TIRE & RUBBER COMPANY,** Defendants Below, Appellees.	No. 546, 2018 On Appeal from the Superior Court of the State of Delaware in C.A. No.: N16C-04-206 (ASB)

APPELLANTS' AMENDED OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff-Appellants Craig Charles Richards and Gloria Richards bring this appeal presenting mixed questions of law and fact stemming from the Superior Court's grant of summary judgment in favor of Appellees Copes-Vulcan, Inc. ("Copes," or "Copes-Vulcan"); Ford Motor Co. ("Ford"); and The Goodyear Tire and Rubber Company ("Goodyear"), and subsequent Order denying Plaintiffs leave to supplement their expert report.

In February, 2018, the Supreme Court of Ohio issued an opinion rejecting the "cumulative exposure" theory of asbestos causation as a means of satisfying specific causation.[1] Appellants' expert report, served many months prior, was premised on the "cumulative exposure" theory. Ohio's statutory regime required particularized evidence of the plaintiff's exposure to each defendant's products, considering the manner, proximity, frequency, and length of exposure within the context of the plaintiff's entire history of asbestos exposure. Fortunately, thought Appellants, the Supreme Court of Ohio also made clear that specific causation could (or must) be met through testimonial evidence of asbestos exposure – that expert testimony reiterating exposure in any form was neither necessary or required.

By the time Appellants learned of the change in Ohio substantive law, motions for summary judgment had been filed. In light of the Supreme Court of Ohio's

[1] *Schwartz v. Honeywell International, Inc.*, 102 N.E.3d 477 (Ohio 2018).

analysis, Appellants opposed summary judgment on the basis of Mr. Richards' testimony standing alone.

The Superior Court disagreed with Appellants' interpretation, instead finding that an expert report establishing specific causation as to each defendant was a necessary component of a plaintiff's *prima facie* case under Ohio law. The Superior Court heard arguments as to Copes-Vulcan only; by chance the Appellee to whose products Mr. Richards experienced the least exposure. The Superior Court declined to hear arguments as to either Ford or Goodyear. Herein, Appellants argue that the Superior Court misinterpreted Ohio law, and committed further error by granting the motions of Ford and Goodyear without first hearing the evidence of Mr. Richards' frequent, intense exposure to each of their asbestos-containing products.

In light of the Superior Court's novel interpretation of an evolving aspect of Ohio law, Appellants requested leave to supplement their expert's report. The Superior Court denied that motion, instead effectively dismissing Appellants' case on the basis of an expert report that met muster when served, but did not (under the Superior Court's interpretation) by the time motions for summary judgment were filed. Appellants argue that the Superior Court abused its discretion in denying their motion for leave to supplement their expert report.

SUMMARY OF ARGUMENT

1) The Superior Court erred as a matter of law by refusing to consider the facts relevant to each Appellee's motion for summary judgment, consistent with the Supreme Court of Ohio's analysis in *Schwartz v. Honeywell International, Inc.*, 102 N.E.3d 477 (Ohio 2018).

2) Having found – in a first interpretation of evolving law from a foreign jurisdiction – a compliant expert report a necessary aspect of Appellants *prima facie* case, the Superior Court abused its discretion by refusing Appellants leave to supplement their existing expert report.

STATEMENT OF FACTS

Mr. Richards was diagnosed with the incurable, asbestos-caused disease of mesothelioma on March 9, 2016. He was exposed to asbestos through professional and amateur work as a mechanic, and while working at a Ford Motor Company manufacturing facility as a millwright.

Appellants filed their complaint on April 22, 2016, and Mr. Richards was deposed on July 7-8, 2016. In his depositions, Mr. Richards described extensive exposure to Ford's asbestos-containing original and replacement brakes, clutches, and gaskets;[2] somewhat less exposure to Goodyear's asbestos-containing gaskets;[3] and less exposure (although non-insignificant) exposure to Copes-Vulcan valves while working for Ford.[4]

On June 16, 2017, Appellants timely served the expert report of Dr. Mark E. Ginsburg.[5] As is plaintiffs' customary practice in cases governed by the substantive law of states *not* imposing specific expert requirements, Dr. Ginsburg's initial report

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[2] Appendix A792-803 (Plaintiffs' Opposition to Ford Motor Company's Motion for Summary Judgment, pp. 1-12).

[3] Appendix A1132-1140 (Plaintiffs' Opposition to The Goodyear Tire and Rubber Company's Motion for Summary Judgment, pp.1-8).

[4] Appendix A987-992 (Plaintiffs' Opposition to Defendant Copes-Vulcan, Inc.'s Motion for Summary Judgment, pp. 1-5). Appellants do not contend that Ford is liable for Mr. Richards' exposure while employed by Ford.

[5] Appendix A82-97 (Report of Dr. Mark E. Ginsburg).

was premised on the "cumulative exposure" theory of asbestos causation. Dr. Ginsburg's conclusion was that:

> Mr. Richards's cumulative exposure to asbestos was a substantial contributing cause of his malignant mesothelioma. It is my further opinion, to a reasonable degree of medical certainty, that the cumulative exposure from each company's asbestos product or products was a substantial contributing factor in the development of Mr. Richards's malignant mesothelioma. Each such product for which exposure can be shown was a cause of said disease.

This form of report has repeatedly been held sufficient to satisfy plaintiffs' *prima facie* burden to establish "substantial factor" causation in the vast majority of states. Important to this appeal, such reports do *not* identify each individual defendant by name. Instead, the plaintiff's work history is outlined, it is explained how each type of work would have exposed the plaintiff to asbestos, and the expert reaches his/her conclusions with respect to cumulative exposure and asbestos causation.

Dr. Ginsburg's report in this case was relatively detailed, albeit lacking specific identification of defendants by name. Dr. Ginsburg detailed Mr. Richards' work history.[6] Dr. Ginsburg explained how each type of work performed by Mr. Richards have exposed him to asbestos, including citations to literature establishing the intensity of such exposure.[7] The only thing it lacked were the words "Copes-Vulcan," "Ford," and "Goodyear."

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[6] Appendix A84-87.

[7] Appendix A87-89.

On February 8, 2016, the Supreme Court of Ohio ruled in *Schwartz* that an expert report premised in the "cumulative exposure" theory to asbestos, standing alone, was insufficient to satisfy that State's statutory asbestos-causation standard. The Court detailed Ohio's statutory scheme for asbestos causation, codified in Ohio Revised Code § 2307.96, concluding that "there must be a determination whether the conduct of each 'particular defendant' was a substantial factor in causing the plaintiff's injury and that this determination must be based on specific evidence of the manner, proximity, frequency, and length of exposure."[8] "Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail."[9]

Schwartz recognizes that Ohio's R.C. § 2307.96 is a statutory adoption of the so-called *Lohrmann* standard; a rule by which "to survive summary judgment, a plaintiff must present evidence 'of exposure to a specific product on a regular basis

[8] 102 N.E.3d 477, 481.

[9] *Id.* (quoting "the uncodified portion of the enactment," 150 Ohio Laws, Part III, at 3993).

over some extended period of time in proximity to where the plaintiff actually worked.'"[10]

A crucial aspect of *Schwartz* is that after finding the plaintiff's expert report insufficient to establish causation, the Court continued to determine whether the testimony of exposure, independently, met the statutory standard. The Court considered whether plaintiff "presented sufficient evidence that [plaintiff's] exposure to the [defendant's] brakes was a substantial factor in her contracting mesothelioma[,]" as determined by application of "[the Act's] manner, proximity, frequency, and length factors."[11] This was appropriate because "[b]y employing the *Lohrmann* test, the trial judge usurps the traditional role of the medical or scientific expert, establishing a mechanistic test regarding causation which no contrary expert testimony can overcome."[12] Essentially, adoption of *Lohrmann* allows, or even requires, that a court determine medical causation through defined factors, independent of any expert opinion(s).

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[10] *Id.* at 480 (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986)).

[11] *Id.* at *5.

[12] *Horton v. Harwick Chem. Corp.*, 653 N.E.2d 1196, 1200 (Ohio 1995), overturned due to legislative action (Sept. 2, 2004).

On March 2, 2018, the deadline for Plaintiff-Appellants to produce all expert reports expired. Counsel for Appellants was unaware of the decision in *Schwartz* as of this deadline.

On March 5, 2018, Defendants moved for an order establishing the substantive law of Ohio applicable to this action.[13] On March 14, 2018, the substantive law of Ohio was ordered as controlling.[14] This order establishing applicable law was signed more than six months after Plaintiffs' initial expert report had been filed.

Appellees filed for summary judgment in early May, 2018.[15] Ford and Copes-Vulcan cited to the *Schwartz* decision; Goodyear did not. Appellants addressed *Schwartz* head-on in response to each of the motions, arguing that while the holding in *Schwartz* dictated that Dr. Ginsburg's cumulative-exposure report could not satisfy (specific) causation alone, testimonial evidence of Mr. Richards' frequent, regular, and proximate exposure *could* suffice to survive summary judgment.

On July 10, 2018, the Superior Court heard oral arguments on Appellant Copes' motion for summary judgment only.[16] Counsel for Plaintiffs immediately

[13] Appendix A31.

[14] Appendix A32.

[15] Appendix A99 et seq. (Ford); A427 et seq. (Copes); A664 et seq. (Goodyear).

[16] Ex. A (transcript).

addressed the decision in *Schwartz*, explaining that Plaintiffs were not on notice of the opinion until after summary judgment had been filed, intended to take the position that *Schwartz* allows specific causation to be established through testimonial evidence of exposure, and that "to the extent that Your Honor disagrees with [Plaintiffs'] view of the case .. then [Plaintiffs] would ask for leave to amend [Dr. Ginsburg's] report to comport with the new State of Ohio law …."[17]

The Superior Court continued to hear evidence of Mr. Richards' exposure to Copes-Vulcan's products, stating that: "you've proffered that you think you can still get by on nonexpert causation. So tell me what your maximum exposures are."[18] While Plaintiffs' position is that such exposures are sufficient to survive summary judgment, Mr. Richards' exposure to Copes' products were significantly less than to the products of Appellees Ford and Goodyear. The Superior Court struggled with the specifics of Mr. Richards' testimony as to Copes, noting multiple times that expert testimony might help put into context whether the exposures were a "substantial factor."[19]

Ultimately, the Superior Court found itself "not sure" "without expert testimony" how to weigh Mr. Richards' exposures to Copes' asbestos-containing

[17] Ex. A, at 29:6-18.

[18] Ex. A, at 44:6-10

[19] *E.g.*, Ex. A, at 44:15-45:5 (with respect to the impact steam-powered removal of asbestos-containing gaskets on exposure); 48:4-11.

products.[20] "Under that context," the Superior Court found the "standalone nonexpert testimony [in]sufficient to meet the … plaintiff's burden …."[21]

There was some confusion regarding whether the Superior Court's ruling was that a revised expert report was a necessary part of Plaintiffs' *prima facie* case, or whether it found that the specific testimony as to Copes was insufficient to survive summary judgment without expert explanation. Twice the Superior Court suggested that it was Plaintiffs' counsel who took the position that the ruling necessarily invalidated their remaining oppositions to Ford and Goodyear.[22] Plaintiffs' counsel sought clarification, noting that Mr. Richards' testimony as to Ford established "way more exposure" than as to Copes.[23] The Superior Court refused to hear arguments as to either Ford or Goodyear.

On July 20, 2018, Appellants submitted their Motion for Leave to Supplement Expert Report Due to Changes in Substantive Law, and/or for Reargument.[24] Appellants attached a supplemental report by Dr. Ginsburg, which concluded "consistent with [Dr. Ginsburg's] standard methodology" of evaluating "frequency, duration, proximity, and intensity of exposure," "in the context of Mr. Richard's

[20] Ex. A, at 65:3-17.

[21] *Id.*

[22] Ex. A, at 68:5-11; 68:22-69:2.

[23] Ex. A, at 69:5-13.

[24] Appendix A1394-1400.

entire asbestos exposure," that the products of Copes, Ford, and Goodyear were each substantial factors in causing Mr. Richards' mesothelioma.[25]

On August 8, 2018, the Superior Court denied Plaintiffs' motion for leave and/or reargument.[26] The Superior Court held Appellants' prompt efforts to procure Dr. Ginsburg's supplemental report against them, noting that "[o]bviously, Plaintiffs could have produced a supplemental report before the expiration of the expert report deadline if they had undertaken to do so immediately following the release of *Schwartz*."[27]

On September 24, 2018, the Superior Court granted Defendants' motion to dismiss and close this case.[28]

- *Facts Relevant to Individual Appellees*

Mr. Richards' exposures to each Appellees' products are set forth at length in Plaintiffs' oppositions to each Defendant's motion for summary judgment. Appellants herein summarize such facts for the Court's convenience:

[25] Appendix A1402-1404 (Supplemental Report of Dr. Mark E. Ginsburg dated July 18, 2018).

[26] Ex. E.

[27] Ex. E, p. 7.

[28] Ex. F.

- Ford Motor Company[29]

Mr. Richards worked on Ford vehicles as a shade tree mechanic from approximately 1959 to 1965. Mr. Richards also worked as a professional mechanic, again identifying Ford at two positions held from 1963 to 1965 (full time), and from 1969 to 1972 (part time). In each phase, Mr. Richards testified to both removing and installing original Ford parts, including brakes, clutches, and gaskets. Essentially all such parts were asbestos containing (with the possible exception of some gaskets, which pose more complicated issues). At each phase, Mr. Richards testified to working with original Ford parts on "many" occasions. Mr. Richards described the dust created during each type of work, testified that he inhaled such dust, and that he never saw a warning on a Ford product.

- Goodyear Tire & Rubber Company[30]

Mr. Richards used Goodyear's asbestos-containing gaskets during the auto work described above, and while working at Ford's manufacturing facility. Goodyear does not argue insufficient frequency or intensity of exposure in its motion for summary judgment, instead focusing on whether Mr. Richards identified the asbestos-containing version of its products. To that end, beyond Mr. Richards'

[29] Appendix A792 et seq. (Plaintiffs' Opposition to Ford Motor Company's Motion for Summary Judgment and associated exhibits).
[30] Appendix A1132 et seq. (Plaintiffs' Opposition to The Goodyear Tire and Rubber Company's Motion for Summary Judgment and associated exhibits).

statements that he "knew" the Goodyear gaskets contained asbestos, he also described Goodyear gaskets as "dark blackish," or "sometimes a very dark gray." The gaskets were covered with a "white … soapstone dust." Goodyear, for its part, has described its asbestos-containing gaskets as having an "appearance of shiny gray, black, or white cardboard."

- Copes-Vulcan, Inc.[31]

Mr. Richards encountered Copes-Vulcan's asbestos-containing valves at the Ford facility. At oral argument, Appellants' counsel set forth an argument that Mr. Richards' was exposed to Copes' products "at least 20" times.[32] Whether all such occasions are counted towards Copes depends on the Superior Court's interpretation of the "bare metal" defense under Ohio law, an issue which the Superior Court did not reach. Appellants set forth arguments that Copes' valves were sold with asbestos-containing parts, and required maintenance for which Copes provided instructions and sold replacement parts.

[31] Appendix A987 (Plaintiffs' Opposition to Defendant Copes-Vulcan, Inc.'s Motion for Summary Judgment and associated exhibits).

[32] Ex. A, at 46:19-47:9.

ARGUMENT

I. Ohio Revised Code § 2307.96 allows evidence of exposure standing alone to satisfy specific causation, as illustrated by Schwartz

A. Questions Presented

1) Did the Superior Court misinterpret Ohio law in that *Schwartz* and Ohio Revised Code § 2307.96 dictate that specific causation is established through evidence of exposure, regardless of expert testimony?[33]

2) Did the Superior Court err in refusing to hear the evidence of Mr. Richard's frequent, regular, and proximate exposure to asbestos from the products of Appellees Ford and Goodyear?[34]

B. Scope of Review

A trial court's grant of summary judgment is subject to *de novo* review.[35] "[I]f from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate."[36]

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[33] Issue preserved at Exhibit A, 28:5-9; 33:5-36:11; Appendix A1395, n. 1.

[34] Issue preserved at Exhibit A, 69:5-13; Appendix A1395, n.1.

[35] *See, e.g., Texlon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002).

[36] *AeroGlobal Capital Mgmt., LLC v. Cirrus Industries, Inc.*, 871 A.2d 428, 444 (Del. 2005) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962), *modified*, 208 A.2d 495 (Del. 1965)).

C. Merits of Argument

a. Ohio Revised Code § 2307.96 allows evidence of exposure standing alone to satisfy specific causation, as illustrated by Schwartz.

In adopting the *Lohrmann* standard of asbestos causation, the General Assembly of Ohio:

> Intend[ed] to clarify and define for judges and juries that evidence which is relevant to the common law requirement that plaintiff must prove proximate causation…. [T]he General Assembly also recognizes … that the *Lohrmann* factors were of great assistance to the trial courts in the consideration of summary judgment motions and to juries when deciding issues of proximate causation. … It has also held hearings where medical evidence has been submitted indicating such a standard is medically appropriate and is scientifically sound public policy. **The *Lohrmann* standard provides litigants, juries, and the courts of Ohio an objective and easily applied standard for determining whether a plaintiff has submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation.** Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail. To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation on the part of juries, something that the General Assembly has determined not to be in the best interests of Ohio and its courts.[37]

Thus, the legislators specifically stated that evidence of frequency, proximity and length of exposure to a particular defendant's asbestos products are the means by which a plaintiff must "sustain [his] burden of proof as to proximate causation." It

[37] ASBESTOS—CLAIMS—MEDICAL REQUIREMENTS, 2004 Ohio Laws File 88 (Am. Sub. H.B. 292) (emphasis added).

did so because in its view "medical evidence" dictates that such considerations are "medically appropriate" and of "scientifically sound public policy." The statute replaces expert specific causation with a legislatively defined standard.[38]

Indeed, Ohio R.C. § 2307.96 contains no mention of expert reports, let alone a dictate that an expert must establish substantial factor causation. To the contrary, "[i]n determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation," the manner, proximity, frequency and length of exposures, along with "[a]ny factors that mitigated or enhanced the plaintiff's exposure to asbestos."[39]

In contrast, Ohio R.C. § 2307.92 creates detailed and explicit expert medical requirements for non-malignant claims, and claims of smokers suffering from lung cancer.[40]

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[38] As a corollary to Appellants' position here, the Ohio Legislature's understanding of *Lohrmann* validates the many cases were defendants are granted summary judgment notwithstanding an expert report identifying the plaintiff's exposure as a "substantial factor" due to the Superior Court's independent judgment that such exposure is de minimis or otherwise insufficient – *Lohrmann* supplants the expert's findings with the court's, and the judge serves as fact finder at least for purposes of summary judgment.

[39] Ohio R.C. § 2307.96(B).

[40] Ohio R.C. §§ 2307.92 and 2307.93.

Schwartz illustrates this aspect of asbestos causation under R.C. § 2307.96 – the evidence of frequency, proximity and length of exposure from each defendant's product is the determinate factor in whether a case can survive summary judgment. An expert's opinion, while perhaps capable of clarifying such evidence, is not sufficient or necessary as part of a *prima facie* case.

For this reason, after finding the expert's "cumulative exposure" report insufficient to establish causation, the Court in *Schwartz* moved directly to the plaintiff's exposure as an independent means of reaching the same goal.[41] The Court did not question whether the expert issue might be determinative, or otherwise hedge its analysis. Rather, in light of its finding the expert report insufficient, it "consider[ed] then whether [plaintiff] presented sufficient evidence that [the exposure] was a substantial factor in her contracting mesothelioma."[42]

Similar analysis under Ohio law appears in the Northern District of Ohio's decision in *Alexander v. Honeywell International, Inc*.[43] There, the court denied defendant's motion for summary judgment after an analysis of the plaintiff's testimony through the lens of § 2307.96 and *Lohrmann*. The court concluded that plaintiff's "testimony identifies [defendant's] product, and provides sufficient

[41] *Schwartz*, 102 N.E. 3d at 483.

[42] *Id.*

[43] 2017 WL 6374062 (N.D. Ohio Dec. 13, 2017).

evidence for a jury to determine the manner, proximity, frequency, length of exposure, and enhancing factors relevant to a determination as to whether [defendant's product] were a substantial factor in causing her mesothelioma."[44] This was true "[a]lthough there may be some imprecise and even conflicting testimony in the record of this case."[45] Indeed, it was up to the jury to determine the witness's credibility. At no point does the District Court in *Alexander* reference an expert report as relevant in any way to its denial of summary judgment.

Accordingly, it was error as a matter of law for the Superior Court to grant the motions for summary judgment of Appellees Ford and Goodyear without hearing the evidence of Mr. Richards' exposure to their products. Regardless of whether Dr. Ginsburg's supplemental report is accepted into evidence, the merits of Appellants' cases as against Ford and Goodyear must be heard, as dictated by Ohio law.

b. The General Scheduling Order contemplates that "Expert Issues" will be addressed after summary judgment.

Asbestos litigation in Delaware is governed by a unique and quirky set of Scheduling Orders, which set some aspects of this litigation outside normal Superior Court practice. That Dr. Ginsburg would set forth a preliminary opinion, with the opportunity to expand upon it as trial nears, is entirely consistent with the apparent

[44] *Id.* at *4.

[45] *Id.*

intent of the General Scheduling Order ("GSO") governing this litigation.[46] Indeed, with respect to motions for summary judgment, the GSO dictates:

> Motions permitted under Superior Court Rule 56 on issues where the non-moving party bears the burden of proof at trial and which can be met only through expert testimony (commonly referred to as "expert issue summary judgment motions") should be limited to circumstances where such burden must be met as part of the non-moving party's prima facie case under the substantive law applicable; otherwise, such motions may be brought as a Daubert motion, or as a motion in limine.[47]

Experts need not be tendered until fifteen days *after* oral arguments on motions for summary judgment, and an additional twenty-five days are provided before the "Date to Complete All Discovery."[48]

As Dr. Ginsburg states in his supplemental report, to evaluate exposures from individual defendants through the lens of "frequency, duration, proximity, and intensity" is his "standard methodology."[49] Dr. Ginsburg considers these factors in "the context of Mr. Richards' entire asbestos exposure."[50]

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[46] Transaction ID 58312536, at ¶11, No. 77C-ASB-2 (Del. Super. Dec. 17, 2015) (attached hereto as **Exhibit F**).

[47] *Id*., ¶ 11.

[48] *Id*., ¶¶ 17, 18.

[49] Appendix A1558-1560, at 1.

[50] *Id*. The Superior Court is fully aware of Dr. Ginsburg's process in asbestos causation analysis, having heard multiple days of his testimony, following *voir dire*, in the *Knecht* trial held from May to June, 2018. *In re Asbestos Litigation (Knecht)*, No. 14C-08-164 (ASB) (Del. Super. May 14 – June 6, 2018).

Under these circumstances then, it is consistent with the governing documents that Dr. Ginsburg's initial report establish general causation, that specific causation be established for purposes of summary judgment through Mr. Richards' testimony, and that specific causation be examined more fully by each remaining defendant in a subsequent deposition of Dr. Ginsburg. The Superior Court erred as a matter of law in refusing to consider the merits of Appellants' case as against each Appellee.

II. Appellants should not be Deprived of an Opportunity to Litigate on the Merits due to a Delaware Court's First Interpretation of another Jurisdiction's Evolving Substantive Law

A. Question Presented

1) Having granted summary judgment in favor of Appellees, did the Superior Court abuse its discretion by refusing to allow Appellants to supplement their expert report, despite Appellants' rational and good faith basis for not doing so earlier?[51]

B. Scope of Review

Because the combined effect of the Superior Court's order was the *de facto* dismissal of their complaint, Appellants contend that the *Drejka* standard applies.[52] The Superior Court did not consider *Drejka* in its denial of Plaintiffs Motion for Leave, instead referencing both the "good cause" standard for applications to modify the Master Trial Scheduling Order, and the "excusable neglect" standard of Superior Court Civil Rule 60(b).[53] Under any of the three, however, the Superior Court's decisions are subject to review for abuse of discretion.[54]

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[51] Issue preserved at Appendix A1394-1400.

[52] *See Drejka v. Hitchens Tire Service Inc.*, 15 A.3d 1221 (Del. 2013).

[53] Ex. E (Op. at 5-6).

[54] *See, e.g., Drejka*, 15 A.3d at 1222 (reviewing dismissal of personal injury claims under abuse of discretion standard); *Stevenson v. Swiggett*, 8 A.3d 1200, 1204 (Del. 2010) (reviewing denial of motion under Rule 60(b)(1) for abuse of discretion); *Christian v. Counseling Resource Associates, Inc.*, 60 A.3d 1083, 1087 (Del. 2013)

C. Merits of Argument

Appellants' first notice of the *Schwartz* decision was upon receiving Appellees' motions for summary judgment.[55] The pertinent question is what Appellants *could* and/or *should* have done at that time.

In the first instance, Appellants' good faith reading of *Schwartz* was that it allowed for an analysis of the frequency, intensity and duration of exposure to asbestos, as explored *supra*. It was not "neglect," excusable or otherwise, for Appellants to oppose Appellees' motions for summary judgment with a colorable interpretation of the applicable law.

Moreover, asbestos plaintiffs have been refused leave to modify an expert report once motions for summary judgment have been filed.[56] Even more recently,

("This Court reviews a trial court's decision refusing to modify a trial scheduling order for abuse of discretion.").

[55] Whether the plaintiff asbestos bar has a duty to affirmatively review the case law of foreign jurisdictions for potentially impactful changes in substantive law is also at issue. To the extent Appellants became aware of *Schwartz* even within thirty (30) days of its issuance, however, the expert deadline in this matter would already have expired. Recent decisions by the Superior Court call into question whether a motion for leave to supplement/amend Appellants' expert report would have been granted even under those circumstances. *See infra.*

[56] *In re Asbestos Litigation (Creasy)*, 2017 WL 3722863 (Del. Super. Aug. 28, 2017). Although the Superior Court did not perform a full good cause analysis, the Decision of the Special Master which the Superior Court affirmed focused on the prejudice caused to defendants because their motions for summary judgment had already been filed.

asbestos plaintiffs have been denied in attempts to extend scheduling orders, filed *before* the pertinent deadline expired.[57]

The effect of the Superior Court's refusal to accept Appellants' supplemental expert report (given its interpretation of *Schwartz*) was to dismiss Plaintiffs' case. This Court has on at least three occasions in recent years reversed the Superior Court's dismissal of a meritorious case, under circumstances indicating substantially more fault by the appealing party.[58]

"[T]he sanction of dismissal should be imposed only as a last resort."[59] This Court balances six factors to determine whether the ultimate sanction of dismissal is appropriate:

> (1) The party's personal responsibility; (2) the prejudice to the opposing party; (3) the history of delay; (4) whether the party's conduct was willful or in bad faith; (5) the effectiveness of lesser sanctions; and (6) the meritoriousness of the claim.[60]

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[57] *In re Asbestos Litigation (Lee)*, N16C-12-022 (Del. Super. Sept. 17, 2018) (Special Master's Letter Order Granting Plaintiff's Motion to Conform Deadlines to Current Trial Setting) (attached hereto as **Exhibit G**). The Superior Court reversed the Special Master following oral arguments in a bench ruling held on November 29, 2018. The relevant Order does not yet appear on the docket. Plaintiffs in *Lee* intend to appeal the Superior Court's decision refusing to conform trial dates with applicable trial grouping.

[58] See *Drejka*, 15 A.3d at 1224; *Hill v. DuShuttle*, 58 A.3d 403, 406-07 (Del. 2013); *Christian*, 60 A.3d at 1088.

[59] *Hill*, 58 A.3d at 406 (citing *Drejka*).

[60] *Id.*

Here, the Richards themselves bear no personal responsibility. The prejudice to the opposing parties is minimal, although Appellants acknowledge at least the possibility of minor prejudice to Appellees. Mostly, Appellees will be forced to face the case on the merits – not a source of prejudice. Perhaps, though, Appellants will wish to revise their summary judgment motions to reflect Dr. Ginsburg's supplemental report.[61]

There is no history of delay in this case.

Appellants' conduct was willful, in that there was a conscious decision upon learning of the decision in *Schwartz* to rest on Mr. Richards' testimony of exposure. In no way, however, was such conduct in "bad faith," given that Appellants advanced a rational interpretation of *Schwartz* and R.C. 2307.96. Moreover, given the history of denied attempts to submit expert materials after the applicable deadline, Appellants had good reason to doubt the efficacy of such a strategy here. Instead, an attempt to late-serve a supplemental report after summary judgment had been filed would have been a *de facto* acceptance of, in Appellants' view, an erroneous reading of *Schwartz*, and left Appellants in a worse position than they now occupy.

[61] In reality, Appellants anticipate that Appellees will advance substantively near-identical arguments even if given the opportunity to amend their motions.

The Superior Court did not consider lesser sanctions. There is no indication that any such sanction would be ineffective. Indeed, Appellants' attached Dr. Ginsburg's supplemental report to their motion for leave, so there is no danger of continued recalcitrance. As examples of possible lesser sanctions available, Appellants' firms could be forced to shoulder the cost of revised summary judgment motion practice. Indeed, counsel would rather be fined directly than see the Richards' case thrown out without reaching the merits.

In that regard, the Richards' claims are meritorious. Mr. Richards was frequently exposed to original and replacement Ford parts over the course of nearly a decade. He testified in detail to his exposures to asbestos in direct proximity from Ford brakes, clutches, and gaskets.[62] Ford cannot dispute that these parts were asbestos-containing.

Goodyear bases its motion for summary judgment on the so-called *Stigliano* defense, whereby the burden is shifted to plaintiff to produce evidence that he worked on an asbestos-containing, as opposed to a non-asbestos-containing, version of the product.[63] Goodyear must take this position because, again, Mr. Richards'

[62] Appendix A792 et seq.

[63] Appendix A672 (citing *Stigliano v. Westinghouse*, 2006 WL 3026171, at *1 (Del. Super. Oct. 18, 2006) (this single paragraph letter order has become a core piece of asbestos defendants' arsenal)).

exposure to its products is extensive.[64] As to asbestos content, Mr. Richards explained his belief that he worked with the asbestos-containing versions of Goodyear's products.[65] While this belief was based on "common knowledge," he stated repeatedly that he "knew" the gaskets were asbestos-containing.[66] His description of the products was entirely consistent with the asbestos-containing versions, matching very closely Goodyear's own descriptions of its asbestos-containing gaskets.[67]

The extent of Mr. Richards' exposure to Copes' products depends in large part on the "bare metal defense" – an issue which the Superior Court did not reach in light of its interpretation of *Schwartz*. As Appellants' explained in their opposition to Copes' motion for summary judgment, the best authority on the issue is a Rhode Island court's interpretation of Ohio law.[68] That court performed a comprehensive review of Ohio law and concluded that "courts [in Ohio] have held that a plaintiff must produce some evidence that the original manufacturer recommended or

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[64] Appendix A1133-1139 and associated exhibits.

[65] Appendix A1139 and associated exhibits.

[66] *Id*.

[67] *Compare id*. *with* A1141 and associated exhibits.

[68] Appendix A995-996 (citing *Baumgartner v. American Standard, Inc.*, 2015 R.I. Super LEXIS 91 (R.I. Super. July 22, 2015)).

required the use of asbestos" components and/or insulation.[69] Plaintiffs made such a showing in response to Copes' motion for summary judgment.

By way of comparison, in *Schwartz* the Supreme Court of Ohio ultimately found the evidence there insufficient, because plaintiff merely showed that she "***could have*** been exposed … on five to ten occasions" over the course of decades. *Schwartz* was a case of second-hand exposure, and the plaintiff could not be sure she was present during the relevant brake changes. Even that relatively minimal exposure was enough to convince the appellate court that first reviewed the case,[70] as well as one dissenting Justice.[71] Another concurring Justice characterized *Schwartz* as a "close case."[72] Appellants present evidence here of exposure to each of the three Appellees' products orders of magnitude greater than the "close case" in *Schwartz*.

Put in the balance, it was an abuse of the Superior Court's discretion to dismiss Appellants' claims. On remand, Dr. Ginsburg's supplemental report should be admitted, and the merits of Plaintiffs' claims against each of the Appellees heard.

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[69] *Baumgartner*, 2015 R.I. Super LEXIS 91, *19-20.

[70] *Schwartz v. Honeywell Int'l, Inc.*, 66 N.E.3d 118 (Ohio Ct. App. 2016), *judgment rev'd by Schwartz*, 102 N.E. 3d 477 (Ohio 2018).

[71] *Schwartz*, 102 N.E.3d at 485 (even without the expert opinion "there *was* evidence relevant to the statutory factors" and "a determination of the weight to give that evidence is for the jury ….") (O'Neill, J., dissenting).

[72] *Id*. at 484 (Fischer, J., concurring in judgment only).

CONCLUSION

For the reasons set forth herein, Appellants respectfully request that the Order denying them leave to amend their expert report be reversed, and that this matter be remanded for reargument of the motions for summary judgment filed by Defendant-Appellees.

Respectfully submitted,

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