

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-2584

June 22, 2012

A. Dale Bowers, Esquire
Law Office of A. Dale Bowers, P.A.
P.O. Box 6047
Wilmington, Delaware 19801-3733

Joseph Naylor, Esquire
Swartz Campbell, LLC
300 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801

**Re: *In re Asbestos Litigation Ernest Vala*
Limited to Eaton Cutler-Hammer
C.A. No. 11C-04-203 ASB**

Upon Defendant's Letter Requesting Leave to File Revised Reply Brief
DENIED

Dear Counsel:

Defendant, Eaton Cutler-Hammer, filed a letter with the court informing the court it was in the process of filing a revised reply brief to its motion for summary judgment in the above captioned case. Eaton seeks to move for summary judgment based on a Nebraska statute of repose in its proposed brief. The court assumes this is a request for leave from the Master Trial Scheduling Order ("MTSO"). Defendant timely filed its motion for summary judgment on January 18, 2012. Plaintiffs timely responded on February 7, 2012. Defendant timely replied on February 22, 2012. A week prior to oral

argument and nearly four months after filing its reply brief, Defendant seeks to amend its reply brief to include a new argument for which it argues summary judgment should be granted.

The asbestos docket is large and requires adherence to the MTSO. Resident Judge Cooch discussed the standard for modification to scheduling orders in *Candlewood Tiber Group LLC, v. Pan American Energy LLC*.¹ “Delaware courts have considered applications to modify a Trial Scheduling Order have uniformly used the ‘good cause’ standard.”² Judge Cooch concluded “that [p]roperly construed, “good cause” means that scheduling deadlines cannot be met despite a party’s diligent efforts.”³ The court applies the standard as articulated in *Candlewood*.

In the course of this litigation the court has held several times that defendants are limited to the arguments they make in their opening briefs for summary judgment. The practice of adding arguments for summary judgment after the opening brief “has been expressly prohibited by this Court” numerous times.⁴ Judge Ableman addressed a similar issue in *Montgomery*.⁵ In that case Judge Ableman explained:

Since 2007 Judge Slight of this Court that [sic] criticized this ‘sandbagging’ strategy and warned future moving parties in asbestos litigation that they would adopt this practice at their peril. Unfortunately, in this case, GE has failed to heed this admonition and its assertion of the statute of repose argument for the first time in its “second” unauthorized reply brief leads the

¹ 2006 WL 258305 (Del. Super.).

² *Id.* at *4 (citations omitted).

³ *Id.* at *4 (citing *Gonzalez v. Comcast Corp.*, 2004 WL 2009366, *1 (D.Del. 2004) (citation omitted)).

⁴ *In re Asbestos Litig.: Montgomery*, 2011 WL 5395554, at *3 (Del. Super.).

⁵ *Id.*

Court to conclude that the argument has been waived and will not be considered.⁶

Similarly, this judge has said repeatedly it will not permit this practice and considers arguments waived if they are not made in the opening brief for summary judgment.

There is no good cause to grant Defendant leave to file a new reply brief, because as explained above the court will not consider an argument raised for the first time in the reply brief. Moreover, the statute in question was in existence at the time counsel submitted its opening brief for summary judgment, thus there is no argument that “despite a party’s diligent efforts” this argument was omitted from the opening brief.⁷ Because the revised reply brief would violate the MSTO and Defendant waived the argument it hopes to add by not including it in its opening brief, the court **DENIES** the request for leave.

IT IS SO ORDERED.

John A. Parkins, Jr.

oc: Prothonotary
cc: All Counsel of Record via E-File

⁶ *Id.* at *4 (citing *In re Asbestos Litig. Lagrone*, 2007 WL 2410879 (Del. Super.)).

⁷ *Candlewood*, 2006 WL 258305, at *4 (citing *Gonzalez*, 2004 WL 2009366 at *1 (citation omitted)).