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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION **SHAD C. SHAW**, and **SARAH SHAW**, his wife, Plaintiffs Below, Appellants, v. **AMERICAN FRICTION, INC.; BAKER HUGHES INCORPORATED; CABOT CORPORATION; CONOCOPHILLIPS COMPANY, as successor by merger to PHILLIPS PETROLEUM COMPANY, and TOSCO CORPORATION; DRILLING SPECIALITES COMPANY, LLC, individually as successor in interest to CHEVRON-PHILLIPS CHEMICAL COMPANY, LP.; EXXON CORPORATION; FORD MOTOR COMPANY; GENUINE PARTS COMPANY, trading as NAPA AUTO PARTS; GOULDS PUMPS, INCORPORATED;** and **GREENE, TWEED, & CO., INC.,** Defendants Below, Appellees.	No. 86, 2019 On Appeal from the Superior Court of the State of Delaware in C.A. No.: N17C-03-229 (ASB)

APPELLANTS' AMENDED OPENING BRIEF

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TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This is a tragic and valuable case governed by the most onerous substantive law in the United States. Mr. Shad Shaw died at the age of forty-six from mesothelioma, having sustained economic damages of approximately $10,000,000. The Superior Court effectively dismissed this case on procedural grounds, leaving the Shaw family without a remedy. Plaintiffs-Below/Appellants Shad C. Shaw, and Sarah Shaw, his wife, bring this appeal from the Superior Court's denial of Appellants' Motion to Change Trial Grouping.[1]

Prior to the expiration of the deadline to produce expert reports, Appellants moved for an extension. Although deadlines had been altered previously by agreement of the Parties, this was the first time Plaintiffs approached the Superior Court for an alteration of the trial schedule. Nonetheless, the Superior Court refused to alter the scheduling order (set by trial grouping, without involvement of the Superior Court). Accordingly, Appellants' expert report – a necessary component of her *prima facie* case – was deemed untimely. The obvious result of the exclusion of her expert report was that Appellants could not sustain their case against any Defendant, and the matter was dismissed.

[1] More specifically and as explained in the Statement of Facts, *infra*, the Superior Court's ruling affirmed the Special Master's denial of Appellants motion, and overruled Appellants exceptions thereto. The transcript of the hearing wherein the Superior Court denied Appellants motion is attached hereto as **Exhibit A**. The Special Master's Ruling on Appellants' motion is attached hereto as **Exhibit B**.

Herein, Appellants argue that the Superior Court's *de facto* dismissal of this matter constituted abuse of discretion. The Superior Court's decision denied Appellants of a remedy due to technical default, contrary to the aims of Delaware jurisprudence.

SUMMARY OF ARGUMENT

1) Under any framework, the Superior Court abused its discretion through its *de facto* dismissal of this case, thereby depriving Appellants of a remedy.

STATEMENT OF FACTS

Shad Shaw was diagnosed with incurable mesothelioma in April of 2016, at the age of forty-four.[2] Appellants filed suit on March 17, 2017. Shad was deposed on July 25-26, 2017. Significant portions of Shad's exposure to asbestos occurred as a child, when Shad accompanied his father to work at Price Drilling Company. Because of Shad's young age at the time of exposure, his father, Richard Shaw, was also deposed as a "product identification" witness. Richard Shaw was deposed on July 27, 2017, and again on September 27, 2017.

In the month following Shad's deposition, Appellants contacted and retained an industrial hygienist.[3]

On January 11, 2018, by agreement of the Parties, this matter was placed on the November 2018 trial docket.[4] In that setting, the date for Appellants to produce any expert reports was April 6, 2018, and the close of summary judgment fact discovery was May 11, 2018.[5] Plaintiffs initially pushed for the speedy trial of this matter, in the hopes that Mr. Shaw might be able to appear as his own witness. Such

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[2] *E.g.*, Appendix A088 (Plaintiffs' Second Amended Complaint, July 21, 2017).

[3] Hearing Transcript on Plaintiff's Motion to Change Trial Grouping, 40:1-11, Nov. 29, 2018 (attached hereto as **Exhibit C**).

[4] Appendix A118 (Order Approving Agreements and Stipulations Modifying Applicable Master Trial Scheduling Order and/or Standing Order No.1 Deadlines, Feb. 5, 2018).

[5] Master Trial Scheduling Order, Amended Feb. 8, 2018, at 41 (attached hereto as **Exhibit D**).

efforts were in vain, as Mr. Shaw succumbed to his illness on June 21, 2018. He was forty-six years old.

On January 12, 2018, Appellants produced the report of their economist, which concluded in part that Mr. Shaw's "total economic loss range[d] from $9,067,868 to $10,679,686."[6] Of course, this is in addition to damages for the pain and suffering endured by Shad, the loss of consortium for his wife Sarah and the family's two young children, as well as other available damages.

From the beginning, litigation of this matter was complicated by the applicability of the substantive law of Texas. Texas imposes "the most stringent [causation] test of any state" on asbestos plaintiffs.[7] The law of Texas is unlike any other jurisdiction in that it imposes specific *prima facie* requirements that asbestos plaintiffs must satisfy through expert reports. Texas is the only jurisdiction that requires a dosage report through an industrial hygienist as well as a causation report incorporating that dosage report. Specifically, in Texas "in the absence of direct proof of causation, establishing causation in fact against a defendant in an asbestos-related disease case requires scientifically reliable proof that the plaintiff's exposure to the defendant's product more than doubled his risk of contracting the disease. A

[6] Economic Loss Report of Chad L. Staller, at 4 (SHAW0727), Oct. 20, 2017 (attached hereto as **Exhibit E**).

[7] *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016).

more than doubling of the risk must be shown through reliable expert testimony that is based on epidemiological studies or similarly reliable scientific testimony."[8] Essentially, Texas mandates a two-step expert report process, unique in asbestos jurisprudence.[9]

Appellant is unaware of Texas' *Bostic* standard ever having been met in Delaware. Certainly, counsel for Appellants has never successfully met the standard. Thus, although Appellant was aware since commencing this matter that Texas law would apply, securing the necessary reports was necessarily a learning experience.

As stated, after the Shaws' depositions, Appellants promptly set about obtaining the required industrial hygiene report. Only in late January, 2018, were Appellants informed that the Shaws' testimony, as it stood, was insufficient.[10] From the end of January and for the following months, counsel for Appellants conversed

[8] *Georgia-Pacific Corp. v. Bostic*, 439 S.W.3d 332, 350 (Tex. 2014).

[9] *See, e.g., Green v. CertainTeed Corp.*, 2015 WL 556407, at *6 (Cal. Ct. App. Feb. 10, 2015) (describing Texas' causation standard as "a high hurdle"); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1314 (S.D. Fla. 2016) (noting the Texas "uniquely among the 50 states requires a quantification of dose and product-specific epidemiology showing a doubling of the risk").

[10] Ex. C, at 40:1-11 (hearing transcript).

repeatedly with Shad Shaw, working towards an affidavit to clarify his testimony, or a possible reposition to obtain the necessary testimony.[11]

As the April 6, 2018, deadline for expert reports neared, it became clear that Appellants would not be able to secure the necessary industrial hygiene report in time. Appellants still hoped that they could prepare for trial by November, with Shad's live testimony. Accordingly, Appellants worked with Defense Coordinating Counsel to arrange an extension, until May 11, 2018. The Special Master "so ordered" the agreement, without involvement by the Superior Court.[12] Trial date was not delayed.

Shortly thereafter, with Shad's condition worsening, Appellants were forced to recognize that a November trial was unrealistic. On April 15, 2019, Appellants agreed to postpone trial until March, 2019. Again, the Special Master "so ordered" the Parties' agreement, without involvement of the Superior Court.[13] Prior to the motions forming the basis of this appeal, this was the first and only time that this case's trial date was postponed.

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[11] *Id*. at 41:3-6.

[12] Appendix A122 (Order Approving Agreements and Stipulations Modifying Applicable Master Trial Scheduling Order and/or Standing Order No.1 Deadlines, Mar. 22, 2018).

[13] Appendix A128 (Order Approving Agreements and Stipulations Modifying Applicable Master Trial Scheduling Order and/or Standing Order No.1 Deadlines, Apr. 23, 2018).

In the March 2019 trial group, the deadline for expert reports was September 7, 2018, and the close of summary judgment fact discovery was October 4, 2018.[14]

Appellants returned to their Industrial Hygienist, endeavoring to understand what was needed to produce the requisite report. Shad's condition worsened, and in the time both immediately preceding his death in late June, as well as for a respectful period after, counsel for Appellants did not push the Shaw family about their lawsuit.

As the September deadline to produce expert reports approached, Appellants again approached Defense Coordinating Counsel about changing this matter's trial setting. To Appellants' surprise, agreement could not be reached. Accordingly, Appellants on September 4, 2018 – three days before the deadline to produce expert reports – filed a Motion to Change Trial Grouping from March, 2019, to September, 2019.[15]

Attached to Appellants' Motion was an affidavit from Shad's father, Richard Shaw, providing some of the quantification data Appellants had learned was necessary to obtain a compliant industrial hygiene report.[16] The affidavit did not identify any new products; rather, it provided estimates for the minimum number of

[14] *See* Ex. D, at 44 (Master Trial Scheduling Order).

[15] Appendix A131 (Plaintiffs' Motion to Change Trial Grouping).

[16] Appendix A136 (Richard Shaw Affidavit).

times Shad experienced specific exposures, as well as the approximate duration of such exposures.[17]

This was the first time the Court had any involvement whatsoever in this matter, beyond stamping "So Ordered" on the various agreements of the Parties. Trial was still more than six months distant. Defendants had not yet filed for summary judgment.

The Special Master heard oral arguments on September 13, 2018, and issued his decision on October 8, 2018.[18] Applying a good cause standard, the Special Master denied Plaintiff's Motion.[19] Given that the Special Master's decision was subsumed by the Superior Court's subsequent ruling, Appellants refrain from a lengthy recitation of the decision. Appellants simply note that the Special Master did find Plaintiffs to have been "generally diligent."[20]

On September 24, 2018, between arguments to the Special Master and the issuance of his decision, Defendants filed their "Motion to Exclude the Use of

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[17] At Richard Shaw's deposition, he declined to attach specific numbers to Shad's exposures, instead using phrases such as "frequently," "all the time," and "quite often." *See* Deposition of Richard Shaw, 230:13-231:9, Sept. 27, 2017 (excerpts attached hereto as **Exhibit F**).

[18] Appendix A237 (Superior Court Proceeding Worksheet); Ex. B (Special Master's Ruling).

[19] Ex. B (Special Master's Ruling). Appellants contest the applicability of the "good cause" standard, *see infra*.

[20] *Id*. at 7-8.

Richard Shaw's Untimely September 4, 2018 Affidavit."[21] Appellants' opposition was not filed until after oral arguments to the Special Master on Appellants' motion to change trial grouping.[22] Accordingly, although the Special Master was aware of Defendants' motion, he did not decide the issue.[23]

Appellants filed exceptions to the Special Master's ruling on October 15, 2018.[24] There, Appellants made essentially the same arguments as they will here – that the Special Master erred in denying Appellants' request to change trial grouping, and that the policy of deciding cases on their merits trumped fault on Appellants' part, to the extent such fault existed.

On November 6, 2018, Appellants produced the report of industrial hygienist Kenneth Garza.[25] Mr. Garza concluded in relevant part that Shad Shaw's exposure to asbestos from certain Defendants' products "more than doubled Mr. Shaw's risk of developing mesothelioma."[26] On November 21, 2018, Appellants produced the

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[21] Appendix A238 (Defendants' Motion to Exclude the Use of Richard Shaw's Untimely September 4, 2018 Affidavit).

[22] Appendix A502 (Plaintiffs' Opposition to Defendants' Motion to Exclude the Use of Richard Shaw's Untimely September 4, 2018 Affidavit).

[23] Ex. B, at 4, n.6 (Special Master's Ruling).

[24] Appendix A313 (Plaintiffs' Exceptions to the Special Master's Order of October 8, 2018 Denying Plaintiffs' Motion to Change Trial Grouping).

[25] Shad Shaw Asbestos Dose Report of Kenneth S. Garza, CIS, MS, at 13, Oct. 31, 2018 (attached hereto as **Exhibit G**).

[26] *Id*. at 13.

report of Dr. Arthur Frank, which referenced Mr. Garza's report, and concluded that Shad Shaw's non-trivial exposures to asbestos (*i.e.*, the exposures identified by Mr. Garza) were substantial contributing factors in causing Shad's mesothelioma and death.[27]

The Superior Court heard oral arguments on November 29, 2018, and reserved ruling.[28] A week later, in an oral decision, the Superior Court affirmed the Special Master's ruling, and overruled Plaintiff's exceptions to same.[29] Applying the same "good cause" standard, the Superior Court found Appellants to have been "not generally diligent," and the need for a Texas dosage report to have been foreseeable.

The Superior Court held Appellants' earlier attempts to move the case to trial on an expedited schedule against Appellants,[30] notwithstanding its statement at arguments that it "underst[ood] why it was preferable from a plaintiff standpoint to have a live plaintiff who is suffering from mesothelioma for a lot of reasons."[31] The Court also faulted Appellants for failing to approach Richard Shaw for an affidavit sooner, without referencing Appellants' argument that it was preferable to build their case through Shad Shaw himself, to the extent possible.

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[27] Report of Dr. Arthur L. Frank, Nov. 16, 2018 (attached hereto as **Exhibit H**).

[28] *See* Ex. C (hearing transcript).

[29] Ex. A (oral ruling).

[30] *Id*. at 14:21-15:4.

[31] Ex. C, at 37:2-5 (hearing transcript).

Crucially, the Superior Court gave short shrift to the analysis of prejudice. The Superior Court credited Defendants' argument that they were prejudiced through "revealing their summary judgment strategy and their witnesses," presumably through the filing of "Summary Judgment Witness and Exhibit Lists."[32] With respect to Appellants' argument that dismissal of its case would be the ultimate sanction, the Superior Court found that "the specter or dismissal, if that were to carry the day in every argument, if prejudice would carry the day in every argument, then that would excuse a multitude of sins."[33]

"[M]ost importantly," to the Superior Court, was the consideration that "if the Court does not … require adherence to deadlines given the number of cases and litigants on the asbestos docket, that docket would rapidly spiral out of control."[34] Weighing general diligence, foreseeability, and fault and prejudice, the Superior Court "f[ound] that no good cause to move the trial setting exists."[35]

The Superior Court also granted Defendants' motion to exclude Richard Shaw's affidavit, applying the same "good cause" standard it applied to Appellants' motion. In the Superior Court's view, "although the defendants are the moving party

[32] Ex. A, at 15:13-16 (oral ruling).

[33] *Id*. at 15:9-12.

[34] *Id*. at 15:18-22.

[35] *Id*. at 15:23-16:2.

to seeking to exclude Richard Shaw's affidavit, in effect, because it was filed after the deadline for fact discovery [it] is the plaintiffs who are seeking an extension of time to allow consideration of that affidavit."[36] Appellants contend that Richard Shaw's affidavit was not produced late, in that there is no "deadline for fact discovery" in the MTSO, and that the deadline for "summary judgment fact discovery" had not yet expired when the affidavit was produced, *see infra*. In any case, the Superior Court did not separately analyze the affidavit, instead finding that the same considerations applicable to Appellants' motion also applied to Defendants' motion to exclude.

On December 18, 2018, Defendants filed an Omnibus Motion to Dismiss All Claims Against All Defendants Based on Plaintiffs' Failure to Establish the Elements of a *Prima Facie* Case Under Texas Law.[37] Appellants had no grounds to contest Defendants' Motion, which was "so ordered" on January 25, 2018.[38] That Order made this case final and appealable.

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[36] Ex. A, at 6:18-22.

[37] Appendix A582 (Defendants' Omnibus Motion to Dismiss all Claims against all Defendants based on Plaintiffs' Failure to Establish the Elements of Prima Facie Case under Texas Law).

[38] Order Granting Defendants' Omnibus Motion to Dismiss, Jan. 25, 2019 (attached hereto as **Exhibit I**).

ARGUMENT

I. A Request to Delay Trial should not be Declined where the Alternative Is Dismissal of a Meritorious Case by Technical Default

A. Questions Presented

1) Did the Superior Court abuse its discretion by denying Appellants Motion to Change Trial Grouping in the absence of missed deadlines and under the "good cause" framework?[39]

2) To the extent the Superior Court's "good cause" analysis was not an abuse of discretion, should the Superior Court have considered *Drejka* factors as regards sanctions in lieu of dismissal?[40]

B. Scope of Review

This Court reviews a trial court's refusal to modify a scheduling order under the abuse of discretion standard.[41] "Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."[42]

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[39] Issue preserved at Appendix A318-A321 (good cause analysis).

[40] Issue preserved at Appendix A321-323 (urging application of *Drejka*).

[41] *See, e.g., Moses v. Drake*, 109 A.3d 562, 565-66 (Del. 2015) (citing *Christian v. Counseling Resource Assoc.*, 60 A.3d 1083, 1086-87 (Del. 2013)).

[42] *Coleman v. PriceWaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

"Conversely, when a trial judge exceeds the bounds of reason in light of the circumstances or has ignored recognized rules of law or practice to produce injustice, discretion has been abused."[43]

C. Merits of Argument

a. None of the Relevant Deadlines had Expired at the Time of Appellants' Motion

On September 4, 2018, when Appellants filed their Motion to Change Trial Grouping, the deadline to produce expert reports had not yet expired. Yes, it was only a few days away, but Appellants justifiably attempted to reach agreement with Defendants through Defense Coordinating Counsel prior to approaching the Superior Court (or the Special Master) with a request. Notably, cases on the asbestos docket change trial groupings very frequently, and frequently multiple times, without complaint from anybody involved, including the Superior Court.[44] Indeed, Appellants are aware of no instances of the Superior Court denying an extension or change in trial grouping agreed upon by the Parties, no matter how many times the case had been previously delayed.

[43] *Roache v. Charney*, 38 A.3d 281, 287 (Del. 2012).

[44] By way of example, the recent trial in *Knecht v. Ford Motor Co.*, N14C-08-164, was commenced in August 2014, and went to trial in June 2018.

Thus, it was in no way unusual or improper for Plaintiffs to seek agreement through Coordinating Counsel. Here, however, Defendants saw an escape route from a potentially expensive case, and refused to agree. It was only in this abnormal circumstance that Appellants were even forced to request an extension from the Court.

Likewise, Richard Shaw's affidavit was not untimely. Indeed, no extension was necessary in order to produce Mr. Shaw's affidavit on September 4, 2018. Summary judgment fact discovery did not close until October 4, 2018. While Appellees have portrayed the affidavit as "product identification," the simple fact is that Mr. Shaw did not identify any new products. To the contrary, Mr. Shaw clarified existing testimony.

At oral arguments, Defense Coordinating Counsel stated repeatedly that "fact discovery" had closed by the time Appellants produced Richard Shaw's affidavit.[45] This was an extension of its argument in papers, where it referenced the "deadline for product identification and exposure discovery (MTSO Event No. 4)."[46] The actual text of MTSO Event No. 4 is:

> Date to have completed the depositions of all plaintiffs' coworker, product identification, and other witnesses who will offer

[45] Ex. C, at 49:8 (Appellants' motion "was a request to reopen the fact record."); 49:15 ("The fact record was way closed.").

[46] Appendix A239 (Defendants' Motion to Exclude the Use of Richard Shaw's Untimely September 4, 2018 Affidavit).

> testimony establishing exposure to any particular defendant's asbestos or asbestos-containing product(s).[47]

Nevertheless, the Superior Court stated in its decision, without explanation, that Richard Shaw's affidavit "was filed after the deadline for fact discovery …"[48] Quite simply, no such deadline exists on the MTSO.

Asbestos defendants frequently rely on affidavits from their corporate representatives in support of their motions for summary judgment. Such affidavits are frequently drafted specifically for litigation in Delaware, and not produced until attached to the summary judgment motion itself (let alone by the close of the "summary judgment discovery" period). Purely by way of example, Appellee Ford Motor Company's Summary Judgment Witness and Exhibit List in this matter, filed on April 4, 2018, identifies its representative Matthew Fyie.[49] Ford notified Appellants that:

> Based upon written discovery and deposition testimony in this case, Mr. Fyie may provide an affidavit addressing Plainiff's testimony as to specific vehicles, purchases of replacement parts at Ford dealerships, the presence of retainer clips, and the use of aftermarket replacement parts.

If Defendants can properly reserve the right to introduce case-dispositive affidavits even after the close of summary judgment fact discovery, there is no

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[47] Ex. D, at 36 (Master Trial Scheduling Order).

[48] Ex. A, at 6 :18-22.

[49] Appendix A124 (Ford Motor Company's Witness and Exhibit List).

reason why Richard Shaw's affidavit should be rejected. Mr. Shaw's affidavit should not be construed as "product identification" testimony, and should be deemed timely filed.

b. "Good Cause" is Rarely Applied Under these Circumstances.

As mentioned *supra*, both the Special Master and the Superior Court applied a "good cause" standard to Appellants' motion. Appellants question whether the "good cause" standard rightfully applies under these circumstances. Indeed, as the Special Master noted, "[t]he Supreme Court has applied [the "good cause"] standard **when the deadline has expired**."[50]

The Special Master continued to state that "[t]o encourage compliance with the Master Trial Scheduling Order ('MTSO') in asbestos cases, the Court applies the same good cause standard … even in the absence of a missed deadline." For this proposition, the Special Master cited to *In re Asbestos Litigation (Vala)*.[51] In *Vala*, however, the Court considered a defendant's request for leave to file a revised reply brief. In that brief, the defendant wished to present an argument based on statutory law not included in either its opening brief or its initial reply. The statute was unchanged since the commencement of litigation. Under those circumstances, the

[50] Ex. B, at 6 (Special Master's Ruling) (citing *Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015)) (emphasis added).

[51] 2012 WL 2389898 (Del. Super. June 22, 2012).

court was not sympathetic. Thus, *Vala* was not a situation, as here, where a Motion to extend deadlines was made before the expiration of the applicable deadline.

Analysis of the cases cited by the Superior Court in *Vala*, and of the other cases cited by the Special Master lead to the same conclusion – courts generally apply the "good cause" standard for amending a scheduling order where a deadline has been missed. In *Coleman v. PricewaterhouseCoopers, LLC*, for example, the appellant submitted a supplemental expert report two months after its deadline had expired.[52] The trial court found an absence of good cause, and this Court agreed, because "the Supplemental Report 'was just dropped like a mini bomb into the legal landscape of this case without any prior telephone call to defendant's counsel to see if that would be a problem, without any motion to extend or revise the trial scheduling order to allow for later discovery.'"[53]

Likewise, *Moses v. Drake* and the associated line of cases facially consider attempts to "supplement a previously submitted expert report after the expert report cutoff has expired" – these cases are about "untimely filing[s]."[54]

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[52] 902 A.2d 1102, 1105 (Del. 2006) (cited by the Special Master at Ex. B, p.7 n.19).

[53] *Id*.

[54] 109 A.2d at 566. *See also, e.g., Lundeen v. Pricewaterhouse Coopers*, 919 A.2d 561 (Table), 2007 WL 646205 (Del. 2007) (supplemental report after close of expert report period).

Indeed, the "good cause" analysis stems from an outdated version of Superior Court Civil Rule 16(b).[55] Even cases relying on the former text of Rule 16(b) generally considered blown deadlines.[56] Despite relying on a prior version of the applicable rule, citation to these cases continues, including by the Superior Court in asbestos litigation.[57] The current version of Superior Court Civil Rule 16 does not set forth a standard for requests to modify a scheduling order, except to say that modifications requested *after* the pretrial conference will only be granted to prevent manifest injustice.[58]

While the Special Master provided some justification for its application of the "good cause" standard, the Superior Court did so without comment.[59] Appellants contend that the "good cause" standard applied by both was overly stringent under

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[55] *See, e.g., Candlewood Timber Group LLC v. Pan American Energy LLC*, 2006 WL 258305, * 4 (Del. Super. Jan. 18, 2006) ("The standard to be applied upon a motion to amend a scheduling order is set forth in Superior Court Civil Rule 16: 'A schedule shall not be modified except by leave of the Court upon a showing of good cause.'").

[56] *Id.*

[57] *See In re Asbestos Litig. (Richards)*, 2018 WL 3769190, *1 (Del. Super. 2018) (citing *Candlewood*). The opinion in *Richards* is currently under appeal to this Court, and scheduled for oral argument.

[58] Superior Court Civil Rule 16(e). *See also Bumgarner v. Verizon Delaware, LLC*, 2014 WL 595344, *2 (Del. Super. Jan. 14, 2014) (discussing the change in Rule 16).

[59] The Superior Court also did not respond to Appellants' contention that the *Drejka* standard should apply, given that the result of the Special Master's ruling was effectively the dismissal of Appellants' case.

the circumstances, where no deadlines had been missed and Appellants approached the Court for an extension for the first time. Appellants do not mean to suggest that the dates set forth in a scheduling order are unimportant, or should be modified on a whim. Yet, the application of a full "good cause" analysis under the circumstances here is unprecedented, to the best of Appellants' knowledge.

A more appropriate may simply be to analyze the respective prejudice to the parties and the interests of justice.[60] Or, in the alternative, the standard typically applied to motions for continuance.[61] Under that rubric, "the party seeking the continuance has the burden of establishing a clear record of the relevant facts relating to the criteria for a continuance, including the length of the requested continuance."[62] The party must also prove diligence; that the continuance will be efficacious; and "that the inconvenience to the Court, opposing parties, witnesses and jurors is insubstantial in relation to the likely prejudice which would result from the denial of the continuance."[63] Even the case law relating to motions for continuance generally occurs much closer to the scheduled trial date, and under circumstances more troubling than presented here.

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[60] This was the position taken by Appellants in their original motion. *See* Appendix A132-133 (Appellants' Motion to Change Trial Grouping).

[61] *See, e.g., Roache v. Charney*, 38 A.3d 281, 287 (Del. 2012).

[62] *Id*. (quoting *Secrest v. State*, 679 A.2d 58, 66 (Del. 1996)).

[63] *Id*.

c. Even a "Good Cause" Analysis Demonstrates the Superior Court's Abuse of Discretion.

To the extent this Court agrees with the Superior Court that a "good cause" standard controls Appellants' motion to change trial groupings, Appellants meet that standard. "Good cause is likely to be found 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."[64] Included in the "unfairness" factor is an analysis of the prejudice that would be suffered by each party.[65] Courts then engage in a balancing test of those factors to determine whether good cause exists.[66]

1) Diligence

The Special Master and the Superior Court disagreed on this factor, with the Special Master finding Appellants to have been generally diligent in their attempts to secure the necessary expert reports. Appellants clearly side with the Special Master here, and argue that they *were* generally diligent in their attempts to secure the necessary expert reports.

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[64] *Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015) *See also Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006).

[65] *Coleman*, 902 A.2d at 1107.

[66] *Id.*

Within a month following the Shaws' depositions, Appellants retained their industrial hygienist. Mr. Garza's initial review took a long time, and it was not until late January, 2018 – after the case had been placed in a trial group – that Appellants learned definitively that the record as it stood could not support the necessary report. Over the course of the ensuing months, counsel communicated with both Shad Shaw and Mr. Garza on numerous occasions, while Shad's condition steadily worsened.

Appellants communicated with Defense Coordinating Counsel throughout, and prior to the expiration of the expert deadline, attempted to reach out for an agreement to change this case's trial grouping. The fact that no deadlines were missed by Appellants prior to the motion practice at the core of this appeal speaks to Appellants' diligence in prosecuting this matter.

Diligence need not equal perfection. Knowing what they do now, counsel would have been able to secure the necessary testimony, and the subsequent industrial hygiene report, in a more timely fashion. But as the Special Master found, "[t]he problem was not that Plaintiffs were asleep at the switch or dropped the ball."[67] Under the circumstances here, and balancing the relevant factors, lack of diligence should not carry the day.

[67] Ex. B, at 8 (Special Master's Ruling).

2) Foreseeability and Fault

Appellants concede that the need to satisfy Texas' causation standard has been at all times foreseeable. Nonetheless, foreseeability does not equal fault.

Appellants are unaware of any previous asbestos cases in Delaware where Texas' *prima facie* requirements have been successfully met. That Appellants' New York firm has unsuccessfully brought cases governed by Texas substantive law does not, therefore, indicate experience in meeting those standards. Here, Plaintiffs could not move forward with an industrial hygiene report until Mr. Shaw gave his deposition testimony. That started the clock, and Plaintiffs substantive education as to Texas law began.

Appellants repeatedly returned to their proposed industrial hygienist for an understanding of Texas' substantive requirements, and where existing evidence fell short. These discussions led to conversations with Mr. Shaw, whose condition was steadily worsening and who became less responsive as time passed. Appellants considered alternate experts, only to learn that the individuals who they had already approached are widely considered *the* authorities on the issue. As stated at argument, Texas quite simply applies the most onerous standard of any state.

The Superior Court found it to be foreseeable that Shad Shaw would succumb to his mesothelioma.[68] Unfortunately so, but that does not put Appellants at fault for attempting to prove their case through Shad himself, instead of through his father. And when Shad did ultimately die, Appellants moved promptly to build the necessary record through Richard Shaw.

3) Prejudice

The respective prejudice to the Parties is the most compelling factor here, and should carry the day. The "prejudice" to Defendants, should the Motion be granted, is the *possibility* that they need face the merits of this case. Defendants cannot demonstrate wasted costs, or effort, in simply allowing Plaintiffs more time to secure the necessary expert reports.

The Superior Court credited Defendants' argument that they were "prejudiced by revealing the summary judgment strategy and their witnesses."[69] This is without merit. Again, by way of example, Defendant Ford Motor Company's Witness and Exhibit List applied to eleven separate cases.[70] Ford's list, like those of its co-defendants, disclosed nothing of substance regarding their strategy. Defendants' witness and exhibit lists are near meaningless in the grand scheme of this litigation.

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[68] Ex. A, at 11:9-20 (oral ruling).

[69] Ex. A, at 15:13-16.

[70] Appendix A123-124 (Ford Motor Company's Witness and Exhibit List).

By contrast, of course, this matter was effectively dismissed through the Superior Court's denial of Appellants' motion. The Shaw family will be deprived of a remedy for the death of their father at age forty-six (46). Balancing of the prejudice as against the Parties is not a close call.

The Superior Court disregarded the true import of its decision, stating that "the specter of dismissal, if that were to carry the day in every argument … would excuse a multitude of sins."[71] This slippery slope argument should only be credited when the real prejudice in this specific case was fairly weighed. That was not done here.

Likewise, the Superior Court found that "most importantly, … if the Court does not … require adherence to deadlines given the number of cases and litigants on the asbestos docket, that docket would rapidly spiral out of control."[72] Appellants are unsure what supports the Superior Court's perceived fear in this regard. To the contrary, the asbestos dockets appears to Appellants to be well managed and under control. Regardless, Appellants can only reiterate that the possibility of a future problem is not a reason to ignore well-established rules of law as applied to this case.

Balancing diligence, foreseeability, and relative prejudice to the Parties inevitably leads to the conclusion that Appellants' motion should have been granted.

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[71] Ex. A., at 15:9-12.

[72] Ex. A, at 15:18-22.

d. Given that the Effect of the Superior Court's Ruling is to Dismiss Appellants' Case, a *Drejka* Analysis is Appropriate

Due to its finding of lack of diligence and fault on the part of Appellants' counsel, the Superior Court effectively imposed a sanction of dismissal through its denial of Appellants' motion. While Appellants contest the Superior Court's findings in its good cause analysis, *supra*, to the extent this Court does not find that the Superior Court abused its discretion, Appellants contend that the *Drejka* standard applies.[73] *Drejka*, of course, considers the sanctions appropriate for discovery violations. Appellants do not see why they should be worse positioned than the openly recalcitrant litigants in *Drejka*. That is, why should dismissal of a case be an appropriate outcome for active litigants who seek to revise a scheduling order, such as Appellants, but not for repeated violators of court orders, as in *Drejka*?

Indeed, the effect of the Superior Court's denial of Appellants' motion was to dismiss the case. This Court has on at least three occasions in recent years reversed the Superior Court's dismissal of a meritorious case, under circumstances indicating substantially more fault by the appealing party.[74]

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

[74] *See Drejka*, 15 A.3d at 1224; *Hill v. DuShuttle*, 58 A.3d 403, 406-07 (Del. 2013); *Christian v. Counseling Resource Associates, Inc.*, 60 A.3d 1083, 1088 (Del. 2013).

"[T]he sanction of dismissal should be imposed only as a last resort."[75] This Court balances six factors to determine whether the ultimate sanction of dismissal is appropriate:

> (1) The party's personal responsibility; (2) the prejudice to the opposing party; (3) the history of delay; (4) whether the party's conduct was willful or in bad faith; (5) the effectiveness of lesser sanctions; and (6) the meritoriousness of the claim.[76]

The *Drejka* factors largely overlap the "good cause" considerations already stated. Yet *Drejka* highlights the policy reasons pointing towards the granting of Plaintiffs' Motion. "Delaware has a strong public policy that favors permitting a litigant a right to a day in court."[77] The Superior Court has broad discretion and should apply rules with "liberal construction because of the underlying public policy that favors a trial on the merits, as distinguished from a judgment based on a default."[78] In light of the Mr. Shaw's death, and in the spirit of our Supreme Court's teachings in *Dishmon v. Fucci* and its progeny,[79] there exists good cause for the Court to order the rescheduling of this case, and Plaintiffs ask this Court to do so.

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

[76] *Id.*

[77] *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011). *Dishmon* and its progeny highlight Delaware's public policy that favors permitting a litigant a right to a day in Court.

[78] *Beckett v. Beebe Medical Center, Inc.*, 897 A.2d 753, 758 (Del. 2006)

[79] *Id.* (*citing Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998)). *See also* Del. Const., art. I, § 9; *Giles v. Rodolico*, 140 A.2d 263, 267 (Del. 1958); *Battaglia v. Wilmington*

Despite Appellants' arguments in briefing and at argument, the Superior Court did not reference *Drejka* in its opinion.[80] Regardless, consideration of the *Drejka* factors dictate an outcome other than dismissal of Appellants' case.

Certainly the Shaws themselves bear no personal responsibility for the current state of affairs. Prejudice to the opposing Parties is minimal, as discussed previously. There is no indication that Appellants' conduct was "willful or in bad faith."

Because it did not consider *Drejka*, the Superior Court did not consider lesser sanctions. There is no indication that any such sanction would be ineffective. Indeed, Appellants have already served the reports necessary to make out a *prima facie* case, so there is no danger of continued recalcitrance. At argument, Appellants suggested that they be forced to pay for the cost of a re-deposition of Richard Shaw as sanction, to the extent Defendants wish to undertake a redeposition.[81] Indeed, any

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Sav. Fund Soc., 379 A.2d 1132, 1135 (Del. 1977); *Tsipouras v. Tsipouras*, 677 A.2d 493, 496 (Del. 1996); *Reynolds v. Reynolds*, 595 A.2d 385, 389 (Del. 1991).

[80] The Special Master did, stating that "I do not believe *Drejka* is applicable here, where multiple extensions were granted and in the absence of any unforeseeable problems or unfairness. In my view, the *Drejka* analysis was not intended to trump Court deadlines under such circumstances." Ex. B, at 10, n.25. Appellants disagree with the Special Master's apparent understanding of *Drejka* as applicable only to circumstances of "unforeseeable problems or unfairness."

[81] Ex. C, at 44:16:23.

of the range of possible sanctions available, from reprimand to fine, are preferable to counsel than to see the Shaws' case thrown out without reaching the merits.

In that regard, the Shaws' claims are meritorious. Appellants have produced the opinion of an industrial hygienist quantifying Shad's exposures to asbestos, and concluding that the products of certain Defendants resulted in a doubling of Shad's risk of contracting mesothelioma. Coupled with the report of Dr. Frank, these are the necessary components of a *prima facie* case under Texas law. Whether Appellants will ultimately succeed at trial is a question for another day – for now, it suffices to demonstrate that Appellants have a strong expectation of surviving summary judgment against multiple defendants.

Put in the balance, it was an abuse of the Superior Court's discretion to dismiss Appellants' claims. On remand, Richard Shaw's affidavit, Mr. Garza's report based on same, and Dr. Frank's causation report should be admitted, and the merits of Plaintiffs' claims heard.

CONCLUSION

For the reasons set forth herein, Appellants respectfully request the Order denying their Motion to Change Trial Groupings be reversed; that the affidavit of Richard Shaw, the Industrial Hygiene Report premised on same, and the expert report of Dr. Arthur Frank be deemed timely served, and that this matter be remanded for litigation on the merits beginning with motions for summary judgment.

Respectfully submitted,

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