

Not Reported in F.Supp.2d, 2012 WL 1071187 (E.D.Pa.)  
(Cite as: **2012 WL 1071187 (E.D.Pa.)**)

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United States District Court,  
E.D. Pennsylvania.  
Stephen LADYANSKY and Barbara Ladyansky,  
Plaintiffs,  
v.  
COOPER WHEELOCK, INC. and Simplex Grinnell,  
LP, Defendants.

Civil Action No. 11-cv-102.  
March 29, 2012.

[Jeffrey I. Zimmerman](#), [Jeffrey Schmidt](#), Rovner, Allen, Rovner, Zimmerman & Kats, Feasterville, PA, for Plaintiffs.

[Warren E. Voter](#), Sweeney & Sheehan, Philadelphia, PA, Meaghann C. Porth, [Tiffany M. Alexander](#), Campbell Campbell Edwards Conroy, Wayne, PA, [Aaron K. Kirkland](#), [Bethany M. Shelton](#), [Charles Carson Eblen](#), [Erica A. Schroeder](#), [Jason R. Scott](#), Shook Hardy & Bacon LLP, Kansas City, MO, for Defendants.

#### MEMORANDUM

[SITARSKI](#), United States Magistrate Judge.

\*1 Currently pending before the Court is Plaintiffs' Motion to Amend the Complaint to Conform to the Evidence (Doc. No. 49), SimplexGrinnell's Opposition to Plaintiffs' Motion to Amend the Complaint to Conform to the Evidence (Doc. No. 50), and Plaintiffs' Rebuttal to SimplexGrinnell's Opposition to Plaintiffs' Motion to Amend the Complaint to Conform to the Evidence (Doc. No. 53). Also before the Court is SimplexGrinnell's Motion for Entry of Final Judgment (Doc. Nos.51-52) and SimplexGrinnell's Reply in Support of its Motion for Entry of Final Judgment (Doc. No. 54). As more fully set forth

herein, Plaintiffs' Motion to Amend is **DENIED**, and Simplex's Motion for Entry of Final Judgment is **GRANTED**.

#### I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Stephen and Barbara Ladyansky ("Plaintiffs") initiated this action by filing a Complaint in the Court of Common Pleas of Montgomery County on April 13, 2010, against Defendant Cooper Wheelock, Inc. ("Cooper"). See Simplex's Am. Notice of Removal ¶ 1, Ex. A. While in state court, Plaintiffs twice amended the complaint against Cooper. See *id.* at ¶ 2, Ex. B & C. Plaintiffs asserted that Cooper is liable under various legal theories for injuries sustained by Plaintiff Stephen Ladyansky when he was exposed to sound emitted from a fire alarm.<sup>FN1</sup> See Pls.' Mot. to Amend ¶¶ 1-2. On June 23, 2010, Cooper filed an Answer to Plaintiffs' Second Amended Complaint. See Simplex's Am. Notice of Removal ¶ 3, Ex. D. On December 10, 2010, Cooper filed a Joinder Complaint against SimplexGrinnell LP ("Simplex"), asserting that if Plaintiffs succeeded at trial, Simplex "is jointly and severally liable with Cooper on [P]laintiffs' causes of action and/or are liable over to defendant Cooper for contribution and/or indemnity." See Simplex's Am. Notice of Removal, Ex. E.

<sup>FN1</sup>. Specifically, Plaintiffs asserted: negligence, strict liability, breach of warranty, negligent infliction of emotional distress, and loss of consortium. See Simplex's Am. Notice of Removal, Ex. C.

This case arrived in federal court after Simplex filed a Notice of Removal (Doc. No. 1) on January 6, 2011, and an Amended Notice of Removal (Doc. No. 4) on January 13, 2011, to which Cooper consented. See Simplex's Am. Notice of Removal, Ex. F. On January 13, 2011, Simplex filed its Answer to Cooper's Joinder Complaint, which included a counterclaim

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against Cooper. (Doc. No. 5). Cooper filed a reply to the counterclaim on February 2, 2011. (Doc. No. 15). On March 1, 2011, upon the parties consent, the Honorable Juan R. Sanchez ordered this Court to conduct all proceedings and enter final judgment, pursuant to [28 U.S.C. § 636\(c\)](#) and [Federal Rule of Civil Procedure 73](#). (Doc. No. 24).

On January 12, 2012, Cooper filed a Motion for Summary Judgment as to Plaintiffs' claims against it. (Doc. No. 47). Plaintiffs did not oppose the entry of summary judgment because, as Plaintiffs state, it became apparent during discovery that Cooper was not responsible for their injuries. *See* Pls.' Mot. to Amend ¶ 7. Accordingly, this Court granted the motion as unopposed. (Doc. No. 48).

On February 16, 2012, Plaintiffs filed the instant motion to amend their complaint, seeking to add Simplex as a defendant to the current action pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#). (Doc. No. 49). On February 28, 2012, Simplex filed its response in opposition to Plaintiffs' motion (Doc. No. 50), as well as a Motion for Entry of Final Judgment and accompanying memorandum of law (Doc. Nos. 51–52).<sup>FN2</sup> Plaintiffs filed a reply on March 2, 2012—which addressed both the Motion to Amend and the Motion for Entry of Final Judgment. (Doc. No. 53). Simplex filed a reply on March 8, 2012. (Doc. No. 54). This Court held oral argument on March 22, 2012. Accordingly, this matter is now ripe for disposition.

<sup>FN2</sup>. Simplex's Motion for Entry of Final Judgment asserts that judgment should be entered in its favor because Plaintiffs do not (and cannot) have a pending claim against Simplex. Essentially, Simplex argues that if Plaintiffs' Motion to Amend is denied, this Court should enter final judgment in Simplex's favor.

## II. DISCUSSION

### (A) Plaintiffs' Motion to Amend the Complaint.

\*2 In general, “[Rule 15\(a\)](#) declares that leave to amend ‘shall be freely given when justice so requires.’” *Bivings v. Wakefield*, 316 Fed. Appx. 177, 180 (3d Cir.2009) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). “Leave to amend must generally be granted unless equitable considerations render it otherwise unjust.” *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir.2006) (citing *Foman*, 371 U.S. at 182). “Among the factors that may justify denial of leave to amend are undue delay, bad faith, and futility.” *Id.* (citing *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993)). However, prejudice to the nonmovant is the “‘touchstone for the denial of an amendment.’” *Id.* (quoting *Lorenz*, 1 F.3d at 1414). The decision to grant or deny an opportunity to amend is ultimately within the discretion of the [Court. Bivings](#), 316 Fed. Appx. at 180 (quoting *Foman*, 371 U.S. at 182).

Here, Plaintiffs seek “leave to amend the Complaint to conform to the evidence and specifically, to have a direct claim against [Simplex]” pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#). Pls.' Mot. to Amend ¶ 9. Plaintiffs concede that they have heretofore “not undertaken the formality of moving the Court to amend the Complaint to incorporate allegations originally made against [Cooper] to apply to the acts and omissions of [Simplex], despite having proceeded with the understanding that [Simplex] was responsible for such actions.” *Id.* at ¶ 8. Plaintiffs argue that the motion should be granted because “there is no prejudice to [Simplex], as they have fully defended the instant matter as if the allegation have been brought directly against them by the Plaintiff, and will be unable to state any additional step or action that would have been taken had such Defendant been directly named in the initial Complaint.” *Id.* at ¶ 19.

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In opposition, Simplex argues that the motion should be denied for the following reasons: (1) Plaintiffs did not attach a draft Amended Complaint;<sup>FN3</sup> (2) the proposed claims are futile because the applicable statutes of limitations have expired; (3) the proposed claims are futile because Plaintiffs have not offered any expert testimony to support their claims; and (4) Simplex would be substantially prejudiced if the amendment were permitted so close to trial. *See* Simplex's Resp. 2–11.

[FN3](#). Plaintiffs attached the proposed amended complaint to their Reply. *See* Pls.' Reply, Ex. A. Therefore, Simplex's argument concerning Plaintiffs' failure to attach the proposed amended complaint is moot.

The Court concludes that Simplex's second and fourth arguments are determinative, and addresses each of these two arguments below.

#### (1) Futility

In the context of a Motion to Amend the Complaint, “ ‘futility’ means that the complaint, as amended, would fail to state a claim upon which relief could be granted.’ ” *Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 243 (3d Cir.2010) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997)). “In determining whether a claim would be futile, ‘the district court applies the same standard of legal sufficiency as applies under [Federal] Rule [of Civil Procedure] 12(b)(6).’ ” *Id.* (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434). The Third Circuit has stated that an amendment is futile if the amended complaint could not survive a motion to dismiss on the basis of the statute of limitations. *See Garvin v. City of Phila.*, 354 F.3d 215, 222 (3d Cir.2003) (citing *Riley v. Taylor*, 62 F.3d 86, 92 (3d Cir.1995)).

\*3 Here, Plaintiffs' claims arise out of an injury occurring on June 18, 2008. *See* Pls.' Mot. to Amend ¶

1. Plaintiffs proposed amended complaint alleges that Simplex is liable for, *inter alia*, negligence, strict liability, negligent infliction of emotional distress, and loss of consortium.<sup>FN4</sup> *See* Pls.' Proposed Am. Compl. For each of these claims, Pennsylvania's statute of limitations is two years—which expired on June 18, 2010. *See* 42 Pa. Cons.Stat. § 5524. The instant motion for leave to file an amended complaint was filed on February 16, 2012, which is more than six hundred days after the statutes of limitations expired. Therefore, the claims within Plaintiffs' proposed amended complaint are time-barred, unless the relation back doctrine applies.

[FN4](#). “Loss of consortium is a derivative claim, and is, therefore, governed by the statute of limitations of the source claim.” *Watson v. Bd. of Dirs. of William Penn Sch. Dist.*, No. 05–5760, 2006 WL 2506359, at \*3 (E.D.Pa. Aug.29, 2006) (citing *Patterson v. Am. Bosch Corp.*, 914 F.2d 384, 387 n. 4 (3d Cir.1990)). According to the proposed amended complaint, Plaintiffs' loss of consortium claim is based upon Simplex's negligence. *See* Pls.' Proposed Am. Compl. ¶¶ 33–34 (“Solely as a result of the negligence of the Defendant, the Plaintiff, Barbara Ladyansky, has, is, and will be caused to lose the society, comfort, companionship, support and consortium of her husband, Stephen Ladyansky.”). Thus, the statute of limitations for negligence applies to the loss of consortium claim.

Also, Plaintiffs wish to assert that Simplex is liable for breach of warranty. In Pennsylvania, the statute of limitations for a breach of warranty claim is four years, and begins to run at the time of the tender or sale of the allegedly defective product. *See The Knit With v. Knitting Fever, Inc.*, No. 08–4221, 2011 WL 1603118, at \*3 (E.D.Pa. Apr.27, 2011). None of the

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pleadings provide a specific date for when the allegedly defective product (i.e., the fire alarm system) was tendered or sold. The proposed amended complaint states only that the fire alarm system was sold and installed “[o]n some date prior to June 18, 2008.” See Pls.’ Proposed Am. Compl. ¶ 5. At oral argument, Simplex surmised (citing no evidence to support the proposition) that the fire alarm was installed “about 15 years ago.” See Oral Arg. Tr. 4, Mar. 22, 2012. This Court cannot rely on a wholly unsupported supposition to conclude that the statute of limitations has run on Plaintiffs’ breach of warranty claim. Nevertheless, as discussed below, Plaintiffs’ Motion to Amend to assert a breach of warranty claim against Simplex is denied on other grounds. See *infra* Section II.A.2.

[Federal Rule of Civil Procedure 15\(c\)\(1\)\(C\)](#) “provides that an amendment naming a new party will relate back to the original complaint for statute of limitations purposes only if several prerequisites are satisfied.” [Arthur](#), 434 F.3d at 207. Specifically, for a claim to relate back pursuant to [Rule 15\(c\)\(1\)\(C\)](#), the following requirements must be met:

(1) the claim in the amended pleading must arise out of the “conduct, transaction, or occurrence” set forth in the original pleading; (2) within 120 days of institution of the action, the party to be brought in by amendment must have received “such notice of the ... action that the party will not be prejudiced in maintaining a defense on the merits”; and, (3) within 120 days of institution of the action, the party to be brought in by amendment must have known or should have known that, “but for a mistake concerning the identity of the proper party,” the action would have been brought against that party. <sup>FNS</sup>

[FN5. Rule 15\(c\)\(1\)\(C\)](#) provides as follows:

(1) An amendment to a pleading relates back to the date of the original pleading when:

...

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if [Rule 15\(c\)\(1\)\(B\)](#) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

[Fed.R.Civ.P. 15\(c\)\(1\)\(C\)](#). The applicable time period provided by Rule 4(m) is 120 days. See [Fed.R.Civ.P. 4\(m\)](#).

*Id.* (quoting [Fed.R.Civ.P. 15\(c\)](#)). “The burden of proving each of the three conditions rests on the plaintiff.” [Jamison v. City of York](#), No. 09–1289, 2010 WL 3923158, at \*3 (M.D.Pa. Sept.30, 2010) (citing [Garvin](#), 354 F.3d at 222); [Brown v. City of Phila.](#), No. 09–5157, 2010 WL 1956245, at \*3 (E.D.Pa. May 7, 2010) (quoting [Katzenmoyer v. City of Reading](#), 158 F.Supp.2d 491, 497 (E.D.Pa.2001)).

Here, Plaintiffs disputed the application of [Rule 15\(c\)\(1\)\(C\)](#) and asserted that [Rule 15\(c\)\(1\)\(B\)](#) applies. See Pls.’ Reply 2–3; see also Oral Arg. Tr. 5. Plaintiffs did not address the three requisite conditions of [Rule 15\(c\)\(1\)\(C\)](#), despite having the burden of establishing

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that relation back is appropriate. Plaintiffs incorrectly concluded that [Rule 15\(c\)\(1\)\(B\)](#) applies to the current situation. “[Rule 15\(c\)\(1\)\(B\)](#) is inapplicable here because it only applies to amendments related to a current party, not to a newly-added party.” [Giovannelli v. D. Simmons Gen. Contracting, No. 09–1082, 2010 WL 988544, at \\*3 n. 5 \(D.N.J. Mar.15, 2010\)](#) (applying [Rule 15\(c\)\(1\)\(C\)](#) where a plaintiff sought to add claims against a third-party defendant). This is true even where Plaintiff seeks to add claims against a third-party defendant. *See id.*; *see also* [Lundy v. Adamar of N.J., Inc., 34 F.3d 1173 \(3d Cir.1994\)](#) (applying [Rule 15\(c\)\(1\)\(C\)](#) where a plaintiff sought to add a claim against a third-party defendant). Because Plaintiffs are seeking to assert claims against Simplex (a third-party defendant) for the first time, [Rule 15\(c\)\(1\)\(C\)](#) applies.

\*4 Despite shouldering the burden of establishing that relation back is appropriate, Plaintiffs have not provided any argument that the requirements of [Rule 15\(c\)\(1\)\(C\)](#) have been met. *See* [Jamison, 2010 WL 3923158, at \\*3 \(citing Garvin, 354 F.3d at 222\)](#). Plaintiffs have not demonstrated that Simplex knew or should have known that the action would have been brought against it within 120 days of the institution of the action. Plaintiffs filed their original Complaint in state court on April 13, 2010—and this Complaint did not assert any claims against Simplex. Simplex became involved in this case on December 10, 2010 (i.e., 241 days later; after the two-year statute of limitations on Plaintiffs' state law tort claims had expired) when Cooper filed a Joinder Complaint against it.

At oral argument, Simplex asserted that there is no evidence that Simplex was “put on notice of an action against [Cooper] ... that would put [Simplex] on notice that they either knew or should have known of a mistake” within the applicable 120 day window. *See* Oral Arg. Tr. 15–16. When asked whether Simplex had notice of the suit within this 120 days, Plaintiffs admitted that “Simplex could not have notice from us.” *See id.* at 26–27. In other words, Plaintiffs have

no basis to assert that Simplex received notice within the 120-day window, as is required by [Rule 15\(c\)\(1\)\(C\)](#). *See id.* at 27. There simply is no evidence that Simplex became aware of this action within the required time period. Therefore, the relation back doctrine does not apply to Plaintiffs' negligence, negligent infliction of emotional distress, strict products liability, or loss of consortium claims, and these claims are barred by the statute of limitations. Accordingly, Plaintiffs' Motion to Amend to assert these claims will be denied as futile.<sup>FN6</sup>

<sup>FN6</sup> Simplex also argued that Plaintiffs could not meet the third condition of [Rule 15\(c\)\(1\)\(C\)](#) because Plaintiffs' failure to bring direct claims against Simplex did not constitute a mistake. *See* Simplex's Resp. 4–5; Oral Arg. Tr. 17–19. Because Plaintiffs failed to show that Simplex was given notice within the 120 day window, such analysis is unnecessary.

Additionally, at oral argument, Plaintiffs argued (for the first time) that the claims are timely based upon the discovery rule. *See* Oral Arg. Tr. 26. Of course, the statute of limitations begins to run when an injury is sustained. “ ‘Once the statutory period has expired, the discovery rule triggers the tolling of the statute of limitations when the plaintiff is ‘unable, despite the exercise of reasonable diligence, to discover the injury or its cause.’ ” [Harry Miller Corp. v. Mancuso Chem. Ltd., 469 F.Supp.2d 303, 312 \(E.D.Pa.2007\)](#) (quoting [Mest v. Cabot Corp., 449 F.3d 502, 510 \(3d Cir.2006\)](#)) (emphasis in original). Stated differently, the discovery rule tolls the statute of limitations until the plaintiff knows or reasonably should know “ ‘(1) that he has been injured, and (2) that his injury has been caused by another party's conduct.’ ” [Cooney v. Booth, 210 Fed. Appx. 213, 218](#)

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[\(3d Cir.2007\)](#) (quoting [Pearce v. Salvation Army](#), 449 Pa.Super. 654, 674 A.2d 1123 (Pa.Super.Ct.1996)). The party asserting the application of the discovery rule bears the burden of establishing its applicability. [PSC Info Group v. Lason, Inc.](#), 681 F.Supp.2d 577, 590 (E.D.Pa.2010) (quoting [Cochran v. GAF Corp.](#), 542 Pa. 210, 666 A.2d 245, 249 (Pa.1995)). Pennsylvania courts apply the discovery rule “ ‘in only the most limited of circumstances.’ ” [Harry Miller Corp.](#), 469 F.Supp.2d at 313 (quoting [Dalrymple v. Brown](#), 549 Pa. 217, 701 A.2d 164, 171 (Pa.1997)).

“ ‘The focus of the discovery rule inquiry should center upon an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of others.’ ” [Robinson v. Lowe's Home Centers, Inc.](#), No. 06-4403, 2007 WL 2739187, at \*2 (E.D.Pa. Sept.19, 2007) (quoting [Revell v. Port Auth. of N.Y. & N.J.](#), 2007 WL 2462627, at \*4 n. 4 (D.N.J. Aug.27, 2007)) (holding that the discovery rule does not apply where plaintiffs only learned of an additional defendant when the original defendant filed a joinder complaint). “ ‘Uncertainty as to the identity of a defendant is not the sort of lack of knowledge which triggers the discovery rule.’ ” *Id.*; see also [Bradley v. Conner](#), No. 07-1347, 2007 WL 4241846, at \*4-5 (W.D.Pa. Nov.29, 2007). “ ‘The Pennsylvania Superior Court has generally found the discovery rule inapplicable in cases where a plaintiff was aware of an injury and its cause but had not determined the identity of the defendants within the limitations period.’ ” [Robinson](#), 2007 WL 2739187, at \*2 (quoting [In Re Mushroom Transp. Co.](#), 247 B.R. 395, 400 n. 8 (E.D.Pa.2000)).

Here, Plaintiffs have not argued (nor could they) that the injuries at issue in this case went undiscovered. Plaintiffs merely asserted that they were unaware of Simplex (and its alleged role in causing the injury) before the filing of the Joinder Complaint, despite trying “to ascertain through all of the diligence [they] could what happened here, who was responsible, who created it.” Oral Arg. Tr. 26. This argument is unavailing. Plaintiffs' lack of knowledge, mistake, or misunderstanding are not grounds for tolling the statute of limitations. See [Bradley](#), *supra*; see also [DiCicco v. Willow Grove Bank](#), 308 F.Supp.2d 528, 534 (E.D.Pa.2004).

## (2) Undue Delay/Prejudice

“Delay alone is not sufficient to justify denial of leave to amend.” [Arthur](#), 434 F.3d at 204 (citing [Adams v. Gould, Inc.](#), 739 F.2d 858, 868 (3d Cir.1984)). “ ‘[H]owever, at some point, ... delay will become ‘undue,’ placing an unwarranted burden on the court ... [and] an unfair burden on the opposing party.’ ” *Id.* (quoting [Adams](#), 739 F.2d at 868). “ ‘When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied.’ ” *Id.*; see also [Cureton v. Nat'l Collegiate Athletic Ass'n](#), 252 F.3d 267, 273 (3d Cir.2001) (“ ‘Delay may become undue when a movant has had previous opportunities to amend a complaint.’ ”). “ ‘Thus, while bearing in mind the liberal pleading philosophy of the federal rules, the question of undue delay requires that we focus on the movant's reasons for not amending sooner.’ ” [Cureton](#), 252 F.3d at 273 (internal citation omitted).

“ ‘Substantial or undue prejudice to the non-moving party is a sufficient ground for denial of leave to amend.’ ” *Id.* (citing [Lorenz v. CSX Corp.](#), 1 F.3d 1406, 1414 (3d Cir.1993)). “ ‘Prejudice means ‘undue difficulty in prosecuting [or defending] a law

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suit as a result of a change in tactics or theories on the part of the other party.’ ” [Cummings v. City of Phila., No. 03-0034, 2004 WL 906259, at \\*3 \(E.D.Pa. Apr.26, 2004\)](#) (quoting [Deakyne v. Comm'rs of Lewes, 416 F.2d 290, 300 \(3d Cir.1969\)](#)).

\*5 Courts have found undue prejudice to the non-moving party and denied leave to amend where the amendment would have asserted new claims, where new discovery would have been necessary, where the motion for leave was filed months after the factual basis of the amendment was discovered by the moving party, and where the motion for leave was brought after summary judgment motions were filed.

*Id.*; see also [Cureton, 252 F.3d at 273](#) (Courts consider whether “allowing an amendment would result in additional discovery, cost, and preparation to defendant against new facts or new theories.”).

In this case, Simplex argues that Plaintiffs have not explained their undue delay in seeking to amend. Simplex further argues that it would be substantially prejudiced if the amendment is permitted at this stage. See Simplex's Resp. 9–11. On the question of prejudice, Simplex contends that its litigation strategy was premised on the fact that the only claim brought against it was for contribution and/or indemnification by Cooper. See *id.* at 10; Oral Arg. Tr. 19–20. Given this, Simplex proceeded on the assumption that its liability was dependent upon Plaintiff's first showing that Cooper was liable to Plaintiff. Oral Arg. Tr. 19–21. Simplex did not notice any depositions, conducted only follow-up questioning at the depositions, did not file a motion for summary judgment, and did not develop any claim against Cooper. See *id.*; Simplex's Resp. 10. Simplex “stayed out of it” and “stayed silent,” so as to avoid helping Plaintiffs make their case against Cooper. See Oral Arg. Tr. 19–20.

On the other hand, if Plaintiffs would have as-

serted direct claims against Simplex from the beginning, Simplex's strategy would have been very different. Counsel for Simplex represented as follows:

So we're going to depose Cooper Wheelock, we're going to get much more into the nitty-gritty of the engineering, the testing. We're going to depose building managers, facilities managers. But we stayed silent, because we knew that thus far they had not passed that hurdle, and we did not need to engage in any further discovery.

See Oral Arg. Tr. 21–22. Also, Simplex's interaction with Cooper would've been “much more hostile and confrontational, because then it's now an allocation of liability.” *Id.* at 21.

Simplex also argues that prejudice would inure if the motion is granted, because such would “likely require continuing the trial date, conducting more discovery, and filing a summary-judgment motion.” Simplex's Resp. 10. Plaintiffs disagree that Simplex would be substantially prejudiced because “[Simplex] participated in all discovery and depositions and had the opportunity to file a motion for summary judgment should it have wished to do so.” See Pls.' Reply 4. Plaintiffs also argue that Simplex did not provide reasons why continuing the trial date or additional discovery would be necessary. *Id.* at 5.

This Court finds that Plaintiffs did not provide any reason, much less an adequate reason, to excuse the undue delay. Plaintiffs filed their original Complaint on April 13, 2010, which did not assert any claims against Simplex. Plaintiffs also filed two amended complaints in state court, which likewise did not assert claims against Simplex. Simplex only became involved in this case on December 10, 2010 when Cooper filed a Joinder Complaint against it. At this time, Plaintiffs became aware that Simplex was potentially liable to them. Plaintiffs did not seek to add Simplex as an original defendant (instead of a

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third-party defendant) until February 16, 2012—more than twenty-two months after the initiation of this action, and more than fourteen months after Simplex was joined as a third-party defendant. Plaintiffs have not provided any justification or excuse for their failure to seek leave to amend at a prior time. Plaintiffs merely state that they had “not undertaken the formality of moving the Court to amend the Complaint” prior to the filing of the instant motion. *See* Pls.' Mot. to Amend ¶ 8. This Court finds that Plaintiffs did not take advantage of previous opportunities to amend, and did not provide an adequate explanation for their failure. *See* [Arthur](#), 434 F.3d at 204; [Cureton](#), 252 F.3d at 273.

\*6 Additionally, this Court finds that permitting Plaintiffs to amend the complaint at such a late juncture is substantially prejudicial to Simplex. Plaintiffs knew (or should have known) about Simplex's potential liability on December 10, 2010 at the latest, which was prior to this case being removed to this Court. When Plaintiffs filed the instant motion, the deadlines for discovery and dispositive motions had already passed. Trial is scheduled to commence in approximately seven weeks. Simplex litigated the case as a third-party defendant—choosing not to notice any depositions, file a motion for summary judgment against Plaintiffs, or develop any claims against Cooper. Permitting the amendment would require Simplex to now (on the eve of trial) begin defending the lawsuit as a direct defendant (instead of a third-party defendant), which would necessarily require a change of tactics. *See* [Cummings](#), 2004 WL 906259, at \*3. The proposed amendment would lead to additional discovery and, most likely, an unwarranted delay in the disposition of this case.

In sum, Plaintiffs unduly delayed in seeking to add Simplex as a defendant at an earlier. This delay has substantially prejudiced Simplex. Plaintiffs' Motion to Amend to assert a breach of warranty claim will be denied on this basis.

### **(B) Simplex's Motion for Entry of Final Judgment**

Simplex has filed a Motion for Entry of Final Judgment, arguing that because there are no pending claims between Plaintiffs and Simplex, this Court should enter final judgment in Simplex's favor. *See* Simplex's Mem. Law Supp. its Mot. for Entry of Final J. 2–3. Plaintiffs opposed the motion, but did not directly address Simplex's argument. *See* Pls.' Reply.

This Court agrees with Simplex. Simplex is involved in this case solely as a third-party defendant, as no direct claims have been asserted between Plaintiffs and Simplex. Third-party claims are derivative of the claims asserted between the plaintiff and original defendant. *See* [Estate of Burke v. Mahoney City](#), 40 F.Supp.2d 274, 287 (E.D.Pa.1999) (citing [Fed.R.Civ.P. 14](#)). “Once the main action is dismissed, third-party claims become moot because a ‘third party defendant's liability is secondary to, or derivative of, the original defendant's liability on the original plaintiff's claim.’ ” *Id.* (quoting [Faser v. Sears, Roebuck & Co.](#), 674 F.2d 856, 860 (11th Cir.1982)). When this Court granted Cooper's unopposed motion for summary judgment, the third party claims between Cooper and Simplex became moot.

Now that this Court denied Plaintiffs' Motion to Amend, there are no pending claims between the remaining parties. Therefore, this Court grants Simplex's motion, and enters final judgment in its favor.

### **III. CONCLUSION**

For the forgoing reasons, this Court denies Plaintiffs' Motion to Amend, and grants Simplex's Motion for Entry of Final Judgment.

An appropriate Order follows.

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