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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' REPLY BRIEF

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NATURE OF PROCEEDINGS

This Appeal is simple at its core – was the Superior Court justified in dismissing this case in lieu of granting Appellants' timely first request for an extension of relevant deadlines? Indeed, the Parties largely agree about the relevant facts, and this Reply will address non-dispositive assertions and characterizations made by Appellees in their Opposition.

Two such assertions are especially egregious. First, Appellees repeatedly reference a "product identification" deadline that simply does not exist in the relevant scheduling order(s). This matters because under Appellees' characterization, the affidavit of Richard Shaw – a necessary underpinning to the disputed industrial hygiene report – was late filed and therefore properly excluded by the Superior Court.

Second, Appellees seek to characterize Appellants' motion to change trial grouping as their "third" request for extension, or "third" motion. To the contrary, the underlying motion was the first time the Superior Court was approached regarding this matter, and Appellants' first motion of any kind outside of two amendments to their Complaint and a motion for admission *pro hac vice*.

Finally, Plaintiffs obviously disagree with Appellees' meritless assertion that "Appellants' opening brief d[id] not address, and therefore waive[d], any argument concerning the Superior Court's separate ruling excluding Richard Shaw's

affidavit."[1] The Superior Court's two decisions were inextricably intertwined, and Mr. Shaw's affidavit was addressed at length and repeatedly in Appellants' opening brief. To the extent Appellees suggest the issue is waived because of the phrasing of Appellants' "Questions Presented," the argument is gamesmanship that should not be countenanced by this Court.

Nonetheless, these side battles do not change the overarching theme – the Superior Court's unprecedented decision to dispose of a meritorious case due mainly to a perceived lack of diligence on the part of Appellants' counsel. Appellants continue to press their core position that the Superior Court's ruling is inconsistent with Delaware jurisprudence and this State's treatment of litigants – even imperfect litigants.

[1] Appellants' Answering Brief ("AB"), at 4.

UPDATE ON PROCEDURAL FACTS

In the days after Appellants filed their (original) Opening Brief, the Parties became aware of a development in a parallel action venued in the Court of Common Pleas, Philadelphia County, Pennsylvania. When the Complaint in the instant matter was filed, Mack Trucks, Inc. ("Mack"), a Pennsylvania Corporation, was among the named Defendants.[2] On May 22, 2017, Mack moved for dismissal based on lack of personal jurisdiction.[3] On June 20, 2017 Mack's motion was "so ordered."[4]

On July 3, 2017, the Shaws filed a complaint in Philadelphia County, naming Mack as the only defendant (the "Philadelphia Action").

On April 11, 2019, Mack filed a "Joinder Complaint," seeking to join multiple defendants in the Philadelphia Action.[5] Among those defendants are several of the Appellees here. As of this Reply Brief, the Joinder Complaint remains pending.

Appellants' position is that the Joinder Complaint does not affect this Appeal. To the extent that both this Appeal *and* Mack's Joinder Complaint are both successful, the Parties may be forced to litigate forum. Until that time, however, there is no "ripe" issue as to competing actions based on the same underlying facts.

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[2] A44 (Plaintiff's Complaint); A58 (Plaintiff's Amended Complaint).

[3] A3-4, D.I. 20.

[4] D.I. 40.

[5] *See* Mack Truck, Inc.'s Joinder Complaint, *Shaw v. Mack Trucks, Inc.*, No. 00133 (Ct. Cm. Pl. Phila. Apr. 10, 2019) (attached hereto as **Exhibit J** (exhibit lettering is continued from Appellants' Opening Brief)).

Nonetheless, Appellants felt this Court should be aware of this procedural development.

ARGUMENT

I. THIS WAS APPELLANTS' FIRST MOTION FOR EXTENSION

Appellees repeatedly characterize Appellants' motion to change trial grouping as part of an extended series of requests for extensions and continuances. Appellees go so far as to directly state that Appellants "moved to amend the scheduling order – for a third time …."[6] This statement is more than a questionable characterization; it is factually inaccurate. As a matter of fact, the motion to change trial grouping was Appellants' first motion of any kind other than two motions to amend the pleadings, and a motion for admission *pro hac vice*.

What is true is that, after discussion initiated by Appellants, the deadline for Appellants to produce expert reports was previously amended once, and the case's trial grouping changed once. Those two relevant changes overlapped each other in time, such that changing trial group obviated the previous change in deadline. Each was realized by motion of Defense Coordinating Counsel ("DCC").[7] The motions and accompanying orders did not state at whose request they were initiated, or why.

Appellees know that such changes by agreement of the parties are an entirely normal, expected, and necessary part of asbestos litigation in Delaware. The governing orders literally instruct plaintiffs to approach DCC to discuss scheduling

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[6] AB at 33.

[7] Appendix A28-29 (D.I. 122 and 124); A120-22. Appendix A31-32 (D.I. 138 and 139); Appendix A128-30.

order changes, and not the Court: "Any plaintiff wishing to alter the provisions of this Order shall advise … Defense Coordinating Counsel … In the event no objections are raised to the requested changes, [DCC] shall prepare and file a proposed amended version of this Order for consideration by the Court."[8] To Appellants' knowledge, *no amendment ever proposed by DCC* has been denied by the Superior Court, no matter how many times the case had been delayed and/or deadlines altered.

Indeed, in this specific case the docket shows eight (8) motions to amend the scheduling order, *not including* the two that the Superior Court weighed so heavily against Appellants.[9] Nobody knows or takes notice what those motions accomplished, at whose request, or why. Each was "so ordered" by the Special Master without comment.

Appellants are not complaining about these amendments; of course not, that is the way asbestos litigation in Delaware works. So why were Appellants treated as if they had a deficit to overcome when, for the first time in what is an abnormal situation, DCC failed to broker agreement from Defendants, and a motion needed to be filed by Appellants?

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[8] Ex. D, at 2.

[9] *See* Appendix A78-81; A98-102; A103-109; A112-119; A125-127; A307-312; A495-501; A574-577.

The motion to change trial groupings was Appellants *first* request *to the Superior Court* to amend scheduling deadlines in this matter. And that request came before the relevant deadlines had expired. These distinctions make a difference when it comes to a fair interpretation of Appellants' "diligence" in this matter.

II. THERE IS NO PRODUCT IDENTIFICATION DEADLINE

Again and again on opposition, Appellees reference a purported "product identification deadline."[10] Immediately in their "Nature of Proceedings," Appellees state that "the deadline to complete product identification discovery" was on "February 8, 2018." Such a date simply does not exist as laid in the General Scheduling and Master Trial Scheduling Orders governing this litigation.[11]

The deadline referenced by Appellees is the "Date to have completed the deposition of all plaintiffs' coworker, product identification, and other witnesses who will offer testimony establishing exposure to any particular defendant's asbestos …." ("MTSO Deadline No.4").[12] Both Richard and Shad Shaw were, of course, deposed well in advance of such deadline.

Why should Appellees, and the Superior Court, assume that Richard Shaw's subsequent affidavit was late filed because of a deposition deadline? Although MTSO Deadline No. 4 is not the picture of clarity, nowhere does it say that "product identification discovery is closed." Yet that is how the deadline was applied, and as a result, Richard Shaw's affidavit was viewed as late submitted.

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[10] *E.g.*, AB at 2, 11, 12, 14.

[11] *See* Ex. D, at 36; AB, Ex. 1/A at ¶4.

[12] *Id.*

In contrast, MTSO Deadline No. 10 is the "Date to Complete Summary Judgment Fact Discovery (Plaintiff and Defendant)".[13] Appellants' position is that this deadline controlled Richard Shaw's affidavit, and MTSO Deadline No. 10 had not expired when Richard Shaw's affidavit was produced.[14] Indeed, when correctly viewed, Richard Shaw's affidavit was timely filed. Certainly that fact weighs heavily in considering Appellants' diligence – indeed the timeliness of Richard Shaw's affidavit should be dispositive as regards Appellees' granted motion to exclude same.

A. Legal Questions Underlie the Superior Court's Rulings

Appellants characterized their appeal as a question of the Superior Court's exercise of discretion, but certain of the underlying issues present legal questions. For example, whether Richard Shaw's affidavit was timely is a "yes/no" question, where judicial discretion is inapplicable. Appellants are not sure the proper way to review an exercise of discretion premised on a faulty legal conclusion, but surely the underpinnings of the Superior Court's decision are open for consideration. This Court may properly determine, for example, that the Superior Court's exercise of

[13] Ex. D at 37; Appellees' Ex. A/1 at ¶10.

[14] *See* Appellants' Opening Brief, at 16-18.

discretion would have been reasonable *absent its misapprehension* of underlying legal questions, but was not reasonable in light of the correctly-viewed facts.

Similarly, whether "good cause" is the proper standard of review for the Superior Court to apply to a timely request for extension is a legal question. Appellees contend that Appellants waived the right to argue for a different standard. While Appellants disagree,[15] the more fundamental point is that the correct standard should be applied. Certainly this Court should not affirm the application of what it views to be an incorrect standard of law to a timely request for extension.

To that end, Appellants' position is simply that two litigants – one moving for an extension prior to expiration of the relevant deadline, and one after – should not be treated in the same way. The case law is replete with situations where a "good cause" standard was applied to litigants' *untimely* requests for accommodation, but those are simply not the facts here.

The point is further revealed by examination of some of the cases cited by Appellees in opposition. In *Meck v. Christiana Care Health Services, Inc.*, the plaintiff requested a continuance approximately 10-days before trial.[16] Less than a week earlier, at the pretrial conference, plaintiff had represented to the court that he

[15] AB at 21-25. In Appellants' original motion to change trial grouping, they advocated a balancing of the prejudice and interests of justice. A132-33.

[16] 2011 WL 1226456 (Del. Super. Mar. 29, 2011).

was ready for trial. Because the request occurred after pretrial conference, the Superior Court applied the Rule 16(e) "manifest injustice" standard. *Meck* is easily distinguishable from this matter.

Notably, the court in *Meck* also considered the applicability of *Drejka*. Among other considerations, *Drejka* was inapposite because "in *Drejka*, the discovery dispute arose two months prior to the scheduled trial date, whereas in this case, Plaintiff's inability to produce a medical expert was disclosed five (5) business days prior to the scheduled trial date."[17] This case is more factually similar to *Drejka* than to *Meck*.

In *In re Asbestos Litigation (English Trial Group)*, defendant moved for leave to amend its witness and exhibit list more than three months after the relevant deadline had expired.[18] Thus, that case's exhortation regarding "the importance of pre-trial deadlines" in the context of asbestos litigation is not on point when applied here.[19]

Appellees argue that "Delaware courts also routinely apply the [good cause] standard when ruling on motions to amend scheduling orders before the relevant

[17] *Id*. at *3 (discussing *Drejka*).

[18] 1994 WL 721771, *1 (Del. Super. Sept. 19, 1994).

[19] AB at 24-25.

deadline has expired."[20] But Appellees identify only two easily distinguishable cases as examples.[21]

In *Phillips v. Wilks, Lukoff & Bracegirdle*, "the trial court extended the [relevant deadlines] by 329 days, and also granted [plaintiff] extensions, after his counsel withdrew, to engage new counsel."[22] Further review of that case demonstrates that in March 2012 (the case was commenced in the Court of Chancery no later than 2010), the trial court issued a scheduling order stating specifically that "'failure to meet th[ese] deadline, absent good cause shown, likely will result in the court refusing to allow extensions regardless of consequences.'"[23] Thus, the court was justified in denying a May 2013 request to extend deadlines again. Here, by contrast, Appellants' motion to change trial groupings was the Superior Court's first involvement in the case.

The decision in *Todd v. Delmarva Power & Light Co.* also arguably considers a motion to extend made before the relevant deadline.[24] But that case shows years of mutual neglect on behalf of both parties; "largely ignor[ing]" the scheduling order

[20] AB at 26.

[21] AB at 26, 33.

[22] 2014 WL 4930693, *4 (Del. Oct. 1, 2014)).

[23] *Id.* at *1.

[24] 2009 WL 143169 (Del. Super. Jan. 14, 2009) (motion made on the "literal eve" of the deadline).

as part of a "tortoise-like pace" of preparation for trial.[25] The case was among the "oldest on the Court's docket."[26] Moreover, the court in *Todd* demonstrated a concern with maintenance of trial dates which doesn't apply here.

Indeed, as to Appellees' related argument that "good cause" is applied to requests to change trial date – "requests which nearly always come before the actual date of trial" – Appellants also disagree with that parallel, for the reasons stated *infra* at Section IV. A.

[25] *Id*. at *1.

[26] *Id*.

III. APPELLANTS DID NOT WAIVE REVIEW OF THE SUPERIOR COURT'S EXCLUSION OF THE RICHARD SHAW AFFIDAVIT

Appellees' most puzzling position is that Appellants waived the right to contest the Superior Court's grant of Appellees' motion to exclude the affidavit of Richard Shaw (the "Motion to Exclude"). Apparently, Appellees' argument is premised solely on the fact that the Motion to Exclude is not called out separately by Appellants in their Opening Brief, in their statement of "Questions Presented."

But the two issues are inextricably intertwined. Richard Shaw's affidavit was attached to Appellants' original motion to change trial groupings. The Superior Court addressed the Motion to Exclude in a single sentence at the end of its ruling as to the motion to change trial groupings: "And for the same reasons as to lack of good cause, the motion to exclude Richard Shaw's affidavit is granted."[27]

Appellants' Notice of Appeal specifically notes the intent to appeal the Motion to Exclude. Moreover, the Motion to Exclude is discussed extensively in Appellants' Opening Brief, including that argument that Richard Shaw's affidavit was not untimely in the first instance – an argument which vitiates the entire premise of the Motion to Exclude, including the Superior Court's grant of same.

And, of course, as Appellees point out, reversal of the Superior Court's decision to exclude Richard Shaw's affidavit is entirely necessary to this appeal.

[27] Ex. A at 16:5-7.

Appellees contend that Appellants made a "strategic decision not to contest that ruling in their Opening Brief."[28] Such a strategic decision would not make any sense.

Appellees' waiver argument is another end-around of the merits of this matter. In this litigation, plaintiffs are encouraged to resolve timing issues through the Defense Coordinating Counsel. Yet when defendants arbitrarily do not agree to a given request (perhaps because they see an escape hatch from an especially valuable case), the fact that plaintiffs had previously approached DCC is held against them.[29] And because defendants' final decision comes within days of the relevant deadline, plaintiffs are made to appear dilatory for seeking accommodation without much time to spare.[30]

Here, on appeal, Appellees benefit from the high ground of the abuse of discretion standard. Instead of pressing that advantage, however, they seek to avoid appellate review through their semantic waiver argument. Appellants clearly contest both the Superior Court's denial of their motion to change trial groupings, as well as the grant of the Motion to Exclude, and ask this Court to review both aspects of the ruling.

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[28] AB at 20-21.

[29] *See supra* Section I.

[30] This consideration also distinguishes cases such as *Todd v. Delmarva Power & Light Co.*, 2009 WL 143169 (Del. Super. Jan. 14, 2009), where motions are made on the "literal eve" of a deadline, or trial.

IV. NEITHER *DREJKA* NOR OTHER PRECEDENT FITS PERFECTLY HERE, BECAUSE THE SITUATION IS UNPRECEDENTED

Appellees argue strenuously that *Drejka* is inapposite.[31] Appellants agree that *Drejka* is not a perfect fit; certain parallels must be drawn before *Drejka* and its progeny are deemed to control here. In order to see *Drejka* as applicable, it must first be accepted that the Superior Court's action was in effect, a sanction for Appellants' perceived lack of diligence.

But in the alternative, none of the cases cited by Appellees fit this situation any more closely than *Drejka*. *Moses v. Drake*, for example, considers a situation where plaintiffs sought to "supplement a previously submitted expert report after the expert report has expired …."[32] As explained, here Appellants' motion came *prior* to the relevant deadline. It is a key difference.

Likewise, as set forth by Appellees, in *Goode v. Bayhealth Medical Center*, the party "did not comply with the discovery rules and pre-trial orders."[33] Here, in contrast, Appellants complied with every deadline, and in fact acted at all times transparently and in good faith while attempting to make out their *prima facie* case under Texas' rigorous standards.

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[31] AB at 37-40.

[32] AB at 41 (citing *Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015)).

[33] AB at 41 (citing *Goode v. Bayhealth Med. Ctr., Inc.*, 931 A.2d 437 (table), 2007 WL 2050761, at *3 (Del. 2007)).

A. The Concept of "Trial Date" Needs to be Viewed Differently in the Context of Asbestos Litigation

Appellees also argue that *Drejka* does not fit because the decision "does not disturb the Superior Court's well-established discretion in setting dates for trial."[34] Of course Appellants recognize this discretion, but the unique circumstances applicable to asbestos litigation must be taken into account.

"Standing Order No. 1" states that "the number of cases initially set for trial on any trial date shall be limited to thirty-six (36) …."[35] Clearly there is no intention, by anyone involved, that thirty-six trials will be conducted simultaneously. To the contrary, asbestos litigation in Delaware is premised on the idea that cases will be moved, settled, and otherwise altered without involvement of the trial judge.

Indeed, this case was one of fifty-nine (59) cases originally in the November 2018 trial group.[36] As of September, 2018, when Appellants' motion was heard, there were sixty (60) cases "scheduled" for trial in March 2019.[37]

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[34] AB at 38.

[35] A copy of the currently active "Standing Order No. 1" is appended hereto as (**Exhibit K**) (exhibits to same excluded).

[36] Ex. D, at 19-20.

[37] Master Trial Scheduling Order, Amended August 16, 2018 (attached hereto as **Exhibit L**).

Thus, there were no legitimate concerns, in September 2018, about "jeopardiz[ing]" the March 2019 trial date.[38] This is reflected in the fact that the Superior Court did not reference adherence to a specific trial date as important in any way to its decision. Regardless, Appellees' arguments related to trial date must be viewed through the lens of the realities of asbestos litigation in Delaware.

The absence of on-point law is, in itself, and indicator that the Superior Court abused its discretion here.

[38] *See* AB at 39 and cases cited therein.

CONCLUSION

For the reasons set forth herein, and as explained more fully in their Opening Brief, 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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