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Case Number 86,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	)	
	)	
SHAD C. SHAW, and SARAH SHAW, his wife Plaintiffs Below, Appellants	)	
	)	No. 86, 2019
v.	)	
	)	Court Below:
AMERICAN FRICTION, INC.; BAKER HUGHES INCORPORATED; CABOT CORPORATION; CONOCOPHILLIPS COMPANY, as successor by merger to PHILLIPS PETROLEUM COMPANY and TOSCO CORPORATION; DRILLING SPECIALTIES 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 & COMPANY, INC., Defendants Below, Appellees.	)	The Superior Court of The State of Delaware C.A. No. N17C-03-229 (ASB)

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NATURE OF PROCEEDINGS

The premise of Appellants' appeal is that they should have gotten a free pass to move the trial date and discovery deadlines and belatedly offer an affidavit from Richard Shaw providing information that he testified he did not know during his two-day deposition more than a year before. Appellants did not demonstrate good cause for their failure to meet their obligations and comply with established deadlines even after they had secured extensions and accommodations to do so. Appellants' argument is based on the assertion that Texas law sets a high bar for an asbestos plaintiff to establish a prima facie case. But the Texas-law standard has been in place since 2007 and could not have been a surprise to Appellants or their counsel, who knew all of Mr. Shaw's alleged exposures occurred in Texas and explicitly invoked Texas law as the governing substantive law. The Superior Court found that Appellants were not diligent and were at fault for failing to meet the requirements under Texas law, which foreseeably governed the action, and that it was not unfair for the court to adhere to the very case deadlines that Appellants requested and agreed to. These findings are all supported by the record—and certainly were not an abuse of the Superior Court's considerable discretion.

Appellants Shad Shaw and Sarah Shaw filed this asbestos suit in March 2017, asserting claims of negligence and product liability against 17 Defendants. Shad Shaw and his father Richard Shaw were deposed in the summer and fall of

2017 as to their knowledge about any asbestos exposure Shad may have sustained. In January 2018, Appellants requested to add their case to the asbestos Master Trial Scheduling Order (MTSO) as part of the November 2018 trial grouping, which established a number of deadlines in the case, including the deadlines to complete product identification discovery (February 2, 2018) and to submit expert reports (April 6, 2018). Defendants subsequently agreed to Appellants' requests to delay their expert report deadline by a month and later to again postpone that deadline and the trial by six more months.[1]

On the eve of the already-twice-extended deadline for Appellants' expert reports, in September 2018, Appellants moved to change their trial grouping by yet another six months and attached an untimely affidavit from Richard Shaw offering new details about Shad's asbestos exposures that neither Shad nor Richard had provided at their depositions. Appellants' motion acknowledged that without *both* Richard Shaw's new affidavit *and* an extension of expert deadlines that would result from moving to a new trial grouping, they lacked sufficient evidence and time to prepare the industrial hygienist and causation expert reports Texas law requires.

[1] Appellants filed witness and exhibit designations at the end of January 2018, which they amended in April 2018 and September 2018. None of those lists identified an industrial hygiene expert among the more-than-a-dozen witnesses and experts. *See* B017-133.

Appellants' motion to change trial grouping was first heard by the Special Master, who found that Appellants failed to demonstrate good cause and that granting their motion "under these circumstances would jeopardize the orderly development of cases for trial pursuant to the deadlines set forth in the MTSO." Appellants' Ex. B at 12. The Superior Court agreed, denying Appellants' exceptions to the Special Master's report and separately granting Defendants' motion to exclude Richard Shaw's untimely affidavit. Appellants' Ex. A at 10-16. The court found that Appellants had failed to demonstrate good cause to change their trial grouping. *Id.*

The only reason that Appellants offered for moving trial grouping was their need for more time to generate and provide their experts with exposure details required by Texas law. But, as the Superior Court noted, Appellants knew of Texas's requirements from the beginning of the lawsuit. Further, the new exposure details conveyed in Richard Shaw's affidavit predated his and Shad's depositions, taken over a year earlier. Moreover, the court explained that if Appellants' failure to develop a sufficient factual record for an expert report—after two previous extensions—could constitute good cause to move their trial grouping, scheduling orders would become meaningless and the Superior Court would lose the ability to manage the large number of asbestos (and other) cases on its docket.

Defendants then moved to dismiss Appellants' case based on their failure to satisfy Texas's causation standard, which Appellants did not oppose. The Superior Court granted that motion. Appellants appealed, limiting their argument to whether the Superior Court abused its discretion in denying their motion to move trial grouping. Appellants' opening brief does not address, and therefore waives, any argument concerning the Superior Court's separate ruling excluding Richard Shaw's affidavit. *See infra* pp. 20-21 & n.3.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court did not abuse its discretion when it denied Appellants' motion to again change trial grouping. The Superior Court applied the correct legal standard, considered all relevant factors, and carefully examined the record to rule Appellants failed to demonstrate good cause to further postpone trial and all upcoming discovery deadlines.

None of Appellants' contrary arguments withstand scrutiny. *First*, Appellants assert that good cause is not the governing standard, either because their expert deadline had not yet passed when they moved to change the trial grouping or because some other standard "may" be "more appropriate." Appellants' Br. 21. This argument, which was not made below, is both waived and incorrect. Appellants argued to the Superior Court that they had good cause—not that some other, more lenient standard should govern. That made sense, given that both the overall asbestos litigation scheduling management order (General Scheduling Order No. 1, *see* Ex. 1) and prevailing Superior Court practice call for good cause in these circumstances.

Second, Appellants claim that the Superior Court abused its discretion in finding that they did not demonstrate good cause. Appellants concede that one of the three good cause factors cuts against them: it was "at all times foreseeable" that they needed to develop a record that would satisfy Texas's causation standard.

Appellants' Br. 24. Incredibly, Appellants argue somehow it was not a lack of diligence that caused them to determine *after* they had selected a trial grouping that they had created an insufficient record to obtain an industrial hygienist's report, or to wait nine more months before trying to do anything about that deficiency. They offer no reason that the Superior Court's contrary finding was an abuse of discretion.

Although Appellants fault the Superior Court for not doing a comparative analysis of the "respective prejudice" to the parties, the actual good cause factor is "unfairness to [the *moving*] party." *Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015). Appellants never explain how the Superior Court abused its discretion by finding that it was not unfair to hold them to the deadlines for the trial group that they voluntarily requested (and already moved once), knowing Texas law applied, knowing the requirements of Texas law, and knowing what factual record they had created.

Third, Appellants suggest that because denying their motion to move the trial date ultimately meant that their prima facie case failed, this Court's decision in *Drejka v. Hitchens Tire Service Inc.*, 15 A.3d 1221 (Del. 2010), should control the analysis. That, again, is incorrect. For starters, *Drejka* has never been applied to a trial court's decision not to postpone a trial date. Scheduling cases for trial, along with managing the trial docket, is uniquely and securely within the Superior

Court's discretion. This Court should not extend *Drejka* to interfere with those inherent powers for an obvious reason: Doing so would contradict established Delaware law by forcing the Superior Court to grant relief even when the moving party fails to demonstrate good cause for that relief. Moreover, here, the Superior Court was not punishing Appellants for violating its scheduling order. Instead, it ruled simply that Appellants failed to demonstrate good cause for further delays. For that reason too, *Drejka* is inapplicable. The Superior Court's order should be affirmed.

STATEMENT OF FACTS

A. Appellants File Suit Under Texas Law.

Appellant Shad Shaw, a lifelong resident of Texas, was diagnosed with mesothelioma in April 2016. A045-46, A050; *see also* B002, B008. He and his wife Sarah Shaw filed suit in Superior Court in March 2017, naming 17 separate companies as Defendants. *See* A044-45, A049.

Appellants' complaint alleged that Shad Shaw was exposed to asbestos fibers through "drilling muds, drilling rigs, brakes on drilling rigs, pumps, valves, packing, gaskets, automotive brakes, and automotive clutches" that were "manufactured, sold, distributed, or installed by the Defendants." A046, A049. This exposure was allegedly sustained when Appellant Shad Shaw worked at "Price Drilling Co. (TX), in Texas, from approximately 1989 to 2016," and "Texas Cementing Services, in Texas, from approximately 2011 to 2016." A045. In addition, Appellants alleged that Shad Shaw "was exposed to asbestos from the dust brought home on the clothing of his father . . . and grandfather," each of whom worked on drilling rigs in Texas. A046. Lastly, Appellants alleged that Shad Shaw sustained asbestos exposure visiting his father (Richard Shaw) at work and by "working on automobiles," *id.*, all of which also occurred in Texas, *see* B015.

Appellants further provided that their suit was "predicated upon the substantive law of the State of Texas." A050. To establish causation under Texas

law, asbestos plaintiffs must provide "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease." *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007). An expert is required to "offer an opinion as to whether the dose to which the plaintiff was exposed" from a defendant's product was "sufficient to cause the disease." *Id.* at 771 (quoting Reference Manual on Scientific Evidence 419). In cases with multiple exposures, expert testimony must show that an individual defendant's product "more than" doubled "the risk" that the plaintiff would develop his asbestos-related illness. *Id.* at 772 (internal quotation marks omitted). To meet that requirement, the "dose" of asbestos exposure from each defendant's products "must be quantified." *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 353 (Tex. 2014). In 2014, the Texas Supreme Court confirmed this standard is controlling here, concluding that "the essential teaching of *Flores* is that dose matters, and this requirement applies to mesothelioma cases." *Id.* at 360.

Flores was decided in 2007, ten years before Appellants filed this action invoking Texas law. *Bostic* was issued nearly three years before this suit was filed. In 2010, the director of the appellate litigation unit and Asbestos-Cancer group at Appellants' counsel's law firm published a law review article acknowledging that

Texas law required "quantified proof of exposure doses."[2] Moreover, before filing this case, Appellants' own counsel had argued several cases under *Flores*'s causation standard, at least two of which were defeated at summary judgment because the plaintiffs failed to satisfy *Flores*'s requirements. A512. Thus, Appellants were well aware of the unique requirements of Texas's causation standard when they commenced this lawsuit.

B. After Appellant Shad Shaw And His Father Were Deposed For Purposes Of Product Identification, Appellants Added Their Case To The MTSO For Trial In November 2018.

Shad Shaw was deposed on July 25 and 26, 2017, approximately four months after he filed suit. B001, B007, B010. His father, Richard Shaw, was deposed on July 27, 2017, B014, and then again in September 2017, *see* Appellants' Ex. F at 216. According to Appellants, they retained an industrial hygienist one month *after* the Shaws' depositions were completed. Appellants' Ex. C at 40. Neither Shad Shaw nor his father approximated the dose of asbestos exposure Shad allegedly sustained from any particular defendant's product. At most, Shad Shaw testified that he worked with a given defendant's products "frequently." *See* B003. When pressed for an approximation, he admitted, "I couldn't give you a number on each." B005-006; *see also* B004 ("Frequently. But I don't know about—know the number

[2] *See* Alani Golanksi, *Paradigm Shifts in Products Liability and Negligence*, 71 U. Pitt. L. Rev. 673, 692 n.77 (2010).

of times."); B012 ("Frequently, we did them all. I mean, you know, I couldn't give you percentages.").

After obtaining this testimony, Appellants sought to add their case to the asbestos Master Trial Scheduling Order (MTSO) "as part of the November 2018 trial docket." A255. In doing so, Appellants accepted the pretrial requirements stated in the asbestos General Scheduling Order No. 1, which forms the basis of the MTSO. *See* Ex. 1. Defendants accommodated Appellants' request, and accordingly, the trial court amended the MTSO to place this case in the November 2018 trial grouping. A118, A249-251, A255. Appellants' initial witness and exhibit designations were due ten days later. A255. Under the MTSO for the November 2018 trial grouping, Appellants' deadline for product-identification discovery was February 2, 2018, and their expert reports deadline was April 6, 2018. A340; *see also* Appellants' Ex. D at 40, 41. Appellants' deadline for product identification discovery was February 2, 2018, which meant that they were required "to have completed the depositions of all plaintiffs' coworker, product identification, and other witnesses who will offer testimony establishing exposure to any particular defendant's asbestos or asbestos containing product(s)" by that time. A340; *see also* Appellants' Ex. D at 40, 41. Once the defendant-specific exposure testimony was complete, Appellants had two months—until April 6, 2018—to submit their expert reports. *Id.*

Instead of providing their expert reports on that date, Appellants requested, and Defendants agreed, to extend their deadline to submit expert reports from April 6 to May 11, 2018. A340, A357. The Superior Court ordered that the MTSO be amended accordingly. A122, A340, Ex. 2 at 22. But Appellants did not provide an expert report by the revised deadline either. Instead, they asked—and Defendants again agreed—to move the case to the MTSO's March 2019 trial group. This would keep intact all previously passed deadlines, including Appellants' deadline for witness and exhibit designations, deadline to complete Shad and Richard Shaw's depositions, and deadline for product identification, but it would extend Appellants' expert report deadline to September 7, 2018, and move other upcoming discovery deadlines and the trial date back approximately six months. *See* Appellants' Br. 7; A340, A359, Ex. 2 at 10-11, 24-26. The Superior Court granted that motion and moved Appellants' case to the March 2019 trial group. *See* A359, Ex. 2 at 10-11. Appellants thus had 239 days from when they requested the case be docketed for trial to prepare their expert reports—the initial 85 days from their January 11 request until the initial deadline of April 6, 2018, and 154 additional days (i.e., from April 6 to September 7, 2018) based on extensions that Defendants agreed to.

According to Appellants' counsel, from September 2017 to September 2018, they had "been in contact" with an industrial hygiene expert roughly a dozen times.

Appellants' Ex. A at 9. In January 2018, Appellants realized (four months after contacting their expert) that the fact record they had developed during Shad and Richard Shaw's depositions was "insufficient" under Texas law. Appellants' Br. 6; *see also* Appellants' Ex. B at 2. Shad Shaw passed away on June 21, 2018, *see* A131, and neither his nor his father's deposition testimony provided the defendant-specific dosage approximation that Texas law requires. Without that information, Appellants could not obtain the expert report they needed to make a prima facie case against any of the defendants. *See* A132 (recognizing the "continuing deficiency" in Appellants' "expert reports").

C. The Special Master And The Superior Court Found That Appellants Lacked Good Cause To Move The Trial Grouping Again.

Despite allegedly having been in frequent contact with their industrial hygiene expert over the preceding year, by September 4, 2018, Appellants had yet to submit an expert report in accordance with their upcoming September 7 deadline. Without a report, Appellants moved for a third extension, this time requesting that the trial be pushed from the MTSO's March 2019 trial grouping to the September 2019 setting. A131. That would delay trial by another six months and postpone the deadline for their expert report from September 7, 2018 to February 23, 2019. *See* Ex. 2 at 27. In connection with that motion, Appellants submitted a "recently obtained affidavit" from Richard Shaw. A131, A136-141. The affidavit offered

numerous statements, which, for the first time, quantified the asbestos exposure that Shad Shaw allegedly sustained from the products of individual defendants. *See* A136-A141. Appellants' motion offered no explanation for why this affidavit was being untimely produced after the close of product-identification discovery or why Richard Shaw could now remember decades-old information that he had testified he did not recall during his deposition a year earlier.

Appellants' motion asserted that Texas law "imposes specific *prima facie* requirements that asbestos plaintiffs must satisfy through expert reports." A132. They acknowledged that the fact record they had developed during product identification discovery through Shad and Richard Shaw's depositions was insufficient for an expert to opine on causation under Texas law, and that they belatedly obtained and filed Richard Shaw's affidavit in an effort to rectify that deficiency. *Id.* Appellants asked the Superior Court to *again* postpone the trial date by six months, which would also push back every upcoming discovery deadline—including the expert report deadline. Their only rationale was that they "recogniz[ed] the continuing deficiency in their expert reports," A132, and "Delaware has a strong public policy that favors permitting a litigant a right to a day in court." A133 (quoting *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011)).

Defendants opposed Appellants' motion, *see* A147, and separately moved to exclude Richard Shaw's untimely September 4, 2018 affidavit, *see* A238.

Defendants argued Appellants had failed to show "good cause" to postpone the trial date. A150. Appellants made "no effort whatsoever to demonstrate that they have been diligent or that their stated need for additional time and a late-filed affidavit was not foreseeable and not their fault." *Id.* In Defendants' view, it would be inappropriate to grant Appellants "a 'do over'" on summary judgment and trial strategy simply because—over a year after Shad and Richard Shaw's depositions—Appellants realized that they "failed to establish the record they need in order to meet the Texas causation standard." A240.

The motion was submitted to the Special Master, who found that Appellants failed to demonstrate "good cause" to move the trial grouping. Appellants' Ex. B at 6-12. To meet their burden in showing "good cause," Appellants needed to demonstrate that "(a) they have been 'generally diligent,' (b) their need for more time to submit expert reports was 'neither foreseeable nor [their] fault,' and (c) refusing to grant the relief they seek would 'create a substantial risk of unfairness' to Appellants that outweighs the risk of unfair prejudice to Defendants." *Id.* at 7. In the Special Master's view, Appellants attempted to establish "good cause" simply by showing they were unable "to muster a sufficient factual record . . . in the time allocated by the Court." *Id.* at 10. But if that constituted "good cause," the Special Master reasoned, "then the Court would be hard pressed to deny any request

for an extension to accommodate a party who has not yet been able to develop a satisfactory factual record." *Id.*

Moreover, the Special Master ruled that "any seeming unfairness" to Appellants "was cured by the two extensions" they were already granted. *Id.* The Special Master thus denied Appellants' motion and explained that granting a third request for an extension "under these circumstances would jeopardize the orderly development of cases for trial pursuant to the deadlines set forth in the MTSO." *Id.* at 12. Appellants filed exceptions to the Special Master's order. *See* A313.

The Superior Court accepted the Special Master's order and overruled Appellants' objections. It found that all three of the good cause factors weighed against Appellants. Appellants' Ex. A at 10-16. In terms of diligence, the Superior Court found that from the beginning of the lawsuit, Appellants' "counsel knew what was necessary in order to comply with Texas law." *Id.* at 11. Shad Shaw "was diagnosed with mesothelioma in April 2016 and lived a little more than two years after the initial diagnosis." *Id.* But without explanation, Appellants "waited" to submit an affidavit from Richard Shaw purporting to offer details about Shad's exposure until after "Shad Shaw had died." *Id.* at 12. Given that Richard Shaw was deposed in July and September of 2017, Appellants had not "adequately explained" why they waited until September 2018 to supply the information contained in his affidavit. *Id.* Indeed, after Shad Shaw died, the "report was

prepared and the affidavit was obtained within only four months." *Id.* at 14. Ultimately, because the "type of information" that Appellants' expert required for his "expert opinion was the type of questioning that could have been asked at either deposition of Richard Shaw or of Shad Shaw," Appellants lacked diligence in not presenting it sooner. *Id.* at 13; *see also id.* at 10-11.

The Superior Court also found Appellants' arguments as to foreseeability and fault fell short. *Id.* at 14. The court noted that "a lot" of the facts relevant to diligence apply to the foreseeability factor as well. *Id.* Because all parties knew that Texas law applied, "[i]t was entirely foreseeable that the type of information that was necessary for the [expert] report needed to be obtained." *Id.* Moreover, "it was entirely foreseeable that Shad Shaw had a limited life expectancy," and therefore might not be able to personally provide information vital to the expert report. *Id.* Because the facts later included in Richard Shaw's affidavit were "always available to the plaintiffs," they were at fault for not providing that information earlier so that their expert could complete the "expert report within the appropriate deadline." *Id.*

Finally, the Superior Court found that Appellants had not demonstrated the "third criteria," the "risk of unfairness to the moving party," weighed in their favor. *Id.* The Superior Court "agree[d] with" the Special Master "that if the inability to develop a factual product identification record within" an already-twice extended

deadline "were to carry the day," then "plaintiffs would almost always win." *Id.* at 14-15. Relying on its unique expertise in managing the asbestos caseload in Delaware, the court explained that "adherence to the deadlines" in the MTSO is required "given the number of cases and litigants on the asbestos docket." *Id.* at 15. If Appellants' circumstances constituted "good cause," the asbestos "docket would rapidly spiral out of control." *Id.* at 15-16. The Superior Court overruled Appellants' exceptions and denied Appellants' motion to change trial grouping. *Id.* at 16. The Superior Court also separately granted Defendants' Motion to Exclude the Use of Richard Shaw's Untimely September 4, 2018 Affidavit. *Id.*; *see also* A238.

Defendants subsequently filed a motion to dismiss all claims based on Appellants' failure to establish causation under Texas law, which Appellants did not oppose. A582. The Superior Court granted that motion. *See* A585. Appellants limited their argument on appeal to whether the Superior Court improperly denied their motion to change trial grouping. *See* Appellants' Br. 14-30.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION TO MOVE TRIAL GROUPING BASED ON THEIR FAILURE TO SHOW GOOD CAUSE FOR DOING SO.

A. Question Presented.

Whether it was an abuse of discretion for the Superior Court to deny Appellants' third request to deviate from the MTSO and to postpone trial by another six months.

B. Scope of Review.

This Court reviews for abuse of discretion an order denying a motion to postpone the trial date. *Valentine v. Mark*, 873 A.2d 1009, 2005 WL 1123370, at *1 (Del. 2005) (Table); *see also Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 528 (Del. 2006) ("[T]he trial court has discretion to resolve scheduling issues and to control its own docket." (quoting *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006)). It also reviews for an abuse of discretion a grant of summary judgment that is "based on a plaintiff's expert disclosure and report deadline not being extended." *Moses*, 109 A.3d at 565-566. "When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge . . . ." *Sammons*, 913 A.2d at 528 (quoting *Coleman*, 902 A.2d at 1106); *see also* 3 James Wm. Moore et al., *Moore's Federal Practice* § 16.14[1][b] (3d ed. 2019

update) [hereinafter "*Moore's Federal Practice*"] (noting the trial court's "wide discretion in determining good cause"). Thus when the trial court's conclusions are "supported by the record and are the product of an orderly and logical deductive process," this Court will accept those findings even if it would have independently reached opposite conclusions. *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987); *see also Pitts v. White*, 109 A.2d 786, 788 (Del. 1954) ("[T]he question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law" duly considered "the facts of the case").

C. Merits of Argument.

The Superior Court did not abuse its discretion in finding that Appellants lacked good cause to amend the MTSO to move this case from the March 2019 trial setting to the September 2019 trial setting. Appellants' arguments related to their motion to change trial grouping are unavailing. Moreover, Appellants make no arguments directed at the Superior Court's decision to grant Defendants' motion to exclude Richard Shaw's untimely affidavit. Because Appellants admitted below that without his affidavit, they could not obtain an expert report,

their strategic decision not to contest that ruling in their Opening Brief—standing alone—requires affirmance.[3]

1. The Applicable Standard Is Good Cause, And Appellants Waived Any Argument To The Contrary.

Appellants argued below that they had good cause to move their case to a later trial grouping because they had not yet obtained the necessary expert reports. A315. "Good cause" exists where "the moving party had been 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." *Coleman*, 901 A.2d at 1107 (quoting *Moore's Federal Practice* § 16.14[1][b] (3d ed. 2004)).[4]

On appeal, Appellants argue—for the first time—that some other lesser standard should apply. But courts in this State have repeatedly recognized that where a trial court's scheduling order expressly invokes the good cause standard,

[3] By limiting the issue presented to whether the Superior Court should have granted their motion to move to a different trial grouping, Appellants have waived challenging the Superior Court's exclusion of Richard Shaw's affidavit. Del. Sup. Ct. R. 14(b)(iv), (vi), (c)(i); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). The waiver of this issue is dispositive to the appeal. Regardless of the trial grouping, Appellants have acknowledged that they cannot obtain the necessary expert opinions absent inclusion of the affidavit; the factual record is simply insufficient without it. *See* A505 (If "Defendants' Motion to Exclude the Affidavit is granted, this matter is effectively dismissed."). Because Appellants offer no argument on appeal that the Superior Court's order excluding Richard Shaw's affidavit was an abuse of discretion, Appellants cannot meet their prima facie case under Texas law, no matter their trial grouping.

[4] This Court again recently cited to *Moore's Federal Practice* when describing the "good cause" standard. *See Moses*, 109 A.3d at 566 n.14.

that standard governs requests to modify the order. *See Phillips v. Wilks, Lukoff, Bracegirdle, LLC*, 2014 WL 4930693, at *4 (Del. Oct. 7, 2014) (Table) (affirming that showing of good cause is required when scheduling order specifically calls for it); *see also Jackson v. Hopkins Trucking Co.*, 3 A.3d 1097, 2010 WL 3397478, at *1, *3 (Del. 2010) (Table) (applying "good cause" standard where trial court's scheduling order expressly required it); *Jefferson v. Helgason*, 2012 WL 1413674, at * 2 (Del. Super. Ct. Feb. 13, 2012) (same).

The asbestos docket's general scheduling management order, applicable in this case, does just that. *See* Ex. 1. The General Scheduling Order states that the "provisions of this Order, in conjunction with the TRIAL SCHEDULE ABSTRACT, the MASTER TRIAL SCHEDULING ORDER, and STANDING ORDER NO. 1 may be modified by the Court upon a showing of good cause." *Id.* at 1. The Superior Court's August 16, 2018 Master Trial Scheduling Order, in turn, establishes the exact trial date and the due date for Appellants' expert report. *See* Ex. 2 at 10-11 (placing Appellants in March 2019 trial group). Here, the MTSO required Appellants to file their expert reports by September 7, 2018, and trial was to begin March 11, 2019. *Id.* at 24, 26; *see also* Appellants' Ex. D, at 44, 46. As directed in the General Scheduling Order, Appellants needed to show good cause to change either of those dates.

Even without such an explicit directive, the Superior Court requires good cause to amend scheduling orders, both inside and outside of the asbestos docket. *Moses*, 109 A.3d at 566 ("Trial courts are not required to allow a plaintiff to supplement a previously submitted expert report after the expert report cutoff has expired if there is no good cause to permit the untimely filing."); *Rogers v. Bushey*, 2018 WL 818374, at *7 (Del. Super. Ct. Feb. 7, 2018) ("This Court will not modify the trial scheduling order except upon a showing of 'good cause.'"), *aff'd* 195 A.3d 467, 2018 WL 4846535, at *1 (Del. 2018) (Table); *Vick v. Khan*, 2018 WL 656379, at *1 & n.1 (Del. Super. Ct. Jan. 31, 2018) ("[S]cheduling order[s] shall not be modified unless there is a showing of good cause." (collecting cases)); *Hammer v. Howard Med., Inc.*, 2017 WL 1170795, at *1 (Del. Super. Ct. Feb. 14, 2017) ("To properly modify a scheduling order, the requesting party must file a motion for modification and, absent agreement of the other party, show good cause."); *In re Asbestos Litig. (Richards)*, 2018 WL 3769190, at *1 (Del. Super. Ct. Aug. 8, 2018) ("In asbestos litigation, applications to modify the Master Trial Scheduling Order are reviewed under the 'good cause' standard."); *In re Asbestos Litig. (Vala)*, 2012 WL 2389898, at *1 (Del. Super. Ct. June 22, 2012) (because "adherence to the MTSO" is required, good cause must be shown to amend it).

Applying a "good cause" standard makes sense. Due to the "need to maintain scheduled trial dates," motions to amend scheduling orders cannot be

granted as a matter of course. *Valentine*, 2005 WL 1123370, at *1; *see also Moses*, 109 A.3d at 566 n.13 (noting the Superior Court's "necessary reliance on dates and deadlines in a trial scheduling order" (internal quotation marks omitted)); *see also Meck v. Christiana Care Health Servs., Inc.*, 2011 WL 1226456, at *5 (Del. Super. Ct. Mar. 29, 2011) ("good cause" standard recognizes that "[a]dherence to case scheduling orders is essential to the orderly administration of the [Superior] Court's docket" (quoting *Todd v. Delmarva Power & Light Co.*, 2009 WL 143169, at *2 (Del. Super. Ct. Jan. 14, 2009))); *Brewington-Carr v. Univ. & Whist Club*, 2009 WL 924533, at *1 (Del. Super. Ct. Apr. 6, 2009) (same); *Moore's Federal Practice* § 16.14[1][a] ("[I]f changes could be secured too easily in scheduling orders they would not provide the discipline and pressure to prepare that is deemed essential to timely case development and effective docket management.").

If parties were free to treat scheduling orders as "meaningless guidelines," instead of binding directives, the Superior Court's "docket would soon become chaotic." *Meck*, 2011 WL 1226456, at *5 (quoting *Todd*, 2009 WL 143169, at *2); *see also Sammons*, 913 A.2d at 528 ("Parties must be mindful that scheduling orders are not merely guidelines but have full force and effect as any other order of the [Superior] Court." (internal quotation marks omitted)). That is especially true in mass asbestos litigation, where "the importance of pre-trial deadlines" and adherence to the MTSO "cannot be overstated" due to the unusually large number

of parties and filings. *In re Asbestos Litig. (English Trial Grp.)*, 1994 WL 721771, at *1 (Del. Super. Ct. Sept. 19, 1994).

Appellants' made-for-appeal argument (at 18-19), that good cause should not be required because they moved to change the trial grouping *before* their expert report deadline had expired, is both waived and incorrect.[5] In the briefing below, Appellants conceded that the "Delaware Supreme Court recently held that good cause must exist to amend a scheduling order." A318. And they characterized their "argument, at its core," as "simply that the 'good cause' standard for amending scheduling orders is met here." A315. Because Appellants never argued below, or even suggested, that anything but the good cause standard applies, they have waived that argument and are prohibited from arguing it for the

[5] In any event, Appellants *did* miss their product-identification deadline, despite their new arguments to the contrary. Opening Br. 18. Below, Appellants recognized Richard Shaw's affidavit for what it is: belatedly offered "quantification testimony" about Shad Shaw's exposures "that the deposition testimony lacked." A503. As such, the information in the affidavit plainly fell within MTSO Event No. 4 and should have been provided at Shad or Richard Shaw's depositions. *See* Appellants' Ex. D at 36. Appellants point out (at 17) that defendants can rely on affidavits from corporate representatives later in a case, but that is completely beside the point. MTSO Event No. 4 governs only *plaintiffs'* evidence about exposure to any particular defendant's asbestos containing product, which is what Richard Shaw's affidavit addressed. *See* A136-141. But as explained, the timeliness or untimeliness of Richard Shaw's affidavit does not change whether the Superior Court abused its discretion in finding that Appellants failed to show good cause to postpone the trial date, their expert report deadline, and all other upcoming discovery deadlines.

first time on appeal. *See* Del. Sup. Ct. R. 8*; see also, e.g.*, *Clouser v. Doherty*, 175 A.3d 88, 2017 WL 3947404, at *5 (Del. 2017) (Table).

Appellants' argument is also incorrect. They point to a handful of cases where the good cause standard was applied to motions to "amend[ ] a scheduling order where a deadline has been missed," insinuating that is the only time the standard applies. Appellants' Br. 19. But Delaware courts also routinely apply the same standard when ruling on motions to amend scheduling orders before the relevant deadline has expired. In *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, for example, this Court applied the good cause framework to affirm the Superior Court's May 2013 denial of a motion to extend fact discovery beyond the established June 1, 2013 deadline. 2014 WL 4930693, at *1, *4.

Delaware courts also require good cause for requests to change the date of trial[6]—requests which nearly always come before the actual date of trial. *See Valentine*, 2005 WL 1123370, at *1 (affirming Superior Court's denial of a motion to change the trial date because the moving party lacked diligence); *Lorenzetti v. Farrell*, 2013 WL 3569098 (Del. Ch. July 12, 2013) ("I will consider continuation of the trial date for good cause only."); *Meck*, 2011 WL 1226456, at *4. And good cause is needed to "modify the trial scheduling order." *Rogers*, 2018 WL 818374,

[6] Appellants' authorities deal entirely with missed discovery deadlines. *See* Opening Br. 20-21. They fail to offer any authority suggesting that something less than good cause governs their request to postpone the date of trial.

at *7, *aff'd* 195 A.3d 467. It is not confined, as Appellants contend, exclusively to requests that come *after* the order has already been violated.

Appellants propose, in passing, that Delaware courts should determine whether to amend scheduling orders "simply" by "analyz[ing] the respective prejudice to the parties and the interests of justice." Appellants' Br. 21. Appellants cite nothing in support, and fail to explain how the Superior Court abused its discretion by not applying their brand-new, unsupported standard. Appellants' "alternative" argument, also raised for the first time on appeal, is that this Court could apply the standard "typically applied to motions for continuance." *Id.* That, too, does not help Appellants. As Appellants acknowledge, the standard governing motions to continue requires "diligence" and overlaps substantially with the good cause requirements. *Id.* Indeed, when motions to continue require amendments to a scheduling order, courts typically blend the analysis and thus require a showing of good cause. *See, e.g.*, *Bumgarner v. Verizon Del., LLC*, 2014 WL 595344, at *2 (Del. Super. Ct. Jan. 14, 2014); *Meck*, 2011 WL 1226456, at *5; *Brewington-Carr*, 2009 WL 924533, at *1.

In a last-ditch effort, Appellants argue that good cause is not required because the "analysis stems from an outdated version of Superior Court Civil Rule 16(b)." Appellants' Br. 20. That, again, is wrong. Under a previous version of the rule, amended in 2011, the Superior Court was required to apply the good cause

standard to any request to modify a scheduling order. *See Sammons*, 913 A.2d at 528 n.17. The amended rule affords trial judges more leeway "to establish deadlines and protocols for each case;" but in practically all cases, they "continue to use the good cause standard." *Freibott v. Miller*, 2012 WL 6846562, at *1 n.6 (Del. Super. Ct. Oct. 26, 2012) (collecting cases); *see also Bumgarner*, 2014 WL 595344, at *2. There is no question that the Superior Court had the authority to continue applying the good cause standard even though Rule 16(b) no longer expressly requires it. *See supra* p. 23 (collecting cases).

2. The Superior Court Did Not Abuse Its Discretion In Ruling Appellants Failed To Show Good Cause.

Because the Superior Court applied the correct legal test and clearly explained its reasoning, it did not abuse its discretion. Appellants fail to offer *any* legal authority suggesting that the Superior Court committed reversible error under the applicable, and deferential, standard of review. In any event, the Superior Court's findings and ruling regarding Appellants' diligence, foreseeability and fault, and unfairness to Appellants were all correct.

No abuse of discretion. A trial court abuses its discretion if it "ignore[s] recognized rules of law," *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 634 (Del. 2001) (internal quotation marks omitted); "exceed[s] the bounds of reason," *id.* (internal quotation marks omitted); "commits a clear error in judgment," *Layton v. Layton*, 192 A.3d 556, 2018 WL 3814500, at *2 (Del. 2018)

(Table) (internal quotation marks omitted); or applies the incorrect legal factors, *see id.* Appellants fail to show that any of those circumstances is present here.

The Superior Court correctly ruled that Appellants needed good cause to amend the scheduling order, *see* Appellants' Ex. A at 6, and that "diligence of plaintiffs," "foreseeability and fault," and the "chance of risk of unfairness to the moving party" were the relevant factors, *id.* at 10, 14. After examining the factual record, the Superior Court found that each of the three factors weighed against Appellants. *Id.* at 10-16. Because the court "explained the basis" for its ruling, "applied the correct [legal] standard[,] and its decision is supported by the evidence," it "acted within its discretion." *Reid v. Hindt*, 976 A.2d 125, 131 (Del. 2009).

Appellants acknowledge that this Court will reverse the Superior Court only for an abuse of discretion. *See* Appellants' Br. 14. Yet their arguments largely ask this Court to substitute its own view for that of the Superior Court and to "balance[]" the factors differently. *See, e.g., id.* at 23, 26. That is a non-starter: under the abuse of discretion standard, appellants must do more than "argue that the trial judge did not appropriately 'balance' the various factors he considered in exercising his discretion." *Coleman*, 901 A.2d at 1106.

At most, Appellants assert—without a single citation—that the Superior Court abused its discretion by not giving the "respective prejudice to the Parties"

its proper weight in the "good cause" analysis. Appellants' Br. 25; *see also id.* at 23 ("[L]ack of diligence should not carry the day."). That, too, is wrong as a matter of law. Analyzing good cause requires considering whether it "would create a substantial risk of unfairness to th[e *moving*] party" to deny the relief sought. *Moses*, 109 A.3d at 566; *Coleman*, 902 A.2d at 1107 (internal quotation marks omitted); *Lundeen v. PricewaterhouseCoopers*, 919 A.2d 561, 2007 WL 646205, at *2 (Del. 2007) (Table) (internal quotation marks omitted). As *Moore's Federal Practice* explains, "[t]he existence or degree of prejudice to the party opposing modification may supply an additional reason to deny a motion to modify a scheduling order, but it is irrelevant to the moving party's exercise of diligence and does not show good cause." *Moore's Federal Practice* § 16.14[1][b]. The analysis therefore looks to whether the moving party would be *unfairly* prejudiced, not whether the moving party has more at stake than the non-moving party.

In any event, it is the moving party's diligence, not the potential unfairness or prejudice, that is the critical factor in the "good cause" analysis. "Properly construed, 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts." *Rogers*, 2018 WL 818374, at *7 (internal quotation marks omitted), *aff'd* 195 A.3d 467; *see also Moore's Federal Practice* § 16.14[1][a] ("'Good cause' for amending a scheduling order means that scheduling deadlines cannot be met despite a party's diligent efforts."). With the focus on diligence, it is

"not sufficient merely to claim, as here, an absence of prejudice to the opposing party." *Rogers*, 2018 WL 818374, at *7, *aff'd* 195 A.3d 467; *see also Meck*, 2011 WL 1226456, at *5 & n.38 (citing *Candlewood Timber Grp. LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *4 (Del. Super. Ct. Jan. 18, 2006) (same)); *Doe v. Colonial Sch. Dist.*, 2011 WL 7063682, at *2 (Del. Super. Ct. Dec. 27, 2011). ("'[G]ood cause,' not mere 'prejudice,' is required.").

Appellants therefore have presented no basis to for this Court to hold that the Superior Court abused its discretion in analyzing good cause. As described below, the Superior Court's findings on each factor in the analysis were rooted in the record and precedent.

Lack of Diligence. Appellants had over a year and a half after filing suit to provide their expert with the factual information necessary to meet Texas's causation standard. They did not do so. The Superior Court therefore did not err—let alone abuse its discretion—in finding that Appellants failed to show they acted with diligence in pursuing their claims.

Diligence is shown where a party has "worked" to "position the case" for a timely trial, but "unforeseeable circumstances, or events beyond [the party's] control," have "intervened." *Moore's Federal Practice* § 16.14[1][b]. Indeed, this Court has explained that a failure to timely act on "available" information cuts against a showing of diligence. *Lundeen*, 2007 WL 646205, at *2; *see also*

Candlewood Timber Grp., 2006 WL 258305, at *5 (no diligence where party has "known for years of its need for a surveying expert"). Moreover, demonstrating diligence becomes more difficult once the Superior Court has already granted a party additional time—as occurred here, twice. *See Phillips*, 2014 WL 4930693, at *4 (the moving party failed to show diligence after "[t]he trial court accommodated [its] requests for deadline extensions on several occasions"); *Nationwide Mut. Fire Ins. Co. v. Cropper Oil & Gas, Inc.*, 2012 WL 1413589, at *1 (Del. Super. Ct. Feb. 7, 2012) (plaintiff's lack of diligence confirmed by prior request for additional time).

The "dose" information later contained in Richard Shaw's September 2018 untimely affidavit was known to him during his two days of depositions in June and September of 2017 and certainly "could have been" provided at that time. Appellants' Ex. A at 13; *compare Lundeen*, 2007 WL 646205, at *2.[7] Appellants' initial deadline to submit their expert report was 192 days after the second day of Richard Shaw's deposition (September 27, 2017 to April 6, 2018). *See* A152. They were then given an extra 35 days when the deadline was moved to May 11, 2018. *See id.* After that, Defendants again consented to, and the Superior Court granted, Appellants' request for an additional 119 days by moving the expert report deadline to September 7, 2018 and the trial to March 2019. *Id.* During this period,

[7] That information also could have been provided by Shad Shaw during his deposition in the summer of 2017.

there were no events "beyond" Appellants' control that intervened to prevent Richard Shaw from providing this information, their expert from serving a timely report, or Appellants themselves from being prepared for the court's March 2019 trial date. *See Moore's Federal Practice* § 16.14[1][b]; *see also* Appellants' Ex. A at 12-14.

On appeal, Appellants claim they were diligent because they moved to amend the scheduling order—for a third time—before the expert report deadline elapsed. Appellants' Br. 23. But the question is whether Appellants made "diligent efforts" to meet the court's "scheduling deadlines." *Rogers*, 2018 WL 818374, at *7 (internal quotation marks omitted), *aff'd* 195 A.3d 467. The fact that a party asked for more time to meet a deadline before time officially expired does not bear on whether they diligently tried to meet the deadline in the first place. Here again, this Court's decision in *Phillips* forecloses Appellants' argument. In *Phillips*, even though appellants had not yet missed any deadlines, this Court held they "failed to put forth any valid reason as to why an extension was warranted." 2014 WL 4930693, at *4; *see also Todd*, 2009 WL 143169, at *1-2 (finding a lack of diligence and "good cause" where the moving parties "waited to the literal eve of the discovery cut-off" to request a continuance of trial and extension of the discovery cut-off date). The same is true here.

Appellants' suggestion that they acted diligently to meet the court's deadlines in light of Shad's "steadily worsen[ing]" condition rings hollow. Appellants' Br. 23; *see also id.* at 7. As Appellants' experienced litigation counsel is well aware, all mesothelioma plaintiffs have a "steadily worsening condition." There was nothing unusual or special about Shad Shaw's deteriorating condition that, in and of itself, warranted further postponement of the trial date. *See Christian v. Counseling Res. Assocs.*, 60 A.3d 1083, 1085 (Del. 2013) (noting a trial date will be postponed only in "unusual circumstance[s]"). And Appellants submitted an affidavit from Richard Shaw (not Shad), who easily could and should have provided it within the Superior Court's timeframe. Appellants' Ex. A at 14. Given all of this, the Superior Court correctly found Appellants lacked diligence because the "type of information that [the expert] required for his expert opinion was the type of questioning that could have been asked at either deposition of Richard Shaw or of Shad Shaw." *Id.* at 13; *compare Lundeen*, 2007 WL 646205, at *2 (moving party lacked diligence because they "could have, and should have" provided available information to an expert "earlier, making it possible for their expert to review and make a report before the expiration of the expert deadline").

Foreseeability and fault. The Superior Court also correctly found that the need for additional factual information was foreseeable and that Appellants were at fault for not providing it earlier. Appellants "concede" that the need for more

detailed information on exposure was foreseeable. Appellants' Br. 24; *see* Appellants' Ex. A at 11. They argue only that they were not "at fault for attempting to prove their case through Shad himself, instead of through his father." Appellants' Br. 25. But as the Superior Court ruled, Appellants had no excuse for not timely giving Richard Shaw's information to their expert so that they could meet their existing deadline. Appellants' Ex. A at 12-13. Even if Appellants preferred to, and intended to, elicit those additional facts through Shad, they also should have timely obtained those facts from Richard Shaw, especially since they knew Shad's health could fail at any time. In other words, Appellants were at fault for not having "a plan B in place." *Id.* at 12; *compare Jefferson*, 2012 WL 1413674, at *2 (no unfairness because it was "counsel's fault that he did not plan for such a contingency"). At a minimum, Appellants offer no authority showing the Superior Court abused its discretion on this point.

No substantial risk of unfairness to Appellants. Finally, the Superior Court was correct to find that denying Appellants' motion did not present them with a substantial "risk of unfairness." Appellants' Ex. A at 10, 14-15. The good cause standard's "unfairness" factor considers whether the moving party had "a fair opportunity to develop the evidence it needs if the time limits that were set in the original scheduling order remain in effect." *Moore's Federal Practice* § 16.14[1][b]. Following that framework, Delaware courts have found unfairness

where a moving party missed a deadline due to the opposing party's "uncooperative behavior," *Bumgarner*, 2014 WL 595344, at *2, or because the moving party "did not discover the facts" until the deadline had already passed, *Incyte Corp. v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *3, *5 (Del. Super. Ct. Nov. 1, 2017).

No such circumstances are present here. Defendants have been fully cooperative, even consenting to two separate extensions. *See* Appellants' Ex. A at 10. Meanwhile, Appellants always had the underlying information available to them, and if they were diligent, would have provided it to their expert in a timely fashion. *Id.* at 12-15. The Superior Court correctly ruled that if the "specter of dismissal" carried the day, then it would "carry the day in every argument." *Id.* at 15.

Appellants challenge that ruling by arguing that "respective prejudice to the Parties is the most compelling factor here, and should carry the day." Appellants' Br. 25. But, as previously explained, "respective prejudice" is not the relevant factor in showing "good cause." *See supra* pp. 29-30.[8] Far from abusing its

[8] In any event, the Superior Court did not abuse its discretion in ruling that an extension would prejudice Defendants "by revealing the summary judgment strategy and their witnesses." Appellants' Ex. A at 15. On appeal, Appellants argue that "Defendants' witness and exhibit lists are near meaningless in the grand scheme of this litigation." Opening Br. 25. They have not, however, explained how the Superior Court's differing view of the "grand scheme" of the litigation amounts to a clear error or abuse of discretion. Nor have Appellants asserted that

discretion, the Superior Court correctly ruled that if the "unfairness" factor were unhinged from the diligence and foreseeability analysis, it would be exceedingly difficult to "require adherence to deadlines." Appellants' Ex. A at 14-15; *see Meck*, 2011 WL 1226456, at *6 (analyzing diligence and foreseeability before ruling that "[g]iven these facts, denying Plaintiff's motion for a continuance would create no risk of unfairness to Plaintiff"); *Todd*, 2009 WL 143169, at *2 ("If this Court were to allow parties to disregard these orders on the basis of the thin excuse offered by the instant parties, the Court would be hard pressed to deny almost any request to modify other scheduling orders."); *Brewington-Carr*, 2009 WL 924533, at *1 (same). Good cause is not a free pass: "[T]he party seeking an extension must show that, despite due diligence, it could not have reasonably met the scheduled deadlines." *Moore's Federal Practice* § 16.14[1][a]. This Court should not supplant that time-tested standard with the novel "[b]alancing of the prejudice" framework that Appellants now propose. Appellants' Br. 26.

3. *Drejka* Is Inapplicable.

Appellants conclude by arguing that this Court's decision in *Drejka* should control. Appellants' Br. 27-30. In *Drejka*, the Superior Court excluded expert testimony because the plaintiff "failed to abide by" its discovery deadlines. 15 A.3d at 1223. In doing so, the trial court "[i]n essence" "entered a default

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any Defendants aside from Ford already disclosed their witness and exhibit lists in separate cases. *Id*.

judgment against [the plaintiff] as a sanction for violating the court's Scheduling Order." *Id.* Although the expert report was late, the opposing party received it "more than two months before the scheduled trial date, and, presumably, could have deposed [the expert] within that time." *Id.* at 1224. This Court held that under those circumstances the trial court abused its discretion by not allowing the expert testimony. *Id.* It cautioned that the "sanction of dismissal" for a discovery violation must be applied as a "last resort." *Id.* (internal quotation marks omitted).

Appellants' invocation of *Drejka* misses the mark for two reasons. First, *Drejka* does not disturb the Superior Court's well-established discretion in setting dates for trial. The *Drejka* line of cases clarifies that while discovery sanctions should be administered principally to "prod[]" the case to meet the trial date, *id.*, "[t]he trial court retains its discretion to . . . retain the trial date, or to reschedule the trial." *Christian*, 60 A.3d at 1088; *see also id.* at 1085 ("[T]he Court has determined that it is necessary to refine the *Drejka* analysis . . . . [I]f the trial court is asked to extend any deadlines in the scheduling order, the extension should not alter the trial date.").

That makes practical sense. Setting a date for trial is core to the Superior Court's ability to "control" its own docket. *Id.* at 1088. And "rescheduling a trial date usually means setting a date that is often another year or more away, after all other scheduled trials." *Id.*; *see also Drejka*, 15 A.3d at 1224 ("The trial courts'

caseloads, however, require that trials be scheduled a year or more in advance."). Likely for that reason, Rule 16(b) sets the date of "trial" and "pretrial conferences" apart from the less rigid "deadlines" contained in the scheduling order. *Compare* Del. Super. Ct. R. 16(b)(6) (requiring that the "date, or dates for conferences before trial, a final pretrial conference, and trial" to be established in the scheduling order), *with* Del. Super. Ct. R. 16(b)(5) (providing that "in the Court's discretion," the Superior Court "may also include" "scheduling order deadlines," upon which parties may apply to change by written motion).

Delaware courts have universally followed suit. In case after case, trial courts have been afforded discretion to hold trial dates firm, and the argument that *Drejka* limits that discretion has been rejected. *See Coleman*, 902 A.2d at 1107 (affirming denial of an extension request that "undoubtedly" would have "jeopardize[d] the trial date"); *Valentine*, 2005 WL 1123370, at *1 (same); *Rogers*, 2018 WL 818374, at *7 ("[A]llowing these new claims at this juncture might well jeopardize that trial date."), *aff'd* 195 A.3d 467; *Kent v. Dover Ophthalmology ASC., LLC,* 2018 WL 1940450, at *3 (Del. Super. Ct. Apr. 12, 2018) ("[W]ere this motion to be granted, the trial date would be jeopardized."); *Meck*, 2011 WL 1226456, at *4 ("[T]he *Drejka* Court's opinion did not dilute the Supreme Court's previously expressed views on the critical importance, generally, of firm trial dates.").

Here, of course, Appellants requested that trial date along with *all* upcoming discovery deadlines be extended by six months, not that the Superior Court accept a single, untimely filing. *See* A326 ("Plaintiffs request to push the current March 2019 trial date six months in order to obtain an industrial [expert] report as well as a causation report as required by Texas law . . . ."); Appellants' Ex. A at 16 (the "denial of the motion to move the trial setting is affirmed"). Because the asbestos MTSO is tightly regulated on a week-by-week basis, Appellants' request afforded the Superior Court no possible way to delay the relevant discovery deadlines without also postponing the March 11, 2019 trial date. *See* Ex. 2 at 24-26. And this Court has never applied *Drejka* to require a trial court to postpone the date for trial. *See Christian*, 60 A.3d at 1085 ("[T]he trial court could have set new discovery deadlines that would have maintained the original trial date.").[9] It should not do so now.

Drejka is inapplicable for a second, independent reason: The Superior Court's order denying the motion to change trial grouping was not a sanction imposed on Appellants. This Court's decision in *Hill v. DuShuttle*, 58 A.3d 403 (Del. 2013), lays out *Drejka*'s proper scope. The Superior Court in *Hill* dismissed

[9] In *Christian*, this Court reversed a trial court for "refus[ing] to meet with counsel . . . to determine whether the circumstances justified a new trial date." 60 A.3d at 1085. By contrast, here, the Superior Court held a hearing, *see generally* Appellants' Ex. C, and determined that the circumstances did not warrant the trial to be further postponed.

plaintiffs' case as a sanction for discovery violations, stating that because the attorney "consciously disregarded the trial scheduling order," "counsel's conduct should be severely sanctioned as a deterrent to others." 58 A.3d at 406. This Court reversed, holding that under *Drejka*, dismissal was an "inappropriate" sanction. *Id.* at 404, 406-407.

But Appellants were not being sanctioned or in any way punished; their motion was denied because they failed to show good cause. Under these circumstances, they are not entitled to more lenient treatment. *Moses*, 109 A.3d at 566 ("Trial courts are not required to allow a plaintiff to supplement a previously submitted expert report after the expert report cutoff has expired if there is no good cause to permit the untimely filing."); *see also Goode v. Bayhealth Med. Ctr., Inc.*, 931 A.2d 437, 2007 WL 2050761, at *3 (Del. 2007) (Table) ("When a party does not comply with the discovery rules and pre-trial orders, it is not an abuse of discretion for the trial judge to exclude testimony not properly identified."). Indeed, even Appellants admit that *Drejka* is a poor fit under these circumstances. Appellants' Br. 27 ("*Drejka*, of course, considers the sanctions appropriate for discovery violations."). Nonetheless, they ask that this Court *extend Drejka* and apply its rigorous framework any time a trial court's denial of a motion to amend a scheduling order could result in dismissal. *Id.*

None of the three cases Appellants cite concern a motion to amend a scheduling order. *See* Appellants' Br. 27 n.74; *Drejka*, 15 A.3d at 1224 ("The trial court excluded Balu's evidence because Drejka failed to abide by the Scheduling Order, and failed to seek modification of that Order."); *Hill*, 58 A.3d at 405 (concerning the trial court's sanction for counsel's deliberate disregard of its order granting a motion to compel); *Christian*, 60 A.3d at 1087 (limiting its analysis to "whether to dismiss a case for discovery violations"). And accepting Appellants' argument would eliminate the good cause standard for granting continuances, amending scheduling orders, and moving trial dates. The Superior Court will be forced to change the scheduling order to accommodate any party claiming it needs more time to develop their case, regardless of the circumstances.

Such a rule would wreak havoc on the orderly administration of cases in the lower courts. There is no reason to expand *Drejka* to upend the "good cause" standard.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: May 13, 2019

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