IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**Ronald Hardy, Ralph Manuel,
Edgel Dudleson, Ricky Miller,
James Cruey, Mark Scott,
and Gary Scott,
Plaintiffs Below, Petitioners,**

v. **No. 22-ICA-123**

**3M Company, Mine Safety Appliances Company,
LLC, AO-C-A (American Optical Corporation –
Cabot CSC Corporation – Cabot Corporation),
Eastern States Mine Supply Company, and
Raleigh Mine and Industrial Supply,
Defendants Below, Respondents.**

RESPONDENTS AMERICAN OPTICAL CORPORATION, CABOT CSC CORPORATION, AND CABOT CORPORATION'S BRIEF

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and Cabot Corporation**

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STATEMENT OF THE CASE

Petitioners provide the Intermediate Court of Appeals with no basis to overturn the well-reasoned decision of the Circuit Court of McDowell County. As Judge Kornish noted in his order below,

> there is a two-year statute of limitations that starts to run when a coal miner knows of his lung injury, should know of the connection between his injury and the dust masks and respirators, and should file a lawsuit against the dust and respirator manufacturers and distributors. This two-year statute of limitations was not met in these cases. In short, although each of these miners had a potential suit against these manufacturers and distributors, the miners simply waited too long to file their lawsuits. The Court must follow existing law.

September 7, 2022 Order Granting Defendants' Motions for Summary Judgment As to Statute of Limitations ("September 7, 2022 Order"). In the month following the September 7, 2022 Order, both the Supreme Court of Appeals of West Virginia and the Fourth Circuit Court of Appeals affirmed grants of summary judgment on these exact same grounds in factually similar cases. *See Collins v. Mine Safety Appliances Co.*, No. 21-0621, 2022 WL 10084174 (W. Va. Oct. 17, 2022); *Teets v. Mine Safety Appliances Co., LLC*, No. 3:19-CV-195, 2021 WL 3280528 (N.D.W. Va. July 28, 2021), aff'd *Teets v. Mine Safety Appliances Co., LLC*, No. 21-1834, 2022 WL 14365086 (4th Cir. Oct. 25, 2022). Petitioners offer no plausible reason to distinguish this case from *Collins* and *Teets*, and offer no plausible reason to overturn Judge Kornish's correct application of West Virginia law.

Furthermore, Petitioners' Statement of the Case omits key undisputed facts considered and relied upon by the Circuit Court in its September 7, 2022 Order. As a result, Respondents American Optical Corporation, Cabot CSC Corporation, and Cabot Corporation (together, the

"AO-C Respondents")[1] provide additional facts necessary to correct the inaccuracies or omissions in Petitioners' brief. W. VA. R. APP. P. 10(d). Because the AO-C Respondents are only involved in two of the cases below—that of Petitioners Edgel Dudleson and Gary Scott—the AO-C Respondents only address the factual inaccuracies and omissions related to those Petitioners.

a. Petitioner Edgel Dudleson

Petitioner Edgel Dudleson ("Mr. Dudleson") did not, as Petitioners claim, learn about his pulmonary impairment within two years of filing suit. Rather, Mr. Dudleson worked in or around coal mines between 1976 (JA 1940) and 1999 (JA 1947). It is undisputed that Mr. Dudleson was aware of the potential harm caused by breathing coal dust during his coal mining career. At deposition, Mr. Dudleson testified that he became aware of the harm that can result from breathing coal dust and began wearing respirators to protect his lungs:

> Q. So the way I understand your testimony here today is, you wore the respirators to protect you from inhaling coal dust; is that correct?
> A. Yeah.
> Q. You understood that black lung was caused by inhaling coal dust, right?
> A. I do now. Back then, I didn't really think about it. **Well, I am sure — yeah, I knew it was harmful for your lungs if you breathe dust in. So I wore them to keep me from breathing so much dust in my lungs. Yes, I did.**

[1] Though the style refers to these Respondents as "AO-C-A", an entity formally included in that designation, Aearo LLC, has filed for bankruptcy, so the AO-C Respondents omit the last "A." Two parties below, Aearo Technologies, LLC, and Aearo LLC, were not included as parties to Petitioners' Motion or to the appeal. The Aearo entities filed motions for summary judgment on the statute of limitations which were granted by the Circuit Court in the same order appealed by Petitioners. Subsequent to Aearo filing its motion, but prior to the grant of summary judgment, on July 26, 2022, Aearo Technologies LLC and certain of its affiliates, including Aearo LLC, filed voluntary petitions for relief under the bankruptcy code in the United States Bankruptcy Court for the Southern District of Indiana. A suggestion of bankruptcy was filed in the underlying McDowell County matter on July 28, 2022. Petitioners did not include either Aearo entity as a party to the appeal, nor have they requested permission from the bankruptcy court to appeal the Circuit Court's order without violating the automatic bankruptcy stay. As a result of their inaction, the automatic stay, which precludes the "continuation … of a judicial, administrative, or other action or proceeding against the debtor…" remains in place here. 11 U.S. CODE § 362 (2020). According to Rule 5(c), all parties below must be made parties to the appeal. The failure to include the Aearo entities violates Rule 5(c).

5/11/2022 Edgel Dudleson Dep. at 74:14–75:2 (JA 1575–76) (emphasis added). Further, Mr. Dudleson testified that his fellow coal miners wore respirators for the same reason—they did not want to breathe coal dust and experience the potential consequences of that exposure. *Id.* at 69:12–70:5 (JA 1705–06). Mr. Dudleson's own testimony—considered by the Circuit Court in the September 7, 2022 Order—establishes that Mr. Dudleson was aware of and understood the harm caused by inhaling coal dust and wore respirators to protect himself from that harm. September 7, 2022 Order at 6–7 (JA 7–8).

Despite wearing respirators, including those manufactured by AO-C Respondents, Mr. Dudleson began experiencing shortness of breath in the 1990s. 5/11/22 Edgel Dudleson Dep. at 42:11–15 (JA 1698). In 1996, Mr. Dudleson was diagnosed with simple coal worker's pneumoconiosis ("CWP"), *id.* at 37:19–38:10 (JA 1693–94), and in 2000 he was diagnosed with silicosis. *Id.* at 41:1–12 (JA 1697). At deposition, Mr. Dudleson testified that he knew about the connection between CWP and silicosis and inhalation of coal and rock dust. *Id.* at 42:11–15 (JA 1698). Moreover, Mr. Dudleson testified that he specifically attributed his breathing difficulty and his diagnoses to his coal dust exposure while working in the mines, saying that "I could tell. I couldn't breathe." *Id.* Finally, Mr. Dudleson testified that, apparently, the respirators he used failed to protect him. *Id.* at 89:4–9 (JA 1713).

West Virginia awarded Mr. Dudleson 5% CWP benefits on January 25, 2001. 1/25/01 Dudleson Award Letter (JA 1735–36). His award was increased to 10% in January 2003. 1/16/03 Dudleson Award Order (JA 1738–42). By November 30, 2018, CT scans showed that Mr. Dudleson had complicated CWP. 11/30/18 Dudleson CT Scan Report (JA 1748). This CT Scan was obtained during the pendency of a federal black lung administrative claim while Mr. Dudleson was represented by Attorney Sam Petsonk, the same counsel who would file suit on his behalf here

approximately thirty three (33) months later. An additional CT scan from June 14, 2019, confirmed Mr. Dudleson's condition. 6/14/19 Dudleson CT Scan Report (JA 1750). However, Mr. Dudleson waited until August 19, 2021, to file his Complaint against the AO-C Respondents. Dudleson Complaint (JA 1501). Petitioners point to no portion of Mr. Dudleson's testimony or any document in the appendix disputing any of the above.

b. Petitioner Gary Scott

Petitioner Gary Scott ("Mr. Scott") started his career in coal mining in 1975 with Eastern at the Keystone No. 1 Mine. Gary Scott Employment History (JA 3784). Mr. Scott worked in mining until he retired in 2020. 5/12/22 Gary Scott Dep. at 261:12–16 (JA 3818). However, Mr. Scott only wore respirators during his time with Eastern, between 1975 and 1981, and the remainder of his career he was unprotected. *Id.* at 18:7-13 (JA 3801). From the outset of his mining career, Mr. Scott was aware that exposure to coal dust was harmful to his lungs:

> Q. And that year you went into the mines, I guess did you know that one of the health hazards of coal mining was coal dust?
> A. Yes.

Id. at 54:20-24 (JA 3807). Mr. Scott also knew that respirators were designed to protect him from breathing harmful coal dust. *Id.* at 54:20-55:6 (JA 3807–08). To protect himself from this health hazard, Mr. Scott wore respirators. *Id.* It is undisputed that Mr. Scott was aware of the hazard posed by breathing coal dust and that he wore respirators to protect himself.

Despite the effort to protect himself made by Mr. Scott, he was diagnosed with CWP in 1994, when he received his first award related to his CWP from State worker's compensation. Mr. Scott testified:

> Q. In looking at some of the medical records, I saw that you were – you received your first -- you were first diagnosed with black lung around 1997. Do you recall that?
> A. I got -- my first settlement was in '94.

> Q. So you would have been diagnosed prior to '94. Do you know when you would have received that diagnosis?
> A. It would have been in '94.
> Q. So you think in '94 you were diagnosed with black lung, and then you received an award –
> A. In '94.
> Q. -- in '94?
> A. Yes.

Id. at 44:19–45:11 (JA 3802–03). Unfortunately, records related to Mr. Scott's 1994 state black lung claim have been lost. However, records from Mr. Scott's 1998 claim still exist. *See* 4/24/98 Employee's Report of Occupational Pneumoconiosis (JA 3820–21). In Mr. Scott's application for benefits, he lists January 13, 1998, as the date he was diagnosed with black lung by Dr. Jones-Chapman. (JA 3820). Mr. Scott specifically recalled his 1998 diagnosis as well:

> Q. So you received -- I take it your black lung -- do you know who diagnosed you with black lung in 1998?
> A. Tug River. I went there and got another x-ray, and they sent it to Charleston.
> Q. And someone told you that your black lung had gotten worse?
> A. Well, the first time I was awarded black lung, it specifically said on the paper I was awarded 5 percent because of my length of time in the coal mines. Then in '98 is when I really got -- in my opinion got something because they told me I had something not until '98.

5/12/22 Gary Scott Dep. at 46:18–47:8 (JA 3804–05).

Further, Mr. Scott acknowledged that he believed in 1998 that the respirators did not offer adequate protection:

> Q. When you found out you were sick, did you think maybe the respirators didn't protect you like you thought they would have?
> MR. PETSONK: I'm going to object again to the form of the question.
> A. Yes. **I didn't think they worked like they said they would**.
> Q. You didn't think they worked?
> A. No. I mean –
> Q. Did you talk to your employer at that time?
> A. No.
> Q. Who would have been your employer in the mid '90s?

A. Let me think. I think it was Top Gun Mining. Yes, I believe.

Id. at 57:11-58:3 (JA 3810–11) (emphasis added). Despite knowing the health hazard posed by coal dust, despite knowing respirators were designed to protect from that hazard, and despite wearing respirators to protect himself from that hazard, Mr. Scott performed no investigation whatsoever after he was diagnosed with CWP. *Id.* at 60:9-61:3 (JA 3812–13). Then, on January 10, 2018, the National Institute of Occupational Safety and Health (NIOSH) notified Mr. Scott that he had "Category A complicated pneumoconiosis." 1/10/18 NIOSH Letter to Gary Scott (JA 3955).

Mr. Scott waited to file his case against the AO-C Respondents until September 9, 2021. Gary Scott Compl. (JA 3709). Like with Mr. Dudleson, Petitioners do not dispute the facts relied upon by the Circuit Court below.

SUMMARY OF THE ARGUMENT

Viewing all relevant, undisputed facts, the Circuit Court of McDowell County committed no error in dismissing the Petitioners' claims based on the statute of limitations.

The Circuit Court did not err in deciding the statute of limitations had run as a matter of law. Contrary to Petitioners' assertion that the Supreme Court of Appeals of West Virginia "repeatedly has held that when the statute of limitations begins to run is a question of fact[,]" Pet. Brief at 7, summary judgment on the statute of limitations is appropriate where, as here, all relevant facts related to when the statute of limitations begins to run are undisputed. In arguing otherwise, Petitioners grossly overstate the holding in *State ex rel. 3M Co. v. Hoke,* 244 W. Va. 299, 852 S.E.2d 799 (2020), claiming that the holding in *Hoke* establishes categorically that the statute of limitations for claims involving allegedly defective respirators cannot be resolved as a matter of law. But that is not the holding in *Hoke,* and Petitioners' argument should be rejected. The Circuit

Court here correctly determined no genuine issue of material fact existed regarding the statute of limitations in the cases at issue and did not commit error by granting summary judgment to AO-C Respondents.

Nor did the Circuit Court err in determining that no tolling doctrine saves Petitioners claims. The undisputed facts considered by the Circuit Court show that Petitioners worked in coal mines for decades, understood that exposure to coal dust was a health hazard, wore respirators for the specific purpose of protecting against that hazard, and were diagnosed with CWP. Petitioners discovered all this information well before the two years immediately before filing their Complaints. As such, the discovery rule does not save Petitioners' claims.

Petitioners try to avoid the issue of their diagnosis more than two years before filing suit by claiming that progressive massive fibrosis ("PMF")—also known as complicated CWP—is a separate disease that triggers a new statute of limitations. However, West Virginia does not recognize a two-disease rule for CWP. In arguing for a separate statute of limitations for complicated CWP, Petitioners request the Intermediate Court of Appeals depart from "bedrock precedent" set by the Supreme Court of Appeals of West Virginia establishing 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 v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005). Petitioners present no reason the Circuit Court incorrectly applied precedent or any reason this Court should deviate from it. And even if the Intermediate Court of Appeals was persuaded to do so, Petitioners Dudleson and Scott were both diagnosed with complicated CWP more than two years before filing suit.

Similarly, the Circuit Court correctly decided the fraudulent concealment doctrine does not save Petitioners' claims. The Circuit Court assumed the fraud alleged by Petitioners occurred, but

points to a different issue of proof that Petitioners have no evidence to overcome: "whether this alleged concealment 'prevented the [Petitioners] from discovery or pursuing the cause of action.'" Sept. 7, 2022 Order Granting Summ. Judg., (JA 43) (quoting *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009)). In answering this question, the Circuit Court noted that "[Petitioners] have offered no evidence that [Respondents'] years-ago alleged concealment of product defects in any way pre[v]ented [Petitioners] from connecting their lung injuries to the [Respondents'] products during the two years immediately prior to when [Petitioners] filed these lawsuits." *Id.* Petitioners offer no such evidence here. Instead, Petitioners merely point to a case from Pennsylvania that, upon careful review, supports the AO-C Respondents' position.

Petitioners present the Intermediate Court of Appeals with no reason to overturn the well-reasoned decision of the Circuit Court of McDowell County. Rather than address the Circuit Court's holding, Petitioners disregard the undisputed facts relied upon by the Circuit Court and use nothing but red herrings in an attempt to upset the well-reasoned decision below. But the Circuit Court was correct. Petitioners' appeal should be denied, and the decision of the Circuit Court of McDowell County affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioner respectfully requests a Rule 19 oral argument. This Appeal is appropriate for oral argument under Rule of Appellate Procedure 19(a)(1). Petitioners' Appeal addresses an assignment of error in the application of settled law in the State of West Virginia regarding when the statute of limitations in a personal injury suit begins to run, as well as the application of the discovery rule and fraudulent concealment doctrine. The trial court correctly applied the law on this issue to hold that the

Petitioners' claims are barred by the statute of limitations. Because this Petition satisfies Rule 19(a), oral argument is necessary and appropriate.

ARGUMENT

On September 7, 2022, the Circuit Court of McDowell County granted summary judgment to the Respondents, including AO-C Respondents. In doing so, the Circuit Court properly applied West Virginia law governing the statute of limitations, the discovery rule, and the fraudulent concealment doctrine, determining as a matter of law that Petitioners' claims were untimely brought. Summary judgment is appropriate on statute of limitations issues when, as here, there are no genuine issues of material fact for the jury to determine. The Circuit Court correctly determined that the undisputed facts of Petitioners' cases establish that the statute of limitations ran before Petitioners filed their lawsuits and are therefore time-barred. Further, the Circuit Court correctly decided that Petitioners' claims are not saved by the application of the discovery rule or the fraudulent concealment doctrine. Finally, the Circuit Court correctly determined that West Virginia's statute of limitations law does not include a "two-disease rule," where a diagnosis with complicated CWP restarts the statute of limitations. At all points, the Circuit Court's decision is consistent with West Virginia law, and its September 7, 2022 Order should be affirmed.

I. The Circuit Court of McDowell County did not err by determining the statute of limitations bars Petitioners' claims as a matter of law.

Rule 56 of the West Virginia Rules of Civil Procedure establishes that summary judgment "shall be rendered" when "the pleadings, depositions, answers to interrogatories, and admissions on file … show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." W. VA. R. CIV. P. 56(c). Though the Supreme Court of Appeals of West Virginia has held that when the statute of limitations begins to run "will generally involve questions of material fact that will need to be resolved by the trier of fact[,]" the Supreme Court

has clearly recognized this is not the case when no questions of material fact exist. Syl. Pt. 5, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009) ("Second, **the court (or, if questions of material fact exist, the jury)** should identify when the requisite elements of the cause of action occurred.")(emphasis added). In the instant cases, Petitioners did not below—and even in their appeal brief now, do not—dispute the facts relied upon by the Circuit Court in determining the statute of limitations began to run and expired before Petitioners filed suit.

The Circuit Court's decision was not an aberration; the Supreme Court of Appeals of West Virginia has, on multiple occasions, determined that the statute of limitations bars a plaintiff's claims as a matter of law. *See Coffield v. Robinson*, 245 W. Va. 55, 62, 857 S.E.2d 395, 402 (2021)(recognizing there are instances where the statute of limitations can be determined as a matter of law "because of the undisputed nature of the injury."); *Legg v. Rashid*, 222 W. Va. 169, 176, 663 S.E.2d 623, 630 (2008)("While many cases will require a jury to resolve the issue of when a plaintiff discovered his or her injury … the issue can also be resolved by the court where the relevant facts are undisputed and only one conclusion may be drawn from those facts."); *Brown v. Cmty. Moving & Storage, Inc.*, 193 W. Va. 176, 178, 455 S.E.2d 545, 547 (1995) (affirming circuit court's dismissal of fraud claim due to statute of limitations when undisputed facts demonstrated plaintiff should have been aware of the claim three and a half years before filing suit). In fact, the Supreme Court of Appeals of West Virginia has noted that "the related issue of whether the plaintiff was reasonably diligent in discovery of his or her injury" can also be determined when the relevant facts are undisputed. *Legg*, 222 W. Va. at 630. Petitioners' assertion that the statute of limitations always presents a jury issue simply is not true.

Further, many courts—including the Supreme Court of Appeals of West Virginia—have analyzed the statute of limitations on when a coal miner possesses the knowledge required for the

statute of limitations to begin running. *See Collins v. Mine Safety Appliances Co.*, No. 21-0621, 2022 WL 10084174 (W. Va. Oct. 17, 2022); *Teets v. Mine Safety Appliances Co., LLC*, No. 3:19-CV-195, 2021 WL 3280528 (N.D.W. Va. July 28, 2021), aff'd *Teets v. Mine Safety Appliances Co., LLC*, No. 21-1834, 2022 WL 14365086 (4th Cir. Oct. 25, 2022); and *Preece v. Mine Safety Appliances Co.*, No. CC-50-2019-C-135 (Cir. Court Wayne Cty., W. Va., Feb. 10, 21) (*Preece* is included in joint appendix at JA 1618–24).

In *Collins*, the plaintiff coal miner brought an action against Mine Safety Appliances Company ("MSA"),[2] a manufacturer of respirators, and others. *Collins*, 2022 WL 10084174, at *1. Plaintiff knew he had CWP more than two years before filing suit. *Id.* The undisputed evidence showed that plaintiff "knew from the outset of his mining career that coal mine dust could cause black lung, the specific respirator he contends he used throughout his career, and the date of his black lung diagnosis." *Id.* at *2. As such, the circuit court in *Collins* granted summary judgment to MSA on the statute of limitations, finding that "the statute of limitations began to run on May 23, 2017, when Mr. Collins knew of his injury, knew the identity of the respirator manufacturer, and knew or should have known the causal connection between respondent's respirators and his injury." *Id.* On appeal, the Supreme Court of Appeals of West Virginia affirmed because "plaintiffs who are injured by a product, with reasonable means of identifying the manufacturer of the product, are on notice of potential claims as long as they have 'at their disposal reasonable means of discovering the proper identity of the manufacturer of the [defective product].'" *Id.* at *3 (quoting *Cecil v. Airco, Inc.*, 187 W. Va. 190, 192, 416 S.E.2d 728, 730 (1992)). Therefore, the undisputed evidence showed that the plaintiff had sufficient information for the statute of limitations to begin to run, and the plaintiff's claims were time-barred. *Id.*

[2] MSA is also a Respondent in the instant action.

Similarly, in *Teets*, plaintiff was an underground coal miner who was diagnosed with CWP more than two years before filing suit. *Teets*, 2021 WL 3280528 at *3. The United States District Court for the Northern District of West Virginia, like the Court in *Collins*, determined that the plaintiff knew of his injury, and that "the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach'" Id. at *5 (quoting *McCoy v. Miller*, 578 S.E.2d 355, 359 (W. Va. 2003)). The plaintiff in *Teets* knew who manufactured his respirators, which he knew were designed to prevent lung injury, and that his CWP was related to his mining work. *Id.* However, the plaintiff in *Teets* failed to investigate his claims and his cause of action was barred by the statute of limitations. The Fourth Circuit Court of Appeals affirmed the grant of summary judgment. *Teets v. Mine Safety Appliances Co., LLC*, No. 21-1834, 2022 WL 14365086 (4th Cir. Oct. 25, 2022).

The same was true in *Preece*. In *Preece*, the plaintiff knew of the potential harm from breathing coal dust and knew he wore respirators to protect himself from coal dust over the course of his 28-year career. *Preece*, No. CC-50-2019-C-135, at *2 (JA 1619). The plaintiff also recalled the respirators he wore while working in various mines and testifying specifically that "he knew the trade names of the respirators, and testified he read the instructions and boxes provided with the respirators." *Id.* at *4 (JA 1621). Based on that knowledge, the Circuit Court of Wayne County determined in *Preece* that the plaintiff's duty to investigate the identity of the manufacturers of the respirators he wore and their connection to his lung injury was triggered. *Id.* Further, the Circuit Court of Wayne County noted that the plaintiff suspected the respirators may not have worked properly in July 2016 but failed to filed suit until October 2019. *Id.* at *4–*5 (JA

1621–22). Therefore, the Circuit Court of Wayne County determined the plaintiff's actions were barred by the statute of limitations.

Ignoring this precedent, Plaintiffs point to *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020) to suggest that summary judgment is prohibited in products liability claims involving respirators. In *Hoke*, the West Virginia Attorney General filed suit against respirator companies. *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 303, 852 S.E.2d 799, 803 (2020).[3] Notably, and in stark contrast to this case, the Supreme Court of Appeals of West Virginia held that the relevant facts "as of yet, have not been explored by the parties in discovery." *Id.* at 310, 852 S.E.2d at 810.

Obviously, a case like *Hoke* where depositions have not occurred is distinguishable from the present appeal because here, discovery in each of Petitioners' actions below was developed to the point where the relevant facts were both in the record and undisputed. The *Hoke* decision occurred prior to depositions. As such, *Hoke* is not relevant to this appeal and the Circuit Court here did not err in deciding Petitioners' claims were barred by the statute of limitations as a matter of law.

Just as in *Collins*, *Teets*, and *Preece*, summary judgment was appropriate here because of the testimony of the Plaintiffs demonstrate they were on notice of a potential claim and failed to investigate their claims for more than two years.

II. The Circuit Court did not err in determining that no tolling doctrine saves Petitioners' claims from the statute of limitations.

[3] *Hoke* is also inapposite because it involved only a claim under the West Virginia Consumer Credit and Protect Act and was essentially a preliminary, pre-discovery ruling on whether the discovery rule applies to WVCCPA claims brought by the Attorney General. It did not, and could not, change application of the summary judgment standard to the discovery rule in consumer product liability claims.

West Virginia follows a five-step analysis in determining whether an action is barred by the statute of limitations:

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

Syl. Pt. 5, *Dunn v. Rockwell*, 225 W. Va. 43, 46, 689 S.E.2d 255, 258 (2009). Here, as below, the parties do not dispute the first or fifth elements of the *Dunn* analysis: a two-year state of limitations apply and no other tolling doctrines save Petitioners' claims.

The second, third, and fourth elements of Dunn also mandate summary judgment here, and therefore the Circuit Court correctly determined Petitioners' claims are barred by the statute of limitations. The discovery rule does not save Petitioners' claim because Petitioners possessed all requisite knowledge for the statute of limitations to begin running more than two years before filing suit. Petitioners' attempt to invoke a "two disease rule" to avoid this is contrary to bedrock precedent in West Virginia law. Finally, Petitioners' invocation of the fraudulent concealment doctrine is unavailing as Petitioners have provided no evidence that any alleged concealment prevented these Petitioners from having knowledge of their claims in the two years prior to filing

suit. Petitioners raise the same arguments presented to the Circuit Court. The Circuit Court did not err in rejecting them. The Order of the court below should be affirmed.

a. West Virginia does not recognize a two-disease rule.

Petitioners do not dispute they were diagnosed with simple CWP long before filing suit. Instead, Petitioners argue they filed their suit "within two years from the date they were diagnosed with and/or were informed they had [progressive massive fibrosis ("PMF")]." Pet. Brief at 42. In their brief, Petitioners fail to acknowledge that PMF is simply another form of CWP. In order to circumvent this, Petitioners claim that PMF is a "distinct actionable injury from simple clinical pneumoconiosis." Pet. Brief at 50. Petitioners assert two basic arguments in support of this claim: dicta related to "pure latent injuries" in *Jones v. Trustees of Bethany Coll.*, 177 W. Va. 168, 169, 351 S.E.2d 183, 184 (1986), and the deliberate intent provisions of West Virginia's Workers' Compensation statute, specifically W. Va. Code § 23-4-2. Both arguments should be rejected. West Virginia does not recognize PMF as a separate injury from simple CWP, and the Workers' Compensation statutes do not apply to the AO-C Respondents.

The statute of limitations begins to run when a plaintiff becomes aware they have been injured. *Jones v. Trustees of Bethany Coll.*, 177 W. Va. 168, 351 S.E.2d 183 (1986). In *Jones*, the plaintiff and his daughter were injured, and plaintiff's wife killed, when the motor vehicle he was driving collided with one driven by an employee of Bethany College. *Id.* at 168, 351 S.E.2d at 183. Plaintiff reached a settlement with Bethany College as to all their claims. *Id.* Two years later, while being evaluated for a low-back problem, tests revealed plaintiff had a "pseudoaneurysm of the descending thoracic aorta" that medical evidence indicated was caused by the previous automobile accident. *Id.* at 169, 351 S.E.2d at 184. Despite the prior settlement related to the automobile accident, the plaintiff filed suit against Bethany College. *Id.* In turn, Bethany College asserted the

statute of limitations barred the claim, and also raised the settlement release as an affirmative defense. *Id.*

In analyzing the statute of limitations, the Supreme Court of Appeals acknowledged that "the statute of limitations ordinarily begins to run when the right to bring an action for personal injuries accrues, which is when the injury is inflicted." *Id.* at 169, 351 S.E.2d at 184. The Supreme Court acknowledged that the discovery rule applies to products liability cases involving "injury only after a lengthy period of exposure or the injury surfaces only after a considerable period from the date of exposure." *Id.* at 170, 351 S.E.2d at 185. In those situations, "the statute of limitations does not begin to run until **the plaintiff is aware of the injury or through reasonable diligence should have been aware of the injury.**" *Id.* This is because in "pure latent injury cases, the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred." *Id.* at 170–71, 351 S.E.2d at 186. Petitioners claim that this discussion—which is dicta, as the *Jones* case did not involve a pure latent injury—establishes that diagnosis with PMF or complicated CWP is a separate injury, because Petitioners' disease was not "sufficiently pronounced" until that diagnosis. However, Petitioners' analysis is wrong. In fact, the Circuit Court correctly applied the "pure latent injury" doctrine identified in *Jones*—the Circuit Court specifically determined that the statute of limitations did not begin to run at the time of exposure, but instead began to run when Petitioners became aware they had CWP. (JA 27–30); (JA 32–42). As the Court below found, the Petitioners here did have sufficiently pronounced injuries to put them on notice of the need to file a claim. In fact, all of the Petitioners here filed federal workers' compensation claims with the United States Department of Labor but failed to simultaneously file any civil claims based on the same injuries. Furthermore, nothing in the *Jones* case indicates that knowledge of the injury is not enough to trigger the running of the statute of limitations. The

Court, in *Jones*, discussed the application of the pure latent injury rule, and describes the rule exactly as Judge Kornish applied it here. *Jones*, at 170-171. The "sufficiently pronounced" language relied upon by Petitioners relates to whether the injury is "sufficiently pronounced" enough for the Plaintiff to be aware something is wrong, not that there are varying thresholds or gradations of injury, each of which would create a separate statute of limitations period, as suggested by Petitioners. *Id*.[4] Nothing about the *Jones* case would indicate that PMF or complicated CWP would create the running of a second statute of limitations period.

Further, Petitioners' claim that PMF or complicated CWP creates a separate actionable injury under W. Va. Code § 23-4-2 is inapplicable. Chapter 23 of the West Virginia Code specifically relates to Workers' Compensation and establishes that the chapter applies to employers within the State, see W. Va. Code § 23-2-1, and that the relevant employees "are all persons in the service of employers … and employed by them for the purpose of carrying on the industry business, service, or work in which they are engaged[.]" W. Va. Code § 23-2-1a(a). Simply stated, Petitioners did not allege and do not argue the AO-C Respondents are employers as defined by Chapter 23, or that any Petitioner is an "employee" of the AO-C Respondents as defined by W. Va. Code § 23-2-1a. Nor do Petitioners provide any legal authority this Court could use to justify expansion of West Virginia's Workers' Compensation statutes to manufacturers of products used at any worksite. Petitioners' claim that the deliberate intent provisions of W. Va. Code § 23-4-2 alter the statute of limitations in a products liability claim simply has no basis in the law and should be rejected.

Finally, West Virginia does recognize a two-disease rule for silica-induced occupational pneumoconiosis, but the legislature specifically excepted coal workers' pneumoconiosis from the

[4] The sufficiently pronounced argument also fails because these Plaintiffs were diagnosed with complicated CWP more than two years before they filed their complaints. *See infra*.

definitions. *See* W. Va. Code § 55-7G-3(30) (defining silica actions in the two-disease rule statute to exclude "any administrative claim or civil action related to coal workers" pneumoconiosis.").

Even assuming Petitioners' arguments were legally correct—and they are not—the Relevant Petitioners' (Edgel Dudleson's and Gary Scott's) claims are barred by the statute of limitations. As recognized by the Circuit Court, Edgel Dudleson was first diagnosed with PMF or complicated CWP on November 30, 2018, or at the latest on June 14, 2019. (JA 8) (citing CT Scan Report from Community Radiology dated 11-30-2018, at (JA 1748)). Petitioner Dudleson did not file his suit against AO-C Respondents until August 19, 2021—more than two years after being diagnosed with complicated CWP. See Complaint. Similarly, Petitioner Gary Scott was informed by NIOSH he had "Category A complicated pneumoconiosis" on January 10, 2018. (JA 3955). Petitioner Gary Scott did not file his suit against AO-C Respondents until September 9, 2021—again, more than two years after his diagnosis with complicated CWP. So, even if this Court is inclined to implement any two-disease rule, Petitioners Edgel Dudleson and Gary Scott's claims were *still* untimely. The Circuit Court's September 7, 2022 Order should be affirmed.

b. The discovery rule does not save Petitioners' claims.

In West Virginia, "the statute of limitations ordinarily begins to run when the right to bring an action for personal injuries accrues, which is when the injury is inflicted." *Jones v. Trustees of Bethany Coll.*, 177 W. Va. 168, 169, 351 S.E.2d 183, 184 (1986). However, the discovery rule tolls the statute of limitations until

> the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Syl. Pt. 4, *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 708, 487 S.E.2d 901, 903 (1997). In products liability actions, "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." Syl. Pt. 1, *Hickman v. Grover*, 178 W. Va. 249, 358 S.E.2d 810 (1987).

In the instant case, the facts—undisputed both below and before this Court—establish that Petitioners Edgel Dudleson and Gary Scott, like the plaintiffs in *Collins*, *Teets*, and *Preece*, supra, possessed all information necessary for the statute of limitations to begin running more than two years before filing suit. Therefore, the Circuit Court did not err in deciding the statute of limitations does not save Petitioners' claims.

Petitioner Edgel Dudleson

Petitioner Dudleson knew he had been injured and the maker of the product more than two years before filing suit. Mr. Dudleson was first diagnosed with occupational pneumoconiosis in 1996, when he filed a State black lung claim. 5/11/22 Dudleson Dep. at 37.:19–38:10, (JA 1693–94). In 2000, Mr. Dudleson was diagnosed with silicosis. *Id.* at 41:1–12 (JA 1697). At deposition, Mr. Dudleson specifically associated these diagnoses with his time in coal mines:

> Q. So you knew — sometime between '96 and 2000, you had an understanding that you had contracted a disease from your time in the coal mines from inhaling dust, right?
>
> A. I could tell. I couldn't breathe.

Id. at 42:11–15 (JA 1698). Mr. Dudleson was also able to recognize respirators manufactured by AO-C Respondents as ones he had worn during his coal mining career. *Id.* at 148:2–8 (JA 1580); 171:19–24 (JA 1581); 182:13–17 (JA 1582). A CT scan showed Mr. Dudleson had complicated

CWP, at the absolute latest, by June 14, 2019. Dudleson CT Scan Rep. from Community Radiology dated June 14, 2019 (JA 1750).

The evidence in the record also shows Mr. Dudleson knew or through reasonable diligence should have known about the causal connection between his injuries and the respirators more than two years before filing suit. Mr. Dudleson testified that he was aware of the health hazard associated with breathing coal dust and specifically wore respirators to protect himself from that hazard. 5/11/22 Dudleson Dep. 74:14–75:2 (JA 1575–76). He also testified that the respirators had evidently not protected them. *Id.* at 89:4–9 (JA 1713). Yet, Mr. Dudleson undertook no investigation. *Id.* at 72:12–16 (JA 1574). Therefore, based on documents in the record and Mr. Dudleson's own testimony, the undisputed facts in this case show Mr. Dudleson knew he was injured, knew the identity of the manufacturer of the respirators he wore, and knew or should have known of the causal connection more than two years before filing suit. The Circuit Court did not err in determining the discovery rule does not save Mr. Dudleson's claims.

Petitioner Gary Scott

Like Mr. Dudleson, Mr. Scott possessed all knowledge required for the statute of limitations to begin running more than two years before filing suit. Mr. Scott only wore respirators from when he started working in mines in 1975 until 1981. 5/12/22 Gary Scott Dep. at 18:7–13 (JA 3801). Mr. Scott knew when he started work in the coal mines that inhalation of coal dust was hazardous. 5/12/22 Gary Scott Dep. at 53:20–54:24 (JA 3806–07). Mr. Scott was initially diagnosed with simple CWP in 1994, the same year he received a 5% *de minimis* State workers' compensation benefits. *Id.* at 44:15–45:11 (JA 3802–03). In January 1998, Mr. Scott's diagnosis was further confirmed, and his award was increased to 10%. *Id.* at 46:9–17 (JA 3804). NIOSH informed Mr. Scott that he had "Category A complicated pneumoconiosis" on January 10, 2018.

1/10/18 Letter from NIOSH to Gary Scott. (JA 3955). Mr. Scott testified that, between 1975 and 1981, he wore a respirator manufactured by the AO-C Respondents. 5/12/22 Gary Scott Dep. at 116:5–19 (JA 3814).

Like Mr. Dudleson, the evidence also shows that Mr. Scott knew, or should have known through the exercise of reasonable diligence, of the causal relation between his respirator usage and his injury. Mr. Scott testified that, at the time of his 1998 State Workers' Compensation claim, he questioned if the respirators had adequately protected him. *Id.* at 57:11–58:3 (JA 3810–3811). Despite suspecting this causal connection in 1998, Mr. Scott failed to do anything to investigate his claims. *Id.* at 60:6–61:3 (JA 3812–13). Therefore, based on Mr. Scott's own testimony and the documents in the record in his case, Mr. Scott possessed all knowledge required for the statute of limitations to begin running by 1998. And even if West Virginia recognized a two-disease rule for CWP—and it does not and should not—Mr. Scott was aware he had complicated CWP on January 10, 2018. Mr. Scott then waited until September 9, 2021, to file its suit against the AO-C Respondents. His filing was untimely, and the Circuit Court did not err by determining the discovery rule does not save his claims.

The facts in the record of this matter—supported by both documents and testimony—establish that Petitioners Edgel Dudleson and Gary Scott possessed all knowledge required for the statute of limitations to begin running. Petitioners did not dispute these facts below, and do not dispute these facts now. Instead, Petitioners refer the Court to different, irrelevant facts to argue the discovery rule should save their claims. But they do not. No genuine issue of material fact exists regarding whether Petitioners Edgel Dudleson and Gary Scott possessed the requisite knowledge for the statute of limitations to begin running more than two years before filing suit – they testified that they knew they were injured, that they knew the respirators were intended to

protect them, and that they knew who to sue. Yet, suit was not filed on their behalf for more than two years later. The Circuit Court did not err in its September 7 Order, and its decision should be affirmed.

c. The record does not support application of the fraudulent concealment doctrine.

The fraudulent concealment doctrine in the fourth step of the *Dunn* analysis requires a court to evaluate "whether the defendant fraudulently concealed facts **that prevented the plaintiff from discovering or pursuing the cause of action**. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts **which prevented the plaintiff from discovering or pursuing the potential cause of action**, the statute of limitation is tolled." Syl. Pt. 5, *Dunn v. Rockwell*, 225 W. Va. 43, 46, 689 S.E.2d 255, 258 (2009)(emphasis added). Stated simply, it is not enough that a defendant has information that was fraudulently concealed; that concealment must prevent the plaintiff from discovering a suit could be brought. *Id.*

Here, as below, Petitioners have presented no evidence that any purported concealment by the AO-C Respondents prevented them from discovering their cause of action in the two years prior to filing suit. Instead, Petitioners provide a bland summary of the facts "fraudulently concealed" by AO-C Respondents, which amounts to nothing more than allegations of knowledge of an issue between the 1950s and 1970s. *See* Pet. Brief at 30–31. Petitioners then improperly lump the AO-C Respondents in with the other Respondents to argue that continuing to sell respirators amounts to fraudulent concealment. *Id.* at 45. Petitioners acknowledge that even this stopped in 1998 after MSHA changed its regulations. *Id.* ("Yet, Respondents continued to market, advertise, and sell these products through at least 1998, when regulatory standards changed and these respirators could not pass the new test administered by NIOSH."). Crucially, Petitioners point to no evidence in the voluminous appeal record supporting the assertion that any of this

alleged fraud prevented these Petitioners from learning of their causes of action during the years immediately before they filed suit. There is none, and the Circuit Court did not err in determining that no such evidence exists.

Further, the only case cited by Petitioners in support of their fraudulent concealment argument does not support their position. In *Rice v. Diocese of Altoona-Johnston*, 255 A.3d 237 (Pa. 2021), the Pennsylvania court analyzed, in part, whether the fraudulent concealment doctrine applied to claims regarding sexual abuse by a Catholic priest when the Diocese had "falsely represented to her that each of the Diocese's priests ... would act in her best interests and in the best interests of the children they served." *Rice*, 255 A.3d at 245–46. In analyzing whether the doctrine applied, the Pennsylvania Court recognized the doctrine applies where "fraud has prevented the plaintiff from knowing of his or her cause of action, that cause of action simply does not even exist until the plaintiff becomes aware of, i.e., 'discovers,' the fraud." *Id.* at 248 (internal quotation marks and citations omitted). Further, the fraudulent concealment doctrine in Pennsylvania—like in West Virginia—involves " a causal element by asking whether the fraud or concealment 'cause[d] the plaintiff to relax his vigilance or deviate from his right of inquiry[.]'" *Id.* (internal citations omitted); *see also* Syl. Pt. 5, *Dunn*, *supra* (holding that question is "whether the defendant fraudulently concealed facts **that prevented the plaintiff from discovering or pursuing the cause of action**.")(emphasis added). Stated directly, *Rice* though factually distinguishable from this case, establishes that even under Pennsylvania law, Petitioners' claim of fraudulent concealment would fail for want of evidence that AO-C Respondents' alleged fraudulent concealment caused Petitioners to "relax their vigilance or deviate from their right of inquiry." *See Rich*, 255 A.3d at 248. Rather, the evidence shows that neither Petitioner Edgel Dudleson nor Petitioner Gary Scott engaged in any investigation into potential claims at all. *See*

5/11/22 Edgel Dudleson Dep. at 72:12–16 (JA 1574); 5/12/22 Gary Scott Dep. at 60:6–61:3 (JA 3812–13).

To argue they are entitled to application of the fraudulent concealment doctrine, Petitioners improperly lump all Respondents together, point only to ancient, limited, and irrelevant allegations, and provide no evidence that any alleged fraudulent concealment prevented these specific plaintiffs from learning of their causes of action in the two years before filing suit. Petitioners cite only to case law from a foreign jurisdiction which does not support their claim. Petitioners ask this Court to hold that anytime an allegation of fraud exists, no matter the timing, even when there is not a shred of evidence of causation between the alleged fraud and the failure to file a claim, that there is no statute of limitations at all. That is not the law, and it is not how the fraudulent concealment doctrine is applied. Petitioners here, as below, have failed to establish the fraudulent concealment doctrine applies. The Circuit Court did not err in determining it does not, and the September 7, 2022 Order should be affirmed.

CONCLUSION

Petitioners' brief fails to offer the Intermediate Court of Appeals any reason why it should reverse the decision of the Circuit Court of McDowell County. Petitioners' claims are barred by the statute of limitations. The discovery rule does not save them, as Petitioners had all knowledge required for the statute of limitations to begin running more than two years before filing suit. West Virginia does not recognize a two-disease rule for CWP claims, as such a rule would deviate from bedrock precedent West Virginia courts have relied upon for decades. And even if such a rule did exist in West Virginia, Petitioners Edgel Dudleson and Gary Scott were both aware of their complicated CWP more than two years before filing suit. Finally, Petitioners continue to fail to provide any evidence that any alleged fraudulent concealment prevented them from learning of

their claims. The Circuit Court did not err in granting summary judgment to AO-C Respondents on the basis of statute of limitations. The Circuit Court's Order, despite predating *Collins* and *Teets*, applied the law correctly just as the Supreme Court of Appeals of West Virginia affirmed in *Collins* and the Fourth Circuit affirmed in *Teets*. Accordingly, Respondents American Optical Corporation, Cabot CSC Corporation, and Cabot Corporation request this Court enter an order affirming the decision of the Circuit Court of McDowell County.

DATED: February 22, 2023

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Ronald Hardy, Ralph Manuel,
Edgel Dudleson, Ricky Miller,
James Cruey, Mark Scott,
and Gary Scott,
Plaintiffs Below, Petitioners,

v. **No. 22-ICA-123**

3M Company, Mine Safety Appliances Company,
LLC, AO-C-A (American Optical Corporation –
Cabot CSC Corporation – Cabot Corporation),
Eastern States Mine Supply Company, and
Raleigh Mine and Industrial Supply,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that ***"Respondents American Optical Corporation, Cabot CSC Corporation, and Cabot Corporation's Brief"*** was electronically filed using the File & ServeXpress system on the 22nd day of February, 2023, which shall send automatic notification to the following:

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