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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Appellees proffer only conclusory arguments that an expert report establishing specific causation is a necessary part of an asbestos plaintiff's *prima facie* case under Ohio law. To the contrary, the best indication is the Ohio statute's plain direction that "[n]o prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma."[1] Indeed, "[i]n determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact shall consider … [t]he manner … proximity … frequency and length … [and] [a]ny factors that mitigated or enhanced the plaintiff's exposure to asbestos."[2] By statute, this is the "Plaintiff's burden of proof in tort actions" based on asbestos exposure.[3]

The Supreme Court of Ohio's decision in *Schwartz* is a logical application of the statute.[4] Again, Appellees offer no convincing explanation why, having found an expert report based on cumulative exposure insufficient to satisfy proximate causation, the Court continued to analyze the plaintiff's testimony of exposure. If the sufficiency of the expert report was determinative, there would be no reason to

[1] Ohio Rev. Code Ann. § 2307.92(E).

[2] Ohio Rev. Code Ann. § 2307.96.

[3] *Id*.

[4] *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477 (Ohio 2018).

analyze the frequency, regularity, and proximity of plaintiff's exposure. Rather, while an expert report can help explain the significance of a plaintiff's exposure, it is neither a substitute nor a requirement in addition to evidence of exposure.

Likewise, Appellees offer only unconvincing arguments as to Appellants' request to supplement their expert report. Most notably, Appellees fail to show any prejudice to them should Appellants' request be granted. The only prejudice to Appellees would be the necessity to face the merits of this case. To this end, Appellees' suggestions that this case *was* decided on the merits are incorrect.[5] To the contrary, summary judgment was granted because of a technical deficiency, and *not* the merits of Appellants' case.

The only new content set forth by any of the Appellees is Ford's argument that it alone is subject to a different schedule than its identically situated co-defendants. Ford's argument in this regard is contrary to literally all of the goals of the final judgment rule and the interlocutory appeal system. The reality is that Ford "slipped one under the radar" by adding additional language to what are, generally speaking, *pro forma* "proposed orders" submitted by movants for summary judgment. On the electronic docket, the Superior Court entered four identical orders

[5] With the possible exception of Appellee Copes-Vulcan, as to whom the evidence of exposure was at least heard. *See infra*. Even as to Copes, the best reading of the Superior Court's ruling is that summary judgment was granted on the basis of a *prima facie* deficiency, and not on the strength (or weakness) of the evidence.

granting summary judgment, without indication that Ford should be subject to a different appellate schedule. The order also lacks the "express determination" by the Superior Court necessary to make it final; unsurprising, since there is no rational reason why the Superior Court would enter "final judgment" against Ford alone.

ARGUMENT

I. Ford Is Not Subject to a Different Schedule

A. The Superior Court made no "express determination" of final judgment.

The Order granting Ford's motion for summary judgment should not be considered "Final," notwithstanding the text in the written Order. Superior Court Rule 54(b) states that final judgment may be granted as to less than all the parties "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[6] Here, even to the extent the written order constitutes an "express direction," the Superior Court did not make the requisite "express determination."

Indeed, the most reasonable inference, looking at the record and weighing the relevant considerations, is that the Superior Court did *not* intend to enter final judgment as to Ford alone. As this Court has explained, "A final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration. In short a final judgment is one that determines all the claims as to all the parties. The test for whether an order is final and therefore ripe for appeal is whether the trial

[6] Del. Super. Ct. Civ. R. 54(b) (emphasis added).

court has clearly declared its intention that the order be the court's 'final act' in a case."[7]

Here, at oral argument the Superior Court specifically noted that Ford would have the opportunity to oppose Plaintiffs' anticipated motion to amend Dr. Ginsburg's report.[8] The dialogue is antithetical to Ford's contention that the Superior Court purposefully made its order granting Ford's motion for summary judgment "final" and immediately appealable.

It is unsurprising that the Superior Court may not have noticed the language tacked onto Ford's Proposed Order granting its motion for summary judgment. Ford did not advertise the language (which was unique among defendants filing for summary judgment). Ford's docket entry of its proposed order did not indicate that it would be final and appealable once granted. A0038. Ford did not discuss at oral argument that it sought – unlike its codefendants – a final order with respect to its motion for summary judgment.[9] Although Ford needed to do nothing to benefit from the Superior Court's interpretation of *Schwartz*, it did raise multiple issues at oral argument (but not that it sought final judgment). "Although the trial court's intention to enter a final order is an essential element in the inquiry, the mere use of the term

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[7] *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002). *See also Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 795 (Del. 1958).

[8] Exhibit A to Appellants' Amended Opening Brief, at 68:5-11.

[9] *Id*. at 67-71.

'final judgment' may not be determinative if a party, with the acquiescence, tacit or otherwise, of the court has left the docket open for further proceedings."[10]

An additional indication that the Superior Court did not intend to set Ford alone on a different schedule from the other Appellees is that the electronic docket entries for each of the four motions for summary judgment granted on July 10, 2018 are equivalent. A0058. Looking at the electronic docket, there is no reason to believe that the Superior Court's order as to Ford was different in kind from the orders in favor of Copes-Vulcan, Goodyear, or The Fairbanks Company. Because the Superior Court did not make an "express determination" that its grant of Ford's motion for summary judgment be final, a requirement of Superior Court Rule 54(b) is unmet, and the order should not be treated as "final."

B. Ford's position undermines every goal fostered by the final judgment rule.

The Superior Court did not make an express determination that its grant of Ford's motion for summary judgment be final, because it makes no sense that it be final. "The policy underlying the final judgment rule is one of efficient use of judicial resources through disposition of cases as a whole, rather than piecemeal."[11]

[10] *Tyson Foods*, 809 A.2d at 580.

[11] *Tyson Foods*, 809 A.2d at 580 (citing *Showell Poultry*, 146 A.2d at 795).

There is no reason why the Superior Court would have wanted to set Ford alone on an expedited path to appellate review.

Ford cites *Foley v. Washington Group* for the proposition that the "Rule 54(b) analysis operates the same way in complex asbestos cases."[12] Plaintiffs agree, except as to the proposition demonstrated. What *Foley* shows is that similarly situated litigants should be subject to the same schedule. In *Foley*, Plaintiff argued summary judgment against two defendants, and two defendants only.[13] Summary judgment was granted as to both. Plaintiffs and Defendants separately wrote letters to the Superior Court requesting that the Court enter final judgment, and submitting proposed orders to the same effect.[14] Plaintiff also wrote the Superior Court to indicate that the case had been settled to any other defendants, and now had "no remaining defendants."[15] The Superior Court entered the proposed order submitted by the parties, making final *all* motions for summary judgment heard on the relevant

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[12] Appellee Ford Motor Company's Answering Brief, at 18 (discussing *Foley v. Washington Gp. Int'l, Inc.*, 984 A.2d 123, 2009 WL 3656798 (Del. Nov. 4, 2009) (Table)).

[13] *See* Electronic Docket of *Foley v. Washington Gp., Int'l, Inc*, N07C-07-006 (ASB) (excerpts attached hereto as **Exhibit A**).

[14] Letters and Proposed Orders dated June 16 and July 9, 2009, *Foley v. Washington Gp., Int'l, Inc.*, N07C-07-006 (ASB) (Del. Super. 2009) (attached collectively hereto as **Exhibit B**).

[15] Letter dated June 19, 2009, *Foley v. Washington Gp., Int'l, Inc.*, N07C-07-006 (ASB) (Del. Super. June 19, 2009) (attached hereto as **Exhibit C**).

day.[16] Plaintiff appealed the grants of summary judgment as to the two defendants only.[17] Under those circumstances, this Court correctly rejected the appeal as untimely. The relevant order had expressly been rendered "final," at the direct request of the litigants. There were no remaining claims as to other parties. There were no similarly-situated litigants subject to a different appellate timeline.

Thus, *Foley* highlights both that an order for final judgment need be result of an "express determination," and that all parties should be subject to the same appellate schedule, so as to avoid piecemeal litigation and the inefficient use of judicial resources. *Foley* is of no benefit to Ford, and Appellants' case should be heard against Ford as against Goodyear and Copes-Vulcan.

[16] Order, *Foley v. Washington Gp., Int'l, Inc.*, N07C-07-006 (ASB) (Del. Super. Jul. 24, 2009) (attached hereto as **Exhibit D**).

[17] Plaintiff's Notice of Appeal, *Foley v. Washington Gp., Int'l, Inc.*, N07C-07-006 (ASB) (Del. Super. Sept. 2, 2009) (attached hereto as **Exhibit E**).

II. Appellees Fail to Demonstrate that Appellants' *Prima Facie* Case is Deficient Under Ohio Law

The problem with Appellees arguments is that the cases cited universally fail to explain the Supreme Court's decision in *Schwartz*.

Both Ford and Copes-Vulcan cite to multiple Ohio decisions not in the context of asbestos, therefore outside the realm of § 2307.96 or its method of establishing specific causation, and irrelevant to this matter.[18] *Terry v. Caputo* involved exposure to mold.[19] *Kerns v. Hobart Brothers Co.*, cited by Ford for the proposition that without an expert report establishing specific causation, "summary judgment is proper," concerned certain inconclusively identified chemicals.[20] The pronouncements in such cases that specific causation need be established through expert testimony – normally an uncontroversial proposition – are statutorily overridden in Ohio in the context of asbestos litigation. In Ohio, by statute, evidence of frequent, regular and proximate exposure "provides litigants, juries, and the courts … an objective and easily applied standard for determining whether a plaintiff has

[18] *See* Appellee The Ford Company's Answering Brief, at 21-24; Appellee Copes-Vulcan, Inc.'s Answering Brief, at 22.

[19] *Terry v. Caputo*, 875 N.E.2d 72 (Ohio 2007).

[20] *Kerns v. Hobart Bros. Co.*, 2008 WL 1991909 (Ohio Ct. App. May 8, 2008).

submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation."[21]

Ford's citations to other states' decisions are equally inapposite. Texas famously applies the *most* stringent *prima facie* burdens on asbestos plaintiffs; Texas alone requires scientific evidence of dosage to maintain a suit based on asbestos exposure.[22] That State's decisional law is of no applicability here.

Courts in New York recently raised the requirements for asbestos causation in that State through the decisions in *Juni*.[23] The inapplicability of those decisions are demonstrated, *inter alia*, by Judge Feinman's reference in dissent to the *Lohrmann* standard as providing a preferable framework for asbestos causation.[24]

Finally, Appellees' citations to Delaware law are similarly unavailing.[25] To Appellants' knowledge, Delaware is the *only* jurisdiction to expressly adopt the "but

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[21] ASBESTOS–CLAIMS–MEDICAL REQUIREMENTS, 2004 Ohio Laws File 88 (Am. Sub. H.B. 292).

[22] *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 348 (Tex. 2014). *See also Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1314 (S.D. Fla. 2016) (noting that through *Bostic*, Texas "uniquely among the 50 states requires a quantification of dose and product-specific epidemiology showing a doubling of the risk").

[23] *In re New York City Asbestos Litig. (Juni)*, 148 A.D.3d 233 (N.Y. App. Div. 2017), *aff'd on alternate grounds*, 2018 WL 6173944 (N.Y. Nov. 27, 2018).

[24] *Id*. at 255 (J. Feinman, dissenting) (citing *Lohrmann v. Pittsburgh Corning Corp.*, 783 F.2d 1156 (4th Cir. 1986)). Judge Feinman is currently an Associate Judge on the New York Court of Appeals.

[25] *See* Appellee The Ford Company's Answering Brief, at 28; Appellee Copes-Vulcan, Inc.'s Answering Brief, at 29-31.

for" standard in asbestos litigation.[26] And while asbestos plaintiffs in Delaware need putatively produce pre-summary judgment expert reports addressing each individual defendant, the standard is so easily satisfied as to be meaningless. Indeed, an expert need only state that the plaintiff *may* not have developed the same disease in the same time and manner "but for" the disputed exposure.[27] There is no "*de minimus*" standard in Delaware – any exposure can satisfy proximate causation, if the expert report states that magic words.[28] The "but for" standard applied in Delaware is therefore less a substantive burden than a procedural hurdle, and one without applicability to Ohio's statutory method of excluding asbestos cases with *de minimus* exposure.

Ultimately, there is no better guide as to the meaning of § 2307.96 than the language of the statute itself, as applied by the State's highest court in *Schwartz*. Proximate causation is established through evidence of frequent, regular, and proximate exposure to asbestos. Full stop.

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[26] *See Money v. Manville Corp. Asbestos Disease Comp. Tr. Fund*, 596 A.2d 1372 (Del. 1991).

[27] *See, e.g., In re Asbestos Litig. (Walls)*, 2016 WL 10703199, *3-4 (Del. Super. June 8, 2016).

[28] *See, e.g., Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 694 (Del. Super. 1986) (rejecting *de minimus* argument when plaintiff's expert indicated she would testify that the exposure was harmful).

A. Goodyear's incorrect argument that the Superior Court granted its Motion for Summary Judgment on the merits.

Goodyear does not contend that an expert report is necessary as part of a plaintiff's *prima facie* burden under Ohio law. Instead, Goodyear acknowledges that the *Schwartz* Court correctly analyzed "plaintiff's non-expert exposure evidence … to determine whether plaintiff had met her *prima facie* burden of establishing frequent, regular, and proximate exposure to the defendant's asbestos-containing product as required by Ohio Revised Code § 2307.96."[29]

The core of Goodyear's position is that "[h]ere, the Superior Court correctly conducted the same analysis as in *Schwartz*."[30] Clearly not – the Court's ruling was that Appellants lacked an element of their prima facie case – there was no finding about the sufficiency of the non-expert testimony as to Goodyear. To reiterate, the Superior Court did not hear oral argument on Goodyear's motion for summary judgment. Appellants simply do not assign the same meaning to the portions of the transcript quoted by Goodyear.[31] Certainly there is no indication that the Superior Court considered, let alone granted summary judgment on the basis of, e.g., insufficient proof regarding the asbestos content of the Goodyear gaskets used by Mr. Richards.

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[29] Appellee The Goodyear Tire & Rubber Company's Answering Brief, at 14.

[30] *Id*.

[31] *Id*. at 15-16.

Goodyear proceeds to restate the arguments it made in its original motion for summary judgment.[32] To be clear, Appellants disagree with Goodyear's arguments in this regard, for the reasons stated in their original Opposition to Goodyears Motion for Summary Judgment.[33] But Appellants position is that review of the merits of Goodyear's motion for summary judgment is inappropriate at this time, because there exists no record for review. To the extent the Court disagrees, Appellants refer the Court to the papers below.

B. Copes-Vulcan may be differently situated.

Of the three Appellees, the Superior Court heard argument only as to Copes-Vulcan. Of the three Appellees, then, Copes-Vulcan is the only defendant where the Superior Court's ruling could be read as a determination of *de minimus* exposure. Appellants do not agree with this reading – to the contrary, Appellants understand the Superior Court's ruling to be of technical deficiency as to all three Appellees.

[32] *Id*. at 17-24. Ford does the same. *See* Appellee Ford Motor Company's Answering Brief, at 30-33. Appellants' position applies equally against Ford as against Goodyear; to wit, the merits of Ford's motion for summary judgment are not ripe for appellate consideration. That said, Appellants strenuously disagree with Ford's contention that it is entitled to summary judgment on the merits.

[33] A1131-1146 and exhibits thereto, A1147-1249.

Appellants also disagree with Copes-Vulcan's interpretation of Mr. Richards' testimony. Again, Appellants rely in that regard on the arguments made in their briefing and expanded upon at oral argument.

Appellants request that this Court remand Copes-Vulcan's motion for summary judgment, along with the motions of Ford and Goodyear, for a determination of product ID, nexus, and adequate exposure to satisfy Ohio's statutory standard. In the alternative, Appellants request a ruling that Mr. Richards' testimony of exposure to Copes-Vulcan's asbestos-containing products creates a question of material fact requiring determination by the fact-finder – a jury of Mr. Richards' peers.

C. Appellees do not address timing contemplated by the Master Trial Scheduling Order.

To be clear, Plaintiffs will not proceed to trial without the benefit of expert testimony. To the contrary, Dr. Ginsburg can and will testify – as he has in two recent trials – as to the causation of Mr. Richards' disease. This testimony will encompass both general and specific causation. All of this is exactly as envisioned by the Scheduling Orders governing asbestos litigation in Delaware.

Accordingly, Appellees' suggestions that Appellants consider expert testimony unnecessary are misguided. The question is simply whether, under Ohio law, a specific formulation of expert report is necessary to survive summary

judgment. To say "yes" would be to promote form over function to no one's benefit. Frankly, as Dr. Ginsburg's supplemental report demonstrates, inclusion of the "magic" language does nothing to assist the *Lohrmann* "frequency, regularity and proximity" analysis. Regardless of whether Dr. Ginsburg's supplemental report is admitted, the case should be remanded for a simple determination of whether Mr. Richards' exposure to each Appellee's asbestos-containing products is *de minimus*, or not.[34]

[34] Included in this analysis are issues argued by, e.g., Goodyear – product ID and nexus. Clearly, to the extent Appellant cannot sustain his burden to demonstrate exposure to an *asbestos-containing* version of Goodyear's product, any exposure would necessarily be *de minimus*.

III. To the Extent Necessary, Appellants should be Permitted to Supplement Their Expert Report

Appellees counter Appellants' request to supplement their expert report by quibbling over the applicable standard, citing to cases such as *Moses v. Drake* as opposed to Appellants' reliance on *Drejka* and its progeny.[35] This case is distinguishable from *Moses* because here, indisputably, there was a change in underlying substantive law. To the extent another case arises controlled by Ohio, and the Superior Court's decision below remains good law, the plaintiff in that subsequent case will be required to obtain a compliant expert report as part of her *prima facie* case. Failure to do so would put that hypothetical plaintiff in the ambit of *Moses.*

Here, to the contrary, it was unclear how *Schwartz* would be interpreted. At all times until the issuance of *Schwartz*, Appellants' expert report would have sufficed as part of Appellants' *prima facie* case. Were Appellants' required to assume the most strict reading of the new authority? Should Appellants have requested an advisory opinion?

These were litigation decisions made by Appellants. But such decisions were made in good faith, and on a colorable basis as regards evolving underlying law. There is no reason why Appellants, then, should be worse-situated than the

[35] *Compare Moses v. Drake*, 109 A.3d 562 (Del. 2015) *with Drejka v. Hitchens Tire Service, Inc.*, 15 A.3d 1221 (Del. 2010).

defaulting parties in *Drejka*. Even to the extent counsel is deemed to be at fault, there is no reason why the Richards themselves should be deprived of a remedy under these circumstances.

If the Court opts to analyze this case under *Moses* and "good cause," or Superior Court Civil Rule 60 and "excusable neglect," the same outcome should result. Any balancing must consider the lack of prejudice Appellees will experience as a result. Yes, the grants of summary judgment will be reversed. But facing the merits of a dispute is not prejudice, and Appellees have no right to maintain undeserved victory.

Ultimately, the Superior Court thought counsel should have acted differently. The outcome, in all practical effect, was the sanction of dismissal. That sanction was unmerited under these circumstances, and the Superior Court's refusal to allow Appellants to supplement their expert report should be reversed.

CONCLUSION

WHEREFORE, Plaintiffs-Appellants move this Honorable Court to enter an Order granting them leave to amend their expert report, and remanding this matter for reargument of the motions for summary judgment filed by Defendants-Appellees.

Respectfully submitted,

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