No. 22-ICA-123

In the

Intermediate Court of Appeals of West Virginia

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

Petitioners,

v.

3M Company, Mine Safety Appliances Company, LLC, American Optical Corporation, Cabot CSC Corporation, Cabot Corporation, Eastern States Mine Supply Company, and Raleigh Mine and Industrial Supply,

Respondents.

On Appeal from the Circuit Court of McDowell County
Case Nos. 21-C-41, -42, -43, -44, -48, -51, & -52

BRIEF OF RESPONDENT 3M COMPANY

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STATEMENT REGARDING PETITIONERS' ASSIGNMENTS OF ERROR

The circuit court correctly resolved these cases on summary judgment, and its judgment should be affirmed. Disputing Petitioners' assignments of error, 3M Company provides this statement of the issues presented:

1. West Virginia's two-year statute of limitations begins to run when the plaintiff knows, or by exercising reasonable diligence should know, of the elements of a possible cause of action. Petitioners say they wore 3M respirators to protect against coal workers' pneumoconiosis (CWP or black lung); and they were diagnosed with CWP or other lung diseases more than two years before suing 3M. Given those uncontroverted facts, did the circuit court correctly conclude that West Virginia's two-year statute of limitations bars their claims?

2. Fraudulent concealment tolls a claim's accrual only if the plaintiff proves that the defendant prevented the plaintiff from learning of the claim. Petitioners claim 3M committed fraud. But they offer no evidence that this alleged fraud prevented them from learning of their injuries, 3M's identity, or a potential causal connection between the respirators they say they used and their injuries. Given the lack of evidence that 3M prevented Petitioners from learning of their claims, did the circuit court correctly reject Petitioners' claims of fraudulent concealment?

STATEMENT OF THE CASE

Petitioners are seven former or current coal miners. Respondents, including 3M, are manufacturers of respirators or alleged suppliers of respirators. Petitioners allege they wore some combination of Respondents' respirators to prevent lung injuries from coal dust exposure. Five Petitioners assert claims against 3M: Ronald Hardy, Ralph

Manuel, Ricky Miller, James Cruey, and Gary Scott. Subsequent references to "Petitioners" are to those specific miners.

Petitioners developed CWP or other lung diseases, but did not file suit for those injuries for more than two years after their diagnoses. This appeal concerns the untimeliness of Petitioners' claims.

I. Statement of Facts

Each Petitioner's case is addressed below. They share common facts, including that they knew inhaling coal mine dust could cause CWP and other lung diseases, they claim that they specifically wore 3M respirators to prevent those lung ailments, and yet, when they were eventually diagnosed with those illnesses, they waited more than two years before suing 3M. For convenience, the chart below summarizes their diagnoses and lawsuit dates:

Petitioner	First Diagnosis Date	Date of Lawsuit	Years between diagnosis and lawsuit
Ronald Hardy	2018	2021	3
Ralph Manuel	2000	2021	21
Ricky Miller	2013	2021	8
James Cruey	1985	2021	36
Gary Scott	1994	2021	27

A. Hardy was diagnosed in 2018 but did not file suit until 2021.

Petitioner Ronald Hardy worked in coal mines from 1986 to 2001, when he retired.[1] Hardy's father had black lung, so Hardy knew his entire career that he "wanted

[1] R.99. This and many subsequent citations are to the memoranda supporting the summary judgment motions. Those memoranda provide precise citations to the summary judgment record, all of which is in the Joint Appendix.

to stay away from that black lung."[2] He says he wore respirators for that purpose, and he understood and expected that the respirators would protect him from inhaling coal mine dust.[3] While working, he saw dust inside the respirators he wore.[4]

Sometime between 1995 and 2001, Hardy began experiencing shortness of breath while working.[5] In 2018, he testified that he had noticed his breathing problems had worsened over time.[6]

Hardy applied for federal black lung benefits in June 2018, certifying under penalty of fine or imprisonment that he believed he had CWP or other pulmonary or respiratory disease caused by coal mine employment.[7] The following month, a physician told him he had obstructive lung disease and impaired gas exchange.[8] When Hardy was deposed in November 2018 as part of his federal benefits claim, he was asked whether he had considered bringing a lawsuit about the respirators he wore.[9] The same counsel represented him in that benefits claim as in this tort claim.[10]

Hardy sued Respondents on August 18, 2021, more than three years after his federal black lung application and diagnosis, and more than two years after he was asked in a deposition whether he had considered bringing a lawsuit about respirators.

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2 R.101.

3 *Id.*

4 R.101-02.

5 R.101.

6 *Id.*

7 R.100.

8 *Id.*

9 R.102.

10 *Id.*

B. Manuel was diagnosed by 2000 but did not sue until 2021.

Petitioner Ralph Manuel worked in coal mines from 1981 to 2021.[11] Since 1981, Manuel has known that coal and rock dust could cause lung disease.[12] Several of his family members and friends died from black lung.[13]

Manuel expected respirators to protect him from coal dust and black lung.[14] His 2009 or 2010 training as a dust examiner (someone who breaks down and examines the monitors miners wear to measure respirable dust) reinforced the dangers of respirable dust, and emphasized the need to protect himself from dust exposure.[15]

In 1999, Manuel was diagnosed with silicosis and sought state workers' compensation benefits.[16] He then sought governmental benefits for CWP in 2000, 2008, and 2018.[17] He was diagnosed with COPD/CWP in 2008, and the Occupational Pneumoconiosis Board notified him he had CWP in 2009.[18]

In 2018, Manuel applied for federal black lung benefits.[19] He was again diagnosed with CWP in July 2018, after telling a physician he had sputum "most days" and that he suffered shortness of breath for more than 20 years.[20] The physician found his CWP was

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11 R.873.

12 R.877.

13 R.878.

14 R.877; R.946.

15 R.877-78.

16 R. 875 n.23.

17 R.875.

18 R.875.

19 R.876.

20 *Id.*

at the complicated stage, also called progressive massive fibrosis.[21] The physician told him his "lungs were pretty bad," mentioned fibrosis, and told him to become a Part 90 miner (allowing him to work under a reduced dust standard). Manuel followed that advice.[22] He concedes that he did not investigate whether he had a potential claim against the companies that made the respirators he says he used to protect against breathing coal mine dust.[23]

Manuel sued Respondents on August 19, 2021, more than 20 years after his first diagnosis with occupational lung disease and associated benefits applications, more than ten years after his 2008/2009 diagnosis and benefits application, and more than three years after his July 2018 diagnosis and benefits application.

C. Miller was diagnosed in 2013 but did not sue until 2021.

Petitioner Ricky Miller worked in coal mining from 1970 to 1982.[24] When Miller began mining, he knew that coal and rock dust exposure could cause lung disease, including black lung.[25]

Miller reports wearing a respirator throughout his career for his entire shift, except lunch breaks, even though most of his co-workers did not.[26] He says he wore respirators because he saw significant dust in the mines, had seen older miners coughing and spitting up dust, and wanted to protect his lungs.[27]

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21 R.875.

22 R.876.

23 R.955.

24 R.2090.

25 R.2093.

26 R.2090; R.2093.

27 R.2093.

In 2013, Miller told his physician that he had experienced a cough for many years, shortness of breath, and nighttime wheezing.[28] When Miller applied for state workers' compensation benefits in 2013, the Occupational Pneumoconiosis Board found he had simple occupational pneumoconiosis, and he received an approximately $15,000 award.[29] Miller understood that he had received this award as part of a black lung recovery.[30]

After being diagnosed with pneumoconiosis, Miller assumed the respirators did not protect him.[31] He knew something was not right in 2013, and he considered contacting 3M because he felt like its respirators should have protected him.[32] But he did not investigate whether he had a claim against 3M.[33]

In 2017, Miller received another letter from the Occupational Pneumoconiosis Board, again informing him he had been diagnosed with occupational pneumoconiosis.[34] The Board found that he had reported shortness of breath for nine years and chronic productive cough for ten years.[35] The same year, Miller also applied for federal black lung benefits.[36]

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28 R.2091.

29 R.2091; R.2178.

30 R.2091.

31 R.2091

32 R.2091-92.

33 R.2092.

34 R.2092.

35 R.2092.

36 R.2092.

Miller says he "heard" about other people filing lawsuits against respirator manufacturers "a couple years ago."[37] Miller sued Respondents on August 19, 2021, eight years after his 2013 diagnosis, and four years after his 2017 diagnosis and federal benefits application. He cannot explain why he waited.[38]

D. Cruey was diagnosed in 1985 but did not file suit until 2021.

Petitioner James Cruey worked in coal mines from 1968 to 1999, when he retired due to his injuries.[39] Cruey reports wearing Respondent Mine Safety Appliance's (MSA) respirators almost exclusively; he says he wore a 3M product for just eight months of his 31-year career.[40] He was aware of the dangers of coal and rock dust.[41] He believed the respirators were "keeping out all of the dust."[42] Despite testifying that he constantly wore respirators, he was diagnosed with several occupational lung diseases, reported coughing up coal dust, and testified that he realized that "apparently the masks wasn't slowing it all down."[43] He admits his failure to investigate.[44]

In 1985, Cruey applied for and received state black lung benefits.[45] In 2004, he applied for federal black lung benefits, providing x-rays that physicians found showed

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37 R.2094.

38 R.2094.

39 R.2545-47.

40 R.2810.

41 R.2548.

42 *Id.*

43 *Id.*

44 R.2660-62.

45 R.2545.

CWP.[46] In 2005, the federal claims examiner found he had CWP caused by his coal mine work.[47] In 2006 and 2013, Cruey again sought federal black lung benefits.[48]

In 2016, represented by the same counsel who later filed this lawsuit, Cruey filed a fourth application for federal benefits, and a physician diagnosed him with interstitial lung disease and impaired gas exchange.[49] His counsel argued to the federal government that the evidence "establishes that Mr. Cruey suffers from a pulmonary or respiratory impairment that is significantly related to or substantially aggravated by dust exposure in coal mine employment, i.e., that Mr. Cruey has legal pneumoconiosis."[50] Cruey was awarded federal benefits in 2020.[51]

Cruey sued Respondents on September 3, 2021. This was more than thirty years after his 1985 diagnosis, more than 15 years after a federal claims examiner found he had CWP, and about five years after the counsel representing him in this lawsuit filed Cruey's fourth federal benefits application.

E. Scott was diagnosed in 1994 but did not file suit until 2021.

Petitioner Gary Scott worked in coal mines from 1975 until retiring in 2020.[52] When he began mining in 1975, he knew that coal dust was a health hazard, and he says

46 R.2547.

47 *Id.*

48 *Id.*

49 *Id.*

50 R.2565; R.2570.

51 R.2548.

52 R.3992.

he wore respirators to prevent inhaling coal dust.[53] He wore respirators from 1975 to 1982, mainly other manufacturers' products.[54]

In 1994, Scott was diagnosed with black lung and awarded state workers' compensation benefits.[55] In 1998, he was again diagnosed with black lung and applied for state benefits.[56] At that time, he questioned whether his respirators had worked.[57] He admits he did not investigate whether he might have had a claim against respirator manufacturers.[58] He filed for federal black lung benefits in 2020.[59]

Scott sued Respondents on September 9, 2021, more than 25 years after his first diagnosis and more than 20 years after he questioned whether his respirators worked.

II. Procedural Background

Petitioners' cases were filed separately in the Circuit Court of McDowell County. After discovery, 3M moved for summary judgment,[60] as did other Respondents, and the motions were fully briefed.

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53 R.3765-66.

54 R.3392-93, 3765.

55 R.3766.

56 R.3767.

57 R.3767-68.

58 R.3768.

59 R.3879.

60 *Hardy*, R.93-95 (motion), R.96-227 (memorandum and exhibits); *Manuel*, R.867-70 (motion), R.871-996 (memorandum and exhibits); *Miller*, R.2085-87 (motion), R.2088-2218 (memorandum and exhibits); *Cruey*, R.2809-73 (joinder in MSA's summary judgment motion and exhibits); *Gary Scott*, R.3991-4056 (joinder in MSA's and AO-C-A's summary judgment motions and exhibits).

On August 15, 2022, the circuit court (Kornish, J.) heard the motions.[61] The circuit court noted that Syllabus Point 5 of *Dunn v. Rockwell* controlled the statute of limitations issue across all the cases.[62] The circuit court recognized that "mostly we're talking about undisputed facts, and the dispute is really in the interpretation of those facts."[63] It reviewed the decisions of another circuit court granting summary judgment on similar facts in *Collins*, as well as the similar decision of Chief Judge Groh of the federal Northern District of West Virginia in *Teets*.[64]

Petitioners contended, among other things, that their diagnoses did not sufficiently injure them to have a tort claim; they were not injured until their diseases progressed to more serious stages. Petitioners asked the circuit court to delay ruling to allow them to provide additional authority showing that a strict liability claim requires serious harm.[65] The circuit court allowed Petitioners additional time to supplement their filings with these additional cases.[66] The circuit court stressed that this was to add to Petitioner's oppositions "additional cases you want me to read as far as the injury and the understanding that the miners – that an objective miner would have made

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61 The transcript is R.689-811.

62 R.695-96.

63 R.697.

64 R.701; *see* R.122-28 (*Preece v. Mine Safety Appliances*, No. CC50-2019-C-132 (Cir. Ct. Wayne Cty. July 21, 2021) (Young, J.)); R.129-37 (*Teets v. Mine Safety Appliances Co.*, No. 3:19-cv-195, 2021 3280528 (N.D. W. Va. July 28, 2021) (Groh, J.)). As discussed below, both decisions were later affirmed by the Supreme Court of Appeals and Fourth Circuit, respectively.

65 R.784-85.

66 R.785; R.806.

connecting their lung disease to wearing a mask."[67] Petitioners used this invitation to file a 40-page supplemental brief.[68]

On September 7, the circuit court granted 3M's and the other Respondents' summary judgment motions in a comprehensive, 45-page order.[69] After recognizing that no Petitioner disputed that he knew who manufactured the respirators he wore, the circuit court recited the facts about when each Petitioner was diagnosed and sought federal or state benefits.[70] The circuit court concluded no material issues of fact existed and that "no rational trier of fact, based on these facts and existing West Virginia law—a two-year statute of limitations and the current Discovery Rule—could find for Plaintiffs unless they disregarded the law and decided these cases based on their sympathy for the miners' current breathing difficulties based on this injury we call black lung."[71]

On September 22, Petitioners moved this Court to consolidate their cases for appeal. That motion was granted on October 13, and Petitioners timely filed a notice of appeal on October 21.

SUMMARY OF ARGUMENT

The circuit court correctly recognized that Petitioners' claims were time-barred. Its judgment should be affirmed.

More than two years before filing these lawsuits, Petitioners were (1) diagnosed with CWP or other lung disease caused by inhaling coal mine dust, (2) knew that they

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67 R.809-10.

68 R.510-49.

69 R.1-46.

70 R.3-15.

71 R.45.

had worn 3M respirators while exposed to coal mine dust, and (3) agreed that they had expected the respirators to prevent CWP or other lung disease caused by inhaling coal mine dust. That is all they needed to know to bring these lawsuits.

Subsequent decisions of the Supreme Court of Appeals (*Collins*) and the Fourth Circuit (*Teets*) confirm this analysis. *Collins* and *Teets*, like these consolidated cases, involved former coal miners who sued respirator manufacturer more than two years after being diagnosed with the CWP they said they had worn the respirators to prevent. Applying well-established West Virginia law on the statute of limitations, both courts affirmed summary judgments.

Petitioners offer this Court no persuasive reason to depart from the Supreme Court of Appeals' and Fourth Circuit's holdings. Their arguments conflate the accrual of tort claims with the requirements of federal and state workers' compensation benefits programs. The circuit court correctly refused to extend tort law along the lines Petitioners suggest. The circuit court also correctly declined their invitation to hold that simple CWP is not an injury for tort purposes.

The circuit court also correctly ruled that because Petitioners presented no evidence of fraudulent concealment, that doctrine did not toll the statute of limitations. Fraudulent concealment requires proof that the defendant said or did something to prevent the plaintiff from learning about a possible cause of action. Although Petitioners crammed the record with what they say is evidence that 3M committed fraud, none of that evidence—which the circuit court considered—establishes 3M said or did anything to prevent Petitioners from learning of their possible claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary. The circuit court's well-reasoned order correctly granted summary judgment, and the dispositive issue has been authoritatively decided by subsequent decisions of the Supreme Court of Appeals and Fourth Circuit.[72] The central issue—application of the statute of limitations—is governed by settled law, and the record and briefs adequately present the cases. Argument would not significantly aid this Court's decisional process.[73]

Dozens of similar cases brought by more than 400 coal miners—often years or decades untimely—are pending across West Virginia. In its opinion and order granting summary judgment in these cases, the circuit court urged the appellate courts to ensure courts and litigants know how this recurring limitations issue should be resolved going forward.[74] This Court should issue a detailed, precedential opinion reinforcing that such time-barred claims are appropriately resolved on summary judgment. Doing so will help circuit courts and litigants efficiently clear dockets clogged with untimely cases.

STANDARD OF REVIEW

Summary judgment "shall be rendered" when the evidence on file "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[75] A summary judgment is reviewed *de novo*.[76]

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72 W. Va. R. App. P 18(a)(3).

73 W. Va. R. App. P. 18(a)(4).

74 *See, e.g.*, R.807-08 (circuit court referencing hearing on discovery issues in other pending respirator cases); R.2 (stating appeal would "give greater clarity to the law"). The circuit court did so without the benefit of the affirmances in *Collins* and *Teets*.

75 W. Va. R. Civ. P. 56(c).

76 *Dunn v. Rockwell*, 225 W. Va. 43, 50, 689 S.E.2d 255, 262 (2009) (citing Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)).

ARGUMENT

The circuit court correctly concluded that no genuine issue of material fact exists as to the timeliness of Petitioners' claims. Their medical records, testimony, and sworn benefits applications establish that they knew, or reasonably should have known the facts underlying their claims more than two years before filing suit. The circuit court also correctly rejected Petitioners' assertion of fraudulent concealment, because they have no evidence 3M prevented them from learning of their claims. The judgment of the circuit court should be affirmed.

I. The circuit court correctly concluded that Petitioners' claims are untimely.

More than two years before filing these lawsuits, Petitioners knew that: inhaling coal mine dust could cause lung diseases including CWP; they had worn respirators to prevent disease; and they had been diagnosed with CWP or other lung disease. The circuit court correctly concluded that there was no genuine issue of material fact as to their claims' timeliness.

A. The discovery rule tolls the statute of limitations until the claimant knew, or should have known, of a possible claim.

West Virginia's "bedrock precedent" holds 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."[77] Distilling this bedrock precedent, *Dunn v. Rockwell* established adopted a "step-by-step process" to be

[77] *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005) (citing *Harrison v. Seltzer*, 165 W. Va. 366, 371, 268 S.E.2d 312, 315 (1980); *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 712, 487 S.E.2d 901, 907 (1997); & *McCoy v. Miller*, 213 W. Va. 161, 166, 578 S.E.2d 355, 360 (2003)).

"applied to determine whether a cause of action is time-barred."[78] Syllabus Point 5 of *Dunn*, set out below, provides this step-by-step process; and the circuit court correctly recognized that this original syllabus point supplies the rule of law it had to apply:

> First, the court should identify the applicable statute of limitations 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 limitations 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 3 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.[79]

Petitioners agree that *Dunn* controls.[80]

Under *Dunn*'s third step, the discovery rule tolls the two-year tort statute of limitations "until a claimant knows or by reasonable diligence should know of his claim."[81] So, the "statute of limitations begins to run when 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

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78 *Dunn*, 225 W. Va. at 52-53 689 S.E.2d at 264-65.

79 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255; *see* R.16-17 (circuit court quoting this syllabus point); R.695 (circuit court describing this at hearing); Syl. Pt. 1, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014) (original syllabus points have highest precedential value).

80 R.764 (discussing *Dunn*); Petitioners' Br. 33.

81 *Id.* (quoting *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 711, 487 S.E.2d 901, 906 (1997)).

have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury."[82] The statute "begins to run when a plaintiff has knowledge of the fact that something is wrong."[83]

"[W]hether a plaintiff 'knows of' or 'discovered' a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action."[84]

In a products liability case, the plaintiff does not need to know that a product was defectively designed or manufactured for the statute of limitations to begin running.[85] "[S]uch knowledge is often not known with legal certainty until after the jury returns its verdict."[86] Requiring knowledge of the defect would "almost abrogate the statute of limitations in products liability claims."[87]

When there is no genuine issue of material fact on these steps' application, courts must resolve the statute of limitations on summary judgment.[88] Syllabus point 5 of

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82 *Id.*, 225 W. Va. at 52-53, 689 S.E.2d at 264-65 (quoting Syl. Pt. 4, *Gaither*, 199 W. Va. 706, 487 S.E.2d 901).

83 *Goodwin*, 218 W. Va. at 221, 624 S.E.2d at 568 (citations omitted).

84 Syl. Pt. 4, *Dunn*, 225 W. Va. 43, 868 S.E.2d 255.

85 *Hickman v. Grover*, 178 W. Va. 249, 253, 358 S.E.2d 810, 814 (1987).

86 *Id.*

87 *Id.*

88 *See, e.g.*, *Collins v. Mine Safety Appliances Co.*, No. 21-0621, 2022 WL 10084174, at *1-3 (W. Va. Oct. 17, 2022) (memorandum decision). The Supreme Court of Appeals has even affirmed granting a motion to dismiss based on the statute of limitations when the pleadings establish the claims are time-barred. *Richards v. Walker*, 244 W. Va. 1, 7-8, 813 S.E.2d 923, 929-30 (2018) (citing Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255).

Dunn recognizes that, although some cases will involve genuine issues of material fact to be resolved by a jury, courts should resolve the cases that do not.[89] *Dunn* itself affirmed a circuit court's order granting summary judgment on the statute of limitations.[90]

The Supreme Court of Appeals has not hesitated to affirm summary judgments based on the statute of limitations.[91] About a month after the circuit court's ruling here, for example, the Court affirmed summary judgment that a similarly situated miner's tort claims against MSA were time-barred.[92] In that case, just like these, it was "undisputed that [the 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," meaning his "diagnosis triggered his duty to investigate the cause of his injury."[93] Because the plaintiff "failed to timely file his action," a reasonable jury would have had insufficient evidence to find for the plaintiff, and the circuit court correctly granted summary judgment.[94] Applying *Dunn*, the Fourth Circuit reached the same conclusion just a few days later.[95]

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89 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255.

90 *Id.*, 225 W. Va. at 63-64, 689 S.E.2d at 275-76. Another order, on different claims, was reversed because genuine issues of material fact remained for those claims. *See id.*

91 *See, e.g.*, *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 220, 624 S.E.2d 562, 567 (2005) (rejecting plaintiff's reliance on language that statute of limitations is often a jury question; "[T]his Court has, on more than one occasion, affirmed summary judgment in cases where the undisputed facts establish that the suit was time-barred pursuant to the applicable statute of limitations." (collecting cases)).

92 *Collins*, 2022 WL 10084174, at *1-3.

93 *Id.* at *2.

94 *Id.*

95 *Teets v. Mine Safety Appliances Co., LLC*, No. 21-1834, 2022 WL 14365086, at *1-3 (4th Cir. 2022) (unpublished).

B. No one disputes *Dunn* step 1.

Dunn's first step is to identify the statute of limitations. The parties agree that W. Va. Code § 55-2-12's two-year statute of limitations applies.[96]

C. The circuit court correctly concluded that there is no genuine issue of material fact as to *Dunn* steps 2 and 3.

There is no genuine issue of material fact regarding *Dunn*'s second step (determining when the elements occurred) or third step (whether the discovery rule tolls the statute of limitations).

1. Invasion of any legally protected interest counts as an injury.

Analyzing steps 2 and 3 requires identifying the elements of the claims. Petitioners' complaints sound in strict liability, negligence, breach of warranty, and fraud, all requiring proof that the defendant caused the plaintiff's injury.[97] Analyzing the discovery rule likewise requires considering when the plaintiff knew, or through the exercise of reasonable diligence should have known, that (1) he was injured, (2) the identity of the defendant, and (3) that the injury could be causally connected to the defendant.[98]

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96 Petitioners' Br. 42; R.21.

97 *E.g.*, R.61-69 (Hardy's complaint); *see C.C. v. Harrison Cty. Bd. of Educ.*, 245 W. Va. 594, 603, 859 S.E.2d 762, 771 (2021) (negligence); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992) (fraud); *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 646-47, 403 S.E.2d 189, 194-95 (1991) (breach of warranty requires "same evidentiary showing" as strict liability); *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 891, 253 S.E.2d 666, 684 (1979) (strict liability).

98 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d at 255.

In tort, a plaintiff is injured when any legally protected interest is invaded.[99] For example, the claims of a plaintiff who discussed injuries with his medical providers were not tolled by the discovery rule; they accrued when he was injured, making his lawsuit more than two years later untimely.[100] A miner's application for federal black lung benefits likewise showed that "he knew or should have known that he had suffered an invasion of his legally protected interests."[101] So did another miner's application for Kentucky compensation benefits, which certified he had CWP.[102]

Statutory compensation regimes impose their own requirements. The federal black lung benefits program, for example, requires beneficiaries to be totally disabled to qualify.[103] But those statutory requirements have nothing to do with the West Virginia tort claims at issue here.

2. The Supreme Court of Appeals and Fourth Circuit have confirmed that diagnoses of lung diseases count as injuries.

In decisions rendered after the circuit court's decision, the Supreme Court of Appeals and Fourth Circuit confirmed that a plaintiff's diagnosis with black lung qualifies as an injury. In *Collins*, the Supreme Court of Appeals affirmed summary judgment against a plaintiff diagnosed with black lung more than two years before suing

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99 *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 139, 522 S.E.2d 424, 430 (1999) (citing Restatement (Second) of Torts § 7(1) (1964)).

100 *Smith v. Velotta Co.*, No. 15-0228, 2016 WL 597743, at *4 (W. Va. Feb. 12, 2016) (memorandum decision).

101 *Adams v. 3M Co.*, No. 12-61-ART, 2013 WL 3367134, at *3 (E.D. Ky. July 5, 2013).

102 *Roark v. 3M Co.*, 571 F. Supp. 3d 708, 712-13 (E.D. Ky. 2021).

103 *See, e.g., E. Assoc. Coal Corp. v. Dir., Off. of Workers' Comp. Progs.*, 805 F.3d 502, 504-05 (4th Cir. 2015).

a respirator manufacturer.[104] The "date of his black lung diagnosis" was the date of his injury.[105] The Fourth Circuit reached the same conclusion, reasoning when the plaintiff was diagnosed, the plaintiff "knew that he had been injured."[106]

3. Petitioners were injured (for purposes of the statute of limitations) when diagnosed with CWP or other lung diseases.

The circuit court correctly concluded there is no genuine dispute about when Petitioners were diagnosed with CWP or other lung diseases. Their testimony and medical records establish that each was diagnosed more than two years before filing suit.[107]

More than two years before filing, each Petitioner except Gary Scott applied for federal black lung benefits, representing to the federal government that he believed he had CWP or other lung disease resulting from coal mine employment.[108] By applying for federal black lung benefits, a miner certifies under penalty of fine or imprisonment that he believes he is disabled "due to pneumoconiosis (Black Lung) or other respiratory or

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104 *Collins v. Mine Safety Appliances Co.*, No. 21-0621, 2022 WL 10084174, at *1-3 (W. Va. Oct. 17, 2022) (memorandum decision).

105 *See id.* at *2.

106 *Teets v. Mine Safety Appliances Co.*, No. 21-1834, 2022 WL 14365086, at *2 (4th Cir. Oct. 25, 2022)

107 Hardy (diagnosed with obstructive lung disease and impaired gas exchange in 2018; R.193); Manuel (diagnosed with silicosis in 1999, with COPD/CWP in 2008, and with CWP in 2018; R.875); Miller (diagnosed with CWP in 2013 and 2017; R.2091-92, R.2178); Cruey (diagnosed with silicosis in 1985, CWP in 2004-05, and CWP again in 2016; R.2545-48); Gary Scott (diagnosed with CWP in 1994 and 1998; R.3766-67).

108 By federal regulation, a disease arises out of "coal mine employment" when the disease is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 CFR § 718.201(b). Gary Scott sought federal black lung benefits in 2020.

pulmonary disease resulting from coal mine employment."[109] The only way to interpret that certification is that each Petitioner knew he was injured and sought compensation for it. And even Scott applied for and received state workers' compensation benefits for his alleged occupational lung injury almost 30 years ago.[110] That each Petitioner asserted this type of claim—in a system designed to compensate miners disabled by CWP or other lung disease relating to dust exposure—"shows that [each Petitioner] knew or should have known that he had suffered an invasion of his legally protected interests."[111]

4. Petitioners knew they were injured and that they used 3M respirators they intended to prevent their injuries.

Under Petitioners' allegations that 3M's respirators caused their injuries, their legally protected rights were invaded no later than when they were diagnosed with the lung diseases that they used 3M respirators to prevent. At that point, they knew something was wrong,[112] which is why they sought federal or state compensation benefits.

As soon as they were diagnosed, Petitioners could have brought claims against 3M on the same theory they now allege. They were injured, they knew they had used 3M respirators, and they knew they had used 3M respirators to prevent the injuries with

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109 *E.g.*, R.1073-76 (Manuel's application).

110 R.3766.

111 *Adams,* 2013 WL 3367134, at *3.

112 *See Goodwin*, 218 W. Va. at 221, 624 S.,E.2d at 568 ("This Court has repeatedly stated that the statute of limitations begins to run when a plaintiff has knowledge of a fact that something is wrong and not when he or she knows of the particular nature of the injury . . . .").

which they were diagnosed. Under *Dunn*, that is all they needed to know to bring their claims. Those claims accrued then, and the statute of limitations began to run.[113]

Collins and *Teets* hold that summary judgment is proper when, more than two years before filing, plaintiffs are diagnosed with CWP, knew they wore a manufacturer's respirators, and knew that the respirators were supposed to prevent them from inhaling the coal mine dust that causes CWP.[114] So do Kentucky cases applying its similar (albeit shorter) statute of limitations.[115] The circuit court did not err by reaching the same conclusion.

D. Petitioners' contrary reasoning is unavailing.

Petitioners offer this Court a smorgasbord of reasons to reverse summary judgment. Each fails.

1. General language on jury questions proves nothing about specific cases.

Petitioners invoke general language that applying the statute of limitations is often a jury question. But often is not always, and such general language says nothing about how specific cases should be resolved. To analyze summary judgments on the statute of limitations, courts must determine whether a genuine issue of material fact exists on the case's record.[116] After making that review, "summary judgment can and

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113 *See* Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255.

114 *Collins*, 2022 WL 10084174, at *1-3, *Teets*, 2022 WL 14365086, at *2.

115 *Roark*, 571 F. Supp. 3d at 712-14; *Adams*, 2013 WL 3367134, at *3-6; *Boggs v. 3M Co.*, No. 11-57-ART, 2012 WL 3644967, at *2-6 (E.D. Ky. Aug. 24, 2012), *aff'd*, 527 F. App'x 415 (6th Cir. 2013).

116 *Goodwin*, 218 W. Va. at 220, 624 S.E.2d at 567.

should be granted on the basis of an applicable statute of limitations when no genuine issue of material fact exists as to whether the statute of limitation has been violated."[117]

That confirms why the Court affirmed summary judgment in *Collins*. After evaluating the case's record, the Court rejected the plaintiff's assertion that the circuit court had misapplied Rule 56's standard, concluding that a reasonable jury could not find for the plaintiff.[118] And it explains why the circuit court granted summary judgment here. As in *Collins*, the record shows no genuine issue of material fact on the statute of limitations.

2. *Hoke* does not speak to these cases.

Petitioners frequently reference the Supreme Court of Appeals's decision on a writ petition, *State ex rel. 3M Co. v. Hoke*, but that case is inapposite.[119] *Hoke* concerned a Consumer Credit and Protection Act (CCPA) case the Attorney General has brought against respirator manufacturers. *Hoke* held that the discovery rule applies to the Attorney General's CCPA claim, remanding for the "parties to develop their evidence" on the discovery rule applicable to CCPA claims, "and present it anew in competing motions for summary judgment or at trial."[120] That says nothing about Petitioners' tort claims; everyone agrees that *Dunn*'s five-step statute of limitations analysis applies to them.

Contrary to Petitioners' arguments, *Hoke* does not hold that "whether or not the claims are barred by the statute of limitations is a fact issue," or that the "statute of

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117 *Id.*; *see also* Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255.

118 *Collins*, 2022 WL 10084174, at *2.

119 *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020).

120 *Id.*, 244 W. Va. at 309-10, 852 S.E.2d at 809-10.

limitations for claims involving these same [allegedly] defective respirators cannot be resolved as a matter of law."[121] All *Hoke* resolved was the threshold issue whether the discovery rule applies to the Attorney General's CCPA claim. The Supreme Court of Appeals did not determine whether summary judgment was proper in that case, because the evidence on the discovery rule had not been developed.[122] In fact, *Hoke* acknowledged that on remand, the evidence developed could allow the limitations issue to be resolved on "competing motions for summary judgment,"[123] an aspect of *Hoke* that the circuit court correctly recognized.[124] Petitioners' characterizations find no home in *Hoke*.

3. When Petitioners spoke with counsel about a causal connection between respirators and their disease is immaterial.

Petitioners next assert that they first spoke to their lawyers about a possible causal connection between 3M respirators and their disease within two years of filing, so their claims are not time-barred.[125] But that "reasoning contradicts West Virginia law."[126] Once a plaintiff is injured, "and 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."[127] Petitioners

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121 Petitioner's Br. 3, 33.

122 *See Hoke*, 244 W. Va. at 309-10, 852 S.E.2d at 809-10.

123 *Hoke*, 244 W. Va. at 310, 852 S.E.2d at 810.

124 R.43 (recognizing case was remanded "to the trial court for discovery to determine whether the discovery rule applied").

125 Petitioners' Br. 42.

126 *Teets*, 2022 WL 14365086, at *2 (quoting *Goodwin*, 624 S.E.2d at 568).

127 *Goodwin*, 218 W. Va. at 221, 624 S.E.2d at 568 (emphasis added; citation omitted).

did not need to speak with an attorney to know that they wore 3M respirators to prevent CWP or other lung disease, yet they ended up with CWP or other lung disease. "It would have been only logical for [them] to investigate the respirators."[128]

The Fourth Circuit correctly recognized that adopting this argument would "create an exception large enough to swallow the rule," eliminating *Dunn*'s "requirement of 'reasonable diligence' to discover and bring suits within a given time."[129] The Supreme Court of Appeals has refused to nullify West Virginia's statute of limitations by requiring knowledge of the alleged defect with legal certainty.[130] This Court should stay the course, joining the Fourth Circuit in rejecting this latest permutation of that argument.

4. Sworn benefits applications and testimony confirm knowledge of injury.

Petitioners say that their sworn benefits filings and testimony are "no evidence that the coal miner actually has some PMF or any specific latent pulmonary disease."[131] But courts cannot so easily jettison what parties swear to be true. Each Petitioner applying for federal black lung benefits certified that, as of the date of his application, he believed he had CWP or other lung disease relating to coal mine employment, *i.e.*, they had inhaled coal mine dust.[132] And that is what they supposedly used respirators to avoid. That explains the circuit court's reasoning that applying for federal black lung

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128 *Roark*, 571 F. Supp. 3d at 715.

129 *Teets*, 2022 WL 14365086, at *2 (quoting *Dunn*, 689 S.E.2d at 262).

130 *See Hickman*, 178 W. Va. at 253, 358 S.E.2d at 814.

131 Petitioners' Br. 10.

132 *E.g.*, R.1073-76.

benefits proves a person who used respirators to prevent CWP knew, or with reasonable diligence should have known, the information required to bring a tort claim.[133]

Courts have relied on sworn federal benefits applications in similar cases, for good reason.[134] Applicants for federal benefits cannot genuinely dispute what they represented to the federal government as true. Petitioners certified that they believed they had CWP caused by exposure to coal mine dust. The circuit court correctly held Petitioners to their sworn statements.

Nor can Petitioners genuinely dispute their testimony. Each testified that he was diagnosed with CWP or other lung disease more than two years before filing.[135]

As have other courts granting summary judgment on similar facts, the circuit court correctly rejected Petitioners' attempts to discount their own sworn testimony.[136]

5. PMF does not reset the clock.

Petitioners' brief argues that progressive massive fibrosis (PMF) is a separate disease from CWP. It isn't. PMF is just a synonym for complicated CWP. Petitioners

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133 R.31.

134 *See Adams*, 2013 WL 3367134, at *3; *Boggs*, 2012 WL 3644967, at *3-4.

135 Hardy (physician told him he had black lung in July 2018; R. 176, R.214); Manuel (physician told him his lungs were pretty bad due to fibrosis in July 2018; R.957); Miller (his 2013 CWP diagnosis surprised him because he wore a respirator all the time, and he thought in 2013 that the respirators had not fully protected him; R.2168-69); Cruey (physician told him he had black lung in 2016; admits that before 2019, he knew his lungs "probably" were injured; in July 2019 federal benefits hearing, the same counsel now representing him in this tort suit elicited his testimony that doctors "always told me I had" black lung, "but not enough" to qualify for federal benefits; R.2604-05, R.2647, R.2698-2702, R.2649, R.2804); Gary Scott (diagnosed with black lung in 1994 and 1998; in 1998, did not believe that his respirators had worked as intended; R.3766-67).

136 *See, e.g.*, *Boggs*, 2012 WL 3644967, at *4 ("A plaintiff may not use the contradictions in his own testimony to create an issue of fact for the jury." (brackets omitted; citing *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984)).

were injured when they were diagnosed with CWP or other lung diseases. Neither later PMF diagnoses, nor employers' disputes of those diagnosis in federal benefits proceedings, changes when Petitioners' tort claims accrued. The Supreme Court of Appeals has rejected the argument that an injury's worsening resets the clock.[137]

CWP is characterized as simple or complicated, depending on the size of the opacities observed in an image of a person's lungs.[138] Complicated CWP is also called PMF.[139] Petitioners' medical expert says that "[c]oal mine dust lung disease is a spectrum of lung disease" including CWP and PMF.[140] As the Fourth Circuit has helpfully summarized:

> CWP, known colloquially as "black lung," is a latent occupational disease marked by fibrosis, or scarring caused by inhalation of coal dust. It can take years of coal dust exposure for CWP to develop, and it progresses slowly once it occurs. *The disease progresses through three stages of simple CWP—beginning with Category 1 and advancing to Category 3—followed by three stages of complicated CWP—beginning with Category A and ultimately becoming Category C.*[141]

The Fourth Circuit's summary is consistent with federal regulations governing black lung benefits. To receive federal black lung benefits, a miner must prove either that he has a totally disabling pulmonary or respiratory impairment arising out of coal mine employment, or that he has complicated CWP/PMF.[142]

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137 *Goodwin*, 218 W. Va. at 222, 624 S.E.2d at 569.

138 *See* R.233 (Hardy's response opposing summary judgment; discussing this).

139 Petitioners agree. Hardy, for example, told the circuit court that PMF is "also known as 'complicated pneumoconiosis or black lung.'" R.233.

140 R.29 (circuit court quoting him).

141 *Adams v. Am. Optical Corp.*, 979 F.3d 248, 252 (4th Cir. 2020) (emphasis added; affirming summary judgment on miner's claims against respirator manufacturers based on Virginia's statute of limitations).

142 R.233 (discussing this; citing 20 C.F.R. § 718.201(c)).

That some Petitioners' diseases progressed from simple CWP to complicated CWP (a/k/a PMF) does not mean they were not injured when they had simple CWP. Simple CWP is a lung disease.[143] When Petitioners were diagnosed with a "noticeable injury," the injury was no longer latent.[144] They knew, or should have known by exercising reasonable diligence, that "something [was] wrong."[145] And "the fact that the damage may be on-going and may worsen later does not alter when the limitations period begins to run."[146] This is settled law.

A good example of this principle is *Goodwin*, affirming summary judgment on the statute of limitations. Years before filing suit, the plaintiff discovered he had breathing problems after using paint, and sought medical treatment.[147] The plaintiff argued that he was "absolutely unaware" of a separate "neuropsychological injury caused by the same exposures to paint fumes that caused his breathing problems."[148] He claimed this injury was caused by a different component in the paint, separate from the component that caused the breathing problems he had discovered years earlier.[149]

The Supreme Court of Appeals rejected this position, reasoning there was "no credible argument . . . to avoid the operation of the statute of limitations."[150] The record

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143 *See Adams*, 979 F.3d at 252; 20 C.F.R. § 718.201(c).

144 *See Smith v. Raven Hocking Coal Corp.*, 199 W. Va. 620, 623, 486 S.E.2d 789, 792 (1997).

145 *Goodwin*, 218 W. Va. at 221; 624 S.E.2d at 568.

146 *Smith*, 199 W. Va. at 623, 486 S.E.2d at 792.

147 *Goodwin*, 218 W. Va. at 217-18, 624 S.E.2d at 564-65.

148 *Id.*, 218 W. Va. at 222, 624 S.E.2d at 569.

149 *Id.*

150 *Id.*

established that the plaintiff "knew . . . that he had suffered some sort of injury due to his exposure to paints" when he first experienced and was diagnosed with breathing problems.[151] Accordingly, the plaintiff had a "duty to begin investigating" his injuries when he knew he was injured, or his claims would be time-barred.[152]

Another good example is a decision of the Eastern District of Kentucky holding a similarly situated miner's claims against 3M were time-barred. The plaintiff was diagnosed with CWP in 1994, decades outside Kentucky's one-year limitations period for his 2019 claims against 3M.[153] That his CWP later progressed (to an 11mm opacity, which would be PMF) was immaterial to the statute of limitations.[154] He "was aware of his injury in 1994, when he was diagnosed with CWP."[155] Because he did not file his lawsuit until decades later, his claims were time-barred.

The same analysis applies here. The record establishes that Petitioners knew they had CWP or other lung diseases caused by exposure to coal mine dust, despite allegedly wearing 3M respirators to prevent lung diseases caused by coal mine dust. True, some lung diseases (including CWP) may be progressive, but the statute of limitations does not reset because a disease progresses. Petitioners' claims accrued when they were first diagnosed with CWP or other lung disease and knew that they had worn 3M respirators to prevent that injury.[156]

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151 *Id.*

152 *Id.*

153 *Roark*, 571 F. Supp. 3d at 712-13.

154 *Id.* at 713.

155 *Id.*

156 *Young v. Clinchfield Railroad*, a Federal Employers' Liability Act (FELA) case on which Petitioners rely, supports the circuit court's conclusion. The railroad worker in *Young* sued his employer outside FELA's three-year limitations period, but within

Petitioners' contrary argument, resting on the phrase "sufficiently pronounced,"[157] would upend settled law. A new statute of limitations would apply each time a person says a no-longer-latent disease has progressed, or that his injury has worsened. That is not the law. The discovery rule exists to prevent "the inherent unfairness of barring a claim" when a party cannot timely recognize his cause of action.[158] When an injury is no longer latent, such as when a doctor diagnoses a person with a lung disease, the person has learned (or with reasonable diligence should have learned) of his injury. Further tolling does not serve the rule's purpose.[159]

The circuit court also correctly recognized that adopting Petitioners' rule would mean "a whole group of potential product liability plaintiffs, those without debilitating complicated pneumoconiosis such as those with some impairment caused by simple

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three years of his silicosis diagnosis. 288 F.2d 499, 503 (4th Cir. 1961). The worker was injured, and his claim accrued, when he was diagnosed. *Id.*

157 This phrase was used in *Jones v. Trustees of Bethany College*, 177 W. Va. 168, 170, 351 S.E.2d 183, 185 (1986). The circuit court considered the argument Petitioners make here, and correctly reasoned that *Bethany College* was inapposite because it concerned a car accident causing both immediate harm and a latent injury. R.28. Here, the injury was latent until, at the latest, Petitioners were diagnosed with CWP or other lung diseases. Moreover, the court correctly recognized that adopting Petitioners' reasoning would contradict *Goodwin*'s rule 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." R.28.

158 *Dunn*, 225 W. Va. at 50, 689 S.E.2d at 262 (quoting *Harris v. Jones*, 209 W. Va. 557, 562, 550 S.E.2d 93, 98 (2001)); *see also McCoy v. Miller*, 213 W. Va. 161, 165, 578 S.E.2d 355, 359 (2003) ("The crux of the 'discovery rule' has always been to benefit those individuals who were either unaware of their injuries or prevented from discovering them." (citation omitted)).

159 *See Boggs*, 2012 WL 3644967, at *4 (applying Kentucky's analogous statute of limitations to conclude similarly situated miner's claims against 3M were untimely; the discovery rule "simply does not toll the statute of limitations when a plaintiff does not need to discover any more information to learn of his injury and its possible cause").

pneumoconiosis, chronic obstructive pulmonary disease (COPD), or some other dust-induced lung disorder would be precluded from filing a product liability cause of action."[160] The circuit court correctly refused to "extend the law" to prevent those persons from bringing tort claims concerning their injuries.[161]

The circuit court also correctly rejected Petitioners' attempt to transplant the deliberate intent cause of action from the workers' compensation statutes to their tort claims against 3M.[162] West Virginia's workers' compensation laws provide a miner with a statutory deliberate intent claim against his employer when he has complicated CWP/PMF and resulting pulmonary impairment.[163] Relying on workers' compensation law, Petitioners argue the onset of PMF or complicated CWP creates a separately actionable injury in tort.[164]

As the circuit court correctly recognized, however, that statutory claim against an employer has nothing to do with Petitioners' tort claims against 3M.[165] Petitioners did not need to have complicated CWP/PMF to sue 3M. Petitioners provided no authority for their position in circuit court,[166] and they provide none to this Court.

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160 R.30.

161 R.30.

162 R.27.

163 W. Va. Code § 23-4-2(d)(2)(B)(v)(IV).

164 Petitioners' Br. 51.

165 R.27.

166 R.27; *see* Petitioners' Br.

Finally, in circuit court, Petitioners analogized to a "two-disease" rule.[167] They do not advance that position on appeal, so they have waived it.[168] Petitioners had good reason for abandoning this position. Although the Legislature adopted such a rule for asbestos and silica actions, the statute says this special rule does not apply to claims relating to CWP.[169] Obviously, courts do not have the power to adopt common law rules that the Legislature has rejected by statute.

6. Petitioners' injuries do not depend on whether the federal bureaucracy found they were entitled to benefits.

Petitioners also imply that the relevant date of injury for applying the statute of limitations is when the federal bureaucracy adjudicated that they qualified for federal black lung benefits.[170] Petitioners cite no authority for this position, because there is none. *Dunn* does not hold that a West Virginia tort claim's accrual depends on when the federal bureaucracy might eventually determine a miner qualifies for federal compensation benefits. Nor does any other case. *Dunn* instead holds that a tort claim

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167 R.29-30 (circuit court rejecting this argument).

168 *See, e.g.*, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) ("In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." (quoting Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971)).

169 W. Va. Code §§ 55-7G-3(30) (defining "silica action" to exclude "any administrative claim or civil action related to coal workers' pneumoconiosis"), 55-7G-3(31) ("'Silicosis' does not mean coal workers' pneumoconiosis."); *see* W. Va. Code § 55-7G-9 (adopting two disease rule for asbestos and silica actions).

170 *See* Petitioners' Br. 10, 39 ("Petitioners had no obligation to go out and search the world for other possible tortfeasors unless and until their latent disease was confirmed.").

accrues when the plaintiff knows, or through the exercise of reasonable diligence should know, of the claim's elements.[171]

Hardy's case demonstrates Petitioners' fallacious reasoning. Petitioners represent that because Hardy's federal black lung benefits application was not finally adjudicated until October 2022, whether he had complicated CWP/PMF "was not finally resolved until" October 2022.[172] So, they argue, his 2021 lawsuit against 3M cannot be untimely. But using that final administrative adjudication as the accrual date would mean his tort claims did not accrue until more than a year *after* he filed this lawsuit. That is nonsensical.

Moreover, that some of Petitioners' employers denied liability for federal benefits is irrelevant to Petitioners' tort claims.[173] *Dunn*'s five-step analysis controls the statute of limitations.[174] Petitioners did not need their employers to agree they qualified for federal benefits to know that they were injured.

Manuel's and Gary Scott's cases demonstrate the absurd results of yoking tort claims' accrual to employers' positions in federal benefits proceedings. Manuel and Gary Scott represent that, in their federal benefits cases, their employers still dispute their entitlement to federal benefits.[175] Adopting their reasoning would mean that their tort claims—the ones they filed in 2021—*still* have not accrued. Such an outcome would also

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171 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255; *see also Roark*, 571 F. Supp. 3d at 710-11 (granting summary judgment on tort claims even though plaintiff's "federal benefits were still not secure").

172 Petitioners' Br. 13-14.

173 Petitioners' Br. 12-14, 15, 25.

174 R. 30; Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255.

175 Petitioners' Br. 17.

ignore that several doctors have diagnosed Manuel with CWP, that a doctor told Manuel in July 2018 that his "lungs were pretty bad," and that in 1998, Gary Scott questioned whether his respirators worked after his second CWP diagnosis.[176] This Court should reject this absurd result, as have other courts presented with similarly self-serving arguments about accrual dates.[177]

Petitioners' arguments also suffer another fundamental defect. They essentially ask this Court to hold that their claims did not accrue until they knew, with legal certainty from an adjudicated federal benefits claim, that they had PMF.[178] That position contradicts the Supreme Court of Appeals' reasoning in *Hickman,* holding that a plaintiff does not need to know of a product defect "with legal certainty" for the statute of limitations to begin running.[179] Diagnoses of CWP and other lung diseases suffice to alert a reasonable person that he has been injured.[180]

Adopting Petitioners' position would also have dramatic consequences for how similar claims are litigated. If Petitioners are right, the tort claims of a miner diagnosed with CWP or other lung disease do not accrue until the miner secures a finding by the federal bureaucracy that he is entitled to federal benefits, which requires proof that the disease is totally disabling.[181] This would effectively impose a federal exhaustion

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176 R.957; R.3766-67.

177 *See Roark*, 571 F. Supp. 3d at 712-13.

178 *See* Petitioners' Br. 10.

179 *Hickman*, 178 W. Va. at 253, 358 S.E.2d at 814.

180 R.31-32 (discussing this).

181 *E. Assoc. Coal Corp.*, 805 F.3d at 504-05.

requirement on West Virginia tort claims from similarly situated miners. Petitioners offer this Court no authority for imposing such a requirement.

Petitioners' reasoning also ignores that their *actual* knowledge of injury is not dispositive. Even if they did not actually know they had CWP or other lung disease until the federal government adjudicated that they did, a plaintiff can have a tort injury based on what he *should* have known. Petitioners should have known they were injured no later than when physicians told them they had CWP or other lung disease, and certainly no later than when they represented to the federal government that they believed they had CWP or other lung disease caused by coal mine employment.

7. Petitioners ignore the legal effect of their undisputed failure to investigate their injuries.

Petitioners insist that because they did not always wear respirators, their cases present a jury question.[182] That fact is immaterial to the statute of limitations. Once they were injured, they had a duty to investigate *all* possible causes of their injury within the two-year limitations period, or their claims would be barred.[183] The fact that their injuries could have been caused by unprotected exposures (or anything else) does not mean that they did not need to investigate other possible causes, such as the respirators they say they wore to prevent those very injuries.

8. That 3M denies its products were defective is immaterial to the statute of limitations.

Petitioners also incorrectly assert that because 3M denies their allegations that its respirators were defective, that makes their claims timely.[184] "Defendants routinely deny

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182 Petitioners' Br. 48-49 (attempting to distinguish *Teets* on this basis).

183 *Goodwin*, 218 W. Va. at 221, 624 S.E.2d at 568.

184 Petitioners' Br. 50.

the existence of facts that give rise to a plaintiff's claims; the running of the statute of limitations is unaffected by such denials."[185] Denying allegations once a lawsuit is brought has no bearing on a claim's accrual.

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The circuit court correctly recognized that there is no genuine issue of material fact on *Dunn* steps 1-3. Petitioners' claims are plainly time-barred.

II. The undisputed facts show fraudulent concealment is inapplicable.

The circuit court correctly rejected Petitioners' invocation of fraudulent concealment, the fourth step of *Dunn*. As the circuit court recognized, Petitioners claim 3M committed fraud in the 1970s and 1980s. Even if that were true, it does not show how 3M prevented Petitioners from learning that they were injured, that they had worn 3M respirators, and that they had worn those respirators to prevent that very injury. Adopting Petitioners' position would mean that presenting a fraud claim automatically supports fraudulent concealment. That is not the law.

A. Fraudulent concealment turns on the plaintiff's proof that the defendant prevented the plaintiff from learning of the claim.

As the circuit court correctly recognized, a plaintiff invoking fraudulent concealment must show that "the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action" to toll the statute of limitations.[186] Only concealment from the plaintiff of "relevant facts that were necessary" for the plaintiff to file a claim can qualify as fraudulent concealment.[187]

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185 *Coffield v. Robinson*, 245 W. Va. 55, 62, 857 S.E.2d 395, 402 (2021).

186 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255; R.42-43.

187 *See State ex re. Gallagher Bassett Servs., Inc. v. Webster*, 242 W. Va. 88, 97, 829 S.E.2d 290, 299 (2019).

Even allegedly delaying a plaintiff's investigatory efforts does not constitute fraudulent concealment when the plaintiff *already knew the facts needed to bring the cause of action*.[188] In those circumstances the alleged delay did not prevent her from learning of the possible cause of action, or toll the statute.[189]

B. Petitioners lack evidence showing that 3M prevented them from learning of their claims.

The circuit court correctly concluded that Petitioners did not raise a jury question on fraudulent concealment.[190] Petitioners cannot genuinely dispute that they knew of their diagnoses with CWP or other lung diseases. Indeed, they relied on those diagnoses in seeking benefits for miners with black lung. They concede that they knew who manufactured the respirators they say they wore. And they cannot genuinely dispute that they knew, or with the exercise of reasonable diligence should have known, of a causal connection between their lung disease and the safety products they say they wore to prevent lung disease. Those are all the facts they needed to know to suspect they might have a claim against 3M.

Petitioners offer no evidence that 3M said or did something to prevent them from learning the facts they needed to bring a claim. As the circuit court recognized, nor did any evidence of alleged fraud "show that any alleged concealment happened during the two years immediately preceding" the filing of these lawsuits.[191]

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188 *Id.*

189 *Id.*

190 R.42-43.

191 R.43.

C. The fraud Petitioners allege 3M committed is immaterial to fraudulent concealment.

Petitioners crammed the record with thousands of pages of exhibits they insist show 3M perpetrated a fraud, by concealing defects about its respirators. Their appellate brief begins by quoting a smattering of those exhibits. None of that matters. When a plaintiff knows the facts needed to bring a claim, such evidence is immaterial to the issue of fraudulent concealment.[192] The circuit court correctly recognized that even if Petitioners' allegations are assumed true, those allegations do not show how 3M prevented Petitioners "from connecting their lung injuries to [3M's] products during the two years immediately prior to when [Petitioners] filed these lawsuits."[193] Had Petitioners investigated their injuries within two years, they could have brought these exact claims. One of them was even asked—more than two years before filing, by the same counsel now representing him—whether he had brought a respirator lawsuit.

That question was not random. Many similarly situated plaintiffs were able to learn about potential claims, and bring lawsuits against 3M alleging the same sorts of defects as Petitioners, years or decades before these 2021 lawsuits. Just as in other similar cases where the same fraudulent concealment argument has been rejected,[194] Petitioners offer no evidence that 3M said or did something to prevent them from doing what many others had done.

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192 *See Gallagher Basset Servs.*, 242 W. Va. at 97, 829 S.E.2d at 299.

193 R.43.

194 *See Teets*, 2022 WL 3280528, at *3; *Roark*, 571 F. Supp. 3d at 714; *Boggs*, 2012 WL 3644967, at *6.

D. Petitioners are wrong about *Collins* and *Teets*.

Petitioners assert that the plaintiffs in *Collins* and *Teets* did not make adequate records on fraudulent concealment. This Court can access and judicially notice the contents of the *Collins* record, and 3M invites this Court to do so. When it does, it will see that fraudulent concealment was litigated. And Chief Judge Groh's order, affirmed in *Teets*, held that the plaintiff did exactly what Petitioners do: asserted that the defendant committed fraud, without proof that the defendant "prevented" the plaintiff "from discovering or pursuing [a] cause of action."[195] That was not fraudulent concealment in *Teets*, and it is not here.

* * *

The circuit court correctly recognized that Petitioners lack evidence supporting fraudulent concealment. It correctly ruled that a reasonable jury would have no basis to find otherwise.

III. No other tolling doctrine would save their untimely claims.

Dunn's fifth step is to evaluate whether another tolling doctrine besides fraudulent concealment applies.[196] Petitioners never asserted in circuit court that another tolling doctrine would apply.[197] Failing to raise this issue in circuit court is a waiver, reinforced by Petitioners' failure to address *Dunn*'s fifth step on appeal.[198]

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195 *Teets v. Mine Safety Appliances Co., LLC*, No. 3:19-cv-195, 2021 WL 3280528, at *3 (N.D. W. Va. July 28, 2021), *aff'd*, 2022 WL 14365086.

196 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255.

197 *See* R.21 ("The Parties also agree under Step Five that no other tolling doctrine applies to these cases.").

198 *Wang-Yu Lin*, 224 W. Va. at 624, 687 S.E.2d at 407.

CONCLUSION

Petitioners' claims are years untimely, some by over two decades. Subsequent decisions of the Supreme Court of Appeals and Fourth Circuit confirm that the circuit court correctly granted summary judgment. A jury could not find for Petitioners on the statute of limitations unless it disregarded the law and ruled based on sympathy for Petitioners' health conditions. The judgment of the circuit court should be affirmed in a precedential opinion that will help circuit courts and litigants efficiently clear dockets of similarly untimely cases.

Respectfully submitted,

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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,

Petitioners

v. **Appeal 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,

Respondents.

CERTIFICATE OF SERVICE

I, Bryant J. Spann, counsel for Defendant 3M Company, hereby certify that service of the foregoing **Brief of Respondent 3M Company** was filed electronically using the File and ServeXpress system reflecting service upon all counsel of record, on this 23rd day of February 2023, addressed as follows:

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