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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION CRAIG CHARLES RICHARDS, and GLORIA RICHARDS, his wife, 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 Court Below: The Superior Court of The State of Delaware C.A. No. N16C-04-206 (ASB)

APPELLEE FORD MOTOR COMPANY'S AMENDED ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page(s)

TABLE OF CONTENTS—Continued

Page(s)

TABLE OF CITATIONS

Page(s)

CASES:

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

STATUTES:

LEGISLATIVE MATERIAL:

RULES:

TABLE OF CITATIONS—Continued

Page(s)

OTHER AUTHORITY:

NATURE OF PROCEEDINGS

This Court should dismiss this appeal as untimely. If it somehow concludes the appeal was timely filed, it should affirm the Superior Court's grant of summary judgment to Ford Motor Company ("Ford") and denial of Appellants' motion for reargument. Craig Richards, a lifelong Ohio resident, developed mesothelioma in 2016. Invoking Ohio law, he and his wife Gloria Richards ("Appellants") sued Ford—along with 29 other defendants—in Superior Court for manufacturing asbestos-containing products that allegedly caused his disease. To show that products manufactured by Ford substantially caused Richards's mesothelioma, Appellants offered an expert report relying exclusively on the "cumulative exposure" theory. After Appellants produced that report, the Ohio Supreme Court categorically rejected the "cumulative exposure" theory of causation in *Schwartz v. Honeywell International, Inc.*, 102 N.E.3d 477 (Ohio 2018).

Despite *Schwartz* rendering their causation expert's report obsolete, Appellants chose not to supplement it before the deadline for expert reports passed. And even after the expert deadline had expired, Appellants never requested an extension of discovery or continuance for the trial date. Ford moved for summary judgment, citing *Schwartz* and pointing to Appellants' lack of expert causation evidence. The Superior Court granted the motion on the basis that Appellants lacked sufficient causation evidence under Ohio law to make out a *prima facie* case

against Ford. Finding "no just cause for delay," the court issued a partial final judgment in favor of Ford under Delaware Superior Court Rule 54(b).

After entry of the partial final judgment for Ford, Appellants moved to set aside the Superior Court's summary judgment order and for leave to belatedly supplement their expert report. Over 150 days had passed between the *Schwartz* decision and the summary judgment hearing, and Appellants offered no reason why they could not have moved for leave to supplement their expert report during that time. The Superior Court therefore properly denied that motion, ruling that Appellants had failed to show "good cause" or "excusable neglect" for why they waited until *after* the court's summary judgment ruling to seek leave to update their expert reports.

Because the Superior Court entered its Rule 54(b) final judgment for Ford on July 10, 2018 and subsequently denied Appellants' motion for post-judgment relief on August 8, 2018, Appellants failed to timely file this appeal within the 30 days prescribed in Delaware Supreme Court Rule 6(a)(1). The appeal therefore must be dismissed.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly followed established Ohio law, which requires plaintiffs in cases involving toxic substances to establish causation through "the testimony of a medical expert." *Terry v. Caputo*, 875 N.E.2d 72, 77 (Ohio 2007). Because Appellants lacked such expert testimony, leaving them with only Richards's own testimony, they failed to "establish a prima facie case" against Ford. *Id.* at 79. Ford was therefore entitled to summary judgment.

Appellants argue that Ohio Revised Code Section 2307.96's "substantial factor" test eliminates the causation expert requirement for asbestos cases and allows causation to be shown through lay testimony alone. Appellants' Br. 15-16. That is incorrect. Section 2307.96 merely restricts the "scientifically valid" factors juries and causation experts must look to when determining whether an individual defendant substantially caused a plaintiff's asbestos-related disease. *See* Section 5, 150 Ohio Laws, Part III, at 3993; *see also* Appellants' Br. 15. How to weigh and compare those factors is not a "matter of common knowledge," which means that "expert testimony" was required to create a *prima facie* case of Ford's liability for causing Richards's mesothelioma. *Darnell v. Eastman*, 261 N.E.2d 114, 116 (Ohio 1970); *see also Money v. Manville Corp. Asbestos Disease Comp. Tr. Fund*, 596 A.2d 1372, 1376 (Del. 1991); *Watkins v. Affinia Grp.*, 54 N.E.3d 174, 180 (Ohio App. Ct. 2016) (applying the causation expert requirement in an asbestos case).

The need for expert testimony here is particularly acute because the record lacks any estimate of Richards's alleged exposure to asbestos through the Ford products or any comparison to the massive, decades-long exposure Richards sustained from other sources. As a result, "there is simply insufficient evidence" to infer that the Ford products at issue substantially caused Richards's mesothelioma. *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011).

2. Denied. The Superior Court did not abuse its discretion when it denied Appellants' motion for post-judgment relief. Appellants sought leave to supplement their expert report *after* the Superior Court issued its summary judgment ruling based on the deficiencies in their causation evidence. The Superior Court acted well within its discretion in denying reargument based on Appellants' lack of diligence.

Appellants' primary response is to claim that the Superior Court effectively issued a sanctions ruling dismissing their case and thus should have evaluated the factors for sanctions articulated in *Drejka v. Hitchens Tire Service Inc.*, 15 A.3d 1221 (Del. 2010). Appellants' Br. 23-27. That, again, is incorrect. *Drejka* applies to situations where default judgments are awarded "as the sanction for discovery violations." *Drejka*, 15 A.3d at 1222. By contrast, the Superior Court granted Ford's motion for summary judgment on the merits, after full briefing and well

beyond the close of discovery. *See* Appellants' Br. Ex. A, at 65. *Drejka* is therefore inapplicable.

3. Because Richards failed to file a timely notice of appeal, this Court lacks jurisdiction as to Ford. The Superior Court's entry of final judgment for Ford on July 10, 2018 triggered a 30-day appeal deadline. *See Foley v. Washington Grp. Int'l, Inc.*, 984 A.2d 123, 2009 WL 3656798, at *1 (Del. Nov. 4, 2009) (Table). That 30-day deadline was then reset on August 8, 2018, when the Superior Court denied Appellants' motion for "reargument." *See Tomasetti v. Wilmington Sav. Fund Soc'y, FSB*, 672 A.2d 61, 64 (Del. 1996). By filing their notice of appeal on October 24, 2018, *see* B24, Appellants "fail[ed] to perfect a timely appeal," *Giordano v. Marta*, 723 A.2d 833, 837 (Del. 1998). The portion of the appeal relating to Ford, therefore, "must be dismissed." *Riggs v. Riggs*, 539 A.2d 163, 164 (Del. 1988) (capitalization removed).

FORD'S COUNTER STATEMENT OF FACTS

A. Richards's Asbestos Exposures.

Richards, an Ohio resident, asserts that he was exposed to large quantities of asbestos dust from dozens of different sources over the course of many decades. According to Richards, the lion's share of his exposure came from his decades-long career working in automotive manufacturing facilities. This exposure is not the basis for his claim against Ford.[1]

From 1965 to 1966, Richards worked in a manufacturing plant in Ohio. A0067, A0829. He testified that this job involved steam cleaning pumps, gaskets, and other automotive parts in a small, windowless room without a functioning ventilation system on a daily basis, and that during these cleanings, he breathed through a "cloud" of steam and asbestos "particles" that was so thick he "could barely see." A0829, B12.

Richards also testified that from 1968 through 1975, he was regularly exposed to similar levels of asbestos through his work as a front end loader and lift truck operator. *See* A0068, A0836. He cleaned and shoveled castings that

[1] Although Richards was employed by Ford at various times, *see* A0067-68, Appellants "concede[d]" before the Superior Court "that Mr. Richards' exposure as an employee of Ford is barred by Ohio's Worker Compensation law." A0792, *see also* A0100. Appellants have not appealed the Superior Court's summary judgment ruling on this issue. For the purposes of this appeal, Ford's products are alleged to have caused Richards's mesothelioma solely from exposure he sustained while working on cars as a hobby and as a part-time gas station attendant in the late 1960s and early 1970s. *See* A0793-0803.

inadvertently fell onto the factory floor using cleaning material that contained asbestos, which he would inhale as he shoveled and maintained the spills. A0831-0832.

Richards continued to work in the automobile factory for the next three decades: as a millwright apprentice from 1975 to 1978, a millwright from 1978 through 2003, and a millwright journeyman from 2003 through 2007. During his apprenticeship, Richards was stationed in "the cleaning room," where he testified that he breathed in asbestos dust as he routinely "repair[ed] and install[ed]" machinery. B18-21. He further testified that as an apprentice, he removed and installed "[m]any" new sets of insulated pipes, causing him to inhale asbestos dust throughout the day. B19, B22. After Richards graduated from the apprentice program in 1978, "the type of work" he did remained the same. B23. As a millwright, he continued to handle "pumps, valves, [and] refractory material" on a daily basis and inhale asbestos dust as he "grind[ed] off the gasket material." A0836. And, as a journeyman millwright—where Richards ended his career—his main responsibility was to "tear[] out pumps [and] piping" as part of "a total demolition of the [factory]." A0872. Like Richards's other jobs, this process exposed him to large amounts of asbestos dust. *Id.*

Richards also inhaled substantial amounts of asbestos dust when renovating and roofing two separate houses. In 1975, he re-roofed his family's home and then

replaced, sanded, and put in new drywall and sheetrock in the house's nine separate rooms—a process which involves "a lot of" asbestos dust. B02. Richards performed similar repairs on his lake house in 1969. B03.

Finally, Richards refurbished cars as a hobby and worked part-time in gas stations during high school and from 1969-1972. B14-16; A0068. During this part-time employment, Richards repaired and installed brakes, clutches, and gaskets from a number of automobile companies. B05, B08-10. Although Richards stated he was exposed to asbestos dust from Ford products "many times" as a hobbyist and part-time gas station attendant, B04-08, he has never roughly approximated, or offered an absolute minimum, for the actual number of times he worked with these types of Ford products. *See, e.g.*, A0794, *see also* A1541. Nor did he compare those exposures to the other years of extensive exposure that he testified to having experienced.

B. Richards Files This Action.

After being diagnosed with mesothelioma, Richards and his wife filed a complaint in Delaware Superior Court. A0065-81. The complaint named thirty defendants, including Ford. A0065-66, A0069-72. Recognizing that Richards was a lifelong Ohio resident, except for his military service, the Complaint was "predicated upon the substantive law of the State of Ohio." A0074. Appellants alleged that Richards developed mesothelioma because he was "wrongfully

exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers . . . he was working with and/or around[,] which were manufactured, sold [and] distributed by the Defendants." A0072.

The complaint asserted four claims: (i) negligence; (ii) willful and wanton conduct; (iii) strict product liability; and (iv) loss of consortium for Richards's wife. *See* A0074-81. For each of the first three claims, causation is a necessary element. *See* A0792.[2] Loss of consortium is a derivative claim, where all elements of the underlying cause of action must be proven before the claim can be stated. A0109 (citing *Lawyers Coop. Publ'g Co. v. Muething*, 603 N.E.2d 969, 974-75 (Ohio 1992)).

C. Richards's Causation Expert Relies Exclusively On The "Cumulative Exposure" Theory That The Ohio Supreme Court Rejected In *Schwartz*.

To establish that each Defendant separately caused his asbestos-related injuries, Richards offered an expert report from Dr. Mark Ginsburg. A0082-0097. The report, which was submitted on May 16, 2017, relied entirely on the theory of "cumulative exposure." A0082, A0089. That theory "examines defendants in the aggregate: it says that because the cumulative dose was responsible [for causing mesothelioma], any defendant that contributed to that cumulative dose was a substantial factor." *Schwartz*, 102 N.E.3d at 481. The theory thus "postulates that

[2] Before the Superior Court, the parties therefore agreed that Appellants' claims rise and fall "on issues of causation." A0792.

every nonminimal exposure to asbestos is a substantial factor in causing mesothelioma." *Id.* at 478.

Dr. Ginsburg's report, because it relied exclusively on a cumulative exposure theory, did not conduct a defendant-by-defendant causation analysis or explain how the Ford products Richards was exposed to through working on cars as a hobby or his part-time work as a gas station attendant were a substantial cause of Richards's mesothelioma. *See* A0082-89.

In February 2018, the Ohio Supreme Court categorically rejected the cumulative exposure theory in *Schwartz*. 102 N.E.3d 477 (2018). It held that the theory is "incompatible" with Ohio Revised Code Section 2307.96, which requires plaintiffs in asbestos cases to show—"based on the manner, proximity, frequency, and length of exposure—that a *particular* defendant's conduct was a substantial factor in causing the injury." *Id.* at 481, 483 (emphasis added). The Court reasoned that considering causation in the aggregate ignores the statutory requirement to conduct an "individualized determination for each defendant." *Id.* at 481. It also faulted the theory for calling any nonminimal exposure a substantial factor, explaining that such a view is "irreconcilable with the rule requiring at least *some* quantification or means of assessing the amount, duration, and frequency of exposure." *Id.* at 482 (quoting *In re New York City Asbestos Litig. (Juni)*, 148 A.D.3d 233, 239 (N.Y. App. Div. 2017)). *Schwartz* unequivocally held the

cumulative exposure theory "is insufficient" to demonstrate the defendant-specific "substantial factor" causation required by Ohio law. *Id.* at 483.

At the time *Schwartz* issued and rendered Appellants' expert report obsolete, Appellants had 22 days in which they could have filed an updated report *without* needing to seek leave of the Superior Court to do so. Appellants' Br. Ex. E, ¶ 7. They chose not to. Additionally, although requests for extensions are commonly made and typically agreed to, Appellants never requested one from Defendants for their expert deadline or asked that the case be moved to a new trial setting.

D. The Superior Court Grants Summary Judgment To Ford And Enters Final Judgment Under Delaware Superior Court Rule 54(b).

In April of 2018, Ford, along with Defendants Copes-Vulcan, Inc. ("Copes-Vulcan") and The Goodyear Tire & Rubber Company ("Goodyear"), moved for summary judgment. A0099-109, A0427-42, A0664-78. Ford argued that under Ohio law, "[p]laintiffs must provide expert testimony sufficient to prove general and specific causation." A0101 (citing *Terry*, 875 N.E.2d at 77). Appellants' expert reports were deficient—and therefore summary judgment was appropriate—because they were "based on the cumulative exposure theory, which has been rejected under Ohio law." *Id.* (citing *Schwartz*, 102 N.E.3d 477). Rather than moving for leave to supplement their expert reports, Appellants responded that Ohio law does not require plaintiffs in asbestos cases to put forth a causation expert. In Richards's view, his own lay testimony was an "independent . . . means

of proving causation," and his "exposure to Ford's asbestos-containing products" was substantial enough that no expert report was needed. A0792, A809.

The Superior Court sided with Ford. At the summary judgment hearing, the court ruled that expert testimony is required to place Section 2307.96's elements "into an appropriate context." *See* Appellants' Br. Ex. A, at 65. The court agreed with Defendants that "[i]t's long established in . . . Ohio, when you have a toxic exposure case, you are going to need expert opinion." *Id.* at 60. Because the expert testimony that Richards provided was "[in]consistent with what *Schwartz* says Ohio law requires," the Superior Court granted summary judgment to Defendants. *Id.* at 65.

On July 10, 2018, the Superior Court issued orders granting summary judgment to Ford, Copes-Vulcan, and Goodyear. *See* Appellants' Br. Exs. B, C, D. When granting summary judgment to Ford, the Superior Court ruled there was "no just cause for delay" and entered the order "as a final judgment pursuant to Superior Court Civil Rule 54(b)." Appellants' Br. Ex. C.

E. <u>The Superior Court Denies Appellants' Motion For Reargument.</u>

Appellants filed a post-judgment motion to belatedly supplement Dr. Ginsburg's expert report and hold "reargument of the summary judgment granted in favor of Copes-Vulcan, Fairbanks, Ford, and Goodyear." A1394, A1399. They argued there was "good cause" to allow expert testimony to be presented after the

scheduling deadline for three reasons: (i) Richards submitted his expert report "eight months before the decision in Schwartz was issued;" (ii) "there were only 22 days between the issuance" of *Schwartz* and Appellants' due date for the expert report; and (iii) "the substantive law of Ohio" had not been ordered controlling until after Appellants' expert reports were due. A1395-97.[3]

On August 8, 2018, the Superior Court denied Richards's motion for post-judgment relief. Appellants' Br. Ex. E. The Superior Court analyzed Richards's motion under two distinct standards. First, it invoked the "good cause" standard that applies to requests for modification of the Master Trial Scheduling Order governing asbestos litigation. *Id.* ¶ 5. Second, it looked to Superior Court Civil Rule 60(b)'s "excusable neglect" standard which provides "relief from a judgment or order" under "certain limited circumstances." *Id.* ¶ 6.

The Superior Court then rejected all three of Richards's arguments. *Id.* ¶¶ 7-8. It highlighted that even though there were "22 days between the issuance of *Schwartz* and the deadline for the submission of expert reports," it took Appellants only eight days to produce Dr. Ginsburg's supplemental report after the Superior Court's summary judgment order. *Id.* ¶ 7. So "[o]bviously," Appellants "could have produced a supplemental report" within the Superior Court's deadlines, but simply chose not to. *Id.* Similarly, the court noted that Appellants had "105 days

[3] The Appellants declined to raise *any* of these arguments on appeal. *See* Appellants' Br. 21-23.

between the publication of *Schwartz*" and the due date for their summary judgment opposition brief. *Id.* ¶ 8. But "despite addressing *Schwartz*" in their briefing, Appellants again chose not to seek leave to update their reports. *Id*. In the end, the Superior Court denied Appellants' motion because they "fail[ed] to seek leave to supplement their expert report until *after* summary judgment was entered against them." *Id*. (emphasis added).

F. Appellants Notice Their Appeal.

Seventy-seven days after the Superior Court denied Appellants' motion for post-judgment relief, Appellants filed a notice of appeal. Their October 24, 2018 notice of appeal seeks to challenge both the "Orders granting the Motions for Summary Judgment," and the "Order denying Plaintiffs' Motion for Leave" to supplement the expert report "and/or for Reargument." B25.

ARGUMENT

I. APPELLANTS' APPEAL IS UNTIMELY AS TO FORD.

A. Question Presented.

Whether Appellants' failure to timely appeal the Superior Court's final judgment in favor of Ford creates a jurisdictional defect that requires this Court to dismiss the appeal as to Ford.

B. Scope of Review.

Before "address[ing] the merits," this Court "must determine whether jurisdiction has been properly conferred upon" it. *Branch Banking & Tr. Co. v. Eid.*, 114 A.3d 955, 957 (Del. 2015). If the Court "is without jurisdiction," the appeal "must be dismissed." *Riggs*, 539 A.2d at 164 (capitalization removed).

C. Merits of Argument.

Because Appellants failed to timely appeal the Superior Court's final judgment in favor of Ford, that portion of the appeal must be dismissed. A party has 30 days from the entry of a final judgment to file an appeal in this Court. Del. Supr. Ct. R. 6(a)(1). That 30-day clock began to run on July 10, 2018, when the Superior Court issued a final judgment in favor of Ford pursuant to Rule 54(b). *See Foley*, 2009 WL 3656798, at *1. Rule 54(b) judgments are an exception to the ordinary rule that "[w]hen a civil action involves multiple claims and multiple parties, a judgment regarding any claim or any party does not become final until the entry of the last judgment that resolves all claims as to all parties." *Plummer v.*

R.T. Vanderbilt Co., 49 A.3d 1163, 1167 (Del. 2012) (quoting *Harrison v. Ramunno*, 730 A.2d 653, 653-54 (Del. 1999)). Under Rule 54(b), "the [Superior] Court may direct the entry of a final judgment upon one or more but fewer than all of the claims or parties," if there is "an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Del. Super. Ct. R. 54(b). Nothing more than those two express determinations is required: "If the language of the judgment evidences the judge's intention that the judgment be final, then the judgment is final." *Plummer*, 49 A.3d at 1167; *see also Hercules Inc. v. Leu Tr. & Banking (Bahamas) Ltd.*, 611 A.2d 476, 485 n.12 (Del. 1992) ("entry of judgment" under Rule 54(b) requires nothing more than "an 'express determination that there is no just reason for delay'" and "an express direction for the entry of judgment" (emphases omitted)).

The Superior Court's July 10, 2018 ruling, which was docketed on July 11, 2018, expressly determined that there was "no just cause for delay," and that its summary judgment ruling for Ford was "a final judgment pursuant to Superior Court Rule 54(b)." Appellants' Br. Ex. C. That satisfies Rule 54(b)'s only two requirements, *see, e.g.*, *Hercules Inc.*, 611 A.2d at 485 n.12, putting Appellants "on notice that the time for the appeal would begin to run as soon as the . . . Rule 54(b) final judgment was docketed," *Giordano*, 723 A.2d at 836.

At the latest, Appellants' appeal deadline expired 30 days after the Superior Court denied their post-judgment motion for reargument on August 8, 2018.[4] *See Tomasetti*, 672 A.2d at 64 ("[T]he timely filing of a Motion for a New Trial or Motion for Reargument . . . tolls the finality of a judgment and also, therefore, the time period for filing an appeal to this Court." (footnote omitted) (citing *Katcher v. Martin*, 597 A.2d 352, 353 (Del. 1991)); *Katcher*, 597 A.2d at 353 (explaining that the "entire period to appeal from the judgment in a civil case begins to run anew" when the Superior Court dockets its denial of a motion for a new trial or reargument (emphasis omitted)). Accordingly, Appellants had until September 7, 2018—30 days from that date—to appeal the Superior Court's final judgment in favor of Ford. But Appellants did not notice their appeal until October 24, 2018—over a month after their 30-day deadline expired.

Because Appellants failed to timely appeal the final judgment in favor of Ford, this Court lacks jurisdiction over that portion of the case. "When a party

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[4] Appellants' motion did not specify under which Superior Court Rule they sought post-judgment relief. The Superior Court, however, treated their motion as filed under Rule 60(b). Appellants' Br. Ex. E. Appellants have not challenged that determination on appeal. Motions brought under Rule 60(b) do "not affect the finality of a judgment or suspend its operation." Del. Super. Ct. R. 60(b). Therefore, under that rule, Plaintiffs' 30-day appeal clock would have expired on August 10, 2018. Even if Plaintiffs' post-judgment motion did toll the time to file an appeal until 30 days after the motion was resolved, which is the case for motions brought under Rule 59(d), Plaintiffs' appeal is still untimely. Finally, Ford notes the motion would have been untimely if filed under Rule 59(e), which has a five-day filing deadline. *See* Del. Super. Ct. R. 59(e).

fails to perfect a timely appeal, 'a jurisdictional defect is created . . . .'" *Giordano*, 723 A.2d at 837 (quoting *Riggs*, 539 A.2d at 164). That defect may be excused if, and only if, the "appellant can demonstrate that the failure to file a timely notice of appeal is attributable to court-related personnel." *Hooper v. Olmstead*, 191 A.3d 1109, 2018 WL 3492040, at *1 (Del. 2018) (Table) (citing *Bey v. State*, 402 A.2d 362, 363 (Del. 1979)). Appellants here have not demonstrated, or even suggested, that "court-related personnel" were at fault for their procedural blunder. *Id.* "This appeal therefore must be dismissed." *Id*.

The Rule 54(b) analysis operates the same way in complex asbestos cases. In *Foley*, for example, the plaintiff "brought an asbestos-related personal injury complaint in the Superior Court [and] named dozens of defendants in the complaint." 2009 WL 3656798, at *1. The superior court granted summary judgment to two of those defendants and on July 24, 2009, entered that ruling "as a final judgment pursuant to Superior Court Civil Rule 54(b)." *Id.* On August 4, 2009, the Superior Court then "entered a 'final order as to all defendants,'" and on September 1, 2009, the plaintiff filed a single appeal. *Id.* This Court ruled that appeal was untimely. The plaintiff "was required to file her notice of appeal as to [the Rule 54(b) defendants] within thirty days of the docketing of the July 24, 2009 order, i.e., by August 24, 2009." *Id.* The August 4th "final order as to all

defendants" had no bearing on the Superior Court's previous and targeted Rule 54(b) order or on this Court's timeliness analysis. *See id.*

The same applies here. The only difference between this case and *Foley* is that Appellants subsequently filed a motion for "reargument." But the Superior Court denied that motion without qualification. *See* Appellant's Br. Ex. E. It did not disturb—much less mention—its initial determination that there was no "just cause for delay" or its direction that final judgment be entered under Rule 54(b). *See id.* As a result, all aspects of the Superior Court's original July 10th decision, including its finality determination, "must stand as originally rendered." *St. Catherine of Sienna Catholic Church v. Hart Constr. Co.*, 2000 WL 33301940, at *1 (Del Super. Ct. Aug. 23, 2000), *aff'd*, 781 A.2d 695, 2001 WL 760854 (Del. 2001) (Table). As with any case, the Superior Court's denial of post-judgment relief served only to reset the 30-day appeal deadline. *Katcher*, 597 A.2d at 353.

Appellants failed to challenge the Superior Court's Rule 54(b) order either in the Superior Court or in its opening brief before this Court. And it certainly cannot do so for the first time in an appellate reply brief. *See* Del. Supr. Ct. R. 14(c); *see also, e.g., inTeam Assocs., LLC v. Heartland Payment Sys., LLC*, 2018 WL 6643654, at *2 n.15 (Del. Dec. 18, 2018). Even if they try to do so, this Court would lack jurisdiction to hear it. "[T]he power of an appellate court to exercise jurisdiction rests upon the perfecting of an appeal within the time period fixed by

statute." *PNC Bank, Del. v. Hudson*, 687 A.2d 915, 916 (Del. 1997) (per curiam) (citing *Fisher v. Biggs*, 284 A.2d 117 (Del. 1971)). And if this Court "determine[s] [it] do[es] not have jurisdiction over this appeal," its "only function remaining will be that of announcing the fact and dismissing the appeal." *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 219 (3d Cir. 2012) (alterations omitted) (quoting *Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 94 (1998)).

Appellants missed their 30-day jurisdictional deadline for filing an appeal, and as a result, "the appeal must be dismissed." *Fisher*, 284 A.2d at 118.

II. THE SUPERIOR COURT CORRECTLY RULED THAT FORD IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS.

A. Question Presented.

1) Whether the Superior Court correctly granted Ford summary judgment because Appellants failed to fulfill the requirement of Ohio law that a plaintiff must have an adequate causation expert. A0101-04, A0793-809, A1250-52.

B. Scope of Review.

This Court reviews the Superior Court's grant of summary judgment *de novo*. *See Roberts v. Murray*, 991 A.2d 18, 2010 WL 626060, at *1 (Del. 2010) (Table).

C. Merits of Argument.

Ford is entitled to summary judgment. Under Ohio law, plaintiffs in asbestos cases must offer an adequate causation expert to establish a *prima facie* claim. *Terry*, 875 N.E.2d at 77. The Superior Court correctly granted Ford summary judgment because Appellants failed to meet that requirement. Moreover, there was an even greater need for an adequate causation expert in this case because the record fails to quantify Richards's alleged exposures to Ford products. Appellants relied nearly exclusively on Richards's own lay testimony, which neither approximated the amount of relevant asbestos exposure Richards sustained through Ford's products nor performed a comparative analysis of that exposure to his extensive exposure from other sources. Appellants therefore failed to establish

causation. *Moeller*, 660 F.3d at 954.

1. Appellants Lacked Specific Causation Expert Evidence, As Required Under Ohio Law.

i. Ohio law requires an adequate causation expert for cases involving toxic substances, including asbestos.

The Superior Court correctly ruled that Appellants lacked sufficient evidence to establish a *prima facie* case because they lacked any expert evidence addressing specific causation. Under Ohio law, "a claimant cannot establish a *prima facie* case" of exposure to a toxic substance "[w]ithout expert testimony to establish both general causation and specific causation." *Terry*, 875 N.E.2d at 79. To demonstrate specific causation, the expert must establish that defendant's product "in fact caused the injury of which [the plaintiffs] complain." *Id.* at 76; *see also Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 348 (Tex. 2014) (specific causation concerns "whether the defendant's product caused the specific injury in issue"). If a plaintiff fails to offer an adequate expert opinion on specific causation, "summary judgment . . . is proper." *Kerns v. Hobart Bros. Co.*, 2008 WL 1991909, at *12 (Ohio Ct. App. May 9, 2008).

This asbestos-specific rule flows from a broader principle of evidence. *Terry* establishes that under Ohio law, "[e]xcept as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability

involves a scientific inquiry and *must* be established by the opinion of medical witnesses competent to express such opinion." 875 N.E.2d at 77 (quoting *Darnell*, 261 N.E.2d at 116).

Determining whether the asbestos contained in a specific defendant's products substantially caused a plaintiff's mesothelioma plainly qualifies as a "scientific inquiry." *Id.* Indeed, according to "[t]he prevailing scientific and medical view," one type of asbestos fibers, amphibole fibers, has "a significantly greater propensity to cause disease" than other types of asbestos fibers. *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 606 (N.D. Ohio 2004). Because these questions of causation are far from "matters of common knowledge," they "*must* be established" through a competent expert. *Terry*, 875 N.E.2d at 77 (quoting *Darnell*, 261 N.E.2d at 116); *see also, e.g.*, *Watkins*, 54 N.E.3d at 180 (applying *Terry*'s causation expert requirement to an asbestos case).

When Appellants initiated this lawsuit, they sought to satisfy this expert testimony requirement with Dr. Ginsburg's medical report—a report that relied exclusively on the "cumulative exposure" theory. A0089. After Dr. Ginsburg's report had been produced but before the deadline to submit expert reports had elapsed, the Ohio Supreme Court expressly rejected the sufficiency of a "cumulative exposure" theory of causation. *Schwartz*, 102 N.E.3d at 481-83. Instead of seeking a sufficient report in accordance with Ohio law, Appellants

deliberately choose to argue that expert testimony was not necessary to show that Ford's products were a substantial factor in causing his mesothelioma. A0810 ("Mr. Richards' testimony easily satisfies the requirements of Ohio law . . . .").

That was an error. Using lay testimony to show a plaintiff was *exposed* to asbestos is, of course, permissible. *See, e.g.*, *Lohrmann v. Pittsburg Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986) (detailing the types of evidence that "prove exposure to [defendant's] product").[5] But using that same lay testimony to establish certain exposure *substantially caused* a plaintiff's disease is not. *See Terry*, 875 N.E.2d at 79 ("[T]he issue [is] whether the claimants' illnesses were caused by the exposure," not whether the claimant was exposed to toxic substances). Because Appellants failed to meet the causation expert requirement, they failed to establish a *prima facie* case. *See id*.[6] Granting "summary judgment" for Ford was therefore "proper." *Kerns*, 2008 WL 1991909, at *12.

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[5] When the Ohio legislature passed Section 2307.96, it "stepped in to adopt the *Lohrmann* test." *Schwartz*, 102 N.E.2d at 480.

[6] Appellants seem to argue (at 19) that "expert issue summary judgment motions" in asbestos cases are "limited to circumstances where" deficiencies with expert testimony prevent the non-moving party from establishing a "*prima facie* case under the substantive applicable law." That standard is met here. As part of their "*prima facie* case," Appellants had to establish specific causation through competent expert testimony. *Terry*, 875 N.E.2d at 77. They did not.

ii. Section 2307.96 has not replaced Ohio's requirement for a causation expert in asbestos cases.

Appellants argue that unlike other toxic tort cases, there is no causation expert requirement in asbestos cases because Ohio Revised Code Section 2307.96's "substantial factor" test has "replace[d]" it. Appellants' Br. 15-18. Not so. When the legislature passed Section 2307.96, it raised the bar for what qualifies as a "substantial factor" in the causation analysis. *See Schwartz*, 102 N.E.3d at 480-81. It did not address, much less eliminate, the decades-old requirement that plaintiffs in asbestos cases must establish causation through expert testimony. *See* Ohio Rev. Code Ann. § 2307.96.

Both before and after Section 2703.96 was enacted, plaintiffs in asbestos cases had to show that an individual defendant's products were a *substantial* cause of their injuries. *See Schwartz*, 102 N.E.3d at 480-81. Before Section 2307.96, *Horton v. Harwick Chemical Corp.* set the controlling standard for causation. 653 N.E.2d 1196 (Ohio 1995). Among other things, *Horton* held that "[a] plaintiff need not prove that he was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a *substantial factor* in causing his injury." *Id.* at 1202 (emphasis added).

With Section 2307.96, the legislature specifically set out to "overrule[]" that portion of *Horton*. *Vince v. Crane Co.*, No. 87955, 2007 WL 766114, at *1 n.3

(Ohio Ct. App. Mar. 15, 2007); *see also Schwartz*, 102 N.E.3d at 480-81. Section 2307.96 requires plaintiffs to provide evidence of "the manner, proximity, and frequency and length" of asbestos exposure to establish a particular defendant's products were a "substantial factor" in causing their injuries. *Id.* at 481; *see also* Ohio Rev. Code Ann. § 2307.96(B). Put differently, this new "substantial factor" test raised "the level of proof required to establish specific causation." *Bostic*, 439 S.W.3d at 352; *see also Schwartz*, 102 N.E.3d at 482 (Section 2307.96 was designed to limit a defendant's previously "unbounded liability" (internal quotation marks omitted)).

Section 2307.96 did not, as Appellants claim, do away with the causation expert requirement or suggest that causation in asbestos cases could somehow be demonstrated through non-scientific means. To the contrary, the Ohio legislature itself labeled proximity, frequency, and length of exposure "scientifically valid defining factors." Section 5, 150 Ohio Laws, Part III, at 3993; *see also* Appellants' Br. 15; *Fisher v. Alliance Mach. Co.*, 947 N.E.2d 1308, 1311-12 (Ohio Ct. App. 2011). Weighing and comparing the relative proximity, frequency, and length of exposure to determine causation under the "substantial factor" test still requires "a

scientific expression of the level of plaintiff's exposure." *In re New York City Asbestos Litig. (Juni)*, 148 A.3d at 253;[7] *see also Schwartz*, 102 N.E.3d at 482.

Accordingly, after the legislature passed Section 2307.96, the Ohio Court of Appeals has consistently applied *Terry*'s causation expert requirement to asbestos cases. In *Watkins*, for example, that court cited *Terry* directly and reaffirmed that to establish causation, a plaintiff must show both "knowledge that [the] plaintiff was exposed to such quantities [of asbestos]" (i.e., Section 2307.96's "substantial factor" elements) *and* "scientific knowledge of the harmful level of exposure to [that] chemical" (i.e., expert testimony). 54 N.E.3d at 180 (quoting *Allen v. Penn. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)). Similarly, in *Walker v. Ford Motor Co.*, the Ohio Court of Appeals squarely held that "because [plaintiff] alleges that his Hodgkin's lymphoma was caused by his exposure to asbestos at Ford, . . . [he] was required to present expert medical evidence establishing [that] . . . his Hodgkin's lymphoma was caused by his asbestos exposure at Ford." 2014 WL 4748482, at *6 (Ohio Ct. App. Sept. 25, 2014) (footnote omitted); *see also Bryant v. Gen. Motors Corp.*, 2015 WL 7709627, at *9 (Ohio Ct. App. Nov. 30, 2015) (citing to this excerpt).

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[7] The New York Court of Appeals affirmed this decision on the grounds that plaintiffs in that case failed to show causation under the "standards set forth in *Parker v. Mobil Oil Corp.*" *In re New York City Asbestos Litig. (Juni)*, No. 123, 2018 WL 6173944, at *1 (N.Y. Nov. 27, 2018). *Parker* similarly requires a plaintiff to provide "a scientific expression of [his] exposure level." 857 N.E.2d 1114, 1122 (N.Y. 2006).

Not surprisingly, other States and jurisdictions have taken the same approach. Most notably, *this* Court has ruled that "to make a *prima facie* showing with respect to the cause of an asbestos-related disease, a plaintiff must introduce direct competent expert medical testimony that a defendant's asbestos product was a proximate cause of the plaintiff's injury." *Money*, 596 A.2d at 1377; *see also, e.g.*, *Hagen v. Celotex Corp.*, 816 S.W.2d 667, 670 (Mo. 1991) (en banc); *Lineaweaver v. Plant Insulation Co.*, 37 Cal. Rptr. 2d 902, 906 (Ct. App. 1995). As the court succinctly explained in *In re New York City Asbestos Litigation (Juni)*, even where lay testimony is presented, "a causation expert must still establish that the plaintiff was exposed to sufficient levels of the toxin from the defendant's products to have caused his disease." 148 A.D.3d at 236, *aff'd on alternate grounds*, No. 123, 2018 WL 6173944, at *1 (N.Y. Nov. 27, 2018) (case cited at *Schwartz*, 102 N.E.3d at 482). This Court should reject Appellants' contrary argument.

iii. Appellants' remaining arguments regarding Sections 2307.96 and 2307.92 similarly fail.

Appellants' more specific arguments regarding Section 2307.96 also fail. First, Appellants argue (at 16) that because Section 2307.96 "contains no mention of expert reports," expert reports are no longer required in asbestos cases. But Section 2307.96's "substantial factor" test was designed to limit a defendant's previously "unbounded liability." *Schwartz*, 102 N.E.3d at 482. It would make no

sense to interpret Section 2307.96 as also *implicitly* eliminating a long-standing expert evidentiary rule designed to protect defendants.

Second, Appellants argue (at 16-17) that because Section 2307.92 contains "detailed and explicit expert medical requirements," expert reports are not required under Section 2307.96. But that portion of Section 2307.92 was implemented to impose a *more* demanding set of expert requirements for a specific subset of plaintiffs: smokers that claim asbestos caused their lung cancer. *See Turner v. CertainTeed Corp.*, 2018 WL 4627703, at *3 (Ohio Sept. 27, 2018) ("The plain text of the statute dictates that only a 'smoker' has the burden to meet those requirements."); *see also Renfrow v. Norfolk S. Ry. Co.*, 18 N.E.3d 1173, 1179 (Ohio 2014) (listing the four additional criteria for experts in these very specific cases). These additional requirements do not abrogate the baseline principle that plaintiffs must offer some expert testimony to establish causation in toxic tort cases.

Third, Appellants contend (at 17) that "*Schwartz* moved directly to the plaintiff's exposure as an independent means" to establish causation. That interpretation of *Schwartz* is incorrect. The Ohio Supreme Court was explaining that under the facts of that particular case, no theory of causation could have "established that [plaintiff's] exposure to asbestos from [defendant's] products was a substantial factor in causing her mesothelioma." *Schwartz*, 102 N.E.3d at 484.

On summary judgment motions, courts must conduct their "own careful review of the record, including the testimony of each expert," to determine if defendant's products were "a substantial factor in bringing about the harm." *Moeller*, 660 F.3d at 954. This type of factual review does not undercut *Terry*'s requirement that plaintiffs present their theory of causation through expert testimony.

Finally, Appellants (at 18) argue that in *Alexander v. Honeywell International, Inc.*, 2017 WL 6374062 (N.D. Ohio Dec. 13, 2017), "an expert report" was not "in any way" relevant to the district court's denial of summary judgment. That is false. As Ohio law requires, the plaintiffs in *Alexander* presented their theory of causation through two separate expert reports. *See* Bedrossian Expert Report, *Alexander*, No. 1:17 CV 504 (N.D. Ohio Oct. 30, 2017), ECF No. 59-8; Guth Expert Report, *Alexander*, No. 1:17 CV 504 (N.D. Ohio Oct. 30, 2017), ECF No. 59-10. These reports were submitted as exhibits to the plaintiffs' summary-judgment opposition—refuting Appellants' claim that expert reports were uninvolved in the court's summary judgment analysis.

iv. There is a particular need for detailed testimony from a causation expert in this case.

Given significant gaps in the factual record, there is an even stronger need for robust testimony from a causation expert in this case. As just described, whether Richards's exposure to Ford products containing asbestos was of sufficient magnitude, quantity, and frequency to be a substantial factor in causing

his mesothelioma is not a matter of common knowledge and thus requires an expert opinion. But here, due to the weakness of Richards's lay testimony, the need for causation expert testimony is particularly acute. Richards's testimony that he was exposed to asbestos through Ford's products that he encountered as a car enthusiast or through part-time employment at a gas station is insufficient on its own to establish that this exposure—in light of his total lifetime asbestos exposure—was a substantial factor in his development of mesothelioma. Expert testimony was needed to fill in those gaps.

"The burden rests with the plaintiff to prove" causation in asbestos cases. *Schwartz*, 102 N.E.3d at 480-81. To meet that burden, "the plaintiff must show a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural." *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492 (6th Cir. 2005) (internal quotation marks omitted) (case cited by *Schwartz*, 102 N.E.3d at 482). To do so, plaintiffs must establish that exposure to defendant's products "had a *substantial* impact on the[ir] *total cumulative exposure*." *Schwartz*, 102 N.E.3d at 482 (second emphasis added); *see also Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) ("[O]ne measure of whether an action is a substantial factor is 'the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.'" (quoting Restatement (Second) of Torts § 433(a))). And plaintiffs

must provide "at least *some* quantification or means of assessing the amount, duration, and frequency of exposure" so that there is context to place an individual defendant's products in the context of a plaintiff's total aggregate exposure. *Schwartz*, 102 N.E.3d at 482 (quoting *In re New York City Asbestos Litig. (Juni)*, 148 A.D.3d at 239); *see also Bostic*, 439 S.W.3d at 353 (to avoid jury speculation, plaintiff must "quantif[y]" the approximate dose of asbestos exposure from each defendant).

The Sixth Circuit in *Moeller* applied this standard to a strikingly similar set of facts. 660 F.3d at 955. There, the court recognized that the plaintiff was exposed to asbestos through the defendant's gaskets. *Id.* It nonetheless held that because "Plaintiff failed to quantify [his] exposure to asbestos from [defendant's] gaskets and . . . concede[d] that [he] sustained massive exposure to asbestos from non-[defendant] sources, there is simply insufficient evidence" to create the substantial factor inference. *Id.*

Appellants here offer the same theory. Rather than providing the sort of approximation that would be necessary for a comparative analysis, Richards asserts simply that he repaired and installed "[m]any" Ford brakes and Ford gaskets both as a hobbyist and part-time gas station attendant. *See, e.g.*, B07-08. Not only is this non-specific, but it also fails to account for the "massive" and constant asbestos exposure Richards sustained throughout his life. *Moeller*, 660 F.3d at

955. Richards worked in a manufacturing plant for decades, where he testified that he was daily covered in a "big cloud" of asbestos dust. A0829. He refurbished two separate houses, re-laying roofing tiles and putting up drywall, both of which were laden with asbestos. A0819-820; *see also* A0085. And although he identified Ford products, he also identified automotive products from Delco, GM, Goodyear, Bendix, Raybestos, and BorgWarner. A0822, A0825-826. Based on this record, there is simply no way to tell how much asbestos Richards was exposed to through Ford products he encountered as an car enthusiast and at gas stations—let alone how that amount compared to exposure from other sources.

Because Appellants failed to estimate Richards's asbestos exposure from Ford products he encountered through his hobby and at the gas station *and* failed to account for massive exposure from other sources, they have not shown Ford's products "had a *substantial* impact on [his] *total cumulative [asbestos] exposure*." *Schwartz*, 102 N.E.3d at 482 (second emphasis added); *see also Moeller*, 660 F.3d at 955; *Bostic*, 439 S.W.3d at 353. That leaves Appellants resting "merely upon speculation and conjecture." *Lohrmann*, 782 F.2d at 1163 (internal quotation marks omitted). Ford was therefore entitled to summary judgment.

2. Appellants Were Not Entitled To A Hearing On Ford's Summary Judgment Motion.

In a last ditch-effort, Appellants argue (at 18) that the Superior Court erred by not hearing arguments relating to Ford and Goodyear. That is a non-starter.

Under Delaware Superior Court Rule 56(c), summary judgment "shall be rendered *forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Del. Super. Ct. R. 56(c) (emphasis added). Rule 78(c), meanwhile, specifically states "[t]here will be no oral argument unless scheduled by the Court, except as may be otherwise expressly provided by statute or rule." Del. Super. Ct. R. 78(c).

Appellants point to no statute or rule that gives them a right to a summary judgment hearing, *see* Appellants' Br. 18, and none exists, *see, e.g.*, *Pazuniak Law Office, LLC v. Pi-Net Int'l, Inc.*, 2016 WL 3916281, at *1 (Del. Super. Ct. July 7, 2016) ("[T]he Court having determined no hearing is necessary on the Summary Judgment Motion . . . ."); *Chavin v. PNC Bank, Del.*, 830 A.2d 1220, 1221 (Del. Ch. 2003) (noting this Court "enter[ed] summary judgment in favor of the two grandsons without a hearing").

III. THE SUPERIOR COURT'S DENIAL OF REARGUMENT WAS NOT AN ABUSE OF DISCRETION.

A. Question Presented.

Whether the Superior Court abused its discretion in denying reargument on the basis that Appellants failed to show "good cause" or "excusable neglect" for waiting to make any effort to supplement their expert report until after the Superior Court had granted summary judgment to Ford. A1394-99, A1455-59; Appellants' Br. Ex. E.

B. Scope of Review.

The Superior Court's determinations that "good cause" and "excusable neglect" were lacking are reviewed for abuse of discretion. *Walls v. Cooper*, 645 A.2d 569, 1994 WL 175604, at *1 (Table) (Del. 1994); *DeSantis v. Chilkotowsky*, 877 A.2d 52, 2005 WL 1653640, at *1 (Del. 2005).

C. Merits of Argument.

1. The Superior Court Did Not Abuse Its Discretion In Finding That Appellants Failed To Show "Good Cause" Or "Excusable Neglect."

The Superior Court acted well within its discretion in finding that Appellants failed to show either "good cause" or "excusable neglect" in waiting until *after* a grant of summary judgment to attempt to update their expert report. *See* Appellants' Br. Ex. E, ¶ 8. Appellants' post-judgment motion requested two things: (1) that the Superior Court vacate or amend its summary judgment order

and hold "reargument of the summary judgment" issues, and (2) that the court grant them "leave to supplement their expert report" after the deadline in the Master Trial Scheduling Order ("MTSO") had elapsed. A1399; *see also* Appellants' Br. Ex. E, ¶¶ 5, 6. The Superior Court correctly analyzed these requests under Section 60(b)'s "excusable neglect" standard[8] and the "good cause" standard applicable to modifying the MTSO deadline. Order Appellants' Br. Ex. E, ¶¶ 5, 6.

Excusable neglect. Appellants argued below that their failure to timely provide an adequate expert report was due to "excusable neglect," Del. Super. Ct. R. 60(b)(1), because the "change in underlying substantive law occur[ed] less than a month before the applicable [expert report] deadline." A1398. But demonstrating "excusable neglect" requires showing that a party acted as "a reasonably prudent person under the circumstances." *Apartment Communities Corp. v. Martinelli*, 859 A.2d 67, 70 (Del. 2004) (internal quotation marks omitted). The facts here show otherwise.

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[8] Even if Appellants now try to characterize their motion as one seeking relief under Delaware Superior Court Rule 59(d), they would get nowhere. A Rule 59(d) motion requires one of the following: "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct clear error of law or to prevent manifest injustice." *Smith v. Mahoney*, 2015 WL 13697675, at *1 (Del. Super. Nov. 20, 2015) (internal quotation marks omitted). Appellants lack all three. *Schwartz* issued nearly six months before the Superior Court's summary judgment ruling. *See, e.g.*, *Baker v. Russell Corp.*, 372 F. App'x 917, 921 (11th Cir. 2010) (per curiam) (a decision is not an "intervening change in the controlling law" if it was "decided before judgment was entered").

Appellants admit that they did not know that *Schwartz* had issued until Ford moved for summary judgment, and that when they learned about *Schwartz*, they chose to argue that no expert testimony was needed rather than to seek leave to amend their expert's report. *See* Appellants' Br. 8. That reflects a conscious strategy decision made by Appellants—not excusable neglect.

Rule 60(b)'s "excusable neglect" standard is not a parachute for parties who actively press erroneous legal arguments. It is met when a party "had a reason" to "miss[] [a procedural] deadline," and then "promptly attempt[s] to file the required" documents. *Keener v. Isken*, 58 A.3d 407, 408, 410 (Del. 2013). And "[m]istakes of law are not as favored as grounds for relief." *County Bank v. Thompson*, 2013 WL 7084479, at *3 (Del. Super. Ct. Dec. 5, 2013), *aff'd* 93 A.3d 655, 2014 WL 2601626 (Del. 2014) (Table). Indeed, this Court noted in *MCA, Inc. v. Matsushita Electric Industrial Co.*, that absent "extraordinary reasons," Rule 60(b) motions should not be granted to correct legal or tactical errors because if parties believe "they can have a second try . . . the judicial process will become less accurate." 785 A.2d 625, 635 & n.10 (Del. 2001) (internal quotation marks omitted). For that reason, courts universally agree that "neither strategic miscalculation nor counsel's misinterpretation of the law" constitutes "excusable neglect." *McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d

586, 593 (6th Cir. 2002);[9] *see also U.S. Commodity Futures Trading Comm'n v. Kratville*, 796 F.3d 873, 896 (8th Cir. 2015) ("Rule 60(b)(1) does not permit litigants and their counsel to evade the consequences of their legal positions and litigation strategies . . . ."); *Helm v. Resolution Tr. Corp.*, 84 F.3d 874, 878 (7th Cir. 1996) (similar); *Hartford Fire Ins. Co. v. Evergreen Org. Inc.*, 410 F. Supp. 2d 180, 185-86 (S.D.N.Y. 2006) (similar).

Appellants fall on the wrong side of that line. They did not miss the expert report deadline, and then fail to promptly ask for an extension, due to an understandable and procedural oversight. Instead, after learning about *Schwartz* months after it issued from Ford, A0101, Appellants actively chose to argue that Richards's "lay testimony" was sufficient to establish specific causation without needing an expert report. *See* A0792. Appellants' position was that Richards's testimony alone "easily satisfies the requirements of Ohio law." A0810; *see also* Appellants' Br. Ex. A, at 38-39 ("[W]e can properly analyze the [lay] testimony of exposure here, and to the extent that Your Honor finds that that testimony satisfies frequency, regularity, proximity, . . . then that is sufficient for purposes of summary judgment."). They were incorrect. *See supra* 20-32.

[9] Federal Rule of Civil Procedure 60(b) is nearly "identical" to Delaware Superior Court Rule 60(b) and therefore offers this Court "[p]ersuasive" authority. *Apartment Communities*, 859 A.2d at 70-71.

Rule 60(b) does not grant Appellants the right to correct their "[m]istake[] of law" and get a do-over on their summary judgment arguments. *County Bank*, 2013 WL 7084479, at *3; *see also MCA, Inc.*, 785 A.2d at 635 & n.10. As the Superior Court succinctly ruled, "[t]he real problem for Plaintiffs is that they never sought leave for Dr. Ginsburg to supplement his report until *after* the Court had entered summary judgment against them." Appellants' Br. Ex. E, ¶ 8. That was not an abuse of discretion. *See Rash v. Wilkins*, 935 A.2d 256, 2007 WL 2827685, at *2 (Del. 2007) (Table) (affirming that appellants should have "requested an extension of time" before the trial court issued its final judgment on the merits).

Good cause. Appellants similarly failed to show they had "good cause" for seeking to extend the MTSO deadline for supplementing their expert report after the Superior Court's summary judgment order. *See In re Asbestos Litig. (Vala)*, 2012 WL 2389898, at *1 (Del. Super. Ct. June 22, 2012) ("good cause" standard applies to applications to modify MTSO). "The asbestos docket is large and requires adherence to the MTSO." *Id.* "Good cause" can be shown "when the moving party has been generally diligent, [and] the need for more time was neither foreseeable nor its fault." *Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015).

Appellants have failed to show they diligently tried to meet the Superior Court's deadlines. After the Superior Court's summary judgment order, it took Appellants only 8 days to file a supplemental expert report. Appellants' Br. Ex. E,

¶ 7. They had nearly three times that long—22 days—between the issuance of *Schwartz* and their expert deadline under the MTSO. *Id.* Moreover, after Ford alerted Appellants of *Schwartz* and its impact, *see* A0101, Appellants still had *more than three months* to seek leave to supplement the report before the summary judgment hearing, *see* A1459. The Superior Court reasonably found that a diligent person would not have waited to seek "leave for Dr. Ginsburg to supplement his report until *after* the Court had entered summary judgment against them." Appellants' Br. Ex. E, ¶ 8. The Superior Court certainly did not abuse its discretion in so ruling. *Cf. Moses*, 109 A.3d at 566 ("[O]n this record we will not find that the trial court abused its discretion for not considering . . . supplemental [expert] reports after the stipulated expert disclosure and report deadline had expired.").

2. *Drejka* And The Law Of Sanctions Is Inapplicable.

Appellants all but ignore the "excusable neglect" and "good cause" standards. Instead, they claim the Superior Court's denial of their post-judgment motion is governed by *Drejka v. Hitchens Tire Service, Inc.*, 15 A.3d 1221 (Del. 2010), and the rule of sanctions. Appellants' Br. 23-27. Once again, Appellants are incorrect. In *Drejka*, the Superior Court "excluded" the plaintiff's expert and subsequent proposed experts as a "discovery sanction" for missing the relevant discovery filing deadline. 15 A.3d at 1222-23. And only after those experts were

excluded, did the defendant move for summary judgment. *Id.* at 1223. The court granted that motion "on the basis that, without an expert, [plaintiff] could not make a *prima facie* claim." *Id.* In essence, therefore, the court's *initial* order excluding plaintiff's expert was "a default judgment against Drejka as a sanction for violating the court's" discovery rules. *Id.*

By contrast, here, the Superior Court's ruling for Ford on summary judgment was neither a "discovery sanction" nor a "default judgment." *Id.* at 1222-23. Because the Superior Court's summary judgment order was issued well after discovery had closed, it could not conceivably be construed as a "sanction for discovery violations." *Id.* at 1222. And unlike in *Drejka*, the Superior Court did not "exclude" Appellants' proposed expert report. *Id.* at 1223. Appellants simply never tried to correct the deficiencies in the expert report until *after* the Superior Court had already issued a substantive ruling.

As a result, the Superior Court's summary judgment ruling was not equivalent to a "default judgment." *Id.* Under Delaware Superior Court Rule 55, "default judgment" may be entered where a party "has failed to appear, plead or otherwise defend" a lawsuit. Del. Super. Ct. R. 55(b). On the other hand, "summary judgment" is appropriate under Rule 56, provided "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Del. Super. Ct. R. 56(c). Applying these rules, this Court has held

that the entry of default judgment is warranted when a party *fails to respond* to a summary judgment motion. *Brady v. Wells Fargo Fin. Bank*, 47 A.3d 971, 2012 WL 2858321, at *1-2 (Del. 2012) (Table).

Appellants did not fail to respond to Ford's motion for summary judgment, fail to show up to the summary judgment hearing, or fail to otherwise press their case. To the contrary, they submitted a 21-page brief, *see* A0791-A0812, forcefully and fully arguing that their interpretations of *Schwartz* and Ohio law were correct. A0792, 0807-09. After weighing the parties' substantive arguments, the Superior Court granted Ford summary judgment *on the merits*. *See* Appellants' Br. Ex. A, at 65 ("[U]nder that context, I don't find that standalone nonexpert testimony sufficient to meet the . . . plaintiff's burden here, and I'm going to grant the motion for summary judgment."). After they lost on the merits, Appellants asked the Superior Court to vacate and amend its final judgment. *See* Appellants' Br. Ex. E, ¶ 8. That is altogether different from the situation that *Drejka* governs: whether a court should "dismiss a case for discovery violations." *Christian v. Counseling Resource Assocs., Inc.*, 60 A.3d 1083, 1087 (Del. 2013); *see also id.* at 1085 (stating that *Drejka* is applicable where cases are "dismissed without being heard on the merits"). The Superior Court was therefore correct that the "excusable neglect" and "good cause" standards—not *Drejka*—governed Appellants' motion for post-judgment relief.

CONCLUSION

For the foregoing reasons, this Court should either dismiss the appeal and/or affirm the Superior Court's decision granting Ford summary judgment.

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