

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-123

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**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.

Appeal from the Circuit Court of McDowell County, West Virginia

PETITIONERS' JOINT REPLY BRIEF

Lonnie C. Simmons (WVSB 3406)
Robert M. Bastress III (WVSB 9616)
**DiPIERO SIMMONS McGINLEY &
BASTRESS, PLLC**
604 Virginia Street, East
Charleston, West Virginia 25301
304-342-0133

Bren J. Pomponio (WVSB 7774)
MOUNTAIN STATE JUSTICE, INC.
1217 Quarrier St.
Charleston, West Virginia 25301
304-344-3144

Samuel B. Petsonk (WVSB 12418)
PETSONK LAW
P.O. Box 1045
Beckley, West Virginia 25802
304-712-9858

Counsel for Petitioners

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PETITIONERS' JOINT REPLY BRIEF

I. Introduction

To the Honorable Judges of the

Intermediate Court of Appeals of West Virginia:

Petitioners Ronald Hardy, Ralph Manuel, Edgel Dudleson, Ricky Miller, Mark Scott, Gary Scott, and James Cruey respectfully file **PETITIONERS' JOINT REPLY BRIEF** in response to the separate briefs filed by 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)¹, Respondent Eastern States Mine and Industrial Supply (Respondent Eastern States), and Respondent Raleigh Mine and Industrial Supply (Respondent Raleigh Mine).²

Before replying to some of the assertions and arguments made, another relevant ruling in this line of cases recently was made after Petitioners filed their initial brief. In a case styled *Robert Tucker v. Mine Safety Appliances Company, LLC, Eastern States Mine Supply Co., and Raleigh Mine and Industrial Supply*, 21-C-262, the plaintiff, a coal miner, filed a products liability action against MSA as the manufacturer of the respirator he wore while working in the coal mines as well as against two distributors. In 2000, Mr. Tucker was awarded 5% workers' compensation based on a diagnosis of medically *de minimis* black lung with zero pulmonary functional impairment attributable to that disease.

Mr. Tucker testified it was in May 2021, that he first understood that he suffered from black lung disease. On August 20, 2021, the U.S. Department of Labor's Office of Workers' Compensation Programs issued a Proposed Decision and Order, proposing to decide for the first time that Mr. Tucker had developed a greater degree of impairment due to black lung disease, after reconciling contradictory evidence. On September 10, 2021, Mr. Tucker filed his products liability

¹In footnote one of Respondent AO's brief, for some reason, counsel for Respondent AO suggests that two bankrupt entities, Aearo Technologies LLC, and Aearo LLC, named in two of the seven underlying actions, somehow should be included in this joint appeal. This issue already has been fully briefed by the parties and resolved by this Court. The bankruptcy stay was filed on July 28, 2022, the summary judgment hearing was held on August 15, 2022, and the final order was issued on September 7, 2022. At the summary judgment hearing, the trial court and counsel for Respondent AO made it clear that the actions against these two bankrupt companies were stayed, so the hearing went forward with all of the remaining defendants. After considering these facts, this Court on October 13, 2022, entered the order permitting these seven separate cases to be appealed jointly. Thus, neither of these Aearo entities is involved in this appeal because the claims against them are automatically stayed because they filed for bankruptcy.

²Respondents Eastern States and Raleigh Mine filed a short brief joining in the more substantive briefs filed by the other three Respondents.

action. Mr. Tucker did not know about the concealed defects in the respirators until speaking with his lawyer less than two years before his lawsuit was filed. These facts mirror the circumstances faced by several of Petitioners.

The defendants in *Tucker* once again moved to dismiss the claim based upon the statute of limitations. At the hearing held on February 8, 2023, Judge Cindy Scott denied the motion for summary judgment, finding there was a genuine dispute of material fact such that the Court could not resolve this issue as a matter of law. The written order in the *Tucker* case has not yet been entered.

In addition to the claims filed by Petitioners and Mr. Tucker, there are many similar products liability cases working through the system now where coal miners developed latent respiratory diseases due to exposure to coal dust and only later learned that the respirators they used while working were defective. Several of these cases now are stayed pending the outcome of this joint appeal. Petitioners respectfully submit that once this Court issues a final decision in these cases, the decision should be consistent with the West Virginia Supreme Court's holding in *State ex rel. 3M Co. v. Hoke*, 244 W.Va. 299, 304, 852 S.E.2d 799, 804 (2020), where similar motions for summary judgment on the statute of limitations issue were denied so that a properly instructed jury can resolve all of the factual issues presented.

II. Reply to statement of facts

Because this joint appeal involves a final order granting summary judgment, the parties necessarily included a comprehensive recitation of the facts regarding the claims asserted by each of the seven Petitioners. In **PETITIONERS' JOINT APPEAL BRIEF**, there is a detailed discussion of the challenges each Petitioner had in seeking to obtain black lung benefits. All seven Petitioners timely filed their complaints within two years from the date they learned of their black

lung diagnosis after litigating the issue through the available administrative process. Respondents disregard these facts and suggest that the statute of limitations for a products liability action against Respondents for their defective respirators begins when a coal miner simply files for black lung benefits, regardless of whether the presence of that disease has been confirmed.

Whether or not a coal miner qualifies for black lung benefits is based upon expert medical determinations made after reviewing the relevant records. Medical experts often disagree about the diagnosis, demonstrating just how challenging it is for a coal miner to determine whether, as a factual matter, his pulmonary ailment does or does not actually arise from his coal mine dust exposure. However, the process for obtaining black lung benefits begins when the coal miner files an application. Respondent MSA references the language on the federal black lung form requiring the miner to assert he or she is totally disabled, under the threat of fine and imprisonment. (Respondent MSA brief, at 4). While the form does have that language, that does not mean that every coal miner who has ever applied for federal black lung benefits automatically receives them. The up and down machinations of the administrative process experienced by Petitioners as set out in **PETITIONERS' JOINT APPEAL BRIEF** demonstrate just how unpredictable pursuing black lung claims can be.

The earliest date that these Petitioners had a reason to learn whether the use of Respondents' respirators contributed to their disease is once Petitioners finally learned that the relevant factfinders (typically, administrative law judges) had reconciled all the conflicting evidence and concluded they were suffering more than *de minimis* medical harm from coal mine dust lung disease (*e.g.*, pulmonary massive fibrosis ("PMF"), sometimes referred to as complicated pneumoconiosis or complicated black lung), and that ruling was communicated to and understood by Petitioners. Fundamentally, unless and until Petitioners know for sure they are suffering from

one or more diseases caused by the inhalation of dust, there would not be any reason to investigate whether any tortfeasors contributed to Petitioners' respiratory problems. Yet, notwithstanding the logical untenability of their assertions, Respondents maintain that Petitioners should have investigated and filed civil claims based on an as yet unproven occupational injury.

Respondents never explain why, as a matter of law, the conflicting medical evidence in Petitioners' cases is not something for the jury to consider in resolving the statute of limitations issue. Instead, Respondents contend only the facts they discuss are relevant and these facts establish, as a matter of law, that the statute of limitations has expired in all seven cases. Petitioners agree with Respondents that the relevant and admissible facts they cite in their briefs are relevant to this inquiry. However, Petitioners disagree that these facts are the *only* relevant facts a jury should be permitted to consider in resolving the statute of limitations question.

When a coal miner applies for black lung benefits, that does not mean the coal miner has black lung or will be successful in proving that he or she has this disease. Until an official finding of PMF or related respiratory disease has been made and communicated to Petitioners, Petitioners would not have any reason to investigate all of the possible contributors to this diagnosis.

The factual nature of this statute of limitations inquiry, consistently held by the West Virginia Supreme Court in multiple cases cited by all parties, is illustrated by the extensive discussion of the facts in the briefs filed. Respondents' attempt to persuade the Court that only the facts they cite are relevant and controlling is contrary to our statute of limitations case law, where it is the jury's role to evaluate all of the facts before reaching a decision on the statute of limitations. Petitioners respectfully submit, consistent with controlling West Virginia case law, that all of the relevant and admissible facts identified by Petitioners and Respondents should be presented to the

jury to consider and decide whether or not Petitioners' claims were filed timely within the applicable statute of limitations.

III. Reply to arguments

In the briefs, Petitioners and Respondents cite many of the same cases--*State ex rel. 3M Co. v. Hoke*, 244 W.Va. 299, 852 S.E.2d 799 (2020); *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009); *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810 (1987); *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Petitioners emphasize the language in these decisions holding that whether a complaint was filed timely generally is a fact question. Respondents counter by focusing on the word "generally" and cite cases where the application of the statute of limitations was resolved as a matter of law. Thus, to resolve this joint appeal, the Court will need to analyze the facts relevant to each Petitioner. Because Petitioners already have argued at length that the myriad fact issues in this record preclude summary judgment, those arguments will not be repeated.

Respondents AO, MSA, and 3M engage in extensive discussions of a Memorandum Decision from the West Virginia Supreme Court, an unpublished decision from the United States District Court for the Northern District of West Virginia, and a Wayne County Circuit Court ruling. In **PETITIONERS' JOINT APPEAL BRIEF**, *Collins v. Mine Safety Appliances, Co.*, 2022 WL 10084174 (W.Va. 10/17/22)(Memorandum Decision), *Teets v. Mine Safety Appliances, Co.*, 2021 WL 3280528 (N.D.W.Va. 2021)(unpublished), and *Preece v. Mine Safety Appliances, Co.*, are discussed and distinguished from the facts and record developed in Petitioners' cases.

These Respondents criticize Petitioners for relying on the decision in *Hoke*, which is a very comprehensive authored opinion from the West Virginia Supreme Court analyzing all of the facts and theories asserted by Petitioners in these seven cases. *Hoke* provides the correct legal analysis

that the trial court should have applied in Petitioners' cases and is far more persuasive than the limited holdings in *Collins*, *Teets*, and *Preece*.

Although Respondents go to great lengths to distinguish *Hoke*, they nevertheless endorse the trial court's holding that "[t]he Attorney General's case creates 2003 as a year that would make a reasonable, objective plaintiff aware of the alleged defects in Defendants' masks and respirators." Somehow all coal miners are bound to have knowledge of the "Attorney General's 2003 filing [in *Hoke*] as a definitive line in the sand." (Respondent MSA brief, at 9, 30). Under this unsupported theory offered by the trial court and accepted by Respondents, coal miners not only have to worry about feeding their families, paying the rent, keeping healthy enough to work, and otherwise living, but they also have to keep up with all of the possible litigation taking place. While the trial court identified this "line in the sand" seeking to create an absolute date upon which all statutes of limitations in these cases begins to run, this unprecedented holding is belied by the case law recognizing the factual nature of this inquiry. Each one of the products liability cases filed or to be filed by coal miners against Respondents must be evaluated on a case-by-case basis for each plaintiff to determine whether or not the complaint was filed timely.

Respondents 3M and MSA rely heavily on *dicta* included in *Goodwin v. Bayer Corp.*, 218 W.Va. 215, 624 S.E.2d 562 (2005), which is a *per curiam* decision.³ The facts in *Goodwin* are unique to that plaintiff and the West Virginia Supreme Court evaluated those specific facts in concluding the plaintiff's claim was barred by the statute of limitations. That plaintiff testified "at least by 1997, that his breathing problems were attributable to his use of isocyanate-containing paint products manufactured by the defendants." 218 W.Va. at 221, 624 S.E.2d at 568. While

³ An unsigned opinion has less precedential value, particularly where the holding is contradicted by a published decision. Syllabus Point 5, *State v. McKinley*, 234 W.Va. 143, 764 S.E.2d 303 (2014).

Goodwin provides another example of the case-by-case factual inquiry required in these cases, the overreliance by Respondents on certain phrases and *dicta* used in that decision is misplaced.

Critically, in *Goodwin*, the nature of the injury that triggered the Plaintiff's statute of limitations was *not* a pure latent injury, such as pneumoconiosis, whose etiology and symptomatology are not immediately apparent. The West Virginia Supreme Court in *Goodwin* expressly recognized that the statute of limitations would not begin to run the minute a worker first noticed he had medical symptoms when the injury involved was a pure latent injury such as Petitioners' diseases in these consolidated cases. In *Goodwin*, the West Virginia Supreme Court was able to resolve the application of the discovery rule based upon the plaintiff's specific testimony where he admitted knowing he had a disease and he associated his disease with the inhalation of paint fumes. However, in products liability cases, as explained in Syllabus Point 4 of *Goodwin* and Syllabus Point 4 of *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), often the causal link between the plaintiff's illness or injury and the use of a particular product is going to be a fact question.

The development of a latent disease over time and investigating what may have contributed to that disease is a factually complex question. In comparison, the inhalation of paint fumes that caused an immediate, acute, and adverse health event in the *Goodwin* case is more readily apparent. Unlike the acute harm sustained by the plaintiff in *Goodwin*, the inhalation of coal mine dust does not cause any appreciable or immediate harm to the worker's health. Questions of causation when a person is diagnosed with a latent disease such as PMF or other related respiratory disease necessarily are more complex, as recognized by the West Virginia Supreme Court in *Goodwin* and the long line of cases applying the pure latent injury doctrine.

The trial court and Respondents conclude the causal connection between Petitioners use of Respondents' defective respirators and Petitioners' latent black lung disease was so obvious Petitioners had to know of this causal connection. For example, Respondent AO asserts that Petitioner Edgel Dudleson and Petitioner Gary Scott knew they had some disease and knew the manufacturer of the respirators they used. (Respondent AO brief, at 20). This conclusion not only oversimplifies the type of evidence required to prove that a product is defective, but also ignores the testimony of Respondents' own experts, who testified that when a coal miner is 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.

The trial court and Respondents seek to persuade this Court that the application of the discovery rule in these cases only requires each Petitioner to have some undefined respiratory illness and then each Petitioner has a reason to investigate all of the possible culprits, whose tortious actions contributed to the disease. It is worth reexamining Syllabus Point 1 of *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810 (1987), which provides:

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 *Hickman* standard is not as straightforward as the trial court and Respondents suggest. Step one requires the plaintiff to know he or she has been injured. As applied to Petitioners, the relevant injury is a latent disease that developed over time caused by the inhalation of coal dust. Thus, it is critical for each Petitioner to understand that the medical evidence proves he or she has

black lung. Until that question is resolved, particularly where multiple experts disagree over whether each Petitioner had indeed contracted PMF or some coal dust related disease, the “know or should have known” process of finding other causes for the disease is not triggered.

The critical final step of investigating whether the use of a particular product has a causal connection to the latent disease is not nearly as simple as the trial court and Respondents make it out to be. In Petitioners’ cases, they used OSHA-approved respirators, were provided respirators by their employers on a regular basis, were never presented with any warning labels on the respirators explaining they were not fit to be used in coal mines, were never advised by Respondents or any governmental agency of any problems with the use of these respirators, and were not made aware of any problems with these respirators until they filed their products liability actions. It was not until coal miners began suing Respondents that these companies were forced to produce internal documents exposing how thoughtless and cavalier they were in risking the health and safety of coal miners, who were oblivious to the defects in the respirators.

When companies are engaged in bad behavior just to make a profit, regardless of whose lives are permanently destroyed as a consequence, litigation has a way of forcing them to expose internal documents they never wanted revealed. Hoards of internal documents from these Respondents have been uncovered in discovery where they acknowledged how unfit their respirators were for use in a coal mine. Petitioners had no ability to gain access to this damning but vital material until these respirator cases began to be litigated in recent years.

Suppose Petitioners, after learning they had a coal dust related latent disease, went to Respondents and explained that a trial court in West Virginia insists Petitioners should have known that Respondents’ respirators were defective. Petitioners then could ask Respondents to hand over the millions of pages of internal documents generated in connection with their respirators to

determine whether or not a viable products liability claim should be filed. The absurdity of this scenario is matched by the sophistry of the claim that each Petitioner simply had to be sick and to know the identity of the respirator manufacturer to make the causal connection between the sickness and the use of the respirator.

A properly instructed jury should be permitted to consider all of the relevant facts, including the internal admissions hidden by Respondents, to determine whether Petitioners should have known that Respondents' respirators were defective and a contributing cause to their PMF or other coal dust related disease. Even under an objective ("should have known") standard, the reasonableness of Petitioners' actions and lack of knowledge is unquestionably a jury issue. Petitioners respectfully submit that resolving the application of the discovery rule as a matter of law was a clear error by the trial court that must be reversed.

Finally, while Respondent MSA minimizes, but does not deny, the fraudulent concealment evidence cited against it, it goes on to assert the internal evidence showing its respirators were not fit for use in coal mines somehow is of no consequence. (Respondent MSA brief, at 24). Respondent 3M similarly references the specific fraudulent concealment evidence relating to its respirators as being unfit for use in coal mines and does not deny the truth of these claims, but nonetheless asserts, "None of that matters." (Respondent 3M brief, at 38).

None of that matters? Petitioners respectfully beg to disagree. The extensive fraudulent concealment engaged in by Respondents, the magnitude of their lies, and ultimately the permanent injuries Respondents' prevarications have caused is very relevant for a jury to consider in deciding whether Petitioners filed their complaints within the statute of limitations. Keeping these internal documents hidden while Respondents continued to sell respirators for use in coal mines certainly

impacted the ability of Petitioners to know whether or not they could assert a valid products liability action against Respondents over their defective respirators.

Even the trial court and Respondents would have to admit that by not going public with the fact that these respirators provided woefully inadequate protection and were inappropriate for use in coal mines at least made it much more difficult for Petitioners to discern whether or not they had legitimate products liability claims to assert. Once again, a properly instructed jury should be permitted to consider all of this fraudulent concealment evidence as well as whatever evidence Respondents choose to present to show why Petitioners "should have known" just how defective Respondents respirators were. The jury then will be in a position to decide whether the statute of limitations for Petitioners' claims was tolled by Respondents' fraudulent concealment or whether despite all of Respondents' lies, Petitioners should have been able to figure out that Respondents' defective respirators contributed to Petitioners' latent diseases.

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,**

--By Counsel--

/s/ Lonnie C. Simmons

Lonnie C. Simmons (WVSB #3406)
Robert M. Bastress III (WVSB #9616)
**DiPIERO SIMMONS McGINLEY &
BASTRESS, PLLC**
P.O. Box 25326
Charleston, West Virginia 25301
(304) 342-0133
Lonnie.simmons@dbdawfirm.com
Rob.bastress@dbdlawfirm.com

Samuel B. Petsonk (WVSB #12-418)
PETSONK PLLC
PO Box 1045
Beckley, WV 25802
(304) 900-3171
Sam@petsonk.com

Bren J. Pomponio (WVSB #7774)
MOUNTAIN STATE JUSTICE
1217 Quarrier Street
Charleston, West Virginia 25301
(304) 344-3144
bren@msjlaw.org

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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on March 15, 2023, the foregoing **PETITIONERS' JOINT REPLY BRIEF** was electronically served on all counsel of record using the File and Xpress system.

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