IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	§	
	§	
SHAD C. SHAW, and SARAH SHAW, his wife,	§	
	§	No. 86, 2019
Plaintiffs Below, Appellants,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware
	§	
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.,	§	C.A. No. N17C-03-229
	§	
	§	
Defendants Below, Appellees.	§	

Submitted: January 15, 2019
Decided: March 24, 2020

Before **SEITZ**, Chief Justice; **VALIHURA**, **VAUGHN**, **TRAYNOR**, and **MONTGOMERY-REEVES**, Justices, constituting the Court *en Banc*.

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SEITZ, Chief Justice, for the majority:

In this appeal we decide whether the Superior Court abused its discretion when it accepted the Special Master's report denying the plaintiffs a second extension to move the trial date. To warrant the extension, the plaintiffs had to show good cause. According to the court, the plaintiffs failed to show good cause because they were not diligent in meeting Texas law requirements for asbestos exposure claims, the time pressures faced by counsel were foreseeable, counsel should not have missed deadlines, and, under the circumstances, refusing to grant another trial date extension was not unfair. On appeal, the plaintiffs try to switch to a new standard to evaluate the Superior Court's decision. We decline to do so. The Superior Court applied the law correctly and based its findings on the record and reason. There was no abuse of discretion, and we affirm.

I.

Doctors diagnosed Shad Shaw with mesothelioma in April 2016. He and his wife, Sarah Shaw, filed suit in the Superior Court in March 2017 against seventeen companies. They alleged that Shad was exposed to asbestos fibers "mixed, mined, manufactured, distributed, sold, removed, installed, and/or used by" the defendants.[1] As alleged, Shad's exposure occurred during both employment and as a shade tree mechanic. Because all of Shad Shaw's asbestos exposure occurred in Texas, the parties agree that Texas law governs the substantive claims.

[1] App. to Opening Br. at A060 (Amended Complaint 3 ¶ 4).

For some time, Texas law has required asbestos exposure plaintiffs to meet stringent expert report requirements. The injured party must quantify the "dosage" of the asbestos exposure and then submit a causation report incorporating the dosage report.[2] To meet this standard, Shad's lawyers deposed him once in July 2017, and deposed his father in July and September 2017. During the depositions, Shad's out of state attorneys did not ask questions to quantify the "dose" of asbestos Shad received from any particular product. It was not until a month after depositions ended that the plaintiffs retained an industrial hygienist—the expert needed for the expert dosage report.

The plaintiffs sought to expedite the case because Shad had a terminal illness. On January 11, 2018, the parties agreed to place the case on the November 2018 trial docket. Under the accompanying Master Trial Scheduling Order, the plaintiffs had to meet a February 2, 2018 product identification deadline, which required the plaintiffs "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)."[3] Once they met that requirement, the expert report deadline followed on April 6, 2018. Late in

[2] *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 353 (Tex. 2014) ("the dose must be quantified") ("to establish substantial factor causation in the absence of direct evidence of causation, the plaintiff must prove with scientifically reliable expert testimony that the plaintiff's exposure to the defendant's product more than doubled the plaintiff's risk of contracting the disease"); Opening Br. at 5.

[3] Opening Br. Ex. D. at 40.

January, however, the plaintiffs' industrial hygienist notified counsel that the deposition testimony could not support the required dosage report. Without a dosage report, the plaintiffs could not obtain a causation expert report.

Unable to meet the April deadline, the plaintiffs requested an extension to the expert report deadline until May 11, 2018. The defendants agreed. The Special Master overseeing the Superior Court asbestos docket granted the request. Meanwhile, Shad's health continued to decline. In April, the plaintiffs requested another delay—this time to push back the trial, and all of the deadlines, five months to the March 2019 trial group. The defendants agreed again, and the Superior Court granted the request. Along with the new trial schedule, the expert report deadline became September 7, 2018. Sadly, Shad Shaw passed away in June 2018.

With the expert deadline looming again, the plaintiffs approached the defendants and requested another extension. The plaintiffs sought to push the trial to the September 2019 trial group—another six-month delay. The defendants, having agreed to two prior extension requests, refused. On September 4, 2018, the plaintiffs filed a motion to change the trial group to the later date. If granted by the court, the expert deadline would move to February 2019. With their motion, the plaintiffs attached a "recently obtained affidavit" from Shad's father.[4] The affidavit from Shad's father attempted to plug the holes from Shad's deposition by providing

[4] App. to Opening Br. at A131.

new quantification of Shad's asbestos exposure. In response, the defendants argued that the plaintiffs failed to show "good cause" to move the trial date after receiving two earlier extensions. They also sought to exclude Shad's father's affidavit, arguing that the affidavit could not be used as a substitute for facts that should have been established during Shad Shaw's deposition.[5]

The Special Master denied the plaintiffs' motion to change the trial group.[6] The Special Master applied a "good cause" standard, reasoning the good cause standard "encourage[s] compliance with the Master Trial Scheduling Order ("MTSO") in asbestos cases" and "helps establish a meaningful structure for the development of asbestos cases under the MTSO, which would be jeopardized if the deadlines were not enforced in the absence of some good cause to justify a deviation from them."[7] To show good cause, the Special Master required the plaintiffs 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 Plaintiffs that outweighs the risk of unfair prejudice to Defendants."[8]

[5] The plaintiffs' brief also states that they produced a dosage report on November 6, 2018 and a causation report on November 21, 2018. Opening Br. at 10–11, Exhibits G–H.
[6] *Id.* Ex. B. The Special Master did not decide whether to exclude the affidavit.
[7] *Id.* at 6–7.
[8] *Id.* at 7 (quoting *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006)).

The Special Master found that the plaintiffs were "generally diligent in pursuing expert reports and in attempting to comply with MTSO" because they knew Texas law applied, sought deposition testimony early, worked with an industrial hygienist shortly after, and sought to remedy the deficient testimony despite Shad's declining health.[9] The Special Master also found that they were not "asleep at the switch," but that they "were unable to build a factual record—within the time frame allotted by the Court and with two additional extensions—that would enable their industrial hygienist to issue an expert report satisfying the requirements of Texas law."[10]

On the second factor, the Special Master found that the need for more time was foreseeable because the plaintiffs knew that Texas law applied when they filed the complaint and took depositions, and knew that experts would have to satisfy the rigorous Texas causation requirements. Further, according to the Special Master, the plaintiffs knew shortly after the July 2017 deposition that their factual record was insufficient.

Finally, balancing the prejudice, the Special Master found that denial did not create a "substantial risk of unfairness" to the plaintiffs because they initially sought to expedite the case, and the two extensions cured any unfairness.[11] And, according

[9] *Id.* at 7–8.
[10] *Id.* at 8.
[11] *Id.* at 9–10.

to the Special Master, not enforcing deadlines without some countervailing good cause would prejudice the defendants. As the Special Master ruled, "[i]f good cause could be established simply by a party's inability to muster a sufficient factual record to allow expert reports to be filed in the time allocated by the Court, 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."[12] Balancing all of the relevant factors, the Special Master denied the motion to change trial dates.[13]

The Superior Court accepted the Special Master's ruling that the plaintiffs had not shown good cause to extend the trial date. It applied a similar test for good cause.[14] While the Superior Court generally agreed with the Special Master's reasoning, it did find that the plaintiffs were not generally diligent.[15] As the court held, the plaintiffs' out of state counsel was experienced in the asbestos exposure requirements under Texas law, and Shad's passing was "entirely foreseeable" because of his diagnosis.[16] Thus, out of state counsel knew what information they needed for the dosage report, knew they had to act "expeditiously" to get the

[12] *Id*. at 10.
[13] *Id*. at 12 (noting that "[g]ranting Plaintiffs' Motion under these circumstances would jeopardize the orderly development of cases for trial pursuant to the deadlines set forth in the MTSO").
[14] *Id*. Ex. A at 6 ("Good cause exists when the moving party is, one, generally diligent; the need for more time is neither foreseeable nor the fault of the moving party; and refusing to grant the relief would create a substantial risk of unfairness to that party. And the court engages in the balancing of all of those factors in order to determine if good cause exists.").
[15] *Id*. at 11.
[16] *Id*.

information from a seriously ill party, and yet had no adequate explanation as to why they did not obtain the information during the original depositions and then waited a year to submit a final affidavit from Shad's father.[17]

The same findings went to foreseeability—out of state counsel knew the information needed to satisfy Texas law and Shad's limited life expectancy was foreseeable. The Superior Court also found that "there is fault in not getting those facts and that expert report within the appropriate deadline."[18] And the court generally agreed with the Special Master's balancing of the prejudice to the parties.[19] Finally, the court found "most importantly" 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."[20] The court also granted the defendants' motion to exclude Richard Shaw's affidavit for the same reasons under the good cause standard.[21] The Superior Court eventually dismissed the case, which the plaintiffs did not oppose.

[17] *Id*. at 11–12.
[18] *Id*. at 14.
[19] *Id*. at 15 (noting that if "the specter of dismissal" carried the day in every argument, "then that would excuse a multitude of sins").
[20] *Id*.
[21] *Id*. at 16. The Superior Court also found that the affidavit was untimely.

II.

This Court reviews a trial court's decision denying a motion to change the trial date for abuse of discretion.[22] When reviewing for an abuse of discretion, we may not substitute our "own notions of what is right for those of the trial judge, if his [or her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness."[23] 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."[24] The question is not whether we agree with the court below, but rather if we believe "that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made."[25]

A.

On appeal, we deal first with the plaintiffs' shifting positions on what standard the Superior Court should have applied when it considered the plaintiffs' motion. Before the Special Master and the Superior Court judge, the plaintiffs agreed that

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[22] *Christian v. Counseling Res. Assocs., Inc.*, 60 A.3d 1083, 1086–87 (Del. 2013); *Coleman*, 902 A.2d at 1107 ("It is well settled that 'the trial court has discretion to resolve scheduling issues and to control its own docket.'") (quoting *Valentine v. Mark*, 873 A.2d 1099 (Del. 2005) (TABLE)).
[23] *Coleman*, 902 A.2d at 1106 (quoting *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968)).
[24] *Id.* (quoting *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).
[25] *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

the "good cause" standard should be used to decide their motion.[26] In their Superior Court opening brief, they acknowledged that this Court "recently held that good cause must exist to amend a scheduling order."[27]

Good cause is the proper standard under Delaware law, and the General Scheduling Order expressly requires a "showing of good cause" to modify the scheduling order.[28] To assess good cause, as the Special Master and Superior Court did here, the court examines whether 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."[29]

The plaintiffs argue on appeal that a different standard should apply. According to the plaintiffs, the good cause standard only applies when a deadline has passed, which is not the case on a timely motion to change the trial date. They also note that the Superior Court rule creating the good cause standard has since been

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[26] App. to Opening Br. at A484–85 (Before the Special Master, the plaintiffs stated "the standard we probably should be under is good cause, just pursuant to the rules themselves."); *id*. at A315 (stating in the plaintiffs' exceptions to the Superior Court that their "argument, at its core, is simply that the 'good cause' standard for amending scheduling orders is met here"); Opening Br. Ex. C (arguing the good cause factors at the Superior Court hearing).

[27] App. to Opening Br. at A318.

[28] Answering Br. Ex. A; *see Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015) ("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."); *Coleman*, 902 A.2d at 1107 (finding that the party must show good cause to extend the discovery schedule); *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, 2014 WL 4930693 (Del. Oct. 1, 2014) (TABLE) (requiring good cause when the scheduling order required it).

[29] *Moses*, 109 A.3d at 566. The good cause standard does not separately weigh prejudice to the non-moving party. Unlike in *Coleman*, 902 A.2d at 1106 n.6, where this Court weighed good cause among other factors, good cause is the only issue here.

amended. They suggest we "simply . . . analyze the respective prejudice to the parties and the interests of justice," or apply the standard for motions for continuance.[30]

These arguments should have been raised in the Superior Court and not for the first time on appeal.[31] Even if they were properly raised with us, the plaintiffs offer no authority for their proposed alternatives, and we decline to limit the good cause standard to cases with "missed deadlines." There is no reason to depart from the settled good cause standard, particularly when the General Scheduling Order provides notice of the good cause requirement, and the parties have at all times, until now, agreed that good cause is the proper standard.[32]

As another alternative, the plaintiffs argue that we should review the Superior Court's ruling as a discovery sanction and apply the factors in *Drejka v. Hitchens Tire Service Inc*.[33] to assess the motion because denial would likely, and later does,

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[30] Opening Br. at 21.

[31] Supr. Ct. R. 8. The plaintiffs assert that they raised this challenge to the Special Master because they "advocated a balancing of the prejudice and interests of justice" in their motion. Reply Br. at 10. In their motion, they argued that "[a] six-month delay of the trial date would cause no prejudice whatsoever to the defendants," while "[r]efusal to extend the trial date would result, for all practicable purposes, in dismissal of Plaintiffs' case." App. to Opening Br. at A132–33. And they highlighted that "Delaware has a strong public policy that favors permitting a litigant a right to a day in court." *Id.* (quoting *Dishmon v. Fucci*, 32 A.3d 338 (Del. 2011)). But their motion does not address any applicable standard. And at the hearing before the Special Master, they argued they met the good cause standard. *Id.* at A481, A484–85.

[32] *See also Freibott v. Miller*, 2012 WL 6846562, at *1 n.6 (Del. Sup. Oct. 26, 2012) (Addressing the amended Superior Court rule, "[t]he Rule now allows the trial judge to establish deadlines and protocols for each case, and trial judges continue to use the good cause standard.").

[33] 15 A.3d 1221 (Del. 2010).

lead to dismissal. According to the plaintiffs, if those factors are applied, counsel could have been sanctioned for their lack of diligence, but the motion should have been granted to avoid dismissal. Once again, however, the plaintiffs never raised this alternative with the Special Master.[34] And they argued before the Superior Court and now on appeal that "[t]he *Drejka* factors largely overlap the 'good cause' considerations already stated," and conclude that "there exists good cause for the Court to order the rescheduling of this case."[35] We will not fault the Superior Court for applying the good cause standard that the plaintiffs relied on below.[36]

B.

Turning to the Superior Court's good cause analysis, the plaintiffs have not pointed to any legal errors by the Superior Court. Nor do the plaintiffs quarrel with the court's central findings on lack of diligence and foreseeability—out of state

[34] App. to Opening Br. at A131–33 (not mentioning *Drejka* in their motion to change trial grouping); *id.* at A481–85 (not mentioning *Drejka* in the Special Master hearing).

[35] *Id*. at A322 (exceptions submitted to the Superior Court); Opening Br. at 28. The plaintiffs did not address *Drejka* at the hearing before the Superior Court, and the court did not address it.

[36] The Superior Court would not have erred if it refused to consider the *Drejka* factors when deciding the plaintiffs' motion to change the trial date. In *Drejka*, this Court reversed the Superior Court's dismissal of the plaintiff's complaint for submitting an expert report five months late. We reversed because "the sanction against [the plaintiff] was inappropriate," and "[i]n essence, the trial court entered a default judgment against [the plaintiff] as a sanction for violating the court's Scheduling Order." *Drejka*, 15 A.3d at 1223-24. Here, neither the Special Master nor the Superior Court judge sanctioned the plaintiffs' counsel or effectively entered a default judgment. Instead the Special Master and the Superior Court recognized the reality that no remedial measures could fix the problem the plaintiffs faced if they continued to pursue their case—the plaintiffs' out of state counsel failed to get the first hand dosage testimony from Shad Shaw before he passed away. The plaintiffs also had no explanation why the second hand information in Shad's father's affidavit could not have been obtained earlier.

counsel knew what was required to state a claim under Texas law, Shad's death was "entirely foreseeable" because of his 2016 diagnosis, and Shad's father was always available to submit an affidavit or be deposed again during the discovery period.[37] Yet they waited almost a year to secure Shad's father's affidavit, and filed it three days before the twice-extended expert report deadline. They also failed to obtain the same critical dosage facts from Shad Shaw before he passed away. Under these circumstances, the Superior Court acted "within reason" when it found a lack of diligence and foreseeability of the need for more time on the part of counsel.

As for unfairness, the Superior Court applied the correct law—whether denying relief would "create a substantial risk of unfairness" to the moving party.[38] Applied to the facts of a given case, what is fair or unfair often depends upon the lens one looks through to make the assessment. From the plaintiffs' perspective, denying their motion resulted in the ultimate act of unfairness—effective dismissal of the case. From the defendants' point of view, they were not unfair to the plaintiffs when they twice agreed to extend deadlines. The plaintiffs knew from the outset the rigorous Texas expert report requirements, sought to expedite the case, but twice requested extensions.[39] They also could have attempted to meet the dosage

[37] Opening Br. Ex. A at 11.
[38] *Moses*, 109 A.3d at 566; *Coleman*, 902 A.2d at 1107.
[39] The plaintiffs argue that this is their "first motion for extension." Reply Br. at 5. While technically true because the defendants agreed without a motion, the prior modification requests delayed the expert report deadline twice, which is why they seek to delay the trial schedule. App.

requirement through Shad Shaw's first hand testimony instead of trying to backfill the information through an affidavit from Shad's father just before the deadline. Given these two reasonable views of fairness, we cannot say the Superior Court abused its discretion when it sided with the defendants. We agree with the Special Master's and the Superior Court's observation "that if the inability to develop a factual product identification record within the deadline here extended twice and exacerbated by what I would believe to be an overly aggressive request to set an early trial date, that the plaintiffs would almost always win if that were to carry the day."[40]

III.

We might not have ruled the same way as the Superior Court, but that is not the standard of review on appeal. The Superior Court did not abuse its discretion in denying the plaintiffs' motion. The court's judgment is affirmed.

to Opening Br. at A131 ("Plaintiffs request to push the current March 2019 trial date six months in order to obtain an industrial hygienist report as well as a causation report . . . .").

[40] Opening Br. Ex. A 14–15.

VAUGHN, Justice, with whom Justice **VALIHURA** joins dissenting.

I agree that the plaintiff, Sarah Shaw,[1] was required to show good cause for continuing the trial date from the March 2019 trial grouping to the September 2019 trial grouping. The scheduling order provides that good cause is the governing standard. I also agree that the applicable standard of review is abuse of discretion as described in the Majority's opinion. I dissent because I believe that the plaintiff did show good cause for a change of trial grouping and that the Superior Court abused its discretion in denying her request.

Good cause exists where a legally sufficient reason is shown why a request should be granted.[2] In Delaware, courts have made use of 3 James Moore et al., *Moore's Federal Practice* § 16.14[1][b] (3d ed. 2004) to interpret the good cause standard.[3] Section 16.14[1][b] summarizes, generally, how federal courts apply this analysis under 16(b)(4) of the Federal Rules of Civil Procedure. *Moore's Federal Practice* and the cases annotated therein focus on diligence as the primary

[1] Ms. Shaw is plaintiff individually and as Executrix of the Estate of her late husband, Shad Shaw.
[2] *See Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019). Although defining the phrase in a different context, under "cause," "[a] ground for legal action," BLACK'S LAW DICTIONARY states that "good cause" is "[a] legally sufficient reason. Good cause is often the burden placed on a litigant . . . to show why a request should be granted or an action excused." *Id.*
[3] One of this Court's earliest decisions to mention the good cause standard appears to be *Coleman v. PricewaterhouseCoopers, LLC*, in which we cited 3 James Moore et al., *Moore's Federal Practice* § 16.14[1][b] (3d ed. 2004). *See* 902 A.2d 1102, 1106 n.6 (Del. 2006) (en banc). We most recently cited the same provision in referencing the good cause standard in *Moses v. Drake*. *See* 109 A.3d 562, 566 n.14 (Del. 2015).

consideration in a court's good cause analysis.[4] As Delaware courts recite, § 16.14[1][b] provides that "'[g]ood 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."[5] While a court may also consider the prejudice to the party opposing modification, the absence of prejudice, alone, does not establish good cause.[6]

The good cause analysis requires a trial court to consider the unique circumstances of the case before it.[7] A court, therefore, should balance all relevant factors under this standard, taking care not to apply those factors in a rigid or otherwise inflexible manner. Courts must bear in mind that the good cause standard is less burdensome on a movant than the strict standard a party is required to meet in proving "manifest injustice," although good cause requires more of a showing

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[4] *See generally* 3 James Moore et al., *Moore's Federal Practice* § 16.14 (3d ed. 2020); *see also* FED. R. CIV. P. 16(b)(4) advisory committee's note (emphasizing that, to satisfy the good cause standard, it is the movant's burden to show that it would be unable to reasonably meet a deadline despite the movant's diligence).

[5] *Moore's Federal Practice, supra* note 4, at § 16.14[1][b].

[6] *Id.*

[7] S*ee* 6A ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1522.2 (3d ed. Aug. 2019) (describing the good cause standard under Fed. R. Civ. P. 16(b)(4) and noting that "[w]hat constitutes good cause sufficient to justify the modification of a scheduling order necessarily varies with the circumstances of each case"); *see also Moses*, 109 A.3d at 566 (indicating that the good cause analysis is fact-intensive and finding that "on th[at] record we w[ould] not find that the trial court abused its discretion" in denying the admission of a supplemental report after the relevant deadline had expired).

than would be the case under the liberal "freely given" standard.[8] A court applying the good cause standard should be especially mindful of one overarching consideration—Delaware's strong judicial policy that courts should decide cases on their merits.[9]

In this case, Shad and Richard Shaw were deposed as product identification witnesses in July 2017, four months after the action was filed. Shad Shaw's deposition was completed in July. Richard Shaw's deposition was completed in September 2017. In the month following the July depositions, plaintiff's counsel contacted and retained an industrial hygienist. On January 11, 2018, the plaintiff sought and obtained an early trial date in the November 2018 trial grouping, with an April 6, 2018 expert discovery cut-off. Counsel sought the early trial date in the hope that Shad Shaw would be able to appear as his own witness at trial.

Over the course of the year after the industrial hygienist was retained, plaintiff's counsel was in touch with the expert dozens of times in a continuing effort to develop the expert's report. It was only in late January 2018, shortly after plaintiff's counsel sought and obtained the November 2018 trial date, that the expert informed plaintiff's counsel that the Shaws' depositions did not contain all of the

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[8] *Moore's Federal Practice*, *supra* note 4, at § 16.14[1][a]; *see* FED. R. CIV. P. 16(b)(4) advisory committee's note.

[9] *E.g.*, *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011) (en banc) ("To reiterate, Delaware has a strong public policy that favors permitting a litigant a right to a day in court.") (citing *Beckett v. Beebe Med. Ctr.*, 897 A.2d 753, 757-58 (Del. 2006) (emphasizing Delaware's public policy favoring "a trial on the merits")).

information needed for him to develop a report. From the end of January and over the following months, plaintiff's counsel conversed repeatedly with Shad Shaw, working towards an affidavit or possible deposition to obtain the necessary testimony. As the April 6, 2018 expert discovery cut-off approached, plaintiff's counsel still hoped they could prepare for a November 2018 trial with Shad Shaw's live testimony, but it was becoming clear that the industrial hygienist's report would not be available by April 6. Accordingly, plaintiff's counsel worked with the Defense Coordinating Counsel before the deadline to arrange an extension until May 11, 2018. Shortly thereafter, with Shad Shaw's condition worsening, plaintiff's counsel recognized that a November 2018 trial date was no longer feasible. The trial date was continued, for the first time and without objection, for a period of three months from November 2018 to March 2019, with an expert report discovery cut-off of September 7, 2018. Unfortunately, Shad Shaw died in late June 2018.

After Shad Shaw died, plaintiff's counsel turned to his father, Richard, for an affidavit setting forth the information on Shad Shaw's exposures and the duration of exposures the expert needed to prepare his report. The affidavit, dated September 4, 2018, focused on the exposure information the expert needed and did not contain new product identification information. That same day, before the expert discovery cut-off and with the expert's report not yet in hand, the plaintiff filed a timely motion to change the trial grouping from March 2019 to September 2019, which would

move the expert discovery cut-off to February 23, 2019. Two months later, on November 6, 2018 and November 21, 2018, before the Superior Court judge assigned to the asbestos docket heard the motion for change of trial grouping, the plaintiff filed the expert report of the certified industrial hygienist, Kenneth S. Garza, and an expert report on causation, also required under Texas law, prepared by Arthur L. Frank, MD, PhD.

The Special Master issued his ruling before the plaintiff filed her expert reports. Although he denied the plaintiff's motion, he found that the plaintiff had been generally diligent. I agree. The Special Master found that the plaintiff "'spent the better part of a year trying to work with a dying man in order to get a supplemental affidavit,' and then sought to get one from his father."[10] The Special Master found that "try as they might," the plaintiff was unable to build a factual record that would enable the experts to complete their reports.[11] The Special Master also found there was no fault on the part of plaintiffs "in the usual sense of having missed a deadline or forgotten about some important obligation."[12]

The Superior Court judge disagreed and found that the plaintiff was not diligent. He faulted plaintiff's counsel for not being aware of all the information the industrial hygienist would need when the Shaws' depositions were taken in July and

[10] Opening Br. Ex. B at 8.
[11] *Id.*
[12] *Id.* at 9.

September 2017. Plaintiff's counsel reasonably explained, however, that, although they were aware that Texas law would apply, it was only after the November 2018 trial grouping was set that the industrial hygienist informed them the information in the depositions was not sufficient and additional information was necessary for him to prepare a report. They explained that, despite their knowledge of the Texas cases, they did not anticipate the precise information or form of information the expert would say was needed.[13] Counsel indicated, in substance, that actually working with an expert to satisfy Texas' unique causation requirements had been a difficult experience.[14] The Superior Court judge also criticized plaintiff's counsel for waiting

[13] Second Oral Argument Video, 51:31—52:27, https://livestream.com/accounts/5969852/events/8952027/videos/200786466 ("We knew it was Texas law. And we had read the Texas cases. However, there was a gap between the teachings of those Texas requirements in the case law and what the expert needed. We did not know he was going to come back to us after reading days and days of transcripts, close to a thousand pages and say, 'I need to know numerical clarification. How many inches away was he from the product? Or how many minutes exactly did he work?' We did not expect that. That was not foreseeable to us. And that's what caused the hurdle in this case, in the first place. . . . It was the expert that needed numerical clarification. Texas law talks about the necessity of an industrial hygienist. . . . But it was the numerical clarification that was not known to us."); First Oral Argument Video, 11:16—12:11, https://livestream.com/accounts/5969852/events/8821648/videos/196850561 ("And that is what we did not foresee would happen. When we reviewed the Texas case law . . ., there was nowhere in there that we would need . . . testimony with regards to how many inches away our client was from the . . . brake product, for example . . .. We didn't expect that and nowhere did it say in [*Georgia-Pacific Corp. v.*] *Bostic* or other precedent from Texas. . . . As this Court pointed out in *Phillips*[*v. Wilk, Lukoff & Bracegirdle, LLC*], . . . just because we had merely read about Texas law, just because maybe we had talked about Texas law, did not give us the expertise to sufficiently . . . exercise our duty of care. We had never practiced under Texas law. In fact, this case, in Delaware, is the first time we are able to successfully meet the requirements under Texas law.")

[14] *See* Opening Br. at 24 ("Appellants are unaware of any previous asbestos cases in Delaware where Texas' *prima facie* requirements have been successfully met. . . . Appellants repeatedly returned to their proposed industrial hygienist for an understanding of Texas' substantive requirements, and where existing evidence fell short. . . . Appellants considered alternate experts,

until after Shad Shaw had died before moving forward to obtain an affidavit from Richard Shaw. The court reasoned that Shad Shaw's death was foreseeable. While that may be true, plaintiff's counsel acted reasonably in hoping that the dosage and exposure information could be obtained directly from the alleged victim himself. The foreseeability, or fault, factor of the good cause analysis is mitigated in this case by the unique and challenging causation standard Texas law imposes.[15]

In discussing the factor of unfairness to the moving party, the Superior Court agreed with the Special Master:

> that if the inability to develop a factual product identification record within the deadline here extended twice and exacerbated by what I would believe to be an overly aggressive request to set an early trial date, that the plaintiffs would almost always win if that were to carry the day.[16]

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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.").

[15] Importantly, even where fault can be attributed to a movant, a court may still find that, under the circumstances, the movant has satisfied the good cause standard. In *Bumgarner v. Verizon Delaware, LLC*, the Superior Court found that defendants demonstrated good cause to continue trial even though defendants "[we]re not entirely without blame for waiting . . . before realizing that the doctors [that needed to be deposed as fact witnesses] would not be called by the [p]laintiffs." 2014 WL 595344, at *2 (Del. Super. Jan. 14, 2014). The court found good cause existed because of "the apparent lack of cooperation on [p]laintiffs' side in attempts to schedule depositions of th[o]se witnesses before the trial date, and the preexisting confusion regarding whether the doctors would be called as [p]laintiffs' witnesses at trial, *as well as the diligent efforts made by [d]efendants* after it was realized that the doctors would not be testifying at trial." *Id.* at *3 (emphasis added).

[16] Opening Br. Ex. A at 14:22—15:4.

Seeking an early trial date is not something that should be criticized or held against a party. While the decision to seek an early trial date did not work out as planned, it is not reasonable to criticize counsel for seeking an early trial date in an asbestos case with the hope that the injured plaintiff may be able to testify as a live witness on his own behalf. The Superior Court judge also seems to have placed no weight on the fact that the plaintiff filed a timely request for a change of trial grouping and that by the time he heard the motion the expert reports had been filed and the factual record was developed.

The Superior Court continued that, "[i]n other words, the defendants could never prevail in the face of when the plaintiffs were alleging that the failure to extend deadlines was likely to result in, almost certainly result in dismissal."[17] The generalization that a defendant "could never prevail" if denial of a motion to extend deadlines would result in dismissal is an overstatement. In a particular case, it may be entirely appropriate and not unfair to a plaintiff to conclude that a lack of diligence or other fault on the part of the plaintiff justifies denial of a motion to extend deadlines even where denial will result in dismissal of the case. But a lack of diligence or other fault does not exist here.

[17] *Id.* at 15:4-8.

The Superior Court judge also expressed concern that "most importantly, I think that if the court does not recognize, require adherence to deadlines given the number of cases and litigants on the asbestos docket, that docket would rapidly spiral out of control."[18] However, the Superior Court's asbestos docket will not "spiral out of control" if motions for change of trial grouping are granted in cases like or similar to this one. The Superior Court is fully capable of granting motions for a change of trial grouping while controlling the asbestos docket. A trial court always has discretion to control its docket, but it abuses its discretion when it elevates an overstated concern about docket control to the level of a "most important" factor in a good cause analysis.

The Superior Court judge also reasoned that a continuance would prejudice the defendants because they revealed their summary judgment strategy and witnesses. I see no prejudice to the defendants whatsoever by granting the plaintiff the continuance she sought.

By the time the motion for a continuance was heard by the Superior Court judge, the plaintiff had actively positioned her case for trial. The general practice by Delaware courts is to deny motions to change scheduling deadlines in those cases where the movant has generally failed to act in a diligent manner or has otherwise

[18] *Id.* at 15:19-22.

engaged in a practice of ignoring court deadlines.[19] No such failure to act in a diligent manner or practice of ignoring court deadlines has occurred here.

[19] *See Moses v. Drake*, 109 A.3d 562, 566 (Del. 2015) (affirming denial of motion to amend the scheduling order where the movant had failed to "seek an extension to file expert disclosures and reports" prior to missing the relevant deadline); *Phillips v. Wilk, Lukoff & Bracegirdle, LLC*, 2014 WL 4930693, at *4 (Del. Oct. 1, 2014) (affirming denial of motion to extend time for discovery where "[t]he trial court accommodated [the movant's] request for deadline extensions on several occasions"); *Lundeen v. Pricewaterhouse Coopers*, 919 A.2d 561, 2007 WL 646205, at *2 (Del. Mar. 5, 2007) (ORDER) (affirming denial of motion to amend the scheduling order under the good cause standard after appellants had moved the trial court to allow them to amend their expert's report more than six months after the deadline had passed and noting appellants' pervasive noncompliance with trial rules and practice); *Nationwide Mut. Fire Ins. Co. v. Cropper Oil & Gas, Inc.*, 2012 WL 1413589, at *1-2 (Del. Super. Feb. 7, 2012) (denying party's request to amend the scheduling order under the good cause standard where party sought an additional thirty (30) day extension to identify experts and obtain reports more than five months after it had missed the applicable deadline); *Todd v. Delmarva Power & Light Co.*, 2009 WL 143169, at *1 (Del. Super. Jan. 14, 2009) (finding both plaintiffs and defendants failed to show good cause to jointly amend a scheduling order to extend the discovery deadline and grant a trial continuance "the day before the discovery cut-off" when the parties had an extensive history of repeatedly ignoring deadlines and taking unreasonably long amounts of time to respond to filings and discovery requests, file motions, serve discovery requests, or take depositions); *Candlewood Timber Grp. LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *2, 5 (Del. Super. Jan. 18, 2006) (finding plaintiff failed to demonstrate good cause for the court to permit the admission of an expert report after the deadline had passed more than three months prior). *Cf. Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1105-06 (Del. 2006) (en banc) (affirming trial court's denial of motion to admit supplemental report after the trial court considered a variety of factors, including good cause, and ultimately denied the admission of a supplemental report two days before the relevant deadline would expire where the movant had available the information necessary to correct an error in the original expert report and the admission of the supplement would be disruptive to discovery and scheduling, as "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'") (alteration in original); *Kent v. Dover Ophthalmology ASC, LLC*, 2018 WL 1940450, at *2-3 (Del. Super. Apr. 12, 2019) (denying defendants' untimely request to supplement an expert disclosure report after considering the *Coleman* factors, defining the good cause analysis solely as whether "diligent efforts were made to meet the deadlines," and finding that defendants failed to show good cause to permit the supplemental disclosure because, "[a]bsent from their motion [wa]s any showing of past diligent efforts to disclose fully the bases for [the expert's] opinions") (internal quotation marks omitted) (quoting *Candlewood Timber Grp. LLC*, 2006 WL 258305, at *4).

The unfairness to plaintiff in this case is substantial. This is not a case where, despite denial of the motion for change of trial grouping, the plaintiff can still proceed to trial. Here, for being two months late with expert reports which were completed and filed before her motion for change of trial grouping was heard; despite not having missed any prior deadlines; and after having timely moved for a continuance, the plaintiff's causes of action are destroyed. She is denied an opportunity to present her case, which apparently includes economic damages of more than $9,000,000, to a jury.

The Superior Court applied the good cause standard in a rigid, inflexible manner, giving undue weight to factors which disfavored a finding of good cause and giving no weight, or certainly not much weight, to factors which favored a finding of good cause. The Superior Court failed to engage in a fair balancing of all relevant factors and arrived at a ruling that is beyond the bounds of reason in view of the circumstances of this case.[20] The plaintiff should have an opportunity to present her case to a jury. I would reverse the judgment of the Superior Court.

[20] To that extent, I also would find that the trial court abused its discretion in granting defendants' request to exclude the Richard Shaw Affidavit as untimely. The Richard Shaw Affidavit did not identify any new products from which Shad Shaw purportedly received asbestos exposure. Rather, the Richard Shaw Affidavit was crucial for the expert reports required by Texas law, as the affidavit provided the quantification data critical for those reports. Because of the intertwined nature of the Richard Shaw Affidavit and the two expert reports plaintiff successfully secured by the time the Superior Court heard her motion, the good cause analysis as I discuss above with regards to the expert reports subsumes the analysis with respect to the Richard Shaw Affidavit.