EFiled: Feb 08 2019 03:00PM EST
Filing ID 62952358
Case Number 546,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRAIG CHARLES RICHARDS, and GLORIA RICHARDS, his wife,	)	No. 546, 2018
Plaintiffs below, Appellants,	)	Court Below: Superior Court of the State of Delaware
v.	)	
COPES-VULCAN, INC., FORD MOTOR COMPANY, THE FAIRBANKS COMPANY, and THE GOODYEAR TIRE & RUBBER COMPANY.	)	C.A. No. N16C-04-206 ASB
Defendants below, Appellees.	)	

APPELLEE THE GOODYEAR TIRE & RUBBER COMPANY'S ANSWERING BRIEF

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February 8, 2019

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NATURE OF PROCEEDINGS

This is an appeal from an Order of the Superior Court granting a motion for summary judgment on the basis of Plaintiffs' failure to establish substantial factor causation under Ohio law. Appellants, Craig and Gloria Richards (together, "Appellants"), filed their below Superior Court action on April 22, 2016 against numerous defendants, including Defendant below-Appellee, The Goodyear Tire & Rubber Company (hereinafter "Appellee" or "Goodyear Tire"). Appellants based their claims against Defendants upon Mr. Richards' alleged occupational exposure to asbestos while working as a gas station attendant, automotive mechanic, and millwright at multiple gas stations and at a Ford Motor Company plant in Ohio from 1963 to 2007. Appellants also alleged that Mr. Richards experienced non-occupational exposure to asbestos while performing automotive repair work on his personal vehicles from 1959 to 1965.

Appellants offered Mr. Richards as their sole witness to provide testimony in support of their claims, and Defendants deposed him over three days from July 7, 2016 to August 16, 2016. During his deposition, Mr. Richards identified Goodyear Tire gasket products as one of many products he allegedly encountered throughout his career.

Goodyear Tire timely moved for summary judgment on May 7, 2018, asserting two grounds in support (the "Motion"). Goodyear Tire argued that: (i)

Appellants failed to prove Mr. Richards worked with an asbestos-containing, rather than asbestos-free, version of a Goodyear Tire gasket material pursuant to the Superior Court's decision in *Stigliano v. Westinghouse*[1] and its progeny; and (ii) Appellants' failure to demonstrate that any Goodyear Tire gasket material Mr. Richards allegedly worked with contained asbestos fell short of the causation standard under applicable Ohio law. Appellants opposed Goodyear Tire's Motion on May 31, 2018, and Goodyear Tire filed its reply in further support of its Motion on June 18, 2018. The other three remaining Defendants, Copes-Vulcan, Inc. ("Copes"), Ford Motor Company ("Ford"), and The Fairbanks Company, filed their own respective motions for summary judgment.

The Superior Court heard oral argument on Defendants' motions for summary judgment on July 10, 2018. During oral argument, the Superior Court first considered Defendant Copes' summary judgment motion. During her presentation, counsel for Copes argued that Appellants failed to meet their causation burden under Ohio law as to Copes because Appellants did not establish evidence to satisfy the familiar *Lohrmann*[2] "frequency, regularity, proximity" standard as codified by Ohio Revised Code § 2307.96, and because Appellants' expert report of Dr. Mark Ginsburg ("Dr. Ginsburg") was insufficient under the Ohio Supreme Court's holding

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1 2006 WL 3026171 (Del. Super. Ct. Oct. 18, 2006).

2 *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986)

in *Schwartz v. Honeywell International, Inc.*,[3] which rejected the cumulative exposure theory of causation. The Superior Court agreed with Copes' argument, finding via oral order that Dr. Ginsburg's expert report, which was based on the cumulative exposure theory, was invalid under Ohio law, and that Appellants' non-expert evidence did not meet the *Lohrmann* standard for causation (the "Ruling"). The Court then indicated that its findings were the same with respect to the other remaining defendants, including Goodyear Tire, and thus granted all Defendants' motions for summary judgment without any additional oral argument. The Court did, however, provide Appellants with an opportunity to move for leave to amend their expert report to comport with the holding in *Schwartz*.

Appellants moved for leave to amend their expert report on July 20, 2018, which Goodyear Tire (along with Copes and Ford) opposed on July 30, 2018. On August 8, 2018, the Superior Court issued a written opinion denying Appellants' request for leave to amend their expert report, finding that Appellants failed to establish either good cause or excusable neglect which would support the requested leave to amend because Appellants waited until more than 150 days had passed, and after summary judgment was awarded against them, to seek such relief.

Appellants filed a Notice of Appeal of the Superior Court's Ruling on October 25, 2018, and filed their Opening Brief on December 10, 2018. In their Opening

[3] 102 N.E.3d 477 (Ohio 2018).

Brief, Appellants argue that the Superior Court incorrectly interpreted the *Schwartz* decision as holding that an expert report was required to establish causation under Ohio law, and that the Superior Court erred in denying Appellants an opportunity to supplement their expert report.

This is Goodyear Tire's Answering Brief in opposition to Appellants' appeal.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly granted Goodyear Tire's Motion on the basis that Appellants failed to present admissible, non-speculative evidence from which a reasonable factfinder could conclude that Mr. Richards' exposure to Goodyear Tire asbestos-containing gasket material was a substantial factor in the causation of his injury, and thus failed as a matter of law to establish an essential element of their claims against Goodyear Tire.

2. Denied. The Superior Court did not abuse its discretion in denying Appellants leave to amend or supplement their expert report because Appellants failed to establish good cause or excusable neglect to support the request. Additionally, any error by the Superior Court in refusing Appellants' request was harmless because Appellants' proposed supplemental report was still insufficient under Ohio law.

STATEMENT OF FACTS

The material facts, which were presented to the Superior Court in Goodyear Tire's fully-briefed Motion below, are not in dispute. Appellants allege for purposes of this appeal that Mr. Richards potentially encountered asbestos-containing Goodyear Tire gasket material during: (i) his employment as a full-time mechanic from 1963 to 1965, and a part-time mechanic from 1969 to 1972; (ii) his employment at a Ford manufacturing facility from 1965 to 1966, and from 1968 to 2007; and (iii) his personal automotive work from 1959 to 1965.

Mr. Richards began performing automotive repair work on his friends' vehicles at his family home in Columbia Station, Ohio in 1959, at the age of twelve.[4] He testified that one of his tasks was scraping off old gasket material that was stuck to the heads and intakes of engines.[5] Mr. Richards identified Goodyear Tire as one of the brands of gasket material he removed and claimed he was able to do so because he saw "the Wingfoot of Goodyear on it."[6]

From 1963 to 1965, Mr. Richards worked as a gas station attendant and mechanic at a Shell Station ("Shell") in North Olmsted, Ohio.[7] At Shell, Mr. Richards performed general automotive repairs, including removing old gasket

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4 A0710, Videotaped Dep. Tr. of Craig Richards, July 7, 2016, at 36:7-13.
5 A0712-13, *id*. at 38:21-39:10.
6 A0715, *id*. at 55:15-21.
7 A0717, *id*. at 58:8-16.

material.[8] One brand of gasket material Mr. Richards recalled removing was Goodyear Tire and, again, claimed he was able to do so because the old gasket material was adorned with a winged-foot logo.[9] Mr. Richards also installed pre-cut gaskets while at Shell and testified that the pre-cut gaskets he installed came from rebuild kits.[10] He associated these pre-cut gaskets with Goodyear Tire because he claimed the gaskets came packaged in a blue, cardboard box with a diamond-shaped Goodyear Tire logo.[11] He described the gaskets as flexible, pre-cut, and either dark black or dark gray.[12] Mr. Richards testified that he installed pre-cut gaskets he associated with Goodyear Tire "many times" while at Shell but did not provide any further quantification.[13]

After Shell, Mr. Richards began working as a light assembler at Ford Motor Company ("FMC") in Brook Park, Ohio in March of 1965.[14] Shortly thereafter, Mr. Richards became a material handler, wherein he was responsible for stocking the I6 and V8 assembly lines with automotive parts, including gaskets.[15] He described the

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8 A0719-20, *id*. at 63:11-64:6.
9 A0720-21, *id*. at 64:12-65:4.
10 A0752, Disc. Dep. Tr. of Craig Richards Volume I, July 7, 2016, at 123:14-16.
11 A0684-85, Disc. Dep. Tr. of Craig Richards Volume II, July 8, 2016, at 388:19-389:12.
12 A0685-88, *id*. at 389:23-392:12.
13 A0723, Vid. Dep., at 69:12-14.
14 A0723-24, *id*. at 69:18-70:5.
15 A0726, *id*. at 94:17-23.

gaskets as flexible, pre-cut, and either dark black or dark gray.[16] Mr. Richards testified that the pre-cut gaskets were packaged in brown cardboard boxes that were the same size as the gasket, and that the word "Goodyear" was printed on the box in blue writing.[17] Mr. Richards never performed any hands-on work with the pre-cut gaskets, but instead only stocked parts on shelves for other workers' use.

After an approximately two-year period of service in the United States Army, Mr. Richards returned to FMC as a lift truck operator in 1968.[18] His job duties as a lift truck operator were virtually identical to his job duties as a material handler as he testified that he stocked the assembly lines with automotive parts, including pre-cut gaskets he associated with Goodyear Tire.[19] Mr. Richards confirmed that the pre-cut gaskets he stocked as a lift truck operator were the same and came packaged in the same way as the pre-cut gaskets he stocked as a material handler.[20] As with his time as a material handler, Mr. Richards did not perform any hands-on work with the gaskets as a lift truck operator.

From July of 1969 to November of 1972, while still working at FMC, Mr. Richards worked as a part-time mechanic at a Texaco Station ("Texaco") in

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16 A0690-91, Richards Vol. II, at 394:17-395:23.
17 A0729, Vid. Dep., at 97:10-14; A0689-90, Richards Vol. II, at 393:24-394:5.
18 A0731, *id*. at 101:8-13.
19 A0731, *id*. at 101:14-20.
20 A0692-94, Richards Vol. II, at 396:16-398:14.

North Olmsted, Ohio.[21] He recalled removing and installing gaskets while at Texaco and identified Ford, GM, and Goodyear Tire as brands of gaskets with which he worked.[22] More specifically, Mr. Richards associated the name Goodyear Tire with pre-cut water pump gaskets and gooseneck gaskets.[23] He claimed that he installed gaskets he associated with Goodyear Tire "many" times while at Texaco but, again, was unable to provide any further quantification.[24]

In April of 1975, after nearly six years as a lift truck operator at FMC, Mr. Richards became a millwright at FMC.[25] As a millwright, one of Mr. Richards' job responsibilities was repairing pumps, valves, and gearboxes.[26] He testified that, during this work, he removed and installed pre-cut gaskets he associated with Goodyear Tire.[27] Mr. Richards believed these gaskets were manufactured by Goodyear Tire because they came packaged in blue and white "Goodyear" packaging.[28] He described the gaskets he installed and removed as pre-cut, round

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21 A0733-35, Vid. Dep., at 106:23-108:14.
22 A0737, *id*. at 119:9-12.
23 A0682, Richards Vol II, at 196:18-24.
24 A0739, Vid. Dep., at 124:5-9.
25 A0739, *id*. at 124:16-20.
26 A0739-40, *id*. at 124:21-:125:10.
27 A0742, *id*. at 154:1-5.
28 A0696, Richards Vol. II, at 400:3-10.

with bolt holes, and ready to be installed.[29] Mr. Richards also testified that he was able to identify the gaskets he removed because he remembered what he installed.[30]

As explained in Goodyear Tire's Motion below, Mr. Richards never received any training in the identification of asbestos or asbestos-containing products throughout the entirety of his career.[31] Moreover, Mr. Richards testified that, with respect to all the gaskets and gasket material he associated with Goodyear Tire with which he allegedly worked throughout his career, he could not state without speculating or guessing whether any of those gaskets contained asbestos.[32] He never saw the word "asbestos" on any of the packaging he associated with Goodyear Tire gasket products.[33] While he believed that all gaskets generally contained asbestos, he testified that his belief was based simply on "common knowledge" and a general rule of thumb that all gaskets contained asbestos.[34]

Goodyear Tire began manufacturing and selling sheet gasket material in the early part of the 20th century.[35] However, only a small portion of Goodyear Tire's gasket material was asbestos-containing,[36] and Goodyear Tire ceased its production

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29 A0694, *id*. at 398:19-6.
30 A0698, *id*. at 405:17-21.
31 A0749, Richards Vol. I, at 112:20-22.
32 A0704, Richards Vol. II, at 411:13-24.
33 A0704, *id*. at 411:22-24.
34 A0748-50, Richards Vol. I, at 111:2-7, 112:23-113:6.
35 A0756, Aff. of Gary Tompkin, July 22, 2015, ¶ 4.
36 A0759, Aff. of E.W. DeMarse, May 2, 2008, ¶ 2.

of all asbestos-containing gasket material in 1969.[37] Goodyear Tire continued manufacturing and selling a number of sheet gasket products that did not contain asbestos until at least 1983.[38] Goodyear Tire manufactured and sold gasket material in sheet form; it did not manufacture or sell pre-cut gaskets nor did it sell gaskets in kits or boxes as described by Mr. Richards.[39] In addition, Goodyear Tire manufactured and sold asbestos-free sheet gasket material with the winged-foot logo.[40] Goodyear Tire established all of these facts in its Motion before the Superior Court through multiple sources, including its verified written discovery responses and the prior affidavit testimony of its corporate representatives, E.W. Demarse and Gary Tompkin.[41] Appellants do not dispute these facts in their Opening Brief. [42]

[37] A0759-60, *id*. ¶ 3.
[38] *Id*.
[39] A0763, Aff. of E.W. DeMarse, Mar. 18, 2010, ¶ 5.
[40] A0765-68, Excerpts from Goodyear Tire catalogues.
[41] A0664, Goodyear Tire Mot. Summ. J., May 7, 2018.
[42] *See* Appellants' Br., Dec. 10, 2018.

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED OHIO SUBSTANTIVE LAW IN DETERMINING THAT APPELLANTS DID NOT MEET THEIR *PRIMA FACIE* CAUSATION BURDEN ON SUMMARY JUDGMENT.

A. Question Presented

Did Appellants present sufficient admissible evidence from which a reasonable jury could find that Mr. Richards' injury was caused by an asbestos-containing gasket material manufactured by Goodyear Tire? The Superior Court addressed this issue in its Ruling below.

B. Scope of Review

A trial court's decision on a motion for summary judgment is subject to a *de novo* standard of review on appeal.[43] Therefore, this Court must "apply the usual standards for the granting of summary judgment:

(1) The moving party bears the burden of demonstrating both the absence of a material issue of fact and entitlement to judgment as a matter of law; and

(2) Any doubt concerning the existence of a factual dispute must be resolved in favor of the non-movant."[44]

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[43] *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013).

[44] *Atamian v. Gorkin*, 746 A.2d 275, 2000 WL 139979, at *2 (Del. Jan. 18, 2000) (TABLE).

C. Merits of Argument

Appellants' argument on appeal is that the Superior Court erred by misinterpreting Ohio law as requiring expert testimony to meet Appellants' *prima facie* causation burden and refusing to hear non-expert evidence regarding the frequency, regularity, and proximity of Mr. Richards' alleged exposure to asbestos from Goodyear Tire gasket products. For the reasons discussed by the Superior Court below in its Ruling granting summary judgment as to all Defendants, as well as those argued in Goodyear Tire's Motion, this Court should reject Appellants' argument and affirm the grant of Goodyear Tire's Motion.

1. The Elements of Appellants' *Prima Facie* Negligence Claim under Ohio Substantive Law.

To establish a claim for asbestos-related injuries under Ohio substantive law, a plaintiff must demonstrate "that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss."[45] In determining whether exposure to a defendant's asbestos-containing product was a substantial factor in the plaintiff's injury, the trier of fact must consider: (1) the manner in which the plaintiff was exposed to the defendant's asbestos; (2) the proximity of the defendant's asbestos to the plaintiff

[45] Ohio Rev. Code § 2307.96(B).

when the exposure to the defendant's asbestos occurred; (3) the frequency and length of the plaintiff's exposure to the defendant's asbestos; and (4) any factors that mitigated or enhanced the plaintiff's exposure to asbestos.[46] A plaintiff must provide "at least *some* quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease."[47]

As Appellants correctly point out, the Ohio Supreme Court rejected the cumulative exposure theory of asbestos causation in *Schwartz*, and in so doing struck down an expert report that based its opinion on that theory. Having found the plaintiff's expert report insufficient, the *Schwartz* Court then turned to the plaintiff's non-expert exposure evidence in that case to determine whether the plaintiff had met her *prima facie* burden of establishing frequent, regular, and proximate exposure to the defendant's asbestos-containing product as required by Ohio Revised Code § 2307.96, and found that evidence to be similarly insufficient to satisfy Ohio's causation standard.[48]

Here, the Superior Court correctly conducted the same analysis as in *Schwartz*. First, the Superior Court found that the expert report of Dr. Ginsburg,

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[46] *Id*.

[47] *Schwartz*, 102 N.E.3d at 482 (quoting *In re New York City Asbestos Litig.*, 148 A.D.3d 233, 239 (N.Y. 2017)).

[48] *Id*. at 483.

which based its causation opinion as to all Defendants on the cumulative exposure theory, was insufficient after *Schwartz* to meet Appellants' *prima facie* burden.[49] Next, contrary to Appellants' assertion, the Superior Court heard rather extensive argument from Appellants' counsel regarding non-expert causation evidence, in the form of Mr. Richards' deposition testimony, as it pertained to Copes.[50] Based on the record evidence before it, the Superior Court found that Appellants failed to meet their *prima facie* burden. As the Superior Court stated:

> Well, without expert testimony, I'm not sure how any of those things are put into an appropriate context, and what meaning is to be given to any of those exposures that Mr. Richards described. They are just sort of standing alone there without any explanation of how significant they are without any expert testimony consistent with what *Schwartz* says Ohio law requires. So under that context, I don't find that standalone nonexpert testimony sufficient to meet the defendant – the plaintiff's burden here, and I'm going to grant the motion for summary judgment.[51]

At that point in the July 10, 2018 hearing it was Appellants' counsel that first suggested the Court's Ruling as to Copes would be the same as to all other Defendants, including Goodyear Tire, stating:

> MR. SMITH: Thank you. Your decision here is dispositive as to the remaining Richards motions which will fall into the same bucket?

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[49] Del. Super. Ct., C.A. No. N16C-04-206, Wharton, J. (July 10, 2018) (Tr.), at 64.
[50] *Id*. at 44-47.
[51] *Id*. at 64-65.

> THE COURT: Right. You can incorporate them.[52]

In fact, Appellants' counsel even sought further clarification on the application of the Court's Ruling with the following additional exchange:

> MR. SMITH: If there's any chance that there's a different outcome, I will fight that fight. It seems to me your ruling applies to all of them.
>
> THE COURT: It does.[53]

Given these statements by Appellants' counsel during the July 10, 2018 argument, it is disingenuous for Appellants to now assert that the Superior Court "refused to hear arguments as to Ford or Goodyear [Tire]."[54] Moreover, Appellants incorrectly assert that the Superior Court was required to hear oral argument specifically as to Goodyear Tire at the July 10, 2018 hearing instead of deciding Goodyear Tire's Motion after review of the parties' respective briefs.[55] Goodyear Tire submitted its Motion and supporting brief on May 7, 2018, Appellants filed their brief in opposition on May 31, 2018, and Goodyear Tire replied on June 18, 2018.[56] There is nothing to indicate that the Superior Court deviated from its regular practice of thoroughly reviewing the summary judgment record, including Goodyear

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52 *Id*. at 66-67.
53 *Id*. at 69.
54 Appellants' Br., Dec. 10, 2018, at 10.
55 *See Concord Mall, LLC v. Best Buy Stores, L.P.*, 2004 WL 1588248, at *1 (Del. Super. Ct. July 12, 2004) ("Upon review of the parties' briefs, the Court finds that oral argument is not required and renders its decision forthwith.").
56 A0043-52.

Tire's fully-briefed Motion, before issued its Ruling on July 10, 2018. The Superior Court's summary judgment decision, based on the record before it, was appropriate and the Court entertained as much oral argument as it deemed necessary to render its decision. Accordingly, this Court should affirm the Superior Court's Ruling as to Goodyear Tire.

2. The Product Identification Record Does Not Establish Causation Under Ohio Law as to Any Asbestos-Containing Goodyear Tire Product.[57]

Even if this Court finds that the Superior Court erred in not hearing oral argument specifically as to Goodyear Tire at the July 10, 2018 hearing, this Court may conduct its own *de novo* review of the factual record as it pertains to Goodyear Tire.[58] As explained below, such a *de novo* review will unquestionably show that the Superior Court's grant of summary judgment as to Goodyear Tire was correct and should be affirmed.

A fatal deficiency in Appellants' claims as to Goodyear Tire is the complete lack of evidence that any of the Goodyear Tire gasket material that Mr. Richards allegedly encountered actually contained asbestos. Thus, even if Appellants had met their burden of quantifying Mr. Richards' frequent, regular, and proximate exposure

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[57] Goodyear Tire raised this issue in its Motion, but the Superior Court did not reach this issue in awarding summary judgment to Goodyear Tire. A0672-77, Goodyear Tire's Mot. Summ. J. at 8-13.

[58] *See State Farm Mut. Auto. Ins. Co.*, 80 A.3d at 632.

to a Goodyear Tire product such that the exposure could constitute a substantial factor in causing his asbestos-related disease, Goodyear Tire would nonetheless be entitled to summary judgment as to Appellants' claims because where a defendant presents evidence "that it manufactured both asbestos and asbestos-free versions of its products in the timeframe of [the plaintiff's] alleged exposures," the plaintiff's claims are subject to summary judgment unless the plaintiff submits evidence from which a reasonable factfinder[59] could infer exposure to the asbestos-containing, rather than asbestos-free, version of the defendant's product.[60] Once a defendant establishes that it produced both asbestos-containing and asbestos-free versions of its product within the time period of the alleged exposure, the burden shifts to the plaintiff to demonstrate work with the asbestos-containing variety.[61]

As explained in the Statement of Facts and in the record below, the vast majority of all sheet gasket material sold by Goodyear Tire was asbestos-free.[62] Mr.

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59 "Stated differently, the judge as gate-keeper merely considers whether the finder of fact could come to a rational conclusion either way, not whether that conclusion would be objectively reasonable." *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

60 *Stigliano v. Westinghouse*, 2006 WL 3026171, at *1 (Del. Super. Ct. Oct. 18, 2006) ("When the record reveals that a defendant manufactured both asbestos-containing and non-asbestos-containing versions of a product during the time period of alleged exposure, in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product, the Court cannot draw the inference of exposure and summary judgment on product nexus must be granted.").

61 *Id.*

62 *See supra* notes 35-40 and accompanying text.

Richards candidly admitted that he never received any training on the identification of asbestos-containing materials,[63] that he was unable to state without speculation or conjecture that any of the gasket material he worked with contained asbestos,[64] and that he never saw the word "asbestos" on the packaging of any Goodyear Tire gasket products.[65]

In cases with similar facts, the Superior Court has awarded summary judgment to defendants. For example, in *In re Asbestos Litigation (Holstege)*,[66] the plaintiff allegedly worked with automotive gaskets generally between 1979 and 1999.[67] One of the defendants in that case established, through similar evidence presented in this action, that, at all relevant times, it manufactured asbestos-free versions of all of the gaskets at issue in that case.[68] In opposition, the plaintiff cited only his testimony that it was "common knowledge" that all automotive products used in high-heat applications contained asbestos as evidence that he encountered an asbestos-containing version of the defendant's gasket.[69] In granting summary judgment, the Superior Court found that such "common knowledge" is insufficient

63 A0749, Richards I at 112:20-22.
64 A0704, Richards II at 411:13-24.
65 A0704, *id*. at 411:22-24.
66 Del. Super. Ct., C.A. No. N14C-06-038, Wharton, J. (Apr. 24, 2017) (Op.).
67 *Id.* at 2.
68 *See id.* at 4-6.
69 *Id.* at 6-7.

to overcome *Stigliano* and that without more concrete evidence that the specific gaskets at issue in the case contained asbestos, summary judgment was warranted.[70]

Likewise, in *In re Asbestos Litig. (McRae)*,[71] the plaintiff never received any training in the identification of asbestos or asbestos-containing products, but testified that he knew the packing and gaskets with which he worked contained asbestos because it was "common knowledge" that such products contained asbestos at the time.[72] Because the plaintiff had not received any training to support his assumption about the asbestos content of the products he encountered, the Superior Court found that such testimony was far too speculative for a reasonable jury to find that the gaskets and packing with which the plaintiff worked actually contained asbestos.[73]

Here, just as in *Holstege* and *McRae*, Mr. Richards' only basis for his subjective belief that the Goodyear Tire gasket products he encountered contained asbestos was "common knowledge."[74] This Court has held that unsupported allegations "do not suffice as a substitute for evidence to preclude summary judgment; nor do assertions made in briefs as to the probable existence of undemonstrated evidence that may be adduced later at trial."[75] While a court may

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70 *Id.* at 7.
71 Del. Super. Ct., C.A. No. 10C-05-225, Mem. Op. (Mar. 31, 2014).
72 *Id*. at 3.
73 *Id*. at 6-7.
74 A0748, Richards Vol I. at 111:2-7.
75 *Martin v. Nealis Motors, Inc.*, 247 A.2d 831, 833 (Del. 1968).

make reasonable inferences, those inferences must be based on facts and not "surmise, speculation, conjecture, or guess, or on imagination or supposition."[76] Appellants were required to establish all elements they would have been required to prove at trial in order to survive summary judgment as to Goodyear Tire.[77] This Court should conclude that Appellants failed to do so and uphold the Superior Court's grant of Goodyear Tire's Motion on this basis.

Goodyear Tire does not dispute that a small portion of its gasket material contained asbestos up until 1969. However, the fact remains that Appellants failed to put forth any evidence in the record below linking Mr. Richards to the asbestos-containing variety. Contrary to Appellants' contention, Mr. Richards' belief based on "common knowledge" that gaskets contained asbestos does not satisfy Appellants' burden under *Stigliano* to prove that Mr. Richards encountered an asbestos-containing Goodyear Tire gasket product during his career. Further, Mr. Richards' descriptions of Goodyear Tire gaskets as black or gray in color, and being adorned with the winged-foot logo, do not establish that he encountered an asbestos-containing Goodyear Tire gasket product because Goodyear Tire manufactured and sold asbestos-free gasket material matching those descriptions.

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[76] *In re Asbestos Litig. (Helm)*, 2007 WL 1651968, at *16 (Del. Super. Ct. May 31, 2007) (citation omitted).

[77] *Rayfield v. Power*, 840 A.2d 682, 2003 WL 22873037, at *1 (Del. Dec. 2, 2003) (TABLE).

As explained in the Statement of Facts, *supra*, Mr. Richards never received any training in the identification of asbestos, did not know the composition of the Goodyear Tire gasket products he allegedly encountered, and there is no direct or circumstantial evidence establishing that the Goodyear Tire gasket products he identified contained asbestos. Thus, these facts cannot support a non-speculative inference of exposure to asbestos from a Goodyear Tire gasket product, and the Superior Court's grant of summary judgment should be upheld.

Even if Appellants had established that some of Mr. Richards' encountered an asbestos-containing version of a Goodyear Tire product, their claims would still fail as a matter of law because any the record is still devoid of any evidence that properly quantifies such alleged exposure. Mr. Richards' only testimony quantifying his exposure to Goodyear Tire gasket products generally was that he worked with them "many times."[78] This statement, however, was as to all Goodyear Tire gasket material generally, not to that portion which may have contained asbestos. The record is completely devoid of any evidence quantifying in even the vaguest of contexts how often (if at all) Mr. Richards encountered an asbestos-containing Goodyear Tire gasket product. Even considering the limited statement of "many times" however, such vague, unquantified testimony is simply not sufficient to meet

[78] A0723, 739; Vid. Dep., at 69:12-14; 124:5-9.

Appellants' *prima facie* causation burden, as the Superior Court has routinely applied the "frequency, regularity, and proximity" standard to grant summary judgment to defendants on the basis that the plaintiff failed to provide a quantifiable measure of the frequency and regularity of alleged exposure to a particular defendant's product.[79]

Significantly, Appellants rely on only a single case, *Alexander v. Honeywell International, Inc.*,[80] to support their position that Mr. Richards' testimony was sufficient to establish the necessary frequency, regularity, and proximity to Goodyear Tire gasket products to support substantial causation. In *Alexander*, the United States District Court for the Northern District of Ohio denied summary judgment to defendant Honeywell International on the basis that the plaintiff had provided sufficient testimony for a jury to find that her exposure to Honeywell's Bendix brakes was a substantial factor in causing her injury. Unlike here, however, the plaintiff in *Alexander* was able to quantify her exposure to the defendant's

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[79] *See, e.g.*, *In re Asbestos Litig. (McGhee)*, C.A. No. 10C-12-114 ASB, at 133:3-19 (Del. Super. Ct. May 10, 2012) (TRANSCRIPT) (granting summary judgment where the plaintiff allegedly worked on gaskets contained in the moving defendant's valves on twelve to eighteen occasions); *In re Asbestos Litig. (Gordon)*, 2011 WL 6058302 (Del. Super. Ct. Nov. 16, 2011) (finding plaintiff's alleged exposure from performing upwards of seventy-five (75) gasket repair jobs over a period of forty-seven years, with each repair-job taking close to an hour to complete could not constitute "frequent" or "regular" exposure under a Kansas statute that codified a *Lohrmann*-like causation standard).

[80] 2017 WL 6374062 (N.D. Ohio Dec. 13, 2017).

product, stating that she was in close proximity to her significant other as he performed one to three brake jobs per week over the course of four years, which would amount to between 200 and 600 brake jobs.[81] Mr. Richards provided no such quantification, again only testifying to working with Goodyear Tire gasket products "many times."[82] As stated above, this speculative and vague testimony as to the frequency and regularity with which Mr. Richards may have encountered a Goodyear Tire product is insufficient to satisfy Ohio's causation standard. For this reason, in conjunction with the additional reasons stated *supra*, this Court should affirm the Superior Court's grant of summary judgment in favor of Goodyear Tire.

[81] *Id*. at *4.

[82] A0723, 739; Vid. Dep., at 69:12-14; 124:5-9.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS LEAVE TO SUPPLEMENT OR AMEND THEIR EXPERT REPORT.

A. Question Presented

Did Appellants establish good cause as required for the Superior Court to modify the Master Trial Scheduling Order and grant Appellants' request for leave to supplement or amend their deficient expert report?

B. Scope of Review

A trial court's pretrial discovery rulings are subject to review for abuse of discretion upon appeal.[83] Delaware courts consider applications to modify a scheduling order under the "good cause" standard.[84] Good cause may be found only when "the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."[85] Under Delaware Superior Court Civil Rule 60(b), a party may seek relief from a judgment or order where there is "excusable neglect," wherein the moving party must establish that: 1) it acted in a

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[83] *Lundeen v. Pricewaterhouse Coopers*, 919 A.2d 561, 2007 WL 646205, at *2 (Del. Mar. 5, 2007) (TABLE).

[84] *In re Asbestos Litig. (Vala)*, 2012 WL 2389898, at *1 (Del. Super. Ct. June 22, 2012).

[85] *Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015).

reasonably prudent fashion; 2) it has the possibility of a meritorious claim; and 3) there is a lack of substantial prejudice to the non-moving party.[86]

C. Merits of Argument

Appellants served Dr. Ginsburg's initial expert report on Goodyear Tire on June 16, 2017. Despite Appellants' contentions to the contrary, they were not diligent, the need to supplement their expert report was completely foreseeable, and Appellants' failure to timely supplement the report of Dr. Ginsburg was solely their fault. Specifically, Appellants designated Ohio law in their complaint, and the applicability of Ohio substantive law was never in doubt because the entirety of Mr. Richards' alleged exposure took place in Ohio, where he has lived his entire life.[87] The Ohio Supreme Court's decision in *Schwartz*, which invalidated the cumulative exposure theory espoused in Dr. Ginsburg's report, was released on February 8, 2018, and Appellants' expert report deadline was not until March 2, 2018.[88] Finally, it was Appellants' affirmative choice, based on their belief that Mr. Richards' testimony alone was sufficient to establish substantial factor causation, not to supplement Dr. Ginsburg's report at any point between the issuance of the Ohio Supreme Court's *Schwartz* decision in January 2018 and the Delaware Superior

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86 *See PNC Bank v. Sills*, 2006 WL 3587247, at *5 (Del. Super. Ct. Nov. 30, 2006).
87 *In re Asbestos Litig. (Richards)*, 2018 WL 3769190, at *2 (Del. Super. Ct. Aug. 8, 2018).
88 *Id*. at *1-2.

Court's grant of summary judgment in this case on July 10, 2018.[89] At any point during the more than 150 days between those two court actions, Appellants could have sought leave to supplement Dr. Ginsburg's report, but they did not.[90]

The Superior Court relied on the above factors in determining in its written opinion of August 8, 2018, that Appellants were not entitled to leave to supplement the report of Dr. Ginsburg.[91] After awarding summary judgment to the remaining defendants on July 10, 2018, the Court granted Appellants ten days in which to move for leave to supplement their expert report. A mere eight days later, on July 18, 2018, Appellants filed their motion for leave along with a supplement report by Dr. Ginsburg. In the supplemental report, Dr. Ginsburg concluded that Mr. Richards' exposures to each defendant's products "were sufficient to constitute a substantial factor in causing his mesothelioma."[92] In support of their motion for leave to supplement, Appellants' argued there was good cause because: 1) they submitted their expert report several months before the decision in *Schwartz*; 2) they only had twenty-two days between the issuance of *Schwartz* and their expert report deadline; and 3) Ohio substantive law had not yet been ordered as controlling as of the date Appellants' expert reports were due.[93]

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89 *See* Appellants' Br., Dec. 10, 2018, at 24.
90 *In re Asbestos Litig. (Richards)*, 2018 WL 3769190, at *2.
91 *Id*. at *3.
92 *Id*. at *2.
93 *Id*.

The Superior Court properly rejected all of Appellants' arguments.[94] First, Appellants' decision to submit their expert report in advance of the deadline to do so was of no moment. Appellants' could have supplemented their expert report, without seeking leave to do so, up until the March 2, 2018 deadline. Next, Appellants demonstrated that the twenty-two day period between the issuance of *Schwartz* and the expert report deadline was more than enough time for them to have supplemented their expert report, because they were able to obtain a supplemental report from Dr. Ginsburg within only eight days of the Superior Court's award of summary judgment to the remaining defendants. Significantly, Appellants' waited until after the award of summary judgment in this matter to seek leave to supplement the report of Dr. Ginsburg, rather than upon receipt of summary judgment motions from both Ford and Copes, which explicitly addressed *Schwartz*. Finally, the Superior Court found that "the fact that Ohio substantive law was not ordered controlling until after the expert deadline [was] of no significance" because "Plaintiffs always knew Ohio substantive law would apply."[95]

Appellants argue in their brief in support of their appeal that under their reading of *Schwartz*, they were not required to supplement their expert report because they believed Mr. Richards' testimony alone established substantial factor

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94 *Id*. at *2.
95 *Id*.

causation against Goodyear Tire. Thus, it was Appellants' conscious choice, rather than excusable neglect, not to supplement Dr. Ginsburg's report. When faced with similar facts, the Delaware Superior Court has denied requests to extend the deadline for expert reports so that a plaintiff can supplement or replace an expert report after the plaintiff was on notice that the report was insufficient and did not timely seek to supplement.[96] Accordingly, this Court should conclude that the Superior Court did not abuse its discretion in denying Appellants leave to supplement their expert report.

Even assuming, *arguendo* that the Superior Court did err in refusing Appellants' request to supplement, the error was harmless because Dr. Ginsburg's supplemental report still failed to comply with Ohio law. As stated in *Schwartz*, an expert report based on the cumulative exposure theory is insufficient to support a finding of substantial causation.[97] Rather, an expert report can only support a finding of substantial causation where it is based on the plaintiff's frequent and regular exposures to a specific defendant's product, and there must be "at least *some* quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing

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[96] *See In re Asbestos Litig. (Creasy)*, 2017 WL 3722863, at *1 (Del. Super. Ct. Aug. 28, 2017) (denying plaintiff's request to re-open discovery based on insufficiency of expert report under Virginia law where plaintiffs were on notice that Virginia substantive law would apply).

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

cause of the disease."[98] In his supplemental report, Dr. Ginsburg concluded the following as to Goodyear Tire:

> Mr. Richards worked as a shade tree mechanic from 1959 until 1965. He worked as a mechanic at the North Olmsted Shell from 1963 until 1965, 8-10 hours per day/7 days per week. Mr. Richards worked at Texaco from 1969 until 1972, 4 hours per day/4 days per week. Mr. Richards stated that he worked with Goodyear gaskets at all three sites. Mr. Richards testified that he worked with original Goodyear parts and those exposures were sufficient to constitute a substantial factor in causing his mesothelioma.[99]

Nothing in Dr. Ginsburg's supplemental report quantifies Mr. Richards' alleged exposure to Goodyear Tire gasket products at all, much less in a manner that could aid the trier of fact in determining whether the alleged exposure was frequent and regular enough to constitute a substantial factor in causing Mr. Richards' disease. Dr. Ginsburg's supplemental report does nothing more than recite a date range within Mr. Richards alleges to have encountered Goodyear Tire gasket products that, as discussed *supra*, Appellants failed to establish actually contained asbestos. Furthermore, Mr. Richards' only testimony regarding the frequency and regularity with which he worked with Goodyear Tire gasket products was that he worked with them "many times."[100] Mr. Richards' vague, speculative testimony regarding the

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98 *Id*. at 482 (citation omitted).
99 A1559, Supplemental Report of Dr. Ginsburg, July 18, 2018, at 2.
100 A0723, 739; Vid. Dep., at 69:12-14; 124:5-9.

frequency and regularity of exposure to Goodyear Tire gasket products is insufficient to support a finding of substantial causation, and therefore so is Dr. Ginsburg's supplemental report based on Mr. Richards' testimony.

In sum, Appellants failed to establish good cause or excusable neglect for their failure to timely supplement the report of Dr. Ginsburg to comply with controlling Ohio substantive law. Additionally, Appellants' untimely attempt to supplement Dr. Ginsburg's report was still insufficient to support a finding of substantial causation against Goodyear Tire. Thus, the Superior Court did not abuse its discretion in denying Appellants leave to supplement their expert report.

CONCLUSION

For all the foregoing reasons, Defendant below-Appellee Goodyear Tire respectfully requests that the Court affirm the Superior Court's Order granting Goodyear Tire's Motion for Summary Judgment as to all Appellants' claims.

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Respectfully submitted,

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February 8, 2019
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