EFiled: Feb 08 2019 04:13PM EST
Filing ID 62953143
Case Number 546,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRAIG RICHARDS and his wife, GLORIA RICHARDS, *Plaintiffs Below, Appellants,* v. COPES-VULCAN, INC.; FORD MOTOR COMPANY; THE FAIRBANKS 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 and for New Castle County, C.A. No.: N16C-04-206 ASB

APPELLEE COPES-VULCAN, INC.'S ANSWERING BRIEF

MARON MARVEL BRADLEY ANDERSON & TARDY LLC

/s/ Paul A. Bradley
Paul A. Bradley (DE No. 2156)
Antoinette D. Hubbard (DE No. 2308)
1201 N. Market Street, Ste. 900
Wilmington, DE 19899
Telephone: (302) 425-5177
Facsimile: (302) 425-0180
pab@maronmarvel.com
adh@maronmarvel.com
Attorneys for Appellee/Defendant Below
Copes-Vulcan, Inc.

Dated: February 8, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Unreported Decisions

Statutes

Rules

Other Authorities

NATURE OF THE PROCEEDINGS

This is an appeal from the grant of summary judgment to Copes-Vulcan, Inc. ("Copes"), one of thirty defendants named in an asbestos personal injury case brought by Appellants-Plaintiffs, Craig Richards and his wife, Gloria Jeanne Richards. Although all of Mr. Richards' claimed exposure to asbestos occurred in Ohio, and he is a resident of Ohio, he chose to bring his action in Delaware. His complaint acknowledged that Ohio substantive law would apply to his claim. In 2004, the Ohio legislature enacted a statutory scheme regarding the proof required for asbestos-related injury claims, and the Ohio Supreme Court in early 2018 clarified expert opinion requirements.

When Copes moved for summary judgment on the basis that the Richards' claims against Copes were patently inadequate under Ohio law, Appellants professed to be unaware of the Ohio requirements. After familiarizing themselves with these Ohio requirements, they chose to *stand on their existing papers* and asked the Court to rule. It did, granting summary judgment to Copes. Appellants then – *after judgment was entered against them* - moved for leave to open the judgment and serve a new expert report that they hoped would meet the Ohio requirements. This request was denied.

The Richards appeal both rulings: the grant of summary judgment to Copes and the denial of their post-judgment request to serve a new expert report.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly construed and applied Ohio statutory and case law. Copes was entitled to summary judgment pursuant to *Schwartz v. Honeywell International, Inc.*, 102 N.E.3d 477 (Ohio 2018). Appellants' failure to offer an expert opinion on specific causation was fatal to their claims. See, *Terry v. Caputo*, 875 N.E.2d 72 (Ohio 2007) ("*Terry*"). Applying all reasonable inferences in favor of the non-movants, the Superior Court correctly ruled that they failed to establish that exposure to airborne asbestos from any pre-formed gaskets for which Copes may be held responsible constituted a substantial contributing factor in the causation of Mr. Richards' mesothelioma.

2. Denied. The Superior Court did not abuse its discretion in denying a request, *after judgment was entered against them,* to resurrect Appellants' claims. The Superior Court correctly denied the extraordinary request to set aside judgment and for leave to serve an amended expert report designed to meet the applicable substantial factor test which the original report failed to meet. See *Moses v. Drake,* 109 A.3d 562 (Del. 2015). At least by the filing of Copes' motion for summary judgment, Appellants had knowledge that the viability of their claims had been questioned, *inter alia*, due to rulings that the type of causation analysis provided by their expert was deficient. For months, they took no action and indeed took the position, contrary to precedent and until after the dismissal of their claims,

that their expert's cumulative exposure report was immaterial on the issue of substantial factor causation. Appellants have failed to establish good cause and Copes would be severely prejudiced if opposing counsel's litigation decisions result in it being deprived of the finality of its judgment on the merits. Moreover, the interests of fair and efficient judicial administration would also be undermined.

STATEMENT OF FACTS

Mr. Richards lived and worked in Ohio.[1] He worked in various capacities at Ford Motor Company at its manufacturing facility in Brook Park, Ohio (the "Ford Facility") from the mid-1960s to 2007, the year that he retired.[2] The Ford Facility housed various assembly lines and a foundry.[3] Various types of asbestos-containing products were present and used at this industrial facility, including thermal insulation and/or refractory materials used on pipes and furnaces.[4] Based on information provided by his supervisors, Mr. Richards, who had no formal training in asbestos identification, believed that all gaskets and packing material used as sealants on different equipment at the facility contained asbestos.[5] Appellant concedes that his exposure to Copes valves was significantly less than any other alleged exposures that are the subject of this appeal.[6]

---

[1] (A0065-A0081), Plaintiffs' Complaint.

[2] (A0446), Tr. at P. 69, LL. 21-23; (A0067-A0068), Plaintiffs' Complaint. In addition to his employment at Ford, from the latter 1960s to the early 1970s, Mr. Richards also worked part-time as a mechanic at a service station in North Olmstead, Ohio. (A0452), Tr. at P. 106, LL. 18-24; Tr. at P. 107, L. 25 - P. 108, L. 17.

[3] (A0451), Tr. at P. 105, LL. 8-19; (A0881-A0882), Tr. at P. 317, L. 20 – P. 319, L. 17; (A0882), Tr. at P. 320, L. 16 – P. 321, L. 11.

[4] (A1010), Tr. at P. 124, L. 25 – P. 125, L. 10; (A0463-A0464), Tr. at P. 224, L. 25 - P. 225, L. 16; P. 226, LL. 2-6; P. 229, L. 21 - P. 230, L. 23; (A0897), Tr. at P. 453, LL. 6-10; (A0897), Tr. at P. 453, L. 18 – P. 455, L. 14; (A1392), Tr. at P. 605, LL. 2-25.

[5] (A0455), Tr. at P. 146, LL. 4-13; (A0748), Tr. at P. 111, LL. 2-20; (A0749-A0750), Tr. at P. 112, L. 20 - P. 113, L. 11.

[6] *See*, *Appellants' Amended Opening Brief,* P. 2.

I. MR. RICHARDS' VARIOUS POSITIONS AT THE FORD FACILITY FROM 1965 TO 2007

Mr. Richards was hired in March of 1965 as a light assembler of motors at the Ford Facility.[7] Mr. Richards' first alleged asbestos exposure at the Ford Facility was while he worked as a cleaner, a position that he assumed in March of 1965 and held for a couple of months.[8] As one of the plant's cleaners, one of Mr. Richards' responsibilities was to use soap and a steam machine to clean various types of equipment that the maintenance department had removed before the equipment was sent to a repair shop at the plant.[9] This was a wet process: the steam used in the cleaning process inevitably cooled down and changed to water.[10] Nonetheless, Mr. Richards believed that while steam cleaning, he was exposed to any gasket materials that may have been left in the flange connections of equipment.[11]

Mr. Richards could not state the number of times that he steam-cleaned any particular brand of equipment, including valves.[12] Moreover, Mr. Richards lacked knowledge regarding: where any of the valves had been installed in the plant; the

---

[7] (A0446-A0447), Tr. at P. 69, L. 18 - P. 70, L. 11.
[8] (A0446-A0447), Tr. at P. 69, L. 18 - P. 71, L. 5; (A0466), Tr. at P. 328, L. 23 - P. 329, L. 2.
[9] (A1024-A1025), Tr. at P. 130, LL. 1-15; P. 131, L. 25 - P. 132, L. 15; P. 134, L. 21 - P. 135, L. 9.
[10] (A1024), Tr. at P. 132, L. 2-10.
[11] (A0447), Tr. at P. 71, L. 6 - P. 72, L. 14.
[12] (A1025-1026), Tr. at P. 137, LL. 14-19; P. 138, LL. 1-8; P. 138, LL. 13-20; (A1029), Tr. at P. 369, LL. 8-19.

purpose for which any of the valves were used; the materials that may have flown through any of the valves; or the maintenance history of any of the valves that he cleaned.[13] He identified Copes-Vulcan as one of several brands of valves that he steam-cleaned during the months he worked as a cleaner.[14]

Mr. Richards next worked as a material handler and then as a lift truck operator.[15] In the latter positions, Mr. Richards transported car parts to the assembly line and claimed no exposure as a result of valves.[16] In the fall of 1968, Mr. Richards resumed his position as a lift truck operator at Ford for a few months prior to working as a front end loader.[17] Mr. Richards next worked several years as a front end loader in the foundry, where the Ford Facility cast motor blocks and heads.[18] Mr. Richards stated that he was exposed to asbestos as one of his duties was to clean up metal spills in the foundry area where Kaowool was used to cover

[13] (A1025-A1026), Tr. at P. 137, LL. 14-19; P. 138, LL. 1-8; P. 138, LL. 13-20; (A0467), Tr. at P. 333, L. 20 - P. 334, L. 25; (A0468), Tr. at P. 368, L. 20 - P. 369, L. 7.
[14] (A1025), Tr. at P. 137, LL. 4-13.
[15] (A0449), Tr. at P. 94, LL. 13-18; P. 95, L. 4 - P. 96, L. 9; (A0445), at Tr. at P. 19, LL. 4-6. There was no claimed exposure to Copes-Vulcan valves during the period Mr. Richards worked as a material handler or as an operator of lift trucks or front end loaders. (A0449), Tr. at P. 96, L. 6 - P. 97, L. 14; (A0450-A0451), Tr. at P. 101, LL. 8-22; P. 102, LL. 8-19.
[16] (A0449), Tr. at P. 94, LL. 19-23.
[17] (A0451), Tr. at P. 104, L. 3 - P. 105, L. 5.
[18] (A0450), Tr. at P. 101, LL. 8-20; (A0451-A0452), at Tr. at P. 104, L. 23 - P. 105, L. 5; P. 105, L. 8 - P. 106, L. 11.

spills; Mr. Richards claimed no exposure from work on valves during this period.[19]

In April of 1975, Mr. Richards became a millwright apprentice and began to actually work on equipment, such as pumps and valves.[20] He also performed other tasks such as the removal of pipe insulation and tear downs of furnaces.[21] Mr. Richards' work on valves chiefly consisted of replacement of old ones with new valves.[22] As with other types of equipment at the Ford Facility, gaskets were used as sealants on the flange connections between the valves and adjacent pipes or equipment.[23] When replacing valves, Mr. Richards testified that he cleaned old gasket material from flange connections, prior to installing new valves into the applicable system.[24] Mr. Richards also testified about work with packing, an internal sealant in certain types of valves, but noted that such type of work on valves was infrequent.[25]

---

[19] (A0451-A0452), Tr. at P. 105, L. 7 - P. 106, L. 17.
[20] (A0451), Tr. at P. 105, LL. 6-7; (A0453), Tr. at P. 140, L. 23 - P. 141, L. 3; (A0459), Tr. at P. 10, LL. 5-21; (A0469), Tr. at P. 371, LL. 1-14.
[21] (A0463-A0464), Tr. at P. 223, L. 7 - P. 224, L. 10; P. 224, L. 25 - P. 225, L. 16; P. 226, LL. 2-6; P. 229, L. 21 - P. 230, L. 23.
[22] (A0453), Tr. at P. 140, LL. 16-22. Mr. Richards often described the process as "R and R": "Rip out and replace"; (A0454), Tr. at P. 144, LL. 6-10.
[23] (A0453-A0454), Tr. at P. 139, LL. 11-17; P. 140, LL. 12-22; P. 142, L. 23 - P. 143, L. 14; P. 140, LL. 16-22; P. 141, LL. 4-16.
[24] (A0453), Tr. at P. 141, LL. 9-20.
[25] (A0453-A0454), P. 139, L. 8 - P. 140, L. 11; P. 144, LL. 6-15.

II. COPES-VULCAN VALVES

Copes did not manufacture asbestos products.[26] Historically, its product lines included specialty control valves made of various metals that were individually engineered and designed to meet the unique, customized needs and specifications of its customers.[27] Copes valves were not designed, supplied, or required to be insulated.[28]

In the 1970s and several years of the 1980s, Copes valves incorporated packing components manufactured and recommended by third parties depending upon the individual circumstances, specifications, and requirements of customers.[29] Any gaskets used in connection with Copes valves were exterior to the valves themselves and only used on their flanges, (i.e., connecting ends).[30] They were standard sized spiral wound gaskets manufactured by Flexitallic.[31]

Copes introduced non asbestos-containing packing and gaskets in its equipment, including valves.[32] This was based on industry changes and recommendations made by sealant manufacturers given the function of the Copes'

---

[26] (A0474-A0478); (A1061), Tr. at P. 39, LL. 12-25.
[27] (A1042), Tr. at P. 14, LL. 3-20; (A1044-A1045), Tr. at P. 16, L. 21- P. 17, L. 2; (A1046-A1047), Tr. at P. 19, L. 16 - P. 20, L. 6; P. 20, LL. 17-21.
[28] *Id.*
[29] (A0474-A0478); (A1118). (A1058-A1059), Tr. at P. 36, L. 19 - P. 37, L. 7; P. 37, LL. 12-19; (A1061), Tr. at P. 39, LL. 12-25; (A1063), Tr. at P. 41, LL. 4-21; (A1106), Tr. at P. 175, LL. 5-25.
[30] (A1060), Tr. at P. 38, LL. 10-20; (A1063), Tr. at P. 41, LL.13-17.
[31] (A1060), Tr. at P. 38, LL. 10-20.
[32] (A1087), Tr. at P. 99, LL. 17-25.

equipment.[33] During nearly two decades of Mr. Richards' alleged period of exposure to asbestos as a result of work on Copes valves, Copes valves had asbestos-free packing and flange gaskets.[34]

[33] (A1087), Tr. at P. 99, LL. 17-25.

[34] Mr. Richards identified 2005 as the last year that he worked on any Copes valve. (A0469), Tr. at P. 373, LL. 9-21. Thus, from the end of the 1980s, through the 1990s and the 2000s, when Mr. Richards worked at Ford, Copes valves lacked asbestos-containing materials.

III. MR. RICHARDS' ALLEGED EXPOSURE TO ASBESTOS FROM COPES VALVES

Copes was one of several brands of valves that Mr. Richards identified as being present at the Ford Facility while he worked as a cleaner for a couple of months in 1965.[35] Mr. Richards also identified Copes valves as one of several brands of valves that he removed and replaced when he performed millwright work.[36]

Mr. Richards initially was uncertain if he did packing work on Copes valves, but eventually stated that he never repaired the internal components of Copes valves, rather he removed and replaced the entire valve.[37] Thus, his work with sealant materials in association with Copes valves was limited to flange gasket removal and replacement.[38] Mr. Richards lacked knowledge of the origin or age of the flange gaskets that he removed, as he was unaware of the maintenance history of the valves on which he worked.[39] Moreover, any replacement gaskets used in relation to the flange work that Mr. Richards may have performed were not manufactured or supplied by Copes.[40] While Copes sold replacement gaskets for its equipment that it secured from third party suppliers, such gaskets were standard

[35] (A0455), Tr. at P. 147, LL. 7-15.
[36] (A0453), Tr. at P. 141, LL. 22-25.
[37] (A0472), Tr. at P. 626, L. 24 - P. 628, L. 3.
[38] (A0455), Tr. at P. 147, LL. 7-15.
[39] (A0461), Tr. at P. 138, LL. 1-8; (A0467), Tr. at P. 333, LL. 16-19; (A0468), Tr. at P. 368, L. 20 - P. 369, L. 7.
[40] (A0456), Tr. at P. 154, LL. 1-5.

size and thus could be directly obtained from the gasket manufacturer or its suppliers.[41] Significantly, Mr. Richards did not recall working with or around Flexitallic gaskets, the brand which Copes originally supplied as flange gaskets for its valves or which were available for purchase from it as replacement flange gaskets.[42]

Mr. Richards did not know the number or percentage of Copes valves he worked on.[43] He worked on various brands of valves "many" times, but he lacked knowledge of the number of times he worked on a specific brand of valve.[44] Subsequently on re-direct, when Mr. Richards' counsel solicited an estimate of the number of times he worked on specific brands of valves, he rejected counsel's suggestion of at least twenty times, an estimate that he adopted only as to the frequency of his work on specific pumps.[45] Rather, Mr. Richards estimated that his work on any specific valve was at least ten times.[46]

As of the date for the filing of summary judgment motions, Appellants had produced an expert report by Mark Ginsberg, M.D. in which he opined that the "cumulative exposure to asbestos for each company's asbestos product or products was a substantial contributing factor in the development of Mr. Richards'

[41] (A1060), Tr. at P. 38, LL. 10-20.
[42] (A0468), Tr. at P. 369, L. 18 - P. 370, L. 21.
[43] *Id.*
[44] (A0471), Tr. at P. 606, L. 24 - P. 607, L. 7.
[45] *Id.*
[46] *Id.*

disease."[47] Dr. Ginsberg, a surgeon and not an industrial hygienist, did not identify any company by name, or provide an specific exposure to any company's product. At the time he issued his report, none of the thirty named defendants had been dismissed from the case.[48]

[47] (A0082-A0098).
[48] (A0001-A0064), Case docket of *Craig Charles Richards v. Copes-Vulcan, Inc., et al.*, N16C-04-206.

ARGUMENT

I. COPES-VULCAN, INC. WAS ENTITLED TO SUMMARY JUDGMENT AS PLAINTIFFS FAILED TO ESTABLISH THAT EXPOSURE TO ASBESTOS FROM PRODUCTS FOR WHICH IT IS LEGALLY RESPONSIBLE WAS A SUBSTANTIAL FACTOR IN CAUSING MR. RICHARDS' DISEASE

1. QUESTION PRESENTED

Did the Superior Court properly rule that under Ohio law, specific causation must be established in asbestos cases by testimony of percipient witnesses that satisfies the factors outlined in Ohio Rev. Code Ann. § 2307.96 and must also be supported by scientifically reliable expert analysis regarding the role that the products of a specific defendant played in causing the claimed injury?[49]

2. SCOPE OF REVIEW

The Delaware Supreme Court reviews a trial court's ruling on a motion for summary judgment *de novo* on both facts and law in order to determine if the moving party has demonstrated there are no material issues of fact in dispute and it is entitled to judgment as a matter of law. *DaBaldo v. URS Energy & Construction*, 85 A.3d 73, 77 (Del. 2014). If an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find

[49] Appellants raise a second issue with regard to the Superior Court's application of Ohio law with regard to Appellees Ford and Goodyear. The Court concluded that Ginsburg's report was insufficient on the issue of substantial factor and, thus, did not hold additional oral arguments at the conclusion of the Copes argument. As this second issue does not involve Copes, it will not be addressed herein.

in that party's favor, then an award of summary judgment will be affirmed on appeal. *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192 *2 (Table) (Del. 2012).

While a litigant may not attempt to enlarge his own rights to "correct an error or to supplement the [trial court's] decree with respect to a matter not dealt with below," an appellee may support the underlying decree with "any matter appearing in the record." *United States & Interstate Commerce Comm'n v. Am. Railway Express Co., et al.*, 265 U.S. 425, 435 (1924). In so doing, the appellee is merely defining additional grounds why the Delaware Supreme Court pursuant to its *de novo* review should affirm the lower court's judgment.[50] *Smith v. Delaware State University*, 47 A.3d 472, 480 (Del. 2012).

3. MERITS OF ARGUMENT

To survive a motion for summary judgment, under Ohio law a plaintiff must establish that a particular defendant's product was a substantial factor in causing plaintiff's injury. *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477 (Ohio 2018) (hereinafter "*Schwartz*"). Appellants do not dispute that proof of specific causation under the substantial factor test adopted by Ohio is a necessary element

[50] ("[A]n appellee is entitled to argue any theory in support of the judgment in its favor, even if that theory was not relied upon in the decision on appeal." (quotations omitted) (citation omitted)) *Id.*; *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996) ("An appellee . . . may defend the judgment with any argument that is supported by the record, even if" the trial court disregarded that argument).

of their asbestos exposure claims.[51] They also concede that the report of their expert, Dr. Ginsberg, is deficient and contains the type of analysis rejected in *Schwartz*.[52] In arguing that summary judgment was improperly awarded, they assert a novel and unsupported argument that under Ohio law, expert specific causation opinions are not necessary to establish a *prima facie* case to recover for mesothelioma. This argument lacks merit. Moreover, on this record, Copes was entitled to summary judgment as Plaintiffs failed to establish the requisite exposure under Ohio law.

A. Mr. Richards' Testimony Did Not Establish Frequency and Regularity of Exposure to Copes Valves.

Ohio Rev. Code Ann. § 2307.96 defines the burden of proof to establish the element of substantial factor in multi-defendant asbestos cases. Ohio Rev. Code Ann. § 2307.96 (A) specifically provides that a plaintiff alleging exposure and injury as a result of one or more defendants must prove that "the conduct of that particular defendant was a substantial factor in causing the injury on which the cause of action is based."

Ohio clearly identified the types of facts which should be considered in making a determination of substantial factor in asbestos cases:

---

[51] *Appellants' Amended Opening Brief*, PP. 15-16.

[52] Although he indicated that he had read the deposition testimony of Mr. Richards, he undertook no analysis specific to any of the named defendants. In *Schwartz*, such a cumulative exposure analysis was ruled to lack scientific reliability and thus probative value on the issue of substantial factor under Ohio law.

> A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving 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. In 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, all of the following:
>
> (1) The manner in which the plaintiff was exposed to the defendant's [asbestos product];
>
> (2) The proximity of the defendant's [asbestos product] to the plaintiff when the exposure to the defendant's [asbestos product] occurred;
>
> (3) The frequency and length of the plaintiff's exposure to the defendant's [asbestos product];
>
> (4) Any factors that mitigated or enhanced the plaintiff's exposure to [asbestos].[53]

These factors are consistent with those applied in *Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156 (4th Cir. 1986), ("*Lohrmann*"), a case which enunciated a standard by which to determine if a plaintiff's evidence of asbestos exposure to a specific defendant's product was sufficient to submit the question of specific causation to a jury. The plaintiff in *Lohrmann* was a pipefitter who

[53] Ohio Rev. Code Ann. § 2307.96 (B). In enacting this statutory provision, the Ohio Legislature promulgated the substantial factor test and reversed the Ohio Supreme Court's ruling in *Horton v. Harwick Chemical Corp.,* 653 N.E.2d 1196 (Ohio 1995) which rejected a frequency, regularity and proximity test.

worked at a shipyard thirty-nine years and alleged he contracted an asbestos-related disease as the result of exposure to a specific insulation product. The Court ruled that proof of the presence of a company's asbestos-containing product at a worksite was insufficient. The Court concluded that requiring a claimant to prove proximity, regularity, and frequency of exposure to a specific defendant's product would provide an appropriate factual basis for a jury to make objective determinations of specific causation. The *Lohrmann* Court provided a standard under which judges could objectively consider the facts of a case and fulfill its proper role as a gatekeeper in preventing the issue of specific causation from being decided by a jury when exposure evidence was so tenuous that a finding would amount to speculation and conjecture.

In formulating the *Lohrmann* standard, the Court observed the unique feature of asbestos cases: Most plaintiffs sue almost every known manufacturer of the types of asbestos products at issue and those remaining in the case at its later stages are not those necessarily most responsible given the composition of their products or those with which or around which the plaintiff most frequently worked. Rather, the remaining defendants just may be the few companies that sold equipment with asbestos-containing materials that are still financially viable. *Lohrmann*, at 1162. In essence, the *Lohrmann* test establishes a *de minimis* rule in asbestos cases to guard against companies being held responsible based on slight

exposure and causation evidence. *Id.* at 1162-1163.

The General Assembly of Ohio in adopting the *Lohrmann* test was similarly concerned with the unique challenges in asbestos cases in ensuring that decisions on causation are grounded on sufficient and reliable facts and thus embraced the principle that cases involving *de minimis* exposure should not be permitted to proceed to trial. The Legislative Notes state in pertinent part:

> Where specific evidence of frequency of exposure to, or proximity and length of exposure to, a particular defendant's [asbestos product] is lacking, summary judgment is appropriate in tort actions involving [asbestos] because such a plaintiff lacks any evidence of an essential element that is 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…"[54]

In the case at hand, after extensive oral argument with regard to Copes' Motion, the Court below considered the *Lohrmann* factors codified by Ohio. It found Plaintiffs' case lacking.[55] On that basis alone, Copes was properly awarded summary judgment. On this *de novo* review, Copes respectfully submits that the only reasonable conclusion from a fair examination of the record is that Mr. Richards' alleged asbestos exposure as a result of flange gaskets of Copes valves

[54] *See*, Ohio Rev. Code Ann. § 2307.96, Legislative Notes Section 5.
[55] Transcript of Motion Hearing, 7/10/18, at P. 65:4-17 (*Appellants' Amended Opening Brief*, Exhibit A).

was *de minimis*.[56] Absent is any evidence of regular or frequent work with or around Copes valves.

For less than two months as a cleaner, Mr. Richards steamed cleaned various types of industrial equipment, some of which were valves; and of that subset of equipment, Copes was one of several brands. Even if one inferred that some of the valves that Mr. Richards steam cleaned were manufactured by Copes and happened to have some leftover gasket materials on their flanges, there is simply no evidence of regular and frequent exposure to Copes valves specifically. Moreover, cleaning valve flanges with steam and soap is hardly a process from which one could reasonably infer that dry friable gasket materials susceptible of respiration were released.

Similarly, one cannot reasonably infer that Mr. Richards was regularly or frequently exposed to respirable asbestos fibers from work on flange gaskets from Copes valves as a millwright apprentice and millwright. Mr. Richards had various duties when holding those positions and worked with and around numerous types

[56] In light of the issues raised on appeal and the weakness of Appellants' exposure evidence, Copes directly addresses the issue of the lack of evidence of any regular and frequent exposure as a result of Copes valves. However, the issue of Copes' entitlement to summary judgment because of a lack of proof that Mr. Richards removed any gaskets supplied by it was asserted and briefed below. (A0435-A0436). It is uncontested that The Ohio Supreme Court has not ruled on the issue of the bare metal defense, and the court below did not address it in its decision. (*Appellants' Amended Opening Brief*, P. 26). Copes reserves its rights while asserting that in any event, summary judgment was properly granted.

of equipment and insulating materials to which he alleged asbestos exposure. There is no reliable factual basis from which to infer regularity or frequency as Mr. Richards lacked knowledge of the number or percentage of times that he, or those in his proximity, may have removed gaskets from a Copes valve. Moreover, if one considers Mr. Richards' general estimate of less than twenty times, but at least ten times, as to each identified brand of valves over a period spanning from 1975 to 2005, clearly the frequency and regularity factors under Ohio Rev. Code Ann. § 2307.96 are lacking. This is especially so when one considers that asbestos-free gaskets were used on flanges of Copes valves from 1986, nearly two decades of Mr. Richards' alleged exposure as a millwright to Copes valves.

As noted above, Appellants acknowledge that any alleged exposure evidence with regard to Copes valves is weaker than that asserted against others. Copes submits that not only is Mr. Richards' exposure testimony against it less compelling, but also that it falls below Ohio's statutory requirements to survive summary judgment. The Superior Court was not confused as suggested by Appellants. Inherent in the Superior Court's decision was the ruling that Mr. Richards' testimony alone was insufficient to create a material issue of fact of exposure under applicable statutory factors. However, the Court went on to give the non-movants the benefit of considering all of their proffered evidence and found Dr. Ginsberg's cumulative exposure report lacking and incompatible with

the expert analysis pertinent and necessary on the issue of an individual defendant's product constituting a substantial factor in the causation of Mr. Richards' disease. It is highly ironic that Appellants have taken the position that it was improper for the Court to consider their own expert report in determining if they established a *prima facie* case against Copes.

B. Scientifically Reliable Expert Reports Are Necessary To Establish Specific Causation, An Element Of Plaintiffs' Prima Facie Case

(1) Ohio Authorities

Under Ohio law, to establish a *prima facie* case in a toxic tort case, a plaintiff must establish both general and specific causation through expert testimony. *Terry*. This rule is neither novel nor revolutionary. Indeed, it is based on the principle that expert testimony is necessary whenever lay persons are tasked with making factual findings on issues involving scientific concepts and principles. *Watkins v. Affinia Group*, 54 N.E.3d 174, 180 (Ohio Ct. App. 2016) (quoting from *Allen v. Pennsylvania Eng. Corp.*, 102 F.3d 194, 199 (5th Cir. 1996), the Court stated in an asbestos exposure case, "scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiff's burden."). Without question and as argued by Copes in support of its motion for summary judgment,

the same rule applies in Delaware cases.[57]

Issues associated with identifying specific respirable asbestos fibers and causally connecting the inhalation of those fibers with an illness attributable to asbestos is technically complex and outside matters of common knowledge. As the Court observed in *Leng v. Celotex Corporation,* 554 N.E.2d 468, 470 (Ill. App. Ct. 1990), "… asbestos products do not exhibit equal propensities for the release of noxious fibers. The relative toxicity of each product depends on a number of factors, including the physical properties of the product, the form of the product and the amount of dust it generates". *See also, Bartel v. John Crane, Inc.,* 316 F.Supp.2d 603, 606-607 (N.D. Ohio 2004). Opinions of competent experts are thus necessary to give meaning to testimony regarding alleged exposures and in a multi-defendant case to shed light on the nature and degree of any causal relationship between the claimed injuries and exposure to respirable asbestos fibers from a specific defendant's product.

Notwithstanding this bedrock tenet in asbestos cases, and the Ohio Supreme Court's consideration of the sufficiency of a plaintiff's opinion testimony on the issue of substantial factor in *Schwartz,* Appellants strenuously argue that it was improper for the Superior Court to consider Dr. Ginsberg's case report. Such a construction of Ohio law ignores established rules of statutory construction and an

[57] Delaware Rules of Evidence 702 and 703.

entire body of national jurisprudence in toxic tort matters.

(a) Ohio's Statutory Scheme Did Not Eliminate Expert Requirements

Ohio Rev. Code Ann. § 2307.96 is silent on the issue of the requirement of expert reports in asbestos cases. However, a reading of the plain language of the statutory provision and related legislative notes indicates it was only intended to change Ohio law regarding the substantial factor test as articulated by the Ohio Supreme Court in *Horton v. Hartwick*, 653 N.E.2d 1196 (Ohio 1995). If adoption of Ohio Rev. Code Ann. § 2307.96 was intended to also effectuate a sea change in the circumstances under which expert testimony is necessary in asbestos cases and to overturn the Ohio Supreme Court's ruling in *Terry* certainly the statute would have stated that.

Finding no support in the text of the statute for their position, Appellants rely on notes of the Ohio legislature which indicated that it consulted with experts to determine if the *Lohrmann f*actors were relevant to scientific and medical issues relating to causation of asbestos-related diseases. However, it requires a quantum leap in logic to conclude from that legislative consultation that Ohio intended to eliminate case-specific expert opinions on an alleged causal link between an individual plaintiff's disease and exposure from a particular company's asbestos-containing product. As indicated above, *Lohrmann* articulated a standard under which objective facts must be developed regarding the nature of an alleged

exposure. While Ohio Rev. Code Ann. § 2307.96 sets a legal standard of proof which courts are mandated to apply to determine if a case can survive summary judgment or a directed verdict, and which jurors must consider in making factual findings, it did not touch on the essential role that experts must play with regard to complex causation issues which, by their very nature, require explanation and resolution of scientific issues in many disciplines, including industrial hygiene, toxicology, and medicine.

In further support of their argument that the Superior Court erred in considering the sufficiency of their expert's report, Appellants contend that Ohio statutory law requires expert medical reports in cases involving non-malignant and lung cancer cases, but not in mesothelioma cases. An examination of the governing statute and its underlying goals, however, reveals that these contentions also lack merit.

Ohio Rev. Code Ann. § 2307.92 sets "*[m]inimum medical requirements*"[58] when claimants file non-mesothelioma cases. In litigation involving one of the covered diseases, a plaintiff must make an initial showing through a medical practitioner that there is a causal connection between the plaintiff's disease and a history of alleged asbestos exposure through evidence of the necessary latency period and objective indicia of physical impairment. Ohio Rev. Code Ann. §

[58] Ohio Rev. Code Ann. § 2307.96, on the other hand, is substantive and details the elements necessary to establish an asbestos exposure claim under Ohio law.

2307.92 belongs to a set of state statutes designed to prevent the filing of questionable or frivolous asbestos exposure claims and its requirements have been adjudged to be threshold and procedural. *See, Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008). The failure to comply with them only results in an administrative dismissal without prejudice. Ohio Rev. Code Ann. § 2307.93.

Nowhere does the statute address the issue of specific causation and the products of a particular defendant. Notably, Ohio Rev. Code Ann. § 2307.92 (G) provides that a *prima facie* finding under the provision has no binding effect, and "is not conclusive as to the liability of any defendant in the case." In other words, the statute does not set separate criteria for an asbestos plaintiff to prevail at trial or define the expert testimony necessary to prevail on the merits of a case. Rather than setting the substantive elements of an asbestos case, Ohio Rev. Code Ann. § 2307.92 merely sets a minimum evidentiary submission necessary to file and maintain a personal injury action in Ohio for those conditions which are also medically attributable to other substances.

(b) Ohio Case Law Does Not Support Appellants' Position

The Ohio Supreme Court's analysis in *Schwartz* militates against the conclusion that Ohio Rev. Code Ann. § 2307.96 limited *Terry* or marked a complete departure of the practice of state and federal courts in Ohio. Courts in Ohio have considered expert reports in deciding motions for summary judgment.

See, Williams v. Goodyear Tire & Rubber Co., 2017 WL 2366563 (Ohio Ct. App. May 31, 2017) (lower court's summary judgment decision reversed, in part, because it did not consider an expert affidavit which analyzed the issue of substantial factor causation with respect to a defendant's asbestos tape product); *Fisher v. Alliance Machine Company*, 947 N.E.2d 1308 (Ohio Ct. App. 2011) (uncontroverted expert opinion considered in determining if summary judgment was proper on substantial factor requirement); *Schmidt v. A Best Products Company*, 2004 WL 2676319 (Ohio Ct. App. Nov. 22, 2014) (summary judgment properly entered on issue of causation where plaintiff only offered a generic expert affidavit on fiber drift, that was "void of any specifics" as to the plaintiff and his work with specific products or even his worksite); *Lindstrom v. A.C. Products Liability Trust*, 264 F.Supp.2d 583, 588 (N.D. Ohio 2003) (Applying a substantial factor test under maritime law, the Court concluded that a medical expert's "each and every causation" opinion that did "not reference the product of any particular Defendant" was insufficient and that consideration of opinions of that type would render the substantial factor test meaningless).

If the statutory factors of Ohio Rev. Code Ann. § 2307.96 (B) were the exclusive inquiry obviating the need for expert testimony, then the *Schwartz* Court would not have addressed the sufficiency of plaintiff's expert's cumulative exposure analysis. However, in concluding that a directed verdict should have

been entered in favor of the manufacturer, it specifically ruled that an expert opinion which lacks an analysis as to each specific defendant's products and which concludes that "each and every" or cumulative exposure is the cause of a plaintiff's disease fails to meet the substantial factor test under Ohio law.[59]

Schwartz clearly stands as precedent that an asbestos claimant must establish facts which satisfy the exposure factors under *Lohrmann,* plus offer scientifically and reliable expert opinion testimony related to those key factors that provides an exposure analysis with regard to a particular defendant's product, free of surmise and conjecture. Only after producing such evidence, can a plaintiff contend that a material issue of fact exists as to whether exposure from a specific defendant's asbestos-containing products constituted a substantial factor in the plaintiff's claimed injury.[60] The Ohio Supreme Court in *Schwartz* settled the issue of what type of specific causation opinion would pass muster, it did not radically change

[59] The Eighth District Court of Appeals of Ohio in *Schwartz*, although reversed by the Supreme Court as to the sufficiency of a cumulative-exposure opinion, relied on *Caputo* when observing that expert testimony in asbestos cases is necessary on both general and specific causation issues. *See, Schwartz v. Honeywell Internatl., Inc.*, 66 N.E.3d 118, ¶ 44 (Ohio Ct. App. 2016), *rev'd on other grounds*, 102 N.E.3d 477 (Ohio Ct. App. 2018).

[60] Appellants' argument that Judge Wharton from whose decisions this appeal emanates is familiar with Dr. Ginsberg's methodology from the trial of another asbestos matter does not further their case. The issue is whether the claimants in this case sustained their evidentiary burden to proceed to trial under the applicable law. Moreover, if Judge Wharton's awareness of Dr. Ginsberg's general methodology has any bearing, it vitiates Appellant's position given his ruling that Ginsberg's opinion was insufficient as a matter of law.

Ohio law with regard to if and when expert opinion testimony is necessary.

Appellants cite *Alexander v. Honeywell International, Inc.*, 2017 WL 6374062 (N.D. Ohio Dec. 13, 2017) in support of their argument that under Ohio law, at least at the summary judgment stage, courts must only consider factual testimony. However, in that case, the issue of whether a claimant could survive summary judgment in the absence of expert opinion testimony was not even raised. In fact, the court considered both fact witness testimony and the plaintiff's expert opinion in reviewing the motion for summary judgment before it. Appellants' reliance on that precedent is clearly misplaced.

(2) Delaware Courts Require Competent and Reliable Expert Opinions on Causation Regardless of Substantive Law

As in Ohio, it has long been established in Delaware that plaintiffs must prove not only general causation, but also specific causation to prevail on their claims. In *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372, 1377 (Del. 1991), this Court ruled: The plaintiff's expert medical witness must be able to state in terms of reasonable medical probability that there was "a causal relationship between *defendant's* product and the plaintiff's physical injury." *See also, Duncan v. O.A. Newton & Sons,* 2006 WL 2329378 *6 (Del. Super. Ct. July 27, 2006) (summary judgment properly granted against plaintiff who failed to provide medical expert opinion linking her exposure to mold and her physical conditions).

Although Appellants neglected to address it in their brief, Copes also relied on Delaware legal authorities in support of its argument that Ginsberg's opinion fell short of the analysis necessary with regard to the element of specific causation. Delaware courts have repeatedly addressed the issue of the need for expert reports at the summary judgment stage. Consistent with the rulings in an increasing number of jurisdictions, the Superior Court has ruled that when a plaintiff's expert is unable to quantify the putative asbestos exposure and fails to "identify how [Defendant's products] were a substantial factor, themselves, in causing the illness," summary judgment is appropriate.[61]

As argued in Copes' motion for summary judgment and the cases cited therein, "each and every exposure" opinions and "cumulative exposure" opinions, such as that contained in Ginsberg' report, are insufficient and lack probative value in that they lack any scientific analysis as to a causal link between asbestos

[61] *See, In Re: Asbestos Litig., Delbert Olden v. Arvin Meritor,* Del. Super., C.A. No. 14C-04-083, 2014, Wharton, J. (August 14, 2017) Ruling at Tr. PP. 24-25. *See also, In Re: Asbestos Litig., Pinnavaria v. American Honda Motor Corp.,* C.A. No. N12C-04-195, 2012, Parkins, J. (July 18, 2013) Ruling at Tr. PP. 24-26. Central to each of these decisions is the principle that: (1) "ipsi dixit" expert conclusions on the issue of causation are not helpful; and (2) expert reports which fail to evaluate specific exposures and link such exposure to a plaintiffs' disease are insufficient to defeat summary judgment. These basic tenets are followed in other types of cases and are not novel. *See, Lynch v. Athey Prods. Corp.,* 505 A.2d 42, 45 (Del. Super. 1985) (An expert's conclusory allegations without a factual foundation amounts to speculation and conjecture and is inadequate to oppose or support a motion for summary judgment).

exposure attributable to a specific defendant and the claimed injury.[62] A chief criticism of such opinions is that such exposure theories impermissibly lump all manufacturers together, with no regard for the possibility that a specific manufacturer's product may have caused no harm. In essence, it prohibits a defendant from demonstrating that it could not have been responsible for injury to a particular plaintiff, thus making it impossible to separate tortfeasors from innocent actors. *See*, *Krik v. Crane Co.,* 76 F.Supp.3d 747 (D. Ill. Dec. 22, 2014). Allowing testimony of cumulative exposures, without requiring a plaintiff to prove the specific wrongdoings of each defendant, deprives them of this fundamental defense.

C. Applicable Expert Report Deadlines Do Not Excuse Appellants' Deficient Report.

Appellants' contention that the General Scheduling Order (GSO) only requires general causation reports at the summary judgment stage is equally unfounded. While the GSO allows the parties in further preparation for trial an opportunity to depose experts during a window after summary judgment decisions, the order creates no exceptions for the subject of plaintiffs' expert reports which

[62] Such opinions have been disfavored because they cannot withstand scrutiny under *Daubert* and are directly at odds with generally accepted scientific principles. *See,* William L. Anderson, *et al*., *The "Any Exposure" Theory Round II: Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008,* 22 Kan. J.L. & Publ. Pol'y 1 (2012); Mark A. Behrens and William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony,* 37 SW. U.L. Rev. 479 (2008).

are due in advance of the filing date for motions for summary judgment.[63]

Appellants' assertion that they were obligated to only serve general causation reports is also belied by the numerous Delaware rulings that an expert report was deficient and thus summary judgment was proper.[64] Moreover, *In Re Asbestos Litg., Creasy v. Ga. Pac.*, 2017 WL 3722863 (Del. Super. Ct. Aug. 28, 2017), undercuts the argument that Appellants' counsel now make. During summary judgment briefing in that case, a claimant represented by Appellants' firm sought leave to reopen discovery to cure the deficiency of a causation report of Dr. Ginsburg in order to meet Virginia's specific causation standard. That request was denied as untimely. In summary, Appellants clearly find no safe harbor under Delaware procedural rules or precedent for their argument that only general causation reports are due under the GSO prior to the summary judgment deadline.

---

[63] *See*, Order entered in No. 77C-ASB-2 (Del. Super. Dec. 17, 2015) at Transaction ID No. 58312536 at ¶ 8(c) (Exhibit G to *Appellants' Amended Opening Brief*). Indeed, the GSO specifically provides that expert opinion testimony is the proper subject of a motion for summary judgment if it is necessary to establish *prima facie* elements of plaintiff's claims. *Id.*, at ¶ 11.

[64] *See, e.g., In Re Asbestos Litig., Estate of Walter H. Godfrey, Jr. v. Cleaver-Brooks, Inc.*, 2017 WL 3051483 (Del. Super. Ct. July 19, 2017) (equipment manufacturer granted summary judgment on issue of substantial factor when plaintiff's expert report was generic and failed to link plaintiff's disease to a particular defendant); S*ee also,* cases cited in footnote 61 herein.

In summary, Copes' motion for summary judgment was properly granted. If one only considers Mr. Richards' deposition testimony, as urged, Mr. Richards' exposure from flange gaskets from Copes valves was *de minimis*, at best, when one considers the factors required under Ohio law. Moreover, any alleged exposure as a result of Copes valves must be considered in the context of the record of Mr. Richards' alleged other occupational and non-occupational exposures spanning decades. As outlined above, Appellants' various arguments as to why a specific causation opinion was unnecessary are unmeritorious. Inasmuch as Appellants have conceded that Ginsberg's cumulative exposure report fails to provide the required defendant specific analysis, the judgment in favor of Copes should be affirmed.

II. THE SUPERIOR COURT'S DENIAL OF APPELLANTS' REQUEST FOR RELIEF FROM JUDGMENT IN ORDER TO SERVE A SUPPLEMENTAL EXPERT REPORT WAS PROPER

1. QUESTION PRESENTED

Did the Superior Court properly deny Appellants' motion for leave to amend their expert report when it was filed only after the Superior Court granted summary judgment?

2. SCOPE OF REVIEW

The applicable standard of review of the Superior Court's denial of Appellants' post-dismissal motion for leave to amend their expert report is whether it abused its discretion. *Moses v. Drake*, 109 A.3d 562, 565-566 (Del. 2015).

3. MERITS OF ARGUMENT

The Superior Court did not abuse its discretion in denying Appellants' motion for leave to serve an amended expert report. No good cause has been demonstrated for Appellants' failure to earlier seek leave and Copes would be severely prejudiced if the judgment which it was awarded based on the merits is overturned. Whether one applies the line of cases under Del. Super. Ct. Civil R. 60(b) or *Drejka v. Hitchens Tire Service, Inc.*, 15 A.3d 1221 (Del. 2010) ("*Drejka*"), basic principles of fairness dictate that Appellants should not be allowed to restack the evidentiary deck of cards in an effort to now cure their case deficiencies.

When Appellants filed their belated request, they did not invoke *Drejka* and treated it as a motion to revise the case schedule.[65] The Superior Court properly treated the request as a Rule 60(b) motion because essentially the relief sought was from its dismissal order after an adjudication on the merits. Appellants chiefly argued that there was insufficient time between the issuance of the *Schwartz* decision and the expert report deadline for them to obtain an amended report. Key to the court's ruling that Appellants had failed to establish excusable neglect and rather had demonstrated a lack of diligence was the fact that they had actually addressed *Schwartz* in their opposition in May of 2018, but took no action until summary judgment was granted to Copes months later.[66] Based on lack of good cause, Appellants' request was properly denied.

This case is analogous to the recent case of *Moses v. Drake*, 109 A.3d 562 (Del. 2015). In *Mose*s, the defendant filed a motion to dismiss based on the insufficiency of the plaintiff's medical expert report. In response, the plaintiff contended that the report was sufficient and submitted a "clarifying statement" by his expert. The trial court observed that the plaintiff was precluded from offering supplemental expert testimony, awarded summary judgment, and later denied

[65] (A1394-A1400). Plaintiffs' Motion for Leave to Supplement Expert Report and/or For Reargument.

[66] Order Upon Plaintiffs' Motion for Leave to Supplement Expert Report Due To Changes in Substantive Law, and/or Reargument, August 8, 2018 (Exhibit E to *Appellants' Amended Opening Brief*) at ¶¶ 7-8.

plaintiff's motion to reargue. In affirming the lower court's order, this Court observed that: "Trial courts are not required to allow a plaintiff to supplement a previously submitted expert report after the expert report cutoff has expired if there is no good cause to permit the untimely filing." *Id*. at p. 566. Good cause only exists 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."[67] *Id.* Applying the reasoning of *Moses* to this case, Appellants clearly are not entitled to the extraordinary relief they seek. Good cause has not been established which would justify them from being spared from the consequences of their counsel's legal judgment in deciding to go forward with the cumulative exposure report in the face of adverse legal authorities.

Appellants now seek refuge in *Drejka* and its progeny, although that was not the basis of their request below and the circumstances presented in that line of cases are distinguishable. In *Drejka*, *Christian v. Counseling Resource Associates, Inc*., 60 A.3d 1083 (Del. 2013) ("*Christian*"), and *Hill v. DuShuttle*, 58 A.3d 403 (Del. 2013) ("*Hill*"), the issue presented was whether failure to adhere to discovery

[67] "Properly construed 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts." *Rogers v. Bushey*, 2018 WL 818374, at *7 (Del. Super. Ct. Feb.7, 2018) (internal quotes omitted) (citing *Candlewood Timber Grp. LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *4 (Del. Super. Ct. Jan. 18, 2006)).

deadlines justified the exclusion of plaintiffs' expert reports which ultimately proved fatal to their claims.[68] In none of those cases, did the party knowingly submit his case for a determination on its merits pursuant to summary judgment procedure based on its counsel's interpretation of substantive law, ultimately adjudged to be erroneous. Unlike, in *Drejka* and *Christian*, this case does not present the issue of the propriety of a discovery sanction due to a violation of case deadlines. Rather, this case presents the issue of whether a court has abused its discretion because it denied a party the unfair advantage of having a Mulligan after the parties went to the time and expense of briefing the merits of their respective positions and judicial resources were expended in reviewing the issues presented, holding oral argument, and the issuance of a decision.

Even if this Court applies *Drejka*, Copes submits that the Superior Court did not abuse its discretion in denying Appellants' belated request. While there is no evidence of personal responsibility on the part of the Richards family, the other factors to be considered under *Drejka* heavily weigh against reversal. Foremost, prejudice to Copes will be severe. It complied with the applicable schedule and

[68] *See, Drejka* (opinion testimony of treating physician excluded because of failure to adhere to scheduling order where its scientific reliability was not questioned); *Christian* (expert opinion excluded notwithstanding change of counsel, the completion of expert depositions pursuant to the parties' informal agreement, and the trial court's earlier refusal for six months to hold a scheduling conference despite new counsel's request; and *Hill* (plaintiff violated scheduling order by failing to produce expert report).

rules and incurred legal expenses in order to present its case pursuant to established summary judgment procedure. Copes would be unfairly denied the finality of its judgment if the dismissal order is vacated.

As outlined in the court's decision below, over one hundred and fifty days elapsed between the issuance of the *Schwartz* decision and oral argument on Copes' motion for summary judgment. Even if one accepts the incredible argument that based on ignorance of the law, Appellants can be excused for the period between the issuance of *Schwartz* and the filing of Copes' motion, they cannot account for their subsequent inaction for over eighty days except for a conscious decision on the part of their attorneys, their duly appointed agents, to go forward with the summary judgment process and test their interpretation of the law. Notwithstanding counsel's knowledge of repeated litigation regarding the sufficiency of expert causation reports in asbestos cases,[69] they elected to proceed because of a tactical decision not to undercut the strength of their argument that an expert report was unnecessary under Ohio law.[70] The conscious decision not to

[69] *See, e.g., In Re Asbestos Litg. Creasy v. Ga. Pac.,* 2017 WL 3722863 (Del. Super. Ct. Aug. 28, 2017).

[70] *See, Appellants' Amended Opening Brief*, P. 24. The half-hearted argument that Appellants' counsel's inaction was justified because motions for additional time to serve expert reports in other asbestos cases have been denied is problematic. The other instances point either to frequent issues with the substance of the reports of their retained experts and/or establish knowledge of the need for same prior to summary judgment briefing. It is axiomatic that the specter of a denial of a motion does not justify the failure to file it, obtain a decision on the unique circumstances

seek relief, even in the alternative, to maintain Appellants' litigation position weighs heavily against the conclusion that the Superior Court abused its discretion.

The other *Drejka* factors militate against reversal. Given the procedural posture of the case, mere discovery sanctions would have been inappropriate. Appellants did not seek relief before the filing of summary judgment motions or pursuant to Del. Super. Ct. Civil R. 56(f) after the motions were filed. To suggest that a standard taxation of costs as discovery sanctions would have been suitable under the circumstances truly misses the point and ignores the harm caused not only to the parties in this case, but also to the integrity of the asbestos litigation management system in this state. In asbestos cases, it is even more essential that the litigants comply with deadlines and disclosure requirements, because of the high number of cases and the numerous parties involved. *See, In Re Asbestos Litigation, English Trial Group*, 1994 WL 721771, at *2 (Del. Super. Ct. Sept. 19, 1994); *In Re Asbestos Litg., Ernest Vala Ltd.*, 2012 WL 2389898 (Del. Super. Ct. June 22, 2012) (the managing court ruled that "[t]he asbestos docket is large and requires adherence to the MTSO").

Finally, as outlined in the first section of this brief, Appellants' claims against Copes lack merit. Putting the bare metal defense and expert opinion issues aside, any asbestos exposure arising from the removal of flange gaskets from

---

of the case, and properly preserve the issue for appeal.

Copes valves was *de minimis* and thus all claims against it were properly dismissed as a matter of law. Moreover, Copes submits that the proposed supplemental Ginsberg report is equally deficient and fails to provide the causation analysis required by *Schwartz*.

In closing, each litigant is entitled to fair and equal treatment and should be able to expect that case deadlines will be honored so as to prevent an opposing party from gaining an undue advantage. Basic fairness and equitable principles militate against the relief sought in this appeal.

CONCLUSION

Appellants chose to bring their case in Delaware and they were aware from the filing of the complaint that Ohio substantive law would apply. When confronted with Copes-Vulcan's Inc.'s *Motion for Summary Judgment*, they, apparently for the first time, familiarized themselves with the Ohio requirements and argued that even under Ohio law their evidence should suffice. They were wrong and judgment was entered against them and in favor of Copes-Vulcan, Inc. Appellants then asked for a "do-over", opening the judgment and permitting them to get another expert report. This was denied. This ruling was unquestionably within the discretion of the trial judge, particularly in the context of Delaware asbestos litigation where the smooth progress of the litigation is based on ready lawyers and finality of rulings. For these reasons, the judgment of the Superior Court granting judgment to Copes-Vulcan, Inc. and denying Appellants' motion for relief from judgment should be affirmed.

[SIGNATURE BLOCK ON NEXT PAGE]

MARON MARVEL BRADLEY
ANDERSON & TARDY LLC

/s/ Paul A. Bradley

Paul A. Bradley (DE No. 2156)
Antoinette D. Hubbard (DE No. 2308)
1201 N. Market Street, Suite 900
Wilmington, DE 19899
Telephone: (302) 425-5177
Facsimile: (302) 425-0180
pab@maronmarvel.com
adh@maronmarvel.com
Attorneys for Appellee/Defendant Below
Copes-Vulcan, Inc.