BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-123

RONALD HARDY, RALPH MANUEL, EDGEL DUDLESON, RICKY MILLER, JAMES CRUEY, MARK SCOTT, and **GARY SCOTT,**

Petitioners, Plaintiffs Below,

v.

3M COMPANY; MINE SAFETY APPLIANCES COMPANY, LLC (MSA); AO-C-A (AMERICAN OPTICAL CORPORATION-CABOT CSC CORPORATION-CABOT CORPORATION); EASTERN STATES MINE SUPPLY COMPANY; and **RALEIGH MINE AND INDUSTRIAL SUPPLY,**

Respondents, Defendants Below.

Appeal from the Circuit Court of McDowell County, West Virginia

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PETITIONERS' JOINT APPEAL BRIEF

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3M COMPANY, MINE SAFETY APPLIANCES COMPANY, LLC, AMERICAN OPTICAL CORPORATION, CABOT CSC CORPORATION, CABOT CORPORATION, EASTERN STATES MINE AND INDUSTRIAL SUPPLY, AND RALEIGH MINE AND INDUSTRIAL SUPPLY,

Respondents, Defendants below.

JOINT APPEAL FROM THE CIRCUIT COURT OF MCDOWELL COUNTY

PETITIONERS' JOINT APPEAL BRIEF

WHILE RESPONDENT MANUFACTURERS OF RESPIRATORS REPRESENTED THE FOLLOWING TO THE PUBLIC:

"You don't have to work yourself to death. Black lung, Stonecutter's disease, Asbestosis, Grinder's rot. All of them caused by dust particles in the air. And all of them can kill a man. That's why workers should wear 3M Brand Respirator 8710. The 8710 stops pneumoconiosis and fibrosis producing dusts from ever reaching the lungs. In fact, it's so effective it has received Bureau of Mines approval." (Emphasis added). Respondent 3M advertisement. (JA 5438).

"Take a breather! The new AO R2090N Dust/Mist Respirator...it's NIOSH-Certified. The new AO R2090N Dust/Mist Respirator combines lightweight wearing comfort with dependable protection in atmospheres containing hazardous dusts and mists, including lead, and other pneumoconiosis-producing dusts." (Emphasis added). Respondent AO advertisement. (JA 7358).

THESE SAME RESPONDENTS HID FROM THE PUBLIC THE FACT THEY KNEW THEIR RESPIRATORS WERE NOT FIT FOR USE IN COAL MINES:

On December 20, 1976, 3M acknowledged that the 8710 was unacceptable for use in a coal mining environment. 3M further recognized that strap breakage and "collapse due to buildup of moisture in the filter media" were potential major problem areas. 3M stated that it needed an improved product. Respondent 3M document. (Emphasis added). Respondent 3M document. (JA 5329).

[W]e now know that the 8710 is unacceptable in the underground mining area due to collapse and abuse from high heat and humidity") (Emphasis added). Respondent 3M document. (JA 5391).

Finally, in 1994, an MSA Inter-Office Memorandum White Paper written by then Product Line Manager, Bill Lambert, who later became CEO, MSA stated: "And what's unconscionable is that the user, who is depending on this electrostatic filter for respiratory protection, has no "indicator" that the electrostatic filter is losing its efficiency - there is no "breakthrough" or "warning properties" -that the user can detect, taste or smell; only his uncontrollable, unwitting, unwanted exposure to the hazard. This issue is not just a "hot DOP vs. cold DOP" argument, this is a worker safety issue that must be addressed." (Emphasis added). Respondent MSA document. (JA 7752).

I. Introduction

To the Honorable Judges of the

Intermediate Court of Appeals of West Virginia:

This joint appeal involves the same respirator manufacturers involved in *State ex rel. 3M Co. v. Hoke*, 244 W.Va. 299, 304, 852 S.E.2d 799, 804 (2020), where the West Virginia Supreme Court gave the following summary of the facts:

> The central allegation in the Attorney General's case is that each of the **defendants designed, manufactured, and then delivered respirators and dust masks in West Virginia that did not do what they were supposed to do: protect workers from dust-related illnesses.** The Attorney General asserts that each defendant knew its products did not work as advertised. Despite that knowledge, each defendant engaged in a scheme to hide, from both employers and workers, the limitations and defects of their own products as well as those they discovered in the products of the other defendants and competitors. (Emphasis added).

These respirator manufacturers sought a writ of prohibition asserting that the statute of limitations barred the consumer credit claims asserted by the Attorney General. In *Hoke*, the West Virginia Supreme Court unanimously rejected these arguments concluding that whether or not the claims are barred by the statute of limitations is a fact issue.

In the present case and despite the holding in *Hoke*, once again these same respirator manufacturers along with two distributors argue the products liability claims filed against them by seven coal miners are barred by the statute of limitations. Beginning in the early 1970's, coal miners began wearing government-approved respirators advertised as being designed to protect them from developing various latent respiratory diseases caused by the inhalation of fine particles of coal, sand, and rock.

Respondents 3M Company (Respondent 3M), Mine Safety Appliances Company, LLC (Respondent MSA), American Optical Corporation, Cabot CSC Corporation, and Cabot Corporation (referred to collectively as Respondent AO) were manufacturers of respirators.

Respondent Eastern States Mine and Industrial Supply (Respondent Eastern States) and Raleigh Mine and Industrial Supply (Respondent Raleigh Mine) distributed these respirators.

The coal miners who wore these respirators and the coal companies that purchased these devices had no way of knowing these Respondents had internal studies and memos admitting that these respirators were not suitable for the coal mine environment.[1] Despite this knowledge, Respondents continued to market and sell these respirators knowing they were defective. Through time, many coal miners in West Virginia, Kentucky, and other states developed a variety of latent diseases caused by the inhalation of coal dust and some of these miners began filing products liability complaints against these Respondents. Through the extensive discovery produced in these other cases, the truth about the unsuitability of these respirators and the hidden health hazards they posed to people using them was uncovered and has prompted the filing of many other products liability claims against these Respondents.[2]

Petitioners Ronald Hardy, Ralph Manuel, Edgel Dudleson, Ricky Miller, Mark Scott and Gary Scott are coal miners who were diagnosed as suffering from pulmonary massive fibrosis ("PMF"), sometimes referred to as complicated pneumoconiosis or complicated black lung. PMF is a purely latent disease that can develop over time due to exposure to coal, rock, and sand dust,

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[1] Generally speaking, the respirators at issue are Respondent 3M's 8710, Respondent MSA's Dustfoe 66, and Respondent AO's R2090N. These respirators may no longer be sold because none of them could pass the new standard set by NIOSH. 42 CFR §84.

[2] While some of the discovery produced in multiple Kentucky cases as well as in the ongoing litigation addressed by the West Virginia Supreme Court in *Hoke* was labeled as confidential and subject to protective orders, in the **JOINT APPENDIX**, samples of the nonconfidential documents, memos, and depositions produced by Respondents in these other cases are included. The **JOINT APPENDIX** does include some documents filed under seal either due to the medical information revealed or because the document is subject to a Kentucky protective order.

including many years after the exposure has ceased, and is not caused by any traumatic event. In August and September, 2021, within two years from the date each of these six Petitioners was diagnosed as or understood that he was or learned that he was suffering from PMF, they timely filed in the Circuit Court of McDowell County separate products liability actions against Respondents, who manufactured or distributed the defective respirators Petitioners wore in the coal mines. Petitioner James Cruey has not been diagnosed with PMF, but Petitioner Cruey was awarded federal black lung benefits because he was determined to suffer from a totally-disabling pulmonary or respiratory impairment arising from his coal mine dust exposure. Within two years from this diagnosis, Petitioner Cruey timely filed his products liability complaint against Respondents in the Circuit Court of McDowell County.[3]

Petitioners' cases were treated jointly for purposes of discovery and summary judgment. (JA 49). Respondents filed separate motions for summary judgment in all seven cases, asserting that Petitioners' claims were barred by the statute of limitations. The issues were fully briefed and a hearing was held. From the facts raised in the briefs, there are several different occurrences that a properly instructed jury would need to consider in resolving whether or not each Petitioner filed his complaint within the statute of limitations. The West Virginia Supreme Court repeatedly has emphasized that whether a complaint was filed within the statute of limitations is a fact issue to be resolved by the jury. "In the great majority of cases, the issue of whether a claim is barred by the

[3] The main difference in the legal analysis applicable to these different Petitioners is that the six Petitioners with PMF assert their complaints were timely filed within two years after their PMF diagnoses, and, alternatively, seek to toll the statute of limitations through the application of the discovery rule, fraudulent concealment doctrine, and latent disease sufficiently pronounced rule. Petitioner Cruey, who has not developed a second latent disease, relies upon the first three theories.

statute of limitations **is a question of fact for the jury**." (Emphasis added). *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997).

Respondents, who freely acknowledged in their internal documents that their respirators were not suitable for use in coal mines, argued below, without publicly "admitting to any defects, that it was **common knowledge** more than two years before any Plaintiff filed suit in these cases that **there might be a problem with the masks and respirators** and that **there might be a connection between the alleged defects in the masks and respirators and the development of lung diseases from inhalation of coal, rock, and sand dust.**" (Emphasis added). (JA 26).

The Honorable Judge Edward J. Kornish issued a final order on September 7, 2022, ignoring the evidence that Petitioners had timely filed their complaints and taking all inferences in the Movants' favor and instead usurping the role of the jury by holding as a matter of law that the statute of limitations barred these claims. Consequently, the trial court granted summary judgment and all seven cases were dismissed. (JA 1). "This Court encourages Plaintiffs to appeal this *Order* and give the Supreme Court of Appeals of West Virginia an opportunity to review this ruling and give greater clarity to the law for these Plaintiffs, Defendants, and future litigants." (JA 3). Petitioners timely appealed this final order and thereafter this Court entered an order permitting Petitioners to file one joint appeal challenging this final ruling. (JA 47).

Petitioners respectfully submit the trial court erred in granting summary judgment in these seven cases and ask this Court to reverse this final order and remand these cases so that juries can decide all of the issues raised, including whether Petitioners filed their claims within the statute of limitations.

II. Assignments of error

A.

Whether the trial court erred in granting summary judgment by concluding that Petitioners, who are coal miners diagnosed with latent pulmonary disease, either knew or should have known that the respirators they wore while working in the coal mines caused each relevant pulmonary injury where:

1. The West Virginia Supreme Court repeatedly has held that when the statute of limitations begins to run is a question of fact;

2. The discovery rule tolls the statute of limitations to the date when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action and is a question of fact; and

3. Fraudulent concealment tolls the statute of limitations where the fraud has prevented the plaintiff from knowing of his or her cause of action to the date when the plaintiff learns of the fraudulently concealed facts and is a question of fact?

B.

Whether the trial court erred in rejecting the pure latent disease rule applicable in toxic tort cases, where the plaintiff may develop an initial latent exposure-related disease, but later develops a second latent exposure-related disease, which gives rise to a new claim that is not time barred by the initial disease?

III. Statement of the case

A. Pneumoconiosis-related latent diseases

Before discussing the facts relevant to each Petitioner, some background information regarding the latent diseases suffered by Petitioners and an overview of the state and federal administrative procedures available to coal miners to pursue possible black lung benefits is

pertinent to the Court's analysis. Pneumoconiosis is a latent disease that can develop years after a coal miner has retired and which may or may not progress to an advanced, totally disabling state often known as complicated pneumoconiosis or PMF. Simply because a coal miner develops a minor pulmonary impairment does not mean the miner will develop PMF. The trial court exhibited a fundamental misunderstanding of these latent pulmonary diseases by asserting that treating PMF as a distinct disease is like saying "that a woman's not pregnant until she delivers the baby nine months later." (JA 808). Pregnancy is a woefully inappropriate analogy to the latent diseases at issue in these cases.

Unlike a pregnancy, there is nothing inevitable or linear about the progression of pneumoconiosis from simple to advanced, which are two medically distinct diseases. First, there is simple pneumoconiosis, and second, there is the advanced disease known as complicated pneumoconiosis or PMF.[4]

PMF is generally defined as a chronic dust disease of the lung which, when diagnosed by chest X-ray yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C in accordance with the classification system established in Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses.

"This leads us to the Supreme Court's description of the two types of pneumoconiosis, which, of course, we follow: `pneumoconiosis...is generally regarded by physicians as seldom productive of significant respiratory impairment" whereas "[c]omplicated pneumoconiosis is generally far more serious, involves progressive massive fibrosis [and] usually produces

[4]Petitioners' expert pulmonologist Dr. Leonard Go, M.D., explained in Petitioner Hardy's report: "Coal mine dust lung disease is a spectrum of lung disease that includes not only coal workers' pneumoconiosis, mixed-dust pneumoconiosis, and silicosis, but also obstructive lung disease such as chronic obstructive pulmonary disease, as well as pulmonary fibrosis known as dust-related diffuse fibrosis." (JA 580).

significant pulmonary impairment and marked respiratory disability, [which] may induce death by cardiac failure, and may contribute to other causes of death.' *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1972) (citing Surgeon General's report)." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 361 (4th Cir. 2006).

In the state system, a coal miner may be awarded black lung benefits based upon the miner's demonstrated degree of functional impairment, *i.e.*, how much air can the miner exhale in one second relative to the amount predicted for a person of the miner's age and height, or how much CO2 the miner can exhale for every unit of oxygen that the miner inhales. Presently, black lung benefits are awarded for 10%, 15%, and on up incrementally to totally-disabling impairment. In the federal system, there are two ways to qualify for black lung benefits. First, a coal miner can qualify by demonstrating totally-disabling pulmonary impairment (there is no 10% or partial impairment option). Second, a coal miner can qualify by proving that the miner has PMF. Of course, merely because a coal miner has applied either for State or federal black lung benefits does not mean the miner has black lung.

Finally, the diagnosis of any level of pneumoconiosis is a complex medical determination where often there are disagreements between the various health care providers who analyze the relevant records. This fact pattern is repeated in virtually all of the administrative claims filed by Petitioners. For example, Dr. Go explained in his report issued after reviewing the medical records of Petitioner Crucy that at the time of the report, Petitioner Cruey presently suffers from advanced, totally-disabling pneumoconiosis. However, Dr. Go noted that before Petitioner Cruey was awarded federal black lung benefits in September 2020, the most recent x-rays reviewed were found to be totally negative for pneumoconiosis by no less than all four of the experts who reviewed them. (JA 595).

In this administrative system, the coal miner seeking benefits has to rely on the experts who review the medical records. The mere fact that a coal miner files a claim seeking black lung benefits is no evidence that the coal miner actually has some PMF or any specific latent pulmonary disease or that the experts who review the medical records will uphold the claim. Ultimately, a coal miner cannot know that he or she has a particular latent disease related to exposure to coal dust unless and until the disease is confirmed by the experts and that opinion is communicated to the miner.

B. Standard of review

Whether or not the statute of limitations has expired is a fact intensive analysis. The challenge in this joint appeal involving seven separate Petitioners is to make sure the facts relevant to each Petitioner are considered. Before separately addressing Petitioners' individual facts, the following legal principles, which will be discussed in more detail in Part VI of this **BRIEF**, govern this factual analysis.

First, all facts and reasonable inferences must be reviewed in the light most favorable to Petitioners.[5] Furthermore, at the summary judgment stage, the court's role is not to weigh the evidence or discern the truth, but rather is to determine whether there are genuine issues of material fact.[6] Although the final order references these standards, the trial court failed to apply them correctly and resolved disputed material facts, weighed the evidence, and foreclosed a jury from resolving the statute of limitations issue based upon all of the evidence presented.

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[5] *Bowden v. Monroe County Commission*, 239 W.Va. 214, 218, 800 S.E.2d 252, 256 (2017).

[6] Syllabus Point 3 of *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994); *see also Goodwin v. Shaffer*, 246 W.Va. 354, 873 S.E.2d 885 (2022)(Summary judgment reversed where trial court weighed the evidence and addressed credibility of some witnesses).

Second, the West Virginia Supreme Court repeatedly has held that whether or not a claim is barred by the statute of limitations is a jury issue.[7] The reversible error committed by the trial court in these seven cases was focusing on certain occurrences that a jury could consider in concluding that the statute of limitations did bar the claims, while ignoring the facts that a jury could rely upon in deciding all of the claims had been timely filed.

Third, in applying the discovery rule to toll the statute of limitations, the jury has to determine whether the plaintiff who sustained some injury knew or by the exercise of reasonable diligence should have known of the elements of a possible cause action, the identity of the defendant who owed a duty to plaintiff and breached that duty, and that the defendant's conduct caused the injury.[8] As applied in products liability litigation, the jury has to determine whether the defective product had a causal relation to the plaintiff's injury.[9] The reasonableness of a party's actions and questions of causation always have been left to a jury to decide.[10]

Fourth, where a defendant fraudulently conceals facts that prevent a plaintiff from discovering or pursuing a cause of action, such fraudulent concealment can be considered by a jury in deciding the claim was filed within the statute of limitations.[11] This equitable rule prevents

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[7] Syllabus Point 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009)("Only the first step is purely a question of law; **the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact."**). (Emphasis added).

[8] Syllabus Point 4, *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997).

[9] Syllabus Point 1, *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810 (1987).

[10] Syllabus Point 5 of *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964).

[11] Syllabus Point 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009); Syllabus Point 6, *Hoke*.

a defendant from having a lawsuit barred by the statute of limitations where the defendant fraudulently concealed critical facts relevant to the plaintiff's cause of action.

Although the foregoing standard of review and legal principles were cited in the final order, the trial court omitted facts and inferences in the light most favorable to Petitioners and failed to apply the foregoing legal principles consistent with decisions by the West Virginia Supreme Court. The trial court also failed to note the conflicting medical information developed in Petitioners' cases where often the medical experts not only disagreed about the proper diagnosis, but sometimes concluded there was no pulmonary disease present. In the summaries below, critical facts omitted by the trial court, but which should be considered by a jury in deciding the timeliness of Petitioners' complaints, are in bold.

C. Petitioner Ronald Hardy

Petitioner Ronald Hardy worked as a coal miner for at least 32 years during the period from 1976 through 1999. (JA 242, 251-52). **He wore respirators manufactured by Respondent 3M, but did not wear those respirators 100% of the time that he worked around coal mine dust. He wore Respondent 3M respirators most generally about 30-40% of the time that he worked at various mining operations, typically during the periods of greatest risk of dust exposure.** (JA 243-48, 250).

Petitioner Hardy received conflicting medical reports regarding whether or not he suffered from PMF before the United States Office of Workers' Compensation Programs (OWCP), which initially resolved the conflicting factual records by concluding Petitioner Hardy did suffer from PMF. On June 13, 2018, Petitioner Hardy applied for federal black lung benefits. (JA 183). **On October 2, 2018, the OWCP issued a schedule for the submission of additional evidence. The employer developed contrary medical evidence indicating that**

Petitioner Hardy did not suffer from PMF or any form of black lung. On April 26, 2019, Dr. Robert Tarver authored a B-reading of an x-ray taken of Petitioner Hardy on July 31, 2018, which Dr. Tarver read as negative for any black lung. (JA 254). Dr. Gregory Fino authored a B-reading of an x-ray taken on December 12, 2018, which Dr. Fino read as negative for any black lung. (JA 257). On March 10, 2020, Dr. Kim Adcock authored a B-reading of an x-ray taken on February 20, 2020, and Dr. Adcock read the image as negative for any black lung. (JA 260).

Consequently Petitioner Hardy was, quite reasonably, unsure whether or not he had black lung or PMF until the Department of Labor actually started sending him his monthly benefits and his black lung medical benefits card:

> Q. You first learned you had black lung from Dr. Forehand?
> A. He told me that I had all of the qualifications for it.
> Q. Okay.
> A. And then all of that information was sent in and they awarded me the black lung.
> Q. Okay.
> A. I got the medical card and a check in November -- or October of 2019.
> Q. Okay.
> A. I knew then I had it. (JA 249).

That decision became effective thirty days later, and Petitioner Hardy first received federal black lung benefits on or about the fifteenth day of the month following the month in which the decision became effective, *i.e.* on October 15, 2019. As he stated in his deposition, "I knew then I had it." (JA 249). At the time of the summary judgment briefing, this decision remained disputed by the responsible coal mine operator. On May 10, 2022, the federal black lung benefits case was heard by an administrative law judge. On September 29, 2022, Administrative Law Judge Theodore W. Annos issued a Decision and Order Awarding federal black lung benefits to Petitioner Hardy. No appeal was taken and the decision became

final thirty days later. Accordingly, the factual question as to whether Petitioner Hardy suffers from PMF was not finally resolved until Monday, October 31, 2022.

On July 2, 2021, Petitioner Hardy met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed a defective respirator worn by Petitioner Hardy, and he signed a retainer agreement to be represented by Petsonk PLLC in a relevant tort action. On August 18, 2021, Petitioner Hardy filed in the Circuit Court of McDowell County a complaint initiating this matter against Respondents. (JA 72).

The trial court concluded that by June 4, 2018, when Petitioner Hardy applied for federal black lung benefits, and July 31, 2018, when Dr. Foreman diagnosed him with black lung, Petitioner Hardy "should have known of the possibility of a claim against the dust mask and respirator Manufacturer Defendants and Distributor Defendants more than two years before he filed his *Complaint*." (JA 32).

As noted above, this conclusion ignores all of the contrary medical evidence developed where the question as to whether or not Petitioner Hardy actually had sustained a pulmonary disease was disputed by his employer. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

D. Petitioner Ralph Manuel

Petitioner Ralph Manuel worked as a coal miner for at least 33 years during the period from 1978 to 2021. **He wore respirators manufactured by Respondents, but did not wear those respirators 100% of the time that he worked around coal mine dust. (JA 1268-72). Petitioner Manuel testified that, as a miner, he expected to contract some measure of silicosis,**

even though he wore a respirator during significant periods of his coal mine employment. (JA 1273-79).

> Q. Did you think that if you wore the respirator you wouldn't get silicosis?
> A. I knew it probably would help, but I know you probably would get it. I ain't seen a coal miner who didn't. (JA 1279).

What he did not expect was to come down with a totally-disabling lung disease such as PMF. Yet, in 2020, Petitioner Manuel determined that he suffered from the separate malady of PMF:

> Q. And when were you diagnosed with complicated Pneumoconiosis?
> A. That would be when the people coming over to the company, and that would have been -- let's see. I'm trying to think when that was. They said stage 2 complicated black lung. And I said, "what in the world is complicated black lung?"
> I didn't know what complicated black lung was, but I know now.
> Q. When was that?
> A. That might have been what, in October '20.
> Q. Of 2020?
> A. 2020, I believe. (JA 1280).

Petitioner Manuel testified that he did not recall being notified earlier than October 2020 that he had PMF. (JA 1281-82) ("All I can say is he said my lungs was bad. If he said all those words [*i.e.* PMF or complicated black lung], I probably didn't know what he was talking about no way, if he did."). Shortly following October 5, 2020, Petitioner Manuel first determined that he had PMF after the factual dispute was resolved as to the cause and nature of his lung disease, and his last coal mine employer agreed that he did have PMF. (JA 1284). Thus, the factual question as to whether or not Petitioner Manuel suffered from PMF was not resolved until October 5, 2020.

In 1999, Petitioner Manuel was awarded 5% partial workers' compensation, without any evidence that he suffered any perceptible or injurious harm from black lung disease at

the time of that award. In 2003, the West Virginia Legislature abolished the 5% award as a remedy in workers' compensation because it had been based on a finding of pneumoconiosis with no measurable impairment. *See* W.Va.Code §23-4-6A ("for any employee who applies for occupational pneumoconiosis benefits whose award was granted on or after the effective date of the amendment and reenactment of this section during the year two thousand three, there shall be no permanent partial disability awarded based solely upon a diagnosis of occupational pneumoconiosis, it being the intent of the Legislature to eliminate any permanent partial disability awards for occupational pneumoconiosis without a specific finding of measurable impairment."). However, for many years prior to 2003, 5% awards were issued to miners who had x-ray evidence of black lung disease without any impairment or actual injury whatsoever from the retention of dust in their lungs.

There is no testimony reflecting any injury or loss of ability to work at that time---no material diminution in lung function, loss of pay, or anything materially adverse to Petitioner Manuel at all. Indeed, he continued to perform heavy manual labor in the coal mines without any accommodation for years after receiving his 5% award. The award of workers' compensation benefits for such *de minimis* or non-existent harm was not surprising at all for a miner like Petitioner Manuel who had worked for substantial periods both with and without the protection of respirators. Nothing about such a minimal partial workers' compensation award placed Petitioner on any notice that any respirator had been defective.

On May 21, 2021, Petitioner Manuel met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed defective respirators he had worn and he signed a retainer agreement to be represented by Petsonk PLLC in a relevant tort action. On August 19, 2021, Petitioner Manuel filed a

complaint in the Circuit Court of McDowell County initiating this matter against Respondents. (JA 830).

The trial court concluded that by June 4, 2018, when Petitioner Manuel applied for federal black lung benefits, and July 10, 2018, when Dr. Foreman diagnosed him with "complicated coal workers' pneumoconiosis with progressive massive fibrosis," Petitioner Manuel "reasonably should have known of the possibility of a claim against the dust mask and respirator Manufacturer Defendants and Distributor Defendants more than three years before he filed his *Complaint*." (JA 34).

As noted above, this conclusion ignores all of the contrary medical evidence developed where the question as to whether or not Petitioner Manuel actually had sustained a pulmonary disease was disputed by his employer and remains unresolved today. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

E. Petitioner Edgel Dudleson

Petitioner Edgel Dudleson worked as a coal miner for at least 19 years during the period from 1976 through 1999. (JA 1940, 1947). **He did not wear his respirator 100% of the time. He wore his Respondent AO and Respondent MSA respirators about 60-70% of the time that he worked around coal mine dust at various mining operations. (JA 1941-46).**

Petitioner Dudleson was awarded partial workers' compensation benefits, without any evidence or testimony that he suffered any perceptible or injurious harm from black lung disease at the time of those awards in 2000 and 2001. In 1996, Petitioner Dudleson filed a state workers' compensation claim but apparently was denied. In 2000, he received a 5%

award of workers' compensation based on occupational pneumoconiosis with zero impairment, and the following year that award was modified to 10%. (JA 1939).

After the State abolished the 5% award in 2003, the lowest percentage awarded by the State of West Virginia for occupational disease became 10%. W.Va.Code St.R. §85-20-1, Table 85-20A. A so-called 10% award is based on pulmonary function being two to five points below normal---a *de minimis* degree of impairment. *Id.* (To illustrate: if the FEV1 (forced expiratory volume in 1 second) is 75% of predicted, it is regarded as zero impairment; and if it falls to 73% of predicted, that triggers a 10% workers' compensation award). Consequently, a finding of "10%" under workers' compensation does not actually require anything more than a truly *de minimis* demonstration of measurable impairment---and it does not require any showing that the miner suffers from disease meriting any medical treatment or affecting any loss of capacity to fulfill job functions.

Upon questioning by counsel for Respondent AO, it was established that Petitioner Dudleson's 5% award was augmented to 10% because he "got in front of Dr. Rasmussen, and that's what got you to the 10 percent." (JA 1939). There is no testimony reflecting any injury or loss of ability to work at that time---no material diminution in lung function, loss of pay, or anything materially adverse to Petitioner Dudleson at all. Indeed, he continued to perform heavy manual labor in the coal mines without any accommodation for years after that award. The award of workers' compensation benefits for such *de minimis* or non-existent harm was not surprising at all for a miner like Petitioner Dudleson who had worked for substantial periods both with and without the protection of respirators. Nothing about such a minimal partial workers' compensation award placed Petitioner Dudleson on any notice that any respirator had been defective.

Petitioner Dudleson received conflicting medical reports regarding whether or not he suffered from PMF before the OWCP initially resolved the conflicting factual records by concluding Petitioner Dudleson did suffer from PMF. On June 14, 2018, Petitioner Dudleson applied for federal black lung benefits. On March 27, 2019, the OWCP denied Petitioner Dudleson's application for federal black lung benefits, finding that he had not satisfied the grounds for eligibility. Petitioner Dudleson continued to develop additional medical evidence to ascertain whether or not the OWCP was accurate in its decision that he did not suffer from PMF. On June 10, 2020, the OWCP reversed its prior decision and concluded that Petitioner Dudleson did suffer from PMF. At the present day, this decision remains disputed by the responsible coal mine operator. The factual question of whether Petitioner Dudleson suffers from PMF has still not been finally resolved.

On June 10, 2020, the OWCP issued a Proposed Decision and Order finding that Petitioner Dudleson suffered from PMF. That decision became effective thirty days later on an interim basis pending the responsible operator's appeal to the Office of Administrative Law Judges], and Petitioner Dudleson first received federal black lung benefits on or about the fifteenth day of the month following the month in which the decision became effective, *i.e.* on August 15, 2020. Following that decision, a number of medical experts continued to dispute whether or not Petitioner Dudleson suffered from PMF. On March 1, 2022, Dr. Robert Cohen re-reviewed the images of the CT scan from June 14, 2019, as well as his prior report of July 26, 2019, regarding the same images; he also reviewed the reports of Dr. Danielle Seaman regarding CT scans dated November 30, 2018, and June 4, 2019. He disagreed with Dr. Seaman's lack of finding of large opacities and reaffirmed his prior opinion that Petitioner Dudleson's CT scan indicates the presence of complicated

pneumoconiosis or PMF. On June 23, 2022, Dr. Leonard Go opined that "I believe to a reasonable degree of medical certainty that Mr. Dudleson's years of exposure to coal mine dust led to the development of clinical pneumoconiosis, specifically simple and complicated coal workers' pneumoconiosis."

On July 2, 2021, Petitioner Dudleson met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed a defective respirator worn by Petitioner Dudleson, and he signed a retainer agreement to be represented by Petsonk PLLC in a relevant tort action. On August 19, 2021, Petitioner Dudleson filed a complaint in the Circuit Court of McDowell County initiating this matter against Respondents. (JA 1505).

The trial court concluded that by November 30, 2018, and June 14, 2019, when tests showed he had complicated pneumoconiosis, and June 12 or 14, 2018, when Petitioner Dudleson applied for federal black lung benefits, Petitioner Dudleson "reasonably should have known of the possibility of a claim against the dust mask and respirator Manufacturer Defendants and Distributor Defendants more than three years before he filed his *Complaint*." (JA 36).

As noted above, this conclusion ignores all of the contrary medical evidence developed where the question as to whether or not Petitioner Manuel actually had sustained PMF was not resolved until 2020. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

F. Petitioner Ricky Miller

Petitioner Ricky Miller worked as a coal miner for at least 11 years during the period from 1970 through 1982. (JA 2237). **He wore respirators manufactured by Respondent 3M, but**

did not wear those respirators 100% of the time that he worked around coal mine dust. (JA 2239, noting he "mostly" wore it, but not exclusively). Petitioner Miller was awarded partial workers' compensation benefits for silicosis in 2013, but it never occurred to him that his partial impairment could have been due to a concealed design defect in one or more of the respirators that he wore.

> **Q. You didn't think the respirators helped you at all?**
> **A. No; well, some I'd say.**
> **Q. You thought some protection was better than none?**
> **A. Yeah, right. (JA 2238).**

Petitioner Miller first determined that he suffered from complicated black lung in September 2019, when he received his initial federal black lung benefits:

> **Q. When was the first time you were diagnosed with Black Lung?**
> **A. When I got my first check Black Lung; it was complicated Black Lung.**
> **Q. And when did you get that?**
> **A. 2000 -- I mean, yeah, September 14, 2019. (JA 2236).**

On July 9, 2021, Petitioner Miller met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed a defective respirator worn by Petitioner Miller, and he signed a retainer agreement to be represented by Petsonk PLLC, in a relevant tort action. On August 19, 2021, Petitioner Miller filed a complaint in the Circuit Court of McDowell County against Respondents. (JA 2067).

The trial court concluded that by October 24, 2013, when Petitioner Miller was informed by the Occupational Pneumoconiosis Board that he had black lung, and by December 18, 2017, when he applied for federal black lung benefits, Petitioner Miller "reasonably should have known of the possibility of a claim against the dust mask and respirator Manufacturer Defendants and Distributor Defendants more than three years before he filed his *Complaint*." (JA 38).

As noted above, this conclusion ignores the evidence that Petitioner Miller did not know he had PMF until September 14, 2019, when he received his first check for PMF. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

G. Petitioner Mark Scott

Petitioner Mark Scott worked as a coal miner for at least 28 years during the period from 1980 through April 19, 2017. (JA 3417, 3425). **He wore respirators manufactured by Respondents, but did not wear those respirators 100% of the time that he worked around coal mine dust. (JA 3422-24, noting cessation of respirator usage around 1994, with limited exposure to coal mine dust thereafter).**

On November 28, 2018, the OWCP determined that Petitioner Mark Scott did not suffer from PMF. (JA 3428). Petitioner Mark Scott first determined that he had PMF shortly following December 11, 2019, when the OWCP later determined that he did suffer from PMF. (JA 3439).

> **Q. All right. Have you ever been diagnosed with black lung?**
> **A. Yes.**
> **Q. When?**
> **A. In 2019 is when I got my Federal black lung that--they said I had black lung....**
> **Q. Okay. Have you ever been diagnosed with complicated black lung?**
> **A. Yes.**
> **Q. When did that happen?**
> **A. In 2019 was when I got my Federal. (JA 3420-21)**

In 1998, Petitioner Mark Scott was awarded 10% partial workers' compensation due to silicosis, without any evidence or testimony demonstrating that he suffered any perceptible or injurious harm from black lung disease at the time. (JA 3418).

Q. Okay. And you were, at that time, told you had silicosis?
A. Yes, I guess. Silicosis and black lung is not the same thing, is it? (JA 3418-19).

Similar to Petitioner Dudleson, Petitioner Mark Scott received a 5% workers' compensation award. The discussion above of the relevant changes in this area of the law is incorporated herein by reference.

There is no testimony reflecting any injury or loss of ability to work at that time---no material diminution in lung function, loss of pay, or anything materially adverse to Petitioner Mark Scott at all. Indeed, he continued to perform heavy manual labor in the coal mines without any accommodation for nearly twenty years after receiving his 10% award. The award of workers' compensation benefits for such *de minimis* or non-existent harm was not surprising at all for a miner like Petitioner Mark Scott who had worked for substantial periods both with and without the protection of respirators. Nothing about such a minimal partial workers' compensation award placed Petitioner Mark Scott on any notice that any respirator had been defective.

On July 8, 2021, Petitioner Mark Scott met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed defective respirators he had worn and he signed a retainer agreement to be represented by Petsonk PLLC in a relevant tort action. On September 9, 2021, Petitioner Mark Scott filed a complaint in the Circuit Court of McDowell County initiating this matter against Respondents. (JA 3249).

The trial court concluded that by 1998, when Petitioner Mark Scott was diagnosed with silicosis, and by December 20, 2017, when he applied for federal black lung benefits, Petitioner Mark Scott "reasonably should have known of the possibility of a claim against the dust mask and

respirator Manufacturer Defendants and Distributor Defendants more than two years before he filed his *Complaint*." (JA 41).

As noted above, this conclusion ignores all of the evidence of the *de minimis* nature of the earlier diagnoses where Petitioner Mark Scott had little or no impairments. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

H. Petitioner Gary Scott

Petitioner Gary Scott worked as a coal miner for at least 38 years during the period from 1975 through April 30, 2020. (JA 4076). **He wore respirators manufactured by Respondents, but did not wear those respirators 100% of the time that he worked around coal mine dust. He regularly wore them from 1975-1982. (JA 4084-93). Petitioner Gary Scott first determined that he had PMF in 2020:**

> **Q. You mentioned you retired in 2020. That was also the same year that you were first diagnosed with complicated black lung disease; is that right?**
> **A. Yes.**
> **Q. Is that also known as progressive massive fibrosis?**
> **A. Yes.**
> **Q. That was the first time you ever understood that you had that diagnosis?**
> **A. Understood that, yes. (JA 4094).**

Similar to Petitioner Dudleson and Petitioner Mark Scott, Petitioner Gary Scott received a 5% workers' compensation award. The discussion above of the relevant changes in this area of the law is incorporated herein by reference.

There is no testimony reflecting any injury or loss of ability to work at that time---no material diminution in lung function, loss of pay, or anything materially adverse to Petitioner Gary Scott at all. Indeed, he continued to perform heavy manual labor in the coal mines

without any accommodation for years after receiving his 5% awards. The award of workers' compensation benefits for such *de minimis* or non-existent harm was not surprising at all for a miner like Petitioner Gary Scott who had worked for substantial periods both with and without the protection of respirators. Nothing about such a minimal partial workers' compensation award placed Petitioner Gary Scott on any notice that any respirator had been defective.

Petitioner Gary Scott's employer still apparently disputes whether or not he suffers from PMF. On July 12, 2021, the OWCP issued a proposed decision and order awarding federal black lung benefits to Petitioner Gary Scott based on a finding of PMF. At the present day, pending a formal hearing on that proposed order, Petitioner Gary Scott's status remains disputed, thus the factual question of whether he suffers from PMF has still not been finally resolved.

On July 19, 2021, Petitioner Gary Scott met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed defective respirators he had worn and he signed a retainer agreement to be represented by Petsonk PLLC in a relevant tort action. On September 9, 2021, Petitioner Gary Scott filed a complaint in the Circuit Court of McDowell County initiating this matter against Respondents. (JA 3704).

The trial court concluded that by January 10, 2018, when NIOSH and MSHA notified Petitioner Gary Scott that he had "Category A complicated pneumoconiosis," Petitioner Gary Scott "reasonably should have known of the possibility of a claim against the dust mask and respirator Manufacturer Defendants and Distributor Defendants more than two years before he filed his *Complaint*." (JA 42).

As noted above, this conclusion ignores all of the evidence of the *de minimis* nature of the earlier diagnoses where Petitioner Gary Scott had little or no impairments. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

I. Petitioner James Cruey

Petitioner James Cruey worked as a coal miner for at least 30 years during the period from 1968 through 1999. (JA 2894). **He wore respirators manufactured by Respondents, but did not wear those respirators 100% of the time that he worked around coal mine dust. He only wore them while he worked in the face areas underground---but not in other underground areas where he was necessarily exposed to respirable coal mine dust. (JA 2892-93, describing that he moved to electrician's job in 1980s, quit working full-time in the face, but still breathed coal dust; JA 2895, stating that he only wore the respirator when he worked in the face; JA 2897-2910, noting he did not wear a respirator during certain work periods).** Petitioner Cruey was awarded partial workers' compensation benefits for silicosis in 1985. **Petitioner Cruey continued working his normal job duties for many years notwithstanding his awards, and it never occurred to him that his partial impairment could have been due to a concealed design defect in one or more of the respirators that he wore.**

> **Q. Okay. So that when you figured out that you actually had silicosis in 1984 or 1985, did that indicate to you that the respirator was not protecting you from all the dust?**
> **A. To tell you the truth, I didn't even think about it. I mean, you get on the job, and you get used to doing that stuff, and you automatically do it. You don't pay no attention to it. (JA 2896).**

On September 22, 2020, Petitioner Cruey was awarded federal black lung benefits because he was determined to suffer from a totally-disabling pulmonary or respiratory impairment arising from his coal mine dust exposure. Prior to his federal black lung benefits being awarded on

September 22, 2020, Petitioner Cruey received conflicting reports from physicians regarding whether or not he suffered from black lung disease. (JA 596).

> **Q. Okay. So it's true, right, that doctors told you you had black lung disease before 2019?**
> **A. But the other doctors told me I didn't. (JA 2911).**

On June 30, 2021, Petitioner Cruey met with Sam Petsonk, one of Petitioners' counsel, and learned for the first time that Respondents allegedly designed and marketed a defective respirator he had worn and he signed a retainer agreement to be represented by Petsonk PLLC, in a relevant tort action. On September 3, 2021, Petitioner Cruey filed a complaint in the Circuit Court of McDowell County against Respondents. (JA 2482).

The trial court concluded that by 2016, when Dr. Forehand diagnosed Petitioner Cruey with "interstitial lung disease with impairment gas exchange," Petitioner Cruey "reasonably should have known of the possibility of a claim against the dust mask and respirator Manufacturer Defendants and Distributor Defendants more than two years before he filed his *Complaint*." (JA 39).

As noted above, this conclusion ignores all of the evidence of the *de minimis* nature of the earlier diagnoses where Petitioner Cruey had little or no impairments. Furthermore, this conclusion fails to consider the evidence that the statute of limitations was tolled based upon the discovery rule and/or Respondents' fraudulent concealment, which are issues of fact.

J. Sample of relevant facts fraudulently concealed by Respondents

It is undisputed that until Petitioners consulted with counsel, they had no knowledge of the critical facts Respondents fraudulently concealed from the public regarding how unsuitable their respirators were in a coal mining environment. Thus, the date Petitioners first learned of Respondents' fraudulent concealment, which occurred after meeting with counsel, is the date from

which the statute of limitations begins to run.[12] Based upon this analysis, all of Petitioners' complaints were filed within two years from the date they learned of Respondents' deceit.

The amount of evidence regarding Respondents' fraudulent concealment is vast. In order to make a record on this issue, Petitioners endeavored to provide a small sampling of this material. Petitioners have included internal memos from Respondents as well as admissions by some of their employees and the depositions of experts explaining in great detail how the respirators manufactured by Respondents were not fit to be used in coal mines. Of course, Respondents did not share this critical information, but instead kept it confidential while, at the same time, marketing these respirators as helping to prevent a wide variety of respiratory diseases. Petitioners, who used these respirators, had no way of knowing that Respondents already had determined the respirators were ineffective in coal mines for a wide variety of reasons. Among other problems, the respirators failed to filter small respirable particles; degraded in the heat and humidity of the coal mine environment; needed to be properly fitted on the user; were designed as one size fits all instead of offering a variety of sizes; had problems with the straps; and were not tested in real coal mining conditions.

This concealed information is of critical importance in these products liability cases, where the trial court surprisingly blamed Petitioners, and not Respondents, for failing to discover that these respirators were defective and helped to cause their pulmonary diseases. This ruling rewards Respondents for deceiving the public by having meritorious products liability claims dismissed against them. Petitioners had no way of knowing about the critical information fraudulently concealed by Respondents until they learned about it from their counsel.

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[12] Syllabus Point 8, *Hoke*.

Here is a brief summary of the fraudulently concealed material Respondents kept from Petitioners and the public:

1. Respondent 3M:

Respondent 3M marketed the 8710 as being able to stop pneumoconiosis and fibrosis producing dusts from ever reaching the lungs. (JA 5438). These misrepresentations were false and omitted the material fact that the respiratory protection devices were defective and/or unsuitable for use in industrial environments. In 1973, Mr. Robert Barghini, laboratory manager, cautioned Respondent 3M's advertising section that ads for respirators should be "totally correct." (JA 5440). Mr. Barghini further cautioned that when an ad states 99% efficiency that the ad should make clear that this is only for the filter media, "because the overall efficiency of the product is much less than that *i.e.* fit efficiency." Respondent 3M ran advertisements in 1974 and 1975 which ignored Mr. Barghini's comments. (JA 5443).

The 8710 could not be fit tested until saccharin was approved as a fit test agent. (JA 5325). In a letter Respondent 3M acknowledged: "We strongly believe that there is a tremendous risk to the wearer of any respirator that has not been properly fit tested. This risk far out shadows any risk from the use of saccharin." (JA 5326). Between 1972, the year the 8710 was approved, and the end of 1982, when saccharin was approved as a fit test agent, Respondent 3M sold in excess of 200 million 8710's that could not be fit tested.

On December 20, 1976, Respondent 3M acknowledged that the 8710 **was unacceptable for use in a coal mining environment** and further recognized that strap breakage and "collapse due to buildup of moisture in the filter media" were potential major problem areas. Respondent 3M stated that it needed an improved product. (JA 5329, 5391-93).

Finally, Dr. Nelson Leidel, a former official with the National Institutes for Occupational Safety and Health (NIOSH) and an expert witness who provided evidence in some of the Kentucky cases, prepared a 135-page report entitled "Findings on the 3M Company 8710 Throwaway Paper Dust Mask for Protection Against Respirable Duest in Coal Mines." In this report, Dr. Leidel identified at least twenty general areas of Respondent 3M's misconduct, some of which constituted violations of regulatory standards and misrepresentations made with respect to the unsuitability of the 8710 for use in a coal mine. (JA 5512).

2. Respondent AO

Respondent AO knew of the deficiencies with regard to electrostatic filters and that use of these respirators by West Virginia coal miners could contribute to causing occupational pneumoconiosis by the 1950's and certainly by the early 1970's. Mr. William Revoir, former Chief Engineer of Respondent AO's Safety Products Laboratory, wrote an article, while employed by Respondent AO in 1951, discussing the weaknesses of electrostatic felt, the decreased filtering efficiency, and the increase in the user's exposure as impacted by heat and humidity. (JA 5605).

Respondent AO knew at least beginning in the 1950's and certainly by the 1970's that electrostatic charges decline over time from, among other things, many of the conditions present in coal mines such as high humidity, high temperatures, mists, liquid aerosols, water vapor, and dust. (JA 5609). Respondent AO's representatives have repeatedly admitted in their depositions that electrostatic filter media were long known to degrade. (JA 6149).

In the early 1970's, after the government prohibited Respondent AO from using and selling its mechanical filters due to its asbestos components, it went back to using an electrostatic filter with a mechanical pre-filter. (JA 6979). At that point, internally, Respondent

AO stated degradation was worth the risk in order to have a competitive filter on the market, but externally, Respondent AO stopped communicating about the weaknesses of degradation in electrostatic filters as compared to mechanical filters. (JA 6985).

Despite all of these facts recited above, Respondent AO concealed this knowledge of the unsuitability of the R2090N and R90N filters for use in coal mines from users and the general public and repeatedly and willfully continued marketing, advertising and selling substantial amounts of its R2090 and R2090N respirators with the electrostatic filters in West Virginia as providing dependable protection against pneumoconiosis-producing dusts that these faulty respirators could not satisfy. All the while, Respondent AO knew the electrostatic filters would not protect West Virginia coal miners from contracting occupational pneumoconiosis. (JA 4754).

3. Respondent MSA

In a "Progress Report on Filter Media Development," dated February 12, 1951, MSA's Research Department noted "It is well known that wool fibre will take up considerable moisture, and that moist fibres have a lower electrical resistivity. It is thought that this may result in a lowered filtering efficiency." (JA 7722).

Finally, in 1994, a Respondent MSA Inter-Office Memorandum White Paper written by then Product Line Manager, Bill Lambert, who later became CEO, states: "And **what's unconscionable is that the user, who is depending on this electrostatic filter for respiratory protection, has no "indicator" that the electrostatic filter is losing its efficiency** - there is no "breakthrough" or "warning properties" -that the user can detect, taste or smell; only his uncontrollable, unwitting, unwanted exposure to the hazard. This issue is not just a "hot DOP vs.

cold DOP" argument, **this is a worker safety issue that must be addressed....**" (Emphasis added). (JA 7752).

4. Trial court's analysis of fraudulent concealment evidence

For purposes of the summary judgment motions, the trial court accepted as true all of the evidence of Respondents' fraudulent concealment. In this part of the order, the trial court suggests the consumer credit complaint filed by the Attorney General in 2003, the focus of the *Hoke* decision, "creates 2003 as a year that would make a reasonable, objective plaintiff aware of the alleged defects in Defendants' masks and respirators." (JA 43). By this ruling, the trial court is asserting a novel view that all coal miners somehow are on notice they may have a products liability claim against Respondents, even before the miners have been diagnosed as suffering from a latent pulmonary disease associated with exposure to coal dust.

Ultimately, the trial court failed to appreciate the significance of the extensive evidence of Respondents' fraudulent concealment and concluded that "Plaintiffs have failed to prove that any alleged concealment by the Defendants prevented Plaintiffs from discovering or pursuing these cause of actions." (JA 42).

IV. Summary of the argument

The diagnosis of any level of pneumoconiosis is a complex medical determination where often there are disagreements between the various health care providers who analyze the relevant records. In this administrative system, the coal miner seeking benefits has to rely on the experts who review the medical records. The mere fact that a coal miner files a claim seeking black lung benefits is no evidence that the coal miner actually has some PMF or any specific latent pulmonary disease or that the experts who review the medical records will uphold the claim. Ultimately, a coal miner cannot know that he or she has a particular latent disease related to exposure to coal

dust unless and until the disease is confirmed by the experts and that opinion is communicated to the miner.

In resolving a summary judgment motion, all facts and reasonable inferences must be reviewed in the light most favorable to Petitioners, who are the nonmoving parties. Furthermore, at the summary judgment stage, the court's role is not to weigh the evidence or discern the truth, but rather is to determine whether there are genuine issues of material fact.

In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury. The West Virginia Supreme Court already has determined that the statute of limitations for claims involving these same defective respirators cannot be resolved as a matter of law, particularly where the discovery and fraudulent concealment rules are asserted.

In *State ex rel. 3M Co. v. Hoke*, 244 W.Va. 299, 304, 852 S.E.2d 799, 804 (2020), the petition for a writ of prohibition filed by the same respirator manufacturers involved in the present cases was denied by West Virginia Supreme Court, which held that whether the claim asserted by the Attorney General is barred by the statute of limitations is a question of fact to be resolved by the factfinder. Thus, the West Virginia Supreme Court already has determined that the statute of limitations for claims involving these same defective respirators cannot be resolved as a matter of law, particularly where the discovery and fraudulent concealment rules are asserted.

Four of the five steps identified by the West Virginia Supreme Court in Syllabus Point 5 of *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009), for analyzing a statute of limitations defense involve questions of material fact that will need to be resolved by the trier of fact. Clearly the message sent by the West Virginia Supreme Court is that juries should be permitted to

determine whether or not a claim is timely or barred by the statute of limitations, after all of the facts are considered and the various tolling theories are resolved.

Fundamentally, in any tort case, the plaintiff has to know that he or she has suffered an injury or disease that resulted from the fault of another party. When the medical evidence is in dispute over whether or not a plaintiff actually has suffered an injury, this holding by the trial court that the plaintiff should have known what may have caused the injury or disease is premature.

Petitioners agree that the *de minimis* nature of any physical impairment is a relevant consideration. For example, a coal miner who has been found to have some minor impairment that does not otherwise impact the miner's life or ability to work may not have a reason to look for possible tortfeasors. However, a coal miner who has a permanent life-altering latent disease diagnosis has much greater motivation and reason for finding who to blame. Thus, while the *de mimimis* nature of any physical impairment is relevant, to comply with West Virginia law, this *de minimis* impairment must be considered by the jury or factfinder along with all of the other relevant evidence to decide whether or not the claim is barred by the statute of limitations.

In determining the statute of limitations in a products liability case, the plaintiff has to know or by the exercise of reasonable diligence should know that he has been injured, the identity of the maker of the product, and importantly that the product had a causal relation to the injury. The causation element in a products liability claim is very factual and often requires expert testimony to establish this element. Thus, this case presents a question as to what these coal miners, who are not experts in industrial hygiene, reasonably should have done to determine whether or not there was some causal connection between their latent disease and wearing Respondents' respirators.

Petitioners presented evidence that their complaints were filed within two years from the dates they learned of their latent pulmonary disease and consulted with counsel, who advised them of the possible causal connection between their diseases and wearing Respondents' defective respirators. For Petitioners Hardy, Manuel, Dudleson, Miller, Mark Scott, and Gary Scott, their complaints were filed timely within two years from the date they were diagnosed with and/or were informed they had PMF. For Petitioner Cruey, he filed his complaint within two years from the date he was diagnosed with a totally-disabling pulmonary or respiratory impairment arising from his coal mine dust exposure. Based upon these facts, a jury could conclude Petitioners timely filed all of their complaints. However, Petitioners recognize this still is a fact issue that should not be resolved as a matter of law through the granting of summary judgment.

The discovery rule is particularly applicable in cases involving pure latent diseases, which develop over time and are diagnosed several years after the plaintiff no longer is exposed to the risk created by the defendant. A pure latent disease is one where the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred.

The West Virginia Supreme Court reiterated in Syllabus Point 5 of *Dunn* that the application of the discovery rule raises questions of fact for the jury to decide. Each Petitioner in this joint appeal presented evidence on when he learned various relevant facts. None of Petitioners had any actual knowledge about a possible products liability claim that could be asserted against Respondents until they met with counsel, which was well within the statute of limitations. Petitioners also presented evidence regarding the conflicting medical opinions received when they applied for black lung benefits. Additionally, a jury also could consider the evidence that Petitioners filed their claims withing two years from the dates they were diagnosed with either PMF or totally disabling pulmonary impairment.

Fraudulent concealment is rooted in the recognition that fraud can prevent a plaintiff from even knowing that he or she has been defrauded. Effectively, the distinction is that where fraud has prevented the plaintiff from knowing of his or her cause of action, that cause of action simply does not even exist until the plaintiff becomes aware of, *i.e.*, "discovers," the fraud.

In these seven cases, the statute of limitations is tolled under the fraudulent concealment doctrine until Petitioners learned of Respondents deceit. The record before this Court is clear—Petitioners did not learn of Respondents' fraudulent concealment of these critical facts until after their cases were filed. However, again to be consistent with the case law, Respondents have the right to dispute this evidence and ultimately the juries in these cases will be left to resolve these disputed claims.

The trial court seems to assume that because a coal miner once used a respirator and later develops a latent coal dust related disease that means the respirator must have been defective. This assumption is refuted by Respondents own experts, who testified that when a coal miner was diagnosed with coal workers' pneumoconiosis/black lung and previously had worn a respirator, that does not mean the respirator was defective. Thus, Respondents' own experts, educated in the field of industrial hygiene and respiratory protection, testified there was no apparent causal connection between their defective products and the miners' diseases.

The West Virginia Supreme Court has recognized that the discovery rule tolls the limitations period in products liability cases involving a "pure latent injury" because the onset of the injury is ***"not sufficiently pronounced"*** to put a plaintiff on notice that he has been injured by the defective product. Courts have expanded the discovery rule to product liability cases dealing with chemicals, drugs, asbestosis, and products like the Dalkon Shield. The common denominator in these cases is that the product often causes an injury only after a lengthy period of exposure or

the injury surfaces only after a considerable period of time from the date of exposure. Because the injury initially is not sufficiently pronounced to put a plaintiff on notice that he has been injured, courts conclude the statute of limitations does not begin to run until the plaintiff is aware of the injury or through reasonable diligence should have been aware of the injury.

When a relatively minor disease progresses over time to a more serious permanent disease, the diagnosis of this more serious disease triggers a new statute of limitations. Petitioners did not learn their latent diseases had become "sufficiently pronounced" to trigger notice the respirators were defective until less than two years prior to filing their complaints. At minimum, when Petitioners learned of their progressive latent diseases is yet another issue of fact that should be submitted to a jury.

V. Statement regarding oral argument and decision

Due to the latent nature of the coal dust related pulmonary diseases addressed in this joint appeal, more and more coal miners will be consulting with counsel and will be filing similar products liability claims against these Respondents. Clear guidance from the Court on how to apply established case law to these statute of limitations issues will benefit Respondents as well as all of the other coal miners who will be filing their own complaints. Petitioners respectfully ask the Court for Rule 20 oral argument to permit the Court and the parties enough time to address all of the fact and legal issues raised in these seven different cases. As for the decision, this case will set a critical precedent in an ever-growing area of the law and should result in an opinion authored by a Judge or Justice.

V. Argument

A. Trial court ruled contrary to the facts and controlling West Virginia law

Although the trial court freely acknowledged "The Parties disagree on when Plaintiffs' injuries occurred and when Plaintiffs should have been reasonably aware that they might have a claim," it nevertheless proceeded to ignore the West Virginia case law mandating that whether the statute of limitations bars a claim is a fact issue and instead ruled as a matter of law that all of Petitioners' complaints were barred by the statute of limitations. (JA Order at 25).

While the specific holdings in each case are summarized above, the following is a summary of the trial court's analysis on how the statute of limitations applies in Petitioners' cases:

> This Court **FINDS** that the relevant date for Plaintiffs in these cases to objectively and reasonably know that something was wrong is the date that each of the Plaintiffs was awarded more than 5% *de minimis* disability compensation for a work-related, dust-based chronic lung injury; or was medically diagnosed with any form of lung impairment resulting from their inhalation of coal, rock, and sand dust; or applied for federal black lung benefits. Therefore, the two-year statute of limitations in each of these cases began running when each Plaintiff was initially diagnosed by a medical professional with breathing or lung problems related to the inhalation of coal, rock, and sand dust; when they received more than 5% *de mimimis* disability benefits for a work-related, dust-based chronic lung injury; or when they applied for federal black lung benefits." (JA Order at 30-31, JA).

The trial court identifies three specific facts that, as a matter of law, place a coal miner suffering from a latent coal dust related disease on notice that he or she is obligated to investigate possible causes for that disease. First, the trial court asserts that any coal miner who wore a respirator and is diagnosed by a medical professional with any breathing or lung problems related to the inhalation of coal, rock, and sand dust is on notice of a products liability claim against Respondents. This view not only is contrary to existing West Virginia law, but as applied in these cases, ignores the specific administrative litigation history each of these Petitioners experienced,

where the medical evidence often was contradictory where some of the medical experts asserted Petitioners had not suffered any breathing or lung impairment.

Fundamentally, in any tort case, the plaintiff has to know that he or she has suffered an injury or disease that resulted from the fault of another party. When the medical evidence is in dispute over whether or not a plaintiff actually has suffered an injury, this holding by the trial court that the plaintiff should have known what may have caused the injury or disease is premature. Thus, Petitioners had no obligation to go out and search the world for other possible tortfeasors unless and until their latent disease was confirmed.

Second, the trial court next asserts a plaintiff who has received more than a *de mimimis* 5% disability benefits award is then on notice to investigate other possible causes for this injury or disease. Petitioners agree that the *de minimis* nature of any physical impairment is a relevant consideration. For example, a coal miner who has been found to have some minor impairment that does not otherwise impact the miner's life or ability to work may not have a reason to look for possible tortfeasors. However, a coal miner who has a permanent life-altering latent disease diagnosis has much greater motivation and reason for finding who to blame. Thus, while the *de mimimis* nature of any physical impairment is relevant, to comply with West Virginia law, this *de minimis* impairment must be considered by the jury or factfinder along with all of the other relevant evidence to decide whether or not the claim is barred by the statute of limitations.

Third, for reasons that are not clear, the trial court concludes that when a coal miner applies for federal, as opposed to state, black lung benefits, that miner, as a matter of law, is on notice to investigate any tortfeasors responsible for causing the latent disease. Once again this holding ignores the uncertainty regarding whether or not the coal miner actually has a disease, based upon the conflicting medical evidence developed in the underlying administrative actions.

Similar to the flaw with the trial court's first category of cases, when the medical evidence is in dispute over whether or not a plaintiff actually has suffered an injury, this holding by the trial court that the plaintiff should have known what may have caused the injury or disease is premature. Thus, Petitioners had no obligation to go out and search the world for other possible tortfeasors unless and until their latent disease was confirmed.

B. The application of the statute of limitations, discovery rule, and fraudulent concealment doctrine present fact issues for the jury to decide

"'In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury.'" *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W.Va. 578, 567 S.E.2d 294, 300 (2002) (quoting *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 714-15 (1997)). In both of these cases - *Trafalgar House* and *Gaither* as well as *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009) – the West Virginia Supreme Court reversed the lower court's grant of summary judgment on statute of limitations grounds.

Similarly, in *Hoke*, the petition for a writ of prohibition filed by the same respirator manufacturers involved in the present cases was unanimously denied by West Virginia Supreme Court, which held that whether the claim asserted by the Attorney General is barred by the statute of limitations is a question of fact to be resolved by the factfinder. Thus, the West Virginia Supreme Court already has determined that the statute of limitations for claims involving these same defective respirators cannot be resolved as a matter of law, particularly where the discovery and fraudulent concealment rules are asserted.

In Syllabus Point 5 of *Dunn*, relied upon in *Hoke*, the West Virginia Supreme Court engaged in an extensive discussion of its statute of limitations jurisprudence and created a five-step analysis for courts to follow:

> A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Four of the five steps identified by the West Virginia Supreme Court "involve questions of material fact that will need to be resolved by the trier of fact." Clearly the message sent by the West Virginia Supreme Court is that juries should be permitted to determine whether or not a claim is timely or barred by the statute of limitations, after all of the facts are considered and the various tolling theories are resolved.

Determining the statute of limitations in a products liability case is explained in Syllabus Point 1, *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810 (1987):

> In products liability cases, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury.

The causation element in a products liability claim is very factual and often requires expert testimony to establish this element. Thus, this case presents a question as to whether these coal

miners, who are not experts in industrial hygiene, acted reasonably with respect to the causal connection between their latent disease and the defects in Respondents' respirators.

Dunn/Hoke first requires the applicable statute of limitations to be identified. Here, the parties agree the statute of limitations is two years. W.Va.Code §55-2-12. Second, a determination has to be made on when the requisite elements of the cause of action occurred, including the causal relation noted in *Hickman*. Petitioners presented evidence that their complaints were filed within two years from the dates they learned of their latent pulmonary disease and consulted with counsel, who advised them of the possible causal connection between their diseases and wearing Respondents' defective respirators. For Petitioners Hardy, Manuel, Dudleson, Miller, Mark Scott, and Gary Scott, their complaints were filed timely within two years from the date they were diagnosed with and/or were informed they had PMF. For Petitioner Cruey, he filed his complaint within two years from the date he was diagnosed with a totally-disabling pulmonary or respiratory impairment arising from his coal mine dust exposure. Based upon these facts, a jury could conclude Petitioners timely filed all of their complaints.

While Petitioners are adamant that their complaints were filed timely within two years from the dates they were diagnosed with either PMF or totally disabling pulmonary impairment, Petitioners recognize it would be error for a court to resolve this statute of limitations issue as a matter of law in favor of Petitioners. In *Perrine v. E. I. DuPont De Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010), the trial court granted summary judgment for the plaintiffs on the statute of limitations issue and this decision was reversed by the West Virginia Supreme Court.

Kentucky, which has a one-year statute of limitations for personal injury actions, also follows the same rationale as the West Virginia Supreme Court that in most cases, the jury determines whether a claim is barred by the statute of limitations. Kentucky coal miners who are

litigating these same products liability claims involving Respondents' respirators have been permitted by their courts to proceed to trial over Respondents' objections that the statute of limitations had elapsed in their cases. Numerous Kentucky Circuit Court decisions rejected Respondents' statute of limitations arguments because there were too many genuine issues of fact that have to be resolved by the jury. (JA 560-72).[13] Some of these cases were tried, resulting in significant jury verdicts ranging between $7.2 million and $67.5 million.[14]

[13] Two unreported federal district court decisions in the Eastern District of Kentucky are factually inapposite to the circumstances of this case: *Boggs v. 3M Co.*, 2012 WL 3644967 (E.D. Ky. 2012), and *Adams v. 3M Co.*, 2013 WL 3367134 (E.D. Ky. 2013). Unlike the present case, both of these federal district court cases involved two former coal miners who were evidently diagnosed with advanced, totally and permanently disabling black lung many years before they filed suit. Moreover, in one Kentucky Circuit Court case decided after the *Boggs* decision, the Perry County Circuit Court specifically found that the Kentucky Supreme Court's stance in *3M v. Engle*, *supra*, was more persuasive than the unpublished federal court decision. (JA 564).

[14] The fact that many of these cases progressed to trial stage is manifest by Respondents' public filings about the substantive disposition of these cases. Respondents have publicly reported that they have paid hundreds of millions of dollars in settling these respirator cases in both West Virginia and Kentucky. According to Respondent 3M's SEC filings, it paid $340 million to resolve a batch of claims in Kentucky. (Respondent 3M's 2020 10-K at pp. 112-113, *available at*: www.sec.gov.) The SEC filing also notes that another $662 million has been reserved for these claims. Respondent MSA is also reserving funds for these claims on the order of $40 million. Respondent MSA was named as a defendant in 1,675 cumulative trauma lawsuits comprised of 4,554 claims at December 31, 2021. (Respondent MSA 2021 Annual Report at 10, *available at*: https://investors.msasafety.com/static-files/c7f78094-c346-4a3d-91f6-2bdde2feecc2). In fiscal 2020 and fiscal 2019, Respondent AO's successor, Cabot, recorded charges of $53 million and $20 million, respectively related to the respirator liability, including a large group of claims alleging serious injury, brought by coal workers in Kentucky and West Virginia represented by common legal counsel. Through a series of transactions and agreements involving Respondent AO and other companies, a Payor Group was created to deal with these liabilities. The Payor Group's share of the liability for this settlement was $65.2 million. This Group made payments related to its respirator liability of $37 million in both fiscal 2021 and fiscal 2020 and $10 million in fiscal 2019. The majority of the payments in fiscal 2021 and fiscal 2020 relate to the settlement noted above. (Cabot 2021 10-K at pp. 76-77, Note T, *available at*: https://sec.report/Document/0001564590-21-058692/)

The next step in the *Dunn/Hoke* analysis is to determine whether the discovery rule should apply. In Syllabus Point 4 of *Dunn*, the West Virginia Supreme Court explained the discovery rule as follows:

> Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

See also Syllabus Point 8, *State ex rel. 3M Co. v. Hoke*, 244 W.Va. 299, 852 S.E.2d 799 (2020)(the statute of limitation in West Virginia Code § 46A-7-111(2) (1999) begins to run, from the time the Attorney General discovers or reasonably should have discovered the deception, fraud, or other unlawful conduct supporting the action. Determining that point in time is generally a question of fact.").

The discovery rule is particularly applicable in cases involving pure latent diseases, which develop over time and are diagnosed several years after the plaintiff no longer is exposed to the risk created by the defendant. A pure latent disease is one where "the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred." *Jones v. Trustees of Bethany College*, 177 W.Va. 168, 170-71, 351 S.E.2d 183, 185-86 (1986).

The West Virginia Supreme Court reiterated in Syllabus Point 5 of *Dunn* that the application of the discovery rule raises questions of fact for the jury to decide. Each Petitioner in this joint appeal presented evidence on when he learned various relevant facts. None of Petitioners had any actual knowledge about a possible products liability claim that could be asserted against Respondents until they met with counsel, which was well within the statute of limitations. Petitioners also presented evidence regarding the conflicting medical opinions received when they

applied for black lung benefits. Additionally, a jury also could consider the evidence that Petitioners filed their claims withing two years from the dates they were diagnosed with either PMF or totally disabling pulmonary impairment.

The final applicable step under *Dunn/Hoke* is whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled.

In *Rice v. Diocese of Altoona-Johnston*, 255 A.3d 237, 247-48 (Pa. 2021), the Pennsylvania Supreme Court explained the differences between applying the discovery rule and fraudulent concealment doctrine in determining whether the statute of limitations was met:

> Whereas the "discovery rule" tolls the statute of limitations, the fraudulent concealment doctrine "is based upon estoppel [and] has its basis in equity."…. Generally speaking, tolling "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Dubose v. Quinlan*, 643 Pa. 244, 173 A.3d 634, 644 (2017)(quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014) (citation omitted))….Fraudulent concealment, in contrast, is rooted in the recognition that fraud can prevent a plaintiff from even knowing that he or she has been defrauded. **Effectively, the distinction is that where fraud has prevented the plaintiff from knowing of his or her cause of action, that cause of action simply does not even exist until the plaintiff becomes aware of, *i.e.*, "discovers," the fraud.** (Emphasis added).

Respondents knew of the defects in their products beginning as early as the 1950s and certainly by the 1970s with respect to their respirators' failure to protect coal miners from lung disease. Yet, Respondents continued to market, advertise, and sell these products through at least 1998, when the regulatory standards changed and these respirators could not pass the new test

administered by NIOSH. Between 1998 and the present, Respondents have settled many of these lawsuits confidentially, but have not otherwise taken any steps to correct the situation that is clear from their internal records—Respondents put coal miners who wore these products in danger of serious injury and death. There have been no recalls, no warnings, no apologies, nor any public explanations.

In these seven cases, the statute of limitations is tolled under the fraudulent concealment doctrine until Petitioners learned of Respondents deceit. The record before this Court is clear—Petitioners did not learn of Respondents' fraudulent concealment of these critical facts until after their cases were filed. However, again to be consistent with the case law, Respondents have the right to dispute this evidence and ultimately the juries in these cases will be left to resolve these disputed claims.

Petitioners have presented facts (largely based upon Respondents' internal documents and depositions) demonstrating they knew their products were unsafe and dangerous to coal miners, but marketed and sold them anyway. Petitioners testified they promptly filed their separate complaints easily within two years after they were advised by counsel of the defects in the respirators. Even under an objective ("should have known") standard, the reasonableness of Petitioner's belief, or lack of knowledge, is unquestionably a jury issue.

Petitioners anticipate Respondents will cite three recent unpublished cases (*Preece*, *Teets*, and *Collins*) involving defective respirator litigation where the courts held the statute of limitations barred those claims. The unpublished Circuit Court decision, *per curiam* opinion, and Memorandum Decision are unhelpful to the analysis here for, at least, the following three reasons: (1) the record in those unpublished cases did not include the devastating and overwhelming evidence of fraudulent concealment present in Petitioners' cases, (2) the history of the plaintiffs in

those cases are also distinguishable, and (3) Petitioners have presented legal arguments herein that were not made in those cases.

In *Preece v. Mine Safety Appliances, Co.*, a circuit court ruling where the appeal was withdrawn, Paragraph 12 of Judge Young's order states it was alleged that Respondent MSA committed fraud by selling a version of the Dustfoe 66 respirator approved under outdated government regulations and failed to perform all of the quality assurance testing required under the government approval program. Similarly, in *Teets v. Mine Safety Appliances, Co.*, 2021 WL 3280528 (N.D.W.Va. 2021)(unpublished), Judge Groh characterized the fraudulent concealment issue in *Teets* as "purported fraud revolv[ing] around misleading statements and selling expired or untested respirators." Faced with a scant record consisting of "speculative allegations," the Fourth Circuit in an unpublished, *per curiam* opinion described Teets as claiming that "MSA committed fraud by hiding information about whether their respirators were properly tested." *Teets v. Mine Safety Appliances Co., LLC*, No. 21-1834, 2022 WL 14365086, at **3, 7 (4th Cir. Oct. 25, 2022)(*per curiam*)(unpublished). Likewise, in *Collins v. Mine Safety Appliances, Co.*, 2022 WL 10084174 (W.Va. 10/17/22)(Memorandum Decision), the plaintiff failed to make a record justifying the application of either the discovery rule or the fraudulent concealment doctrine.

By contrast, the record evidence in these cases does not just involve outdated government regulations and quality assurance failures. The record evidence here includes the Respondents' internal documents demonstrating, for example, they knew their respirators were "unacceptable in the underground mining area," was "borderline with no safety margin," and that it was "unconscionable" and a "worker safety issue" because the "user, who is depending on the electrostatic filter for respiratory protection, has no 'indicator' that the electrostatic filter is losing its efficiency ... only his uncontrollable, unwitting, and unwanted exposure to the hazard." Despite

these types of internal documents demonstrating Respondents' knowledge of the defects and their danger, Respondents did nothing to notify coal miners of these

In the present cases, Petitioners have provided these and other internal documents relating to evidence of the defects in the respirators, Respondents' knowledge of these defects, and Respondents fraudulently concealing this critical information from the public and Petitioners. At the same time, Respondents continued to sell its respirators and marketed them to coal companies when they knew their respirators were not suitable for use in coal mines, placing Petitioners and other coal miners in danger without taking any steps to correct this life-threatening situation. This evidence and the legal arguments made on behalf of Petitioners simply were not addressed in the Orders in *Preece*, *Teets*, and *Collins*. Consequently, Petitioners respectfully submit these three decisions do not provide Respondents with any persuasive authority in the present cases.

In *Teets*, it was "undisputed" that the plaintiff knew of the three *Gaither/Dunn* elements that trigger the statute of limitations for an individual to run – (1) that plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached the duty, and (3) that the conduct of that entity has a causal relation to the injury – in April 2017, but he did not file his claim until October 2019. *Teets v. Mine Safety Appliances Company, LLC*, 2022 WL 1436086 (4th Cir. 2022) (*per curiam*); *see also* Syl. Pt. 3, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009); Syl. Pt. 4, *Gaither v. City Hosp., Inc., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). In assessing these three "undisputed" elements, the Fourth Circuit noted that "in 2017, Teets knew that he had been injured, that the inhalation of coal dust caused CWP, that he always wore respirators made by Moldex and MSA, and that the respirators would prevent CWP if they worked properly." *Id.* (emphasis added). The unpublished Fourth Circuit Opinion used these undisputed, subjective facts regarding Teets's

personal knowledge apparently to draw its conclusion on the objective "should have known" standard regarding the third element of when Teets reasonably should have known about the causal link between the product and his injury. *See id.*

But the same undisputed facts used by the Fourth Circuit in *Teets* are not present in these cases. The factual record in this case is more complex and contested. These particular Petitioners did not "always" wear the respirators in question. Further, the respirator manufacturers themselves have long argued that their respirators do not prevent CWP even when working properly.

The well-known fact that coal dust can lead to some level of CWP is not the same thing as understanding the causal link between the defect in the respirators that could lead to a more serious lung disease such as PMF. The assumption that because a coal miner once used a respirator and later develops a latent coal dust related disease that means the respirator must have been defective is refuted by Respondents own experts, who testified that when a coal miner was diagnosed with coal workers' pneumoconiosis/black lung and previously had worn a respirator, that does not, in fact, necessarily mean the respirator was defective. (JA 8111, 8204). Thus, Respondents' own experts, educated in the field of industrial hygiene and respiratory protection, testified there was no apparent causal connection between their defective products and the miners' diseases. This point was not made in *Preece, Teets* or *Collins*.

Instead of resolving the disputed facts relevant to the statute of limitations, discovery rule, and fraudulent concealment doctrine, the trial court should have denied the summary judgment motions so that the jury, in deciding what Petitioners reasonably should have known, could consider all of the evidence, including, but not limited to:

1. The main information Petitioners had regarding the respirators is that they were government approved.

2. Petitioners' employers provided the respirators to them for daily use.

3. The respirators had no information or warning on them notifying Petitioners that they were not suitable for use in a coal mine environment.

4. During the relevant time period, Respondents did not do any marketing or issue any press releases advising Petitioners and other coal miners that they should not use their respirators.

5. Respondents still dispute that their respirators were defective or otherwise should not have been used in coal mining.

6. Petitioners received conflicting medical opinions on whether they suffered from some form of black lung. During the time when experts disputed whether Petitioners even had any coal dust related impairment, what obligation did Petitioners have to investigate a possible products liability claim when questions existed as to whether Petitioners had suffered any injury?

7. Petitioners consulted with counsel within two years before their complaints were filed and learned for the first time of their possible products liability claims against Respondents.

8. While the dates on which various events occurred may not be disputed, the inferences arising from these events are disputed.

Somehow the trial court resolved all of the facts and inferences in favor of Respondents and concluded as a matter of law that these coal miner Petitioners acted unreasonably and on their own should have determined earlier there was a causal link between their latent diseases and the defects of Respondents' respirators. Petitioners respectfully submit the controlling case law, the facts in this record, and the inferences derived therefrom require the trial court's final order dismissing Petitioner's cases to be reversed and these cases must be remanded so that a jury can decide the statute of limitations issues presented.

C. Pulmonary massive fibrosis is a distinct actionable injury from simple clinical pneumoconiosis

In *Jones v. Trustees of Bethany College*, 177 W. Va. 168, 170, 351 S.E.2d 183, 185 (1986), the West Virginia Supreme Court recognized that the discovery rule tolls the limitations period in products liability cases involving a "pure latent injury" because the onset of the injury is ***"not***

sufficiently pronounced" to put a plaintiff on notice that he has been injured by the defective product:

> [C]ourts have expanded the discovery rule to product liability cases dealing with chemicals, drugs, asbestosis, and products like the Dalkon Shield. The common denominator in these cases is that the product often causes an injury only after a lengthy period of exposure or the injury surfaces only after a considerable period of time from the date of exposure. **Because the injury initially is not sufficiently pronounced to put a plaintiff on notice that he has been injured, courts conclude the statute of limitations does not begin to run until the plaintiff is aware of the injury or through reasonable diligence should have been aware of the injury.** (Emphasis added).

Citing e.g., Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018 (1949) (silicosis); *Young v. Clinchfield R.R.*, 288 F.2d 499 (4th Cir. 1961) (silicosis); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869, 95 S.Ct. 127 (1974) (asbestosis); *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (polyvinyl chloride fumes causing chronic lung disease); *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259 (N.D.W. Va. 1982) (air pollutants); *Pauley v. Combustion Engineering, Inc.*, 528 F. Supp. 759 (S.D.W. Va. 1981) (asbestosis); *Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84 (Ind. 1985) (Dalkon Shield); *Cullender v. BASF Wyandotte Corp.*, 146 Mich. App. 423, 381 N.W.2d 737 (1985) (acrylonitrile inducing cancer); *Condon v. A.H. Robins Co., Inc.*, 217 Neb. 60, 349 N.W.2d 622 (1984) (Dalkon Shield); *Colvin v. FMC Corp.*, 43 Or. App. 709, 604 P.2d 157 (1979) (Pyrenone); *Anthony v. Abbott Laboratories*, 490 A.2d 43 (R.I. 1985) (DES); *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 496 A.2d 154 (1985) (DES); *Olson v. A.H. Robins Co., Inc.*, 696 P.2d 1294 (Wyo. 1985) (Dalkon Shield).

The onset of PMF or complicated pneumoconiosis creates a separately actionable injury in tort under the laws of West Virginia. The tort cause of action based on PMF is known as a "deliberate intent" claim pursuant to W.Va.Code §23-4-2. Section 2 expressly provides an

actionable injury based on coal mine dust exposure only accrues once a miner conclusively establishes the fact that he suffers from *both* the specific injury of PMF—a mere diagnosis of simple clinical pneumoconiosis does not suffice--and at least fifteen percent pulmonary impairment. *See* W.Va.Code §23-4-2(d)(II)(B)(v)(IV).

Anything less than the distinct disease of PMF does not create an actionable tort against an employer based upon coal mine dust exposure in West Virginia. A reasonable coal miner should not be charged with knowing that PMF represents a distinctly actionable injury in relation to certain tortfeasors (*i.e.* his employers), but not others (manufacturers and suppliers of defective products) who play a part in causing that very same injury.

Coal miners are extremely knowledgeable about many matters, but the question of when a mild or totally undetectable, non-injurious case of black lung transforms into progressive massive fibrosis is not one such matter. Indeed, even the nation's preeminent expert radiologists routinely disagree about whether pulmonary fibrosis is attributable to coal mine dust exposure and/or whether it has progressed from the simple to complicated stage. It is unreasonable to hold that a lay person must detect the onset of such a latent and inherently undetectable injury as pneumoconiosis, or that if he or she does detect it, that such detection triggers a duty to investigate and prosecute legal claims in tort against the manufacturers of all potentially defective products that might have contributed to that injury. Until the miner reasonably understands the injury has become "sufficiently pronounced" to represent a distinctly recognizable harm, it is manifestly unreasonable to impute notice to the miner that something might have been defective in one or more of the various safety devices utilized by that miner over the course of decades of underground labor.

The West Virginia Supreme Court expressly recognized in Syllabus Point 1 of *Hickman* that in products liability cases the statute of limitations only begins to run once the plaintiff has knowledge that the product had a causal relation to the injury as to which he seeks a remedy. Establishing the causal relationship to the plaintiff's injury in a toxic exposure case can be very complicated because there are so many factors. Expert witnesses viewing the same facts can disagree over whether or not the defective mask caused the plaintiff's injury. In *Young v. Clinchfield Railroad Company*, 288 F.2d 499, 503 (4th Cir. 1961), the Fourth Circuit explained why it is untenable to charge a coal miner with receiving notice of injury for purposes of triggering the statute of limitations in cases just like these, where multiple expert radiologists have reviewed medical records and found no such pneumoconiosis, or formed conflicting opinions:

> Residence in the mining country of West Virginia does not invest one with the expert knowledge or diagnostic skill sought to be attributed to the plaintiff. The sought-for inference [that the latent injury was caused by a defective product] could rest on nothing more than speculation. ... A medical judgment that eluded the specialist cannot reasonably be expected from the plaintiff.

Petitioners did not learn their latent diseases had become "sufficiently pronounced" to trigger notice the respirators were defective until less than two years prior to filing their complaints. At minimum, when Petitioners learned of their progressive latent diseases is an issue of fact that should be submitted to a jury.

VI. Conclusion

For the foregoing reasons, Petitioners Ronald Hardy, Ralph Manuel, Edgel Dudleson, Ricky Miller, Mark Scott, Gary Scott, and James Cruey respectfully ask the Court to grant oral argument, to reverse the summary judgment order entered by the Circuit Court of McDowell County, and to remand this case for a jury to resolve all issues raised in these cases.

RONALD HARDY, RALPH MANUEL, EDGEL DUDLESON, RICKY MILLER, JAMES CRUEY, MARK SCOTT, and GARY SCOTT, Petitioners,

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BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-123

RONALD HARDY, RALPH MANUEL, EDGEL DUDLESON, RICKY MILLER, JAMES CRUEY, MARK SCOTT, and GARY SCOTT,

Petitioners, Plaintiffs below,

v.

3M COMPANY, MINE SAFETY APPLIANCES COMPANY, LLC, AMERICAN OPTICAL CORPORATION, CABOT CSC CORPORATION, CABOT CORPORATION, EASTERN STATES MINE AND INDUSTRIAL SUPPLY, AND RALEIGH MINE AND INDUSTRIAL SUPPLY,

Respondents, Defendants below.

JOINT APPEAL FROM THE CIRCUIT COURT OF MCDOWELL COUNTY

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on January 9, 2023, a copies of the foregoing **PETITIONERS' JOINT APPEAL BRIEF** and **JOINT APPENDIX** were electronically served on all counsel of record using the File and Xpress system.

/s/ Lonnie C. Simmons
Lonnie C. Simmons (WVSB #3406)