IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CHARLES E. REAUME and NANCY REAUME, his wife, Plaintiffs, v. DENTSPLY INTERNATIONAL, INC., *et al.*, Defendants.	)	C.A. No. N14C-11-095 ASB
CHARLES E. REAUME and NANCY REAUME, his wife, Plaintiffs, v. ARKEMA INC., *et al.*, Defendants.	)	C.A. No. N16C-04-134 ASB

ORDER

On this 16th day of November, 2016, upon consideration of Defendants DENTSPLY International, Inc.'s ("Dentsply"), Ransom & Randolph Company's ("R&R"), and Kerr Corporation's ("Kerr") (collectively, "Defendants") submissions in support of Defendants' Exceptions to the Special Master's July 7, 2016, decision granting Plaintiffs', Charles E. Reaume ("Mr. Reaume") and Nancy Reaume (collectively, "Plaintiffs"), Motion to Consolidate and Plaintiffs' response in opposition thereto (the "Special Master's Order"), the Court finds as follows:

By way of background[1], Plaintiffs filed their first action against Defendants, as well as two other defendants, on November 11, 2014, seeking to recover for injuries allegedly caused by Mr. Reaume's exposure to asbestos for which Defendants' are responsible (the "2014 Action"). In December, 2015, after product identification witness deadlines had passed, the 2014 Action was assigned to the May 2017 trial group in the Master Trial Scheduling Order ("MTSO"), but Plaintiffs sought to move the case up to the September 2016 trial group. Defendants agreed to move the case up with the express understanding that the deadlines in the MTSO for the May 2017 trial group that had already expired would not be reopened.

On Friday, March 18, 2016, at 8:32 PM, Plaintiffs filed their Final Witness and Exhibit Lists, which added a new product identification witness, Dr. Buhite, not previously disclosed to Defendants, and on the following Monday, Plaintiffs filed their First Amended Final Witness and Exhibit Lists, which added an additional expert witness. On Tuesday, March 22, 2016, Defense Coordinating Counsel sent an email to Plaintiffs' counsel asking counsel, in light of the fact that the date to tender witnesses in the September 2016 trial group had passed long ago and summary judgment motions would soon be filed, to identify any product

[1] The Parties hereto agree that the recitation of facts in Section I ("Background") of the Special Master's letter opinion is true and accurate. Accordingly, and upon independent review, the Court is similarly in agreement and, thus, hereby adopts and incorporates by way of reference Section I of the Special Master's letter opinion dated July 7, 2016. However, for clarity, the Court recites the relevant timeline herein.

identification witnesses that still needed to be tendered, as had recently been done in a different case. Plaintiffs' counsel did not respond to the email. Instead, on or about March 26, 2016, Plaintiffs' co-counsel met with Dr. Buhite, who was then able to recall the name of another classmate, Dr. Gagliardi. Thereafter, sometime between March 26 and April 9, 2016, Plaintiffs' co-counsel met with Dr. Gagliardi and showed him photographs of Kerr and R&R asbestos strips and rolls, and on Saturday, April 9, 2016, Dr. Gagliardi signed an affidavit identifying those asbestos-containing strips and rolls as the ones he used in his lab during dental school, where he and Mr. Reaume participated in the same labs.

On Tuesday, April 12, 2016, Defendants timely filed their motions for summary judgment in reliance on a closed fact record under the MTSO. Then, two days later, Plaintiffs' counsel notified Defense Coordinating Counsel that Plaintiffs had identified a new coworker who had purportedly provided "additional details," which led to the discovery of new defendants, and acknowledged that this discovery would cause problems because the case was on the verge of summary judgment motions, despite the fact that the motions had already been filed in accordance with the deadline of two days prior. The next day, Plaintiffs filed a second, similar action against the same five defendants, as well as three new defendants (the "2016 Action"). Then, on May 6, 2016, Plaintiffs' moved to consolidate the two actions and requesting an extension of time in which to file

their summary judgment responses. In support of their request for an extension of time, Plaintiffs acknowledged that additional discovery would be conducted as part of the companion case and anticipated that Defendants may choose to supplement or amend their motions as a result.

The morning after Defendants file their response in opposition to Plaintiffs' consolidation motion, on May 17, 2016, Plaintiffs filed a Second Amended Final Witness and Exhibit List in the 2014 Action, which added Dr. Gagliardi as an additional product identification witness.

After hearing oral argument and reviewing supplemental submissions from the Parties, Special Master Boyer granted Plaintiffs' motion in a lengthy and considerate letter opinion dated July 7, 2016 (the "Special Master's Order"). Therein, the Special Master granted Plaintiffs' request for consolidation, ordered Plaintiffs' counsel to reimburse the five defendants from the 2014 Action for an equitable portion of the reasonable fees incurred in preparing and filing their motions for summary judgment, and directed the Parties to place the 2014 and 2016 Actions on the same Master Trial Scheduling Order ("MTSO") in order that Plaintiffs may tender Dr. Gagliardi as an additional product identification witness against all defendants, including the original five defendants in the 2014 Action whose deadlines for tendering and deposing all product identification witnesses,

completing summary judgment fact discovery, and filing final witness lists, as well as summary judgment motions, had already passed.

On July 14, 2016, Defendants filed their Exceptions to the Special Master's Order granting consolidation and placing the 2014 Action on the same schedule as the 2016 Action, arguing that the Special Master erred in deciding to allow the MTSO deadlines for the 2016 Action to supersede those already passed in the 2014 Action, because Plaintiffs' failure to demonstrate good cause to what is, in effect, an attempt to introduce a new witness out of time is dispositive of the issue and *Drejka* does not apply where Dr. Gagliardi's exclusion is not dispositive and his inclusion prejudices Defendants absolutely.

In response, Plaintiffs argue that the Special Master correctly granted their Motion to Consolidate, that *Drejka* is applicable, and that under *Drejka* monetary sanctions are appropriate here. As to Defendants' prejudice argument, Plaintiffs argue in, at most, three sentences that Defendants' citation to *Helmick* for their assertion that *McLeod* applies only when there has been no prejudice to the opposing party is faulty.

This Court reviews a master's findings, both factual and legal, *de novo*.[2]

[2] *In re Asbestos Litig (Attwood)*, C.A. No. 09C-01-021 ASB, slip op. at 1 (Del. Super. May 22, 2012) (quoting *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999)); *Price v. Anchor Packing Co.*, 2009 WL 4017549, at *3 (Del. Super.), *aff'd sub nom. Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del.).

As to the Special Master's determination that, pursuant to Superior Court Civil Rule 42 and the broad discretion provided to the Court thereunder to decide how cases on its docket are to be tried, consolidation is appropriate here, for the reasons stated in the Special Master's Order, the portion of the Special Master's Order granting consolidation is **AFFIRMED** and adopted herein.

As to the Special Master's determination that Plaintiffs have not met their burden under the good cause standard, which is applied to motions to alter or create exceptions to deadlines set under the MTSO, to introduce a new witness out of time, for the reasons stated in the Special Master's Order, the portion of the Special Master's Order finding no good cause is **AFFIRMED** and adopted herein.

As to the Special Master's determination that Defendants would suffer prejudice if the Court were to set aside the MTSO summary judgment discovery deadlines that govern the 2014 Action, for the reasons stated in the Special Master's Order and herein *infra*, the portion of the Special Master's Order finding prejudice to Defendants is **AFFIRMED** and adopted herein.

However, as to the Special Master's determination that the *Drejka* factors apply and, thus, the appropriate sanction for Plaintiffs' untimely proposal to add Dr. Gagliardi as a product identification witness out of time is a monetary sanction, for the reasons discussed below, Defendant's Exceptions to the portion of the Special Master's Order applying *Drejka*, fixing monetary sanctions, and placing

the 2014 Action and the 2016 Action on the same schedule in the MTSO so that Plaintiffs may tender Dr. Gagliardi as a product identification witness against all Defendants are **GRANTED**.

As the Special Master correctly noted in his decision, "[e]ven when the exclusion of testimony is not dispositive, the *Drejka* factors may be considered because less extreme sanctions are preferred when there is no evidence of bad faith or *prejudice* to the other party."[3] However, as Defendants aptly note, though the *Drejka* factors have been applied to situations where a ruling would not effectively result in the granting of a dismissal, court have only done so in situations where there has been no prejudice to the opposing party. In *McLeod*, to which the Special Master cites in support of his decision to apply the *Drejka* factors, the defendant failed to serve a complete copy of his expert report on the plaintiff until a month after the deadline for filing of expert reports had passed.[4] In ultimately deciding to apply the *Drejka* factors, this Court reviewed several cases that had previously applied *Drejka* to situations where there was no prejudice to the opposing party and likewise determined that, because the plaintiff suffered no prejudice from the defendant's untimely service of the entirety of his expert's report, as she received the missing pages of the expert report less than a month after the filing date had

[3] Special Master's Order 17 (citing *McLeod v. McLeod*, 2014 WL 7474337, at *7 (Del. Super. Dec. 20, 2014) (emphasis added).
[4] 2014 WL 7474337, at *5.

passed, the *Drejka* factors applied in determining whether fairness requires sanctions.[5]

As mentioned above and previously affirmed and adopted herein, the Special Master also correctly noted in his decision that "the Original Defendants would be prejudiced if Plaintiffs are now permitted to reopen a closed fact record for summary judgment purposes," because "the filing of summary judgment motions is a well-established 'turning point' in the asbestos litigation."[6] Such a finding is amply supported by case law, which the Special Master explicitly noted in his Order.[7] As this Court previously explained in *Stigliano v. Nosroc Corp.*:

> "[T]he Court's rules of civil procedure provide the plaintiffs with an opportunity in discovery to develop the factual evidence needed to support his legal claim(s) and to identify the evidence in response to properly propounded discovery requests. Once that period for discovery is closed, the defendant is entitled to test the

[5] *Id.* at *6-7 (discussing *Dillulio v. Reece*, 2014 WL 1760318 (Del. Super. Apr. 23, 2014) (untimely expert disclosure but no likely prejudice to the plaintiff); *Helmick v. Miller*, 2012 WL 2833057 (Del. Super. June 13, 2012) (untimely expert report and the defendant's claims of general prejudice due to delay were exaggerated)).

[6] Special Master's Order 18.

[7] *See id.* at 14 n.31 ("*See In re: Asbestos Litig. (Tisdel)*, 2006 WL 3492370, at *16 (Del. Super. Ct. [sic] Nov. 28, 2006) ('Summary judgment is not meant to be an exercise in which the defendant must put all of his cards on the table in order to allow a plaintiff to determine if his hand is adequate or if he needs to open a new pack of cards to restack the deck. . . . Once the period of discovery is closed, the defendant is then entitled to test the sufficiency of the plaintiff's evidence with confidence that the record is fixed.'). *See also In re: Asbestos Litig. (Cates and King)*, C.A. No. 08C-06-065 and C.A. No. 07C-04-129 (Del. Super. Ct. [sic] Nov. 11, 2009) (granting plaintiffs' motion to strike defendant's witnesses identified after MTSO deadline and shortly before trial); *In re: Asbestos Litig. (Edminsten)*, C.A. No. 10C-06-249 (Del. Super. Ct. [sic] Oct. 7, 2011) (granting plaintiff's motion to strike two expert witnesses whom defendant sought to add after the MTSO deadline).").

> sufficiency of the plaintiff's evidence with confidence that the record is fixed."[8]

Therefore, given the circumstances *sub judice*, the Special Master erred in applying the *Drejka* factors and in imposing the monetary sanction against Plaintiffs' counsel.

Instead, fairness dictates that, though the two actions are ordered consolidated, the summary judgment motions filed by the Original Defendants in the 2014 Action, any responses thereto by Plaintiffs, and any replies by Defendants shall proceed in accordance with the fact record as it existed at the time prior to Plaintiffs' untimely and prejudicial disclosure of product identification witness Dr. Gagliardi and in accordance with the deadlines set in the MTSO as it applied and to which the Parties agreed to be bound when Plaintiffs' request to join the September 2016 trial group was granted. Once summary judgment briefing has concluded and any decisions required are rendered, the Court will make any further adjustments to the management of these consolidated cases as necessary.

Accordingly, for the foregoing reasons, the Special Master's Order is **AFFIRMED, IN PART,** and Defendants' Exceptions are **GRANTED, IN PART.** Furthermore, because Plaintiffs have represented that their claims against the Original Defendants remain viable without Dr. Gagliardi's testimony, the Parties are directed to submit proposed filing deadlines for the remaining summary

[8] *Stigliano v. Nosroc Corp.*, 2006 WL 3492209, at *1 (Del. Super. Nov. 21, 2006).

judgment briefing in regards to the motions for summary judgment already filed in the 2014 Action within a reasonable time from the date of this order, but only to the extent that the Parties prefer to conclude this briefing in advance of the summary judgment briefing schedule that has yet to be set in the 2016 Action.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
The Honorable Calvin L. Scott, Jr.

cc: Prothonotary