IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Feb 23 2023
03:27PM EST
Transaction ID 69208059

No. 22-ICA-123

RONALD HARDY, RALPH MANUEL, EDGEL DUDLESON, RICKEY 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.

RESPONDENT MINE SAFETY APPLIANCES COMPANY LLC'S RESPONSE IN OPPOSITION TO PETITIONERS' JOINT APPEAL BRIEF

Benjamin L. Bailey (WVSB #200)
Eric B. Snyder (WVSB #9143)
Nicholas S. Johnson (WVSB #10272) – *Counsel of Record*
John A. Budig (WVSB #13594)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, WV 25301
Telephone: (304) 345-6555
Fax: (304) 342-1110
bbailey@baileyglasser.com
esnyder@baileyglasser.com
njohnson@baileyglasser.com
jbudig@baileyglasser.com
Counsel for Respondent Mine Safety Appliances Company, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

This appeal concerns a single, simple issue—namely, when Petitioners' product-liability claims accrued for purposes of West Virginia's two-year statute of limitations. Petitioners claim MSA LLC's allegedly defective respiratory protection devices caused them to contract black-lung disease. MSA LLC disagrees that it was negligent or that its products were defective. All parties agree, however, that, under the discovery rule, those claims accrued when each Petitioner knew or, with reasonable diligence, should have known (1) that he was injured (*i.e.*, that "something was wrong"), (2) the identity of the maker of product that injured him, and (3) that the product had a causal relation to his injuries. The second prong is not at issue in this appeal. The trial court found that all Petitioners knew, at all relevant times, that MSA LLC had manufactured the respirators and filters they wore. Petitioners do not challenge this holding. The outcome of this appeal thus hinges on the first and third prongs.

As to the injury prong, the trial court closely examined the record and concluded that Petitioners knew or reasonably should have known they were injured when (1) they were diagnosed with black lung; (2) they received more than *de minimis* compensation from West Virginia's black-lung benefits program, which necessarily includes a finding of permanent partial impairment; or (3) they applied for federal black-lung benefits and certified to the federal government that they were "totally disabled" by black lung. Which of the three alternatives best captured the moment Petitioners obtained the requisite knowledge was ultimately an academic exercise. As to these Petitioners, *all* the dates that could have triggered the statute of limitations occurred more than two years before they filed suit.

Petitioners cannot escape the consequences of this reality. Their various efforts to do so would "create . . . exception[s] large enough to swallow the rule." *Teets v. Mine Safety Appliances*

Co., No. 21-1834, 2022 WL 14365086, at *2 (4th Cir. Oct. 25, 2022). Indeed, their arguments would mean a reasonably prudent person should not realize "something was wrong" when doctors (and federal agencies) told him he had black-lung disease, when West Virginia awarded him benefits for black-lung-related impairments, or when *he* told the federal government he was "totally disabled" by black lung. It is difficult to imagine when a reasonably prudent person would have realized "something was wrong" if *not* at these times. Unfazed, Petitioners further argue that two Petitioners' claims have not accrued for statute-of-limitations purposes even now, meaning a reasonably prudent person would not realize "something was wrong" when he filed a lawsuit alleging something was wrong. Put otherwise, as the trial court explained, if Petitioners' arguments are accepted, "[t]he legislatively-created statute of limitations would be for naught, and the discovery rule would be extended well beyond any formulation ever considered by the West Virginia Supreme Court of Appeals." JA 30. Petitioners' fifty-four-page appellate brief does nothing but prove the trial court right.

As to the third prong (*i.e.*, causal connection), the West Virginia Attorney General publicly alleged that MSA LLC's respirators were defective and caused users to develop black lung in 2003. Anyone injured after that date was necessarily on notice of the purported causal connection because any reasonable investigation into the injuries would have uncovered that public filing. Likewise, those injured before that date were on notice no later than 2003. For that reason, Petitioners' vague suggestion of fraudulent concealment fails. Moreover, each Petitioner testified that he wore respirators specifically to avoid black lung. *See, e.g.*, JA 1044, 1706, 2617, 3334, 3917, 3925–26. But each one was diagnosed with black lung. The diagnosis itself put each Petitioner on notice that the single-purpose respirators warranted investigation. Once again, the statute of limitations began to run more than two years before Petitioners filed their complaints.

The trial court got it right. West Virginia's two-year statute of limitations bars Petitioners' claims. The order granting summary judgment should be affirmed.

II. STATEMENT OF FACTS

A. Background

In August and September 2021, Ralph Manuel, Edgel Dudleson, Mark Scott, Gary Scott, and James Cruey (collectively, "Petitioners") brought product-liability claims against Mine Safety Appliances Company, LLC ("MSA LLC"), and other respirator or mask manufacturers.[1] As relevant here, they allege that MSA LLC's supposedly defective respirators failed to protect them from inhaling harmful coal dust. They also allege that MSA LLC concealed those purported defects from the public.

Petitioners spent decades working in underground coal mines in West Virginia. *See, e.g.*, JA at 4, 6, 7, 10, 13, 14. Petitioners wore MSA LLC's respirators intermittently for at least a portion of their mining careers. *See id.* at 23–24. All Petitioners knew, at all relevant times, that certain of the respirators they wore were manufactured by MSA LLC. *See id.* at 4, 31. Petitioners wore respirators to protect themselves against black lung and to prevent the inhalation of coal dust and related materials. *See id.* at 23–24, 31, 1044, 1045–49, 1706–13, 2554, 3334, 3339, 3917, 3925–27, 3935–37, 3951–52. As discussed below, Petitioners were nonetheless diagnosed with black lung. *See id.* at 1051, 1086, 1697–98, 1702–04, 1748, 1750, 1781, 2543, 3354–56, 3920–21. As discussed below, most were awarded state black-lung benefits because of impairments related to their diagnoses. *See id.* at 1699, 1738–42, 2545, 3333, 3922. And, as discussed below, all applied

[1] Petitioners Ronald Hardy and Rick Miller did not name MSA LLC as a defendant in their complaints. This brief addresses only the claims brought by the five Petitioners mentioned above.

for federal black-lung benefits as well. *See id.* at 1073–76, 1811–14, 3520–23, 2547–58, 2698–2702, 3965–66.

Critically, the application for federal black-lung benefits required Petitioners to describe "any disability [they] ha[d] due to pneumoconiosis (Black Lung) . . . resulting from coal mine employment." *Id.* at 1073. The application also required them to specify which "aspect(s) of [their] regular job[s] in the coal mines [they were] physically unable to perform as a result of [their] disability." *Id.* And, to ensure applicants understood the importance of this information, the application contained the following certification just above the signature line:

SIGNATURE OF MINER

I hereby certify that the information given by me on and in connection with this form is true and correct to the best of my knowledge and belief. I am also fully aware that any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this title shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than $1,000. or by imprisonment for not more than one year or both.

Id. at 1076. Indeed, federal black-lung benefits are available only to those who are "totally disabled" by black lung. *See, e.g.*, 30 U.S.C. § 901. Accordingly, an applicant for federal black-lung benefits necessarily tells the federal government—under threat of fine and imprisonment—it is "true and correct" that he is already "totally disabled" by black lung.

In 2003, the West Virginia Attorney General publicly filed a consumer-protection complaint against MSA LLC and other respirator and mask producers. *See* JA 25. The crux of that complaint is that MSA LLC and others designed, manufactured, and sold respirators in West Virginia that did not function as promised and, instead, caused users to develop black lung. *See id.* The Attorney General specifically alleged that MSA LLC's respirators and filters were defective and that MSA LLC had taken steps to conceal those defects from consumers and the public. *See id.* MSA LLC, of course, disputes the Attorney General's allegations, and the case remains in pre-trial litigation.

For purposes of this appeal, the various dates each Petitioner (i) was diagnosed with black lung, (ii) was awarded state black-lung benefits for more than a *de minimis* impairment, (iii) filed for federal black-lung benefits, and (iv) filed his complaint are most relevant.[2] Because those dates differ across the five Petitioners, MSA LLC will set them out separately.

Ralph Manuel

Mr. Manuel claims to have worn an MSA LLC respiratory protection device each year that he worked, but he donned the devices only when he believed conditions were sufficiently dusty. *See* Pets.' Br. at 14. As a result, he spent significant time underground without wearing any protective devices. *See id.* Mr. Manuel was diagnosed with black lung no later than July 10, 2018. *See* JA 1051, 1086. He applied for federal black-lung benefits—and thus certified to the federal government that he was already totally disabled by black lung—on May 29, 2018. *See id.* at 1073–76. More than three years after that diagnosis and certification to the federal government, Mr. Manuel filed his complaint on August 19, 2021. *See id.* at 812–29.

Edgel Dudleson

Mr. Dudleson claims to have worn an MSA LLC respiratory protection device 60% to 70% of the time during his thirty-eight years as an underground coal miner. *See* Pets.' Br. at 17; JA 1922 (also claiming to have worn other manufacturers' devices intermittently). For at least 30% or 40% of his time working underground, however, he wore no respiratory protection at all. *See id.* Mr. Dudleson was first diagnosed with black lung between 1996 and 2000 and certainly no later than November 30, 2018, or June 14, 2019, when additional scans confirmed the diagnosis. *See id.* at 1697–98, 1702–04, 1748, 1750, 1781. He was awarded state black-lung benefits for a

[2] The trial court disregarded state benefits in the amount of 5% because *de minimis* awards did not require a finding of impairment. *See* JA 31. Larger awards, on the other hand, required a finding of impairment. *See id.* MSA LLC likewise ignores *de minimis* awards in this recitation of facts.

10% permanent partial disability stemming from his diagnosis on January 16, 2003. *See id.* at 1699, 1738–42. He applied for federal black-lung benefits—and thus certified to the federal government that he was already totally disabled by black lung—on June 12, 2018. *See id.* at 1811–14. His counsel in that administrative process, who continues to represent him for this appeal, stated in support of his application that, by June 14, 2019, Mr. Dudleson "plainly and unequivocally [received] a diagnosis of [black lung] by a qualified radiologist." *Id.* at 1752–53. More than two years after his current lawyer wrote that letter to the federal government, Mr. Dudleson filed his complaint on August 19, 2021. *See id.* at 1757–75.

Mark Scott

Mr. Scott claims to have worn an MSA LLC respiratory protection device for only a portion of his twenty-eight years working as an underground coal miner. *See* Pets.' Br. at 22; JA 3335–39, 3398, 3422–24. He stopped wearing respiratory protection devices around 1994 and continued working as an underground coal miner until April 19, 2017. *See id*. As a result, he spent significant time underground without wearing any protective devices. *See id*. Mr. Scott was diagnosed with black lung no later than April 19, 2018. *See* JA 3354–56. He was awarded state black-lung benefits for a 10% permanent partial disability stemming from his diagnosis in 1998. *See id.* at 3333. He applied for federal black-lung benefits—and thus certified to the federal government that he was already totally disabled by black lung—on December 20, 2017. *See id.* at 3520–23. His counsel in that administrative process, who continues to represent him for this appeal, stated in support of his application that, by January 19, 2019, Mr. Scott conclusively had black lung. *Id.* at 3362. More than two years after his current lawyer wrote that letter to the federal government, Mr. Scott filed his complaint on September 9, 2021. *See id.* at 3377–94.

Gary Scott

Mr. Scott claims to have worn an MSA LLC respiratory protection device for seven years out of his thirty-eight-year career as an underground coal miner. *See* Pets.' Br. at 24; JA 4059 (also claiming to have worn other manufacturers' devices intermittently). For at least 81% of his time working underground, he did not regularly wear any respiratory protection. *See id*. Mr. Scott was diagnosed with black lung in 1994. *See id.* at 3920–21. He was awarded state black-lung benefits for a 10% permanent partial disability stemming from his diagnosis on January 13, 1998. *See id.* at 3922. On January 10, 2018, the National Institute of Occupational Safety and Health ("NIOSH") informed him by letter that he had "Category A complicated pneumoconiosis." *Id.* at 3954–57. By its express terms, the NIOSH letter was "a serious warning about [his] lung health." *Id.* at 3955. It explained that, over his mining career, he "inhaled a large amount of coal dust" and now had black lung, which "means [his] lungs have been damaged by dust." *Id.* A separate letter from the Mine Safety and Health Administration ("MSHA")—also sent on January 10, 2018—informed him, in all caps, that he "HA[D] ENOUGH EVIDENCE OF COAL WORKERS' PNEUMOCONIOSIS ('BLACK LUNG') TO BE ELIGIBLE FOR THE 'OPTION TO WORK IN A LOW DUST AREA' OF A MINE." *Id.* at 3959. It also advised him that his diagnosis could affect his legal rights and "recommended that [he] consult with a knowledgeable professional, such as an attorney or a physician who is qualified to advise [him]." *Id.* He applied for federal black lung benefits—and thus certified to the federal government that he was totally disabled by black lung—on January 21, 2020. *See id.* at 3965–66. More than three years after he received those warning letters from NIOSH and MSHA, Mr. Scott filed his complaint on September 9, 2021. *See id.* at 3970–88.

James Cruey

Mr. Cruey claims to have worn an MSA LLC respiratory protection device for twenty-five years out of his thirty-year career as an underground coal miner. *See* Pets.' Br. at 26; JA 2606–67, 2615, 2625–27, 2629–30 (also claiming to have worn other manufacturers' devices intermittently). For at least some of his time working underground, he wore no respiratory protection at all. *See, e.g.*, Pets.' Br. at 26; *see also* JA 2635. Mr. Cruey was diagnosed with black lung as early as 1985 and no later than November 30, 2016. *See* JA 2543. He was awarded state black-lung benefits for a 25% disability stemming from his diagnosis on September 4, 1985. *See id.* at 2545. He first applied for federal black-lung benefits—and thus certified to the federal government that he was already totally disabled by black lung—in 2004, but he did not file a successful application until August 24, 2016. *See id.* at 2547–58, 2705. His counsel in that administrative process, who continues to represent him for this appeal, stated in support of his application that medical evidence from 2017 and 2018 confirmed he had black lung. *Id.* at 2753. More than three years after receiving that confirmation, Mr. Cruey filed his complaint on September 3, 2021. *See id.* at 2747–65.

B. The Decision Below

Based on these facts, the trial court granted MSA LLC summary judgment, holding that each Petitioner's claim accrued more than two years before he filed suit. *See* JA 24, 31–42. The court noted that the statute-of-limitations analysis will "*generally* [involve] questions of fact to be resolved by the trier of fact." *Id.* at 17, 44. But it explained that the law does not presume there "will *always* be questions of material fact" that prevent summary judgment. *Id.* at 44. Because there was no dispute of material fact here, the court analyzed the legal implications of the facts.

The court began by holding that "a reasonable coal miner in West Virginia should have known of a connection between the alleged[ly] defective masks and respirators and the possibility

of developing a lung-related injury" when the Attorney General filed its 2003 complaint. *Id.* at 25. Indeed, the court explained that Petitioners likely developed knowledge of that link even earlier. *See id.* at 31. Petitioners wore the respirators specifically "to prevent them from inhaling coal, rock, and sand dust." *Id.* The court reasoned: "Common sense tells us that if you blow coal, rock, and sand dust out of your nose or cough up material that contains coal, rock, and sand dust, then the mask or respirator is not stopping all the dust." *Id.* As a result, "a miner should know at this early stage that something is wrong with the masks." *Id.* The court also rejected Petitioners' fraudulent concealment arguments because "[t]he Attorney General's case creates 2003 as a year that would make a reasonable, objective plaintiff aware of the alleged defects in [MSA LLC's] masks and respirators." *Id.* at 43. And Petitioners did not even allege, let alone provide evidence to suggest, that there was any concealment after 2003. *See id.*

Next, the court examined when Petitioners developed knowledge that they had been injured and concluded that several dates merited consideration. In particular, the court explained:

> The relevant date for [Petitioners] . . . to objectively and reasonably know that something was wrong is the date that each of the [Petitioners] 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 lung benefits.

Id. at 31. The claims accrued—and the statute of limitations began to run—when any one of those events occurred. *Id.* at 31–32. The court then determined that each Petitioner had been diagnosed with black lung, received more than a *de minimis* award of state black-lung benefits, or applied for federal black-lung benefits—and, in most cases, had done all three—more than two years before filing their complaints. *See id.* at 32–42.

The court also rejected Petitioners' argument that their claims did not accrue until their black-lung diseases became "sufficiently pronounced." *Id.* at 27–28. It explained the West Virginia

Supreme Court of Appeals has made clear that claims accrue when an individual "has knowledge of the fact that *something is wrong* and not when he or she knows of the *particular nature* of the injury." *Id.* at 28 (citing *Goodwin v. Bayer Corp.*, 624 S.E.2d 562, 568 (W. Va. 2005)). For similar reasons, the court also rejected Petitioners' argument that they were entitled to a fresh statute of limitations each time their black-lung disease progressed from one stage to another (*e.g.*, from simple pneumoconiosis to complicated pneumoconiosis). *See id.* at 29–30. As the court explained, the West Virginia Legislature does not "differentiate the many manifestations of black lung into discrete, actionable diseases." *Id.* at 29.

For all these reasons, "no rational trier of fact . . . could find for [Petitioners] unless they disregarded the law and decided these cases based on their sympathy for the miners' current breathing difficulties." *Id.* at 45. Accordingly, the trial court granted MSA LLC summary judgment.

III. SUMMARY OF THE ARGUMENT

The trial court correctly decided that Petitioners' claims are barred by the statute of limitations. More than two years before filing their lawsuits, Petitioners knew, or reasonably should have known, the three factual elements of their claims: (1) they were injured; (2) MSA LLC manufactured the respirators they wore to avoid those injuries; and (3) there was a causal connection between their injuries and MSA LLC's allegedly defective respirators. The law requires no more, and MSA LLC is entitled to judgment as a matter of law.

First, West Virginia law asks when each Petitioner knew, or reasonably should have known, that "something [was] wrong" or that he had suffered "some sort of injury." *Goodwin v. Bayer Corp*., 624 S.E.2d 562, 568–70 (W. Va. 2005). There are at least three dates by which a reasonably prudent person would have possessed such knowledge: (1) when he was diagnosed

with black lung, (2) when he received state black-lung benefits that included a finding of impairment (*i.e.*, more than a *de minimis* award), or (3) when he applied for federal black-lung benefits and told the federal government he was "totally disabled" by black lung. It is undisputed that Petitioners knew their diagnoses, received larger than *de minimis* state black-lung benefits, or applied for federal black-lung benefits more than two years before the filed their lawsuits. It is likewise undisputed that, more than two years before he filed suit, one Petitioner received letters from NIOSH and MSHA informing him that he had black lung, that his lungs had been damaged by coal dust, and that he should contact a lawyer about his options.

Petitioners do not and cannot dispute these facts. Instead, they attempt to escape the consequences of these undisputed facts by pointing to disputes over their medical diagnoses in the administrative process for federal black-lung benefits. *See* Pets.' Br. at 38–39, 50. But West Virginia law is clear, a reasonably prudent person should have known "something [was] wrong" when he received a diagnosis. *See, e.g.*, *Teets v. Mine Safety Appliances Company, LLC*, No. 21-1834, 2022 WL 14365086, at *2 (4th Cir. 2022) (holding that the statute of limitations begins to run when the plaintiff receives a diagnosis); *Collins v. Mine Safety Appliances Co.*, No. 21-0621, 2022 WL 10084174 (W. Va. Oct. 17, 2022) (unpublished memorandum decision) (same); *Preece v. Mine Safety Appliances Company*, No. CC-50-2019-C-135, at ¶ 11 (Wayne County Cir. Ct. Feb. 21, 2021) (same); *Coffield v. Robinson*, 857 S.E.2d 395, 402 (W. Va. 2021) (holding that a claim accrues for statute-of-limitations purposes even when a fact is disputed). A reasonably prudent person should likewise have known "something [was] wrong" when West Virginia informed him, with an award of benefits, that he had suffered permanent partial impairment; when he certified to the federal government that he was "totally disabled" by black lung; or when NIOSH and MSHA wrote to tell him so.

Accordingly, facts about disputes in the administrative process are immaterial and should be ignored. Indeed, a contrary rule would lead to absurd results. Because two Petitioners' administrative claims remain disputed even today, their proffered rule would mean that—despite filing their lawsuits approximately eighteen months ago—their claims *still* have not accrued for statute-of-limitations purposes.

Petitioners next argue that they suffered two distinct latent illnesses—first simple pneumoconiosis, and then complicated pneumoconiosis—and that the statute of limitations restarted when they received their second diagnoses. Pets.' Br. at 51–52. This argument is once again foreclosed by binding precedent from the Supreme Court of Appeals. *See, e.g.*, *Goodwin*, 624 S.E.2d at 568–70 (holding that a plaintiff need know only that he "suffered *some sort of injury*" and that "[i]t isn't important whether or when [a plaintiff] was aware of the full extent of injuries that might be manifested"). A reasonably prudent person should have known he had suffered "some sort of injury" when he was diagnosed with black lung, received larger than *de minimis* awards of state black-lung benefits, certified to the federal government that he was "totally disabled" by black lung, or received letters from NIOSH and MSHA providing a "serious warning" about the harm his lungs had suffered from coal dust.

In a last-ditch effort to save their claims, Petitioners argue that the trial court erred by resolving these questions as a matter of law. *See* Pets.' Br. at 40. The argument hinges on a statement in *Dunn v. Rockwell* that statute-of-limitations issues "generally" require jury resolution. 689 S.E.2d 255 (W. Va. 2009). But *Dunn* itself defeats Petitioners' argument. There, the Supreme Court of Appeals *affirmed* a trial court's grant of summary judgment because the material facts were undisputed and, as a matter of law, the plaintiffs' claims were filed outside the statute of limitations. *See id.* at 275. This reality confirms that Petitioners have simply misread *Dunn*—the

Court could not have simultaneously announced that all statute-of-limitations issues require jury resolution *and* also that summary judgment was proper on a statute-of-limitations issue. And *Dunn* hardly stands alone. The Supreme Court of Appeals has repeatedly resolved statute-of-limitations issues as a matter of law. *See, e.g.*, *Coffield*, 857 S.E.2d at 397; *Goodwin*, 624 S.E.2d at 570; *McCoy v. Miller*, 578 S.E.2d 355, 361 (W. Va. 2003); *Collins*, 2022 WL 10084174, at *3. Where, as here, the material facts are undisputed, summary judgment remains appropriate.

Second, the trial court held that Petitioners knew—at all relevant times—that MSA LLC manufactured the respirators they wore to protect themselves from inhaling coal dust. Petitioners do not challenge this holding on appeal.

Third, in 2003, West Virginia's Attorney General alleged, in a public filing, that MSA LLC's respirators were defective and, instead of protecting users from inhaling coal dust, caused users to get black lung. A reasonably prudent person was on notice of the purported causal connection between MSA LLC's allegedly defective respirators and lung injuries in 2003. Any reasonable investigation would have uncovered the Attorney General's public allegations. In addition, each Petitioner testified he wore the protective devices specifically to avoid black lung. As such, a black-lung diagnosis itself suggested that something might have been wrong. Petitioners do not dispute these holdings directly. Instead, they vaguely suggest that fraudulent concealment prevented them from filing their complaints sooner. *See* Pets.' Br. at 31–32, 36, 45–46.

To start, the supposed concealment relates *only* to when a reasonably prudent person should have known of the causal link between MSA LLC's allegedly defective respirators and lung injuries. MSA LLC did not—and could not—conceal Petitioners' own diagnoses, state black-lung benefits, NIOSH and MSHA letters, or applications for federal black-lung benefits from them. But the evidence of MSA LLC's alleged concealment is limited to 1951 report (about a product no

Petitioner here claims to have worn) and a 1994 memorandum (which was ultimately filed publicly with NIOSH in response to its request for comments). Setting aside whether the documents actually show any defect or concealment, they could not possibly have prevented a reasonably prudent person from learning about the causal connection between MSA LLC's allegedly defective respirators and black-lung disease after 2003. By that time, the West Virginia Attorney General, represented by the same counsel representing the Petitioners here, had placed the purported connection into the public domain.

Finally, Petitioners argue they lacked "actual knowledge about a possible products liability claim that could be asserted against [MSA LLC] until they met with counsel" in the summer of 2021. Pets.' Br. at 44. But this argument, too, runs headlong into binding precedent. West Virginia law requires plaintiffs to know only the *factual* basis for the claim, not the *legal* basis for it. *See, e.g.*, *Dunn*, 689 S.E.2d at 265. That Petitioners may not have known the specific nature of their legal claims is irrelevant. A contrary rule "would create an exception large enough to swallow the rule . . . by allowing a plaintiff to plead a stale case merely because he did not see the right lawyer at the appropriate time." *Teets*, 2022 WL 14365086, at *2.

Put simply, West Virginia's objective standard requires injured parties to investigate what harmed them. *See, e.g.*, *Goodwin*, 624 S.E.2d at 568; *Teets*, 2022 WL 14365086, at *2. When a reasonably prudent person learned of his injury, he would have investigated potential culprits, including the manufacturer of the respirators he wore specifically to avoid the injury he suffered. *See* JA 31. Indeed, each miner testified—and the court below found—that the only reason he wore a respiratory protection device was to prevent black-lung disease. *See id.* And any reasonable investigation would have uncovered the Attorney General's 2003 public filing claiming that MSA LLC's allegedly defective respirators caused users to get black lung.

This analysis confirms that, based on the undisputed facts, Petitioners claims accrued more than two years before they filed their complaints. Accordingly, the statute of limitations bars their claims, and MSA LLC is entitled to judgment as a matter of law. The trial court's order granting summary judgment to MSA LLC should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

MSA LLC does not believe oral argument is necessary in this case. Indeed, the issues raised here are strikingly similar to those recently decided by the West Virginia Supreme Court of Appeals in *Collins*. Moreover, the material facts are undisputed, and the dispositive legal issues are adequately presented in the briefs and the trial court's thorough order granting summary judgment. For these reasons, MSA LLC does not believe the decisional process will be significantly aided by oral argument.

V. ARGUMENT

This Court reviews a trial court's entry of summary judgment *de novo*. *See, e.g.*, *Painter v. Peavy*, 451 S.E.2d 755, 759 (W. Va. 1994). Under Rule 56, summary judgment must be granted if the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. VA. R. CIV. P. 56(c). A "genuine" issue exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Jividen v. Law*, 461 S.E.2d 451, 459 (W. Va. 1995) (citations omitted). And a fact is "material" only when it "has the capacity to sway the outcome of the litigation under the applicable law." *Id.* at 460 (citation omitted). Facts that "are irrelevant or unnecessary" cannot prevent the entry of summary judgment, regardless of whether they are disputed. *Id.* Moreover, "while the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some concrete evidence from which

a reasonable finder of fact could return a verdict in its favor." *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 336–37 (W. Va. 1995).

All parties agree that a two-year statute of limitations applies to Petitioners' claims. *See, e.g.*, Pets.' Br. at 42. As relevant here, it is black-letter law in West Virginia that "the statute of limitations begins to run when the plaintiff knows, or by 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." *Gaither v. City Hospital, Inc.*, 487 S.E.2d 901, 909–10 (W. Va. 1997). As to the second prong, the trial court determined that all Petitioners knew, at all relevant times, that MSA LLC manufactured the respirators they wore. *See* JA 4, 31. Petitioners do not challenge this holding on appeal. As such, the analysis in this case depends on when Petitioners knew, or reasonably should have known, they had been injured and that there was a causal connection between MSA LLC's respirators and those injuries.

Because all Petitioners knew, or reasonably should have known, the material facts more than two years before they filed suit, their claims are barred by the statute of limitations. MSA LLC is entitled to judgment as a matter of law, and the trial court's order should be affirmed.

A. All Petitioners Knew, or Reasonably Should Have Known, They Were Injured More than Two Years before They Filed Their Complaints.

Regarding the knowledge-of-injury prong, the Supreme Court of Appeals has "repeatedly stated that the statute of limitations begins to run when a plaintiff has knowledge of *the fact that something is wrong* and not when he or she knows of the particular nature of the injury." *Goodwin*, 624 S.E.2d at 568 (emphasis added). At that point, a potential plaintiff "has an affirmative duty to further and fully investigate the facts" surrounding the injury to determine whether a claim exists. *Id.* at 568 (citations omitted). Critically, this test is objective, "focus[ing] 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." *Dunn*, 689 S.E.2d at 265. But the relevant knowledge pertains only to "the factual, rather than legal, basis for the action." *Id.*

The trial court developed three critical dates on which the Petitioners knew, or reasonably should have known, they had suffered an injury: (1) the dates they received black-lung diagnoses, (2) the dates they received more than *de minimis* awards of state black-lung benefits, or (3) the dates they applied for federal black-lung benefits and informed the federal government that they were "totally disabled" by black lung. All three dates are well supported by logic and the law. This Court should affirm the entry of summary judgment using any one of these dates, or—as the trial court did—considering all three together.

1. Petitioners knew, or reasonably should have known, they were injured when they were diagnosed with black lung.

A diagnosis of black lung is certainly sufficient to put an individual on notice that "something is wrong." *Goodwin*, 624 S.E.2d at 568. Indeed, the date of diagnosis is one of the most common measures for when the statute of limitations begins to run. *See, e.g.*, *Teets*, 2022 WL 14365086, at *2 (holding that "the statute of limitations began to run in April 2017 at the latest" because the plaintiff had been diagnosed with black lung and "knew or should have known of the elements of a possible cause of action"); *Collins*, 2022 WL 10084174, at *2 (holding the date of diagnosis triggered the running of the statute of limitations); *Preece*, No. CC-50-2019-C-135, at ¶ 11 (Wayne County Cir. Ct. Feb. 21, 2021) (holding that the statute of limitations had run because plaintiff did not file his lawsuit within two years of his diagnosis).

As the chart below demonstrates, even viewing the evidence in the light most favorable to Petitioners, each one was diagnosed with black lung more than two years before filing a complaint.

	Latest Possible Diagnosis[3]	Two Years Expired	Complaint Filed
Ralph Manuel	July 10, 2018	July 10, 2020	August 19, 2021
Edgel Dudleson	November 30, 2018	November 30, 2020	August 19, 2021
Mark Scott	April 19, 2018	April 19, 2020	September 9, 2021
Gary Scott	January 10, 2018	January 10, 2020	September 9, 2021
James Cruey	November 30, 2016	November 30, 2018	September 3, 2021

See, *e.g.*, JA 32–42, 1051, 1086, 1697–98, 1702–04, 1748, 1750, 1781, 2543, 3354–56, 3920–21. Because Petitioners did not file their complaints within two years of their diagnoses, MSA LLC is entitled to judgment as a matter of law. The Court can—and should—affirm the order granting summary judgment on this basis alone.

2. Petitioners knew, or reasonably should have known, they were injured when they received more than a *de minimis* award of state black-lung benefits.

As the trial court explained, West Virginia's workers' compensation law allows for black-lung benefits if an employee has been diagnosed with black lung and has a measurable permanent impairment resulting from that diagnosis. *See* JA 20 (citing W. VA. CODE § 23-4-6a and related materials). Prior to 2003, the program awarded some miners a *de minimis* 5% award in the absence of any discernable impairment. *See id.* At all relevant times, however, an award exceeding 5% *necessarily* meant the recipient had some measurable permanent impairment caused by black lung. *See id.* Accordingly, any award exceeding 5% was sufficient put the individual on notice that "something is wrong." *Goodwin*, 624 S.E.2d at 568.

[3] Each Petitioner had an earlier diagnosis of black lung disease in his medical history—sometimes decades earlier. Although a reasonably prudent person almost certainly should have known "something [was] wrong" at the time of his first diagnosis, this table lists the diagnosis *latest* in time prior to filing of each Complaint below. A reasonably prudent person certainly should have known "something [was] wrong" by then.

As the chart below demonstrates, even viewing the evidence in the light most favorable to Petitioners, four of the five received more than a *de minimus* award of state black-lung benefits more than two years before filing a complaint. Indeed, three received such awards more than *twenty years* prior to filing their complaints.

	Award Date (%)	**Two Years Expired**	**Complaint Filed**
Ralph Manuel	N/A	N/A	August 19, 2021
Edgel Dudleson	January 16, 2003 (10%)	January 16, 2005	August 19, 2021
Mark Scott	1998 (10%)	2000	September 9, 2021
Gary Scott	January 13, 1998 (10%)	January 13, 2000	September 9, 2021
James Cruey	September 4, 1985 (25%)	September 4, 1987	September 3, 2021

See, e.g., JA 32–42, 1699, 1738–42, 2545, 3333, 3922. Because these four Petitioners did not file their complaints within two years of being told by the West Virginia black-lung benefits program that they suffered permanent impairments because of their black-lung diagnoses, MSA LLC is entitled to judgment as a matter of law. Again, the Court can affirm summary judgment on this basis alone.[4]

[4] Petitioners argue that *de minimis* impairments are relevant but must be considered by the factfinder, along with other evidence, to assess when a claim accrued. *See* Pets.' Br. at 39. They claim the jury must determine whether "a coal miner who has been found to have some minor impairment that does not impact the miner's life or ability to work" nonetheless has "a reason to look for possible tortfeasors." *Id.* This argument misunderstands what the trial court did. As explained above, the trial court ignored *de minimis* awards and zeroed in on awards that *required* a determination that there had been some impairment. *See supra* at Part II.B. Once such an impairment existed and was communicated to the miner in the form of state black-lung benefits, a reasonable and prudent person would be on notice that "something is wrong." *Goodwin*, 624 S.E.2d at 568.

3. Petitioners knew, or reasonably should have known, they were injured when they filed applications for federal black-lung benefits.

An application for federal black-lung benefits is no small undertaking. The application requires individuals to describe "any disability [they] have due to pneumoconiosis (Black Lung) . . . resulting from coal mine employment." JA 1073. It also requires individuals to specify which "aspect(s) of [their] regular job[s] in the coal mines [they are] physically unable to perform as a result of [their] disability." *Id.* Federal black-lung benefits are available only to those "totally disabled" by the disease. *See, e.g.*, 30 U.S.C. § 901. Accordingly, an applicant for federal black-lung benefits necessarily tells the federal government—under threat of fine and imprisonment—it is "true and correct" that he is already "totally disabled" by black lung. JA 1076.

Four of the five Petitioners filed for federal black-lung benefits more than two years prior to filing their lawsuits. Each one explained how his diagnosis affected his ability to work. For example, Mr. Manuel explained that black lung made him "short of breath." JA 1073. Similarly, Mr. Dudleson explained that he was "disabled" and could no longer work because of his "shortness of breath." *Id.* at 1811. And Mr. Mark Scott explained that he had become disabled and unable to breathe because of lung disease and, as a result, had to stop working in April 2017. *Id.* at 3520. And each Petitioner necessarily told the federal government, on the date the application was filed, that he was already "totally disabled" because of black lung. There can be no doubt that, as of the date such applications were submitted, a reasonably prudent person should have known that "something [was] wrong." *Goodwin*, 624 S.E.2d at 568.

As the chart below demonstrates, even viewing the evidence in the light most favorable to Petitioners, four of the five submitted applications for federal black-lung benefits more than two years before filing a complaint.

	Federal Application	Two Years Expired	Complaint Filed
Ralph Manuel	June 4, 2018	June 4, 2020	August 19, 2021
Edgel Dudleson	June 14, 2018	June 14, 2020	August 19, 2021
Mark Scott	December 20, 2017	December 20, 2019	September 9, 2021
Gary Scott[5]	January 21, 2020	January 21, 2022	September 9, 2021
James Cruey	August 24, 2016	August 24, 2018	September 3, 2021

Id. 1073–76, 1811–14, 3520–23, 2547–58, 2702, 2705, 3965–66. Because these four Petitioners did not file their complaints within two years of submitting applications that affirmatively told the federal government they were "totally disabled" by black lung and specifically listed how that diagnosis impacted their ability to work, MSA LLC is entitled to judgment as a matter of law. Once again, the Court can affirm summary judgment on this basis alone.

4. Petitioner Gary Scott knew, or reasonably should have known, he was injured when NIOSH and MSHA sent him letters saying his "lungs have been damaged by dust" and recommending that he consult a lawyer.

While there is substantial overlap in the reasoning applicable to all five Petitioners, there is one additional circumstance that applies *only* to Mr. Gary Scott. On January 10, 2018, NIOSH and MSHA sent Mr. Scott "a serious warning about [his] lung health." JA 3954–57, 3959. These letters specifically informed him that he had "inhaled a large amount of coal dust" and that he had black lung, which "means [his] lungs have been damaged by dust." *Id.* at 3955. And they

[5] Although Mr. Gary Scott filed an application for federal black-lung benefits within the two years preceding the filing of his complaint, this act does not resurrect his stale claims. Given the other facts involved—his diagnosis, *supra* at Part V.A.1, award of state benefits for permanent impairment, *supra* at Part V.A.2, and warning letters, *supra* at Part V.A.4—a reasonably prudent person should have known that something was wrong more than two years before he filed his lawsuit. Indeed, given that there is no limit on the number of times a federal application can be filed, a contrary rule would eviscerate the statute of limitations.

recommended that he consult an attorney about this reality. *See id.* at 3959. When he received those letters, Mr. Scott was on notice that "something is wrong." *Goodwin*, 624 S.E.2d at 568.

But, still, even viewing the evidence in the light most favorable to him, he waited more than two years to file this lawsuit.

	NIOSH/MSHA Letters	**Two Years Expired**	**Complaint Filed**
Gary Scott	January 10, 2018	January 10, 2020	September 9, 2021

JA 3954–57, 3959. Because he did not file his complaint within two years of receiving these fulsome notices and warnings, MSA LLC is entitled to judgment as a matter of law. The Court can affirm summary judgment as to Mr. Scott on this basis as well. *See id.* at 42 (holding that, "[a]t the latest, the two-year statute of limitations began to run . . . on January 10, 2018[,] when NIOSH and MSHA told [Mr. Scott] that he had [black lung]").

5. Petitioners' attempts to evade these dates rely on immaterial facts and fundamental misunderstandings of the law.

Critically, Petitioners did not dispute any of the facts discussed above in the trial court, nor do they attempt to do so now.[6] Instead, to avoid the straightforward consequences of those undisputed facts, Petitioners advance three equally misguided arguments. None of them warrants reversing the trial court's opinion.

i. The trial court properly ignored immaterial facts about disputes that arose during the administrative process for black-lung benefits.

Petitioners first seek to avoid the legal implications of the undisputed facts by introducing additional facts. For example, Petitioners complain that the trial court "ignore[d] the specific administrative litigation history each of these Petitioners experienced," in which "some of the

[6] In fact, Petitioners again admit that the material information—that is, "the dates on which various events occurred"—is not disputed. Pets.' Br. at 50.

medical experts asserted that Petitioners had not suffered any breathing or lung impairment." Pets.' Br. at 38–39; *see also id.* at 50 (arguing that Petitioners had received "conflicting medical opinions" in the administrative process). Petitioners then argue, without citation, that a claim cannot accrue when medical evidence is disputed in an administrative process. *See id.* at 39.

For a claim to accrue, Petitioners argue, the administrative process must confirm the black-lung diagnosis and, presumably, award benefits. *See, e.g.*, *id.* at 15 (arguing that Mr. Manuel had not determined that he had black lung until "the factual dispute [in his administrative proceeding] was resolved"); *id.* at 19 (arguing that Mr. Dudleson *still*—years after filing this lawsuit—does not have adequate knowledge for his claim to accrue because the administrative determination that he has black lung "remains disputed by the responsible coal mine operator" and "has . . . not been finally resolved"); *id.* at 25 (arguing that Mr. Gary Scott *still*—years after filing this lawsuit—does not have adequate knowledge for his claim to accrue because his "employer still apparently disputes" his diagnosis and that "factual question . . . has . . . not been finally resolved").

It is worth examining the consequences of Petitioners' argument. It would mean, for example, that a reasonably prudent person would not realize "something is wrong," *Goodwin*, 624 S.E.2d at 568, when he was diagnosed with black-lung disease. *See supra* at Part V.A.1. Nor would he come to that realization when West Virginia, operating its black-lung compensation program, told him he was suffering permanent impairments from black-lung disease. *See supra* at Part V.A.2. Nor would he realize "something is wrong" even when he told the federal government—under threat of fine and imprisonment—that he was "totally disabled" by black lung and listed how it affected his ability to work. *See supra* at Part V.A.3. And it would mean a reasonably prudent person would not realize "something is wrong" even when NIOSH and MSHA wrote

letters informing him he had black lung and encouraging him to contact an attorney about it. *See supra* at Part V.A.4.

Indeed, Petitioners' argument would mean the statute of limitations does not begin when plaintiffs know, or should know, something is wrong at all. Instead, it would begin to run only once plaintiffs had convinced *someone else*—perhaps an administrative board or a former employer, or maybe even a trial judge—that something is wrong. Perhaps there is no better argument against Petitioners' position than pointing out that it would mean claims filed years ago by two Petitioners (*i.e.*, Mr. Dudleson and Mr. Gary Scott) somehow still have not accrued for statute-of-limitations purposes. *See* Pets.' Br. at 19, 25. This fact alone should be enough to reject the argument. *See, e.g.*, *Hickman v. Grover*, 358 S.E.2d 810, 814 (W. Va. 1987) (rejecting an argument that a fact must be "known with legal certainty" for a claim to accrue because that result does not ordinarily obtain "until after the jury returns its verdict," meaning "the statute of limitations would almost never accrue until after the suit was filed"). In any event, Petitioners' argument flatly contradicts West Virginia law. *See, e.g.*, *Goodwin*, 624 S.E.2d at 568 (declining to depart from the "bedrock precedent" that "the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the *particular nature* of the injury" (citations omitted)); *Coffield*, 857 S.E.2d at 402 (rejecting an argument that a claim did not accrue while a fact was disputed because "[d]efendants routinely deny the existence of facts that give rise to a plaintiff's claims" and "the running of the statute of limitations is unaffected by such denials").

Put simply, there is no legitimate basis to conclude that a reasonable, prudent person would have ignored a black-lung diagnosis, disregarded state awards of black-lung benefits, cast aside letters informing him that his lungs were damaged and advising him to consult an attorney, and

even filed for federal black-lung benefits—certifying that he was "totally" disabled—without knowing "something is wrong." Petitioners clearly knew "something [was] wrong" before their administrative cases were resolved. As such, additional facts about those administrative disputes cannot affect the outcome under applicable law. *See, e.g.*, *Jividen*, 461 S.E.2d at 459. The additional facts Petitioners seek to have this Court consider are immaterial. *See id.* They provided the trial court no reason to deny summary judgment to MSA LLC, and they provide this Court no basis to reverse the trial court's entry of summary judgment. *See id.* It is not error for a trial court to ignore immaterial facts. *See id.* Indeed, the law *compels* trial courts to do so. *See id.*

ii. The trial court properly concluded that Petitioners needed to know only that something was wrong, not the specific nature of their illnesses.

Petitioners next argue that, because simple pneumoconiosis is a distinct diagnosis from complicated pneumoconiosis, the latter diagnosis is a "separately actionable injury" that restarts the statute of limitations. Pets.' Br. at 51–52. In other words, they argue a first latent injury (*i.e.*, simple pneumoconiosis) is functionally different from a second latent injury (*i.e.*, complicated pneumoconiosis), even though both are allegedly caused by the same events and both are the same disease, the latter being a more severe manifestation. *See id.* They further argue that they understood they were injured only once their condition progressed to the point where they caused "sufficiently pronounced" impairments. *Id.*

To start, these arguments are foreclosed by binding precedent from the West Virginia Supreme Court of Appeals. Indeed, the entire focus on specific diagnoses—of *any* kind—is misplaced. A reasonably prudent person need not know the precise diagnosis to know that "something is wrong." *Goodwin*, 624 S.E.2d at 568 (explaining that the statute of limitations is triggered when the plaintiff knows "something is wrong and not when he or she knows of the *particular nature* of the injury"). Petitioners' entire argument focuses exclusively on "the

particular nature of the injury," the very thing *Goodwin* explained was irrelevant when deciding when the limitations period begins to run.

And the plaintiff in *Goodwin* presented Petitioners' exact argument, claiming he suffered two distinct injuries from a single exposure to paint fumes—an initial one related to breathing difficulties and a "separate and distinct" neurological issue that was not known until much later. *Id.* at 569. The Supreme Court of Appeals unequivocally rejected the theory that the second diagnosis triggered a new statute of limitations:

> The issue before us is when [the plaintiff] knew that he had suffered harm from breathing paint fumes. There is simply no credible argument upon which [the plaintiff] can rely to avoid the operation of the statute of limitations under these facts. [The plaintiff] knew in 1997, and arguably earlier, that he had suffered *some sort of injury* due to his exposure to paints. On this record, it was [his] duty to begin investigating the *full extent* of his injuries at that time. . . .
>
> It isn't important whether or when [the plaintiff] was aware of the full extent of injuries that might be manifested from the exposure(s). What is important is that [he] knew that he had been harmed as a result of an identified event or events (i.e., exposure(s) to paint fumes), and it was his duty thereafter to fully investigate the injuries that might follow that exposure.

Id. at 569–70 (first emphasis added).

Here, as in *Goodwin*, a reasonably prudent person may have had the requisite knowledge that "something is wrong" or that there had been "some sort of injury" before receiving any clinical diagnosis. The relevant point, for purposes of this appeal, is that a reasonably prudent person would have known that "something is wrong" or that he had suffered "some sort of injury"—at the very latest—when he received a diagnosis of black lung. In other words, focusing on the date of a black-lung diagnosis is one way to draw all possible inferences in Petitioners' favor. It might be possible to arrive at an *earlier* date where a reasonably prudent person would have concluded that "something [was] wrong." It is not possible, however, to arrive at a *later* one. There is no basis, in law or in fact, to draw distinctions once a black-lung diagnosis has occurred. At that point, a

reasonably prudent person would have known that "something is wrong" and that he had suffered "some sort of injury." No more is required to start the clock.

Moreover, this argument overlooks critical and independently sufficient facts. As discussed above, a reasonably prudent person would certainly have known "something is wrong" by the time West Virginia awarded him more than *de minimis* compensation from the black-lung benefits program. *See supra* at Part V.A.2. Likewise, he would have known "something [was] wrong" when he certified to the federal government that he was "totally disabled" from black lung. *See supra* at Part V.A.3. At either point, the reasonably prudent person would have realized that the injury was already "sufficiently pronounced" and causing impairments. Pets.' Br. at 52. The same is true for a reasonably prudent person who received NIOSH and MSHA letters containing a "serious warning" about the injuries his lungs had suffered. *See supra* at Part V.A.4.

Any of those dates—all of which occurred more than two years prior to Petitioners filing their complaints—was sufficient to put a reasonably prudent person on notice that "something is wrong." Indeed, any one was enough for a reasonably prudent person to know that something *serious* was wrong. Additional knowledge, including about precisely how far the disease had progressed or the exact form of lung disease involved, is unnecessary under the law.

iii. The Supreme Court of Appeals has repeatedly confirmed that summary judgment is appropriate, even as to the statute of limitations, when the material facts are undisputed.

Petitioners last argue that statute-of-limitations issues must be resolved by juries and "cannot be resolved as a matter of law." Pets.' Br. at 40. This argument hinges on a dramatic misreading of *Dunn* and *Hoke*, each of which proclaimed only that statute-of-limitations issues "will *generally* involve questions of material fact that will need to be resolved by the trier of fact." *Dunn*, 689 S.E.2d at 258 (emphasis added); *State ex rel. 3M Co. v. Hoke*, 852 S.E.2d 799, 807–08

(W. Va. 2020). But, as the trial court amply explained, what is "generally" true is not necessarily "always" true. *See* JA 45.

And, once again, Petitioners' argument runs headlong into binding precedent from the Supreme Court of Appeals. *See, e.g.*, *Coffield*, 857 S.E.2d at 397 (remanding for entry of an order granting judgment as a matter of law because the lawsuit was filed two weeks after the limitations period expired); *Goodwin*, 624 S.E.2d at 570 (affirming a grant of summary judgment based on the statute of limitations after finding there was no genuine dispute of material fact); *McCoy*, 578 S.E.2d at 361 (affirming a grant of summary judgment on statute-of-limitations grounds after confirming such issues "can . . . be resolved by the court where the relevant facts are undisputed and only one conclusion may be drawn from those facts"); *Collins*, 2022 WL 10084174, at *1–3 (likewise affirming the grant of summary judgment on statute-of-limitations grounds).[7]

Indeed, *Dunn* itself forecloses Petitioners' argument. It explained that statute-of-limitations issues "should be submitted to the finder of fact" only where "the[ir] resolution . . . requires resolution of a genuine issue of material fact." *Dunn*, 689 S.E.2d at 265. And the *Dunn* Court further held that the case presented no such issues as to when the plaintiffs should reasonably have known about their causes of action. *See id.* at 271 (holding that, by September 29, 2003, the plaintiffs "clearly knew, or by the exercise of reasonable diligence, should have known" all the facts giving rise to their causes of action, such that, "on the surface, it would appear that the plaintiffs' causes of action"—filed in August 2006—"[we]re time-barred"). *Dunn* reversed the grant of summary judgment to the lawyer-defendant only because there were genuine issues of

[7] *See also, e.g.*, *Teets*, 2022 WL 14365086, at *3 (affirming a grant of summary judgment because, under West Virginia law, the claims were barred by the statute of limitations).

material fact relating to the separate issue of whether a particular tolling doctrine—namely, the continuous representation doctrine for claims against attorneys—applied. *Id.* at 273.

But it *affirmed* the grant of summary judgment in favor of the defendant law firm at which that lawyer formerly worked. *See id.* at 275. It did so because the plaintiffs knew all the relevant facts as of September 29, 2003, and the attorney's employment had been terminated on March 31, 2004, more than two years before the plaintiffs filed suit. *Id.* As a matter of law, the plaintiffs could not take advantage of the continuous representation doctrine as to the law firm after March 31, 2004. *See id.* In short, *Dunn* itself conclusively demonstrates that statute-of-limitations issues can *sometimes* be resolved at the summary-judgment stage.

Hoke is not to the contrary. Instead, *Hoke* addressed a statute-of-limitations question *before* the parties had been able to explore the relevant issues in discovery. *See Hoke*, 852 S.E.2d at 810. And the *Hoke* Court specifically invited the parties "to develop their evidence and present it anew in competing motions for summary judgment." *Id.* This invitation would make no sense if courts were somehow prohibited from resolving statute-of-limitations issues as a matter of law.

All these cases—all from the Supreme Court of Appeals—confirm that Petitioners are simply wrong. As with any other issue, when the material facts are undisputed, summary judgment can be granted as to the statute of limitations. Indeed, Petitioners appear to concede this point. *See* Pets.' Br. at 48 (attempting to distinguish *Teets* because the facts there were undisputed, necessarily implying that summary judgment can be awarded in such a scenario).

B. All Petitioners Knew, or Reasonably Should Have Known, of the Causal Connection Between Their Injuries and the Allegedly Defective Respirators No Later than 2003.

In 2003, the West Virginia Attorney General filed a public complaint alleging that MSA LLC's respirators were defective and caused users to develop black lung. *See* JA 25. The Attorney General also alleged that MSA LLC had taken steps to conceal those defects from consumers and

the public. *See id.* The trial court held that, as of that 2003 filing, "a reasonable coal miner in West Virginia should have known of a connection between the alleged[ly] defective masks and respirators and the possibility of developing a lung-related injury." *Id.* Indeed, it explained that, because Petitioners wore the respirators specifically "to prevent them from inhaling coal, rock, and sand dust," they likely knew of that link even earlier. *Id.* at 31. It continued: "Common sense tells us that if you blow coal, rock, and sand dust out of your nose or cough up material that contains coal, rock, and sand dust, then the mask or respirator is not stopping all the dust." *Id.* As a result, "a miner should know at this early stage that something is wrong with the masks." *Id.* In any event, the trial court used the Attorney General's 2003 filing as a definitive line in the sand.

Petitioners do not directly challenge these holdings. Instead, they describe the court's holdings as "novel" and vaguely allege fraudulent concealment. Pets.' Br. at 32. This supposed fraudulent concealment, of course, does not—indeed, cannot—concern Petitioners' knowledge of their own injuries. MSA LLC did not—and could not—conceal Petitioners' own diagnoses, state black-lung benefits, NIOSH and MSHA letters, or applications for federal black-lung benefits from them. The claimed concealment relates *only* to when a reasonably prudent person should have known of the purported causal link between MSA LLC's allegedly defective respirators and lung injuries. *See id.* at 45–46 (arguing that MSA LLC concealed evidence concerning the respirators' alleged defects).

Here, Petitioners' fraudulent-concealment argument quickly unravels. Petitioners claim they "did not learn of [MSA LLC's] fraudulent concealment . . . until after their cases were filed." Pets.' Br. at 36, 46. The argument immediately opens a paradox whereby Petitioners' claims somehow did not accrue until *after* they were filed. *But see Hickman*, 358 S.E.2d at 814 (rejecting an argument that would cause the statute of limitations to accrue only after the suit was filed). It

also creates a bit of a time-traveler problem: If filing the claim required knowledge obtained only *after* the claim was filed, how were Petitioners able to file when they did?

More fundamentally, Petitioners point to just two pieces of evidence to support their fraudulent-concealment argument against MSA LLC—a report from 1951 and memorandum from 1994. *See* Pets.' Br. at 31–32. MSA LLC disagrees those documents show a defect or any attempt to conceal a defect. In any event, the documents could not possibly have prevented a reasonably prudent person from learning about the causal connection between MSA LLC's allegedly defective respirators and black-lung disease after 2003. That year, the West Virginia Attorney General entered that purported connection into the public record. By the time Petitioners learned, or should have learned, that they were injured, the causal connection was already in the public domain.

Moreover, Petitioners fail to explain *how* the alleged concealment of these documents prevented them from understanding they had a claim. The fraudulent concealment exception applies only when the defendant has done something "tending to conceal the cause of action from the plaintiff." *Merrill v. W. Virginia Dep't of Health & Human Res.*, 632 S.E.2d 307, 318 (W. Va. 2006); *Dunn*, 689 S.E.2d at 258 (same). At most, the two documents Petitioners rely upon go to the *nature* of the products' alleged defect.[8] However, a plaintiff need not know the nature of the defect for the limitations period to begin. *See, e.g.*, *Hickman*, 358 S.E.2d at 814 (holding that plaintiffs need not know "that that the product was defective as a result of the conduct of its manufacturer" to start the statute running). Petitioners have failed to establish what *Dunn* requires: They have not shown how these documents, or any other acts of concealment, prevented them from discovering their potential causes of action. Nor can they, as the undisputed facts establish

[8] Of course, MSA LLC maintains the documents do not show a defect in MSA LLC's products.

that Petitioners were armed with sufficient knowledge to bring their claims more than two years before they filed their complaints.

Petitioners also argue they did not have "any actual knowledge about a possible products liability claim that could be asserted against [MSA LLC] until they met with counsel." Pets.' Br. at 44; *see also id.* at 16 (pointing out that Mr. Manuel learned about the alleged defects when he met with Sam Petsonk on May 21, 2021); *id.* at 20 (same for Mr. Dudleson on July 2, 2021); *id.* at 23 (same for Mr. Mark Scott on July 8, 2021); *id.* at 25 (same for Mr. Gary Scott on July 19, 2021); *id.* at 27 (same for Mr. Cruey on June 30, 2021). To start, West Virginia law requires plaintiffs to know only the *factual* basis for the claim, not the *legal* basis for it. *See, e.g.*, *Dunn*, 689 S.E.2d at 265. That Petitioners may not have known the specific nature of their legal claims is irrelevant. The Fourth Circuit explained the danger of a contrary rule:

> Allowing [a plaintiff] to claim ignorance until he was told of a potential cause of action by an attorney would create an exception large enough to swallow the rule. This reasoning could vitiate the statute of limitations by allowing a plaintiff to plead a stale case merely because he did not see the right lawyer at the appropriate time. Permitting stale claims to circumvent the statute of limitations undermines the requirement of reasonable diligence to discover and bring suits within a given time.

Teets, 2022 WL 14365086, at *2 (internal quotation marks and citations omitted).

Put simply, the objective standard requires injured parties to investigate what harmed them. *See, e.g.*, *Goodwin*, 624 S.E.2d at 568; *Teets*, 2022 WL 14365086, at *2. When a reasonably prudent person learned of his injury, he would have investigated potential culprits, including the maker of the respirators he wore specifically to avoid the injury he suffered. *See* JA 31. And any reasonable investigation would have uncovered the Attorney General's 2003 public filing alleging that MSA LLC's respirators were defective and caused users to get black lung. Indeed, a reasonably prudent person would have investigated whether something was wrong with the device he wore specifically to avoid the injury once he learned of its existence.

The final problem with Petitioners' argument is that it is factually suspect—at least two Petitioners met with Sam Petsonk long before the summer of 2021. For example, Mr. Petsonk sent a letter on Mr. Mark Scott's behalf on January 24, 2019. *See* JA 3362. Mr. Petsonk sent a similar letter for Mr. Dudleson on March 19, 2020. *See* JA 1752. It is entirely unclear why Mr. Petsonk failed to inform Messrs. Scott and Dudleson of the alleged defects at those earlier times. Because the law is clear, however, the Court need not concern itself with this factual uncertainty.

VI. CONCLUSION

For the foregoing reasons, Petitioners' claims are barred by the statute of limitations, and the Court should affirm the trial court's grant of summary judgment in favor of MSA LLC.

Respectfully submitted,

/s/ Nicholas S. Johnson
Benjamin L. Bailey (WVSB #200)
Eric B. Snyder (WVSB #9143)
Nicholas S. Johnson (WVSB #10272)
John A. Budig (WVSB #13594)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, WV 25301
Telephone: (304) 345-6555
Fax: (304) 342-1110
bbailey@baileyglasser.com
esnyder@baileyglasser.com
njohnson@baileyglasser.com
jbudig@baileyglasser.com
Counsel for Respondent Mine Safety Appliances Company, LLC

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-123

RONALD HARDY, RALPH MANUEL, EDGEL DUDLESON, RICKEY 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.

CERTIFICATE OF SERVICE

I, Nicholas S. Johnson, counsel for Respondent Mine Safety Appliances Company, LLC, hereby certify that on the 23rd day of February, 2023, I filed **Respondent Mine Safety Appliances Company LLC's Response In Opposition To Petitioners' Joint Appeal Brief** via the File and ServeXpress system upon the following counsel of record:

Samuel B. Petsonk
Petsonk PLLC
PO Box 1045
Beckley, WV 25802
sam@petsonk.com
Counsel for Plaintiffs

Bren J. Pomponio
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 25301
bren@msjlaw.org
Counsel for Plaintiffs

Lonnie C. Simmons
Robert M. Bastress III
Dipiero Simmons McGinley & Bastress, PLLC
604 Virginia St. E.
Charleston, WV 25301
lonnie.simmons@dbdlawfirm.com
Rob.Bastress@dbdlawfirm.com
Counsel for Plaintiffs

Glenn A. Huetter, Jr.
Willman & Silvaggio LLP
5500 Corporate Drive, Suite 150
Pittsburgh, PA 15237
ghuetter@willmanlaw.com
Counsel for Raleigh Mine & Industrial Supply, Inc. and Eastern States Mine Supply Company

Marc E. Williams
Thomas M. Hancock
Kendra L. Huff
Nelson Mullins Riley & Scarborough LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Marc.williams@nelsonmullins.com
tom.hancock@nelsonmullins.com
kendra.huff@nelsonmullins.com
Counsel for American Optical Corporation; Cabot Corporation; Cabot CSC Corporation

Bryant J. Spann
Robert H. Akers
Elizabeth L. Taylor
THOMAS COMBS & SPANN, PLLC
P.O. Box 3824
Charleston, WV 25338-3824
bspann@tcspllc.com
rakers@tcspllc.com
etaylor@tcspllc.com
Counsel for 3M

/s/ Nicholas S. Johnson
Nicholas S. Johnson (WVSB #10272)