DO NOT REMOVE
FROM FILE

JAN - 6

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 20-0014

FILE COPY

STATE OF WEST VIRGINIA
ex rel. 3M COMPANY, F/K/A MINNESOTA MINING AND MANUFACTURING COMPANY, MINE SAFETY APPLIANCES COMPANY, and AMERICAN OPTICAL CORPORATION,

Petitioners,

v.

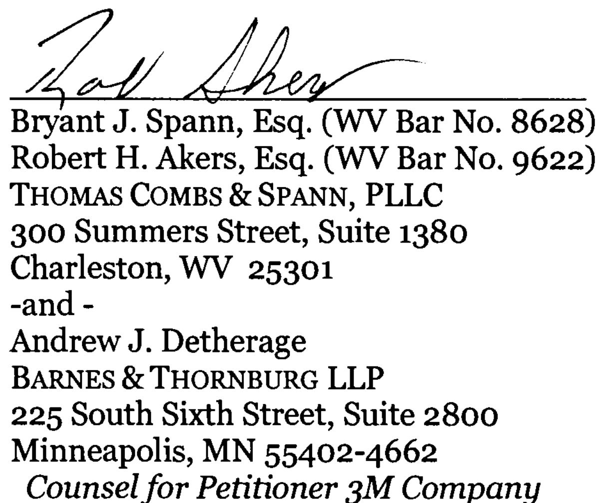
(Civil Action No. 03-C-109)
(Circuit Court of Lincoln County)

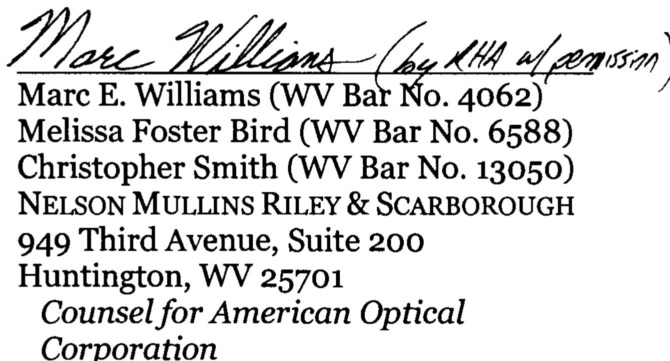
HONORABLE JAY HOKE, JUDGE OF THE CIRCUIT COURT OF LINCOLN COUNTY, AND STATE OF WEST VIRGINIA *ex rel.* PATRICK MORRISSEY, ATTORNEY GENERAL,

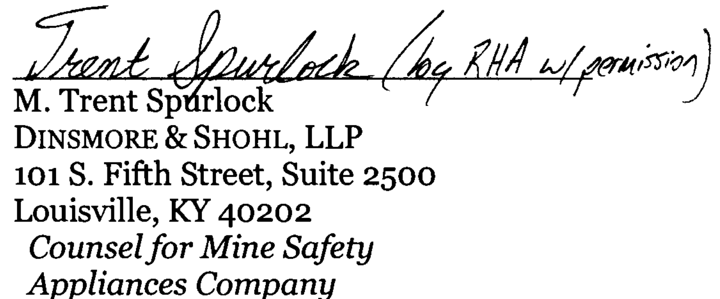
Respondents.

PETITION FOR WRIT OF PROHIBITION

Submitted by:


Bryant J. Spann, Esq. (WV Bar No. 8628)
Robert H. Akers, Esq. (WV Bar No. 9622)
THOMAS COMBS & SPANN, PLLC
300 Summers Street, Suite 1380
Charleston, WV 25301
-and -
Andrew J. Detherage
BARNES & THORNBURG LLP
225 South Sixth Street, Suite 2800
Minneapolis, MN 55402-4662
Counsel for Petitioner 3M Company


Marc E. Williams (WV Bar No. 4062)
Melissa Foster Bird (WV Bar No. 6588)
Christopher Smith (WV Bar No. 13050)
NELSON MULLINS RILEY & SCARBOROUGH
949 Third Avenue, Suite 200
Huntington, WV 25701
Counsel for American Optical Corporation


M. Trent Spurlock
DINSMORE & SHOHL, LLP
101 S. Fifth Street, Suite 2500
Louisville, KY 40202
Counsel for Mine Safety Appliances Company

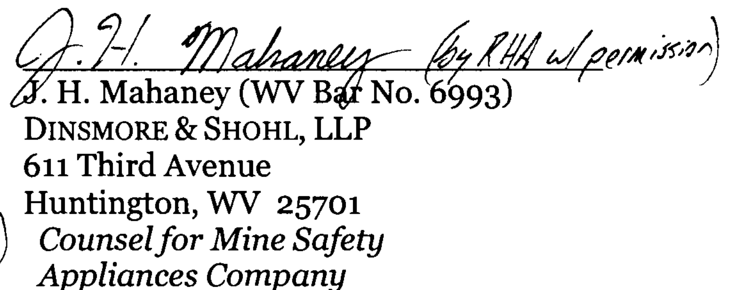

J. H. Mahaney (WV Bar No. 6993)
DINSMORE & SHOHL, LLP
611 Third Avenue
Huntington, WV 25701
Counsel for Mine Safety Appliances Company

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

1. Respirators cannot cause disease by themselves and are not mandatory and not consistently used in mines 5

2. Manufacturers' efforts to obtain relevant discovery 6

3. The State changes course, moving to amend and sever 9

SUMMARY OF ARGUMENT 13

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 15

ARGUMENT 15

I. Statute of Repose: The Circuit Court exceeded its legitimate powers and committed clear error by tolling the CCPA's four-year statute of repose 17

A. The plain language of W. Va. Code § 46A-7-111(2) shows that it is a statute of repose not subject to tolling 17

B. The Legislature includes tolling language when it intends to allow for tolling 19

C. Contrary to the trial court's suggestion, this Court's decision in *Dunn v. Rockwell* does not make the discovery rule applicable to statutory claims 21

D. The U.S. Supreme Court has warned against applying the discovery rule to government actions seeking civil penalties 22

E. Neither § 7-111(2) nor common law permits tolling based on fraudulent concealment 25

II. Retroactive Application of Penalty Enhancement: The Circuit Court exceeded its legitimate powers by retroactively applying the 1999 amendment to CCPA's penalty provision to increase the penalties applicable to alleged violations that occurred before 1999 29

III. Discovery Moratorium: The Circuit Court exceeded its legitimate powers and violated due process by prohibiting Manufacturers from developing product-usage and degree-of-harm proof, which would be relevant to any penalty determination 33

A. Section 7-111(2) requires findings, and thus permits evidence, concerning the *amount* of penalty sought by the State 33

B. Due process entitles Manufacturers to present a defense, including rebutting express allegations in the Second Amended Complaint 35

CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Adams v. Woods, 2 Cranch 336 (1805) 23

Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378, 1385 (2015) 28

Arnold v. Board of Educ., 156 S.E. 835 (W. Va. 1931) 28

CTS Corp. v. Waldburger, 573 U.S. 1, 7 (2014) 18

Clay v. Huntington, 403 S.E.2d 725 (W. Va. 1991) 35

Dunn v. Rockwell, 689 S.E.2d 255 (W. Va. 2009) 20, 21, 22

Eastern Enters. v. Apfel, 524 U.S. 498, 548 (1998) 32

Findley v. State Farm Mut. Auto. Ins. Co., 576 S.E.2d 807, 819-20 (W. Va. 2002) 30, 31

First UMC of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989) 19

Gabelli v. S.E.C., 568 U.S. 442 (2013) 22, 23, 24

Gaither v. City Hosp., Inc., 487 S.E.2d 901, 909 n.8 (W. Va. 1997) 19

Gibson v. W. Va. Dept. of Highways, 185 W. Va. 214, 406 S.E.2d 440 (1991) 18

Hess v. Snyder Hunt Corp., 392 S.E.2d 817, 819 (Va. 1990) 18

In re Charleston Gazette FOIA Request, 671 S.E.2d 776, 777 (W. Va. 2008) 35

Lindsey v. Normet, 405 U.S. 56, 66 (1972) 35

Loveless v. State Workmen's Comp. Comm'r, 184 S.E.2d 127 (W. Va. 1971) 30

Metz v. Eastern Assoc. Coal, LLC, 799 S.E.2d 707, 711 (W. Va. 2017) 21, 22

Osborne v. United States, 567 S.E.2d 677, 683 (W. Va. 2002) 25

Price v. Price, 7 S.E.2d 510, 511 (W. Va. 1940) 28

Public Citizen, Inc. v. First Nat. Bank, 480 S.E.2d 538 (W. Va. 1996) 31

W. Va. ex rel. Blankenship v. Richardson, 474 S.E.2d 906, 919 (W. Va. 1996) 32

State ex rel. Gallagher Bassett Servs. v. Webster, 829 S.E.2d 290 (W. Va. 2019) 16, 17, 26

State ex rel. Hoover v. Berger, 483 S.E.2d 12 (W. Va. 1996) 16, 38, 39

State ex rel. McGraw v. Imperial Marketing, 506 S.E.2d 799, 810-11 (W. Va. 1998) 27, 34

State ex rel. Peck v. Goshorn, 249 S.E.2d 765, 766 (W. Va. 1975) 32

State ex rel. W. Va. State Police v. Taylor, 499 S.E.2d 283, 294 n.16 (W. Va. 1997) 38

Taylor v. Ford Motor Co., 408 S.E.2d 270 (1991) 18

Trafalgar House Const., Inc. v. ZMM, Inc., 567 S.E.2d 294, 300 (W. Va. 2002) 27

W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp., 472 S.E.2d 411, 423 (W. Va. 1996) 25

W. Va. Human Rights Comm'n v. Garetson, 486 S.E.2d 733, 738 (W. Va. 1996) 22, 25

W. Va. v. Morgan, 107 S.E.2d 353, 358 (W. Va. 1959) 26

Wampler Foods, Inc. v. Workers' Comp. Div., 602 S.E.2d 805, 820-21 (W. Va. 2004) 32

Constitutional Provisions

U.S. Const., 14th Amend.,§ 1 35

W. Va. Const. Art. III, § 10 35

Statutes

W. Va. Code St. R. §§ 22A-2-48 5

W. Va. Code St. R. § 22A-2-74 5

W. Va. Code § 2-2-10(bb) 30

W. Va. Code § 29-12A-6(a) 20

W. Va. Code § 30-39-16(c) 19

W. Va. Code § 30-40-20(a) 20

W. Va. Code § 31A-2A-8(a) 20

W. Va. Code § 46-2-725 18

W. Va. Code § 46A-6-102(7)(M) 26

W. Va. Code § 46A-7-111(2) .... passim

W. Va. Code § 47-18-11 19

W. Va. Code § 47-22-6 19

W. Va. Code § 55-2-12 20

W. Va. Code § 55-2-15 20

W. Va. Code § 55-7B-4(a) 19

W. Va. Code § 61-3C-16(d) 20

30 U.S.C. § 842(h) 5

30 C.F.R. § 70.100 5

30 C.F.R. § 70.300 5

30 C.F.R. §§ 75.300–.389 5

Authorities

W. Va. R. App. P. 20 15

QUESTIONS PRESENTED

1. Did the Circuit Court exceed its legitimate powers and ignore clear statutory language by tolling the West Virginia Consumer Credit & Protection Act's (CCPA) statute of repose, W. Va. Code § 46A-7-111(2), so that the State can assert consumer protection claims for violations that allegedly took place nearly 50 years ago (and 30 years before this suit was filed)?

2. Did the Circuit Court exceed its legitimate powers by retroactively applying the 1999 amendment to the CCPA penalty provision, W. Va. Code § 46A-7-111(2), to permit civil penalties of up to $5,000 per violation (instead of $5,000, total) for alleged violations that ended no later than 1998?

3. Did the Circuit Court exceed its legitimate powers and violate defendants' due process rights by preemptively barring defendants from discovering, or presenting at trial, evidence relevant to rebutting allegations in the complaint and to reducing the amount of potential penalties imposed under CCPA?

STATEMENT OF THE CASE

The CCPA includes an unambiguous statute of repose: "No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought." W. Va. Code § 46A-7-111(2). In the face of this clear language—which does not permit tolling—the trial court has ruled that the State may pursue claims for civil penalties based on conduct that occurred much more than four years before this action was brought. This ruling, which was issued after this litigation has languished for 16 years, dramatically alters the course of this case by allowing unlimited CCPA claims against the defendant manufacturers of respiratory protection equipment (the "Manufacturers") for alleged violations dating back to the 1970s. The plain language of the statute of repose, as well as controlling decisions from this Court, foreclose the trial court's unprecedented ruling and alone warrant this Court's issuance of a writ.

But there are more reasons why a writ is appropriate here. The trial court adopted a penalty multiplier—turning a $5,000 maximum statutory penalty for all

collective violations in this case into $5,000 *per violation*—by retroactively applying the 1999 amendment to the CCPA's penalty provision. The trial court did this despite the State's admission that the alleged violations ended no later than 1998, a year before the 1999 amendment became law.

The trial court further barred the Manufacturers from discovering or presenting at trial evidence that their conduct did not harm West Virginians. Such evidence would be relevant to the amount of any CCPA penalty that might be imposed and would rebut specific allegations in the Second Amended Complaint.

Product manufacturers, like other participants in the marketplace, make their business decisions in reliance upon the laws on the books. Trial court decisions like this one, that eliminate express statues of repose, that drastically expand the remedies prescribed by the legislature, or that deny a party the ability to investigate and defend claims against it, undermine business confidence and the consistency and predictability of the rule of law. That is why such policy-oriented decisions are best left to the legislative process. The Manufacturers have both statutory and due process rights to investigate and defend their claims, to have stale claims dismissed under the statute of repose, and to be subject to the lower penalty provisions applicable at the time of the alleged violations. The trial court's decision flouted these rights, exceeded its lawful powers, and needs to be corrected by this Court.

* * *

On August 6, 2003, then-Attorney General Darrel McGraw filed this civil action against 3M Company, American Optical Corporation, and Mine Safety Appliances, Inc. Petitioners' Appendix ("PA") 22-52. The central allegation of the Complaint was that West Virginia coal miners had developed coal workers' pneumoconiosis ("CWP" a/k/a

"black lung") because they relied on the Manufacturers' supposedly ineffective dust respirators in the mines:

> The coal miners to whom the State has paid Workers' Compensation benefits based upon CWP acquired as a result of such miner's coal mine employment within the State of West Virginia used one or more of the respirators / dust masks manufactured, marketed, promoted, distributed, and sold by the Defendants identified in this Complaint.

PA 22-23. The State alleged that the Manufacturers' products had caused the State "hundreds of millions of dollars" in damages. PA 22.

The State alleged six counts: (1) violation of the CCPA; (2) strict product liability; (3) negligence; (4) breach of implied warranty; (5) negligent misrepresentation; and (6) punitive damages. PA 22. The Circuit Court has now agreed to allow the State to sever the CCPA claims (Count 1) from its common law claims (Counts 2 through 6) and proceed to trial solely on the CCPA claims. PA 20-21. The premise of the CCPA claims is that the Manufacturers ran misleading advertisements in trade magazines for certain respirators, and that they concealed unfavorable facts in connection with the sale of those products. According to the State, both the ads and concealment of facts constituted unfair and deceptive trade practices. PA 1-21, 22-52. The original CCPA claim sought equitable remedies of "restitution and reimbursement" of benefits and medical expenses paid by the State "due to the Respiratory Protection Defendants' wrongful conduct," as well as disgorgement; it also sought statutory civil penalties under § 46A-7-111(2). PA 29-30.

The respirators at issue came off the market in West Virginia no later than July 1998. Counsel for the State has confirmed this repeatedly:

> [T]he respirators in issue were those on the market and in use in MSA's -- MSA's case they were on the market from '56 to the late 90's, '98. 3-M's masks, disposable masks, they're approved May 24th, 1972, was off the

> market July 10th, 1998. That's your time frame, because in '95 the government issued new standards for respirators and these wouldn't meet – they couldn't meet those new standards, so, you've got a closed in period. In MSA's case though their respirator was on the market back in the late '50's up to '98, so that's the time frame you're looking at.

PA 1073-74; 1118 (State's counsel saying 3M "continued to sell that product until 1997"); *accord* PA 1218 (listing certification dates for respirators at issue). All advertising statements listed in the original and later amended complaints as purported CCPA violations were made even earlier, in the 1970s and 1980s. PA 1169. The State does not dispute this, and the Circuit Court's Procedural Order of October 25, 2019 (the "Order") takes it as a given. PA 14.

Because this case was filed on August 6, 2003, the relevant statute of repose bars imposition of civil penalties for violations occurring before August 6, 1999: "No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought." W. Va. Code § 46A-7-111(2). Further, as of 1998 when the last of the relevant respirators were sold in West Virginia and all relevant advertising had stopped, the applicable statute provided for a *total* civil penalty of up to $5,000. W. Va. Code § 46A-7-111(2) [1974] read as follows:

> The attorney general may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating this chapter, and if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter, it may assess a civil penalty of no more than five thousand dollars.

It was not until 1999—a year after the latest sales and advertising at issue had ceased, and decades after much of the conduct complained of occurred—that § 46A-7-111(2) was amended to permit a circuit court to impose penalties of $5,000 "for each violation of this chapter," rather than a single penalty of $5,000 for an entire civil action.

1. Respirators cannot cause disease by themselves and are not mandatory or consistently used in mines.

To understand why the State's theory of the case is flawed, it is helpful to keep in mind how respirators are, and are not, supposed to be used in underground mining. The State's basic theory of this case—that if West Virginia coal miners got sick, it must be because their respirators did not work—is inconsistent with federal and state law, as well as the State's own scholarly research. The respirators themselves do not contain or emit coal dust; rather, when properly selected and used, they can reduce a worker's exposure to coal mine dust. Respirators are intended to be used in *exceptional* and rare circumstances, rather than as routine protection from coal mine dust.[1]

The State's case relies on the false assumption that all coal workers wear respirators on a regular basis. The State knows better, because *its own employees' research* disproved this hypothesis before the State even filed this lawsuit. A 1996 study co-authored by four West Virginia University professors found that half of coal miners wore respiratory protection *5% or less* of the time they were working. *See* PA 525-32 (Li,

---

[1] Since 1969, Congress has forbidden coal operators from mandating respirator usage as a primary means of protecting miners from unhealthy levels of coal mine dust: "Use of respirators shall not be substituted for environmental control measures in the active workings." 30 U.S.C. § 842(h). Instead, federal law mandates that operators ventilate mines, and use other methods, to keep respirable dust levels below limits established by the Mine Safety and Health Administration (MSHA). *See, e.g.*, 30 C.F.R. § 70.100 (respirable dust standards for underground coal mines); *id.* § 71.100 (respirable dust standards for surface coal mines); *id.* §§ 75.300–.389 (setting ventilation requirements and standards for underground coal mines); W. Va. Code St. R. § 22A-2-74. Rather than requiring respirator usage among miners, MSHA requires operators to make respirators available for miners to use on a temporary basis when safe dust levels cannot be maintained through ventilation. 30 C.F.R. § 70.300. The State itself, through its Office of Miner's Health Safety and Training, is aware of this regulatory structure. *E.g.*, W. Va. Code St. R. §§ 22A-2-48, 22A-2-74 (governing control of dust and use of respirators in underground mines). The State's own regulations regarding respirator usage in coal mines say that they are to be worn "for short periods." W. Va. Code St. R. § 22A-2-48.

Hongfei, et al., *Respiratory Protection: Associated Factors & Effectiveness of Respirator Use Among Underground Coal Miners*, Am. J. Indus. Med. 42:55–62 (1996)). Even the top half of respirator users wore respirators only about *a third* of the time. PA 528. The average respirator use among all coal miners in that study was a mere 17.3% of the time on the job. PA 527.

Contrary to the State's theory of the case, this study concluded that respirator usage, even when less than full time, *helps protect coal miners' lungs*. PA 529 ("Using stepwise linear regression modeling, we found that the mean percent time of respirator use was associated with a significant positive protective effect on the FEV_1 [a measure of lung function] of the miners.") Thus, to the extent any general conclusions can be drawn about West Virginia coal miners and respirator usage, *the State's own research* indicates that miners infrequently wear respirators, but when they do, respirators help protect the lungs. Despite this inconsistency, the State filed this lawsuit seeking to recover hundreds of millions of dollars.

2. Manufacturers' efforts to obtain relevant discovery.

The State has been consistent on at least one front: It does not want to produce information that either confirms or refutes that West Virginia coal miners used Defendants' respirators.

The Manufacturers timely removed this case to federal court, and it was remanded in 2005. In both courts, they filed discovery requests asking the State to identify which miners it thought defendants had injured and to explain how the State knew this. PA 53-76, 77-89, 131-39, 140-50. In response, the State objected on multiple grounds, including that the answer may have been lost to the passage of time: "Many interrogatories seek information which is literally impossible to obtain because

of the long passage of time, the consequent death of OP beneficiaries or others having information sought by these interrogatories." PA 90, 109-10, 151. The State also objected to answering interrogatories "inquiring into the 'knowledge' of the State of West Virginia, inasmuch as 'knowledge' is unique to each individual living being." PA 91, 110, 152. To date, the State has not produced a single document nor substantive response to these requests for basic information.[2]

In October 2005, the State filed an Amended Complaint that dramatically expanded its allegations to include purported claims on behalf of people who never used the Manufacturers' products. PA 166. The Amended Complaint sought recovery for payments made to or on behalf of *all* occupational pneumoconiosis beneficiaries, whether or not they had worked in coal mines *and* whether or not they had worn respirators. PA 172. The State claimed that the poor design of the subject respirators caused workers not to use them; thus, cases of pneumoconiosis were the Manufacturers' fault whether or not their products were used. PA 166-89.

This case has experienced huge stretches of inactivity, caused by the State's apparent disinterest.[3] 3M moved to compel proper answers to its discovery requests in January 2008. The State primarily resisted producing information in its workers' compensation files, not because it was irrelevant, but on the basis that such production would expose the claimants' personal information. The Manufacturers were perfectly

---

[2] The State has produced exactly two sheets of paper in discovery in the sixteen years the suit has been pending: two documents, executed after this case was filed, which indicate that the outside contingent fee counsel were appointed to represent the State. PA 127-28.

[3] West Virginia's workers' compensation system was chronically underfunded when this suit was filed, but that underfunding was resolved beginning in 2005 when the system was privatized.

willing to enter an appropriate protective order. PA 439-40. In its opposition to 3M's Motion to Compel, the State made clear that its supposed proof would depend on "market share information, combined with data obtained through valid and appropriate statistical sampling," rather than on proof from its own compensation files. PA 436.

The State has pursued two inconsistent procedural mechanisms to avoid producing the relevant information in its files. In November 2013, the State moved to bifurcate the case into "liability" and "damages" phases, seeking to try the liability phase first. PA 450-54. The State's argument was that it could prove the defendants' "liability" in a first trial without producing any evidence that specific West Virginia workers had used or been harmed by the Manufacturers' respirators. [*Id.*] The Manufacturers opposed, pointing out that bifurcation was consistent with neither West Virginia's caselaw nor the Manufacturers' state or federal due process rights. PA 468-534. At a hearing on the motion, the Circuit Court indicated it was not inclined to grant the bifurcation motion, but was open to considering staging discovery in some fashion. PA 1079.[4]

In December 2015, more than 12 years after the State accused respirator manufacturers of injuring thousands of West Virginians, the State *admitted* it had *no idea* and *no way to determine* whether any injured coal miner had ever worn the Manufacturers' products:

> We don't know who was wearing [3M] masks, at this point in time. We have no way of determining that. We don't know who was wearing

4 At the same hearing, the State confirmed what its earlier briefing had implied: It intends to rely on market-share liability to prove its case. PA 1069-70. 3M's counsel pointed out at the same hearing that West Virginia has never recognized market share liability. PA 1075. That remains the case today.

> [American Optical] Mask. We don't [know] who was wearing Mine Safety Appliance[s] Masks, and we can't have any way of establishing that representing the State of West Virginia who is seeking reimbursement for monies that they paid on under black lung payments to miners who . . . admittedly got hurt, working the coal mines in this state, many of whom were wearing masks manufactured by one or the other of the defendants. We don't know the percentages of masks that were being worn, by each one of the defendants. There are many variables with which we're unfamiliar right now and we can't answer . . . .

PA 1114. In fact, the State had not sought discovery or apparently even performed its own investigation on these topics during the decade the case had been pending. PA 1074. ("No, we have not done discovery on which mines used whatever mask in West Virginia. We haven't done that yet. We know which ones were available, on the market for use, but we have not done the discovery on the mines.")

After that hearing, the Circuit Court appointed attorney John Curry as Discovery Commissioner, charging him to help the parties work through the outstanding discovery issues that had stalled the action. PA 1133-35. The Court ordered the State's counsel to contact Curry to begin the process, but they never did so. Despite the defendants' repeated efforts to call out the State's non-compliance, the Circuit Court has never enforced the order. PA 1166, 1282.

3. The State changes course, moving to amend and sever.

In December 2016, rather than comply with the Court's Order, the State proposed yet another way for the case to move forward without confirmation that coal miners actually wore respirators or that they were injured. The State moved to again amend its complaint and to sever Count 1 for separate proceedings and trial. PA 1136-64. The amendment changed the remedies the State sought for the CCPA violations alleged in Count 1; notably, the State eliminated its requests for equitable remedies (restitution, reimbursement, and disgorgement). This is no small change: The State had been

claiming since 2003 that it was due restitution of "hundreds of millions of dollars." PA 22.

But the State's Motion to Amend and Sever made clear why the State was willing to postpone its pursuit of money it claims to have paid out for injured miners:

> The [CCPA] claim involves none of the issues that are inherent in the common law claims for subrogation damages that have resulted in the case having been on file without resolution for over 14 years. If granted, the severance renders irrelevant discovery issues concerning records of the Insurance Commissioner . . . relative to any aspect of injury, causation, medical expense, or other potential causes of disability, amounts paid for medical care and/or compensatory benefits. Severance of the Consumer Act claim as amended also renders irrelevant any medical records of any worker's compensation claimant whose claim might provide a predicate basis for the assertion of the State's subrogation rights.

PA 1139. In other words, the State is willing to postpone pursuit of a supposed nine-figure claim to avoid having to prove that West Virginia coal miners (and other workers) used the Manufacturers' products, or that anything the Manufacturers did caused the workers' injuries. Instead, the State immediately seeks a separate civil penalty of up to $5,000 "for each violation," even though per-violation penalties became available only in 1999, *after* sales of the respirators ceased. PA 1138 (quoting current version of § 46A-7-111(2)). The State asserts it can prove these violations without showing that anyone in West Virginia saw or relied on the Manufacturers' advertisements, much less that they were injured by the conduct that gives rise to liability. PA 1196.

However, the revised version of Count 1, and the allegations incorporated into it, belie the State's position: the CCPA claim still expressly accuses the Manufacturers of injuring West Virginian workers and the State. Those accusations appear, for example, in the introductory allegations of the Second Amended Complaint, which are expressly incorporated by reference into Count 1:

> Many of these workers, including but not limited to coal miners, to whom the State has paid Workers' Compensation benefits based on [occupational pneumoconiosis] acquired as a result of such workers' employment within the State of West Virginia, used one or more of the respirators/dust masks manufactured, marketed, promoted, distributed and sold by the Defendants . . . .

PA 1141-42. Similarly, the "Factual Background" of the new complaint, which also is incorporated into Count 1, states:

> Tens of thousands of West Virginia workers have developed a progressive, irreversible lung disease known as occupational pneumoconiosis . . . caused by breathing coal, rock, sand or other dust *after being provided and/or using the respirators/dust masks manufactured, marketed, promoted, distributed and sold by the Respiratory Protection Defendants* . . . .

PA 1145 (emphasis added).

In Count 1, the State lists certain advertising statements that it alleges "were likely to *and did deceive and /or confuse West Virginia citizens, employers and their employees into utilizing the Defendants' respiratory protection devices*." PA 1146-47 (emphasis added). Likewise, the State alleges not only that West Virginians accepted the defendants' enumerated "misrepresentations regarding the uses, safety and efficacy" of their products, but that the defendants "knew of the acceptance." PA 1147. The State further claims that it was actually damaged by the Manufacturers' advertisements: "As a proximate result of the acts of unfair and deceptive business practices set forth above, the State has paid excessive amounts of [workers' compensation] benefits and healthcare costs related to occupational pneumoconiosis." PA 1147. Thus, despite efforts to insulate itself from discovery regarding coal operator and miner behavior, the State *still* alleges that its citizens, and the State itself, were deceived and hurt by the Defendants' actions.

The Manufacturers resisted the Motion to Amend, pointing out that the State's CCPA claims were time-barred because the alleged violations related to product sales that ceased in 1998, more than four years before this suit was filed. PA 1174, 1406-08, 1415-17 (citing § 7-111(2) ("No civil penalty . . . may be imposed for violations of this chapter occurring more than four years before the action is brought.")) Defendants also noted that, if civil penalties were imposed, the State could recover a total of $5,000—not $5,000 per violation—because the language permitting per-violation penalties was not added to § 7-111(2) until 1999, a year after sales stopped. PA 1175. Finally, the Manufacturers pointed out that the State's central premise for severance was wrong: Limiting the trial to the CCPA count did not obviate the need for the discovery they sought. Evidence as to whether coal operators and miners actually saw the Manufacturers' advertising, whether they used the Manufacturers' products, and whether they were exposed to harmful dust levels as a result of defective respirators were responsive to the allegations in Count 1 and relevant to the *amount* of any penalty imposed. PA 1165-92. The statute provides for a penalty of *up to* $5,000 (either total or per violation, depending on the date), and the extent of the alleged violation logically relates to amount of the penalty.

On October 29, 2019, the Court rejected each of these arguments, ruling that: (1) the four-year repose period in § 7-111(2) is subject to tolling, both under the discovery rule and the doctrine of fraudulent concealment; (2) the State may pursue penalties of $5,000 per violation; and (3) because the Court is "not authorized to consider" any evidence beyond whether the alleged CCPA violations occurred, no evidence as to whether any West Virginian saw, relied on, or was injured by the Manufacturers' statements or products would be discoverable or admissible at trial of Count 1. PA 1-21.

In reaching each of these incorrect legal conclusions, the Circuit Court exceeded its legitimate powers.

SUMMARY OF ARGUMENT

The trial court's decision ignores the plain language of W .Va. Code § 46A-7-111(2), defies due process, commits clear error, exceeds its lawful powers, and should be corrected for three reasons: (1) the plain terms of the CCPA's four-year statute of repose, § 7-111(2), bar the decades-old violations the State seeks to prosecute, the last of which would have occurred five years before the case was filed; (2) the 1999 amendment to the CCPA's penalty provision cannot apply retroactively as a penalty enhancement for violations that occurred in or before 1998; and (3) due process forbids punitive litigation that denies Manufacturers discovery and the opportunity to develop relevant product-related evidence. If allowed to stand, these rulings will have gravity beyond this case, because the Circuit Court's order portends virtually limitless liability (via retroactive CCPA penalties) for every manufacturer that has ever advertised and sold products in West Virginia—*even* for conduct dating back over half a century or more. The business community now faces crippling uncertainty and immense liability. Certainty in legal obligations, and confidence that statutes mean what they say, are crucial to promoting a fair legal climate in West Virginia.

With regard to the statute of repose, the Circuit Court clearly erred by ruling that § 7-111(2)'s four-year repose period may be tolled indefinitely under the discovery rule and the fraudulent concealment doctrine. The plain language of the statute does not permit tolling, and no West Virginia case has ever tolled this four-year period. The discovery rule applies only to torts, not to statutory causes of action like CCPA claims.

And because the Manufacturers had no duty to disclose supposed defects to the State while they were selling their respirators, fraudulent concealment does not apply. Tolling erases the four-year repose period and improperly rewrites the statute. This case presents the worst-case example of why tolling cannot apply: The State seeks penalties for, among other things, advertisements the defendants ran in the 1970s and 1980s, decades before it filed suit. By claiming the power to impose sanctions for decades-old alleged violations, the Circuit Court exceeded its legitimate powers under the CCPA.

The Circuit Court also ruled that it will retroactively apply the vastly more punitive penalty provisions enacted in 1999 to those decades-old violations. The Circuit Court intends to impose civil penalties of up to $5,000 for *each* proven CCPA violation. But the State admits that the sales relevant to their claims ended in 1998, when the maximum penalty for "engag[ing] in a course of repeated and willful [CCPA] violations" was $5,000 total, not $5,000 per violation. The per-violation penalty language was not added until 1999.

West Virginia statutes are presumed to operate only prospectively, and nothing in § 7-111(2) rebuts this presumption. Because the amendment affected the substantive penalties applicable for CCPA violations, it was not merely procedural. The Circuit Court therefore exceeded its legitimate powers by ruling that the 1999 statutory amendments authorizing per-violation penalties will apply retroactively to the pre-1999 violations at issue in this case. Retroactively applying the statute to increase a possible penalty from a total of $5,000 to what the State evidently believes could be hundreds of millions of dollars violates due process limits, under both the West Virginia and U.S. Constitutions.

Finally, the Circuit Court ruled that, in adjudicating claims under § 7-111(2), it was not "authorized" to consider any evidence beyond proof of whether the alleged violations occurred. This is error because, in addition to deciding whether violations occurred, the Circuit Court must decide the amount of any penalty imposed. In seeking a lower penalty, Defendants have a due process right to present evidence that their conduct did not deceive or harm any West Virginians. Such proof also is relevant and necessary to rebut specific allegations in the CCPA count of the Complaint, which accuses the Manufacturers of causing black lung disease in West Virginia miners to whom the State allegedly had to pay excessive black lung benefits. The Manufacturers have a due process right to discover and present at trial evidence from the State's own files showing that workers to whom the State paid benefits never wore the Manufacturers' respirators. By sanctioning the State's years-long efforts to stonewall legitimate discovery requests and by preemptively barring defendants from presenting relevant rebuttal evidence at trial, the Circuit Court has exceeded its legitimate powers.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Manufacturers request oral argument under W. Va. R. App. P. 20 because this Petition is not frivolous; many of the issues raised are first-impression issues for this Court; it involves both issues of fundamental public importance and constitutional questions regarding the Circuit Court's Order; and the decisional process would be significantly aided by oral argument.

ARGUMENT

The Circuit Court exceeded its legitimate powers and committed clear error by: (1) eliminating the CCPA's four-year statute of repose so that it could impose civil

penalties for violations alleged to have occurred between five and thirty years before suit was brought; (2) retroactively applying the CCPA's 1999 enhanced penalty provisions to violations allegedly occurring years before its effective date; and (3) prohibiting product-identification, product-usage, and degree-of-harm discovery, despite the relevance of that evidence to the award of any penalty for violations of the CCPA. All three errors justify issuance of a writ, which depends on:

> (1) whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996); *accord State ex rel. Gallagher Bassett Servs. v. Webster*, 829 S.E.2d 290 (W. Va. 2019). Not all of these factors must be satisfied, and the most important is the third—whether the Circuit Court's order is clearly erroneous as a matter of law. *Id.*

Not only did the Circuit Court clearly err, but the issues presented are uniquely suited for resolution by writ of prohibition. The issues are purely legal. Their outcomes greatly impact the scope and substance of trial and all other aspects of this case. And they are substantial for this case—the *in terrorem* effect of exposing Manufacturers to nearly unlimited CCPA liability means that failure to intervene may prejudice Manufacturers in a way that is not correctable on appeal. The issues are also substantial for the State—they include state law issues of profound importance, at least one federal constitutional issue, and issues of first-impression for this Court. A writ of prohibition is appropriate here.

I. Statute of Repose: The Circuit Court exceeded its legitimate powers and committed clear error by tolling the CCPA's four-year statute of repose.

A. The plain language of W. Va. Code § 46A-7-111(2) shows that it is a statute of repose not subject to tolling.

Any analysis as to whether a statute permits tolling must start with the statutory language. *E.g.*, *Gallagher Bassett*, 829 S.E.2d at 295 ("[I]n deciding the meaning of a statutory provision we look first to a statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.") (internal quotations omitted). A court must apply the plain meaning of the statute, and cannot rewrite its text to achieve what it regards as a fair result.

Here, the Order never cites the operative language of § 7-111(2). Instead, its reasoning consists of a single sentence: "From its review, the Court has determined that there is not a statutory prohibition on the application of the discovery rule." PA 12. But the statutory language makes no allowance for tolling at all: "No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought." W. Va. Code § 46A-7-111(2). The plain language of the statute should end this inquiry—because the violations alleged in this case "occurred" at least five years before this suit was filed, they are not subject to civil penalties.

The Circuit Court erred in treating § 7-111(2) as a statute of limitations instead of a statute of repose. This Court has explained the difference between these types of statutes: "A statute of limitations begins to run on the date of the injury; whereas, under a statute of repose, a cause of action is foreclosed after a stated time period regardless of

when the injury occurred." Syl. Pt. 2, *Gibson v. W. Va. Dept. of Highways*, 406 S.E.2d 440 (W. Va. 1991). The *Gibson* Court further noted that, unlike a statute of limitations, a statute of repose "begins to run from the occurrence of an event unrelated to the accrual of a cause of action." *Id.* at 443 (citing *Hess v. Snyder Hunt Corp.*, 392 S.E.2d 817, 819 (Va. 1990)); *accord CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014) (statute of repose runs "not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant"); *Taylor v. Ford Motor Co.*, 408 S.E.2d 270 (W. Va. 1991) (W. Va. Code § 46-2-725 is a statute of repose "because the limitation period begins to run when the product is delivered, regardless of when the damages are incurred").

Here, § 7-111(2) speaks to a court's power to award penalties and looks to occurrence, not injury—"No civil penalty" for "violations . . . *occurring* more than four years before the action is brought" (emphasis added). Accordingly, it is a statute of repose, not a statute of limitation. Lest there be any doubt that the statute looks to occurrence and not injury, the Circuit Court's denial of product-identification and degree-of-harm discovery presumes that the State can prove its case without evidence of a consumer's injury. *See* PA 4 (finding that CCPA claim "requires no showing of reliance or even actual damages" caused by alleged misrepresentations).

It would defeat the purpose of a statute of repose to apply tolling doctrines, such as the discovery rule or fraudulent concealment. Statutes of repose reflect the legislative "judgment that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" *Waldburger*, 573 U.S. at 10 (quoting C.J.S. § 7, at 24)); *Calif. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (by definition,

statute of repose cannot be tolled). To undo the statute of repose's deadline and resuscitate decades-old CCPA claims, as the trial court did, injects uncertainty into the marketplace and upsets businesses' legitimate expectations about the breadth of their exposure to potential liability. *See, e.g.*, *Gaither v. City Hosp., Inc.*, 487 S.E.2d 901, 909 n.8 (W. Va. 1997) (statute of repose is a clear bar to the application of discovery rule); *Calif. Pub. Employees' Ret. Sys.*, 137 S. Ct. at 2051 ("The purpose and effect of a statute of repose . . . is to override customary tolling rules arising from the equitable powers of courts."); *First UMC of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989) ("[A] statute of repose is typically an absolute limit beyond which liability no longer exists and is not tolled for any reason . . . .").

B. The Legislature includes tolling language when it intends to allow for tolling.

The Legislature knows how to authorize tolling a limitations period, and it has done so explicitly throughout its history. For instance:

- An action for violation of the Antitrust Act—including a civil action brought by the Attorney General—must be brought "within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered the facts relied upon for proof of the conspiracy." W. Va. Code § 47-18-11.
- An action under the Medical Professional Liability Act "must be commenced within two years of the date of [the] injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered [the] injury, whichever last occurs." W. Va. Code § 55-7B-4(a); *accord* § 55-7B-4(b) (providing discovery rule for MPLA claims against nursing homes).
- An action for misappropriation under the Uniform Trade Secrets Act "must be brought within three years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered." W. Va. Code § 47-22-6.
- An action for violation of the Uniform Athlete Agents Act does not accrue "until the educational institution discovers or by the exercise of reasonable diligence should have discovered the violation." W. Va. Code § 30-39-16(c).

- Certain disciplinary actions under the Real Estate License Act must be brought within "two years after the date at which the complainant discovered, or through reasonable diligence should have discovered, the alleged unprofessional conduct." W. Va. Code § 30-40-20(a).

- Civil actions for violations of the Computer Crime and Abuse Act "must be commenced before the earlier of: (1) Five years after the last act in the course of conduct constituting a violation of this article; or (2) two years after the plaintiff discovers or reasonably should have discovered the last act in the course of conduct constituting a violation of this article." W. Va. Code § 61-3C-16(d).

- Claims against political subdivisions under the Governmental Tort Claims and Insurance Reform Act must be brought "within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs." W. Va. Code § 29-12A-6(a).

- Actions for violations of the Maxwell Governmental Access to Financial Records Act must be brought "within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later." W. Va. Code § 31A-2A-8(a).

- Actions for sexual assault or abuse of a person who was underaged at the time of the act "shall be brought against the perpetrator of the sexual assault . . . within four years after the age of majority or within four years after discovery of the sexual assault . . . whichever is longer." W. Va. Code § 55-2-15.[5]

The Legislature therefore knows how to authorize tolling based on a plaintiff's knowledge, discovery of injuries, or discovery of the underlying violation.

But § 7-111(2) contains no such tolling language, and it does not depend on when claims under that statute "accrued." Instead, § 7-111(2) is a statute of repose that bars a circuit court from imposing civil penalties for violations *occurring* more than four years

---

[5] Even the catch-all limitations statute, W. Va. Code § 55-2-12, pegs the running of the limitations period for tort cases to "two years next *after the right to bring the [suit] shall have accrued*" (emphasis added); the date of accrual *in tort cases* then may depend on the discovery rule. *E.g., Dunn v. Rockwell*, 689 S.E.2d 255 (W. Va. 2009).

before the suit was filed.[6] By granting itself the power to toll the four-year repose period under the discovery rule, and then impose civil penalties for purported violations occurring *more than* four years—in this case, decades—before this action was brought, the Circuit Court has violated the Legislature's clear intent and undermined the reasonable expectations of the business community and their insurers who reasonably relied on the CCPA's four-year hard cap.

C. Contrary to the trial court's suggestion, this Court's decision in *Dunn v. Rockwell* does not make the discovery rule applicable to statutory claims.

Having ignored the text of § 7-111(2), the Circuit Court compounded its error by misapplying this Court's decision in *Dunn v. Rockwell*, 689 S.E.2d 255 (W. Va. 2009). Order at 11-12. *Dunn* recognized that the discovery rule "is generally available to all torts." 689 S.E.2d at 264. But, as this Court has since explained, this presumption does not apply to statutory claims: "*Dunn* did not expand the discovery rule beyond those causes of action in which the rule had previously been applied." *Metz v. E. Assoc. Coal, LLC*, 799 S.E.2d 707, 711 (W. Va. 2017). Distinguishing statutory claims from the tort claims in *Dunn*, the *Metz* Court reasoned:

> [I]n *Dunn*, we held that the discovery rule is generally applicable to all *torts*, unless there is a clear statutory prohibition to its application. In seeking to apply the discovery rule to an employment discrimination action, Mr. Metz glosses over the nature of an action brought under the HRA. Unlike torts whose origins are the common law, the action at issue in this case has its genesis in statutory law. This distinction is significant. Because a HRA cause of action is a legislative creation, the statute governs the parameters of such claims.

[6] Other remedy provisions in the CCPA likewise peg the running of the statute to the occurrence of the violation. *See, e.g.*, W. Va. Code § 46A-5-101(1) (prohibiting private actions for civil penalties "more than four years after the violations occurred").

Id. at 711-12 (emphasis in original, internal citations and quotations omitted). Consistent with that framing, the *Metz* Court noted that *Dunn* "had no effect on [Human Rights Act] cases which are not torts and thus not subject to the discovery rule by construct." *Id.* at 713 n.18.

The Circuit Court correctly notes that CCPA claims are statutory claims, PA 6-9, but nevertheless proceeds to treat them as common-law torts under *Dunn*, *id.* at PA 11-12 ("[O]ur West Virginia Supreme Court [of Appeals] addressed the applicability of the discovery rule in *Dunn v. Rockwell*, ... The Court held that the discovery rule generally applies to all tort actions unless there is a clear statutory prohibition against its application.") That constitutes clear error, because *Metz* confirms that *Dunn*'s presumption of a discovery rule does not apply to purely statutory claims, the boundaries of which are determined by the statutory language.

Neither the Circuit Court nor the State has cited any case (whether pre- or post-*Dunn*) applying the discovery rule to an action under § 7-111(2), and understandably so; nothing in the plain text of the statute of repose suggests a discovery rule. Because the CCPA is a purely statutory claim, the trial court committed clear error in relying on *Dunn* to toll the statutory limitations period.

D. The U.S. Supreme Court has warned against applying the discovery rule to government actions seeking civil penalties.

The Circuit Court also ignored the U.S. Supreme Court's admonition that the discovery rule generally is not applicable to government enforcement actions that seek to impose civil penalties. *See Gabelli v. S.E.C.*, 568 U.S. 442 (2013). In *Gabelli,* the Court ruled that the Securities and Exchange Commission could not invoke the discovery rule to toll the statute of limitations in an action to recover civil penalties for

fraud under the federal Investment Advisers Act of 1940. *Id.* at 445–47. The *Gabelli* Court held that the discovery rule was inappropriate in the context of civil penalties, noting that unlike a private plaintiff, the government is tasked with investigating and discovering wrongdoing. *Id.* at 451. The Court similarly noted that the government, unlike a private plaintiff, has investigative tools at its disposal to discover fraud. *Id.*

Just as the SEC is tasked with enforcing securities laws, the West Virginia Attorney General is tasked with enforcing the CCPA. *See* W. Va. Code §§ 46A-7-101 to 7-114. The Attorney General has the power to conduct investigations of potential CCPA violations, subpoena documents and witnesses, and require companies under investigation to produce records. *Compare Gabelli*, 568 U.S. at 451 (noting SEC's investigatory powers), *with* W. Va. Code § 46A-7-104 (granting Attorney General similar investigatory powers to enforce CCPA).

The *Gabelli* Court also noted that the punitive nature of civil penalties—as opposed to the remedial nature of compensatory damages—justified strict enforcement of repose and limitations periods, because "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Id.* at 451–52 (quoting *Adams v. Woods*, 2 Cranch 336 (1805)). Here, the State's CCPA claims are entirely punitive. As in *Gabelli*, it is repugnant to our laws to allow the State to bring an action for penalties some untold time after the underlying conduct occurred.

This is especially true in this case, as much of the alleged misconduct occurred in the early 1970s—nearly 50 years ago now. *See* PA 1203 (citing to "Work Yourself to Death" ad from 1973); *id.* at PA 1207, 1231-37 (alleging fraud based on 1976 internal document). Indeed, the only supposed misleading advertisement the Circuit Court cites in its Order was a 3M advertisement from 1973, the year before the CCPA was enacted.

PA 13. The Circuit Court grossly exceeded its authority—and expanded the Attorney General's purview—by invoking the discovery rule to allow punitive litigation related to decades-old advertisements. *See Gabelli*, 568 U.S. at 452 (noting that a discovery rule for SEC civil penalty actions "[w]ould leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future. Repose would hinge on speculation about what the Government knew, when it knew it, and when it should have known it.")

Finally, the *Gabelli* Court noted that applying a discovery rule to the government was unworkable, because there was no statutory guidance as to *whose* knowledge was relevant or when the statute of limitations was triggered:

> Determining when the Government, as opposed to an individual, knew or reasonably should have known of a fraud presents particular challenges for the courts. Agencies often have hundreds of employees, dozens of offices, and several levels of leadership. In such a case, when does "the Government" know of a violation? Who is the relevant actor? Different agencies often have overlapping responsibilities; is the knowledge of one attributed to all?

Id. at 452. Tellingly, the State itself has raised a similar argument when objecting to 3M's discovery requests seeking knowledge of "the State" on certain issues: "Plaintiff objects to each request inquiring into the knowledge of the State of West Virginia, inasmuch as 'knowledge' is unique to each individual living being." PA 91, 110, 152.

Given the lack of any answers to these questions in the statute at issue, the *Gabelli* Court refused to impose a judicially crafted discovery rule. *Id.* at 453–54. The same reasoning confirms that the discovery rule does not apply here.[7]

[7] Even if the discovery rule could somehow be applied to claims under § 7-111(2)—and it cannot—it was no secret in West Virginia that some believed there were problems with the respirators at issue in this case. For example, private plaintiffs sued 3M in Kanawha County

E. Neither § 7-111(2) nor common law permits tolling based on fraudulent concealment.

The Circuit Court is the first known West Virginia court to invoke fraudulent concealment to toll § 7-111(2)'s repose period. The language of the statute, this Court's decision in *Dunn* and other cases, and sound policy make clear that fraudulent concealment does not apply.

A statutory provision must be interpreted in the context of the statutory scheme of which it is a part, and each provision must be given meaning. *Osborne v. United States*, 567 S.E.2d 677, 683 (W. Va. 2002) ("Ordinarily, when we construe a statute, we give effect to each word employed in a legislative enactment."); *W. Va. Human Rights Comm'n v. Garretson*, 486 S.E.2d 733, 738 (W. Va. 1996) ("A statute is interpreted on the plain meaning of its provision in the statutory context, informed when necessary by the policy that the statute was designed to serve."); *id.* ("A statute must be construed to give effect to all of its provisions, and not to diminish any of them."); *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 472 S.E.2d 411, 423 (W. Va. 1996) ("It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.") Thus, a statute, like the CCPA, that creates claims based on fraud and/or misrepresentation, but then caps those claims with a statute of repose, cannot be read to allow fraud to defeat the statute of repose. That is what the Circuit Court has done here.

Circuit Court as early as 1993, alleging that its 8710 respirator—the same product targeted in this case—was defective. PA 1313-56.

Section 7-111(2) allows the Attorney General to sue a person for "willfully violating this chapter," and it allows the Circuit Court to impose a penalty where it finds "the defendant has engaged in a course of repeated and willful violations of this chapter." Further, the statute specifically *anticipates* that defendants may have engaged in "a course of repeated and willful violations" of the CCPA, including "any deception, fraud, . . . or misrepresentation, or the concealment, suppression or omission of any material fact with the intent that others rely upon such concealment . . . in connection with the sale or advertisement of any goods." W. Va. Code § 46A-6-102(7)(M). Thus, § 7-111(2) presumes that defendants may have engaged in a course of repeated, willful misrepresentations, concealments, and/or omissions about material facts with respect to the goods they are selling. But the *very next* sentence of § 7-111(2) sets a strict time-limit on such claims: "No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought." The statute makes no exception for violations that involve concealment of facts, rather than affirmative, public misstatements.

The statute is clear: Whatever the violation, a Circuit Court may not impose penalties for "violations of this chapter occurring more than four years before the action is brought." § 46A-7-111(2). Where statutory language is clear, "the language must prevail and further inquiry is foreclosed." *Gallagher Bassett*, 829 S.E.2d at 296. The Circuit Court improperly assumed a legislative function by allowing tolling for a subset of cases that the Legislature did not set aside for potential tolling. Such a judicial "rewrite" defies this Court's longstanding precedent that forbids judicial revision in the guise of interpretation. *E.g., State v. Morgan*, 107 S.E.2d 353, 358 (W. Va. 1959) ("It is not the province of the courts to make or supervise legislation, and a statute may not, under the

guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten . . . .")

This Court previously has refused to rewrite § 7-111(2), even though the Attorney General argued that the statute's language would lead to an unfair result. *State ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799, 810-11 (W. Va. 1998) (agreeing with Attorney General that $5,000 penalty may not be an effective deterrent, but recognizing amount of penalty "is more appropriately a matter to be addressed by the Legislature.") So too here. If the State is dissatisfied with the CCPA's statute of repose, that is "a matter to be addressed by the Legislature," not the courts. *Id.*[8]

Yet, even if fraudulent concealment could be applied to toll a CCPA claim, the extreme remoteness of these claims precludes its application here. Fraudulent concealment is an equitable doctrine, meant to promote fairness between the parties. But there is nothing fair or equitable about letting the State wait decades to sue over ads for products that, by the time of suit, have been off the market for half a decade, all without proof of harm to consumers.

Just how old are the alleged violations? The State focuses on alleged misrepresentations that appeared in advertisements in the 1970s and 1980s. PA 1146-47, 1159, 1406-08, 1415-17. The Circuit Court cites a single advertisement that ran in 1973—the year before the CCPA was enacted and 30 years before this suit was filed. *See* PA 14, 1406-08, 1415-17 ("You Don't Have to Work Yourself to Death"). Again, the

---

8 The Circuit Court never acknowledges that fraudulent concealment requires a duty to disclose. *E.g.*, *Dunn*, 689 S.E.2d at 264 (citing *Trafalgar House Const., Inc. v. ZMM, Inc.*, 567 S.E.2d 294, 300 (W. Va. 2002)). No West Virginia law imposes on product manufacturers a duty to spontaneously disclose—not to their customers, but to the State—their own alleged misrepresentations about products they quit selling years ago. Absent such a duty, the State cannot invoke fraudulent concealment.

subject respirators were on the market between 1972 and 1998. PA 1073-74. It was therefore impossible for the Manufacturers to conceal or misstate any facts "in connection with the sale or advertisement of any goods" after 1998, more than five years before this suit was filed.

This Court has long enforced the maxim "equity follows the law." *E.g., Price v. Price*, 7 S.E.2d 510, 511 (W. Va. 1940) ("[W]henever the rights of parties are clearly defined and established by law 'equity follows the law' . . . ."); *Arnold v. Board of Educ.*, 156 S.E. 835 (W. Va. 1931). As Justice Scalia observed, "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 327-28 (2015) (internal quotation marks omitted). The Circuit Court's order opening the door for these decades-old time-barred claims does not follow the law, it rewrites it.

The four-year statutory limit in § 7-111(2) is part of a dense and detailed statutory scheme, in which the Legislature laid out the rights and liabilities of consumers, the attorney general, and entities doing business in West Virginia. Where the Legislature—with full knowledge that some alleged violations will involve concealment of facts—has set a four-year cutoff, with no textual reference to potential tolling, courts should be reluctant to substitute their judgment simply because they believe a longer period would be "fair." If the Legislature wanted a different result, it could have written the statute differently.

II. Retroactive Application of Penalty Enhancement: The Circuit Court exceeded its legitimate powers by retroactively applying the 1999 amendment to CCPA's penalty provision to increase the penalties applicable to alleged violations that occurred before 1999.

In addition to allowing decades-old time-barred claims, the Circuit Court retroactively applied the 1999 penalty provisions of § 7-111(2) to increase Defendants' exposure. Applying new, higher penalties to old violations is unlawful, unconstitutional, and clearly exceeds the Circuit Court's legitimate powers.

Before 1999, § 7-111(2) permitted a trial court to impose only a *single penalty* of up to $5,000 for an *entire course* of willful violations of the CCPA. W. Va. Code § 46A-7-111(2) (1974). This Court confirmed the $5,000 penalty cap in its 1998 decision in *Imperial Marketing*: "Those findings . . . were certainly sufficient for the circuit court to have based its determination upon that [defendant] engaged in a course of repeated and willful violations pursuant to [§ 7-111(2)]. However, the statute, upon such findings, provides for a civil penalty of no more than $5,000." 506 S.E.2d at 810. This Court then suggested that the Legislature should raise the $5,000 limit:

> The Attorney General argues persuasively that a maximum penalty of $5,000 in an action such as this one serves as very little deterrent to repeated violations of the [CCPA]. While this Court must agree with that contention, we recognize that the amount of the civil penalty under W. Va. Code § 46A-7-111(2) (1974) is more appropriately a matter to be addressed by the Legislature.

Id. at 810-11. *Imperial Marketing* was decided on June 25, 1998, making it the law when the last purported violation could have occurred, in about July 1998.

The Legislature answered *Imperial Marketing*'s suggestion the following year by changing the language of § 7-111(2) to permit the Circuit Court to "assess a civil penalty of no more than five thousand dollars *for each violation of this chapter*." (Emphasis added to new language). The amendment was enacted on March 12, 1999 and, by its

own terms, became effective 90 days thereafter on June 10, 1999. *Id.* But, the parties agree that the products that are the subject of this lawsuit were no longer sold for use in West Virginia after July 1998. PA 1073, 1218. The Second Amended Complaint confirms that the alleged violations "were committed by these defendants *in the advertising and sale of their respiratory protection equipment in the State of West Virginia.*" PA 1142. (emphasis added). As a result, any alleged violations relating to the sale of those products occurred in or before July 1998. The Circuit Court provides no authority for ignoring the amendment's effective date and employing the new penalty provision as a multiplier to transform a maximum penalty of $5,000 into hundreds of millions of dollars in potential penalties.

Applying § 7-111(2) in this fashion violates West Virginia statutes and case law prohibiting the retroactive application of substantive statutes. The Legislature instructs that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." W. Va. Code § 2-2-10(bb). So does this Court: "The presumption is a statute is intended to operate prospectively, and not retrospectively, unless it appears, by *clear, strong and imperative words* or by *necessary implication*, that the Legislature intended to give the statute retroactive force and effect." *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807, 819 (W. Va. 2002) (citation omitted)); *accord* Syl. Pt. 1, *Loveless v. State Workmen's Comp. Comm'r*, 184 S.E.2d 127 (W. Va. 1971) ("Statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive."); *accord Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.")

Nothing in the 1999 version of § 7-111(2) even hints that it should be applied retroactively; it certainly does not provide for retroactive application by "clear, strong and imperative words or by necessary implication." *Findley*, 576 S.E.2d at 819. The statutory and common-law presumption against retroactive application therefore applies.

This Court has recognized a single exception to this presumption: purely procedural statutory changes may be applied retroactively. *Id.* Yet, statutory changes that alter parties' *substantive* rights and liabilities—like the 1999 Amendment—fall outside this exception:

> A statute that diminishes substantive rights or *augments substantive liabilities* should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application.

Syl. Pt. 2, *Public Citizen, Inc. v. First Nat. Bank*, 480 S.E.2d 538 (W. Va. 1996) (emphasis added); *accord Findley*, 576 S.E.2d at 820.

The 1999 Amendment did nothing but "augment[] substantive liabilities" of individuals found to have "engaged in a course of repeated and willful violations" of the CCPA. Before the amendment, those defendants were subject to a maximum penalty of $5,000 for the entire course of conduct. *Imperial Marketing*, 506 S.E.2d at 810-11. After the amendment, a defendant could be penalized up to $5,000 "for each violation of [the CCPA]." § 7-111(2). In a case like this, where the State contends that each sale of a respirator for use in West Virginia coal mines was a separate violation worth up to $5,000, the increase in potential substantive liabilities of the defendants is enormous.

The exponential expansion of liabilities that would apply here illustrates why the 1999 Amendment cannot be applied retroactively. Between the 1970s and 1999, product

manufacturers could reasonably expect that any enforcement action under the CCPA would result in at most a $5,000 fine. Even after the 1999 amendment, manufacturers could reasonably expect that claims related to conduct between 1995 and 1999 would be subject to the single $5,000 penalty—and that older claims would fall under the statute of repose. Businesses and their insurers relied on these ground rules because the Legislature told them that was the law. But now, some 20 years later, a trial court has determined that the statute of repose and then-applicable CCPA penalty provision are unfair and has lifted their restrictions on decades-old claims that now may result in untold millions in penalties.

Such disruptive and punitive application of a later-enacted penalty to decades-old claims would violate both state and federal due process clauses. *E.g.*, *Wampler Foods, Inc. v. Workers' Comp. Div.*, 602 S.E.2d 805, 820-21 (W. Va. 2004) (state and federal Due Process Clauses prohibit retroactive application of substantive changes to statutes); *State ex rel. Blankenship v. Richardson*, 474 S.E.2d 906, 919 (W. Va. 1996) (same); *Eastern Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring) ("[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.") The penalty multiplier applied by the trial court lacks all semblance of the "fundamental fairness" that due process requires. *E.g.*, *State ex rel. Peck v. Goshorn*, 249 S.E.2d 765, 766 (W. Va. 1975) ("Due process of law is synonymous with fundamental fairness.")

The Circuit Court has exceeded its legitimate powers and committed clear error by applying the 1999 version of § 7-111(2) to this case, where all alleged violations occurred no later than 1998. In addition, the retroactive increase of maximum penalties is not fully "correctable on appeal." The massive penalties are a grave threat to

Manufacturers. A legally impermissible exposure of this magnitude should not be permitted to hang over Manufacturers' heads throughout these proceedings. The Court should correct this error now.

III. Discovery Moratorium: The Circuit Court exceeded its legitimate powers and violated due process by prohibiting Manufacturers from developing product-usage and degree-of-harm proof, which would be relevant to any penalty determination.

After permitting retroactive application of huge penalties to decades-old potential violations, the Circuit Court then severely narrowed the scope of evidence that Defendants could develop and present in defending against those penalties. The Circuit Court committed clear legal error in ruling that § 7-111(2) "does not provide for any inquiry into any issue other than whether or not the Defendants engaged in conduct that was determined to be in violation of that statute. . . ." PA 20. This is error on its face: § 7-111(2) requires the Circuit Court to find not only *whether* violations occurred, but also the *amount* of the applicable penalty. There is no constraint on the Circuit Court to consider only the evidence it considered to determine that a CCPA violation occurred when setting the amount of a civil penalty.

Furthermore, the allegations of the Second Amended Complaint make clear that the State is seeking higher civil penalties precisely because, it says, Defendants' misstatements *actually did* injure West Virginia coal miners and the State itself. Fundamental fairness requires, at a minimum, that Defendants have the opportunity to conduct discovery and present trial evidence to rebut those allegations.

A. Section 7-111(2) requires findings, and thus permits evidence, concerning the *amount* of penalty sought by the State.

In actions under § 7-111(2), the Circuit Court is the fact finder, and it must determine both (1) whether "the defendant has engaged in a course of repeated and

willful violations" and (2) the amount of penalty that applies to those violations. These are different findings; facts that may support one may not be sufficient to support the other. *See State ex rel. McGraw v. Imperial Mktg.*, 506 S.E.2d 799 (W. Va. 1998).

In *Imperial Marketing*, the Circuit Court made findings sufficient to support its conclusion that the defendant had engaged in a course of repeated and willful violations. *Id.* at 810 ("Those findings and conclusions were certainly sufficient for the circuit court to have based its determination upon that [defendant] engaged in a course of repeated and willful violations . . . .") But the Circuit Court also awarded a civil penalty of $500,000 without making specific findings to support that award. *Id.* This Court overruled that penalty award: "[T]he absence of any reasoning with respect to how the Court arrived at the $500,000 amount necessarily renders that amount arbitrary." *Id.*

Imperial Marketing highlights the differences between findings that violations occurred and findings setting the amount of resulting penalties. Section 7-111(2) grants the Circuit Court discretion to set the level of penalty, up to $5,000. But as *Imperial Marketing* makes clear, it must base its discretionary findings on facts that can be reviewed on appeal.

Implicit in this statutory scheme (and the fact that a *range* of penalties is available) is the obvious idea that some violations—and some offenders—are worse than others, and that if the Circuit Court chooses to award a maximum penalty for a violation, it must support that decision with reviewable findings of fact. Nothing in the statute prohibits Defendants from seeking a lower penalty by arguing that little or no harm resulted from the purported violations because few of their respirators were used or that few miners saw or relied on their statements. The miner-specific and operator-specific discovery the Manufacturers seek is aimed at developing such evidence.

B. Due process entitles Manufacturers to present a defense, including rebutting express allegations in the Second Amended Complaint.

The Court's preemptive bars on the Manufacturers' discovery and trial evidence violate their due process rights under both the United States and West Virginia Constitutions. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 66 (1972); *see also In re Charleston Gazette FOIA Request,* 671 S.E.2d 776, 777 (W. Va. 2008) ("The idea that due process of law prohibits all courts from denying a defendant the right to present a defense to a cause of action is something firmly rooted in our jurisprudence."); Syl. Pt. 2, *Clay v. Huntington,* 403 S.E.2d 725 (W. Va. 1991) (from "procedural due process ... flows the principle that the State cannot preclude the right to litigate an issue central to a statutory violation or deprivation of a property interest"); *see also* U.S. Const. amend. XIV, § 1; W. Va. Const. art. III, § 10. At a minimum, the Manufacturers must have an opportunity to uncover evidence rebutting core allegations in the State's Complaint.

In the introduction to the Complaint, which the CCPA count incorporates by reference, the Attorney General alleges:

> Many of these workers, including but not limited to coal miners, to whom the State has paid Workers' Compensation benefits based on [occupational pneumoconiosis] acquired as a result of such workers' employment within the State of West Virginia, used one or more of the respirators/dust masks manufactured, marketed, promoted, distributed and sold by the Defendants . . . .

PA 1141-42. Certainly, Defendants are entitled to discovery aimed at rebutting the allegations that specific coal miners to whom the State paid benefits actually used defendants' respirators and actually were injured as a result. Likewise, in the "Factual Background" section of the Second Amended Complaint, the State alleges:

> Tens of thousands of West Virginia workers have developed a progressive, irreversible lung disease known as occupational pneumoconiosis . . . caused by breathing coal, rock, sand or other dust *after being provided and/or using the respirators/dust masks manufactured, marketed, promoted, distributed and sold by the Respiratory Protection Defendants* . . . .

PA 1145. (emphasis added). Again, defendants are entitled to conduct discovery and present trial evidence to rebut this breathtakingly broad allegation—an allegation at odds with the State's own prior research and regulations.

In Count 1 itself, the State lists certain advertisements that it alleges "were likely to *and did deceive and /or confuse West Virginia citizens, employers and their employees into utilizing the Defendants' respiratory protection devices.*" PA 1146-47 (emphasis added). The State further alleges that the Manufacturers knew "that the poor, negligent and defective design of the respirator/dust masks encouraged non-use *and that such non-use caused or contributed to causing OP.*" PA 1147. How can anyone prove or rebut the idea that poor design, and not some other factor, caused workers not to use respirators *without* developing evidence of what motivated actual workers to decide whether to use respirators?

Likewise, the State alleges not only that West Virginians accepted the defendants' enumerated "misrepresentations regarding the uses, safety and efficacy" of their products, but that the defendants "knew of the acceptance." PA 1147. Thus, whether or not the State *must* prove that West Virginia employers and coal miners were deceived by the Manufacturers' advertisements, it has alleged that they were and that the Manufacturers knew this. The State then alleges that, even though the Manufacturers knew their representations had been accepted by West Virginians, they nevertheless "remained silent" because they valued future profits over worker safety. PA 1147.

Certainly, the Manufacturers are entitled to develop information aimed at rebutting these inflammatory allegations.

Finally, and most obviously, the State alleges that these same misrepresentations *actually damaged* the State: "As a proximate result of the acts of unfair and deceptive business practices set forth above, the State has paid excessive amounts of [workers' compensation] benefits and healthcare costs related to occupational pneumoconiosis." PA 1147. If, as the State and Circuit Court claim, proof of actual damages is not relevant to establishing the occurrence of a violation, allegations like these must be included in Count 1 solely to increase the amount of potential civil penalties.

The State has loaded the Second Amended Complaint with inflammatory accusations intended to increase penalties awarded against the Manufacturers. Defendants must be permitted to conduct discovery aimed at rebutting *those same allegations*; the Circuit Court has barred not only such discovery, but also the presentation of rebuttal evidence at trial.

Without citing Rule 26, the Circuit Court ruled that, in defending against Count 1, the defendants cannot seek "individual worker or employer specific discovery." PA 6. But the scope of discovery permitted by Rule 26(b) is broad:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In support of Count 1, the State has alleged that West Virginia coal operators and coal miners were actually deceived by the defendants' representations and that those same miners used the defendants' products, developed CWP, and were paid workers'

compensation benefits. The State has even alleged that the respirators' poor design caused miners not to use them; how can this be proven without asking the miners? Rebutting those allegations is central to the Manufacturers' defense of the CCPA claims, both whether there were any violations and, if there were, how they should be penalized. Discovery requests aimed at developing that rebuttal information—including obtaining relevant workers' compensation files—fall squarely within the broad scope of Rule 26(b). *State ex rel. W. Va. State Police v. Taylor*, 490 S.E.2d 283, 294 n.16 ("We have traditionally given the [Civil Procedure] Rules a liberal construction favoring broad discovery, because broad discovery policies are essential to the fair disposition of both civil and criminal lawsuits.") (internal quotations omitted).

Given the extraordinary allegations in Count 1, Defendants' discovery requests are well within the scope of Rule 26(b). For example, 3M's Interrogatory 1 asks the State to "[i]dentify each Coal Miner whom you allege was diagnosed with coal workers' pneumoconiosis and/or silicosis as a result of wearing a 3M respirator." PA 136. Other interrogatories ask for the circumstances of those workers' respirator usage, their employment history, and what benefits they were paid. PA 136-37. This information is critical to rebutting the allegations discussed above.

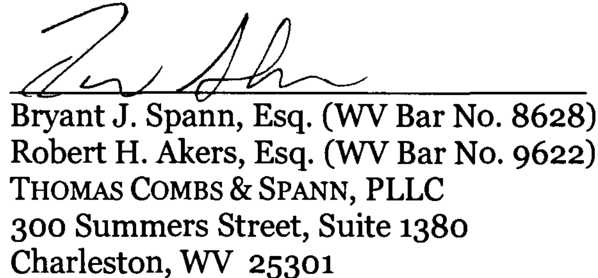
In addition to being a clear error of law, the Circuit Court's decision to bar defendants from discovering relevant evidence and from presenting it at trial will damage the Defendants "in a way that is not correctable on appeal." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996). If Defendants are prevented from even learning what is in the State's files, they cannot develop relevant evidence at all, much less present it in a trial court record that could be reviewed on appeal. Defendants

therefore have "no other adequate means, such as a direct appeal, to obtain the desired relief." *Id.*

CONCLUSION

The Circuit Court clearly and repeatedly exceeded its legitimate powers. The Manufacturers therefore request the Supreme Court of Appeals to issue a Writ of Prohibition to remedy the multiple legal errors referenced above.

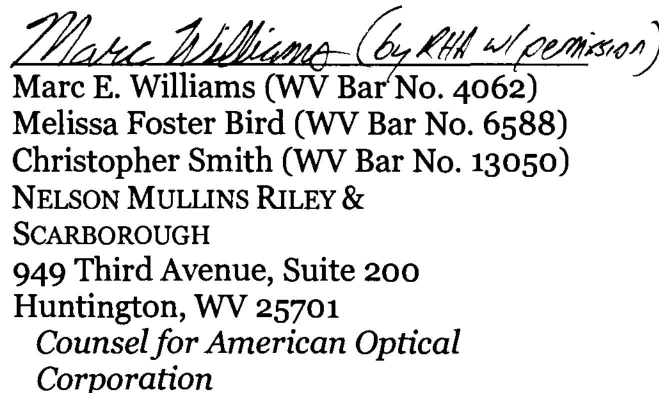
Respectfully submitted,



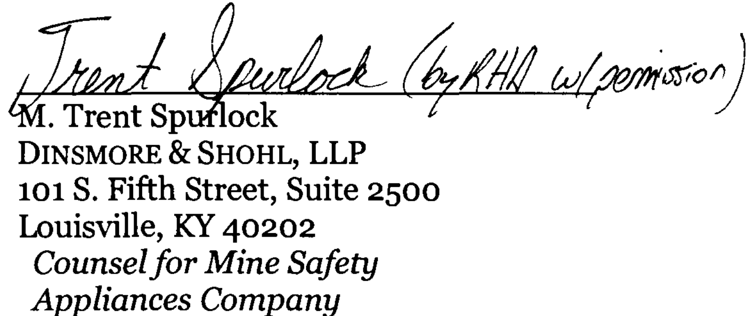
Bryant J. Spann, Esq. (WV Bar No. 8628)
Robert H. Akers, Esq. (WV Bar No. 9622)
THOMAS COMBS & SPANN, PLLC
300 Summers Street, Suite 1380
Charleston, WV 25301

-and -

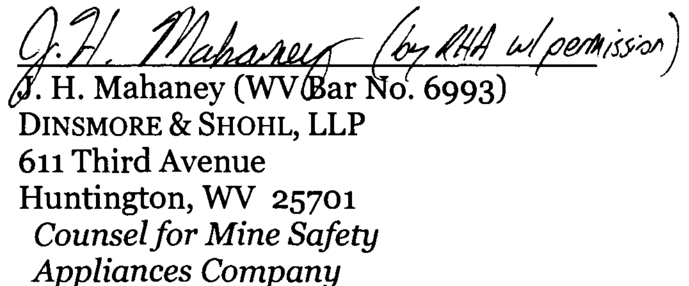
Andrew J. Detherage
BARNES & THORNBURG LLP
225 South Sixth Street, Suite 2800
Minneapolis, MN 55402-4662
Counsel for Petitioner 3M Company



Marc E. Williams (WV Bar No. 4062)
Melissa Foster Bird (WV Bar No. 6588)
Christopher Smith (WV Bar No. 13050)
NELSON MULLINS RILEY & SCARBOROUGH
949 Third Avenue, Suite 200
Huntington, WV 25701
Counsel for American Optical Corporation



M. Trent Spurlock
DINSMORE & SHOHL, LLP
101 S. Fifth Street, Suite 2500
Louisville, KY 40202
Counsel for Mine Safety Appliances Company



J. H. Mahaney (WV Bar No. 6993)
DINSMORE & SHOHL, LLP
611 Third Avenue
Huntington, WV 25701
Counsel for Mine Safety Appliances Company